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## TIP OF THE MONTH

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### ILOAT UPDATE: 104<sup>th</sup> Session Report from Vienna

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The ILOAT issued its rulings for the 104<sup>th</sup> session on 6 February. I am pleased to report on a few significant cases where I represented the staff members:

**Judgment No. 2704 (UNIDO).** UNIDO's former Staff Council President challenged a decision to exclude him from a merit promotion exercise. The President had served on full-time basis for several years without a supervisor. UNIDO had argued that the rules provided that only supervisors could submit recommendations for merit promotions, and therefore it was entitled to exclude him from the exercise. The Tribunal said that UNIDO should have promulgated rules to account for this situation, and its failure to do so subjected the President to unequal treatment since he was in effect the only one excluded from the exercise and that owing solely based on his status as a staff representative. The Tribunal also found that UNIDO had breached the President's freedom of association. For having missed a valuable opportunity for consideration for a merit promotion, the Tribunal awarded 20,000 euros in material damages. In addition, it awarded 5,000 euros moral damages for breach of due process in the internal appeal, and 5,000 euros in legal costs.

**Judgment No. 2679 (CTBTO).** In a follow-up case to Judgment No. 2524, a P-3 radionuclide officer, who had been awarded 35,000 euros in moral damages for harassment in the first case, challenged the subsequent decision not to extend her contract. The internal appeal panel found the decision to be unlawful and recommended the equivalent of what she would have earned for a period of 2 years without interest and 5,000 euros in moral damages. The organization followed the recommendation of the panel. The staff member appealed the decision not to pay interest on the material damages and for not adequately compensating for her moral damages. The Tribunal found that the decision not to extend her contract was flawed because among other things permitting the supervisor with which she had a serious personal and professional conflict to complete a performance appraisal report, which was relied upon in making the decision. The Tribunal noted that the staff member had commenced a rebuttal procedure and the Executive Secretary should have suspended his decision to allow it to be completed. The Tribunal awarded 15,000 euros for moral damages for the decision which was taken in the Tribunal's view to rid itself of a problem it was unwilling to resolve. Overall, in addition to material damages for the unlawful decisions and unacceptable treatment by the organization, the staff member was paid 55,000 euros in moral damages.

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**Judgment No. 2702 (IAEA).** In 2001, with the encouragement of his supervisors a computer expert applied for and was promoted from G-6 to a post at the P-2 level. The Agency has a rotation policy that limits its P staff to tours of service of up to 7 years. However, the policy had not been applied to a G staff member who had been promoted to the P level, and the staff member was confident that this practice would apply in his case. In October 2003, the Agency announced that G staff who were promoted to P would now be subject to the rotation policy. The Agency also advised that they were entitled to return to the G level at the same grade and contractual status that they had prior to promotion, i.e., they were free to accept a demotion.

In 2004, the staff member received a final one year contract which would take him to 6 years of service. He requested review of this decision, which was denied. At the same time, he was offered the opportunity to return to a G level post, which he accepted. His internal appeal was unsuccessful.

Before the Tribunal, he argued that it was not clear that the rotation policy applied to his contract as the rotation policy set forth in a secretariat notice was ambiguous and the Agency had said that with effect in October 2003 it would now apply to such promotions (indicating that the administration did not think it applied previously). The staff member also argued that even if the rotation policy was a contractual term of his contract, the practice was not to apply the rotation policy in these circumstances and that he had a right to application of the practice since it was not abolished until after his promotion. A senior Agency official had said before the Staff Assembly in 2003 that the rotation policy had never been applied to a staff member promoted to P. The Agency conceded that there was a practice of allowing exceptions to the rotation policy but it argued that the practice had a number of stipulations, including that the staff member had to have been recommended for a long-term contract by his supervisors. The Agency did not offer any written evidence to substantiate its version of the practice. The former Staff Council President had recalled on more than one occasion that during advisory panel (P-panel) meetings senior officials had simply said that long-serving GS staff members promoted to P would not be subject to the rotation policy but would receive long-term contract extensions if the services were needed programmatically. Promotions to the P category were for this reason to be made very carefully. The request to the administration for copies of the P-panel minutes was rejected on grounds of privilege. The staff member therefore asked the Tribunal to order the Agency to produce copies of the minutes for inspection.

The Tribunal held that once the staff member was promoted to the P category, he was subject to the rotation policy. With respect to the acknowledged practice of not applying the rotation policy to G staff promoted to P, the Tribunal accepted the Agency's formulation of the practice without requiring it to produce evidence. On the other hand, it held that the staff member's formulation of the practice was not substantiated by enough evidence (subtly impugning the honesty of the former Staff Council President), and that his request for P-panel minutes, which may have proved his case, was based on speculation and therefore did not order production.

Inequality of arms unfortunately is a plea that the Tribunal does not take seriously. With respect to the P-panel minutes, the Agency's lawyers were banking on the Tribunal's consistent refusal to order international organizations to produce probative written evidence. They therefore felt safe making a representation to the Tribunal that the practice of granting exceptions to the rotation policy had a number of stipulations. Not surprisingly, the staff member did not meet two of the stipulations.