

Reform of the ILO Administrative Tribunal

Introduction

For the last three years, and since the initiation of the collective agreement on a procedure for the resolution of grievances between the International Labour Office and the ILO Staff Union, the issue of reform of the Administrative Tribunal of the ILO has been raised by the Staff Union. In the view of the Staff Union, some of the most important issues raised are the method of appointing judges; the reasons set forth in judgments; the observance of prior jurisprudence as well as the incapacity of the Staff Union to bring a case before the Tribunal.

Negotiations on the issue which were held between the Administration and the Staff Union identified 9 points on which there was agreement for the amendment of the Administrative Tribunal's Statute or Rules (the major phases of the negotiations and points of convergence are stated in the annex.). The Staff Union is intent on inserting this point on the agenda of the forthcoming session of the Conference (due in June 2003), with a view to adopting the necessary amendments to the Statute of the Administrative Tribunal.

I. Historical background of the negotiations

- The Staff Union requested the beginning of negotiations based on Article 21.2 of the collective agreement on a procedure for the resolution of grievances (formally signed on 13 September 2000), under which:
 - "The parties agree to undertake the following:
 - a) to negotiate proposed amendments to the Statute of the ILO Administrative Tribunal, as well as the possible establishment of a second appellate instance, with the view to introducing class action before the Tribunal and before the second appellate instance;
 - b) to exchange letters to establish the detailed agenda for these negotiations;
 - c) to commence negotiations within a year of signing this Agreement, and to conclude those negotiations before this Agreement is reviewed;
 - d) upon the conclusion of these negotiations, to make proposals to the relevant bodies, including the Governing Body and the International Labour Conference (in accordance with Article XI of the Statute of the Administrative Tribunal of the ILO and with Article 2 of the Agreement on Recognition and Procedure of 27 March 2000)".
- This collective agreement was submitted to **the Governing Body at its November session of 2000 for approval**. On that occasion, the Programme, Financial and Administrative Committee stressed the need to involve the Governing Body in the process. It also requested an amendment to the draft points for discussion so that the following paragraph may be added:
 - "The Committee recommends to the Governing Body: (Y)
 - f) to reiterate its essential role in proposing to the International Labour Conference amendments to the Statute of the Administrative Tribunal of the ILO;"
- The issue of reform of the Tribunal was brought up at each subsequent meeting of the **Joint Negotiating Committee** (JNC), without agreement being reached.

- **The situation came to a standstill** at a meeting held by the JNC in October 2001, after which the Union's representatives left the meeting and called for the establishment of a **Review Panel**, pursuant to Article 7 of the Recognition and Procedural Agreement, which provides for the settlement of collective conflicts between the Office and the Staff Union.
- **The conclusions of the Review Panel were as follows:**
 - ▶ The Staff Union should indicate to the Office by 27 November, the reasons for each proposed amendment;
 - ▶ The Office should then reply on each point within two weeks;
 - ▶ The parties could set up a small working group responsible mainly for identifying proposals on which there seemed to be an agreement, as well as for those on which there was divergence but which nevertheless merit to be discussed;
 - ▶ The first proposals could be submitted to the JNC with a view to submitting common proposals to the March 2002 Session of the Governing Body;
 - ▶ The Parties should equally seek a common position on a calendar so as to follow up on the next steps to be taken, with respect to the different bodies and relevant organizations.
- The Staff Union submitted to the Administration its proposals in the form of **39 negotiating points**. A joint working group, set up by the JNC, examined these proposals. At the close of its second meeting held in April 2002, the joint working group recommends that the JNC consult the President of the Tribunal on the **points agreed upon by both the Administration and the Union which are as follows:** a reference to the fundamental principles of justice; the principle of *stare decisis*¹; the replies to all the legal arguments raised in the complaint; examination of the case even if the Tribunal may reject the complaint on a procedural ground; obligation to produce documents; reform of time limits; right of bringing an action before the Tribunal by the Staff Union ; and requests for oral hearings.
- **In the name of the JNC, the Director of HRD wrote to the President of the ILOAT on 28 June 2002.** The reply of the President arrived at the Office only in November 2002; that is, at the end of the session of the Tribunal. **Subsequently, the Staff Union made its comments point by point on the position of the Tribunal, by addressing them to the President of the Tribunal** (See table below).
- Meanwhile, the co-president (Staff Union) of the JNC **insisted on the submission of a document to the Governing Body, at its session in November 2002**, in spite of the fact that the Tribunal's views were not known at that time. That being said, this was not the case.
- Nineteen trade unionists and staff associations out of the 40 organizations, which have accepted the jurisdiction of the ILOAT, adopted the **London Resolution of 28 September 2002**. This resolution supports the negotiations led by the Staff Union and calls on the ILO, the Governing Body, and the Conference to adopt without delay, the proposals submitted to them, in the follow up to the process of negotiations.

