THE UNIVERSITY OF THE WEST INDIES
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# Towards An Administrative Tribunal: A Draft Statute for the Caribbean Community (CARICOM)

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## ABSTRACT

This article arises out of a paper "Towards an Administrative Tribunal for CARICOM", presented at the University of the West Indies Faculty Workshop Series, Law Faculty, Cave Hill Campus, on April 9, 2009[1]. It argues that there is a demonstrable need for an Administrative Tribunal to hear employment disputes within the CARICOM context. This would require amendment to Chapter 9 (Disputes Settlement) of the Revised Treaty of Chaguaramas (RTC) Establishing the Caribbean Community Including the CARICOM Single Market and Economy signed by Heads of Government of the Caribbean Community on July 5, 2001, and promulgation of Rules of the Tribunal.

A CARICOM Administrative Tribunal would be similar to, yet different from other International Administrative Tribunals (IATs), e.g. the United Nations Administrative Tribunal (UNAT); the World Bank Administrative Tribunal (WBAT); The International Monetary Fund Administrative Tribunal (IMFAT); the International Labour Organisation Tribunal (ILOAT); the Inter-American Development Bank Administrative Tribunal (IDBAT); the Organisation of American States Administrative Tribunal (OASAT); the North Atlantic Treaty Organization Administrative Board (NATOAB); the Asian Development Bank Administrative Tribunal (AsDBAT); the African Development Bank (AfDBAT); and the Commonwealth Secretariat Arbitration Tribunal (CSAT). Without such Tribunals employees of these organizations would be unable to seek redress, based on the privileges and immunities enjoyed by their respective employers.

Although CARICOM has existed since 1973, it has made no attempt to establish such a Tribunal. Caribbean Heads of Government must establish such a Tribunal since CARICOM related employment disputes could potentially be brought before the Caribbean Court of Justice (CCJ) either in its original or appellate jurisdiction. However, in ***Johnson v.* CARICAD** (OJ) AR 2 of 2008, the CCJ held that it did not have jurisdiction over the Defendant CARICAD based on the fact that the Defendant "was not intended to be an integral part of the Community".

That precedent would seem to require that the Court not exercise jurisdiction over employment discrimination cases involving claims against similar CARICOM Institutions. Pursuant to Article 21 of the Revised Treaty of Chaguaramas, other CARICOM Institutions include the Caribbean Meteorological Institute (CMI); the Caribbean Disaster Emergency Management Agency (CDEMA); the Caribbean Meteorological Organization (CMO); the Caribbean Environmental Health Institute (CEHI); the Caribbean Agricultural Research and Development Institute (CARDI); the Caribbean Regional Centre for the Education and Training of Animal Health and Veterinary Public Health Assistants (REPAHA); the Assembly of Caribbean Community Parliamentarians (ACCP); and the Caribbean Food and Nutrition Institute (CFNI). Employees of these institutions would therefore be without judicial remedy in any employment dispute.

Similarly, the Court would not have jurisdiction over employment disputes originating with CARICOM Associate Institutions, such as the Caribbean Development Bank (CDB); the



[1] I am indebted to the organizers of the UWI Law Faculty Workshop Series at Cave Hill, Professor Andrew Burgess, Dr. David Berry, and to Reverend Clifford Hall, and others for their constructive criticisms and assistance in preparing this paper. I am also indebted to Attorney Doreen Johnson for her research assistance. I am however solely responsible for all errors.

University of Guyana (UG); the University of the West Indies (UWI); the Caribbean Law Institute/ Caribbean Law Institute Centre (CLI/CLIC); and the Secretariat of the Organization of Eastern Caribbean States (OECS), as listed in Article 22 of the Revised Treaty.

Other employment cases - whether concerning wrongful dismissal, discrimination on the grounds of nationality, race, religion or sex - will inevitably arise within CARICOM, and its various entities. Establishment of a CARICOM Administrative Tribunal therefore appears consistent with international best practices and in the interests of employers and employees, governments, businesses, non-profits, lawyers, students and researchers, and necessary from any reasonable and proper perspective.

## I. Introduction[2]:

The idea of an International Administrative Tribunal was first introduced in 1927 at the initiative of the Director of the International Labour Organization (ILO). However, it was the League of Nations (LON) which established the first such Administrative Tribunal (LNAT) in 1927[3]. This structure was eventually taken over by the ILO in 1946.[4] Some fifty organizations, including the World Health Organization (WHO), the World Intellectual Property Organization (WIPO) and several European Community Institutions have recognized the ILO Administrative Tribunal (ILOAT) jurisdiction. ILOAT disposes of dozens of cases each year concerning the rights of staff members of those organizations.[5] At present, among International Administrative Tribunals, only judgments of the ILOAT can be contested before the ICJ. These can be contested either on the basis of lack of jurisdiction on the Tribunal's part or a fundamental procedural irregularity by the Tribunal.[6]

The United Nations, the League's successor, created its own Administrative Tribunal (UNAT) in 1949.[7] The ICJ acted as an appeal court for UNAT until 1995, when the link was severed by the UN General Assembly.[8] The World Bank (IBRD) founded its Administrative Tribunal (WBAT)

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[2] For a discussion of International Administrative Tribunals, see generally C.F. Amerasinghe, ed., *Documents On International Administrative Tribunals* 1989; Amerasinghe, *The Law Of International Civil Service As Applied By International Administrative Tribunals* (1988); Amerasinghe & Bellinger, *Index Of Decisions Of International Administrative Tribunals* (1985).

[3] 3. Nicolas Valticos, 'A Propos du Contrôle du pouvoir discrétionnaire par les tribunaux administratifs des organizations internationales' in Ziadé, ***Problems of International Administrative Law*** (2008) at p 31.

[4] 4. Amerasinghe, *Documents,* n.1 at p. 30-43.

[5] Per the **Desgranges** Judgment No. 11 (ILOAT) (1953) – the ILOAT is governed by general legal principles ("instance de droit commun") with the necessary powers to guarantee the security of employment of all officials attached to the ILO.

[6] G. Guillaume, 'Declaration D'ouverture' in Ziadé at p. 7.

[7] The United Nations Administrative Tribunal (UNAT), established by General Assembly Resolution 351 A (IV) of 24 November 1949, as part of the UN Office of Legal Affairs, constitutes an independent UN organ for matters involving staff members of the UN Secretariat, associated UN programmes, e.g. UNDP, UNHCR, IMO, ICAO, and ICJ staff .

[8]. U.N.G.A. Res. 54, 50th Sess., U.N. Doc. A/Res/50/54 (1995).

in 1980.[9] The International Monetary Fund (IMF), a related institution, but a much smaller employer, created its own separate tribunal (IMFAT) in 1994.[10] Many other international organizations, e.g. the African Development Bank (AfDBAT), the Asian Development Bank (AsDBAT), the Council of Europe (CEAT), the European Space Agency (ESAAB), the European Space Vehicle Launcher Development Organization (ELDO)[11] have established their own separate Administrative Tribunals. It is the case that many other international organizations staff disputes are heard either by a Tribunal such at the IDBAT created in 1981, the OASAT established in 1976, or an equivalent body (Appeal Board) used by the organization concerned; OECD (1950), Council of Europe (1965), NATO (1965), the ESA (1975), the ICM (1972), WEU (1956).

Sir Elihu Lauterpacht has remarked that the source of the need for such Administrative Tribunals

> "is the immunity of the organization from the local jurisdiction. Unless there is an international body like the administrative tribunal, there is no place to which staff can have recourse to air their grievances. But supposing that the organizations did not have immunity in respect of employment matters and supposing that the staff were left to have recourse to the local host country's system of employment law, would that be a serious disadvantage to them?"[12]

As also pointed out by Judge Thomas Burgenthal, international administrative tribunals have been established to enable employees of inter-governmental international organizations to sue their employers. Often times, employees could not successfully sue international

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[9]. As of 2008, the WBAT had issued 225 judgments over the course of 20 years. Per Robert Gorman, all of these judgments have been unanimous, "without any separate opinion and without any dissent". Gorman 'Opening Remarks' in Ziadé, at 4. But cf. Ajibola, *ibid* at 181, and Amerasinghe, *ibid* at 184.

Note also that the most common phrase appearing in WBAT decisions is that the Tribunal will not interfere with the exercise of discretion unless the decision contested "constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure". **Montasser** WBAT decision No. 156, 1997 Para 10.

[10]. IMFAT's Statute, Judgments and Orders, may be accessed on line at www.imf.org/external/imfat. For a review of MFAT's jurisprudence for the years 1994-1999, see Goldman, "The International Monetary Fund Administrative Tribunal: Its First Six Years," in *International Monetary Fund Administrative Tribunal Reports*, vol 1, 1994-1999, pp. 1-33 (2000).

[11]. See Amerasinghe, *Documents,* n.1 at pp.193-203.

[12]. Ziadé, note 3, *supra* at p.134.

organizations in national courts because these organizations are, as a general rule, immune from suits filed in domestic courts.[13]

> The legal regime under which the staff of an international organization is employed derives from the international agreement which established that particular organization. Hence, it pertains to the domain of international law. Nonetheless, disputes concerning the rights and duties of international civil servants closely resemble similar disputes between national agencies and their employees. Furthermore, administrative tribunals have been shaped according to the model of judicial protection at the national level. These two factors make them a genus of their own, hardly reconcilable with the basic features of international judicial bodies.[14]

Despite claims of privilege and immunity, International Organisations have nonetheless been sued over the past several decades on grounds often sounding in tort or contract. As pointed out by August Reinisch,[15] they have been sued for allegedly infringing upon the personal property rights

of private individuals[16], for libel or slander[17], and for false imprisonment[18]. They have also been sued for alleged violations of domestic

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13 Burgenthal, Proliferation of International Courts and Tribunals, 14 *LJIL* (2001) 267-275.

