REVIEW OF THE INTERNATIONAL MONETARY FUND'S DISPUTE RESOLUTION SYSTEM

Report of the External Panel

November 27, 2001

November 27, 2001

Mr. Shigemitsu Sugisaki
Deputy Managing Director
International Monetary Fund
700 19th Street, NW
Washington, D.C. 20431

Dear Mr. Sugisaki:

Enclosed is our report on the review of the Fund's dispute resolution system.

We would like to express to you our appreciation for the opportunity to work with you on this project, which we found to be most interesting and challenging. We have thoroughly enjoyed meeting and working with you and the staff of the Fund. We hope that our report will prove helpful to you in improving what we found to already be a highly commendable system of dispute resolution.

Many staff contributed to our efforts to understand the workings of the Fund. We wish to express our particular gratitude for the cooperation we have received from the staff of the Human Resources and Legal Departments and the Staff Association Committee. Their assistance and comments over the past several months were most welcome and helpful in producing our report. We would also specifically like to express our thanks to Pearl Acquaah and Phebe Abiye for their good humor, valuable administrative support, and proficiency in the production of our report. Above all, we thank Jack Kennedy proved to be a most helpful guide through the intricacies of the IMF and whose professional expertise has brought clarity to the substance and language of this report.

If you have any questions or if you wish us to clarify or expand on a point or proposal, please do not hesitate to call on us. We wish you and the Fund every success in carrying out your important mission.

Sincerely yours,

Arnold M. Zack, Chair — Sarah Christie — Chris de Cooker

PREFACE AND OVERVIEW

In January 2001, the International Monetary Fund appointed us—Arnold Zack, Sarah Christie and Chris de Cooker—as an external panel to carry out an independent review of the Fund's dispute resolution system. We were asked to "assess the extent to which the system facilitates the resolution of employment related disputes in a timely and cost effective manner while providing employees with fair and impartial channels of recourse and meeting the institutional needs of the fund" and " to analyze the strengths and shortcomings of the current system and its implementation . . . while taking into account the practices of other international organizations and other practices where relevant with a view to identifying elements that could be adapted to the Fund." This report presents our conclusions and recommendations on these matters.

To carry out our study, we met with many of the Fund officials who are responsible for various aspects of human resources management and dispute resolution. We also consulted extensively with officers of the Fund's Staff Association, and we arranged, on a completely confidential basis, to meet or to obtain views by e-mail from a large number of individual staff members. We obtained and considered extensive documentation on the Fund's policies and procedures, the jurisprudence, practice and procedure of the Grievance Committee and the Administrative Tribunal, and a range of internal studies on staff attitudes, the role of women, and discrimination. Outside the Fund, we consulted officials of other international organizations, as well as several outside experts, on the operation of dispute resolution systems.

Employment Law of the Fund

Under its Articles of Agreement, the Fund's members have granted it certain immunities from the external laws of its member states; these immunities are considered essential to maintain the independence of the Fund as an international organization. The independence of the Fund gives rise to a corollary obligation for the Fund to establish internal laws that reflect broad principles of employment law among its member States and of international administrative law.[1] An essential component of this internal law must be a system of internal justice that allows disputes over employment conditions and benefits and employees' rights to be heard and resolved through proceedings that are accessible, independent, authoritative, and fair.

Consistent with these obligations, the Fund has established an extensive internal body of law that appropriately covers the employment terms and conditions of its staff and sets out the

[1] Given the near universality of the Fund's membership, individual member States have many different approaches to employment law, which makes it inappropriate for the Fund to rely exclusively, or even predominantly, on the legal system of any single member State. Conversely, member States, which ultimately authorize the Fund's internal law through the Board of Governors and Executive Board, should respect the organization's need for an autonomous system of internal law.

duties, obligations and rights of staff members. This law is set out in the organization's By-Laws, Rules and Regulations, General Administrative Orders (GAOs) and various other bulletins and circulars. The authority for the Fund's internal law ultimately derives from its members through the Board of Governors and the Executive Board. However, the Fund's staff also have an important voice in formulating its policies and rules through the elected Staff Association Committee (SAC) with which Fund management regularly consults on matters that affect staff interests, terms and conditions of employment and working conditions.

Dispute Resolution Systems

The Fund has comprehensive formal and informal systems for employees to raise concerns regarding its rules and regulations on employment terms and conditions and to resolve employment-related disputes.

- For more than 20 years, the Fund has made available the services of Ombudspersons who are appointed for a fixed term, after consultation with the SAC, from outside the Fund as an independent, impartial resource. The Ombudsperson may assist staff members in a wide range of employment-related and workplace problems on a confidential basis, and may intervene and recommend measures to resolve disputes to the responsible Fund officers. The Ombudsperson may also issue annual reports describing the nature of problems brought to her attention, and has the right and obligation to bring systemic issues to the attention of the Managing Director.

- The Fund has had a Grievance Committee for the same period. The Committee, which is composed of an independent outside arbitrator and staff members appointed by both management and the SAC, considers claims by staff members who believe themselves to have been adversely affected by a decision that is inconsistent with any Fund regulation governing personnel.

- For nearly 10 years, the Fund has also had an independent Administrative Tribunal, comprising external jurists, selected by the Fund after consultation with the SAC. The Tribunal has broad jurisdiction over "any individual or regulatory decision taken in the administration of the staff of the Fund". This includes both decisions affecting individual staff and, significantly, regulations adopted by Fund management and its Executive Board.

These structures are supplemented by a range of other resources that both staff members and managers can draw on to prevent and address workplace conflicts and disputes. These include the Senior Advisor on Diversity who focuses on systemic policies, processes and procedures that help to achieve diversity and to limit discrimination; Advisors against Harassment who are available to provide confidential advice and to arrange interventions on behalf of staff members affected by any form of harassment, but with an emphasis on sexual harassment and intimidation; and the Ethics Officer who counsels staff members on

questions of ethics and conducts investigations into alleged violations of the Fund's rules and regulations.

Overall Assessment

Our overall conclusions are that the Fund's body of internal law and dispute resolution systems, processes, and procedures are fundamentally sound and that they compare very favorably to the practices and procedures of other international organizations. The Fund's regulations and rules are comprehensive and, for the most part, are accessible to employees. The development and application of policies and rules affecting the interests of staff are subject to regular consultation with the representatives of the staff through the Staff Association Committee, which contributes significantly to the prevention of subsequent disputes. The Fund's Ombudspersons have played particularly effective roles in advising staff on workplace issues and, through consultations and mediation, informally securing solutions to many disputes. There are also strong formal processes that permit employees to challenge both administrative decisions affecting them individually and broad regulations and rules, significantly including "regulatory decisions" taken by the Executive Board. At each stage in the review and appeal process, Fund staff have clear opportunities to present their case (with assistance by legal counsel, if they wish). The record demonstrates that Fund management is committed to an independent review process for such disputes; management has accepted, without exception, the recommendations of the Grievance Committee and is bound by judgments of the Administrative Tribunal.

The Fund has demonstrated sensitivity to changes in the external environment, evolving employment standards in member countries, and the needs of its own staff. This has been evidenced in recent years by its creation of the functions of Diversity Advisor and Ethics Officer, the adoption of a zero-tolerance policy on discrimination, the development of the Code of Staff Conduct and a system of financial certification and disclosure to prevent conflicts of interest. The Fund also provided an unprecedented "open season" during which any staff member could seek remedial action if she or he believed discrimination had adversely affected her or his career, no matter how long ago; this exercise did produce a number of corrective actions.

Areas for Improvement

Notwithstanding the comprehensiveness and strengths of the Fund's present dispute resolution system, we identified areas where changes to the current system or processes would, we believe, enhance their effectiveness, help to alleviate some employee concerns, and lead to a more timely and efficient resolution of employment related disputes. More of our report addresses these areas than the strengths of the Fund's systems. However, we would not want this balance to be misinterpreted. While we believe that the dispute resolution systems of the Fund, like those of any organization, can be improved, we wish to emphasize that the changes we propose would build on an already very strong and effective foundation.

Our report discusses in detail the improvements that we recommend in ten areas: (1) information and communication; (2) dispute prevention as an objective in HR policies and procedures; (3) the role of the Ombudsperson; (4) the role of the Ethics Officer; (5) the scope of grievable decisions or acts; (6) the standard of review used in deciding grievances; (7) the process of administrative review; (8) the operations of the Grievance Committee; (9) the operations of the Administrative Tribunal; and (10) arbitration procedures for contractual employees. We also discuss the appeals procedures under the Fund's Staff Retirement Plan, which is governed separately and has its own regulations and procedures.

Many of our specific proposals in these areas focus on a few common themes, which we would highlight here:

- **Improving communications and transparency.** We are proposing measures that would strengthen and broaden the scope of the Fund's existing programs to keep staff informed about its rules and regulations and the operation and outcomes of the dispute resolution system. This reflects the principle that employees need to have full knowledge of an organization's laws for the laws to be respected and effective and of its mechanisms for resolving disputes for the mechanisms to have the confidence of the staff.

- **Reinforcing the emphasis on conflict prevention.** It is a truism that it is preferable to anticipate sources of conflict and to prevent disputes rather than to deal with them after they arise. In this area, we are proposing expanded consultations between the Fund the staff on employment-related issues: policies and rules are more likely to have the support of staff if staff representatives have actively participated in their formulation. We also propose steps to identify and remove potential sources of disputes in various rules and regulations, and an expansion of the resources available to assist managers and staff in dealing with workplace conflicts.

- **Strengthening the emphasis on mediation and conciliation.** When disputes do arise, it is generally preferable to resolve them at the earliest possible stage and—if middle ground can be found—to seek solutions through negotiations between the parties themselves rather than through protracted litigation. For these reasons, we are proposing that the Fund expand its reliance on a wide range of conflict-management tools, including recourse to the Ombudsperson, as well as other arrangements for mediation, conciliation, coaching and counseling.

- **Enhancing access to the dispute resolution system.** It is in the interest of both the Fund and its staff to bring disputes into the open where they can be addressed rather than to allow them to fester below the surface. We found that the formal dispute resolution processes of the Fund are less frequently used than the corresponding processes in other international organizations. We attribute this, in part to the effectiveness of the Fund's Ombudsperson and to dispute prevention measures, but we also conclude that certain aspects of the current structure and procedures inhibit or deter employees from using them to resolve disputes. We are proposing several

measures that we believe would lower such barriers and enable a somewhat wider range of disputes to be brought into the Fund's systems.

- **Increasing the efficiency of the dispute resolution processes.** It is desirable for disputes to be resolved expeditiously and at as low a cost as possible—consistent with due process and fairness—for both the Fund and employees. We are accordingly proposing several specific measures that could advance consideration of disputes, as well as changes in approach (e.g., greater emphasis on mediation) that could avoid or expedite more costly litigation.

Arnold M. Zack Chair	Sarah Christie	Chris de Cooker

Contents Page

Preface and Overview i

I. INTRODUCTION 1
  A. Appointment and Goals 1
  B. General Focus 1
  C. Procedures for Conducting the Review 2

II. BACKGROUND: PRINCIPLES OF LAW AND DISPUTE RESOLUTION IN INTERNATIONAL ORGANIZATIONS 3
  A. General Principles for Managing Workplace Conflict and Resolving Disputes ... 3
  B. Some General Principles of International Law Concerning International Organizations 4
  C. Stages of Dispute Resolution in International Organizations 8

III. DISPUTE RESOLUTION SYSTEM OF THE IMF: A BRIEF DESCRIPTION 12
  A. Informal Procedures 12
    1. Office of the Ombudsperson 13
  B. Formal Procedures 14
    1. Administrative Review 14
    2. Grievance Committee 14
    3. Administrative Tribunal 16
      a. Jurisdiction 17
      b. Practice and Procedure 17
    4. Arbitration for contract employees 18
    5. Ethics Officer 19
  C. Other Resources and Programs 20

IV. ASSESSMENT OF DISPUTE RESOLUTION AT THE FUND 21
  A. General Overview 21
  B. Areas for Improvement 23
  C. Information and Communication 23
    1. Availability and Organization of Information 23
    2. Communication of Changes in Policies and Procedures 25
    3. Timely Information on Procedures for Claims and Appeals 26
  D. Dispute Prevention as an Objective in HR Policies and Procedures 27
    1. Staff Consultation and Relations with the Staff Association 27
    2. Decision-making on Human Resources Matters 30
    3. Specific Sources of Conflict and Disputes 31
      a. Annual Performance Reviews (APR) 31
      b. Retention of and Access to Personnel Records 33
  E. Ombudsperson 35
    1. Deadlines and Time Limits 36
    2. Coaching, Counseling and other Assistance 36

F. Ethics Officer 37
  1. Roles of the Ethics Officer 38
  2. Conduct of Investigations 39
G. Scope of Grievable Decisions or Acts 41
  1. Discrimination 41
  2. Duty to Act 45
  3. Informal practices 46
H. The Standard of Review 47
I. Administrative Review 53
  1. Purpose of Administrative Review 54
  2. Encouraging solutions 55
  3. Information and Documentation Required for Administrative Review 55
  4. The Review Process in HRD 56
J. The Grievance Committee 56
  1. Composition of the Committee 58
  2. The Committee's Chair 58
    a. Terms of Office 58
    b. Designating a Successor 58
    c. Possible Selection of a Chair for Each Case 59
  3. Committee Members (Panelists) 59
    a. Selection of Panelists 59
    b. Training for the Panelists 59
    c. Recognition of Staff Service as Panelists 60
  4. Assistance for the Committee 60
  5. Procedural Improvements 60
    a. Expedited Decisions 61
    b. Early Exploration of Issues 63
    c. Pre-hearing Conference 63
    d. Elimination of Reply Briefs 64
  6. Encouraging Resolution 64
    a. Referral to the Ombudsperson 64
    b. Referral to Mediation 65
  7. Committee Reports and Recommendations 65
    a. More Reasoned Opinions 66
    b. Management Action on the Committee's Recommendations 66
K. Administrative Tribunal 67
  1. Limitations on Jurisdiction over Pre-1992 Decisions 67
  2. Appointment of Judges 68
  3. Procedures in the Tribunal: Oral Hearings 68
  4. Findings of Fact 69
  5. Standing Before the Tribunal 69
    a. Group or Class Actions 69
    b. Actions on Behalf of an Individual by the SAC 70
  6. Remedies 71
    a. Reinstatement 71

b. Awards of Costs ... 72
L. Arbitration for Contract Employees ... 73

V. CONCLUSIONS ... 75

Annexes

I. Terms of Reference ... 77
II. Members of the Review Panel ... 79
II. List of Organizations Visited by the Panel ... 80
IV. IMF Staff Retirement Plan: Dispute Resolution Procedures ... 81

List of International Organizations

ADB	Asian Development Bank
CERN	European Organization for Nuclear Research
COE	Council of Europe
EBRD	European Bank for Reconstruction and Development
ECMRWF	European Centre for Medium-range Weather Forecasts
EPO	European Patent Office
ESA	European Space Agency
EU	European Union
EUMETSAT	European Organisation for the Exploitation of Meteorological Satellites
EUROCONTROL	European Organisation for the Safety of Air Navigation
FAO	Food and Agriculture Organization
ICAO	International Civil Aviation Organization
IDB	Inter-American Development Bank
ILO	International Labour Organization
ILOAT	International Labour Organization Administrative Tribunal
NATO	North Atlantic Treaty Organization
OECD	Organization for Economic Co-Operation and Development
UN	United Nations
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
	Council of Europe
WEU	Western European Union
	World Bank
WHO	World Health Organization
WIPO	World Intellectual Property Organization

REVIEW OF THE INTERNATIONAL MONETARY FUND'S DISPUTE RESOLUTION SYSTEM

I. INTRODUCTION

A. Appointment and Goals

1. In January 2001, the International Monetary Fund (IMF or Fund) appointed an External Panel on the Review of the Fund's Dispute Resolution systems to evaluate the Fund's internal conflict resolution system. Our Terms of Reference for this review were to "assess the extent to which the system facilitates the resolution of employment related disputes in a timely and cost-effective manner, while providing employees with fair and impartial channels of recourse and meeting the institutional needs of the Fund." We were required to "analyze the strengths and shortcomings of the current system and its implementation, based on the particular needs of the Fund, while taking into account the practices of other international organizations and other practices, where relevant, with a view to identifying elements that could be adapted to the Fund."[2]

2. As further required in our Terms of Reference, we have examined the Fund's "informal mechanisms for resolving disputes (including the role of supervisors, senior personnel managers, human resource officers, advisors against harassment, and the Ombudsperson), as well as formal mechanisms (binding arbitration for contractual employees, administrative review by the Director of HRD and the Managing Director, relevant functions of the Ethics Officer, the Grievance Committee, and the Administrative Tribunal)." We have also examined both the procedural aspects of the formal systems (such as the opportunity to be heard, the conduct of hearings, and time limits), and the substantive aspects (such as who has access to the system, the range of issues that are subject to review, the standard of review, and the available remedies).

B. General Focus

3. Our report will show that in itself and in comparison with other international organizations, the Fund has a very commendable scheme for the resolution of workplace disputes. Our mission does not, however, end with this conclusion. First of all, we have been asked to make suggestions for possible improvement, which is more difficult to do in the case of a good system like that of the Fund. We have had extensive discussions with a large number of Fund personnel representing a variety of viewpoints, knowledgeable employees from other international organizations and experts in dispute resolution. From these discussions, lessons learned in other organizations and our own experience in various institutional environments and with different approaches to dispute resolution, we identified

---

[2] The Terms of Reference for the review are provided in Annex I. A brief description of the background and experience of the members of the Review Panel—Arnold M. Zack (Chair), Sarah Christie, and Chris de Cooker—are provided in Annex II.

some areas in which we believe the Fund's system can be further strengthened. Secondly, and this is a much more delicate undertaking, we considered whether there are problems or areas of conflict that for one reason or another do not enter into the Fund's informal or formal dispute resolution system. Founded again on our discussions with Fund staff, as well as documentation and internal studies that we received concerning the Fund's workplace practices and environment and our knowledge of the practices and experience of other organizations, we identified a number of latent problems within the Fund and concluded that some of them are amenable to solution through dispute resolution processes. We identified a number of measures that we believe would make the Fund's system and its processes more effective in drawing in and resolving such work place disputes. Finally, we wish to emphasize that we have concentrated in this report on highlighting those elements of the system and aspects of the procedures that we believe could be strengthened and improved. We do not dwell on the larger set of procedures and components of the structure that are acceptable and effective.

C. Procedures for Conducting the Review

4. We had face-to-face discussions with a large number of IMF personnel. They included senior staff and others from the Human Resources Department (HRD) and Legal Department (LEG), Senior Personnel Managers and Administrative Officers from other departments, and the Dean of the Executive Board. We also met with the Ombudsperson and her predecessor, present and past members of the Staff Association Committee (SAC), members of the Fund's Grievance Committee, the President and Registrar of the Fund's Administrative Tribunal, the Ethics Officer and the Special Advisor on Diversity. We have shared with and benefited from the comments on an earlier draft of this report by staff from HRD and LEG, officers of the SAC, and others.

5. We provided all Fund employees confidential e-mail access to each of us and, together with HRD and the SAC, we encouraged them to send us private messages about their experiences and views of the Fund's existing system, and to offer suggestions as to how they thought the system might be improved. For those so requesting, we held meetings away from the Fund premises as an added means of gaining completely confidential insights into the operations of the current structure. We received numerous responses from staff, contract employees, supervisors and line managers at various levels on a number of the issues before us and arranged confidential meetings with most of them, separately or in groups. In keeping with our undertaking to these employees, we are not providing any information in this report or elsewhere that might identify individuals who communicated or met with us.