¹ The principle *stare decisis* sets forth the obligation by a tribunal to observe its jurisprudence. Its impact is different in anglo- american legal systems- common law- from civil systems- French and German law etc.

- **On 13 November 2002, the Staff Union organized a public information meeting on the reform of the Tribunal.** Several speakers, especially Judge Robertson (London Bar) stated that the Tribunal had a few problems.
- The issue of amending the Statute of the Tribunal is **on the agenda of the March 2003 of the Governing Body** (document GB.286/PFA/17/2). The document submitted by the Office should include the replies received from the Tribunal as well as those replies from the 40 organisations which have accepted the jurisdiction of the ILOAT, and which have been consulted in October 2002.
- According to information communicated by JUR, **the Office has so far received replies from 10 Organizations, and comments from 4 trade unions or staff associations.**

II. Next phase

- As indicated in the table mentioned below, the **Tribunal has made no major objection to the majority of** proposals submitted to it. Furthermore, according to information communicated by the Administration, ten Organizations transmitted their comments to the Office. Additional replies are expected to arrive over the next days. Bearing in mind the comments so far received, it seems that there is no large support among the Organizations on **a number of proposed amendments especially with respect to the right of bringing an action before the Tribunal by the relevant staff associations.**
- The document prepared by the Administration for consideration by the PFA Committee of the Governing Body will reflect this position. As clearly indicated in the PFA Committee in November 2000, **the Governing Body intends to maintain control over the process leading to the submission of draft amendments to the Conference.**
- These remarks clearly show the **need for the Staff Union to adopt a constructive attitude**, especially set against the speech made by the President before the PFA Committee. This will ensure that debates are held in the best possible manner and in a way conducive to proposing amendments in the shortest delay.
- Under these conditions, the Union could adopt the following strategy:

On the occasion of the President's speech before the PFA Committee

- (1) Recalls the adherence of the Staff Union to collective negotiation and its will for **constructive dialogue** within the context of the reform of the Tribunal;
- (2) Calls on the Governing Body to:
 - (i) request the Administration to submit a detailed document on the proposed amendments to the Statute of the Tribunal with a view to **placing this item on the agenda of the 91st Session of the Conference (June 2003)**, and
 - (ii) request the Administration to **pursue the dialogue** with the Staff Union in order to **identify possible points of agreement** on the subject of improving the functioning of the Tribunal.
- (3) Requests the Governing Body to take note that the **entire system of dispute settlement within the ILO**, as well as both collective agreements relating to the same subject will be **reviewed within the framework of the JNC.**

Within the framework of the Joint Negotiating Committee (JNC)

- (1) Call on the Administration to hold **a meeting with the President of the ILOAT** in order to discuss ways of including points of agreement, which are relevant in the Rules of the Tribunal;
- (2) **Launch new discussions in order to identify possible additional points of agreement** between the Administration and the Staff Union;

- (3) Propose the **examination of judgments rendered by the Tribunal** after each of its sessions so as to identify any procedural problems, which could arise like reasons stated, and promote different approaches so as to overcome this kind of problem.

Within the framework of international action of the Staff Union

Widen the debate to include the reform of the internal justice system of the United Nations as a whole. In particular, take initiatives aimed at identifying major flaws in the Administrative Tribunal of the United Nations (ATUN) and rectify such flaws.

III. Points of agreement between the Staff Union and the Administration

(See table indicated below)

Summary of points agreed upon between the Administration and the Staff Union Comments made by different bodies

The table indicated below takes up the points of agreement reached between the Administration and the Staff Union; the conclusions of the mixed working group set up by the JNC (4 April 2002); the request for an opinion addressed by the Office to the President of the Tribunal (28 June 2002); the Tribunal's reply (11 November 2002) as well as the observations made by the Staff Union in response to that reply (25 November 2002).