14 Romano, The Proliferation Of International Judicial Bodies: The Pieces Of The Puzzle, *International Law And Politics* Vol. 31:709, 726. 1999.

15 Reinisch, *International Organisations before National Courts*, Cambridge University Press (2004), pp. 28-30.

16 *Manderlier v. Organisation des Nations Unies and état Belge (Ministre des Affaires Étrangères*. Civil Tribunal of Brussels 11 May 1966, and *Manderlier v Organisation des Nations Unies and* état *Belge* (Brussels Appeal Court, 15 September, 1969), 69 ILR 139. (case involving infliction of damages by the U.N. forces in the course of the Congo operation). See also *Starways Ltd. v United Nations*, 44 ILR 433, Arbitral Awards, 24 September 1969 (claim for damages suffered in the course of the Civil War in the Congo). Also *Attorney General v Nissan*, House of Lords, 11th February, 1969, [1970] AC 179, [1969] WLR 926 (claims arising from U.N. involvement brought before the English Courts).

17 Cf. *William Douglas Clark et al. v. Alejandro Orfila et al*. U.S. Court of Appeals D.C. Cir. 8 September, 1977; See also *Steinberg v International Criminal Police Organisation*, 672 F.2d 927, 217 U.S. App. D.C. 365 (defamation action) U.S. Court of Appeals, D.C. Cir., 23 October 1981.

18 *Morgan v IBRD*, 752 Fed. Supp. 492 (D.D.C. 1990) U.S. District Court D.C. 13 September, 1990 (tort action against the World Bank (IBRD) for libel, slander, infliction of emotional distress and false imprisonment).

employment legislation.[19] Suits have been brought against International Organizations or individuals acting on their behalf in order to challenge the organization's activities.[20] On occasion, their alleged violations of individual rights have even been so egregious as to amount to claims of violations of fundamental rights[21].

There are several important issues to be considered in establishing an international Administrative Tribunal. :

1. The specific role of the Tribunal in reviewing employment related decisions
2. Types of cases to be heard by the Tribunal.
3. Access to the Tribunal
4. Composition and Structure of the Tribunal.
5. The remedies and costs which the Tribunal is authorized to award.

Its Mission Statement obligates CARICOM "To provide dynamic leadership and service, in partnership with Community Institutions and Groups, toward the attainment of a viable, internationally competitive and sustainable Community, with improved quality of life for all." Externally, the goals articulated in its Mission Statement, as Lucian Isidore has pointed out, are challenged by the fast moving currents of globalization, as the Caribbean community seeks to

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*Mendaro v World Bank*, U.S. Court of Appeals D.C. Cir., 27 September, 1983 (claim alleging sexual discrimination); 717 F 2d 610, 1983, and World Bank Administrative Tribunal Reports Judgment No. 26, 1981; *Novak v The World Bank*, 216 F. 3d 300, 313, 2d Cir., 2000) (not requiring disclosure of confidential sources). See also *Mukoro v The European Bank for Reconstruction and another*, (1994) UK Employment Appeals Tribunal, Appeal No. EAT/813/92 (suit alleging unlawful racial discrimination in rejecting employment application).

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[20] *Zoernsch v Waldock and MacNullty*, [1964] 1 WLR 675, (attempt to question a decision of the European Commission on Human Rights by suing Sir Humphrey Waldock, a member, for negligence). See also *Donald v. Orfila*, 788 F.2d 36 (D.C. Cir 1986) (employment dismissal suit against then OAS Secretary General, alleging unlawful interference with the Plaintiff's employment contract.) Also *Kissi v De Larosiere*, U.S. District Court D.C., 23 June, 1982, (employment discrimination suit against the IMF Managing Director); *Deluca v U.N Organisation, Perez de Cuellar, Gomez, Duque, Annan et. al*., 841 F. Supp. 531, 533 (S.D.N.Y. 1994), (aff'd 41 F.3d 1502 (2d Cir. 1994) (suit for damages for failure to reimburse plaintiff U.N. Employee income taxes withheld in accordance with the normal U.N. reimbursement scheme).

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The *Confédération Française Démocratique du Travail v European Communities*, European Commission of Human Rights, Application No. 8030/77, Decision of 10 July, 1978, Decisions and Reports 13 (1979) (suit seeking to hold the E.C. directly liable for fundamental rights violations before an international tribunal).

assert its place in a newly emerging social and economic order.[22] Internally, like any other regional and international organization, the Organization, must concern itself with the challenges of good governance, proper and efficient administration, and grievances which may exist among staff members.

Per Article 228 of the Revised Treaty, CARICOM itself has the right "to sue and be sued in its own name". However, disparities in the treatment of different classes of employees among CARICOM's Institutions and Associate Institutions underline the need for a regional administrative tribunal to resolve employment disputes, including claims of discrimination and unequal treatment within Community Institutions,[23] Associate Institutions,[24] Organs[25] and Bodies,[26] and the CSME.

Such disputes between employer and employee are, sadly, a fact of every day life. They have existed since time immemorial, and remain as perennial as weeds of grass. Yet the Community, its Institutions, Associate Institutions, Organs and Bodies may pose their own

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 Isidore, *Remarks on Behalf of CARICOM* at the CDB/IADR Civil Society Organizations Dialogue: CSO Responsibilities and Actions in National Decision Making Development Planning and Implementation, January 24-25, 2006, Port-of –Spain, Trinidad.

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 Article 21, Revised Treaty of Chaguaramas, provides that the following entities "shall be recognized as Institutions of the Community": Caribbean Disaster Emergency Management Agency (CEDEMA), Caribbean Meteorological Institute (CMI), Caribbean Meteorological Organisation (CMO), Caribbean Environmental Health Institute (CEHI), Caribbean Agricultural Research and Development Institute (CARDI), Caribbean Regional Centre for the Education and Training of Animal Health and Veterinary Public Health Assistance (REPAHA), Assembly of Caribbean Community Parliamentarians (ACCP), Caribbean Centre for Development Administration (CARICAD), Caribbean Food and Nutrition Institute (CFNI) and such other entities as may be designated by the Conference.

24. Article 22, the Revised Treaty provides that the following entities "shall be recognized as Associate Institutions of the Community": Caribbean Development Bank (CDB), University of Guyana (UG), University of the West Indies (UWI), Caribbean Law Institute/Caribbean Law Institute Centre (CLI/CLIC), the Secretariat of the Organisation of Eastern Caribbean States and such other entities as may be designated by the Conference.

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Article 10 of the Revised Treaty provides that the principal organs of the Community are the Conference of Heads of Government and Community Council of Ministers. In performance of their functions the principal organs are assisted by the following Organs, namely: The Council For Finance and Planning (COFAP), The Council for Trade and Economic Development (COTED), The Council for Foreign and Community Relations (COFCOR), and the Council for Human and Social Development (COHSOD). Articles 11 through 17 delineated the Composition and functions of the Community Organs.

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Article 18 establishes the bodies of the Community. These are the Legal Affairs Committee, The Budget Committee, and the Committee of Central Bank Governors. The composition and functions are delineated in Article 19.

particular problems in the context of governance, labour and employment law and relations. Anomalies which currently exist might reasonably be expected to engender resentment in some quarters, reduce employee productivity, unnecessarily disrupt the workplace in greater or lesser measure from time to time, and incur extravagant and unnecessary legal costs and waste valuable resources. Absent the establishment of a CARICOM administrative tribunal and dispute resolution mechanism beyond Chapter 9 of the Revised Treaty (Articles 187-210, and 223), employment disputes will continue to fester, if they remain unresolved and adversely affect the organization.

There are several basic reasons for advocating such a tribunal. First, today, few if any regional or international organizations do not have an Administrative Tribunal to address and resolve disputes between employees and the regional or international organizations which employ them. The preponderance of such Administrative Tribunals in regional and international organizations counsel us to consider the raison d'être of such tribunals, and the need for such a Tribunal within CARICOM.

Such a Tribunal, as proposed here, would be similar to those which exist in the United Nations (UNAT), the IBRD (World Bank - WBAT), the ILO Administrative Tribunal (ILOAT), the IMF Administrative Tribunal (IMFAT), the Organization of the American States Administrative Tribunal (OASAT)[27], the Administrative Tribunal of the Inter-American Development Bank (IDBAT)[28], the African Development Bank Administrative Tribunal (AfDBAT)[29], and the Asian Development Bank Administrative Tribunal (AsDBAT).

Secondly, the Revised Treaty in its Preamble recalled the Charter of Civil Society adopted by the Conference of CARICOM Heads of Government on 19 February 1997.[30] The Charter posited a people-oriented vision of regional integration. It went beyond the question "how do we treat our people", and rather answered the question "how should we treat our

[2727.] Established by AG/RES (35 I-O/71) adopted by the OAS General Assembly April 22, 1971.

[28]. Amerasinghe, *Documents*, 62-82.

[29] Established by Resolution of the Bank's Board of Directors, Resolution No. B/BD/97/11 of 16 July 1997.

[30] (2009) Caribbean Community (CARICOM) Secretariat. See also www.caricom.org/jsp/secretariat/.../chartercovolsociety.jsp? ,,,

people?" It constitutes a definitive repository of the rights, juridical, political, economic and social of Caribbean peoples, and sets binding obligations on the Community.

Thus, Article V.3 of the Charter (Equality before the Law) provides that:

> No person shall be favoured or discriminated against by reason of age, colour, creed, disability, ethnicity, gender, language, place of birth or origin, political opinion, race, religion or social class.

**Article XII (Women's Rights**) provides in pertinent part:

> (a) For the promotion of policies and measures aimed at strengthening gender equality, all women have equal rights with men in the political, civil, economic, social and cultural spheres. Such rights shall include the right
>
> (b) to be afforded equal opportunities for employment and to receive equal remuneration with men for work of equal value …
>
> (d) to legal protection including just and effective remedies against … sexual harassment.