6. In addition to meeting Fund personnel we also met some 50 officials, staff association leaders, and employees from more than a dozen international organizations, as well as several outside experts, to learn about their differing approaches to the type of problems faced at the Fund. Annex III provides a list of the organizations we visited. We also met, together with the U.S. Executive Director, representatives of the U.S. Treasury Department, and Senatorial staff who had previously been in contact with the Fund regarding its dispute resolution system.

7. We have been given access to all the IMF documents we requested, as well as several compilations and analyses that were specially prepared for us. We received and examined several thousand pages of documents in preparation for this report. To secure an understanding of the Fund's workplace environment and culture, we obtained and considered a number of comprehensive historical studies on staff attitudes, the status of women in the Fund, and discrimination. We also considered the series of annual reports issued by Ombudspersons, the Special Advisor on Diversity and the Ethics Officer. With specific respect to the Fund's dispute resolution systems, we obtained and reviewed all judgments of the Fund's Administrative Tribunal, the reports and recommendations of the Grievance Committee and arbitration awards. We note, however, that we have avoided comment on pending cases and any issues arising in unresolved disputes that are, properly, now wending their way through the existing dispute resolution system. This is because we are concerned that the reaction to or implementation of any recommendations we propose might influence the process of those disputes one way or the other.

II. Background: Principles of Law and Dispute Resolution in International Organizations

A. General Principles for Managing Workplace Conflict and Resolving Disputes

8. There is no ideal integrated system that fits all organizations, but an acceptable system for preventing, managing conflict, and resolving disputes should stress accessibility and responsiveness. It should encourage conflict management and dispute avoidance and not merely dispute settlement. Problems that do surface should be resolved voluntarily, in confidence and without reprisal; the protagonists' privacy should be respected but balanced with the need for sufficient disclosure to guide others so that the problems do not recur. The system should satisfy the following broad criteria:

- That there are opportunities and procedures to identify and prevent employment problems. These opportunities should be available to all individuals and groups within the employment relationship with emphasis on informal and confidential resolution.

- That the dispute prevention processes are integrated with systems for processing unresolved disputes through individual or collective agreements, or by determination through ombudsmen, peer review, arbitration or adjudication, or a combination of these processes.

- That grievance procedures are sufficiently open and credible, so that employees who raise issues in good faith are confident of consideration by competent and respected individuals.

- That there are appropriate mechanisms for resolving interpersonal conflicts that are not readily amenable to resolution by formal grievance procedures.

- That there is a process for final determination of unresolved disputes of right by an independent forum with authority to provide appropriate remedies.

- That there is sufficient institutional support for and oversight of the system to assure coordination and effective communication, and that the system is amenable to constructive change with appropriate feedback and evaluation mechanisms.

9. As a general proposition, we consider it important for opportunities for resolving conflicts to be provided and for settlement efforts to be encouraged at any stage. This means that from the side of management there must be easy access to the informal process, that thresholds should be low and doors open. From the side of staff, this means that there should be a willingness to resolve a dispute through discussion and perhaps compromise. The best solution is one reached by the parties themselves—each of whom should not only talk but also listen with an open mind to the views of the other—with or without the facilitation of a third party. It is never too early or too late to settle. Settlement should be accessible at any stage of a dispute, and parties should generally avoid proceeding through succeeding review/appeal stages when there is a reasonable possibility of losing. We address this particularly in our discussion of the operation of the Ombudsperson and the Grievance Committee.

10. It is also important to recognize that certain conflicts within employment relations are not readily amenable to judicial resolution. These tend to be interpersonal disputes that may arise between colleagues and personality conflicts between employees and supervisors. In the absence of appropriate, informal problem-solving mechanisms, such as the Ombudsperson or other sources of counseling, individual complainants may seek relief by pleading their problems as pure 'rights' disputes and invoke adjudicative processes. Formalized grievance processing is not appropriate for interpersonal disputes.

B. Some General Principles of International Law Concerning International Organizations

11. The International Monetary Fund (IMF) is a public international organization. As such, it enjoys a number of institutional privileges and immunities common under public international law and essential to safeguard the organization's international character and its independence vis-à-vis the national laws of its several member States. These privileges and immunities are necessary to ensure the proper functioning of the organization, free from unilateral interference by individual governments. The goal of member States in creating an international organization and endowing it with privileges and immunities is specifically to enable it to function without the external impediments that might be imposed by the interests of the host country or any other single member. These functional immunities permit the international civil servants employed by the organizations to be fully committed to, and to

perform their duties exclusively in the interest of, the organization.[3] As a practical matter, it would be impossible for an international organization or its employees to comply with the potentially conflicting laws of its many member States. Thus, the international nature of the secretariats of international organizations requires them "to be dissociated from the host State or any other State."[4] In the specific case of the Fund, the principle of equal treatment to which the Fund adheres in its dealings with member countries further requires that the internal laws of the Fund may not favor any one member country's laws.

12. In the absence of any directly applicable external laws, there is need for a body of internal laws, rules, and regulations to cover employment matters. These internal laws should incorporate similar principles and serve the same broad purposes as national laws governing employment relationships and contracts. Staff joining the Fund, who forgo the legal protections that they enjoy in their home countries, require an appropriate alternative. And the Fund itself needs a framework of laws or rules on which it can rely to manage individual and collective staff relations. Although setting up an internal justice mechanism for approximately 3,000 people is burdensome, it is necessary to ensure that employees are governed by rational and fair rules, that they have ready access to fair, efficient, and transparent procedures to resolve disputes over the application of the laws, and that there are appropriate standards to govern judicial review of administrative action.

13. For these reasons, the Fund has established an extensive internal body of law that is set out in the organization's By-Laws, Rules and Regulations, General Administrative Orders (GAOs), and various other bulletins and circulars. These rules cover among other things—and this is the central subject of the present study—the employment conditions for staff working in the Fund. While these rules broadly reflect general principles of employment law among member States, it has been recognized that there are many different approaches and particulars among those members. The Fund's internal laws were therefore established without direct reliance on the legislation of its member States, including the host State. The latter is particularly important for the Fund, as it is for other international organizations. There often needs to be self-conscious avoidance of a tilt toward U.S. law that might result from the organization having a single central facility in the U.S. and employing substantial numbers of people who are familiar with the host country's legal culture. The international character and the restrictions against dominance of any country in the Fund's internal operations is appropriately reflected in Rule N-3 of the Fund's Rules and Regulations: "Persons on the staff of the Fund, in the discharge of their duties, shall owe their duty entirely to the Fund and to no other authority, and shall neither seek nor accept instructions

---

[3] It is important to note that the immunities afforded Fund employees are not unlimited. They apply only in relation to functions carried out within the course and scope of their employment. They have functional, not diplomatic, immunities and must therefore comply with local laws in relation to their private and non-Fund activities.

[4] See C. F. Amerasinghe, *The Law of the International Civil Service as applied by International Administrative Tribunals*, Vol. 1 Clarendon Press, 2nd ed., p. 6.

from any government or any authority external to the Fund." A corollary of this requirement is that member States, although they ultimately authorize the internal laws of the Fund and other international organizations through their Boards of Directors and Governors, must respect the need of the organizations for the autonomous operation of their internal legal systems.[5]

14. Given that the law of international organizations governing employment conditions and employment relations is primarily developed internally, although not without reference to external sources, including other public international organizations, it follows that international organizations set up internal dispute resolution mechanisms that are similarly independent of any national civil justice systems. Staff members do not continue to be covered by the legal system of their home country, nor do they have the protections of any other national legal system, including that of the host country, on matters of employment arising between them and their employer.[6] In endowing international organizations with immunities from national laws, the member States implicitly assign to the organizations the responsibility to establish fair employment practices for their citizens, so that fair and equal treatment is guaranteed to all staff. It is an extension of the principle of international cooperation that international organizations, which do not submit to national litigation in relation to any employment conditions, must establish internal laws and a system of adjudicating disputes that reflect the same broad principles that infuse national employment laws.

15. The internal world of the international organization—its management and staff—must consider the internal justice system to be accessible, accountable, and fair. It is equally important for the internal system to be credible to the world outside the organization. The organization has the power to determine its own substantive rules to regulate employment conditions and benefits, but these must be equitable and predictable; they must not remove vested rights; and they must be applied by people who are accountable and authoritative. Reasons must be given for any decision concerning a staff member's rights and legitimate interests. Disputes about the interpretation and application of existing rights must be resolved by judicial or quasi-judicial proceedings before a body comprised of one or more persons who are independent and authoritative, and the parties must be bound by the outcome of such proceedings.

16. Establishing and maintaining a system of internal justice that successfully meets these criteria necessarily places an administrative burden on the institution and entails costs. We are mindful that the operational requirements of the Fund and its institutional mission are central, and the burden and cost of the Fund's dispute resolution system need to be kept in an appropriate balance. There are, however, different ways to measure administration and costs.

---

[5] See Articles of Agreement of the International Monetary Fund, Article XII, Section 4(d).

[6] Charles H. Brower "International Immunities: Some Dissident Views on the Role of Municipal Courts" (2000) 41 *Virginia Journal of International Law*.

The efficiency of the system is one. It is important for disputes to be resolved with as little time and effort as possible on the part of management and staff alike. A broader measure would also take into account the impact of the system on staff morale and commitment to the institution. A system that fails to respond to real or perceived grievances or leaves staff with a feeling that they have not been fairly heard, would have substantial, but perhaps intangible, long-term costs. Reduced morale, persistent dissatisfaction and lingering conflicts among employees could all have adverse effects on productivity and the attractiveness of any employer. And the costs of replacing disaffected staff—both the direct cost of recruitment and the intangible cost of lost experience and the time needed to train and develop replacements—can be significant.

17. There is a constant evolution in the internal justice systems of international organizations. Although by and large the formal processes in most international organizations are much the same now as they were twenty years ago, there have been considerable changes in the jurisprudence of the tribunals of these organizations. This reflects increasing societal change, emerging constitutionalism in public administration and employment law, changing socio-political awareness, and rising expectations of employees. Each system, including the Fund's, needs to be responsive to these trends.

18. For example, we perceive a trend in national and international administration to lower the threshold of access to formal and informal internal justice processes in order to forestall conflict and/or achieve an early solution of a problem, a dispute, or a grievance. In some international organizations, formal barriers to access to the formal procedures (such as compliance with requirements relating to time for filing) have been lifted, allowing greater access to dispute resolution processes. The World Bank, Council of Europe (COE), and Organization for Economic Co-Operation and Development (OECD) reflect the trends toward easier access and less formal processes. The greater emphasis on informal processes is probably even more important in an environment in which decisions about career prospects rest exclusively with the employer. It is to be expected that the drafter of a system would seek to minimize the opportunities to challenge its authority to carry out the responsibility of achieving the mission of the organization. However, that perception has to be balanced against the need for the cooperation of the staff and their confidence that they have a fair opportunity for career advancement and to challenge unfair actions of employers. The Fund's Code of Conduct for staff, its structure for resolving employment disputes through a variety of steps culminating before an independent tribunal and the very appointment of this panel to evaluate its system, reflect HRD's mission of making the Fund an employer of choice.

19. In 2001, these developments continue to challenge public and international institutions. Increasing political and social demands on national governments are now reflected in a legal obligation, arising from constitutional and administrative law, that agencies and individuals who exercise public power are no longer merely obliged to exercise it within the formal framework of the powers that are conferred on them but they are obliged to exercise it rationally and fairly. The reliance on so-called prerogative powers is dwindling and public officials are increasingly legally, and not merely politically, accountable for the exercise of that power. These changes have inevitably imposed certain constraints and costs

on governments and public authorities.[7] These developments have increased awareness of employees of their fundamental workplace rights, and all employees, including international civil servants, increasingly assert those rights.

C. Stages of Dispute Resolution in International Organizations

20. All of the international organizations of which we are knowledgeable have established informal and formal internal dispute resolution systems that permit employment-related decisions to be challenged, and that provide channels for the disputes to be considered and resolved. The specific components and procedures of these systems vary considerably, but most have some common threads. To place the systems and procedures of the Fund in the context of practices in other international organizations, we provide the following brief overview of the general approach and some of the specific elements of the systems of these organizations.

21. Access to the internal justice process typically starts very informally in all international organizations. A decision or situation may be perceived—rightly or wrongly—as incorrect; it may simply not be clear enough or it may be misunderstood; or a desired decision may have been delayed or avoided. Regardless of the reason, a staff member may raise the matter with the person who took the decision or who initiated it, or who failed to respond or to act. This is usually the line supervisor in the employee's organizational unit or an appropriate official in the administration or HRD. Very often the problem is resolved then and there: the decision may be better explained, better understood and be accepted by the staff member, or, on the other hand, the decision may be amended or annulled, or the situation may be resolved to the mutual satisfaction of the employee and the organization.

22. Resolution of a conflict or dispute at this informal stage may be facilitated with the assistance of a neutral third party, such as an Ombudsperson, (e.g., in the IMF, World Bank, Inter-American Development Bank (IDB), United Nations Development Program (UNDP), or World Health Organization (WHO)) or a *mediateur,*[8] a mediator, a conciliator or sometimes even a combination of them. Almost all international organizations now acknowledge the useful role of an independent facilitator in resolving disputes and of identifying issues that may trigger future conflict. Not only the names for these positions, but also their specific roles differ. Some give advice to one or all parties, whereas others have a mediating function. Some are officially involved only up to the point at which formal proceedings begin (such as in the OECD or in the IMF) and the start of formal proceedings is seen as a failure to reconcile parties. Others may continue to play a role in the later stages of

---

[7] These include the duty to create or facilitate the establishment of processes for public participation in rulemaking, and the requirement to give reasons for decisions. See, for example, Michael Harris & Martin Partington (eds.) Administrative Justice in the 21st Century; Hart Publishing, Oxford & Portland, Oregon, 1999, passim.

[8] As in the OECD and the Council of Europe.

formal proceedings whenever it is felt that there is still a chance of bringing the parties together. The "neutral" is able to explain matters from a different angle and thus contributes to a jointly acceptable resolution. In all organizations, these facilitators have a high rate of success in resolving disputes and the positions are clearly considered to be a worthwhile investment.

23. If a matter is not resolved in the informal process, the next step in the internal justice system is the opportunity to request a formal administrative review. Such reviews have become common practice in international administration. Most organizations, including the IMF, require an administrative review prior to lodging a formal complaint or appeal. This procedure is typically formal. In the World Bank, for example, a request for an administrative review must be made within 90 days following the date of the decision. The supervisor carrying out the review must respond within 20 calendar days. The administrative review is generally a precondition for starting formal litigation. In some organizations, the administrative review is already part of the formal litigation process. The Director General of European Space Agency (ESA), for example, is invited by the staff member to rescind or amend the contested decision, or to submit the case for advice to the Advisory Board, which has similar roles and functions as the Fund's Grievance Committee. The formal administrative review process provides institutional confirmation of the decision and it is, in most organizations, also a prerequisite for going to the peer review or appeals process. These reviews often resolve the dispute based on a better understanding of the decision; with an amendment or annulment of the decision; or with a compromise between the parties. Throughout the review process, the ombudsperson or other facilitator may continue their important and useful role.

24. In the case of an inconclusive or unsuccessful completion of the administrative review, the staff member may submit a formal grievance to a formal body established for this purpose, unless the dispute involves issues that can, by mutual agreement, be submitted directly to the organization's administrative tribunal. These boards have different names. For example, the United Nations and Interpol have a Joint Appeals Board; the World Bank Group, European Bank for Reconstruction and Development (EBRD), European Patent Office (EPO), and Food and Agriculture Organization (FAO) an Appeals Committee; IDB has a Conciliation Committee; International Labour Organization (ILO) a Joint Committee; IMF a Grievance Committee; United Nations Educational, Scientific and Cultural Organization (UNESCO) an Appeals Board; the COE an Advisory Committee on Disputes; OECD a Joint Advisory Board; ESA an Advisory Board; International Civil Aviation Organization (ICAO) an Advisory Joint Appeals Board; North Atlantic Treaty Organization (NATO) a Claims Committee; and WHO a Board of Inquiry and Appeal at Headquarters and Regional Boards of Appeal. They have, however, many things in common. They are expected to make findings and reach conclusions as to the legality of the claim; but in most organizations, they may also make suggestions for reconciling the parties. They are all internal to the organization and are, typically, composed of representatives of management and staff. The internal representatives are usually not appointed because of their expertise in law, administration or human resources, but because their experience and a commonsense understanding of the rules and internal culture of the organization lets them combine the roles

of expert assessor and peer juror. This typical peer review seeks a resolution of the dispute by urging consensus. The opinions of these boards are usually only advisory most of the panels tend to strive for unanimity in outcome because such opinions are more persuasive.

25. In several international organizations including the Fund, an external chair, who is a professional, for example, a judge or arbitrator, heads these boards.[9] A few international organizations appoint a former staff member as chair.[10] The value of independence derived from having a chair who is not an employee, is enhanced by the fact that many of these independent chairs also have extensive knowledge of general principles of employment and administrative law and are technical experts in the law of international organizations. Furthermore, many of them have held high judicial office and are extremely authoritative. Their professional background and independence enhances the authority of their opinions and the autonomy of the panel.[11] On the other hand, a Chair who is drawn from the staff of the organization can bring to bear direct experience with and understanding of the organization's culture and workplace pressures.

26. The Head of the organization usually takes a final decision based on the report of the review committee. The time limits for the executive head to make his decision known are much shorter in, for example, the Co-Ordinated Organizations than in the organizations of the United Nations Common System.[12] This has, obviously, an additional impact on the length of the dispute resolution process. The final decision exhausts the internal pre-litigation process, and is a prerequisite for proceedings before a judicial tribunal. It follows that, as with administrative review, the peer review process is both an opportunity to settle before initiating tribunal proceedings, as well as the first formal step leading up to the tribunal proceedings. Although this "pre-litigation procedure" is not a legal proceeding or a civil law pleading, the claimant is nevertheless bound by the scope of the dispute that was submitted to the pre-tribunal procedures. There is a clear link between the pre-litigation and the litigation procedure because the issue and the relief sought must be substantially the same. For these

[9] See also the EBRD, the FAO, UNESCO, the World Intellectual Property Organization (WIPO) and the OECD.

[10] For example, the IDB.

[11] However, the presence of an external chair may unbalance the committee by subordinating the views of the members serving as "peers."

[12] The Co-Ordinated Organizations include six international organizations with their Headquarters in Europe: the COE, the European Centre for Medium-range Weather Forecasts (ECMRWF), the European Space Agency (ESA), the North Atlantic Treaty Organization, the Organization for Economic Co-Operation and Development, and the Western European Union. They have an identical system of salaries and allowances, and many of their personnel rules and regulations are similar. The United Nations Common System consists of the United Nations Organization itself and all specialized agencies, except the Washington based world-wide financial institutions (IMF and World Bank Group). The UN Common System applies the same personnel standards and conditions of employment to the maximum extent possible.

reasons, the proceedings before the tribunal tend to be a review of the evidence, findings, and argument that were prepared and used in the pre-litigation proceedings.

