THE ADMINISTRATIVE TRIBUNAL OF THE INTER-AMERICAN DEVELOPMENT BANK

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Administrative tribunals are now a common feature of the legal landscape, nationally and internationally. As we all know, administrative law, a subject rather rare in law schools before World War I, became commonplace nationally in the period between the two great wars, and has exploded exponentially since then. Some sixty years ago, when I was a law student, there were, even in the notoriously litigious United States, very few case books or treatises dealing specifically with administrative —as distinguished from judicial— law. Since then, long ago in terms of changes in the economies of the world and in the manner of their response to such changes, but comparatively recently in historical terms, there has been a major enfloration of administrative law.

Like all such developments, this was a result of changing circumstances and the inevitable need to respond to such changes. The overwhelmingly most prominent of these changes was the growth of governmental activity impinging on our daily lives. I suppose the most dramatic of these changes was the American New Deal of President Franklin D. Roosevelt, who, in 1933, began a new era not only in the States but really in the globe. Essentially, the doctrine proclaimed by Roosevelt —and to a considerable extent echoed by Keynes in the economic sphere, proclaimed the demise of the era of *laissez faire* and the commencement of both involvement and commitment of government in the affairs of citizens. It was no longer permitted to comment, as a response to worry about poverty, that the rich and the poor had equal freedom to sleep under the bridges. And —despite the current fashion of privatization and down-sizing of government responsibilities— it remains the fact that government and governmentally-sponsored organizations play a major role in the direction of our daily lives.

Thus, even though the first of the administrative agencies in the United States, the Interstate Commerce Commission, which was set up to regulate railroads, has recently been abolished, administrative agencies continue to regulate or at least affect such essentials as health, labor conditions, transportation by air and sea, communications and a host of other aspects of our daily lives. On the international front, the same developments have taken place, perhaps even more dramatically. Years ago, the international postal service was practically the solitary activity subject to international cooperation and regulation. Today, the edifices which house international agencies loom in every city of the world. It used to be possible for an individual to keep in his or her mind the meaning of the acronyms which flood the pages of directories of international agencies. Today, that task necessarily falls to the superior memories of computers.

It is natural, in such a system, that the function of international banking, and particularly lending, has come importantly into the hands of the IFIs —the International Financial Institutions— among them the World Bank and the

several regional development banks. It is with one of these institutions —the Inter-American Development Bank— and with its Administrative Tribunal that I propose here to deal. But the issues which arise in one such institution are more than likely to be replicated elsewhere. Comments on the IDB Administrative Tribunal will, I think, have relevance to other IFIs. Indeed, I trust that they will have relevance not only to other financial institutions, but more broadly in the general area of administrative law and employee relations in general.

I

International Administrative Tribunals have flourished in recent years, as a consequence of increased attention to administrative law, on the one hand, and, on the other, the proliferation of large international organizations with significant responsibilities and many employees. The multinational aspect of these institutions —the fact that their staff is recruited from many different nations— tends to increase the possibility of international disputes, and hence the need for a satisfactory mechanism for reconciling those disputes. In a sense, the Administrative Tribunal of the Inter-American Development Bank is an exception to this tendency, since a large part of its management and staff are Latin American and share a common cultural background, even though the Bank is headquartered in Washington. [The United States is the major contributor of the capital resources of the Bank; a number of nations outside the hemisphere also contribute capital, as do all Member nations; and the fact that it draws capital from markets of many nations also makes its reputation for efficient and fair administration essential.]

The Americas are, in any case, not uniform even throughout Latin America, and of course include several differing systems of law and practice with respect to employee rights, which are the basic subject of most administrative tribunal actions.

The IDB Tribunal [I shall use the english rather than the Spanish abbreviation, which would be "BID") was established by the Board of Executive Directors on April 21, 1989. The Board submitted the Bank to the jurisdiction of the Tribunal some months later, by Resolution of November 29, 1991. There are seven members of the Tribunal, no two of whom may possess the same nationality. They are selected by the Board from two lists submitted to the Board by the President. The first such list is drawn up by the Bank's Staff Association. From this list the Board is to designate three members of the Tribunal. The second list is drawn up by the President, contains eight names, and the Board is to appoint four Members from this list.