**ARTICLE XIX- (Workers' Rights)** provides that:

1. Every worker has the right:

> (c) not to be subjected to unfair labour practices, including intimidation and victimisation;
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> (d) to work under safe, hygienic and healthy conditions;
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> (e) to reasonable hours of work, rest, periodic holidays with pay and remuneration for public holidays;
>
> (f) to receive reasonable remuneration for his or her labour and to withhold his or her labour subject to such reasonable restrictions as may be imposed by national law in the public interest…

3. The States undertake:

(e) to provide protection for workers against arbitrary dismissal;

(f) to provide adequate machinery for the speedy resolution of industrial disputes and the restoration of normalcy in the event of strikes, lock-outs and other forms of industrial action;

(g) to provide an adequate period of leave with pay, or with adequate social security benefits for women before and after childbirth and to make it unlawful for an employer to terminate a woman's employment or take any other action that would unfavourably affect her status or promotion by reason of her pregnancy;

(h) to establish standards to be observed by employers in providing workers with a safe and healthy working environment;

(i) to provide workers with adequate social security benefits;

(j) to ensure that every person who has attained the age of retirement and does not have adequate means of subsistence is provided with social and medical assistance.

Third, the Administrative Tribunal proposed would alter the dynamics of the employment relationship between CARICOM, its entities and staff, apart from the recourse it would provide to employers and employees. It would enhance that relationship, even though it would neither expand nor derogate from the rights and duties enunciated in the Charter of Civil Society as referenced above and incorporated into the RTC, nor the ILO Conventions on Discrimination and Termination of Employment.

The CCJ's recent decision in *Johnson v. CARICAD*, AR2 of 2008, compels consideration of the need for an Administrative Tribunal to hear and decide matters in the field of employment discrimination. In *Johnson v. CARICAD,* the Plaintiff, a Barbadian national, sued her employer, CARICAD, an Article 21 CARICOM Institution. Plaintiff alleged that the Defendant discriminated against her in the terms and conditions of her employment based on her national origin. Plaintiff alleged that Defendant's actions in failing to provide her and other Barbadian employees with a pension, gratuity or superannuation payments, while providing gratuities to non-Barbadian employees, were in violation of Article 7 of the Revised Treaty.

The Court concluded that Institutions of the Community "were not intended to be an integral part of the Community" and "do not enjoy the same degree of identification with the Community as do the Organs and Bodies … that …. CARICAD, an Institution of the Community, cannot be sued in proceedings before this Court". Per Article 221, (Judgments of the Court to constitute *stare decisis*) "Judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219". Effectively, this means that, following the Court's decision in *Johnson v. CARICAD*, it is unlikely that any other Article 21 Institution could be a "competent defendant" in proceedings before the CCJ in cases alleging employment discrimination by a CARICOM entity. Let us leave aside the fact that from a claimant's perspective, to date, most if not alls decisions by the CCJ in employment matters have favoured the employer.

International Administrative Tribunals stand at the cross-roads of increasing globalization, international anarchy, fundamental human rights and the Rule of Law. The growth of international tribunals addressing employment issues in international organizations bears witness to the frequency, if not the inevitability, of such disputes. CARICOM is now in its thirty-fifth year. The time is therefore ripe, if not overdue, for the establishment of an international administrative tribunal to resolve employer-employee disputes within CARICOM, its Institutions, Associate Institutions, Organs and Bodies.[31] Such a Tribunal would necessarily have the legal authority to examine evidence, conduct hearings, call witnesses, issue rulings and render judgment in any matter pending before the Tribunal.

The Draft Statute presented here seeks to fill the gap, promote wider discussion and continuous progress in that direction and ultimately establishment of a CARICOM Administrative Tribunal. This would require amendment to Chapter 9 (Disputes Settlement) of the Revised Treaty of Chaguaramas (RTC) Establishing the Caribbean Community Including the CARICOM Single Market and Economy signed by Heads of Government of the Caribbean Community on July 5, 2001, and promulgation of Rules of the Tribunal.

[31]. See CARDI Dispute, 'CARDI Staff on Work-to-Rule', *Nationnews.com,* June 21, 2005; 'CARDI Workers Plan to Strike Today, *Nationnews.com*, October 4, 2005; 'CARDI to Restore Gratuity Payments', *Nationnews.com,* October 26, 2005; 'Settlement Reached in CARDI Dispute', *Nationnews.com*, October 28, 2005; 'CARDI Staff Off the Job', *Nationnews.com,* January 25, 2008.

A caveat is in order. Some may carp or cavil at our inclusion of certain Articles in the Tribunal's Draft Statute below, e.g. Article X (Equality Before the Law), Article XI (Non-Discrimination), Article XII (Arbitrary Dismissal), Article XIII (Whistle blowing). However, inclusion of such matters was not intended to be merely academic or controversial. Rather, such an apparent break with the precedents of conventional statutory drafting can be justified on the basis of the need to enshrine those values and further explicitly guarantee those particular legal protections, given the region's unique political and socio-economic history. Further, Caribbean constitutional rights are necessarily intertwined with any meaningful Caribbean jurisprudence, such as may emerge from the proposed Tribunal. These Articles in the Draft Statute parallel those constitutional protections. At another level, the Statute of the Council of Europe expressly provides in Chapter II, Article 3, that:

> "Every member … must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council …"[32]

Specific Articles on Equality before the Law, Non-Discrimination, the Prohibition against Arbitrary Dismissal, and Protection of Whistle blowing serve as a necessary compass to guide the Tribunal's deliberation, and are intended to ensure adherence to the Rule of Law, transparency and accountability.

The powers of Administrative Tribunals are usually limited to those set forth in their governing Statutes. The general rule is that International Administrative Tribunals have limited rather than general jurisdiction.[33] An efficient, functioning Administrative Tribunal such as proposed here would protect the procedural, due process and substantive rights of employees of CARICOM and related regional organizations. It would also help to alleviate the many negatives alluded to above. Among other things, it would avoid the expenses inherent in litigation, and conceivably reduce the loss of morale often attendant on complaints by employees who see themselves as having been

[32] 87 U.N.T.S 103.

[33] See ICJ Advisory Opinion Concerning the Competence of ILOAT in Judgments of the Administrative Tribunal of the International Labour Organization, ICJ Reports (1956) 77 at page 97.

unfairly and unlawfully treated and victimized. Thus, the following Draft Statute for a Caribbean Community Administrative Tribunal.

## II. DRAFT STATUTE FOR A CARIBBEAN COMMUNITY ADMINISTRATIVE TRIBUNAL (CCAT)

This Statute establishes a Tribunal to be known as the Caribbean Community Administrative Tribunal.

**DEFINITIONS:**

**"Administrative act**" means any individual or regulatory decision taken by the Secretariat or the administration of any of the Community's entities;

**"Adverse employment action"** means any action against an employee which negatively affects his or her employment, including but not limited to termination, suspension, demotion, denial of a position, failure to promote, written or oral warning;

"**CARICOM**" means the Caribbean Community established by Article 2 of the Revised Treaty of Chaguaramas (RTC) and includes the CSME as established by the provisions of the RTC;

**"Charter of Civil Society"** means the Charter of Civil Society adopted by the Conference of CARICOM Heads of Government on 19 February, 1997, and recalled in the preamble to the RTC;

**"Conference of Heads of Government" or "the Conference"** means the Organ so named in paragraph 1(a) of Article 10 of the RTC;

**"Conflict of interests"** means direct or indirect financial or personal interests in the outcome of a dispute, or a past or present financial, business, professional, family or social relationship likely to affect the impartiality, or reasonably create an appearance of partiality or bias, such as would disqualify a member from serving on the Tribunal and would invalidate the proceedings, if the Member acted or participated..

**"Contracting Party"** means a party to the Treaty or the RTC;

"**Contract of employment**" and "**terms of appointment**" include all relevant regulations and rules in force at the time of any alleged violation or non-observance of a contract, the terms and conditions of appointment, and the terms and conditions of employment, including any provisions governing Pension Regulation(s), Staff Retirement Plan(s), Gratuities, Superannuation Payment(s) and all Benefit Plans provided by CARICOM, Its Institutions, Associate Institutions, Organs, or Bodies, to their respective staff;

**"CSME"** means the regime established by the provisions of the Revised Treaty replacing Chapters Three through Seven of the Annex to the Treaty Establishing the Caribbean Community and Common Market signed at Chaguaramas on 4 July 1973;

**"Declaration of Labour and Industrial Relations Principles"** means the CARICOM Declaration of Labour and Industrial Relations approved at the 13th Meeting of CARICOM Standing Committee of Ministers of Labour (SCML) on the 26-28 April, 1995 in Nassau, The Bahamas;

**"Dispute"** means any disagreement between an employee and his or her employer, concerning an adverse employment action including disciplinary actions such as a warning, or suspension, or termination, or dismissal, and any alleged procedural or substantive violation of the terms and conditions of his or her employment;

**"Employee"** means a worker employed under a contract of employment, i.e. a contract *of* service. It may also include an 'independent contractor' or contract employee doing the work of an ordinary employee when the classification does not reflect the actual relationship between the parties.

**"Fundamental Rights"** means basic inalienable human rights to which all human being are entitled, including civil and political rights, the right to equality before the law, the right to be free from discrimination, and the right to work, such rights as recognized by the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the CARICOM Charter of Civil Society, the CARICOM Declaration of Labour and Industrial Relations, the ILO Convention against Discrimination, and the ILO Convention concerning Termination;

**"Institution"** means an entity within the meaning of Article 21 of the Revised Treaty.

**"Associate Institution"** means an an entity within the meaning of Article 22 of the Revised Treaty;

"**Organ"** means an entity within the meaning of Article 10 of the Revised Treaty.

