COMMENTS
LE CONTRÔLE DU POUVOIR DISCRÉTIONNAIRE DE L'ADMINISTRATION PAR LES TRIBUNAUX ADMINISTRATIFS INTERNATIONAUX: OBSERVATIONS À LA LUMIÈRE DE LA PRATIQUE DU TRIBUNAL ADMINISTRATIF DE LA BANQUE MONDIALE

Francisco Orrego Vicuña*

Summary

Judges Gentot and Valticos have provided a most accurate discussion of the nature and limits of the review that international administrative tribunals can undertake in respect of managerial discretion. The following comments will address some relevant aspects of the practice of the World Bank Administrative Tribunal (WBAT) in this regard.

The WBAT requires that discretionary decisions be adopted in the genuine interests of the Organization, an element significantly underlined by Judge Gentot. It follows, as noted in both presentations, that discretionary powers must always be exercised in observance of the rules, general principles of law and the applicant’s employment contract, and that the power of the administration is thereby limited. In this respect, the most common phrase appearing in the judgments of the WBAT 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.”

There are a number of recent developments in the case law of the WBAT which highlight both the nature and extent of the WBAT’s competence to review discretionary decisions of the World Bank. Such developments fall under the categories of: (i) process; (ii) the Bank’s organizational commitments; (iii) the Bank’s quasi-judicial powers; (iv) the Tribunal’s appellate jurisdiction; and (v) the Bank’s internal legislation.

With respect to “process,” the WBAT is concerned in many cases not so much with isolated decisions which standing alone might be unobjectionable, but rather with an aggregate of decisions which, taken as a whole, might amount to an abuse of discretion. Such a decision-making process may constitute “mismanagement of the Applicant’s career” and reveal “errors of judgment which taken together amount to unreasonableness and arbitrariness.” The Tribunal’s broader approach

* Vice-Président au Tribunal administratif de la Banque mondiale; Professeur à l’Institut des études internationales, Université du Chili.
thus ensures the better protection of the rights of civil servants and helps the Administration to redress situations of continuing mismanagement.

As to “organizational commitments,” the WBAT has emphasized the need for the Administration to honor its commitments to staff members, such as promises to convert fixed-term positions into permanent ones. It has thus been held, for example, that the “possibility exists also that there may be something in the surrounding circumstances which creates a right to the conversion of a fixed-term appointment to a permanent one.” The Tribunal’s approach in this respect helps to strengthen the trust upon which the Bank’s relationship with its staff members must be built.

Regarding “the Bank’s quasi-judicial powers,” some discretionary powers amount in fact to the exercise of a quasi-judicial function by the Administration, as is typically the case with the imposition of disciplinary measures. Such powers are reviewed by the WBAT as if the WBAT had been requested to make the contested decision in the first instance. In one case, the WBAT described the various elements to be examined, namely: (a) the existence of the facts; (b) whether they legally amount to misconduct; (c) whether the sanction imposed is provided for in the law of the Bank; (d) whether the sanction is not significantly disproportionate to the offence; and (e) whether the requirements of due process were observed.

Concerning “the Tribunal’s appellate jurisdiction,” the WBAT has such jurisdiction over decisions of the Pension Benefits Administration Committee (PBAC) in pension matters. This jurisdiction is broader than that for the review of managerial discretion. In this context, the Tribunal examines the same elements as in cases involving the Bank’s quasi-judicial powers, but also undertakes a broader examination of whether the conditions required by the Staff Retirement Plan for granting benefits were met, and whether the PBAC correctly interpreted the applicable law. A similar appellate function is performed by the WBAT in respect of the decisions of the Workers’ Compensation Administrative Review Panel.

Lastly, with respect to “the Bank’s internal legislation,” the WBAT in the leading case of de Merode took a first step in reviewing administrative policies that might affect fundamental and essential elements of the rights and duties of staff members. The WBAT has since regularly reviewed legislation that may entail discrimination or other violations of law. Recently, the need arose to take this latter review a step further on account of the legislation enacted by the World Bank to provide pension reform. In Crevier and other subsequent pension cases, the Applicants and the Staff Association complained against the very objective pursued by the reform and its inspiring philosophy, independent of the manner in which it might affect an individual staff member. The WBAT examined each aspect of the contentions in order to determine whether the Bank’s legislation had been reasonable and fair. In the end, the Tribunal upheld the Bank’s legislation.

The Bank’s enactment of legislation can be reviewed by the WBAT on a case-by-case basis in applications raised by staff members who claim to have been adversely impacted by decisions made on the basis of such legislation. However, it would be inappropriate for the WBAT, or any other administrative tribunal, to assume the role of a rule-reviewing body. Such a role could lead to the nullification of rules enacted by the governing bodies and result ultimately in the supremacy of one organ over another.

* * *