INTERNATIONAL LABOUR OFFICE

Governing Body

GB.286/PFA/17/2
286th Session

Geneva, March 2003

Programme, Financial and Administrative Committee **PFA**

SEVENTEENTH ITEM ON THE AGENDA

Matters relating to the Administrative Tribunal of the ILO

(b) Statute of the Tribunal

1. The Committee will recall from its 285th Session in November 2002 that a series of issues relating to possible modifications in the functioning of the Tribunal had been the subject of discussion between the ILO Administration and Staff Union, culminating in the listing of several issues and questions which had been forwarded to the Tribunal itself, as well as to the other organizations which have accepted the jurisdiction of the Tribunal for their comments. [1]

The issues

2. The Office has prepared the following eight-point summary of the views of the Tribunal and of the organizations which responded to the ILO's request for commentary. [2] It should be recalled that, while it is for the Tribunal itself to amend its Rules, it is the International Labour Conference which approves any proposed amendments to the Tribunal's Statute.

Summary points and responses by the Tribunal and the organizations

Point 1: Whether a preambular paragraph might be added to the Statute of the Tribunal, by way of explanatory background, which would express the Tribunal's adherence to general principles of justice, particularly to the application of international

[1] GB.285/PFA/16 and GB.285/PFA/16/2.

[2] World Health Organization (WHO), World Intellectual Property Organization (WIPO), International Atomic Energy Agency (IAEA), Intergovernmental Organization for International Carriage by Rail (OTIF), Inter-Parliamentary Union (IPU), Preparatory Commission for the Comprehensive Nuclear-Test-Ban-Treaty Organization (CTBTO), Eurocontrol (which included the views of three of its five Staff Associations) the European Organization for Nuclear Research (CERN) (which included the views of its Staff Association), International Service for National Agricultural Research (ISNAR) and the European Patent Office (EPO) which also contained the comments of its Staff Association. The WHO Staff Committee also forwarded comments.

administrative law. An example of such a text may be found in article II of the Statute of the Administrative Tribunal of the International Monetary Fund (IMF).

Tribunal

The Tribunal did not consider it necessary to refer in its Statute to the principles on which it bases its judgments. It invokes them quite frequently where the case so warrants. However, it has no objection in principle to including the language used by certain international tribunals. It would be possible to add a paragraph to article I of the Statute, which would read as follows:

Article I – Statute – The Tribunal shall apply the generally recognized principles of international administrative law concerning judicial review of administrative acts.

Organizations

One organization (Eurocontrol) objected to the idea of adding such a paragraph to article I of the Statute, on the grounds that it would be difficult to find an exhaustive statement. [3]

Point 2: What is the extent of the Tribunal's formal adherence to the doctrine of *stare decisis* or similar principle, however expressed, of being bound by precedent when not explicitly distinguished?

Tribunal

The Tribunal recalled that the question of binding force of precedent is a divisive one among the legal systems "represented" within it. While some systems consider that precedent is a source of law, others do not. It is true nonetheless that international organizations and officials need juridical security, and the Tribunal must exercise the utmost care not to deviate from the principles it has built up through its case law. This is what it does, and it agrees that any reversals of precedent must be distinguished and the reasoning set forth.

[3] Eurocontrol suggested instead the possible insertion of a paragraph along the lines of Article 38 of the Statute of the International Court of Justice, which provides that:

1. The Court, whose function is to decide in accordance with international law such disputes as submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

However, it should be noted that the ICJ deals with inter-State disputes, rather than complaints from individuals.

Organizations

The organizations generally agreed with the Tribunal's commentary; it would appear that this point does not give rise to any particular need to modify the Tribunal's Statute. [4]

Point 3: To what extent does the Tribunal consider that it should: (i) address in a judgment all legal issues raised by a case; (ii) set forth its reasoning in detail, particularly where it distinguishes a case from prior jurisprudence; and (iii) address all substantive issues raised, even if a case would otherwise be dismissed on a procedural ground related to receivability?

Tribunal

(i) The Tribunal recognizes the obligation of the judge to address all the legal issues raised by a case, subject to receivability of the dispute.

(ii) The Tribunal already applies article VI(2) of the Statute, which is sufficient in itself and does not, in its view, need to be amended. As regards cases where it departs from jurisprudence, the Tribunal refers to its statement under point 2.

(iii) The Tribunal cannot generally consent in principle to rule on conclusions that are not receivable, as this would result, for example, in admitting complaints that had not been referred to internal appeals procedures, or that would challenge long-standing administrative decisions, or that would open the door to fictitious litigation or cause the Tribunal to overstep the bounds of its competence.