**"Body"** means an entity within the meaning of Article 18 of the Revised Treaty;

**"Member State"** means a Member State of the Community excluding an Associate Member within the meaning of Article 231;

"**Member of Staff**" means any current or former member of staff of CARICOM, Its Institutions, Associate Institution, Organs, or Bodies, which member of staff holds or has held a regular full-time appointment of not fewer than two years immediately preceding the Complaint, or any "successor in interest" or beneficiary legally entitled to claim a right of such member of staff as a personal representative, or by reason of the staff member's death or disability, or any person otherwise designated or entitled to receive payment(s) under any provision of Pension

Regulation(s), Staff Retirement Plan(s), Gratuities, Superannuation Payment(s) and under any Benefit Plans provided by CARICOM, Its Institutions, Associate Institutions, Organs, or Bodies;

**"Revised Treaty"** means the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, signed by the Heads of Government of the Caribbean Community on July 5, 2001 at their Twenty-Second Meeting of the Conference in Nassau, The Bahamas;

**"Secretariat"** means the Secretariat of the Community referred to in Article 23 of the Revised Treaty;

**"Secretary-General"** means the Secretary-General of the Community;

**"Treaty"** means the Treaty Establishing the Caribbean Community and Common Market signed at Chaguaramas on 4 July, 1973;

"**Tribunal"** means the Administrative Tribunal for the Caribbean Community (" CARICOM ") and the Caribbean Single Market Economy ("CSME") established under this Statute;

**ARTICLE I (Establishment of the Tribunal)**

1. There is hereby established an Administrative Tribunal (hereinafter referred to as the "Tribunal") for the Caribbean Community (hereinafter referred to as "CARICOM ") and the Caribbean Single Market Economy (hereinafter referred to as "CSME").

2. The Tribunal shall have its Headquarters in Bridgetown, Barbados.

**Comment: Article 1 parallels similar provisions in the Statutes of other Tribunals. It speaks to the Tribunal's constitutive function. It names the Tribunal and envisages its establishment to serve the Community and the CSME. It provides for the Tribunal's Headquarters in Barbados. This Article is similar to UNAT Statute, Art. 1, WBAT Statute, Art. 1, IMFAT Statute, Art. 1, AfDBAT Statute, Art. 1, and Art. 1 of the AsDBAT Statute. It is different from the OASAT Statute which speaks to general principles, the legal status of the OASAT, its specific functions, the supremacy of the internal law of the OAS and the OAS Charter.**

**ARTICLE II (Jurisdiction)**

The Tribunal shall hear and decide any Complaint in which any individual staff member(s) or employee(s) of CARICOM, or any of its Institutions, Associate

Institutions, Organs, or Bodies, alleges a violation or non-observance of the terms or conditions of his or her employment contract or appointment, including allegations of discrimination on the grounds of race, national origin, gender, age, disability, religion or violation of any fundamental rights as may be provided for in the Constitutions of CARICOM member states.

**Comment: The employment relationships between CARICOM and its employees, and CARICOM entities and their respective employees is subject to legal rights and duties, including the employer's duty to take employment related decisions consistent with Community law and all applicable rules, procedures and norms recognized at the regional and international levels, e.g. Article 7 of the Revised Treaty of Chaguaramas, and Articles V, XII and XIX of the Charter of Civil Society, and the UN and ILO Conventions.**

**The Tribunal would function as a judicial body and determine whether a decision violates the relevant law(s) and the Rule of Law. However, any decision challenged must adversely affect the particular employee. Notwithstanding any rule(s) to the contrary, neither States, Unions, nor Staff Associations shall have standing to bring claims before the Tribunal. The Tribunal shall not entertain hypothetical questions and shall not issue advisory opinions.**

**This Article establishes the Tribunal's competence or jurisdiction. Several Administrative Tribunals have similar provisions; UNAT Art. 2 (except insofar as the competence of CARICOM's Tribunal would extend to all CARICOM entities); OASAT Statute, Art. 2(4) (except that Art 2(4) is discretionary in nature, whereas a CARICOM Tribunal's exercise of jurisdiction is mandatory); IMFAT Statute, Art. 2; NATOAB Statute, Article 4.21; the CEAB staff regulation Article 59.1, and the EC Treaty Article 179.**

**In terms of the Tribunal's competence, this provision is comparable to Art 2(3) of the UNAT Statute, which is unlimited. It is, however, different from others, e.g. the OASAT Statute Art. II.5 where competence is subject to the provisions of Article 1 of the Statute. See also the Statutes of WBAT Art. 3; IMFAT Statute, Art. 4; COE Statute, Art.4; AfDBAT Statute Art. V.2. Note that ILOAT Statute Art 11.7 confers limited competence like the OASAT, Art. XII of the ILOAT Statute provides a right to appeal to the ICJ from ILOAT decisions in limited circumstances.**

**The Tribunal's powers to decide a matter derive from this Statute. The limitations contained herein establish the legal limits to the Tribunal's competence. There shall be no need for any further special agreement with respect to extension of the Tribunal's jurisdiction over all CARICOM entities, unlike the OASAT Statute, Art. 2(4).**

**The Tribunal shall be competent to review all challenges by staff members to the legality of any adverse employment action or administrative act affecting the staff member. It shall be competent to hear cases affecting the terms and conditions of employment whether relating to career benefits or other aspects of appointment.**[34]

**ARTICLE III (Determinations as to Competence)**

1. Any issue concerning the Tribunal's competence or jurisdiction shall be determined by the Tribunal in accordance with this Statute.

2. The Tribunal's competence shall extend to employment disputes involving any CARICOM Institution, Associate Institution, Organ or Body, or to the CSME as defined in Article 1 of the Revised Treaty, as well as to any Caribbean intergovernmental organization, in accordance with the terms of any agreement concluded for that purpose by the Secretary-General with any such organization.

3. Any agreement under paragraph 2 above, shall specifically provide that the organization concerned shall be bound by the Tribunal's judgments and shall include, among others, provisions concerning the organization's participation in the administrative arrangements necessary for the Tribunal's functioning and sharing equitably in the Tribunal's expenses.

4. The Tribunal shall be competent to hear any Complaint which arose subsequent to January 1, 2011)

**Comment: The Tribunal shall be empowered to determine its own competence within the terms of this Statute. Other international administrative tribunals e.g. UNAT Statute Article 2(3); ILOAT Statute, Article II (7); WBAT Statute, Article 3; and IMFAT Statute, Art. IV grants the respective tribunal similar authority. This provision allows the Tribunal to determine its competence with respect to any case.**

**ARTICLE IV (Admissibility)**

1. No Complaint shall be admissible, unless

[34]. E..g. *Johnson v CARICAD,* CCJ (OJ) AR2 of 2008 (alleging discrimination based on defendant's denial of a staff member's right to a pension, superannuation payments or gratuity).

(a) the decision challenged is a final one, and the Applicant has exhausted all grievance procedures and applicable remedies available within CARICOM, its Institutions, Associate Institutions, Organs and Bodies, their respective Rules, Policies and Procedures; and

(b) The Complaint is filed within one hundred and eighty (180) days after the latest of the following:

(i) the occurrence of the event giving rise to the Complaint;

(ii) Receipt of notice, after the Applicant has exhausted all remedies available within CARICOM, its Institution(s), Associate Institution(s), Organ(s) and Bodies, that the relief requested or recommended will not be granted; or

(iii) Receipt of notice that the relief requested or recommended will be granted, if such relief shall not have been granted within thirty (30) days after receipt of such notice; or

(iv) When the procedures referred to in the preceding paragraphs have not been exhausted, but the interested parties agree that the case should be presented to the Tribunal.

**Comment: Under this Article, admissibility requires exhaustion of internal grievance procedures. Such a requirement is a prerequisite common to international administrative tribunals before the matter is adjudicated. The reasons are (1) the administrative tribunal is often the last resort and (2) the requirement of exhaustion give the international organization (IO) the opportunity to assess the complaint and to provide a remedy. See e.g. ILOAT Statute Art. VII.1; IMFAT Statute Art. V.1, AfDBAT Statute Art III.2(i).**

**As to the 180 day limitation period, the Tribumal should not include the day of the particular event in calculating the 180 days. Note, however, that several IATs have a**

**limitation period of 90 days. See e.g. UNAT Statute, Article 7; ILOAT Statute, Article 7.**

**The Statute here parallels UNAT's except with respect to UNAT's discretion "to suspend the provisions regarding time limits". UNAT Statute Art. 7.5. See also OASAT Statute Art. VI.2 and VI.4; WBAT Statute Art. II.2 (a) (i) and (ii); and IMFAT Statute Art. VI.3 which allows the Tribunal to waive time limits in exceptional circumstances.**

**ARTICLE V (Composition)**

1. The Tribunal shall be composed of five (5) members, all of whom shall be nationals of CARICOM Member States. No two (2) serving Tribunal members shall be nationals of the same Member State. The Tribunal's members shall be persons of high moral character and shall possess the qualifications required for appointment to high judicial office, or teaching members of the Academy, or be of recognized competence in relevant fields such as labour, industrial and employment relations, international civil service and international organization administration.[35]

2. The members shall serve solely in their personal capacities.

3. A Tribunal member shall not be a present or former CARICOM staff member or a present or former staff member of its Institutions, Associate Institutions, Organs, or Bodies, or a paid consultant thereto, except that he or she has demitted office for not fewer than five (5) years,. A Tribunal member shall not be eligible to become a staff member of CARICOM or any of its Institutions, Associate Institutions, Organs, or Bodies for a period of not fewer than five (5) years after the expiry of such appointment.