27. The final stage in the internal justice system of most, if not all, international organizations is an appeal to or review by an administrative tribunal. All international organizations either have their own administrative tribunal,[13] or provide for access to such a tribunal in another organization. The best examples of the latter are the Administrative Tribunal of the International Labor Organization (ILOAT), which handles cases from some 40 international organizations, and the United Nations Administrative Tribunal (UNAT). The tribunals are composed of senior judges appointed from outside the organization, to ensure independence and authority. These tribunals may conduct *de novo* hearings. In addition to their review of administrative actions and decisions, they may have original jurisdiction to assess the validity of the organization's laws and regulations concerning employment issues.

28. The judgments of the tribunals are final and binding on the organization. There is no obligation arising from general principles of international administrative law to provide a further appeal. [14] Only the EU has a two-tier system of tribunals, where a party can appeal from the Court of First Instance to the Court of Justice, but only on a point of law.

29. As was indicated at the outset of this survey, there is not a uniform system for resolving disputes amongst the international organizations. However, all organizations have a minimum set of components, which consists, in the formal process, of administrative review, a peer review, and resort to an autonomous administrative tribunal. All organizations also have an informal process before the formal one: discussion with the supervisor or with the HR Department. Many but not all organizations have a third party involvement by a neutral, such as an ombudsperson or a mediator.

30. The dispute resolution systems, as different as they may be in the details, usually compare favorably with national systems, where staff normally only have access, in the formal process, to a lengthy procedure before a tribunal, or, by agreement, to arbitration.

31. We have drawn a number of general lessons from our examination of the practices of other international organizations; these include:

- The internal law (and procedure) of international organizations is no longer as remote or detached as it has been in the past from the employees who are governed by it. There is increased and improved access to and familiarity with the written internal

[13] For example, the ADB, Council of Europe, EU, IADB, IMF, OECD and World Bank. Sometimes they are called an Appeals Board, e.g., in ESA and NATO.

[14] Cf. *Coates (Nos. 1 & 2)*, ILOAT Judgment No. 2029 (2001). The ILOAT rejected an application to review an earlier decision of the Tribunal on the grounds that the Tribunal had made such a serious error of law that its decision was void; any review would undermine the principle of *res judicata,* i.e., the matter has been finally decided and may not be raised again.

law and practice of the organization: improved access to the rules and jurisprudence through the use of modern techniques (Intranet), and to readily available documentation concerning policies of the organization impacting on the employment conditions such as promotion, salary adjustment, and ethics policies.

- An internal justice system must also be expeditious and unnecessary delays should be avoided. In particular, during the informal and formal review process, a mere repetition and confirmation of a decision made at an earlier or lower level serves little purpose. Delayed resolution perpetuates a sense of uncertainty and frustration and is detrimental to the effective functioning of the organization.

- The credibility of any system is dependent in large measure on staff acceptance of the system and its procedures. If staff representatives participate in the formulation of the internal law and policies and take an active part in their implementation, they are more likely to enjoy the support of the staff themselves.

- Finally, an efficient and credible system is likely to flourish only if the organization is committed, at its highest level, to the principle of accountability, and if priority is given to internal justice and the rule of law.

III. Dispute Resolution System of the IMF: A Brief Description

32. The Fund's formal and informal systems and procedures for resolving disputes are described in several documents, including General Administrative Order (GAO) No. 31 dealing with the Grievance Committee and administrative review, published booklets on the Administrative Tribunal, and the respective Terms of Reference for the Ombudsperson and Ethics Officer. We will not repeat these full descriptions, but will summarize the main components for the convenience of readers who may not be familiar with them. (Additional information on many of the components is provided in the following section where we discuss our conclusions and recommendations on the system and several procedures.)

A. Informal Procedures

33. Employees in the Fund, as elsewhere, frequently resolve workplace problems by seeking information, explanation, guidance and advice from their peers, immediate supervisors, officers in HRD, departmental personnel responsible for HR (i.e., Senior Personnel Managers and Administrative Officers or Assistant Senior Personnel Managers), as well as other individuals who have substantial institutional memories and understanding of the Fund's systems and procedures.

1. Office of the Ombudsperson

34. For an employee who is unable to resolve a workplace problem by these means, the Fund's most important institutional resource for resolving workplace problems informally is the office of the Ombudsperson. This office was created in 1980.

35. The Ombudsperson is an independent, neutral resource who can assist staff members in a wide range of employment-related and workplace problems. The Terms of Reference of the office require the Ombudsperson to facilitate solutions through mediation and conciliation, and, in the case of a problem that cannot be resolved by mutual agreement, "the Ombudsperson may present recommendations for the resolution of the problem to those with authority to implement those recommendations." The Ombudsperson is obliged to issue an annual report to all staff and contractual employees not only on the issues that were brought to his or her attention, but also the extent to which problems were resolved and, if not, the reasons for their not being resolved. The Ombudsperson may report on particular cases that appear to be of special importance and is obliged to draw the attention of the Managing Director "any systemic issues, either Fund-wide or specific to particular departments, that become apparent from individual cases.

36. Discussions between individual employees and the Ombudsperson are completely confidential. The Ombudsperson must have no prior or post employment with the Fund and serves for a single, non-renewable, five-year term. In addition, the premises of the Ombudsperson are physically separate from the main Fund offices and have separate telephone and e-mail access. According to the current Ombudsperson, a large number of her contacts concern inquiries as to the operation of or access to the formal system. If the resolution of the problem necessitates contact with management, the employee must be willing to waive the confidentiality commitment by being identified to the superiors involved. In recent years, the issues most often raised with the Ombudsperson have been in the areas of career development, performance management, benefits, and separation problems.

37. The annual reports of the Ombudsperson show that employees generally regard the office as useful. Employees who approach the Ombudsperson are drawn from all departments within the Fund and the profile of the inquirers reflects the demographic diversity within the Fund.[15] Advice or intervention is sought by people drawn from different levels within the Fund including those with supervisory authority, but there are more women than men, more non-economists than economists, and fewer inquiries from the higher grades than the lower.[16] The most recent report of the Ombudsperson indicates that about two-thirds

---

[15] The 1999–2000 Report of the Ombudsperson explained that the high representation of U.S. nationals was misleading. "A very large proportion of this group—perhaps as many as a third or half—were born and raised in other countries and English was their second language." Twentieth Annual Report of the Ombudsperson January 4, 2000, p. 14.

[16] Nineteenth Annual Report, December 10, 1998, p. 3.

of the inquirers consulted the Ombudsperson "in confidence, and, having reviewed the situation and obtained information on options, rights or courses of action, chose to deal with the matter on his/her own"[17] and in a third of the matters the Ombudsperson intervened with the consent of the inquirer.

B. Formal Procedures

1. Administrative Review

38. The first step in moving from informal problem solving into formal resolution of a dispute is administrative review. This usually has two stages: an initial review within six months of the initial decision by a line manager/supervisor in a staff member's department in the case of matters affecting the staff member's work or career, or within three months by a division chief within the HRD, in the case of decisions on benefits and other centrally administered personnel matters with a right to appeal within 30 days to the Director, HRD. In both stages the employee requests an official to explain, vary, or confirm a contested decision. Administrative review is a formal process in which the complainant must record the decision that is being challenged, the alleged violation of the rule or regulation, all the facts known to the staff member, the reasons that the decision (if it is based on discretionary judgment) is deemed to be capricious, arbitrary, or discriminatory or procedurally unfair, and the relief sought. If the Director, HRD, or the Managing Director made the disputed decision, the complainant is not obliged to invoke the full process of administrative review.

2. Grievance Committee

39. The Grievance Committee was created by the Fund in 1981.[18] Its role and operations were last thoroughly reviewed in the 1994–95 period upon the establishment of the Administrative Tribunal. During its 20-year history, 62 cases have been submitted to the Committee. Of these, 19 were withdrawn before hearings were concluded; decisions were rendered by the Committee in 34 cases; and as of this date, 6 matters are pending.

40. The Committee consists of a chair and two members, each with alternates, who are appointed by the Managing Director and by the SAC, respectively. The Committee sits in panels of three; each panel includes one SAC appointee and one management appointee, who is selected for each case by the member. The Managing Director appoints the Chair, after consultation with the SAC. The Chair and members are appointed for renewable two-year terms. The present Chair is an outside labor-management arbitrator who has occupied the

[17] Twenty-first Annual Report of the Ombudsperson, p. 2.

[18] For a more detailed discussion of the Committee's evolution and operation, see David S. Cutler, "The Grievance Committee of the International Monetary Fund" in C. de Cooker (ed.), *International Administration* 1999, vol. 9/1-21.

position continuously on a part-time basis since 1983. The Committee has jurisdiction over grievances brought by present staff members on regular or fixed-term appointments, and former staff members and beneficiaries with respect to claims under benefit plans, with the exception of the Staff Retirement Plan (SRP).[19] It may review "any complaint brought by a staff member that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service" but it lacks jurisdiction to consider challenges to decisions of the Executive Board and staff regulations.[20]

41. The standard of review applied by the Grievance Committee depends on the nature of the decision in question. In the case of non-discretionary decisions, the standard for the Committee is whether the challenged decision is consistent with and taken in accordance with the applicable Fund rules and regulations. In the case of decisions involving the exercise of discretionary authority, the Committee may make a recommendation in favor of a grievant only if it finds that the decision "was arbitrary, capricious, or discriminatory, or was procedurally defective in a manner that substantially affected the outcome."[21]

42. After a grievance is filed, the Committee Chair may arrange to talk to the claimant to clarify aspects of the application or to ask for more details. He will then set a date for a pre-hearing conference at which members of the Committee, the grievant, and the representatives of the HRD will discuss the grievance, the list of proposed witnesses, any additional documentation that may be needed, and the timetable for hearings. If the employee exercises the option of having legal counsel, a representative from the LEG will attend on behalf of the Fund.

43. The Committee may decide the grievance on the written record, but oral hearings are generally held. These hearings typically include an opening statement made by the grievant or representative, followed by an explanation from HRD as to why the complaint was turned down. Witnesses may be called by either party and are subject to examination and cross-examination under oath. Both sides may make closing statements after which written briefs and reply briefs are submitted. Thereafter the hearings are declared closed. A transcript is taken of the proceedings. Within 30 days of closing the case, the Committee meets and issues its Report and Recommendations to the Fund's Managing Director. The Grievance Committee has jurisdiction to recommend interim relief if the complainant can show a risk of irreparable harm pending the outcome of the dispute.[22] The Fund makes no contribution to

[19] The SRP gives its Committees the exclusive right to make determinations with respect to the interpretation and operation of the Plan. The Committees have established procedures governing the appeal of decisions and these may also be appealed to the Administrative Tribunal. The appeals procedures under the SRP are described in Annex IV.

[20] Section 4 GAO No. 31, Rev. 3.

[21] Section 5.02 GAO No.31, Rev 3.

[22] Section 7.02 GAO No.31, Rev. 3.

the staff member's legal fees and each party is responsible for its own costs. The Grievance Committee is authorized to recommend reimbursement for some or all of a grievant's costs, including legal fees, if the grievance is "well-founded in whole or in part" and recommendations of *ex gratia* payments have been made to losing grievants.

44. Since its inception, the Committee has issued unanimous recommendations, and the Managing Director has accepted and implemented all its recommendations. If the grievant remains dissatisfied with the Grievance Committee's recommendation or if the Managing Director rejects a Committee recommendation in favor of the grievant or takes no action on a recommendation against the grievant, the claimant may pursue the grievance to the Fund's Administrative Tribunal.

45. Section 9 of GAO No. 31 provides that no staff member shall be subject to any adverse action by any individual as a result of pursuing a grievance, providing testimony to the Committee, or assisting a grievant in pursing a grievance and that any such adverse action may be grounds for a finding of misconduct and the imposition of disciplinary measures.

46. Section 6.07 of GAO No. 31 does not permit the parties to suspend the six-month period for filing a grievance when cases are referred to the Ombudsperson, and once a staff member has filed a grievance with the Grievance Committee, the Ombudsperson refrains from providing continuing assistance to the grievant. Although the Terms of Reference of the Ombudsperson allow the Ombudsperson to assist in mediating settlement of the pending dispute, this facility has not been utilized.

47. The Grievance Committee is required to issue periodic reports to the staff setting out the nature of the grievances that have been referred, its recommendations, and the Fund's response to them, but employees and witnesses are, typically, not cited by name. Reports have been issued annually except the last one, issued in February 1998, which was a consolidated report of its work during the previous four years.

3. Administrative Tribunal

48. The Fund's Administrative Tribunal (IMFAT) was established in 1992 and heard its first matter in 1994. It is comprised of a President, two associate members, and two alternates. The Managing Director appoints the President after consultation with the Staff Association and with the approval of the Executive Board. The Managing Director also appoints the associate members and alternates after "appropriate consultation." A Registrar, who is a nonstaff employee of the Fund, provides assistance to the Tribunal under the authority of the IMFAT President. An application to IMFAT must be brought within three months after all available channels of administrative review have been exhausted.[23] Under the Tribunal's Statute, administrative review is exhausted three months after the date of a recommendation of the Grievance Committee (if the Managing Director has not acted on

[23] Article VI, Sec. 1, IMFAT Statute.

the recommendation), when the staff member is notified of a decision denying the relief requested, or two months after a decision to grant the relief requested if the relief has not actually been granted. But in exceptional circumstances, the Tribunal may waive the time limits for referring disputes.[24] It has issued nine full judgments.

a. ***Jurisdiction***

49. The jurisdiction of the IMFAT is considerably broader than that of the administrative tribunals of most other international organizations.[25] It is in effect, a constitutional tribunal, that is, it has the authority to review and pass judgment on the legality of regulatory decisions taken by management and the Executive Board. However, the highest legislative body of the IMF, its Board of Governors, retains the authority to amend the legal framework within which the Tribunal exercises its jurisdiction.

50. The Tribunal has jurisdiction over administrative acts, which are defined as "any individual or regulatory decision taken in the administration of the staff of the Fund."[26] The Tribunal may review not only whether a rule was correctly interpreted or applied in a specific case, but also whether the rule itself is legal.[27] However, it may not "pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date."

51. The jurisdiction of the Tribunal is expressly limited to disputes involving "staff" and to any successor in interest to a deceased member of staff, to the extent that such person is entitled to assert a right of such member against the Fund, as well as to beneficiaries of any benefit plans maintained by the Fund challenging decisions under any such plan. [28] The SAC may be heard as *amicus curiae.*

b. ***Practice and procedure***

52. Although the IMFAT rules provide that oral hearings may be held if the Tribunal decides that this is "necessary for the disposition of the case," it has not held any hearings to

---

[24] Article VI, Section 3, IMFAT Statute; see also *Estate of Mr. "D", Applicant vs. International Monetary Fund, Respondent,* IMFAT 2001–1, 30th March 2001.

[25] Compare, for example, the limitation on the jurisdiction of the ILOAT. See *Ayoub No. 2.* ILOAT Judgment No. 986 (1989).

[26] Article II (2)(a), IMFAT Statute.

[27] For a more detailed analysis of the IMFAT, see Celia Goldman, The International Monetary Fund Administrative Tribunal: Its First Six Years, in IMFAT, Reports, Volume I, 1994–99, IMF, 2000, pp. 1-33.

[28] Article II (1) (a) and (b), IMFAT Statute.

date. Members of the Tribunal meet at the Fund's headquarters, and they deliberate in private. A person may apply to intervene or to participate and be heard as an *amicus*. Proceedings at the IMFAT are a consideration *de novo* of all the issues that are in dispute. In practice, the Tribunal receives the report and recommendations of the Grievance Committee as an attachment to the application. The parties may also transmit to the Tribunal the evidence, transcript, and any representations that the parties may have made to the Grievance Committee, which it will consider as elements (albeit the most important) in the factual basis for its own deliberations. The IMFAT has recognized that it may take account of the treatment of an applicant before, during, and after recourse to the Grievance Committee, and that it is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it.[29]

53. Article III of the IMFAT Statute requires it to "apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts."[30] The Tribunal may annul a regulatory decision as well as individual decisions taken on the basis of the regulations. In terms of relief, the Tribunal is authorized to prescribe the rescission of an invalid decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision. If the Tribunal does order specific performance (including reinstatement) it must provide compensation as an alternative to reinstatement. The Fund has a month to elect to perform or to compensate. If compensation is ordered, it is capped at three years' salary. The Tribunal may order additional compensation if it considers it justified in exceptional circumstances.

54. If the Tribunal finds that the claim is well founded, in whole or in part, it can order the Fund to pay some or all of the claimant's reasonable costs.[31] The Tribunal has authority to order costs against an applicant if it is of the view that the application is frivolous or vexatious, although it has never done so.[32]

4. Arbitration for Contractual Employees

55. Persons who are employed as "contract employees" do not have staff status and their terms and conditions of employment differ significantly from those of the staff. Contractual employees do not have access to the Grievance Committee procedures under GAO 31 or to

---

[29] See *Mr. d'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT 1996-1, April 2, 1996.

[30] The international tribunals are not bound by the decisions of other international tribunals, although the judgments are often persuasive. See *Theuns*, ILOAT Judgment No. 1297 (1993).

[31] See *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT 1997-1, 22 August 1997; see also *Assessment of compensable legal costs pursuant to Judgment No. 1997-1*, IMFAT Order No. 1998-1, 18 December 1998.

[32] Article XV, IMFAT Statute.

the Administrative Tribunal. Their disputes are subject to Administrative Review by the Director, HRD, and are referred to binding arbitration before the Chair of the Grievance Committee sitting as a single arbitrator. Within the scope of arbitration of alleged breach of contract, the Fund arbitrator has held that the contents of the Fund's contractual employment manual have been incorporated into the contract terms. The arbitration has gone beyond considering the express terms of the formal contract of employment; even so, arbitration has not extended to include jurisdiction to consider change to the contractual status or renewal extension of a fixed-term contract of employment.[33]

5. Ethics Officer

56. In February 2000, the Fund established the position of Ethics Officer. Like the position of the Chair of the Grievance Committee, this is a part-time position. The terms of reference for the position read, in part, as follows:

> *" . . . to provide an impartial person to inquire into alleged violations of the Fund's rules and regulations and Code of Conduct. The principle aim is to provide assistance in resolving such matters in a manner that contributes to the good governance of the Fund and helps to maintain its reputation for probity, integrity and impartiality. The Ethics Officer shall accordingly conduct inquiries, provide, on request, advice to management, the Director of the Human Resources Department and others, on the application of ethics rules; and participate in training programs aimed at increasing awareness on ethics issues.*
>
> *. . . the Ethics Officer will conduct investigations based on allegations and complaints of misconduct brought to his or her attention by other parties.*
>
> *On request, the Ethics Officer will also counsel managers, staff members, contractual employees, and vender personnel on questions of ethics."*

57. The Ethics Officer presented his first annual report in June 2001. He reported that he had handled 76 matters involving potential misconduct, including 12 reports of investigation (on matters such as bias, racial and sexual discrimination, harassment, misstatements in support of Fund benefits, failure to pay rent, and abuse of tax allowance payments). Of these, the Ethics Officer resolved 29 cases by working with the staff members concerned (on matters such as falsified job application, abuse of the electronic bulletin board, garnishment, e-mail harassment, forgery, fraud, sexual harassment, matters involving G-5 domestic employees, failure to file tax returns, failure to pay child support). Sixteen matters were found to be unfounded or *de minimis* and 19 cases currently remain open. He also reported that he had rendered advice on matters such as outside activity, gift acceptance, possible

---

[33] See *Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT 1999-1, August 12, 1999.

misuse of benefits, outside employment, and that he had participated in various training activities and orientation programs for new staff.