Members are designated for a term of three years, which may be renewed only once. Thus, no Member may serve more than six years. In practice, most do in fact serve for that time. This may result from the fact that members are often respected judges or ex-judges, or persons with other judicial or

semi-judicial experience and backgrounds. Experience indicates a considerable degree of satisfaction with the operations of these Tribunals.

II

In the years since its inception,the IDBAT (Inter-American Development Bank Administrative Tribunal) has handled some 42 cases. This would not seem to be a great number. For that fact, there are several explanations.

First, and probably most important, the IDB Tribunal is not frequently invoked. The personnel policies of the IDB have been designed with more than due regard for employee rights. Supervisory personnel are, in general, extremely careful in their observation of the proprieties and fair treatment of employees is monitored by a vigilant and attentive employees's association (which, as noted, nominates three members of the Tribunal). Thus, there are substantial and serious efforts to ensure fair treatment, so that not many complaints arise.

Next, it is not irrelevant that the staff of the Bank is largely, though certainly not entirely, Latin American. This indeed has given rise to one recent complaint which reached the Tribunal, of an employee who believed that his non-Latin origins had prejudiced his re-employment rights (the Tribunal held that this claim was not well-founded). The cultural communality of background, perhaps fortified by the fact that the President of the Bank has always been a Latin American as is a majority of the Executive Directors, has probably alleviated the natural if generally unjustified sentiment in many international institutions, that national or ethnic prejudices may influence decisions with respect to hiring, promotions, merit pay and the like. Caribbean employees may also feel a sense of solidarity with their Latin colleagues. This type of empathetic relationship does not necessarily characterize staffs of institutions of a more diverse background, where allegations of personnel actions based on national likes and dislikes may be more credible.

Finally, cases come to the Tribunal only after a real effort has been made to settle differences on a less formal level. Ordinarily, employees have easy access to supervisors to voice complaints. If the matter is not settled at that level, it goes to a Conciliation Committee, set up within the Bank's administrative structure, and generally chaired by a former high-level employee of the Bank. That body attempts to settle the matter amicably, on the basis of presentations by all sides.

It is only if these procedures fail to resolve differences that the case comes to the Administrative Tribunal. Hence the limited jurisprudence of the IDB Administrative Tribunal —basically an evidence of good administrative practice in a well-functioning institution.

III

A variety of Administrative Tribunal issues warrant discussion.

1) Qualifications of the Tribunal Members

No two Members of the Tribunal may possess the same nationality. Members are to be persons of recognized professional competence. Staff members are not eligible nor are recent retirees. Beyond these general principles, the qualifications for judges of the Tribunal rest mainly on the judgment of the Executive Directors of the Bank. Modesty requires that the present speaker refrain from comment about himself, but other Members of the Tribunal have characteristically been judges or former judges of high courts, eminent lawyers, ambassadors and scholars, and many experts in labor relations law.

The consequent diversity of the Tribunal reinforces the fact that it does not apply to law of any one state, other than in the unusual situation in which the law of a particular state is relevant to decision. One such situation may face the Tribunal in the near future, this being rival claims to the insurance benefits of an ex-employee, where the validity of a second marriage is at issue. This is a matter not generally within the usual jurisprudence of an administrative tribunal.

2) Interpretation of the contract of employment

Issues of such interpretation are the normal stuff of labor relations cases, and in this respect the administrative tribunals of international organizations resemble other bodies faced with similar problems. It is, however, in one respect, a growing and important issue for the international organizations.

The common past practice for such organizations was to hire employees on a "permanent" basis. Sometimes this was preceded by a probationary period, but after that time, the job was expected to last. It was of course always possible —and still is— that such a "permanent" position might turn out to be not so permanent as was expected. Programs might come to an end. Funding might be reduced, requiring shrinkage of staff. Many other events causing termination might occur —including disagreements at work, discharges for cause, and the like.

Employees who were needed for a short period, because of an emergency task, for example, or during a particularly busy period (interpreting services during a nonrecurring conference, for example) were generally taken on as "temporary" employees, the understanding being that the job to be done was one of short duration. Employment was expected to come to an end when the short-term need was finished.

Another category, which has occasioned many cases coming before administrative tribunals, is that of the "fixed" term contract. In these cases, the employee was given a definite period of time for his employment. Characteristically, such a term would be for several years. Equally characteristically, the contract itself would not only state its limits but would provide that renewal of the contract after its expiration date was entirely in the discretion of the agency or organization.