4. The Tribunal's members shall be selected by the Conference of Heads of Government from a list of candidates to be drawn up by the CARICOM Secretary-General.

[3535]. It is worth considering the practice of the European Space Agency Appeals Board (ESAAB) with respect to appointment of non-lawyers to the Tribunal. Persons with substantive, practical experience in labour and employment areas might contribute substantially to the work of the Tribunal.

5. The Secretary-General shall appoint an Advisory Committee on Administrative Tribunal Matters (hereinafter known as "the Advisory Committee", or "the Committee"), comprising at least five (5) members, including the General Counsel, a member of staff of the Directorate of Human & Social Development, and such other members as may be appropriate.

6. The Committee may include members who are not affiliated with CARICOM, its Institutions, Associate Institutions, Organs, or Bodies. The Secretary-General or his designee, or the General Counsel may act as Chairperson of the Committee.

7. The Tribunal's members shall be appointed for a period of three (3) years. They may be reappointed by the Conference of Heads of Government, upon the Secretary-General's recommendation, for a maximum of two (2) further consecutive terms.

8. A Tribunal Member may at any time resign his or her office by submitting the relevant resignation in writing. The resignation shall be submitted to the Chairman for transmission to the Secretary-General, who shall advise the Heads of Government accordingly.

9. The Secretary-General shall notify the Member States of the appointment of any Tribunal member, or the termination of office of any Tribunal member by resignation, revocation, effluxion of time, disability, death, or for any other reason.

10. A member appointed to fill an unexpired term of office shall hold office for the balance of the unexpired term of his or her predecessor.

11. Any member who has an actual or potential conflict of interest in any matter shall immediately give notice of such conflict, and thereafter recuse himself or herself from any participation in that matter.

12. A Tribunal member may be removed from office by a majority decision of the Conference of Heads of Government upon the Secretary-General's recommendation based upon a fair and impartial investigation by the Secretary-General, or the Regional Judicial and Legal Services Commission, as authorized by the Conference of Heads of Government.

13. In rendering their judgment(s), the Tribunal's members shall be completely independent. They shall not receive any instructions from any person or entity or be subject to any outside influence(s) in connection therewith.

**14.** The Tribunal's composition shall reflect the major legal traditions of the Caribbean region - the common-law, the civil-law and the Roman-Dutch Law traditions.

15. The Tribunal may on its own initiative or at the request of a party to the dispute seek information and technical advice from any expert or body which it considers appropriate, provided that the parties to the dispute so agree and subject to such terms and conditions as the parties may agree.

**Comment**: **The requirement of qualifications suitable for appointment to high judicial office partially mirrors the ICJ and CCJ criteria. See Statute of the International Court of Justice, Article 2 – "The Court shall be composed of a body of judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law"; and Agreement Establishing the Caribbean Court of Justice, Article IV.11, "[I]n making appointments to the office of Judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society".**

**Art. 4 I of this Statute is similar to Art. III.2 of the ILOAT Statute, regarding the period of appointment for Tribunal members. However, international tribunals have various time limits for their members' terms of office, UNAT Statute, Art. 3. ii; OASAT Statute, Art. 3.4; WBAT Statute, Art. IV.3; IMFAT Statute, Art. VII. See also AfDBAT Statute, Art VI, and AsDBAT Statute, Art. IV.3**

**In terms of the Tribunal's competence, this provision is comparable to Art 2(3) of the UNAT Statute, which competence is unlimited. The provision is, however, different from others, e.g. the OASAT Statute Art. II.5 where competence is subject to the provisions of Article 1 of the OASAT Statute. See also the Statutes of WBAT Art. 3; IMFAT Art. 4; COE Art. 4; AfDBAT Statute Art. V.2. Note that ILOAT Statute, Art 11.7 confers limited competence like the OASAT. Art. XII of the ILOAT Statute provides a limited right to appeal to the ICJ from ILOAT decisions.**

**Employees of CARICOM and any related entities, which employees are on leave with or without pay shall not engage in public or private employment while on leave without the express approval of their employer. Such approval shall not be unreasonably withheld. Cf. IMF N.7 persons on staff of IMFAT, on leave with full pay cannot hold public or private employment. IMF N.8 employees cannot engage in political activity for this is considered inconsistent with the IMF's independence and impartiality. Where an employee accepts political office he or she must resign immediately.**

**Note that in 2001 the Article IV of the WBAT Statute was amended to clarify the need for jurisconsults to have competence in "relevant fields such as employment relations, international civil service and international organization administration." This amendment emphasized the labour relations perspective and the fact that an understanding of the specific challenges for international civil servants is important in applying the relevant law to the facts in particular cases. WBAT appointments were also limited to a maximum of ten (10) years, and an advisory process for the selection of Tribunal judges was incorporated into the WBAT Statute, which constituted an innovation in international tribunal practice.**

**It is also standard that in some specific circumstances, a Tribunal member's appointment may be terminated, e.g. if the Member becomes of unsound mind or is incapable of executing his or her duties, if he or she is discharged in bankruptcy, is convicted of a criminal offence, engages in misconduct in relation to his or her duties, is excessively absent from the Tribunal's proceedings, or otherwise fails or refuses to carry out his or her responsibilities.**

**The Tribunal should also have access to a Labour Relations Counsellor, or expert, whose function would be to sit with the Complainant and the Respondent, jointly or individually, before the Tribunal's hearing(s) and assess the merits of the case. This procedure should screen out, at an early stage, those cases where either party admits liability or otherwise concedes the weakness of his or her case. This provision is also consistent with Article 209 of the Revised Treaty, which facilitates the arbitral tribunal's acquisition of additional information from experts in the ADR context, and is in harmony with the New Rules of Civil Procedure (CPR) Part 25.1 (a) and (b), requiring the Court at Case Management to identify the issues at an early stage; and decide promptly which issues need full investigation and trial, and accordingly dispose summarily of the other issues.**

**<u>ARTICLE VI</u> (Operation and Functioning of the Tribunal)**

1. The Secretary-General shall, with the assistance of the Barbados Government, provide the Tribunal with such technical, administrative and secretarial services as may be necessary for the functioning of the Tribunal, including the appointment of a suitably qualified lawyer to serve as the Tribunal's Executive Secretary, which Executive Secretary, in the discharge of his or her duties, shall be solely responsible to the Tribunal.

2. The Tribunal's members shall elect a Chairman and a Deputy-Chairman from among themselves.

3. The Tribunal shall form panels, each consisting of three (3) members, for dealing with any case, except for the instances provided in paragraph 5 of this Article. The panels' decisions shall be recognized as decisions by the entire Tribunal, except in cases of appellate review.

4. The most senior member of each panel shall preside as Chairperson over the particular panel.

5. If a panel member has recused himself or herself, or has been removed from office, or for any reason is unable to hear a case, another Tribunal member shall be appointed as a replacement.

6. The Tribunal shall sit *en* banc when determining:

    (a) Cases which, in the Tribunal's opinion, necessitate a determination by all members of the Tribunal; or

    (b) Any case(s) where a party requests that the matter be heard by all members of the Tribunal and adduces sufficient reason(s) for his or her

request that the case be so heard, and where the Tribunal, in its sound discretion, may agree to such request; or

(c) Any case(s) where a party requests that the matter be heard by all members of the Tribunal, such request shall be in writing and be made no fewer than forty-five (45) days before commencement of the relevant hearing.

7. CARICOM shall bear all of the Tribunal's expenses, including any honorariums, per diem allowances, and travel expenses of its members for attending any hearings and meetings, which expenses shall be defrayed by the Secretariat.

8. In the event that an Applicant, for financial reasons, is unable to travel to the Headquarters to be heard, a three (3) member panel shall visit the particular jurisdiction to hear the evidence pertaining to the Applicant's Complaint and adjudicate the Complaint.

**Comment: The itinerant function of the Tribunal may well represent a departure and an innovation with respect to International Administrative Tribunals. It is however consistent with the CCJ's itinerant jurisdiction. "…as circumstances warrant, the Court may sit in the territory of any other Contracting Party", [36] and the Eastern Caribbean Supreme Court (ESCS) (Court of Appeal) an itinerant court with sittings rotated among its nine (9) member states.**

**ARTICLE VII (Rules of Procedure)**

1. Subject to the provisions of this Statute, the Tribunal shall establish and publish its own Rules of Procedure.

2. Those Rules shall include provisions concerning:

[36] Agreement Establishing the Caribbean Court of Justice Article III.3.

(i) Nomination and Election of the Chairman and the Deputy Chairman of the Tribunal;

(ii) Structure and membership of the panels pursuant to Article VI. 3 - 6 above.

(iii) Admissibility and Initiation of Complaints and the procedure to be followed;

(iv) Intervention(s) by any person or persons to whom the Tribunal is open under Article II, and any person or persons whose rights may be reasonably affected by the Tribunal's decision(s) or judgment(s);

(v) Fact-finding(s) involving persons to whom the Tribunal is open under Article II; and

(vi) Any other matter(s) relating to the Tribunal's functions and responsibilities pursuant to Article VI.

**Comment: This is a standard provision in the Statutes of all Administrative Tribunals.**

**<u>ARTICLE VIII</u> (Scheduling)**

The Tribunal shall hold sessions at dates and in places to be determined in accordance with its Rules, recognizing the need for efficiency and judicial economy in the conduct of its proceedings, while at the same time providing the opportunity for full and fair hearings both procedurally and substantively.

**Comment: This is a standard provision in the Statutes of all Administrative Tribunals. See e.g. UNAT Statute, Art. 4; WBAT Statute, Art VIII.1; IMFAT Statute Art. XI; OASAT Statute Art, XI.1.**

**<u>ARTICLE IX</u> (Public Hearings)**

1. The Tribunal shall decide in each case whether oral proceedings are necessary or whether the matter(s) can be concluded by way of evidence contained in sworn affidavits, and by written submissions. [37]

2. Oral Proceedings before the Tribunal shall be public, unless the Tribunal decides upon written motion by either party, that exceptional circumstances and compelling privacy interests so outweigh the public interest such as to require the proceedings to be held *in camera*.