C. Other Resources and Programs

58. In addition to the foregoing systems and processes, the Fund has a number of other resources and programs that play an important role in managing various forms of conflict and in resolving disputes. These include the following:

- **HRD staff.** The Human Resource Officers (HROs) and Human Resource Assistants (HRAs) in HRD provide substantial counseling and guidance to both individual staff members and to departmental managers on issues in such areas as career development, performance management, and interpersonal conflicts. The Staff Development Division (SDD), in particular, provides consulting assistance to departmental managers to address management and organizational issues. As the initial decision-makers on centrally administered personnel and benefits programs, the HROs and HRAs are often the first to learn of issues arising in the interpretation and application of HR policies and procedures, and are accordingly in a position to make the initial effort to resolve disputes involving individual decisions on these matters.

- **Departmental HR staff.** Each department in the Fund designates a senior staff member (usually at the level of Deputy or Assistant Director) as Senior Personnel Manager (SPM); each department also has either an Administrative Officer (AO) or Assistant Senior Personnel Manager (ASPM). These staff devote most and, in some cases, all of their time to human resources management in their department.

- **Coaching program.** HRD offers the services of coaches trained in management to work with newly appointed department heads, SPMs, division chiefs, and other supervisors. Participation in the program is voluntary, and normally up to 40 hours of coaching assistance can be provided. The coaching assistance is confidential. It typically addresses issues concerning people management (e.g., team building, conducting performance appraisals, communications, conflict management, etc.), and work planning and management. Although access to the program is confidential, we understand that staff who have used it have found it very beneficial, so much so that we recommend increasing access to the program.

- **Special Advisor on staff diversity.** This position was established and the first Special Advisor was appointed in 1995 as part of the Fund’s efforts to achieve greater diversity in its staff and to address concerns about discrimination among the staff. The Special Advisor’s mandate covers all aspects of diversity and any form of discrimination (e.g., gender, race, nationality, age, or religion). Her principal role is to advise Fund management, the Director of HRD, and department heads and line managers on policies, processes, and procedures that help to achieve diversity and to limit discrimination. She issues a comprehensive annual report assessing progress and

issues dealt with in the previous year and to be given priority in the following year. Whilst her primary focus is on systemic policies and processes, she also provides advice, counseling and mentoring to groups of staff and individual staff members with concerns regarding diversity and discrimination.

- **Advisors Against Harassment**. The Fund has enunciated a firm policy against harassment—verbal or physical behavior that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment—with an emphasis on sexual harassment and intimidation. While the Fund provides a variety of resources for dealing with harassment (e.g., line managers, HROs, the Ombudsperson), it has designated six staff members as Advisors Against Harassment. The advisors, who include staff from a range of departments, genders, nationalities, and grade levels, have been trained in dealing with harassment. They are available to provide confidential advice to staff members affected by harassment, to arrange interventions, and, if necessary, to assist in bringing formal complaints to the Director, HRD.

IV. Assessment of Dispute Resolution at the Fund

A. General Overview

59. The dispute resolution systems, processes, and procedures of the Fund are generally sound, and they compare very favorably to the practices and procedures in the other international organizations we examined. On the whole, the Fund's structure clearly meets the requirements of an effective conflict resolution system, which we set out earlier. It has a comprehensive internal body of law that appropriately covers the employment terms and conditions of its staff and sets out the duties, obligations and rights of staff members. The development and application of this law—the policies and rules affecting the interests of staff—is subject to regular consultation with the representatives of the staff through the SAC, which contributes to the prevention of subsequent disputes. The Fund also has comprehensive formal and informal systems for employees to express their workplace and even personal concerns through direct discussions with their supervisors. There is recourse to competent personnel to resolve issues concerning rights and disputes about benefits entitlement, diversity, and harassment. There are strong informal and formal processes that permit employees to challenge both administrative decisions as well as broad regulations and rules (including "regulatory decisions" taken by the Executive Board). At each stage in the review and appeal process—administrative review, Grievance Committee, and Administrative Tribunal—staff have clear opportunities to present their case (with assistance by counsel, if they wish). As noted above, the Fund's management has accepted all the recommendations of the Grievance Committee, which shows a clear commitment to an independent review process. Moreover, the Fund has shown that it is sensitive to changing environments and needs. Recent examples are the discrimination review, the creation of the function of Diversity Advisor, the adoption of a policy of zero tolerance for discrimination, the development of the Code of Conduct, and the establishment of the Ethics Officer. These positive aspects of the dispute resolution system are welcomed and endorsed.

60. When compared to most international organizations we explored, we noted that the formal dispute resolution processes in the Fund are less frequently used. Since 1992, less than one case per year has gone to the Administrative Tribunal, and on average three cases per year have gone to the Grievance Committee.[34] The rate of use is not necessarily an indication of the effectiveness or failure of the dispute resolution system. It may be a reflection of a successful informal process, which should be encouraged to avoid formal process. It may also be a reflection of success in dispute prevention, including successful efforts of the Fund's Ombudsperson. Managing conflict, preventing disputes from arising and resolving those that do arise are basic to good administration. There are four aspects of good administration that can contribute to dispute prevention: sound management, clear definition and thorough communication of employment rules, open participation of staff in establishing rules affecting their employment, and management accountability.

61. Perhaps the most difficult aspect of our assignment was to plumb the question whether employees are satisfied with the present structure and procedures. The absence in recent years of widespread complaints by the staff in general or through the SAC would suggest that employees are reasonably satisfied (or indifferent), and our conclusion that the Fund's systems are generally sound, would suggest that there is no widespread dissatisfaction. On the other hand, as noted above, the Fund's formal systems have very low rates of utilization, and this raises the question whether the present structure or the procedures have features that discourage their use. Alternatively, the low usage may suggest that either the cultural background of Fund staff or aspects of the Fund's own institutional culture may inhibit formal complaints about employment issues. Despite our numerous emails and meetings with Fund employees, and after reviewing the tally of confidential meetings reported by the Ombudsperson and the data on exit questionnaires of staff members leaving the Fund, we still do not have a fully satisfactory answer to these questions.

62. We nevertheless have found sufficient—and, for us, persuasive—reasons to conclude that certain aspects of the current structure and procedures for resolving disputes inhibit or deter employees from airing complaints and, especially from pursuing them within the Fund's formal systems. Whereas most staff members are content with, indeed proud of their affiliation with the Fund, we did detect frustration from some employees who expressed anxiety about registering any formal complaint, lest they be considered uncooperative or troublemakers. Such concerns were conveyed to us by a number of individual staff; they also emerge from our analysis of the questionnaires that were completed by staff who left the Fund in 1999 and 2000. Some individual staff members also conveyed to us their conviction that the formal systems are stacked against them: the resources that the Fund would bring to bear in opposing complaints would not allow them to receive a fair hearing or treatment. We wish to emphasize that we did not just hear these concerns from a few individuals. Senior officials and groups of staff with whom we consulted acknowledged that some or many staff do believe, rightly or wrongly, that formal challenges to decisions, particularly those

[34] But the annual reports of the Ombudsperson show that her office is used regularly.

involving one's career, face two problems: they carry risks for the individual involved and, even if they did not, they have little chance of success. Our review suggests that if employees had greater faith in the fairness, efficiency, and effectiveness of the formal dispute resolution system, it would go a long way toward allaying the perception that it may not pay to jeopardize one's career to undertake a grievance about unfair treatment. A number of our recommendations are intended to address these concerns both directly and indirectly.

B. Areas for Improvement

63. Notwithstanding the general comprehensiveness and strengths of the Fund's present dispute resolution systems, our examination of those systems has identified a number of areas in which revisions to current systems or procedures would improve their effectiveness, help to allay employee concerns about the evenhandedness of the systems, and provide for more timely and efficient resolution of employment-related disputes. Our recommendations for improvements are in the following areas:

1. Information and communication
2. Dispute prevention as an objective in HR policies and procedures
3. Ombudsperson
4. Role of the Ethics Officer
5. Scope of grievable decisions or acts
6. Standard of review
7. Administrative review
8. Grievance Committee
9. Administrative Tribunal
10. Arbitration for contractual employees

C. Information and Communication

64. Laws and rules are respected and effective if those who are governed by them have full knowledge of them, are able to independently assess not only their content and applicability to their situation but also their reliability and fairness, and are able to pursue their working lives in expectation of fair treatment under them. Employees cannot be expected to conform to unknown requirements. The Fund issues and distributes a large volume of information on its personnel and administrative policies, but we observe that many employees do not have as full or easy access to, or understanding of, the relevant law of the Fund as is desirable. "Access," in the sense that we are using the term, has several aspects. It means that the rules are clearly written; that all relevant information is kept up to date; that the information is organized and readily available; and that employees can easily obtain it when needed.

1. Availability and Organization of Information

65. As noted in the Seventeenth Annual Report of the Ombudsperson on December 13, 1996.

> *"It is ironic that an organization that emphasizes the value of transparency to its member countries has been so slow to recognize the value of transparency in its own personnel policies and practices. Shortcomings in the flow of information impede the operation of any market and there is clearly a value in having immediate access to high quality, comprehensive and timely data. Like the markets, staff members and employees are more productive and efficient when the rules and policies affecting their careers are clearly stated, up to date and immediately accessible."*[35]

66. Considerable progress has been made in recent years to improve this state of affairs. Even so, the substantive "law" governing employees and dispute resolution within the Fund is not yet sufficiently clear or readily accessible to employees. The effort to place information on the Fund's intranet and to consolidate information in pamphlets on the Code of Conduct and Administrative Tribunal are good examples of what can be done. However, the Fund has a wide array of rules that govern employee conduct, the requirements for benefit claims, and procedures for appeals or other forms of redress. Various aspects of the Fund's "law" are furnished in the N-Rules, GAOs, the Code of Conduct, numerous Staff Bulletins, Administrative Circulars, the Terms of Reference of the Ethics Officer and Ombudsperson, booklets on various benefit programs, announcements, and more. Much of this material on substantive and procedural rules still needs to be consolidated, with related matters cross-referenced, and with the relative status of each element of the rules and regulations clearly defined.[36] As this material is not sufficiently accessible, it is more difficult than need be for employees to understand and comply with Fund law. The multitude of material can also give rise to unnecessary concern among staff that 'the law' is not always applied consistently or equitably, or that staff are not equally able to take advantage of provisions in the law that may be favorable to them.

67. We urge better access to the law of the organization through distribution of all rules and policies, consolidation and publication of up-to-date and comprehensive information on the intranet of full text, cross-referenced and linked to original sources. The Fund's *Benefits Summary of the Medical Benefits Plan*[37] is an example of how complex material can be summarized on the web with appropriate hyperlinks to provide employees with the full information that they need.

---

[35] Ombudsperson Lynn Blatch, pp. 11–12.

[36] It is not clearly understood, for example, whether the Code of Conduct in itself constitutes a "law of the Fund" or it only draws together and explains "laws" that are established elsewhere (e.g., in the N-Rules and GAOs). There accordingly appears to be some confusion whether a staff member can be charged with misconduct for violating the Code of Conduct or only for violations of the underlying rules described in the Code. It is desirable that this be clarified and staff informed accordingly.

[37] Issued on May 1, 2000.

68. We recognize that reliance on paper documents in the past has made it difficult, time consuming, and costly to provide the access and linkage that we propose. We also recognize that some retired employees, pensioners, and their families participating in the SRP and the Medical Benefits Plan (MBP) who are still dependent on information through paper documentation may not use the Internet or have access to the Fund's intranet. But the ready availability of computer access within the Fund, even for those on overseas assignment, and the increasing universality of such access away from the workplace makes it essential that the new technology become the standard, and that those not so equipped be encouraged to join the trend. We recommend that HRD provide different forms of access to information about changes in employment policies, including CD-Rom, password-protected Internet access, or assembling a hard copy compilation and specific ad hoc notification to those retirees, pensioners, beneficiaries, and dependents for whom Internet access is not a realistic option.[38]

2. Communication of Changes in Policies and Procedures

69. We also urge that any administrative interpretations or applications of policies and procedures by HRD, which might be applicable to employees similarly situated in subsequent cases, should likewise be made generally known to staff on a timely basis. This may be done on the intranet, by e-mail, through desk-to-desk distribution of Staff Bulletins and Circulars, or otherwise.

70. More specifically, provision should be made for timely notification to staff, generally, of changes to the substantive rules, policies, practices and procedures, and of changes to HRD's administrative interpretations and/or application of policies and procedures, which would apply in subsequent cases. Such information should include incremental changes that arise in the course of HRD's ongoing administration in response to individual cases and/or in addressing new or different situations, and through reaction to appeals and grievances. It should also include timely notification of the outcomes of any dispute (including those reached during administrative review or subsequently) that may result in changes in the interpretation or application of the rules; abstracts of all arbitration awards; all Reports and Recommendations of the Grievance Committee; information on the Managing Director's decision on the Committee's recommendations; and the judgments of the IMFAT that are already available on the Internet. Due care should be taken to avoid descriptions that could identify any individuals involved in any cases.

71. For reasons indicated in the following section (see the discussion of decision-making), we endorse HRD's approach of strictly limiting exceptions to its benefit and other personnel policies. Exceptions, which reflected variations in the interpretation or application of rules, may be viewed as a change in the law of the Fund. The provision of information on the possibility of exceptions to policies and procedures, where applicable, can help to

---

[38] See *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT 2001-1, March 30, 2001.

increase transparency in the application of procedures, to build understanding among staff, to provide guidance for staff member's future conduct, and to counter allegations that exceptions are granted on the basis of favoritism. For the same reason, we believe there is a need to communicate the outcome, insofar as it has an impact on the interpretation and application of the rules, of matters that are submitted to administrative review. There is normally a need for confidentiality in negotiated settlements reached between the parties to a dispute; however, there may need to be some constraints on the scope of off-the-record settlements in the interests of transparency, to protect the Fund against a charge of favoritism and to limit the scope of grievance-driven policy change.

3. Timely Information on Procedures for Claims and Appeals

72. Providing timely notification to employees of actions that they must take, and of decisions reached by the Fund on their requests, claims, and appeals are important elements of both sound HR administration and dispute prevention. An appropriate balance regarding notification needs to be maintained, however, between the responsibilities of the Fund and those of the staff. As a general guideline, the Fund should bear responsibility for notifying employees, retirees, and dependents of the deadlines for filing claims, appeals, or protests. But once notified, the responsibility for taking action within the prescribed time shifts to the individuals who have been notified**.** While we found that the Fund provides appropriate notice of deadlines and procedural requirements in many cases, we are aware of others where effective or sufficient notice appears not to be provided. The Fund's ongoing efforts to automate most benefit claims on the intranet will provide an opportunity to implement more systematic notice of requirements to staff, but until those efforts are further advanced, the Fund should identify and fill in any gaps that exist at this time. When relevant information becomes readily accessible, it also becomes reasonable for the Fund to shift more responsibility to employees to research their own entitlements.

73. One area in which we believe the Fund has had, and should continue to have, direct responsibility for timely notification is the provision of information on rights of appeal and the procedures to be followed in appeals. Whenever requests or claims by staff are denied by the Fund, the advice on the decision should routinely include information on procedures and time limits for filing appeals of the Fund's decisions, and the channels to be used. In the case of staff who usually have ready access to the Fund's intranet and the applicable documents on appeals, this information may be limited to instructions on where to find the relevant information on rights and procedures for appeals. However, the burden on the Fund of providing full information is greater when the denials of request or claims are made to retirees, dependents, or others who cannot be expected to have the same degree of knowledge as staff about Fund procedures or easy access to the relevant sources of information. In these

cases, we urge the Fund to provide full and timely descriptions of the applicable policies and procedures on appeals.[39]

D. Dispute Prevention as an Objective in HR Policies and Procedures

74. We have already identified clear communication of relevant information as a vital aid in helping to prevent workplace disputes from arising. We also consider that there are some other areas in which the Fund's rule-making systems and procedures could be improved, thereby reducing the likelihood of problems and forestalling disputes. First, the SAC should be involved in the formulation, consideration, and approval of appropriate policies and rules, and be assured of continued consultation by all departments on matters affecting staff interests. Second, we believe that HRD should systematically review the Fund's policies and procedures to identify provisions that most often give rise to disputes and to consider changes that would reduce the frequency of avoidable conflicts.[40] We discuss two specific topics that have been identified as sources of conflict with some suggestions for avoiding disputes arising from these issues: annual performance reviews and access to and retention of personnel records. Third, we have identified certain characteristics of the Fund's decision-making on human resources and administrative matters that can give rise to avoidable disputes and/or to concern among staff about the fair and equitable application of rules. The recent reorganization of HRD should enable it to systematically identify policies and procedures that might give rise to disputes, as well as to strengthen its information and communications activities.

1. Staff Consultation and Relations with the Staff Association

75. One of the strongest assets available to the Fund in any effort to prevent disputes is that it is able to rely on the SAC not only to communicate with employees, but more importantly as the voice of the employees when considering the development of new rules and policies that will apply to them. It is a general principle of international administration that a sound and efficient staff association is essential to good staff relations and that consultation with staff representatives in public sector organizations is important.[41]

76. The Fund has a number of long standing institutional arrangements concerning its relationship with the SAC. These include the Fund's consultation with the SAC on certain important appointments. Article VII 1.a of the Statute of the Administrative Tribunal, for example, provides that "The President shall be appointed for two years by the Managing

---

[39] See *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT 2001-1, March 30, 2001.

[40] As the IMFAT has no jurisdiction to review pre-1992 "regulatory decisions," there is an increased need for the Fund to review those rules and regulations that were adopted before 1992 but still form part of the legal framework governing the employment relationship with staff.

[41] *Connolly-Battisti*, ILOAT Judgment No. 403 (1980).

Director after appropriate consultation with the Staff Association and with the approval of the Executive Board."[42]

77. The Fund has also afforded the SAC certain facilities to enable members of staff to exercise their freedom of association and to facilitate disclosure of information to, and consultation with, the staff.[43] It is, in any event, a principle of international law that an international organization ought to have an efficient association to represent staff interests.[44] The arrangements customarily granted to staff associations in international organizations tend to include the provision of office space and payroll deduction of members dues. The members of a staff association are also entitled to reasonable time off to fulfill the work of the association.[45] In some international organizations, but not in the Fund, these arrangements are incorporated into collective agreements,[46] but they do not need to be in order to be binding on the employer.[47] They are not privileges that can be withdrawn at will; withdrawal must be "properly justified" after consultation with the staff association itself.[48]

78. We note that management, HRD and the Technology and General Services Department (TGS) regularly consult the SAC on a variety of issues, and that SAC

---

[42] Section 2.01.1 of GAO 31 designates a similar arrangement for the appointment of the Chairperson of the Grievance Committee; much the same applies to the appointment of the Ombudsperson (Section 1 of the Ombudsperson's Terms of Reference. We understand that the SAC is regularly consulted on management appointments of Plan participants to the Pension and Administration Committees of the SRP. The SAC was also represented on the panel that recommended the appointment of the IMF's Ethics Officer. The SAC is cited in different ways in Fund documents: the IMFAT Statute refers to it as a Committee, but the GAO cites it as an Association. We are not convinced that anything turns on this distinction.

[43] Rule N-14 provides that "persons on the staff of the Fund shall have the right to associate to present their views to the Managing Director and the Executive board, through representatives, on matters pertaining to personnel policies and their conditions of service."