Organizations

Again, the organizations generally agreed with the Tribunal's approach. IAEA considered that in practice it would be beneficial for the Tribunal to provide more substantiated and detailed considerations in its judgments. [5] In relation to point (iii), WIPO stated that: "it would seriously object to any attempts to move in that direction. To do so would mean, for example, that staff members could be tempted to circumvent the organizations' internal appeal procedures and proceed straight to the ILOAT. It would also open the floodgates to litigation and encourage staff as well as non-staff members with no standing to challenge administrative decisions on the substance years after the statute of limitations had run out". CERN noted that acceptance of this point would convert a contentious procedure into a consultative one. WHO commented that it would have welcomed the establishment of a mechanism which would allow organizations, in limited cases, to restrict their replies to the issue of receivability in the first instance. This is something upon which the Tribunal may wish to reflect but the comments call for no amendment to the Statute at this stage.

Point 4: Whether the Tribunal might consider adding a provision to its Rules establishing the rights of a party with regard to orders issued by the Tribunal for production of documents requested by another party. An example of such a provision may be found in Rule XVII of the IMF Administrative Tribunal.

[4] CERN Staff Association would see advantage in adding a paragraph to the Tribunal's Statute along the lines of the Tribunal's comment. EPO Staff Association also saw merit in a statutory reference.

[5] One Staff Association of Eurocontrol and that of EPO made similar points.

Tribunal

The Tribunal had no objection in principle to including such a provision, but considered that the production of documents can be ordered only on condition that the existence of such documents is demonstrated, that they are clearly identified and that they are manifestly useful to the case. The Tribunal cannot order the document produced to be communicated to the other party until it has ascertained that it does not infringe privacy rights and that it is relevant to the settlement of the dispute.

Organizations

As this issue concerns the Tribunal's Rules, rather than its Statute, the Office would propose that the question be left to the Tribunal for further consideration. WHO specifically commented that: "consideration should also be given to the protection of certain types of internal communications. This would include for example, certain types of advisory communications assessing such things as the relative merits and risks associated with a particular course of action".

Point 5: Whether the Tribunal considered it would be worthwhile for a review to be undertaken of the time limits set forth in its Statute and Rules in order to ensure that they remain realistic, from the point of view of the Tribunal itself and its Registry, as well as the parties, complainants and respondent organizations.

and

Point 6: Whether the Tribunal has any observations concerning the procedure for summary dismissal of a case under article 7.2 of its Rules, where complainants are not provided with an opportunity to comment on the Tribunal's intended course of action.

Tribunal

The Tribunal noted that under the Rules of the Tribunal, the time limits are 30 days for the filing of a complaint, 30 days for the defendant's reply, 30 days for the rejoinder and 30 days for the surrejoinder. Under article 14 of the Rules, the President may lengthen a time limit in response to a reasoned request, not to exceed, as a rule, 60 days or a total of 90 days for the production of a brief. That said, the investigation of a case has been observed to last, on average, between four and 12 months. Moreover, as a session draws near, extensions of the time limit requested by the defendant to produce its surrejoinder are only granted if they do not exceed the date on which the session is to open; consequently, either they are only granted in part, or they are refused. Hence the Registry does not have any cases pending, i.e. cases ready to be judged during a session but which are not to be judged at that session, except where the proceedings have been unexpectedly shortened either because the parties did not request the usual extensions of the time limits or produced their written submissions before the time limit expired, or because they did not produce a rejoinder or a surrejoinder. It is clear from the above that the procedure for investigating cases before the Administrative Tribunal is particularly rapid (especially if compared with other administrative tribunals, such as that of the United Nations). Hence it is not clear what the rationale for or possible advantages of reviewing the time limits would be. While these may seem short, this is what ensures that the procedure takes place within a reasonable time. Moreover, the President uses the possibilities afforded by article 14 equitably with regard to complainants and organizations. As regards summary dismissal of complaints, which appears to cause concern, the Tribunal recalls that complainants are informed by the Registry that their complaints will not be investigated and will be dealt with summarily pursuant to article 7, paragraph 2, of the Rules. There is nothing to prevent a complainant who feels that this procedure is not appropriate from submitting a new brief

to the Tribunal, which will be filed with the procedure. The principles of adversarial proceedings are thus fully adhered to.

Organizations

The organizations were inclined to support the Tribunal's remarks and in general saw no need to amend the Statute in this connection. CERN considered that it would be appropriate to accord the respondent organization the right to request in its reply to a complaint application of the summary procedure. However it would seem that the current text of Article 7(1) of the Rules would not exclude such a procedure.

Point 7: Does the Tribunal consider it would be beneficial to modify its Rules to provide for obligatory oral hearings, notably in cases where both parties to the case specifically so request in their pleadings?