**Comment**: **Public hearings contribute to the legitimacy of any Tribunal's decision-making processes and procedures. It is axiomatic that "justice must not only be done, but it must be seen to be done". Article 6 of the European Convention on Human Rights requires that member states provide its citizens with fair and public hearings in a court of law. However; some ATs e.g. the ILOAT have appeared exempt from this fundamental requirement. Barring the need for *in camera* proceedings to preserve and protect privacy interests, the balance should tilt in favour of public access to the Tribunal's hearings in the case of a CARICOM Administrative Tribunal.**

**ARTICLE X (Equality before the Law)**

All persons shall be equal before the law, and are entitled to the equal protection of the laws.

**Comment: The right to equality before the law is enshrined in numerous international conventions, including Article 14 of the International Covenant on Civil and Political Rights, which states that "[a]ll persons shall be equal before the courts and tribunals …" See also Art. 7 of the African Charter on Human and Peoples' Rights (the Banjul Charter)[38] and Articles 18, 43, 54, and 83 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.[39] Article X is also consistent with the Charter of Civil Society, adopted by CARICOM Heads of Government, February 19, 1997, and referenced in the Preamble to the Revised Treaty of Chaguaramas.**

[37][37]. With regard to procedural matters several international Administrative Tribunals such as The ASDBAT, IMFAT, ILOAT, and the UNAT and the WBAT either decide their cases on basis of written pleadings alone or hold oral hearing very rarely. Other tribunals such as the Inter-American Development Bank Tribunal (IDBAT), the Council of Europe Administrative Tribunal (CEAT), the NATOAB and OASAT hold oral hearings in virtually every case.

[38]. Entered into force on 21 October 1986 after ratification by 25 States.

[39] . UNGA Res 45/158, 18 December 1990.

**ARTICLE XI (Non-Discrimination)**

1. No person shall be discriminated against by reason of age, colour, creed, disability, ethnicity, gender, language, place of birth or national origin, political opinion, race, religion or social class.[40]

2. Within the scope of this Statute and without prejudice to any other provision(s) contained herein, any discrimination on grounds of nationality only shall be expressly prohibited.

**Comment: The history of racial and gender inequality in the region amply justifies inclusion of provision prohibiting discrimination.**

**This norm against invidious discrimination is also fundamental to many international human rights treaties. For example, Art. 2.1 of the International Covenant on Civil and Political Rights requires states parties to "respect and ensure" all the rights therein to all individuals within their territories "without distinction of any kind, such as race, colour, sex, language, religion.**

**The prohibition against discrimination is thus contained in all major international and regional human rights instruments, including the Universal Declaration of Human Rights 1948, [41] the International Convention On The Elimination Of All Forms Of Racial Discrimination 1966, [42] in particular Articles 1 and 5, [43], Article 26**

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[40]

[40.] ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation Adopted on 25 June 1958 by the General Conference of the ILO at its forty-second session: entry into force 15 June 1960, in accordance with Article 8.

[41] . G.A. Resolution 217A (III), Articles 2 and 7.

[42]

. U.K.T.S. 77 (1969), Cmnd. 4108; 60 U.N.T.S. 195; (1966) 60 A.J.I.L. 650; (1966) 5 I.L.M. 352.

[43]

. **Article 1**

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, or human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

**Article 5**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

**of the ICCPR 1966, [44] Article 2(2) of the ICESCR 1966,[45] Article 2 of the African (Banjul) Charter on Human and People's Rights[46], Article 7 of the RTC, Articles V.3 (Equality before the Law) and XIX (1) (c) of the Charter of Civil Society adopted by the CARICOM Heads of Government Conference on February 19, 1997. [47]**

**Article 7 of the Revised Treaty, which provides that "within the scope of application of the Treaty and without prejudice to any special provision contained therein, any discrimination on grounds of nationality only shall be prohibited …"**

**Non-Discrimination is thus well-settled as a rule of customary international law. It has achieved the status of *jus cogens*, or a peremptory norm, i.e. "a norm accepted and recognized by the international community of States as a whole, from which no derogation is permitted".**

**Indeed, anti-discrimination clauses are a common mandate in Commonwealth Caribbean constitutions, and the principle of non-discrimination finds universal expression in the domestic legislation of CARICOM member-states. The Universal Declaration, in particular, is said to have had great importance in the formation of Caribbean Constitutions.**

**The late Professor Ian Brownlie has stated that:**

> **"There is indeed a considerable support for the view that there is in international law today a legal principle of "non-discrimination" which applies in matters of race ... there is also a legal principle of non-discrimination in matters of sex based upon the same set of multi-lateral instruments….."[48]**

**Brownlie argues that the principle of non-discrimination today represents *jus cogens*. States which have enshrined a provision in their constitutions prohibiting discrimination have done so because of a legal sense of obligation to adapt their**

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. 999 U.N.T.S 171, entered into force, 23 March, 1976.

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.993 U.N.T.S. 3: U.K.T.S. 6 (197), Cmnd. 6702; (1967) 6 I.L.M. 360. Article 2(2) provides that:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

46

. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

47

. Article V.3 provides that "No person shall be favoured or discriminated against by reason of … place of birth or origin". Art XIX. 1 © provides that "[E]very worker has the right not to be subjected to unfair labour practices including intimidation and victimization".

48

. *Principles of Public International Law,* Fifth Edition, 1998 pp. 602-603.

**practice to such a rule against discrimination (*opinio juris).* The prohibition against discrimination has accordingly achieved the status of *jus cogens* in public international law.[49] It also finds expression in the CARICOM Charter of Civil Society, at. V.3, and in Arts. 12 – 15 of the CARICOM Declaration of Labour and Industrial Relations Principles. The Tribunal should be guided by, and observe such a powerful principle of law.**

**ARTICLE XII (Arbitrary Dismissal)**[50]

1. No employee of CARICOM, or of any of its Institutions, Associate Institutions, Organs or Bodies, shall be arbitrarily dismissed from his or her employment.

2. No employee of CARICOM, or of any of its Institutions, Associate Institutions, Organs or Bodies, shall be terminated for reasons related to his or her conduct or performance before being accorded an opportunity to defend against the allegations made.

**Comment: These Provisions are consistent with international labour standards, ILO Conventions and the Charter of Civil Society, above, Art, XIX.3 (e), and the CARICOM Model Harmonization Act Regarding Termination of Employment, Pt. IV – Termination of Employment. Arts. 14 – 33.**

**ARTICLE XIII (Protection of Whistle Blowing)**

1. Where an employee reasonably believes that any practice, action, or activity of CARICOM, any of its Institutions, Associate Institutions, Organs or Bodies, or any agent, employee, or representative thereof is in violation of law, such employee shall file a written complaint with the Executive Director or Chief Executive Officer of the entity concerned or the Secretary-General of CARICOM.

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. See Brownlie, at 515, 602-605.

5050. ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer: entry into force 23:11:1985.

2. Employees shall bring any alleged unlawful practice, action, or activity, to the attention of Executive Director or Chief Executive Officer of the entity concerned or the Secretary-General of CARICOM and provide management with a reasonable opportunity to investigate and correct the alleged unlawful activity.

3. Pursuant to this Article, neither CARICOM, nor its Institutions, Associate Institutions, Organs or Bodies, or any agent, employee, or representative thereof shall retaliate against an employee who in good faith, has disclosed, or is likely to disclose, protested or complained against any alleged unlawful practice, action, or activity of CARICOM, any of its Institutions, Associate Institutions, Organs or Bodies, or of another individual or entity with whom CARICOM or any of the afore-mentioned entities has any official business relationship, so long as the employee holds a reasonable belief that the practice, action, or activity is in violation of law or a clearly mandated public policy.

**Comment: This provision is intended to provide statutory protection for all employees of CARICOM, its Institutions, Associate Institutions, Organs or Bodies, who might engage in "whistle blowing" i.e., disclosing evidence of any illegal or improper organizational activities. Such protections shall apply to all employees regardless of level or rank. They shall take effect whenever and wherever an adverse employment action is taken because of such disclosure by an employee.**

**This provision is intended to protect the rights of the employees, to prevent reprisals against them, and to help eliminate wrongdoing within CARICOM, its Institutions, Associate Institutions, Organs or Bodies by (a) mandating that employees should not suffer any adverse employment action as a result of their disclosure of any unlawful practice; and (b) establishing that the protection of employees who are the subject of an adverse employment action following disclosure remains of paramount importance in maintaining the integrity, transparency and accountability of any CARICOM Institution, Associate Institution, Organ or Body. It is also consistent with the Inter-American Convention against Corruption, adopted at Caracas, Venezuela, 3rd Plenary Session, March 29, 1996, entered into force March 6, 1997.**

**ARTICLE XIV (Notice)**[51]

1. No employee of CARICOM, or of any Institution, Associate Institution, Organ or Body, shall be terminated

   (a) without reasonable notice; or

   (b) without compliance with such notice requirements as provided for within the terms and conditions of his or her appointment, contract of employment; or

   (c) without such statutory notice as is provided for in the particular member state in which the alleged violation has occurred; or

   (d) without such notice as is reasonable in the particular circumstances; or

   (e) without reasonable compensation in lieu of notice.