[44] The ILOAT held in *Garcia No. 2, Marques No. 2*, ILOAT Judgment No. 496 (1982) that "the organization does not provide facilities purely out of benevolence but because it is in the interest of the organization that the functions which the association discharges should be fully and competently performed. Facilities should be granted only when it is in the interests of the organization that they should be; likewise, they should be withdrawn, wholly or in part, only when the withdrawal is in the interests of the organization."

[45] See *Connolly-Battisti No. 7*, ILOAT Judgment No. 403 (1980), and *Van der Ploeg*, ILOAT Judgment No. 54 (1961).

[46] For example, the World Bank Staff Manual summarizes consultation with the staff representatives in relation to specific topics, and it summarizes the form of the consultation; in the ILO, facilities are incorporated into a collective agreement with the ILO Staff Union.

[47] *Baillet, Carvantes, Cook No. 3*, ILOAT Judgment No. 1547 (1996).

[48] *Garcia No. 2, Marquez No. 2*, ILOAT Judgment No. 496 (1982). See also *De Padirac No. 2*, ILOAT Judgment No. 911 (1988), ruling that even though there was no duty to negotiate the provision of facilities to a staff union, general principles compelled consultation.

representatives are often included in working groups or committees that consider issues of concern to staff members. However, we recommend that the SAC should be consulted regularly by all departments, not just HRD, and either included in or consulted by all inter-departmental working groups on matters that affect staff interests, terms and conditions of employment, and working conditions. Reliance on such inclusion would reassure departments that undertakings are done with contribution from those to whom they will apply, at all stages of formulation, consideration and approval.

79. This inclusive approach will minimize subsequent disputes over policies that were not thoroughly explored or understood. It will also include the SAC as a vehicle for bringing home to employees the requirements and expectations of such new rules or policies. The consultation should be on the formulation of new policy and changes to existing policy, and we suggest that it should be at an appropriate time and level and to allow the SAC to formulate an opinion on the issue in question and to secure a timely response from the Fund with a view to securing accord.[49]

80. We also consider that SAC participation should extend to discussions of employment and compensation policies in appropriate committees of the Executive Board, particularly the Committee on Administrative Policies. The present practice of allowing a SAC representative to attend appropriate meetings of the Executive Board on compensation and benefits issues (as well as certain other issues, including discussion of Fund policies on domestic partners) should be broadened to encompass other personnel issues. Rule N-14 should allow SAC to attend meetings, to present its views and to partake in the discussions on issues of compensation and personnel policies, rather than merely remaining (after an initial presentation) as a silent observer only in compensation matters.[50] Although the SAC does not have formal representational authority conferred upon it by a majority of the staff, its large membership throughout the Fund does carry with it the entitlement to speak on behalf of its members.[51]

---

[49] And to exercise its discretion whether to consult its members and other employees and how this should be done. The SAC will in certain circumstances have a duty of confidentiality toward the Fund but be under a correlative duty to disclose information to its own members. This tension will have to be resolved on a case-by-case basis unless staff regulations or rules have been established, which is the case in the World Bank, to deal expressly with these arrangements.

[50] Practices vary in other international organizations. The World Bank allows substantial Staff Association participation—including interventions after their initial statement—in Board Committee and full Board meetings on compensation and other HR matters.

[51] See *Roderick Dunnett v European Investment Bank* Case No. T-0192/99 Court of First Instance of the European Communities 3rd March 2001, concerning the Bank's duty of timely good faith consultation with employees on matters "of financial advantage". The duty arises from a consideration of the relevant interests of the staff not merely on whether they have an actionable right based on a particular statute. See §98–§106.

2. Decision making on Human Resources Matters

81. The Fund's policies and procedures on the conditions of employment and benefits, which are administered centrally by HRD, are complex and written to address an unusually wide range of situations that can arise when dealing with a multinational staff. Some flexibility in the interpretation and application of the various rules is undoubtedly necessary in these circumstances, but such flexibility carries with it the potential for inconsistency. Indeed, a number of staff suggested to us that some policies were applied inconsistently or on the basis of favoritism. These were typically those where HRD staff and/or management have the greatest degree of discretion in their decision-making. (The funds for separation benefits are an example.)[52] We cannot judge the validity of these complaints or whether the problems are widespread, but we did observe that this issue has been raised in other studies and reports (e.g., the Staff Survey and Ombudspersons' reports). Perceptions, if not the fact, of inconsistency are sufficient to produce disputes over the implementation of personnel policies, because differences in treatment easily lead to perceptions of unfair treatment.

82. Because we support the overarching principles of legal certainty and equal treatment, we endorse HRD's approach of allowing exceptions to its personnel policies only if there are compelling circumstances and if the exception would not be contrary to the purpose of the rule. There is an aspect of this approach that needs to be emphasized. Once an organization has enunciated a "no exceptions" policy, it is critical that it be applied consistently. If employees perceive that the policy is applied selectively, with some exceptions continuing to be made but others being barred on the basis of the policy, the credibility of the organization's human resources management can be seriously damaged. It is important for the Fund's management and HRD to guard against this eventuality.

83. Another troubling aspect of decision-making on benefits and other personnel matters that may lead to inconsistencies, in fact or in appearance, and thus to disputes, is a tendency for employees to "shop around" for a favorable decision after they have been denied the result they desire. Middle-level HRD officers often make initial decisions on personnel matters. Although there is clear provision for dissatisfied staff to appeal such decisions to the chief of the division in question, we understand it is not uncommon for employees to raise the matter with a number of more senior personnel, some of whom have no direct responsibility for, or even knowledge of, the point at issue. Such efforts, though understandable, should be discouraged and senior officials and management should resist the temptation to intervene on this basis. It is not unknown for there to be tension between line managers supervisors, and personnel managers, and intervention by senior officials may give rise to the perception of unjustified favoritism. Senior officials should, instead, refer the matter back to the officers or division chief with direct responsibility for the decision.

---

[52] However, regular reports on the use of these funds are provided to management and, with names omitted, to the Ombudsperson and the SAC.

84. Although such interventions will never go away entirely, they may be better controlled if the Fund specifically designates and clearly identifies the official(s) who has the authority to make decisions interpreting and applying rules relating to conditions of employment and substantive benefits. To the extent that exceptions are permissible, the official(s) with authority to make them should also be designated. For example, if the issue concerns a claim to a benefit, this would appropriately be the individual officer in the HR Services Division (or the Compensation and Benefits Division), the chief of that division, and finally (for exceptions), the Director, HRD.

3. Specific Sources of Conflict and Disputes

85. Our examination of the Fund's HR policies and procedures and our consultations with staff indicate that certain policies lead to disputes and conflict, which may not always be expressed openly. Some of these could be avoided through either revisions to the policies or through more consistent implementation of the policies. We believe it would be desirable for HRD to review its policies and procedures, to identify those that have actually generated disputes, and to consider revisions to reduce avoidable misunderstandings or conflict. Although such a review of HR policies and procedures is beyond the scope of our study, staff expressed sufficiently strong concerns to us about two areas that we believe deserve comment. These concern annual performance reviews and the partly related question of access to and the retention of personnel records.

a. *Annual performance reviews*

86. The Fund's performance management process is, in formal terms, a very good system indeed. It requires managers to set expectations of performance with their staff, to coach, monitor, and review that performance and to document and discuss problems with staff. The Fund also provides a number of resources for supervisors and staff, including a Performance Management Handbook, training in the management of performance, and coaching and counseling for supervisory staff. However, our review has shown that the guidelines in the Performance Management Handbook are unevenly applied, and this has led to legitimate perceptions of unfairness. Moreover, several annual reports of different Ombudspersons have indicated that the Annual Performance Review (APR) presents significant problems, and these reports were echoed in a high proportion of questionnaires completed by staff who left the Fund during 1999 and 2000. A central concern involves timely notification of performance problems.

87. The Fund's Performance Management Manual requires managers and supervisors to give subordinate staff timely notice of any shortcomings in performance so that they can discuss the issue or clarify a misunderstanding while the matter is fresh, and to correct against false or inaccurate information or accusations. The Handbook succinctly notes:

> " . . . *it is critical that any areas of performance not fully meeting the required standards be addressed immediately. Experience suggests that timely*

> *intervention can bring about significant improvements in staff member's performance*."[53]

88. The Administrative Tribunal of IDB has also provided the following opinion on the importance of timeliness:

> *"The absence of timely information also infringes the basic right of the staff member to know the reasons for administrative decisions affecting his legitimate interest. If the staff member is unaware of the reasons for his rating, this hinders his ability to object to error or fact or law, mistaken conclusions, improper motives or discrimination. Notice, together with the right to be heard, goes to the essence of the principle of fairness in international administrative law."*[54]

89. By identifying performance difficulties at an early stage and taking steps to correct them, productivity is enhanced and the likelihood of problems and disputes is reduced. By promptly and correctly addressing such difficulties, managers will signal to the rest of the staff that weak performance will not be tolerated.[55] However, it appears that in many departments performance management is undertaken during only the APR. The most common specific complaints we heard in interviews with staff echoed those reported by the Ombudspersons: the APR was unfair because supervisors include criticisms of behavior that had occurred much earlier in the year but had not previously been discussed with them.[56] Other specific complaints were that managers at headquarters do not always give sufficient weight to the views of mission chiefs, and that appraisals sometimes include hearsay comments from managerial/supervisory personnel who are not identified. In consequence, the APR process may be marred by disputes between a supervisor and employee about the relevance or veracity of an observation. On the other hand, and more positively, the Fund's Senior Advisor on Diversity notes that the form for completing the APR has "been revised to leave less room for subjective, biased assessment and language."

90. Even though some staff said they thought the process or the final Review document was unreliable and therefore unfair, the personal costs of challenge were consistently identified as too high.[57] Because the process may involve competing subjective perceptions

---

[53] The Performance Management Handbook: Approaches and Options, July 1999, p. iii.

[54] See IDBAT *Castaneda* Judgment No. 34 (1993).

[55] Paraphrased from the *Performance Management Handbook: Approaches & Options*, prepared by Staff Development Division HR Department of the IMF, January 2000, p. iii.

[56] We include here current and past members of the SAC as well as individual employees, SPMs, and various individuals within HRD.

[57] Leena Lahti, *IMF Diversity Annual Report 2000*, p. 2.

of the rater and the ratee, an employee who seeks to challenge the evaluation faces a high threshold. At present, GAO No. 31 indicates that a staff member should demonstrate that the manager's assessment was "arbitrary and capricious or discriminatory." Visa and tenure concerns, and fear of adverse impact on career prospects were often mentioned as influencing the silence of employees, even when staff felt that they had valid grounds to challenge the APR.

91. The panel was made aware of complaints that many managers do not adhere to the obligation, which is set out clearly in the Fund's *Performance Management Handbook*, to provide timely oral or written notice to employees of inadequate performance and to give staff an opportunity to respond orally in writing. Given these concerns, at a very minimum, HRD's efforts to require continual feedback by supervisors and to require timely notice of performance issues should be reinforced. Employees can scarcely be held accountable for matters that were never brought to their attention and misunderstandings and differences are much more likely to arise if the problems are raised long after the fact. We do not recommend "management by memo," but we do urge that if a supervisor anticipates that an aspect of a subordinate's performance, particularly if uncorrected, would have an adverse impact on the overall assessment in the APR, the superior should certainly draw the staff member's attention to it, note it in writing, and give a copy to the individual concerned. We also believe that supervisors should be held accountable up the line if they fail to provide timely notice of performance problems or to follow the prescribed APR procedure, and that staff should be reminded that supervisors have a responsibility to provide candid feedback, including commenting on those aspects of performance that could be improved or strengthened. This approach should reduce some staff anxiety about the process and the frequency of surprises during the APR exercise.

b. ***Retention of and access to personnel records***

92. The adverse impact of any shortcomings in the objectivity or fairness of performance reviews is exacerbated by the fact that the APR is perceived by some staff to be a permanent part of employee records. Staff are concerned that an adverse APR travels with them throughout their careers, and that adverse notations may be relied on many years later when reassignments are sought. Similar concerns were also expressed to us that incidents involving misconduct and disciplinary matters remain on file long after they have ceased to be relevant and that these records cast a cloud over future progress within the Fund.

93. Notwithstanding that some employees have told us of old incidents continuing to hamper their career progress for an extended period, we understand that no supervisors, including those who are considering staff for a position or promotion, can access Performance Appraisal Forms that are more than three years old. Moreover, documents relating to misconduct and disciplinary actions are kept in separate, locked, confidential files in the Office of the Director of HRD who alone has access to the files. To the extent that there is a disciplinary action that relates to the employment status or pay of the individual, the action itself (e.g., placement on leave, separation, change in pay) would be reflected in the personnel file (the chronological listing of grade and pay). However, the details of the

basis for action remain in the Director of HRD's confidential files, referred to above, and not in the personnel records. Furthermore, actions relating to an individual's employment status or pay may be taken for a number of different reasons unrelated to conduct. It certainly cannot be assumed, therefore, that a particular action recorded in the personnel record (chronological listing) is a disciplinary one. We also understand that HRD staff are required, upon their appointment, to sign an Affirmation requiring them to maintain the confidentiality of information to which their positions give them access. These are all appropriate safeguards.

94. To the extent that information about misconduct or poor performance from long ago travels with a staff member throughout what may be a lifetime of otherwise unblemished employment in the Fund, we consider it may have an unfair adverse impact. This is an issue that is faced by many employers, and there is always tension between the desire to wipe the slate clean when the passage of time has reduced the relevance of performance issues or rules infractions and the potential need for historical records for dealing with recurrent performance problems or misconduct (e.g., repeated incidents of harassment).

95. Some employers, including several international organizations, have a "washout" practice that provides for certain records to be deleted from all personnel records after a period of time.[58] This practice reflects a recognition that the relevance of records of individual misconduct declines over time, and if the behavior that gave rise to the record has been corrected or no longer exists, the potential harm to the individual of continued retention of the record outweighs any institutional benefit to the organization. Although we believe that, as a matter of principle, a staff member's slate should be considered as wiped clean after an appropriate interval, we acknowledge that employers need some latitude to find the right balance between the retention of potentially relevant records and the removal of dated and irrelevant information.

96. In the case of **misconduct**, we prefer and recommend that the Fund consider adopting a policy that allows records of minor wrongdoing to be excised from personnel files when the

[58] In the Council of Europe no reference to a disciplinary measure may remain in the personal administrative file of the staff member after two years in the case of written warning or reprimand, and after six years in the case of other measures except removal from post. In European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT) disciplinary sanctions, except for removal from post, must be deleted from the personal administrative file after three years at the request of the staff member. In other organizations, such as the European Union (EU), the EPO and European Organisation for the Safety of Air Navigation (EUROCONTROL), a staff member may request removal from the file, after three years in the case of written warning or reprimand, and after six years in the case of other measures, but the administration must make a reasoned decision accepting or rejecting the request. In the ESA, a staff member may request that a record of a warning, reprimand or postponement of advancement be deleted from his personal file after three years; if the Director General does not reply within 30 working days the request shall be considered as granted. In European Organization for Nuclear Research (CERN), the disciplinary board must include in its recommendations to the Director General the period, which shall be at least five years, after which all trace of disciplinary action shall be removed from the personal file. The final decision of the Director General imposing the disciplinary sanction must specify the period after which all trace will be removed from the file.

nature of the offense and/or the passage of time eliminate their continuing relevance. Specifically, we would support a policy that would allow an individual staff member to ask HRD to expunge a record from his or her file after a specified period of time.[59]

97. We have been given to understand that the Fund may prefer to retain information on misconduct involving offenses other than those of the most minor nature. We acknowledge that records may be essential to determine whether future offenses may involve recidivism or recurrent conduct about which the staff member has already been warned or disciplined. If records on misconduct are retained for these purposes, we recommend that the Fund should reinforce its present practices of segregating this information from the general personnel files of staff, tightly restrict access to the information to only officers with a clear "need to know," and require specific senior-level authorization for such access and for any use of the information.

98. Regarding **performance reports**, the Fund's current practices of withholding dated reports from departmental managers and Fundwide committees considering staff for positions and/or promotions are reasonable measures, but we believe that the strong concerns of staff about the continuing effects of long-ago events require the Fund to go somewhat further and to establish formal procedures to sequester these reports. This could be accomplished by regularly transferring dated reports—we suggest those older than three to four years—to the Fund's archives, and by requiring specific senior-level authorization for retrieving any archived reports in the event that valid reasons (e.g., a staff member has raised matters discussed in the reports in a grievance) subsequently require reference to them.

99. Regardless of the specific approach taken by the Fund with respect to both performance reports and misconduct, it is important for HRD to clearly establish rules governing retention and access to such information, to fully inform, and periodically to remind, all Fund staff of these rules, and to regularly reinforce its measures to ensure that HRD staff who do have authorized access to this information respect its confidentiality.[60]

E. Ombudsperson

100. One of the most successful components of the dispute resolution process within the Fund has been the operation of the Ombudsperson's office. It has been an open, readily available, and confidential source of support for employees, and occasionally managers, seeking answers to questions, assistance in resolving problems with supervisors, and overcoming conflicts between employees. Although the five persons who have held the

---

[59] In our view, an appropriate period for the retention of most adverse information is three years, as applies in the European Union and a number of other international organizations, but specific periods may vary for different types of information and in accordance with the severity of the matter in question.

[60] Section 11 of GAO No. 33 should be revised to reflect present practices and any modifications in these rules. The present GAO simply notes that "a written record of any disciplinary action imposed on a staff member shall be retained in his personnel file."

Office have taken different approaches and had different styles, we understand all have been effective. All those whom we interviewed within the Fund had high regard for the present Ombudsperson and her effectiveness in fulfilling her responsibilities. She has done a great deal to resolve disputes at an early stage, minimizing the need for employees to undertake formal grievances. Indeed, the paucity of complaints that find their way into the formal processes is, we believe, in large measure a testament to the effectiveness of this informal and confidential office. We believe there are a number of ways in which the effectiveness of the Ombudsperson's office can be further enhanced.

1. Deadlines and Time Limits

101. There should be greater flexibility on the processing of cases that are submitted to the Grievance Committee. At present, the statute of limitations for submitting a complaint to the Grievance Committee remains fixed, regardless of any efforts to resolve a complaint within the confidentiality of the office of the Ombudsperson. Certainly those deadlines are an important stimulus to resolving disputes and ensuring that complaints are resolved in an expeditious manner and are not allowed to drag on unnecessarily. However, if at any time during the grievance process there is a good faith effort at settlement taking place, including involving the Ombudsperson, the parties should be willing—indeed, encouraged—to agree to suspend the applicable time limits for the next stage of the grievance process. We suggest that such suspension should run only for as long as the Fund and the employee are willing to participate in settlement discussions. Time limits should therefore resume running from the date one or the other party notifies the other that it has ended the discussions. We would also encourage both HRD and staff members to refer matters to the Ombudsperson during administrative review, and we urge the Grievance Committee to likewise encourage referrals to the Ombudsperson while disputes are before the Committee.

