

July 2011

**The Luxembourg Colloquium: New Developments in the Legal Protection of
International and European Civil Servants**

**ILOAT Update: 111th Session – Application of IFAD Administration for Suspension of
Execution of Judgment Rejected**

Following last month's "Tips & Information Newsletter" (June 2011), this issue focuses on the recent developments in the legal protection of international civil servants subject to the jurisprudence of the Administrative Tribunal of the ILO as discussed during the Luxembourg Colloquium held on the 1st and 2nd April 2011.

**Reform of the Administrative Tribunal of the ILO (ILOAT) through Judicial
Precedents**

While the administration of justice underwent an important reform within the United Nations, as has been seen in the "Tips & Information Newsletter" of June 2011, only minor efforts were made in the last decade to reform the judicial system of the ILOAT, notwithstanding many calls – also from FICSA – to adapt its procedures to due process standards. It is now well-settled - assuming the statutory language creating the staff union or association and its rights are tailored broadly enough - that staff representatives can lodge a complaint on behalf of a staff association (Judgment Nos. 1147, 1269, 1315, 2649, 2817) and that staff associations are also entitled to file "friend-of-the-court" briefs (*amicus curiae*) (Judgment Nos. 2420, 2422, 2423, 2672).

On the other hand, the Tribunal still does not have a clear stance as regards the right to appeal for independent contractors or consultants hired by international organizations who are not by the terms of the agreement considered staff members of the organization. This 'anxious class', as described by this author in an article for the symposium entitled "*The Anxious Class and Access to Justice*", which tends to increase because international organizations more and more resort to independent contractors, is systematically kept on board for several years, as it rarely resists the implicit expectation of renewal and the promise of fixed-term contracts as full-fledged staff members. While the Tribunal does on rare occasion sanction abuse of this type of contract – see, e.g., Judgment No. 701 – it generally considers that a contractor who has the right to an arbitration of a dispute is not allowed to file a complaint with the Tribunal since he or she is not a staff member and the arbitration is viewed as a viable option. But is such arbitration really a viable option for dispute resolution?

The Tribunal has in a recent case decided that if the organization fails to follow the arbitration procedure, it will not entertain a complaint (Judgment No. 2665), a problematic decision

which could be seen as justice denial when considering that no other venue is open to the agent to lodge his complaint. In addition, even if the organization respects the arbitration procedure and a positive arbitral award is granted, no enforcement mechanism exists, as the ILOAT refuses to force the organization to execute the settlement. Again, no other remedy is possible, as the organization remains immune from suit in local courts.

In July 2011 (111th Session) ILOAT Rejects IFAD's Request for Suspension of Execution of Judgment: Judgment No. 3003

The International Fund for Agricultural Development (IFAD) filed a request with the International Court of Justice (ICJ) to provide an advisory opinion on the validity of a judgment handed down by the ILOAT in Judgment No. 2867. IFAD argues that the ILOAT exceeded its competence by allowing a complaint by a staff member working for an entity which is in its view legally separate from IFAD. The award against IFAD was large.

IFAD then filed an application with the ILOAT requesting suspension of the execution of the judgment and payment of the award pending the ICJ opinion. In a very rare and significant ruling, the ILOAT rejected the application. This is excellent news for international civil servants working for international organizations that use the ILOAT as the final means of appeal. If the stay had been granted by the ILOAT, it would have provided a tremendous incentive for international organizations to routinely seek advisory opinions from the ICJ in order to delay or avoid payment of Tribunal awards.

In this case, the ILOAT felt compelled to analyse the procedure permitting to request an advisory opinion of the ICJ and the nature and scope of its own judgments. The Tribunal thus confirmed that this procedure infringed the principle of the equality of arms as only the international organization has the possibility to submit a request for an advisory opinion to the ICJ and that furthermore no time-limits exist to “appeal” (seek an advisory opinion of) the judgments of the ILOAT. The Tribunal also identified a legal anomaly in this system by drawing a comparison with the two-tier court system of national jurisdictions and the new administration of justice within the United Nations. Thus, only the court handling the appeal against the judgment in these judicial systems is competent to decide on a request for a stay of execution, not the court which rendered the judgment itself, for the obvious reason that the same court cannot judge anew the merits of the case to decide if such request is legitimate. Finally, the Tribunal dismissed the request of IFAD to suspend the execution of its judgment as it has consistently held that its judgments are final and without appeal, which means that they are “immediately operative” and have to be executed without delay, a principle which cannot suffer any exception, especially in light of the imbalance which the procedure before the ICJ creates between parties.

The ILOAT has thus confirmed, albeit only implicitly, that the actual procedure calling up the ICJ to examine a judgment handed down by an administrative tribunal cannot be considered a proper venue to appeal its judgments. This fact can only be confirmed by the praxis: the ICJ has only been asked once to render an advisory opinion on an ILOAT judgment. This was in 1956, more than half a century ago.

It remains to be seen if the various recent efforts undertaken to convince Member States and the Secretariat of the ILO of the necessity of a reform of the Tribunal statutes to include, for example, access by independent contractors and other non-staff agents with grievances, will

bear fruits. In the meanwhile, another solution is to press for legislative reform within the various international organizations by amending their staff regulations and rules as well as their contracts so as to at least allow the settlement of disputes involving non-staff agents by the existing administration of justice system. But the other question of a proper two-tier court system remains unsolved. Various options could be considered, one being to merge the ILOAT with the new system of justice of the UN by giving the new United Nations Appeals Tribunal the competence to adjudicate ILOAT judgments.

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