POINTS OF AGREEMENT	JOINT WORKING GROUP (JNC)	JNC LETTER TO ILOAT	REPLY OF ILOAT	REPLY OF UNION TO ILOAT
<p>Application of international administrative law (Para. 1)</p>	<p><u>Union</u>. Provision made in the preamble of the Statute : due process, equitable procedure, audi alteram partem, nemo iudex in re sua, international labour law including international labour standards and the Declaration of 1998.</p> <p><u>HRD</u>: No objection to principles but they are not integrated in the Statute. Specific reference to * international administrative law +.</p>	<p>Paragraph in the Preamble, reference to general principles of justice especially the internal administrative law Ref. article III of Statute of AT of IMF.</p>	<p>As there is no Preamble in Statute, impossible to add a paragraph. Not indispensable to mention in the Statute the principles on which the Tribunal bases its judgments. It invokes them quite frequently where the case so warrants. No objection in principle. Possibility of new para. to art I of Statute, taking up again art. III of Statute of IMF AT: "<i>The Tribunal shall apply the generally recognized principles of international administrative law concerning judicial review of administrative acts.</i>"</p>	<p>Notes objection to listing of general principles of law in a preamble, primarily because the Statute does not have a preamble. Notes that ILOAT does not oppose the inclusion of such principles in article I of Statute.</p>
<p>Stare decisis Principle (Para. 2)</p>	<p><u>Union</u>: The ILOAT has to strictly adhere to all precedent unless it proves in a written judgment that there is no distinction in law, or in fact or that precedent is incorrect or is now contrary to international law. The ILOAT often refrains from citing precedent nor does it expose in a detailed manner its reasoning.</p> <p><u>HRD</u>: inappropriate to insert the principle <i>stare decisis</i> in the Statute but possibility of dealing with the question differently.</p>	<p>Calls for clarification of the extent to which the ILOAT formally adheres to this principle. This question is given particular importance by the parties.</p>	<p>The binding force of precedent divides legal systems represented within the Tribunal. Inappropriate to decide on this doctrine. Recognizes the need for juridical security. The Tribunal exercises utmost care so as not to deviate from the principles it has built up through its case law. Agrees to distinguish, and set forth reasons in any reversals of precedent in case law.</p>	<p>Notes that the Tribunal's opinion is in substance in conformity with the objectives contained in the principle <i>stare decisis</i> (ensuring equal treatment of identical cases and allowing complainants to predict the probable outcome of a case). In the future, the Staff Union will consider any deviation by the Tribunal of this principle as a legal error, unless the Tribunal gives the reasons for its deviation.</p>

<p>Reasons of Judgment (Paras. 3 & 4)</p>	<p><u>Union</u>: The Tribunal shall examine all the legal issues or claims by the complainant. Whenever possible, the Tribunal shall examine substantive issues raised by the complainant, instead of rejecting the complaint only on a procedural ground. <u>HRD</u>: This is already the case.</p>	<p>Request for information on the extent to which the ILOAT should a) examine all the legal issues raised in a case; b) give its reasoning in detail; c) reply to all substantive questions even if an appeal may not be receivable.</p>	<p>a) Already done, provided that the impugned decision is receivable; b) applies Art. VI.2 of Statute (statement of reasons); if change jurisprudence (see below); c) No. This would admit complaints, which have not been referred to internal appeal procedures; challenge long- standing administrative decisions, or open the door to fictitious litigation or cause the tribunal to over step the bounds of its competence.</p>	<p>Notes the comments of the Tribunal. In future, the Staff Union shall consider any failure to adhere to these principles by the Tribunal as a legal error.</p>
<p>Production of documents (Paras. 11-13)</p>	<p><u>Union</u>: Possibility of calling on the Office to supply all documents and information on the request of the complainant (including informal documents). If case is rejected, possibility of bringing an action before the Tribunal. Objection based only on the recognized right, and not only on the basis of privacy. <u>HRD</u>: Agrees to lead discussions on this issue. However, since this possibility is within the procedure on dispute settlement, it is not relevant in the context of the Tribunal. Alternative proposal: Rule XVII of AT/ IMF.</p>	<p>Invitation to modify the Rules to establish in detail the rights of a party with regard to orders issued by the Tribunal for the production of documents by another party.</p>	<p>No objection in principle but with conditions: proving that the existence of documents is demonstrated; that they are clearly identified; and that they are manifestly useful to the case. The Tribunal shall ascertain that they do not infringe upon privacy rights and that they are relevant for dispute settlement.</p>	<p>The conditions imposed by the Tribunal are so difficult to meet that they make this right fictitious especially in a written procedure. When the documents are in the hands of the respondent organisation, it is impossible to prove their existence, unless this organization has an obligation to disclose documents (* <i>full disclosure</i> +). Furthermore, a mere reference to privacy or to the confidential nature of a document is not sufficient to stop its production.</p>
<p>Time limits (Para. 26) Linked to: Summary dismissal of a complaint which is clearly irreceivable or devoid of merit (para. 32)</p>	<p><u>Union</u>: a) A request to extend the time limit submitted by the Office should not be granted unless it is for a good reason. The complainant should quickly receive notification of the request and has the right to challenge it in writing. b) The ILOAT has to forward to the complainant all correspondence or requests from the Office or from another party. The complainant has at least 21 days during which he may reply, including the possibility of raising the issue of irreceivability.</p>	<p>a) Requests to examine the appropriateness of re-examining the time limits set forth in the Statute and in the Rules in order to ensure that they are realistic. b) Notes that in the case when the Tribunal forwards a copy of the complaint to the respondent organisation for information only (summary dismissal), the complainant does not have the possibility to provide his opinion.</p>	<p>a) No. The procedure of investigation is very quick (especially with regard to ATUN). The set time limits are the ones that guarantee the reasonable duration of the proceedings and the president uses all the extension possibilities in an equitable manner between the parties. b) In the case of a summary dismissal, the Registry informs the complainant who can submit a new brief to the Tribunal.</p>	<p>In view of the agreement between the Staff Union and the Administration on examining the current time limits, which seem unrealistic, negotiations between the parties will eventually lead to an amendment to this rule.</p>