2. Coaching, Counseling, and Other Assistance

102. Interpersonal disputes that arise between employees of different national origins and ethnic groupings constitute a troubling and potentially damaging source of problems for the Fund and, of course, to the individuals. For the office of the Ombudsperson, they provide a unique opportunity for seeking accommodation and resolutions that will maintain or even increase harmony among the staff. Although the Ombudsperson does occasionally facilitate resolution of disputes between peers, we believe the mixture of ethnic, class, social, religious, gender, and racial features of some workplace relationships may make them better suited for facilitation by mutually agreed specialist mediators or counselors.[61] We propose that the Ombudsperson or the Chair of the Grievance committee be authorized to request HRD to arrange for such external assistance if they deem it justified and if the parties concerned are

[61] Although the requirements of institutional efficiency requires conflict to be managed, litigation is not the most appropriate forum. As the ILOAT put it in Judgment No. 550 *In re Glorioso* (1983) "Friction, in greater or lesser degree, is the inevitable adjunct of everyday life and to award restitution for every sort of emotional distress would be to invite ceaseless litigation. Only exceptional circumstances warrant compensation for such distress, and there are none in this case."

willing to entertain the process. That opportunity should also extend to recommending coaching assistance if such is deemed desirable.

103. Such assistance is now available to division chiefs and other senior staff on a limited basis and it now has a focus on managerial/supervisory development. We understand, however, that resources for the program are limited and that there is little flexibility in their use; on occasion, the program has been unable to accommodate proposals from the Ombudsperson to use such resources to resolve conflicts between colleagues and/or supervisors and staff. We urge that the resources available for the coaching program (or similar types of assistance) be expanded by the Fund, and that assistance be provided more flexibly to meet a wider range of circumstances. Conflicts between staff and their supervisors, for example, may require coaching/counseling for both managers and subordinates. Intermediate-level supervisors, who are not currently covered by the program, are equally likely (or perhaps more likely due to inexperience) to need assistance in dealing with conflict or disputes within their work units. The Ombudsperson is uniquely positioned to identify situations where coaching/counseling assistance could reduce or resolve conflicts. If the Ombudsperson recommends coaching, we would accordingly urge HRD to make every effort to respond flexibly and favorably.

104. Resort to the Ombudsperson is not limited to subordinates within the Fund structure. Some supervisory staff have approached the Ombudsperson to help resolve problems with their staff. More members of senior and mid-level management should take advantage of the confidentiality and effectiveness of the office of the Ombudsperson when they believe assistance would be helpful in resolving disputes with subordinate personnel or to recommend mediation between employees if they believe that that process would help to reduce workplace tensions or conflict. We suggest that HRD and management, together with the Ombudsperson, make greater efforts to ensure that senior staff and mid-level supervisors are aware of the Ombudsperson's capacity and willingness to consult with them in confidence. We recommend that the Managing Director continue the practice of having the Ombudsperson present and discuss her annual report in a meeting of the department heads; for HRD to arrange periodic meetings between the Ombudsperson and SPMs, as a group, for general discussions of her experiences and issues she has encountered; and for HRD to involve the Ombudsperson regularly in management development courses and seminars.

F. Ethics Officer

105. The Fund's status and function in relation to its member states and the international community generally, require it to ensure that it maintains the highest levels of integrity and ethical behavior among its staff. In recent years, the Fund has put in place a number of highly commendable programs to meet this requirement. It has adopted a formal Code of Conduct for all staff, and it has established a comprehensive (confidential) system for the disclosure of staff members' financial assets and transactions in order to prevent conflicts of interest with the Fund's operational or administrative activities, and to protect against any personal use of the economic and financial information to which staff have access in the performance of their duties. Key responsibilities for the Fund's ethics programs are vested in an Ethics Office to

which the first Ethics Officer was appointed in early 2000. HRD also has a role in advising staff on whether specific actions would be consistent with the Code of Conduct and in educating staff on ethics issues more generally.

1. Roles of the Ethics Officer

106. In order to achieve its goals of the highest level of integrity and ethical behavior, the Fund must educate its employees to ethical standards and procedures, make available a resource where employees may secure advice on questions concerning ethical issues, and investigate allegations of ethical impropriety. In the Fund, the Ethics Officer has responsibilities in all three of these functions, but others (e.g., the Ombudsperson and HRD) also play a role in some or all of these areas. In his first year, the Ethics Officer has devoted his greatest efforts to the investigatory role. Granting the legitimacy of this role, we question whether assigning the other two tasks to the same person is the best arrangement for achieving the Fund's goals. Our reservations about the appropriateness of combining these roles follow.

107. It is important for staff to be able to obtain confidential advice on ethical issues in a way that, in most circumstances, does not immediately open themselves to investigation.[62] Ethical training should also be an ongoing effort with frequent access to employees to bring them up to standard on ethical expectations and to acquaint them with those standards and the consequences of breach thereof. The efficacy of the Office may be undermined if the ethics officer has primary authority to initiate or recommend investigations. This investigative role is inconsistent with encouraging staff to seek advice or guidance as to what is best ethical practice. Staff may be reluctant to approach an officer for advice if he also has authority to investigate and prosecute breach. It is not in the Fund's interest for potential violations to be kept from correction by staff concerns about the possible risks of obtaining counseling on the matter.

108. We accordingly recommend that the responsibility for training and confidential counseling functions of the ethics office be conducted by a different person from the one who conducts investigations.[63] Combining the roles of investigator and counselor on ethical behavior may discourage employees from seeking guidance on whether particular behavior is likely to violate the Fund Code of Conduct and to elicit advice on how to correct behavior. The same is true of the training role. Although the investigator should be able to talk of his experiences, making him or her the principal trainer could restrict the ability of employees to ask questions freely during training without fear of investigation. It may also create role ambiguity for the Ethics Officer. This is particularly likely as the investigative role of the

---

[62] This may be particularly important in the period following the Fund's introduction of a fully articulated Code of Conduct and procedures on financial disclosure, and staff members need advice on remedying inadvertent prior violations.

[63] This is consistent with the practice in most of the international organizations that we examined.

Ethics Officer is currently better known. Recusal is not enough, and should not be used to thwart what might otherwise be an important investigation into alleged wrongdoing. Effectiveness in investigating unethical behavior should not override the need to assure employees of a helpful and confidential ear in resolving ethical dilemmas. Disclosure to the counselor on ethics—even in confidence—should not bar an investigation into misconduct initiated by the investigator on other evidence.

2. Conduct of Investigations

109. The Ethics Officer undertakes formal investigations of potential misconduct at the request of the Director of HRD or the Managing Director (or his designee).[64] The Ethics Officer may undertake preliminary investigations at his own discretion, but he may not proceed to a formal investigation without being authorized by the Ethics Oversight Committee or Fund management. The request for the Ethics Officer to undertake a formal investigation asks for him to prepare a report on the facts of the situation. In some, but not all, early cases he was called on for recommendations on disciplinary actions if he concluded that misconduct had occurred. We understand this was partly to assist HRD and Fund management in developing guidelines that would assist in applying disciplinary measures consistently. More recently, the Ethics Officer has not been asked to provide specific recommendations on individual cases. We endorse this approach and recommend that the Ethics Officer's reports to the Director of HRD and/or Managing Director be limited to no more than a finding of fact. The decision on disciplinary action that is taken as a result of the findings of such investigation is, in our view, a management function, which should be performed by the Director of HRD or Managing Director. These decisions are, in fact, taken by these officers, but it is important not to give the impression that there is a blurring of the important distinction between the investigative role of the Ethics Officer and execution of management discretion to "prosecute" alleged infractions of staff rules.[65]

110. In all cases, the staff member (with counsel if the staff member has a lawyer or another person if the staff member so requests) under investigation meets with the Ethics Officer and has the opportunity, but is not obliged, to provide information relevant to the case and to answer questions of the Ethics Officer. The information—written or oral—provided by the staff member is included in the formal report of the Ethics Officer. After receiving a report of a formal investigation of possible misconduct from the Ethics Officer, the Director of HRD (for A-level staff) or Fund management (for B-level staff) reviews the report. If the report concludes that misconduct has not occurred and the relevant official agrees with this finding, the case is closed. If the report concludes that misconduct has occurred and the relevant official concurs with the finding, the staff member is charged with misconduct under GAO No. 33. The staff member is provided a copy of the Ethics Officer's report and is asked to respond to the charge within a specific time frame. If requested by the

[64] Not all investigations are undertaken by the Ethics Officer; some are handled by HRD.

[65] Section 10.02 of GAO No. 33.

staff member, the Director of HRD (or her designee) or the Managing Director (or his designee) meets with the staff member. After receiving the staff member's response, the relevant official reviews it. If the response contains new information, the Ethics Officer will be asked to further investigate the issue. A copy of this report is also provided to the staff member, who has the opportunity to make additional comments.

111. After reviewing all the relevant information, the Director of HRD (or the Managing Director) makes a final determination, consistent with the procedures set out in GAO No. 33. If it is concluded that misconduct has occurred, the staff member is informed of this in writing and also informed of the disciplinary action to be taken. If the relevant Fund official concludes that misconduct has not occurred, the staff member is so informed and the case is closed. Consistent with our recommendations regarding the disposition of personnel records, the record of the investigation should either be expunged after an appropriate time or should be sequestered with access to it strictly controlled.

112. We generally endorse the above arrangements, which appropriately ensure that staff have the opportunity to respond in a timely manner to allegations against them. However, we note that the staff member at present has the opportunity to see and to respond to the full results of the investigation **after** formal charges are issued. Because the formal charge becomes part of the staff member's record, we recommend that the staff member be given the full report on the investigation and the opportunity to respond **before** the formal charge is made. [66]

113. We have two final recommendations regarding the overall function of the Ethics Officer:

- Our discussions with some staff indicate that they are not fully aware of the respective responsibilities of the Ethics Officer and relevant Fund officials with regard to misconduct cases. There are also some inconsistencies regarding the role of the Ethics Officer between his terms of reference and GAO No. 33 (which predates the establishment of the Ethics Officer function). We recommend that HRD and Fund management review and revise the GAO and relevant procedures and ensure that these materials are clearly explained to staff.

- Now that the Fund has gained some experience in this area, we would also recommend that HRD generally review the Terms of Reference for the Ethics Officer and specifically the procedures for ethics investigations to ensure that they meet the requirements of due process in all respects, and that investigative techniques are appropriate for dealing with the Fund's own employees.

[66] We suggest that the Fund review the sequencing of the investigation, sharing of the report, and charges to avoid duplication.

G. Scope of Grievable Decisions or Acts

114. GAO No. 31 restricts the jurisdiction of the Grievance Committee to complaints that allege that a staff member has been "adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service."[67] Article II of the Statute of the IMFAT similarly limits the jurisdiction of that body to an "administrative act" which may encompass "any individual or regulatory decision taken in the administration of the staff of the Fund." The meaning of an "administrative act" was further defined as follows in the Commentary on the Statute of the Tribunal:

> *"The Tribunal would be competent to hear cases challenging the legality of an 'administrative act,' which is defined as all individual and regulatory decisions taken in the administration of the staff of the Fund. This definition is intended to encompass all decisions affecting the terms and conditions of employment at the Fund, whether related to a staff member's career, benefits, or other aspects of Fund appointment, including the staff regulations set forth in the N rules. In order to invoke the jurisdiction of the tribunal, there would have to be a 'decision,' whether taken with respect to an individual or a broader class of staff identified in the application filed by the staff member."*[68]

115. We believe that this requirement could be clarified to ensure that two types of situations are addressed. The first is for failure to respond to a staff member's complaint or request for remedial action. The second is for reliance on informal practices, in the administration of policies and procedures. We propose clarifying and broadening the jurisdiction of the Grievance Committee and IMFAT to include disputes in both areas. However, before we take up these jurisdictional issues, we wish to consider the general question of discrimination in the Fund.

1. Discrimination

116. The Fund has devoted considerable time and attention during the last decade to possible sources and forms of discrimination in the Fund. These efforts included three broad studies—*Equity & Excellence: A Report by the Working Group on the Status of Women in the Fund* (May 1994), and *Discrimination in the Fund: A Study of the Nature, Extent, and Cause of Discrimination on the Basis of Race, Nationality, Religion, and Age* (July 1995), and *Discrimination in the Fund* (December 1995). Among the measures adopted to follow up on these reports were the appointment of a Special Advisor on Staff Diversity (1995) and the development of the Code of Staff Conduct (1998). In addition, the Fund undertook a discrimination review exercise in 1996 that was unprecedented among international organizations and rare among private and public employers. This exercise enabled any staff

---

[67] GAO No. 31, Rev. 3, Sec 4.01.

[68] *Administrative Tribunal of the International Monetary Fund*, 1994, p. 14.

member to request a review of any Fund actions that he or she regarded as discriminatory and to have had an adverse effect on Fund employment or career, no matter how far in the past these events had occurred.[69]

117. The Fund's management has clearly committed the Fund to prevent or, if need be, to remedy discrimination in any form. For example, the Managing Director issued the following statement in 1995:

> *"The Deputy Managing Directors and I are firmly committed to equality of treatment and opportunity for all staff, regardless of gender, race, religion, age, or nationality. If there are practices that have led to discrimination--however inadvertent--they must be stopped."* [70]

This commitment was reiterated in an additional statement by the Managing Director in August 1999:

> *"I want to take this opportunity to reinforce the Fund's commitment to meeting the objectives of equality of treatment for all staff and zero tolerance for discrimination on the basis of personal characteristics, including age, disability, gender, nationality, race, religion, or sexual orientation. I take discrimination very seriously and will not hesitate to take additional measures in the future, if required."*[71]

Finally, the Fund's 1998 Code of Conduct provides general guidelines for staff behavior. It provides that staff must show:

> *". . . courtesy and respect, without harassment, or physical or verbal abuse. You should at all times avoid behavior at the workplace that, although not rising to the level of harassment or abuse, may nonetheless create an atmosphere of hostility or intimidation. In view of the international character of the Fund and the value that the Fund attaches to diversity, you are expected to act with tolerance, sensitivity, respect, and impartiality toward other persons' cultures and backgrounds."*

---

[69] About 70 staff requested such reviews, which were conducted by panels comprising Fund staff and independent outside experts. These reviews led to remedial actions—including salary increases and promotions—in 32 cases. Eight staff members were dissatisfied with the outcome of the reviews and filed grievances; some of these have been resolved, and others remain pending in the Grievance Committee or before the Administrative Tribunal.

[70] See *Steps to Achieve Greater Diversity and Address Discrimination Among the Fund's Staff*, June 1995.

[71] See the statement of the Managing Director on the Discrimination Review Exercise, August 30, 1999.

118. Notwithstanding these straightforward statements (as well as considerable training efforts), we have found that there continues to be considerable misunderstanding and uncertainty among Fund staff regarding the range of conduct that may cause offence or may be perceived as discriminatory or harassing. We do not consider it entirely surprising that such uncertainty persists in an international organization with a staff as diverse as that of the Fund. "It is difficult to find a statement of the concept at once sufficiently abstract to be uncontroversial among us and sufficiently concrete to be useful."[72] The subject of that aphorism was justice, but it applies to discrimination as well.

119. By definition, discrimination involves behavior or actions taken (or not taken) by persons in authority on the basis of actual or assumed characteristics of other persons that are not relevant to the action in question. Some forms of discrimination are objectively determinable (e.g., a supervisor's overt refusal to promote staff from a particular ethnic or religious group) and generally understood as unacceptable, but others, grounded in different social and cultural standards of behavior, are more subtle and subjective. It is in this latter area that there appears to be some uncertainty about the range of acceptable conduct and conduct that may be perceived as discriminatory.

120. While we recognize that the Fund has already made considerable efforts and progress in preventing discrimination, we believe that managers and supervisors and staff must be educated in this area. While it is important to develop a common understanding of the forms and range of conduct that constitutes unacceptable behavior, it is equally important to ensure that staff are able to distinguish between discriminatory conduct and behavior that, even though it may be objectionable (e.g., poor management), is not necessarily discriminatory.

121. On the one hand, managers and supervisors in the Fund may not always understand that their decisions may have, or at least be perceived to have, discriminatory effects, intended or not. For example, the report, *Discrimination in the Fund*, explained:

> *"At the root of a number of complaints of discrimination is managerial behavior that indicated an absence of sensitivity or even a lack of good manners: a supervisor who chose to greet some members of his/her work unit and not others; or who discussed work assignments with only some of them; or who was seen to select people of a certain nationality or race for training opportunities so as to give some staff an edge on promotion possibilities; or told ethnic jokes in the presence of staff who were likely to be hurt by them."*[73]

122. On the other hand, staff who believe they have been adversely affected by a decision may assume that this was because of their status and, thus, discriminatory, but this may not be the case. A manager may, for example, assign a man rather than a woman to a mission for

---

[72] Ronald Dworkin, *Law's Empire*, 1986 Fontana, London, p. 74.

[73] *Discrimination in the Fund*, p. 35.

objective reasons of workload or the individual's skills, but the assignment could be perceived as discriminatory if it was believed that the decision deprived a woman of an opportunity for an important assignment on the basis of such considerations as poor living conditions in the mission country or the preferences of the national authorities.

123. If not addressed, actual and perceived instances and patterns of discrimination can result in continuing conflict and long-term morale problems for an organization like the Fund. It is important to recognize in this regard that staff members who believe, rightly or wrongly, that they have been discriminated against in the past may have lost confidence in the Fund's processes for dealing with staffing issues. They may be unwilling or unable, for example, to separate resentments based on their past experience from their present situation and to accept any critical feedback regarding their current performance. The Fund has a range of resources available to work with staff on these issues (e.g., the Ombudsperson, Special Advisor on Diversity, Advisors Against Harassment, and coaches for managers). We are confident that the Fund will continue its support for these programs and to strengthen them as needed. (We proposed in the earlier section on the Ombudsperson that additional counseling resources be made available and that the managerial coaching program be expanded.)

124. Staff who believe they have been subject to past discrimination may, in particular, have lost confidence in the Fund's dispute resolution processes, and they, as well as other staff with no prior personal experience of discrimination (or harassment) may be unwilling to make use of these processes. Our consultations with staff provide some evidence of this. Staff have conveyed to us their concerns that the Fund remains reluctant to acknowledge the existence of less than explicit forms of discrimination and that the dispute resolution systems are stacked against them. Certain aspects of the current processes are also perceived as unduly intimidating, which deters their utilization.

125. A number of our recommendations focus, in part on these concerns. First, the proposals in this Section (on Duty to Act and Informal Practices) are intended, as noted above, to clarify the jurisdiction of the Grievance Committee and IMFAT in ways that we believe will make these organs more effective in dealing with allegations of discrimination and harassment. Second, we propose in later Sections that the present focus and conduct of administrative review be revised to emphasize mediation and conciliation and to make it less confrontational, and that the current standard of review in the Grievance Committee (i.e., that a discretionary act must be found to be arbitrary, capricious, or discriminatory) be modified to focus it more on the content of a decision and the process by which it was taken rather than its characterization. Third, we open the door to resort to the Ombudsperson and to mediation or counseling at any stage in the process to help resolve the personal misunderstandings and conflicts that may be viewed as discriminatory. We believe that these changes would lower current barriers to staff bringing grievances into the formal dispute resolution process.

2. Duty to Act

126. The efficacy of a dispute resolution system is undermined if it does not allow consideration of a claim that the employer ought to have responded to an employee's request for action. Employers, including the Fund, have an implicit duty to implement the organization's stated policies or to maintain employment-related rights of staff. For example, the Fund has enunciated clear policies requiring equality of treatment and opportunity and proscribing discrimination and harassment. The Code of Staff Conduct (paragraph 19) also states that "managers have a responsibility to make themselves available to staff members who may wish to raise concerns in confidence and to deal with such situations in an impartial and sensitive manner." It is reasonable for the staff to assume on the basis of these statements, that the Fund has a duty to act and to respond with investigative, corrective or preventive measures.