The problem which has arisen here is whether, despite these explicit terms, the employee had a reasonable expectation of renewal.

This is a situation which has arisen in several organizations. The language of the employment contract seems to give an absolute discretion to the agency, at least to the same extent as it would have in deciding whether or not to employ a new person. Nonetheless, the tribunals in general have held that such "discretion" must be exercised with regard to the requirements of due process, and not in an arbitrary manner. The IDBAT has considered that labor contracts are in a somewhat special category of contract law, that the employer owes a (somewhat ill-defined) duty of fairness to the employee, and that the Tribunal is entitled to look beyond the exact and strict terms of the contract. "The course of the dealings between the parties, the nature of the work performed, and informal assurances given by those clearly in authority, may well establish that although in form the contract was a fixed-term, in reality it was intended to be renewed indefinitely and not to be terminated except for reasonable cause." (IDBAT case # 35).

In the case just cited, the IDBAT held that it would not order reinstatement of the employee, but could declare him entitled to compensation. The breadth of this ruling was however somewhat modified by the Tribunal's statement that it could grant compensation "particularly if it can be shown that non-renewal was based on improper or arbitrary motives or violated basic principles of fairness".

Administrative tribunals deal with a wide variety of labor relations issues of major importance, but that arising out of the fixed-term contract has become one of the most prevalent.

The reason is largely double:

a) the common sentiment that international bureaucracies have grown too large, too inefficient, and too difficult to terminate when their functions are no longer valid or to reduce in size when they are too large; and

b) the budgetary constraints which have affected both national and international agencies, but especially the latter.

Moreover, fixed term contracts are seen as an easier way to control quality of performance, since they are meant to relieve agencies of the need to go through tedious, difficult and lengthy contested evaluations.

3) Informality and confidentiality

Some cases before the tribunals have involved the confidentiality of the personnel records of employees. An employee who has been terminated —or not renewed— because of wrong-doing is probably not entitled to have that record suppressed. In some cases, it may be well to do so. When the issue is not affirmative wrong-doing, but concerns performance that is not up to the desired level, the issue of confidentiality of personnel records is somewhat different. There are at least two questions which arise in this connection, especially in regard to fixed-term contracts:

a) Is a person whose fixed-term contract is not renewed to be told the reason, beyond the simple statement that the term has expired?

An argument can be made that he or she is entitled to have a reason. This derives from the statement that the discretion not to renew must not be arbitrarily exercised. In order to give the employee the ability to determine whether the decision has or has not been arbitrary, it would seem that an explanation must be given. Yet, if that explanation is that he has not performed adequately, that will go into his personnel record, and presumably be available to other perspective employers. From this point of view, the better course may well be no explanation other than that of simple termination of the fixed term. This poses a question to which there no exact answer.

b) The second issue, as I see it, is how to deal with the hearings prior of those before the Tribunal. In the IDB procedure, as in several others, there are preliminary proceedings, which come before the case reaches the Tribunal. In almost all and perhaps all cases, some procedure for complaint and for resolution of complaint is provided. Then, there is likely to be, as there is in the IDB, reference of a case to a Conciliation Commission —akin to mediation, a step which is increasingly mandated in many lawsuits before the case can go to trial. Conciliation or mediation is designed to give the parties an opportunity to state their cases before an impartial party, who will not have the power to decide on the merits, but who may help the parties to negotiate a settlement. In the course of so doing, the parties may offer concessions, or confess errors, or take other steps which may move the proceedings toward an acceptable settlement. But, by definition, the matter does not go to the Tribunal unless mediation or conciliation has failed. In those circumstances, it is probably not appropriate to preserve the record of what happened and what was said in the give and take of the mediation or conciliation phases of the case. Indeed, in most civil procedures, the parties are encouraged to speak

freely, with the assurance that their remarks, and even more importantly, their preliminary negotiating offers will not be brought up in the eventual trial.

This desirable practice, which frees up the conciliation aspect, is not followed in the IDBAT. The conciliation record is in fact available to and used by the Tribunal. The Tribunal has recently had some discussion of the desirability of this practice.

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The work of administrative tribunals is, as above indicated, very important to the proper functioning of international agencies and organizations. And, in an increasingly inter-related world, the functions of those agencies has increasing impact.