Tribunal

The Tribunal endorsed greater transparency. However, the proposal to make oral hearings obligatory whenever this is requested is obviously unrealistic; moreover, the consequences in terms of more cumbersome procedure and costs have to be measured. On the other hand, the Tribunal has considered that it may grant a request for oral hearings, provided that such request is formulated at the end of the written proceedings and that formal consent of the other party is obtained. In that case, it would establish conditions and limits, notably those relating to the duration of oral submissions.

Organizations

No organization specifically objected to the holding of oral hearings in those cases where both parties effectively have so agreed. The Tribunal in its response seems to accept this procedural measure and accordingly no amendment to the Statute would seem to be required. It would be for the Tribunal to consider an amendment to its Rules if this were felt appropriate.[6] However, it would seem that any request for oral hearings or refusal to accede to such a request should be accompanied by reasons which might be evaluated by the Tribunal. It is also relevant that in many instances oral proceedings have already taken place during the prior internal grievance procedure, reports of which will be before the Tribunal.

Attention should, however, be drawn to the cost of oral hearings particularly in relation to possible travel costs, which would be borne by the respondent organization. The Office will, in reporting the conclusions of consideration by the Governing Body and Conference of this item at the appropriate time, suggest that the Tribunal bear this point in mind when developing procedures on oral hearings.

Point 8: Does the Tribunal have any views on how the following proposal might be incorporated in its Statute and Rules: granting the Staff Union standing to bring an action before the Tribunal, in its own name, where (a) the Union's own legal rights or prerogatives are allegedly being impinged upon; and (b) where a regulatory or quasi-regulatory decision affects staff as a whole or a discrete category or categories of staff?

[6] CERN Staff Association believed that the right should be accorded to the requesting party to comment on the Tribunal's refusal to hear a witness in a case. EPO Staff Association agreed that a complainant had a right to oral hearings.

Tribunal

The Tribunal considered that this possibility, which does not raise any objection, should probably be extended to staff unions or associations of the other international organizations for which the Tribunal has jurisdiction, or at least to those which so wish. Any amendments to this effect in the Statute should refer to "the most representative" bodies. In these circumstances, each organization which recognizes the jurisdiction of the Tribunal would be obliged to inform the Tribunal or its Registry of the name of the most representative staff body that enjoys this capacity and of any subsequent change. Article II of the Statute could provide that such bodies shall have the capacity to bring complaints against decisions impairing their rights or those impairing the collective rights of staff or certain categories of staff.

Organizations

This idea was in fact an initiative of the Office and was supported by the organizations which responded, except for WHO, and to a lesser extent Eurocontrol, CERN and ISNAR, which had major reservations as to the details and considered that it could "politicise and put into an adversarial context issues that would otherwise be the subject of constructive discussion and debate between the administration and the staff representatives". Moreover the text of the proposed amendment, as drafted by the Office, has not so far been approved by the ILO Staff Union. In these circumstances, given the reservations of WHO and CERN, two of the largest organizations party to the Tribunal's Statute, and their request for further discussions on the proposal, the Office would propose that more extensive consultations be held on this issue before a proposal for amendment to the Statute can be put to the Committee.

Other issues

3. The question of costs in relation to frivolous or vexatious complaints was raised by several organizations. As WIPO put it: "Organizations are increasingly faced with frivolous complaints in which officials of the organizations are forced to spend an inordinate amount of time, energy and resources defending complaints that lack merit. It would not be inconsistent with the law of the international civil service to award costs to respondent organizations in frivolous cases where complainants lose. We would be in favour of the introduction of such awards in clearly deserving cases". The Office would point out, however, that at its most recent session, November 2002, in Judgment No. 2211, the Tribunal accepted this point. Accordingly, no amendment to the Tribunal's Statute, or even the Rules, would appear to be necessary. Another issue which was referred to was the possible establishment of a mechanism that would permit the Tribunal between sessions to respond to appropriate requests for clarification or interpretation of judgments.

Conclusions

4. In view of the paucity of responses from the organizations which have accepted the jurisdiction of the Tribunal, the Office would envisage holding a short meeting at the ILO with these organizations and the Registry of the Tribunal late this year, after further consultations with the ILO Staff Union, with the object of reaching some agreement on particular modifications in the functioning of the Tribunal and possible amendments to its Statute. The need for further consultations with the organizations, particularly in relation to the issue of *locus standi* for staff associations, was stressed in their responses by both WHO and WIPO.

5. ***Accordingly, the Programme, Financial and Administrative Committee may wish to recommend that the Governing Body instruct the Office to prepare, at an appropriate time and taking into account the results of appropriate consultations, a set of proposed amendments with a view to further consideration of this item by the Governing Body and the submission of such proposed amendments to the 92nd (June 2004) Session of the Conference.***

Geneva, 4 March 2003.

Point for decision: Paragraph 5.