127. Discrimination and harassment may not be immediately apparent; they may take place and adversely affect a staff member through a pattern of acts (or non-acts) in which no single incident or decision stands out as an overt violation of Fund policies or rules.

GAO No. 31 does not provide that managerial inaction would constitute a "decision" or "act" that would give the Grievance Committee (or Administrative Tribunal) jurisdiction.[74] However, in our view, the refusal or failure of the Fund to take appropriate action in cases of discrimination or harassment after a staff request to do so would constitute a "decision" or "administrative act" that could be challenged by the affected individual under the jurisdiction of the Grievance Committee and the IMFAT.

128. Before a failure to act can give rise to a grievance, the staff member would need to notify the Fund of the alleged duty and violation and to request the Fund to take action to remedy the situation. The request may be for an investigation into the matter; for an admission that a right has been violated; for prospective relief or for redress for past failure to act. Failure to so respond within a reasonable time constitutes a "decision" for purposes of triggering the jurisdiction of the Grievance Committee.

129. If this failure to act or to apply the rules in a correct or non-discriminatory manner to the staff member persisted over a long period of time, the staff member would not be barred from bringing a grievance at any time, even if this inaction predated the applicable time limit or statute of limitations. The concept of a "continuing violation" has been recognized by the Grievance Committee in interpreting GAO No. 31. It provides that certain actions or failures to act are considered to fall within the scope of a violation that is continuous or recurring, such as the failure to promote, wrong assignment or incorrect classification of work. In such

[74] This differs from explicit "acts" over which the Grievance Committee clearly has jurisdiction under GAO No. 31, such as the failure to respond to an application for a benefit or to respond within prescribed time limits to a request for administrative review. But see *Carballo*, ILOAT Judgment No. 1633 (1997) for consideration of circumstances in which failure to respond amounted to a decision.

cases, a staff member could file a grievance (within the time specified) after the first occurrence of the alleged violation or after any later repetition or recurrence of the action or behavior that is the subject of the grievance. The underlying premise for this proposition is that a repeated or continuous breach of a right should be given the same status as if it were occurring for the first time. In such cases, the required time limits are construed to allow a person to file a grievance that would otherwise be out of time. However, even though the merits of the grievance could be considered, in the light of the time limit for initiating grievances, there remains a limitation on any remedy that could be recommended by the Grievance Committee or ordered by the IMFAT. Therefore, if the Grievance Committee considered a complaint to be well founded, relief could only be backdated to the beginning of the applicable statutory period before the grievance was filed.

3. Informal Practices

130. The IMFAT statute Article II, Section 2) gives the Tribunal jurisdiction to review individual and regulatory decisions, the latter either directly or in the context of a review of an individual decision based on the regulatory decision. GAO No. 31 Section 4.01) similarly gives the Grievance Committee jurisdiction over "a decision that was inconsistent with Fund regulations governing personnel and their conditions of service." Thus, jurisdiction in both cases requires staff members to point to a specific "decision."

131. In 1996, The IMFAT considered a case that raised the following question: [75] does a "practice" that has evolved informally in the administration of Fund policies and is applied in individual cases constitute a "regulatory decision" within the meaning of the Tribunal's statute? The IMFAT observed:

> *"It is clear that for a practice to constitute a regulatory decision there must be a 'decision.' That decision must have been taken by an organ authorized to take it. However, the evidence in these proceedings shows that the practice [in question] was never decided upon by the Executive Board, the Managing Director, or the most senior officials of the Fund. The practice is distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund. Rather, at the time that that practice was applied . . ., it was an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund. In view of these uncontested facts, the Tribunal is unable to regard the practice in question as flowing from or constituting a regulatory decision. This being its conclusion, it follows that the Tribunal lacks jurisdiction to pass upon the practice as a regulatory decision, though it has found itself competent to consider the validity of the application of that practice . . . as an "individual" rather than a 'regulatory' decision.*

[75] *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent,* Judgment No. 1996-1 April 2, 1996

At the same time, the Tribunal finds it appropriate to observe that for the Fund to generate and apply a practice that affects . . . a substantial proportion of its staff, but which was and is largely unknown, may require the consideration of the Managing Director. It is clear that neither the members of the staff of the Fund nor this Tribunal can adequately react to a practice which is at once real in its effects but so elusive in its origins, adoption, recording, articulation and transparency.

It may be added that notice by which rights and obligations are clearly conveyed is a requirement not only of due process. Such notice is an element of the structure of the Statute of the Administrative Tribunal of the Fund, and, as a general proposition, it is held to be required by ample judicial authority."[76]

132. We share the concerns of the Tribunal, expressed in its suggestion to the Managing Director, that practices applied in the administration of Fund policies on terms and conditions of employment require authorization by the appropriate authority and notice to the staff. With the Tribunal, we urge the Fund to avoid informal and unannounced practices. As we pointed out in our earlier discussion of information and communications, employees cannot be expected to conform to unknown requirements. In our view, the Fund administration should not be able to "hide behind" informal practices to defend a decision that is arbitrary, discriminatory or inconsistent with principles of international administrative law. However, to the extent that an informal practice allowed for a certain treatment or outcome, a staff member should have the right to insist that such practice also be applied to him/her on the basis of consistent treatment of similarly situated staff.[77] Practices that are not so applied should be—and are—subject to grievance.

H. The Standard of Review

133. Both General Administrative Order (GAO) No. 31 concerning the Grievance Committee and the IMFAT Statute provide for standards of review of administrative decisions. The Statute of the IMFAT is more generally phrased. It provides in its Article III:

"In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts."

---

[76] Ibid, paragraphs 35–37.

[77] See, for instance, *Borrello & Chant*, ILOAT Judgment No. 1461 (1995) in which the Tribunal held that although the applicants were not formally entitled to a particular allowance, EUROCONTROL their employer, had informally placed a construction on one of its rules which was advantageous to the employees; the organization was bound by it. The reverse does not apply; that is, the employer is not entitled to rely on its own non-compliance with its rules to justify relaxation; see *Felkai* ILOAT Judgment No. 1696 (1998).

134. GAO No. 31 makes a distinction between review of non-discretionary decisions and that of discretionary decisions. As far as non-discretionary decisions are concerned the Grievance Committee must determine whether the challenged decision was:

> *". . . consistent with and taken in accordance with applicable Fund rules and regulations."*

135. When, on the other hand, a grievant challenges a decision made in the exercise of discretionary authority:

> "*. . .the Committee shall uphold the challenge only if it finds that the decision was arbitrary, capricious, or discriminatory, or was procedurally defective in a manner that substantially affected the outcome*."

136. We understand that it was not the intention of the Fund to provide for a different standard of review for the IMFAT than the Grievance Committee. When the IMFAT was being established, the Executive Board reported to the Board of Governors that:

> *". . . case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."*

137. The difference in wording is, however, confusing and we suggest that a single standard be established by aligning the standard for the Grievance Committee with the standard set out in Article III of the IMFAT Statute.

138. The concept of "generally recognized principles of international administrative law concerning judicial review of administrative acts," including the notions of "arbitrary, capricious or discriminatory" are difficult to understand and to apply, in particular for non-lawyers. It would be helpful if staff of the Fund who are involved in the dispute resolution system and who are not lawyers by training, are better informed of these principles and their evolution.

139. Most of the principles of international administrative law, to which one may add some general administrative practices of the Fund, apply to discretionary and non-discretionary decisions alike. For example, a decision may be quashed if it was taken by an authority or organ that was not competent to take the decision, if it was inconsistent with established rules or regulations, if it was based on an error of law, if some essential facts were overlooked, if there was serious abuse of authority, or if the decision was taken in violation of applicable procedures in a manner that affected the outcome of the decision. Decisions must, moreover, be non-discriminatory, both in procedure and in outcome, and consistent with the principle of proportionality (e.g., disciplinary sanctions).

140. The central difference between judicial review of non-discretionary and discretionary decisions is that the latter, by definition, involve the exercise of managerial judgment (administrative discretion) or institutional authority (legislative discretion). Administrative tribunals in all international organizations have accepted that the proper exercise of managerial discretion ought not to be vulnerable to judicial scrutiny in the sense that Tribunals have consistently refused to substitute their judgment for that of the competent organs of the organization. Tribunals have also consistently respected the broad, although not unlimited, power of the organization to exercise the residual institutional authority to amend the terms and conditions of employment. The World Bank Administrative Tribunal (WBAT) in the leading case of *De Merode*[78] gave a broad description of the legal constraints that apply to the exercise of legislative power by an international organization. With particular reference to the discretionary power of amending the terms and conditions of employment, the World Bank Administrative Tribunal held: "the [organization] would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and of technical competence.' Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective, which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals of groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff."

141. We accept that there is no bright line between an acceptable and an unacceptable exercise of discretionary power. Although almost all international organizations, at least in their written rules, have the same formal standard of review, their practice and the jurisprudence of their administrative tribunals, show that the concept of review of administrative action is not a static, but an evolving, concept. The approach of the tribunals is exemplified in the following excerpts from different tribunals.

142. The Fund's Grievance Committee itself has on several occasions, when it was reviewing individual discretionary decisions, indicated that it is difficult to provide a precise definition of what constitutes arbitrary, capricious and discriminatory conduct:

> *"Arbitral authority generally concludes, however, that such conduct is that which is patently unreasonable, irrational, devoid of any logical justification, and contrary to the basic norms of elemental justice."*[79]

143. The Grievance Committee has also observed that "the burden of proving that conduct was arbitrary, capricious or discriminatory is a heavy obligation on the part of the Grievant."[80]

---

[78] *De Morode et. al vs. the World Bank*, Decision No. 1, 1981.

[79] See, for example, Grievance Case 96-1 on p. 23, Case 96-5 on p. 34, and Case 97-1 on p. 20.

144. The Tribunals of other international organizations have offered explanations of criteria they apply when considering challenges to discretionary decisions. For example, the Inter-American Development Bank Administrative Tribunal (IDBAT) commented that:

> *"[I]t is a well-established principle of law, which this Tribunal has already had occasion to invoke, that all administrative decisions, including discretionary ones, must respect basic principles of due process of law, including the requirement that they be adopted by impartial officials, after fair proceedings, on sufficient factual grounds and providing reasonable and adequate justification."*[81]

The World Bank Administrative Tribunal put it slightly differently:

> *"At most the Tribunal can find that this conclusion was reached in an arbitrary manner, involving, for example, unfairness, failure to allow the Applicant to state his case, or other departures from established procedure, bias, prejudice, the taking into consideration of irrelevant factors or manifest unreasonableness."*[82]

And the ILOAT held that an administrative decision must stand unless it reveals a fatal flaw[83] such as breach of the rule of proportionality,[84] and that a disciplinary measure was so disproportionate that it amounted to a mistake of law.[85]

145. The principles of accountability, responsiveness and openness that the IMF follows in its mission as an organization echo the principles of administrative law that, as the ILOAT has put it on several occasions, proper management and mutual confidence are based on fairness[86] and good faith.[87] We have already noted that a fair dispute resolution system should be seen to be responsive to staff concerns. Our review has identified that even staff

---

[80] See, for example, Grievance Case 96-1 on p. 23, and Case 96-5 on p. 34.

[81] Buria-Hellbeck 1989 IDBAT, No 23. See also *Pagurek vs. IDB* Judgment No 44 1997, which is too much the same effect.

[82] *Cf. De Raet*, World Bank Administrative Tribunal Decision No. 85.

[83] *Siegfried*, ILOAT Judgment No. 1973 (2000).

[84] *Kigaraba No. 6*, ILOAT Judgment No. 1445 (1995).

[85] *Limage No. 3*, ILOAT Judgment No.1878 (1999).

[86] See, for example, *Crocket*, ILOAT Judgment 1234 (1993), *Gusten*, ILOAT Judgment 1496 (1996), and *Alamgir*, ILOAT Judgment 1724 (1998).

[87] ILOAT Judgment 1514 *Aymon (No. 2), Ball (No. 3), and Borghini (No.3)* (1996).

members who consider that their rights and legitimate interests have been adversely affected, would hesitate to characterize an act or decision of a supervisor or colleague as “arbitrary or capricious.” The phrase connotes a degree of irrationality that could be interpreted to cast doubt on the capacity of the decision maker, whereas the real issues in contention are more likely to be the decision itself or the way the decision was made, or both. The negative connotation of this phrase in everyday usage is even more pejorative than its meaning as a term of art in administrative law and practice. Cultural and social backgrounds may be antithetical to adversarial grievance procedures, and this reluctance may be exacerbated by having to proceed on the basis of language that staff perceive to be inappropriately personal and offensive.

146. A standard of review is not only a guide to the judges in the IMFAT and the members of the quasi-judicial Grievance Committee, it is also a guide to an employee whether to file a claim and if filed, a guide to the parties to resolve the dispute without recourse to litigation. The parties will refer to the legal standard as a benchmark.[88] At the heart of the standard of review are two issues: first, it sets limits to the improper exercise of discretionary power; secondly, it confirms the positive standards that an employer has fixed for itself as an employer of choice on which an employee has come to rely and which become legitimate expectations. This necessarily requires the Fund to set high standards of conduct for itself and to ensure appropriate remedies for breach of what the Grievance Committee referred to as “fundamental fairness.”[89]

147. This leads us to the conclusion that the standard of review set out in GAO No. 31 for the Grievance Committee (and, by extension for administrative review) should be revised and aligned with that of IMFAT’s Statute. However, we acknowledge that, unlike the judges on the IMFAT, the members of the Grievance Committee cannot be expected to be knowledgeable of or experienced in international administrative jurisprudence. For this reason, we recommend that the Fund provide guidance to the Committee on the (evolving) content of the general principles of international administrative law, and on the interpretation and application of the revised standard of review.

148. Accordingly, GAO No. 31 should be amended to provide that the Grievance Committee is authorized to consider whether individual decisions taken in the administration of the staff are consistent with applicable Fund rules and regulations, in particular, whether the challenged decision was:

- taken by an authority or organ that did not have authority to take the decision;

---

[88] Mnookin & Kornhauser in ‘Bargaining in the Shadow of the Law’ (1979) 88 *Yale Law Journal*, 950 demonstrate how the legal framework influences the range of probable outcomes in resolving disputes without recourse to determination by a third party.

[89] In Case 1996-5.

- inconsistent with applicable Fund rules or regulations or otherwise based on an error of law;
- based on erroneous facts or in disregard of essential facts; or
- taken in violation of applicable procedures in a manner that affected the outcome.

And, in the case of a decision taken in the exercise of discretionary authority, was:

- improperly influenced by irrelevant factors, including bias, discrimination or ulterior motive; or
- was based on a manifestly erroneous assessment of the information to be properly considered.[90]

If any of these grounds are established by a preponderance of the evidence, the Grievance Committee would conclude that the decision is invalid, and would recommend appropriate remedies to the Managing Director in its Report and Recommendation.

149. Any review must balance the need for effective and efficient administration on the one hand and an examination of the rights and interests of the employee on the other. The onus of proof remains throughout on the employee to prove that the action was patently unreasonable. We recognize that the jurisdiction of the IMFAT (or the Grievance Committee) with respect to the exercise of discretion by the Fund remains to review decisions and does not amount to an appeal on the merits of the issues in dispute. The two processes remain conceptually distinct: appeal being concerned with the correctness of the result, whereas review is directed primarily at the process of the exercise of the power itself. The reviewer must defer to a body or person that was authorized to take the decision even if it might not have made the same decision itself.

150. Although we do not predict significant change in the approach of the Grievance Committee following the adoption of the revised standard, we would expect this alternative formulation to make the Grievance Committee process somewhat more accessible to employees and to reduce the level of emotion in the grievance process, thereby facilitating the resolution of disputes. An explanation of the revised standard of review should, of course, be issued to staff in order to assist both staff and line managers to understand what might otherwise seem to be very technical legal concepts.

151. The implementation of this adjustment to the language of the standard of review with respect to GAO No. 31 should be accompanied by our proposal (see the discussion of the Grievance Committee, below) to filter out, through expedited judgment, those grievances

---

[90] This criterion would cover the concept of proportionality, for example, in disciplinary matters.

that, on the face of it, lack sufficient merit to justify full hearings and adjudication before the Grievance Committee.

I. Administrative Review

152. Administrative review usually involves two steps: first, an initial review by a line manager in a staff member's department or by a division chief within HRD and, second, an appeal to the Director, HRD. This procedure in the dispute resolution system, particularly the second step, serves to give finality to the Fund's decision as a basis for proceeding to the Grievance Committee (or Administrative Tribunal). More importantly, it provides the occasion for senior managers to re-examine the decision, to confirm or revise it, or to identify some other solution, before the matter moves to more formal adjudication before the Grievance Committee. Administrative review, if properly carried out, can help to resolve disputes at a relatively early stage before the positions of both sides become deeply entrenched.

153. Our assessment of the current implementation of administrative review indicates that it is not as effective or useful as it might be. The Administrative review process is conceptually an HR function but in practice in the Fund, it has tended to become unduly focused on its function as a prelude to litigation. The connection between administrative review and the Grievance Committee, the timing of potential mediation efforts, and the opportunity to achieve earlier and easier resolution of grievances prior to litigation, should be enhanced. GAO No. 31 suggests that a staff member seeking administrative review must provide legal (not merely factual) justifications for overturning the decision complained of, and it implies that, in discretionary cases, administrative review has the same standard for decisions—arbitrary, capricious or discriminatory—as does the Grievance Committee. We understand that the actual practice in administrative review is, apparently, somewhat more relaxed and that these requirements are not strictly enforced. However, the stringent language of the GAO does not convey this practice to the staff.

154. As set out in GAO No. 31, the burden on the staff member seeking administrative review is substantial with respect to both documentation and argument. Requiring staff to meet much the same standard as is called for before the Grievance Committee is an invitation to engage lawyers and to move quickly to lay the groundwork for a full adversarial contest. It may also lead staff to regard administrative review as almost as formidable and intimidating an undertaking as proceedings in the Grievance Committee. HRD was unable to provide us with comprehensive historical records of the range of measures that has been taken during administrative review, but the available information does not demonstrate that administrative review has been an effective conduit for resolving potential grievances to the satisfaction of the complainants or of the Fund.

155. HRD has an essential role in the process of resolving disputes because it has the central responsibility for managing staff relations. HRD also provides a better setting than a "court room" for trying to disentangle the various elements of a complaint, which may include actual violations of rules or procedures, interpersonal conflicts, genuine

misunderstandings, and feelings of unfair treatment, some of which may be resolved just by being aired and properly listened to. Such varied problems are amenable to a larger set of conflict-management tools than are provided in the constraints of litigation, and HR should have full opportunity to use the full range of tools, including recourse to the Ombudsperson, mediation, conciliation, coaching and counseling.

156. For these reasons, we propose changes in administrative review that are likely to make it more accessible and user-friendly to staff; that would place greater emphasis on administrative review's role as a means of resolving disputes; and that would defer any adversarial legal confrontation until the unresolved problem is actually declared as a formal dispute before the Grievance Committee.

1. Purpose of Administrative Review

157. As noted above, the present purposes of administrative review are (a) to determine whether the original decision is valid—were the relevant policies and procedures correctly interpreted and applied in a manner consistent with other comparable cases; (b) to allow the original decision to be amended if it is found not to have been correctly decided; and (c) to give finality to the administrative decision. These are common objectives for the administrative review stage in international organizations, and they should remain the first and basic purpose of administrative review in the Fund.