	<p><u>HRD</u>: agree to continue the discussion within the JNC and to re-examine the constraints of time limits.</p>			
<p>Oral hearings of parties (Para. 17)</p>	<p><u>Union</u>: The Tribunal should organise oral hearings on the request of a complainant.</p> <p><u>HRD</u>: Objects to the idea of making oral hearings obligatory. Possibility to continue the discussions on oral hearings when both parties request it.</p>	<p>Asks whether it would be appropriate to modify Rules in order to make oral hearings of parties obligatory if both parties request it. This could give a more transparent picture.</p>	<p>Agrees to the request when it is at the end of the written procedures and that the other party formally accepts it. The Tribunal shall determine the conditions and limits notably with regard to the duration of pleadings.</p>	<p>The practice of the Tribunal to reject a request for oral hearings is contrary to the obligation of ensuring a transparent and equitable oral hearing (Art. 6 of the European Convention on Human Rights; Art V of the Statute, Art 12 of Rules), Judge Robertson etc., This practice is illegal and ultra vires (outside the mandate). Furthermore, the Tribunal deliberates in camera. Violation also of the obligation of authorizing the complainant to be present when his case is being examined.</p>
<p>Right of bringing an action before the Tribunal by Staff Union (Para. 7)</p>	<p><u>Union</u>: Right of Staff Union to submit a written opinion to the ILOAT, or intervene and be listened to during the oral hearings if there is one, when it judges that the complaint raises a question of policy or of general application. The Tribunal shall take this into account in its deliberations and give the reasons for accepting or refusing this opinion.</p> <p><u>HRD</u>: Alternative proposal, right of bringing an action by the Staff Union in its own name. Regarding the possibility of intervention; questions to examine; a case in which the complainant does not want the Staff Union to act on his behalf; complainant of an organization other than the ILO.</p>	<p>The JNC agrees to request the GB to start the procedure of modifying the Statute of the ILOAT in order to give the Union the power to bring an action before the Tribunal in its own name : a) when it believes that its rights and prerogatives have been impinged; b) when a regulatory or quasi regulatory decision affects as a whole staff or one or several specific categories of staff.</p>	<p>No objection. This should be extended to associations or Unions of other relevant organizations, or to those who are interested. The amendments to the Statute should refer to the * most representative + bodies. Capacity to bring complaints against decisions, which impair their rights, or against decisions impairing the collective interests of staff members or those of specific categories of staff.</p>	<p>The proposal put by the Tribunal which is to render the right of bringing an action by the most representative organization of staff dependent on the respondent administration violates the principle of trade union freedoms. This question lies within the competence of the members of the Staff Union, or the relevant staff association.</p>

Staff Union Committee - 20 February 2003