**Comment: These provisions are consistent with Pts. IV and V of the CARICOM Model Harmonization Act Regarding Termination of Employment, Arts. 14-33, which seek, among other things, "to give effect to the provisions of the ILO Convention concerning Termination of Employment No. 158 (1981).**

**In addition to international conventions and model legislation, municipal law presumes that employment contracts can usually be terminated upon reasonable notice. Richardson v Koeford [1969] 3 All ER 1264 (CA) (reasonable notice must be given to employees, as determined by the circumstances of the particular case); Rouse v Mendoza (1967) 12 WIR 1 (term implied that contract terminable upon reasonable notice); Bardal v Globe & Mail [1960] C.C.S No. 755 (Ont. High Ct. Just) (24 DLR 2d 140) (reasonableness of the notice must be decided with reference to each particular case); see also Caribbean International Airways Ltd. v Waithe (B'dos) [No. 545 of 1987]; June Clarke v. American Life Insurance Co (B'dos) No. 33 of 1998.**

**ARTICLE XV (Immunity)**

[5151]. ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer: entry into force 2:11:1985 (Article 11: Period of Notice): A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of a serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

1. No claim of privilege or immunity by any person natural or juridical shall be recognized by this Tribunal with respect to any employment dispute submitted to this Tribunal.

2. In adjudicating any Complaint, the Community Rules and the Rules of this Tribunal shall take precedence over the individual laws of any Community Member State and general principles of labor law.

**ARTICLE XVI (Preliminary Questions)**

1. The Tribunal shall have regard to the law of the organization and shall seek to protect the fundamental rights of the individual, such as are recognized by international Human Rights Conventions, International Labour Conventions and general principles of international administrative law.

2. Within fourteen (14) days after receiving the Complaint, Respondent shall submit any motion requesting that the Tribunal dismiss the entire Complaint, or any part thereof, based on lack of jurisdiction under Articles II above, failure to satisfy the requirements for admissibility under Article II above, or failure to state a claim upon which relief can be granted.

3. Upon receipt of that motion, the Complainant shall have twenty-eight (28) days to file a written Objection with the Tribunal. The Respondent may file a reply to the Objection within twenty (20) days of receipt of same.

4. Within thirty (30) days of receiving the last of the pleadings to be submitted under paragraphs 2 and 3 above, the Members scheduled to constitute the panel at the next session shall consult in person or by telephone, or other expeditious means and, based on those consultations, shall issue an order either granting the motion in whole or in part, denying it, or suspending all further proceedings in the action until the Tribunal can meet in session to consider the matter. During those thirty (30) days, the Chairman of the panel may serve written

interrogatories on the parties requesting clarification, and copies of the interrogatories and answers shall be served on all parties and members of the Panel.

5. The filing of a motion to dismiss under paragraph 1 shall suspend the time for filing an Answer under the Tribunal's Rules of Procedure until the Tribunal rules on the motion.

6. A party has the right to request that the Tribunal reconsider any decision to grant a motion to dismiss in whole or in part, or deny it, at the following session of the Tribunal.

7. The requesting party shall file the motion for reconsideration within twenty (20) days of the Tribunal's decision. The filing of the motion for reconsideration will suspend further proceedings pending the Tribunal's decision on the motion to reconsider.

8. The Chairman of any panel may extend the time limits for filing pleadings under this Article for good cause shown.

9. Failure of the Respondent to file a Motion to Dismiss under this Article shall not bar or otherwise preclude the Respondent from challenging the admissibility of the Complaint, the Tribunal's jurisdiction, and the legal merits of the claim.

10. The Tribunal shall establish other summary procedures within its Rules of Procedure for the disposition of evidentiary questions and pretrial issues consistent with its authority under this Statute.

**Comment: This Article requires the Tribunal to adhere to (1) the relevant provisions of the Statute, (2) ILO Conventions so far as practicable, (3) general principles of international administrative law. Inclusion of general principles of international administrative law limits the Tribunal's powers by clarifying the legal standards to be applied by the Tribunal. It is also intended to ensure that the decisions of the Tribunal require that CARICOM and its entities treat their respective employees similarly, e.g. whereas the CDB awards pensions to all employees, CARICAD pays no pensions to its Barbadian employees. Inclusion of**

**the general principles also ensures that the Tribunal does not go beyond the standards applied by other international administrative tribunals.**

**In terms of additional sources of law – unwritten - following De Merode WBAT Reports Decision No. 1 (1981) at page 56, the Bank had a legal obligation, arising out of a consistent and established practice to carry out periodic salary reviews. Also, general principles of International Administrative Law, such as the right to be heard, *audi alteram partem*, are universally accepted today and thus applicable to all international Tribunals.**

**Where applicable, the Tribunal may also apply as sources of law the major international human rights instruments ratified individually or collectively by a simple majority of CARICOM member states, and the overwhelming majority of UN member states, including e.g., the International Covenant on Civil and Political Rights,[52] the International Covenant on Economic, Social and Cultural Rights,[53] the Convention on the Elimination of All Forms of Discrimination against Women[54], and any other relevant legal instrument codifying human rights.**

**ARTICLE XVII (Decisions)**

1. The Tribunal's decisions shall be by majority vote[55] and its judgment(s) in each case shall be final and binding.[56]

[52] International Covenant on Civil and Political Rights, adopted December 16, 1966, entered into force March 23, 1976, 6 I.L.M. 368 (1967).

[53] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, entered into force March 23, 1976, 993 UNTS 3.

[54] Convention on the Elimination of All Forms of Discrimination against Women, adopted on December 18, 1979, entered into force on September3, 1981, 19 I.L.M. 33 (1980)

[55] The Statutes and Rules of procedure of some tribunals expressly allow for the filing of dissenting opinions. Many texts are, however, silent on the question. They merely allow decision by the Tribunal's majority present and voting at the session. Arguably, what is not expressly prohibited, is permitted. In the absence of a provision expressly allowing dissenting opinions, UNAT and ILOAT members have on occasion filed dissenting opinions, while no such opinions have ever been filed in the African Development Bank Administrative Tribunal (AfDBAT), the OECD Administrative Tribunal (OECDAT) , the NATO Appeals Board (NATOAB) or the European Space Agency Administrative Board (ESAAB).

Article 6 of the European Convention on Human Rights requires that member states provide its citizens with fair and public hearings in a court of law; but cf., the ILOAT discretion concerning such a fundamental requirement, ILOAT Art. V..

[56][56]. While the decisions of several international administrative tribunals are final and binding, it may well be the case that an additional safety-net might be provided by way of further appeal to the International Labour Organisation Administrative

2. Each judgment shall state in writing the reasoning on which it is based.

3. Any dissenting opinion shall state in writing the reasoning on which it is based and shall be separately attached to the judgment.

**Comment: As a general rule, the Tribunal should not substitute its judgment for that of the organization. However, the concept of judicial independence means that the Tribunal need not automatically follow the organization's decisions. Indeed, the ideal of judicial independence is diametrically opposed, if not anathema to any proclaimed need for uniformity in a Tribunal's decisions. Judicial integrity requires judicial independence, and vice versa. Judicial independence simply means that the judge exercises fearlessly and impartially his individual judgment in interpreting and applying the facts to the law in the circumstances of the individual case, the question being at all times, what is fair, just, reasonable and right in the context of the given case. The concept of judicial independence might therefore be at odds with consistent uniformity and constant unanimity. The judge, from this perspective, is neither a mouse nor a worm, but the Minister of Justice who maintains the integrity of the structure of the rights and obligations which make up the framework of the modern democratic state.**

**Per Gorman, The (WBAT) Tribunal "has issued 225 judgments over the course of 20 years … every one of these 225 judgments has been unanimous, without any separate opinion and without any dissent ….issuing judgments that have greater force and clarity by virtue of the single voice with which the Tribunal speaks". Ziadé at p. 4. However, to argue unanimity may well be to choose conformity and consistency over the fundamental rights of claimants, and blur essential differences among the several classes of employees, their individual claims, and their respective rights (e.g. to be free from discrimination and sexual harassment against women, gays, lesbians, disabled, age-related discrimination issues, pension issues, wrongful dismissal issues). Ultimately, Gorman's espousal of unanimity of judgments may in some cases possibly undermine and forfeit judicial protection of workers' fundamental human rights and even the Rule of Law.**

**<u>ARTICLE XVIII</u> (Remedies)**

1. If the Tribunal determines a Complaint to be well-founded, it shall order rescission of the decision which gave rise to the proceedings, or remand the matter for such

Tribunal (ILOAT), although this would require amendment to the Revised Treaty as well as to relevant local legislation in the Member States.

modification(s), or order specific performance, or such other relief as may be appropriate depending upon the relief requested.

2. The Tribunal shall also assess damages to be paid to the Applicant for any wrongful injury sustained. Thus, in any case involving indemnity, the Tribunal shall fix the amount of the indemnity to be paid by the Community, or by any of its Institutions, Associate Institutions, Organs or Bodies party to any proceeding under this Statute.

3. Any award of damages shall be paid within thirty (30) days of the Tribunal's decision. Failure to pay such an award within thirty (30) days shall result in interest being assessed at the prevailing rate and accruing on a daily basis.

4. The Tribunal may, in exceptional circumstances, in the reasonable exercise of its discretion, when it considers it justified, order payment of exemplary or punitive damages. The Tribunal shall, in all such circumstances, state in its judgment the specific reasons for any order awarding higher compensation.

5. If the Tribunal concludes that a Complaint is well-founded in whole or in part, it may order that the Respondent pay the Applicant's reasonable legal costs in whole or in part, taking into account the nature and complexity of the case, the nature and quality of the work performed, any urgency in the particular matter, and the amount of the fees in relation to prevailing rates.

6. An employee whose employment has been terminated shall be entitled, in accordance with national law and practice in force in the Member State wherein the claim arose, to -

    (a) a severance allowance or other separation benefits, the amount of which shall be based *inter alia* on length of service and the level of wages, and paid directly by the employer or by a fund constituted by the employer's contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) any applicable combination of such allowances and benefits.

7. Should the Tribunal find that a procedure prescribed in its Rules has not been observed, it may, at the Applicant's request, prior to the determination on the merits, order the case to be remanded for the Respondent to apply, or comply with, any required procedure, or remedy the situation giving rise to the Complaint.

8. In all applicable cases, compensation and reasonable costs fixed by the Tribunal pursuant to paragraphs 1 and 2 of this Article shall be paid by the Respondent.

9. The filing of a Complaint shall not suspend execution of the decision contested.

10. The Tribunal may order reasonable compensation to be paid by the Applicant to the Respondent for all or part of the cost(s) of defending a case, if it finds that:

(a) the Complaint was manifestly without foundation either in fact or in law, unless the Applicant demonstrates that the Complaint was based on a good faith argument for extension, modification, or reversal of existing law; or

(b) the Applicant purposefully intended to delay the resolution of his or her case or to harass the Respondent or its officers or employees.

**Comment: The Tribunal may award reasonable costs, including travel, accommodation and a reasonable attorneys' fees to a successful applicant. Many international administrative tribunals have authority to award costs, e.g. WBAT Statute, Art. XII.1. UNAT is authorized to award costs if they are unavoidable, reasonable, and exceed the normal expenses of litigation before the Tribunal.[57] The Tribunals have however "been conservative and cautious in deciding whether, and to what extent, to award costs in a case". Accordingly, in *Powell*[58], the Applicant**

[57]. A/CN.5/R.2 (Dec. 18, 1950) cited in IMF Administrative Tribunal *Commentary,* n. 25.
[58]

**requested payment of costs in excess of US $100,000.00. The Tribunal awarded US $2,000.00 costs.**[59]

**As to the award of costs to the respondent employer, see AfDBAT Statute, Art. X .1 (Abuse of Process) allowing the AfDBAT to order the applicant to pay reasonable compensation to the Bank, where the application was "manifestly without foundation" absent "a good faith argument for an extension, modification, or reversal of existing law; or … the applicant intended to delay the resolution of the case or to harass the bank or any of its officers or employees".**

**Also, see *Carrillo v. Pan American Health Organization (PAHO)(World Health Organization),*[60] where the employee obtained only partial satisfaction. The issues to be decided by the Tribunal concerned whether the employee, a Peruvian national recruited abroad, was entitled to recognition and benefits as "as internationally recruited staff", and whether the Respondent breached the relevant provisions of its Staff Rules.** [61] **The record, however, was far more voluminous than necessary for the tribunal's deliberations. The ILOAT, therefore, awarded the staff member only one-tenth of the amount claimed for legal fees as costs reasonably incurred.** [62]

**<u>ARTICLE XIX</u> (Arbitration, Mediation, and Conciliation)**

1. Except as otherwise stated below, the Tribunal shall recognize the finality of all agreements to arbitrate, to seek conciliation or mediation, settlement agreements, and releases and may not reopen, review, or adjudicate issues finally resolved pursuant to those agreements or procedures, absent the express consent of all parties thereto.

2. Notwithstanding the above, the Tribunal may vacate and remand an otherwise binding arbitration decision and award, in whole or in part, where a party proves by clear and convincing evidence that:

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[59] **UNAT Judgment No. 237 (1979).**

[60] IMF Administrative Tribunal *Commentary,* n. 26.

[61] **ILOAT Judgment No. 272 (1976)**

[62] **1976 *UNJY* at p. 149.**

[62]. **See IMF Administrative Tribunal *Commentary on the Statute,* n. 28, available on line at www.imf.org/external/imfat/report.htm.**

a) The award was procured through corruption or misconduct of the arbitrators;

b) The award was *ultra vires,* exceeding the maximum award or the remedies available to the Tribunal acting under this Statute and any other applicable law or regulation, or the limits otherwise agreed to by the parties;

c) The arbitrators failed to follow the relevant provisions of any of the Tribunal's Rules of Procedure, or otherwise exceeded their authority.

3. Notwithstanding paragraph 1 above, the Tribunal may, at the request of either party, correct an otherwise binding arbitration decision and award where it is clear that:

a) There was an evident miscalculation of figures, typographical error, or an evident mistake in the description of any person, thing, property, or amount referred to in the award;

b) The arbitrators have passed judgment or awarded upon a matter not within their competence and jurisdiction, and the award may be corrected without affecting the merits of the Tribunal's decision on the issue(s) submitted.

4. The Tribunal may at any time prior to a decision on the merits recommend that parties to a Complaint submit to binding arbitration, or non-binding mediation or conciliation. Where the parties accept such a recommendation, the Tribunal shall suspend further proceedings pending the conclusion of the arbitration, mediation or conciliation.

**Comment: This provision is consistent with the Chapter 9 (Disputes Settlement Provisions) Articles 187-210, and 223 of the Revised Treaty of Chaguaramas, the CARICOM Declaration of Labour and Industrial Relations Principles, Arts. 36 – 39, and emerging ADR practice in the Region and elsewhere.**

**ARTICLE XX (Reconsideration and Review of Judgments)**

1. A judgment of the Tribunal may be reviewed by an ad hoc Administrative Tribunal Review Panel (hereinafter the "Review Panel"), upon application by a party aggrieved by the Tribunal's decision.

2. The composition, rules and procedures of the Review Panel shall be established by the Secretary-General.

3. Such a Review Panel shall have jurisdiction only in instances where the Tribunal's judgment is alleged to be *ultra vires* because it exceeds the Tribunal's lawful authority in relation to its jurisdiction, competence, or procedures under this Statute, or there is other clear evidence of procedural impropriety or irregularity.

4. The Review Panel shall not have competence to re-examine the merits of the underlying dispute.

**Comment: But see ILOAT, *In re Villegas (No.4)(Application for Review)*[63] which sets out the grounds for review, e.g. omission to take account of particular facts; a material error, i.e. a mistaken finding(s) of fact; an omission to pass judgment on a claim; discovery of a so-called new fact, i.e. a fact which the complainant discovered too late to cite in his or her original submissions.**

**ARTICLE XXI (Recording of Judgments)**

1. The original copy of each judgment shall be filed in the archives of the CARICOM Secretariat, and in the Tribunal's archives.

2. A copy of the judgment shall be delivered to each of the parties concerned. Copies shall also be made available upon request of any interested persons.

[63]. ILOAT Forty-Sixth Ordinary Session, **Judgment 442, 3 at www.ilo.org/public/english/tribunal/fulltext/0442.htm.**

**Comment: The Tribunal's decisions should be a matter of public record, except for those cases where the Chairperson and Tribunal determine, upon the request of a party, that privacy interests require protection and no compelling public purpose is served by unlimited public access to the particular record(s), e.g. sexual harassment cases, where the respondent has sought review of, or appealed an unfavourable decision, or found not liable.**

**ARTICLE XXII (Post-Judgment Application for Reconsideration and Revision of Judgments)**

1. A party to a judgment delivered by the Tribunal may, upon discovery of a material fact, that is, a fact which by its nature might have had a decisive influence on the Tribunal's judgment and which at the time of the judgment was unknown both to the Tribunal and to that party, request the Tribunal to reconsider and revise its judgment.

2. Such a request to reconsider or revise a judgment by the Tribunal must be made within a period of six (6) months during which the party seeking reconsideration or revision has acquired knowledge of such a material fact.

3. Any such request shall contain the information necessary to show that the conditions laid down in paragraphs 1 and 2 of this Article have been complied with. It shall be accompanied by the original or a certified copy of all supporting documents.

**Comment: The six month limitation above is consistent with Article 31.1 of the CCJ Original Jurisdiction Rules. "An application for a revision of judgment shall be made … within six (6) months of the date on which the facts on which the application is based first came to the applicant's knowledge". See also Article XX.6 of the Agreement Establishing the CCJ, which requires the application for revision to be made within six (6) months of discovery of the new fact.**

**This Article limits the scope for reviewing or setting aside the Tribunal's judgments by stipulating that no "material fact" known to a party before the Tribunal's decision can be presented to the Tribunal anew after it has made its decision.**

**ARTICLE XXIII (No Modification of Powers of Conference of the Heads of Government)**

Nothing in this Statute shall be deemed or construed to limit or modify the powers conferred on the Conference of the Heads of Government under the Treaty Establishing The Caribbean Community, Chaguaramas, 4th July 1973, the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caribbean Single Market and Economy (2001).

**ARTICLE XXIV (Amendment)**

This Statute may only be amended by the Conference of Heads of Government sitting in their capacity as "supreme organ" of the Community.

**Comment**: **This provision is similar to provisions in the WBAT Statute Art. XVI and IMFAT Statute Art. XIX. But, cf. ILOAT Statute, Art XI, which provides that that Statute "may be amended by the Conference or such other organ of the Organization as the Conference may determine". The CARICOM Conference of Heads of Government, by contrast, would have sole authority to amend this Statute, without power to delegate, upon establishment of the Tribunal. The judicial functions of the Tribunal could be expanded or restricted by the Conference as required by future cases.**

**ARTICLE XXV (Language)**

Complaints may be filed in any of the Community's official languages.

## III. CONCLUSION:

What is proposed here is the establishment of an Administrative Tribunal to resolve disputes between employer and employee at the level of CARICOM, its Institutions, Associate Institutions, Organs and Bodies. Pursuant to *Waite and Kennedy*, where there is no "reasonable alternative means" for resolving disputes between an employee and an international organization which employs the individual, it is

permissible to withdraw the immunity of the organization or for the courts to assert jurisdiction over the organization. The creation of a CARICOM Administrative Tribunal with jurisdiction over all CARICOM employees, and employees of its Institutions, Associate Institutions, Organs and Bodies resolves this issue and provides the means for dispute resolution between employer and employee of all CARICOM entities.