158. In many cases, there will be clear-cut answers to these questions. However, in others, particularly those involving the exercise of discretionary authority, there may be room within the applicable rules for differing interpretations, and the original decision—even a "correct" decision—may not always be the only possible result or an outcome that would be regarded as reasonable in light of the specific circumstances of the case. For this reason, we recommend that the purposes of administrative review should be broadened beyond the threshold questions listed above. Administrative review should also be employed as an opportunity to consider alternative solutions and to seek a non-confrontational resolution of the dispute, acceptable to both parties, before embarking on a formal process to adjudicate the matter in the Grievance Committee. The staff member and his or her department (or HRD itself if it made the initial decision) should be encouraged to attempt to resolve the matter informally during the administrative review stage, without waiving any rights the staff member may have to pursue a formal grievance.[91]

[91] Extensive mediation efforts would not be mandatory, particularly in cases involving clear-cut issues of fact and non-discretionary application of rules, and such efforts are not intended to introduce an intervening step between administrative review and Grievance Committee. These changes in administrative review would not replace or interfere with the continuing role that we propose below for the Chair of the Committee and the Ombudsperson in encouraging settlements through mediation after disputes reach the Committee.

2. Encouraging Solutions

159. In the course of administrative review, HRD should utilize the full range of the tools available to it in order to determine if a resolution acceptable to both sides is possible and to attempt to reach agreement on a solution. These efforts must, of course, be reciprocal, and we would urge staff members who request administrative review to enter the process with a view to finding a solution. The most appropriate and potentially effective means would depend on the specifics of each case, but they could include:

- **Referral to the Ombudsperson**. By the time a dispute reaches administrative review, the Ombudsperson may have already been involved, but there may be situations in which another "neutral" look into the matter would result in suggestions or explanations that would lead to an acceptable solution. (It would be essential for such referrals, whether proposed by the staff member or HRD, to fully respect the neutrality and independence of the ombudsperson.)

- **Intervention by outside mediators**. Although it is clear that the overwhelming majority of Fund employees have confidence in the Ombudsperson, situations may arise where individuals, for cultural or other reasons, may feel more comfortable with a more specialized resource or a mediator who is engaged from outside the Fund. In other cases, the circumstances may be such that it would be inappropriate for the Ombudsperson herself to undertake mediation or conciliation efforts. HRD should be prepared to secure and fund appropriate external mediation or conciliation services if necessary. Although there are costs involved in such arrangements, they are usually less than those that would be incurred if the dispute were not resolved and proceeded to full litigation.

- **External counseling and coaching**. Disputes may partly have their origin in inter-personal or professional conflicts among colleagues or between staff and supervisors. Such matters often do not lend themselves to resolution through legal processes, but it is possible that they can be addressed by outside coaches or counselors who can work with all parties to reduce the level of conflict. The Ombudsperson already plays this role, but her time is limited. We understand that HRD can, in certain cases, provide the services of coaches to work with division chiefs or other supervisors. We would urge HRD to provide level of resources needed to extend this (or other similar) programs to a larger number of cases than can now be supported.

3. Information and Documentation Required for Administrative Review

160. As we noted above, staff members requesting administrative review currently need to provide substantial documentation and to set out the legal arguments that they believe support their claim. We believe the request for administrative review should be less formal and burdensome than it is now. Consistent with our previous recommendation to revise the Standard of Review applicable before the Grievance Committee, we are recommending that references to that standard, particularly the requirement to demonstrate that a discretionary

decision is “arbitrary or capricious”, be removed from the process of administrative review. We are also proposing that the burden of documentation in requests for administrative review be reduced. It should be sufficient for the staff member to simply identify the specific decision or act to be reviewed, to identify the policy or rule that the staff member claims has been violated, to briefly describe why he or she considers the decision or act to have been wrong, and the remedy that is sought. Staff should, however, be encouraged to provide whatever information or relevant documentation is available, so that the matter can be fully considered at an early stage in the process, thereby avoiding “surprise” and new issues at the formal grievance stage

4. The Review Process in HRD

161. Administrative review is designed to allow senior management to consider, amend, clarify or reverse a decision that has already been made, but to do so afresh. For administrative review to serve this purpose effectively, it is necessary for it to be performed with some degree of independence from the initial decision-maker and his or her immediate supervisor(s). Otherwise, there is a risk that the review will be perceived as no more than a rubber stamp of the original decision. This risk is greatest when appeals to the Director, HRD involve decisions taken within HRD itself. It is natural in such cases for HRD officials to rely heavily for information on the very person who made the decision that is the subject of the appeal. The reviewing officials may also be reluctant to countermand the original decision maker as doing so could undermine his or her authority.

162. We understand that HRD has recently adopted the practice of assigning research for administrative reviews to a staff member who has had little or no direct involvement in the issue at hand. This is a desirable arrangement, although it probably cannot be entirely successful in securing a truly independent perspective on HRD’s own decisions. We would urge HRD to develop formal procedures, including the independence of the reviewing officer, for handling administrative reviews, and to communicate those procedures to staff.

163. As a further measure to help avoid the appearance of HRD rubber-stamping its own decisions, we also recommend that the Director, HRD be given the ability to waive administrative review and to move the dispute directly to the Grievance Committee. Such waivers would appear appropriate when summary consideration of the issue by the Director, HRD indicates that no material errors in the application of the relevant policies have occurred and that there are no extenuating circumstances to warrant an exception.

J. The Grievance Committee

164. The role of Grievance Committee in the Fund’s dispute resolution system is to consider and make recommendations on employment related disputes where individual staff members contend that they have been “adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service.”[92] As explained

[92] GAO No. 31, Section 4.01.

above, we are proposing that the definition of grievable "decisions" or "acts" be broadened to encompass situations where the Fund has a duty to take actions and does not do so and where a "practice" has effectively acquired the status of a rule.[93] However, the Committee's jurisdiction does not extend to challenges to the Fund's regulations themselves; it is limited to the application of those regulations in individual cases. Challenges to the regulations fall within the exclusive jurisdiction of the Administrative Tribunal.

165. In other international organizations the counterparts of the Grievance Committee are usually peer reviews, but at the Fund the Grievance Committee, in practice, has taken on some characteristics of a court of first instance with full hearings and legal argument. In the EU, the Court of First Instance is the judge of fact and law, and the appeal to the Court of Justice is only on a point of law. We have considered this model and other possible variations and do not see that they would have advantages for the Fund. A full, two stage process would add complexity to the present system and would further "legalize" the hearings before the Grievance Committee, neither of which would be consistent with the general thrust of our recommendations. The present division of responsibilities has worked well, and we see no reason to propose any major changes. However, there is one area in which we believe clarification of the respective roles of the two bodies would be advantageous: the Grievance Committee's findings of fact should, in our view, be accepted as dispositive. We deal with this more fully in our discussion of practice and procedure in the IMF Administrative Tribunal.

166. Two aspects of the Committee's operations are of particular note: first, every determination by the Committee has so far been made unanimously by the Chair and the two panel members (although in one recent report, a Committee member observed that, although the grievance was not well founded because the rule was clear, he found the penalty imposed by the rule to be unduly harsh in the circumstances).[94] Second, the Managing Director has accepted every recommendation of the Committee. These two aspects of the Committee's record speak to its effectiveness in dealing with disputes that staff members have brought before it.

167. Notwithstanding this record, our consultations with the Chair and members of the Committee and with staff who have experience before the Committee (as grievants, representatives of the Fund, and witnesses) have led us to identify a number of measures that we believe would strengthen the Committee's operations and its contributions to the Fund's general system of dispute resolution. These measures are presented below. We also note and briefly address several other suggestions we received regarding possible changes to the

---

[93] See Section IV.B.5 above. We have also proposed in Section IV.B.6. changes in the standard of review to be applied by the Grievance Committee in its consideration of grievances.

[94] This was a case in which the grievant sought retroactive payment of an allowance for reasons of extenuating circumstances. The rules in effect on the allowance preclude retroactivity.

present selection procedures and tenure for the Chair and members of the Grievance Committee, some of which would follow practices in other organizations.

1. Composition of the Committee

168. From the time of its establishment, the membership of the Grievance Committee has consisted of an external Chair, who has been an experienced professional arbitrator, and members drawn from the staff of the Fund. We regard this as an appropriate combination that has effectively served the interests of both the organization and its staff, and we recommend its continuation. An external Chair enhances the independence of the Committee, and he or she can bring expertise in the principles of employment and administrative law to bear on the Committee's deliberations. The inclusion, on the other hand, of members of the Fund's staff on the Committee helps to ensure that its consideration of grievances is grounded in the culture of the Fund and that the Committee has a realistic appreciation of the Fund's work environment and both operational and administrative practices.

2. The Committee Chair

a. *Terms of office*

169. The present incumbent has held that position for eighteen years. From the early 1990s, his appointments have been for renewable two-year terms. It was suggested to us and we considered whether appointments of the Chair should be for a single, non-renewable fixed five-year term similar to those of the Ombudsperson or the Ethics Office. There are, however, important differences among these positions. The two latter offices, unlike that of the Chair of the Grievance Committee, involve a considerable volume of direct one-on-one contact with and between staff members and HRD officers in roles where there is a potential for advocacy on one side or the other and where independence might be compromised by the prospect of extended employment. In the case of the Grievance Committee Chair the position is more akin to a mutually accepted adjudicator, the volume of cases is smaller, and he performs the role of Chair as part of a team. The evidence shows that the incumbent has been asked to continue in office at the end of every two-year term, and the record of complete unanimity in all the decisions of his tenure is a mark of his effectiveness, accepted impartiality and continued acceptability. Furthermore, the two-year term of office makes it easier than it would be with a five-year term for either party to initiate a change if the incumbent proves unacceptable for reappointment. The present arrangements have clearly worked well and we see no reason for altering them other than suggesting that for administrative convenience, it may be preferable to extend the office of the Chair to three years rather than two.

b. *Designating a successor*

170. It would be wise for the parties to adapt to the reality that, at some point, the incumbent will retire or otherwise leave office, or that he may not be re-appointed. The incumbent has a long institutional history with the Fund, and given his continued acceptability has a great deal of knowledge and insight to convey to any successor. With that

in mind we recommend that at the point when either the incumbent or the parties determine that the final two-year term is under way, an early effort should be made to secure a mutually acceptable successor to allow an orderly transition.

c. ***Possible selection of a Chair for each case***

171. In some countries and organizations, grievances are heard by one or more arbitrators chosen on a case-by-case basis from a panel maintained by an external designating agency or professional association. We do not endorse such an arrangement for the Fund. We consider that the qualities of continuity, stability and institutional memory that characterize the single chair are far too important to the credibility and coherence of the IMF's current dispute resolution system to risk having to educate a new arbitrator for every dispute.

3. Committee Members (Panelists)

172. Management and the SAC each designate one Committee member and four alternates, and one staff member designated by each, together with the Chair, serve as a panel to hear a case. The members designated by management and the SAC determine whether they or their alternates sit on the panel for each case. As is the case with the current Chair, many of the current Committee members and alternates have long been involved in the Committee's work and share the Chair's institutional memory.

a. ***Selection of panelists***

173. The suggestion has been made that the claimant in any grievance should be entitled to select one member of the Committee from among the SAC designees to sit on the panel hearing his or her case. We are of the view that the present system has significant advantages over this alternative. This is the autonomy that the present arrangement gives to the panelists. The SAC and management endorse the selection of the panelists but the panelists do not represent management or the SAC, nor are they accountable to them. This independence has enhanced the credibility of their consistently unanimous recommendations. The selection of a panelist by a claimant would, in our view, put inappropriate pressure on the individual and would potentially introduce an undesirable perception of favoritism. We do not recommend any change in the present procedures for designating the panelists for each case.

b. ***Training for the panelists***

174. We believe it desirable for the Fund, in collaboration with the SAC, to inaugurate a joint training program for Committee members on the law of the Fund and general principles of international civil service law; on precedents of the Grievance Committee and the Administrative Tribunal; and on the conduct of a hearing, including pertinent standards of evidence, and decision-making, and writing of decisions. Such training would have the added benefit of transferring some understanding of the Committee's history from current to new Committee members, and it would enhance the credibility of the Committee's future work.

c. *Recognition of staff service as panelists*

175. Many of the Grievance Committee panelists have, as noted, served on the Committee for a long period, during which they have devoted considerable time—often personal time—and energy to the Committee's work. Although HRD and the SAC clearly value the contribution of the panelists in helping to reduce conflict in the Fund, it is not clear that senior line management always recognize this important contribution. The panelists' participation is key to the credibility of the Grievance Committee system and, if properly recognized, it would encourage more support for and participation in the process. We accordingly suggest that the Managing Director find ways to give greater recognition to and commendation for both the SAC and the management designees on the Committee. Their service should also be recognized and given due credit for its value to the Fund in the Annual Performance Reviews of the Committee members and alternates.

4. Assistance for the Committee

176. GAO 31, Section 10.02 provides that the Grievance Committee may specify its administrative requirements. We consider that this provision could be used to strengthen administrative support for the Grievance Committee. In particular we recommend that the existing administrative employee assigned to the Grievance Committee should take on the responsibility to:

(a) register grievances, ensure efficient exchange of documents between the parties, the Committee and its members;

(b) coordinate and schedule hearings and meetings of the Committee; and

(c) assist in drafting and distribution of administrative reports and information on the activities of the Committee, excluding any drafting of Committee decisions.

177. The assignment of one or more appropriately trained employees to the office of the Chair could also provide a source for guidance to employees on the appropriate procedures to be followed in processing claims and would provide a tracking mechanism for individuals who were uncertain of the time limits for filing their claims. It could also relieve the Chair of the burden of coordinating the schedules of the participants and thus hopefully help to expedite the flow of the process.

5. Procedural Improvements

178. Our analysis of the reports and recommendations of the Grievance Committee suggest some new initiatives both before and during the formal Grievance hearing process. The willingness of the Committee to provide grievants considerable latitude in presenting their case has been commendable, but concerns have been increasing on all sides (management representatives from HRD and LEG, grievants as well as staff who are

involved in cases as witnesses) about the demands on participants' time and the duration of the proceedings. A number of the staff with whom we met also expressed concern over delays in the Grievance Committee procedures, particularly those that arose from the Discrimination Review exercise.[95]

179. We have examined the Reports of the Grievance Committee and find that the initial meeting with the parties is consistently held within the prescribed time and that the Report and Recommendations are likewise rendered within the 30-day period prescribed by the statute. The record shows that the extensive delays in conducting the hearings are usually attributable to the problems of scheduling multiple witnesses, committee members and outside attorney schedules. Nevertheless, concerns about the duration of the grievance process and the extent of the resources that both parties need to commit to it have some validity. To address such concerns, we have identified and propose several measures that may increase efficiency at each stage of the grievance process without jeopardizing the overall fairness of the proceedings.

a. ***Expedited decisions***

180. Practice and procedure before the Grievance Committee encourages full hearings even on matters that may have little prospect of success on the merits. This contributes to the view that the grievance process places undue burdens on the institution and the staff members who are required to become involved in hearings.

181. Although employees are entitled to advance a claim that has little obvious merit (and should not be penalized for doing so), it does not follow that every claim warrants an exhaustive and costly judicial hearing. There is equally a responsibility for the Fund to deal with matters expeditiously and an institutional interest in using judicial resources in an efficient and equitable manner, even though this may superficially appear to minimize the concept of individualized justice.

182. For these reasons, we conclude that the Grievance Committee should have greater latitude, and willingness to exercise this discretion, to dispose of certain matters more expeditiously than at present. There are three types of cases in which we consider expedited or summary decisions and recommendations to the Managing Director could appropriately be rendered by the Committee:

(a) **Absence of adverse impact.** If a claim lacks materiality because the adverse impact on the claimant is slight or transitory (or both), the Committee ought to be able to determine whether, on the claimant's own version of the facts, a right or legitimate interest has been violated and to reach judgment on

[95] The exercise was initiated in 1995, with most results decided by HRD in 1997. Of about 70 cases, those decisions led to the filing of 7 grievances.

the matter summarily on the basis of the initial submission and without extended proceedings.

(b) **Improper motivation.** There have been instances in international organizations when employees have pursued grievances primarily to impose an administrative burden or costs on the organization, or in search of information to which the individual is not entitled. In such vexatious cases, employees have become, in effect, professional grievants bringing a series of cases, each of which has little merit. When there are clear indications that a grievance has been filed for such reasons, the Committee should be empowered to dismiss it, with prejudice, for abuse of process.

(c) **Intrusion into management prerogatives.** We have already suggested that in order for a complaint to give rise to a grievance, it must be a dispute concerning the interpretation and application of existing employment rights. Employees may on occasion file grievances that seek a result beyond any existing employment rights created under Fund law or that clearly intrudes into the prerogatives of management in directing the operations of the Fund. For example, an employee could file a grievance seeking to remove a supervisor, or arguing that the Fund should send a mission to a particular country. Under the existing procedures, it appears that such an employee would have the right to utilize the full grievance process and that it would be possible to obtain a full hearing from the Committee. In our view, this would be a misuse of the process, and we recommend that if the issues raised by the claim intrude on management prerogatives without alleging a breach of the claimant's existing rights or legitimate interests, the Committee should be able to summarily dismiss the claim for want of jurisdiction.

183. The Committee should have the authority to reach an expedited judgment at any stage. Before the Committee exercises this authority, it is likely that it will wish to obtain briefs or to hear orally from both parties. As in cases where the Committee conducts grievance hearings in the normal manner, the Committee's expedited judgment, dismissal of a claim or refusal to accept jurisdiction would be made as a recommendation to the Managing Director. If the Managing Director accepts the Committee's recommendation, the grievant would be able to challenge the decision before the Administrative Tribunal. If, on the other hand, the Managing Director concludes that the matter should properly be considered by the Grievance Committee, he may refer it back to the Committee.[96]

[96] Section 7.01.2 of GAO No. 31 authorizes the Managing Director or the Director, HRD, to refer to the Grievance Committee, with the prior consent of the grievant, any case brought directly to their attention, and the Committee has jurisdiction to hear the case.

b. ***Early exploration of issues***

184. The Chair occasionally meets with a grievant around the time of filing to explore the nature of the claim and to advise the grievant on the necessary steps for pursuing the grievance. Such meetings could also allow the Committee Chair to examine whether the dispute would be amenable to informal resolution, through the Ombudsperson or outside mediation and if the grievance is suitable for expedited resolution (see discussion below). We do not think it wise, however, either to formalize or to make this step mandatory, as doing so could increase rather than reduce the overall length of the grievance process. Thus the Committee Chair should have the discretion to decline to call such a meeting if, in his opinion, no useful purpose would be served by it.

c. ***Pre-hearing conference***

185. The Pre-hearing Conference has the objectives of clearly defining the issues that are the subject of the grievance, and of identifying the documentation and witnesses that both parties may require. The conferences provide a further opportunity to expedite proceedings.

186. During these conferences, the Chair of the Grievance Committee, in consultation with the two panelists, should actively guide the parties to identify the key issues that need to be decided and the factual areas that are in dispute or that can be agreed upon. The Chair and Committee members should encourage the parties to narrow the range of issues that will be raised, and to seek as wide agreement as possible on facts that are not or need not be disputed. We believe that the Chair, in particular, and members of the Committee can help greatly to sharpening the focus of the grievance, and, if facts are in contention, to guide or even direct the parties toward agreement. The purpose of this is not to deny the parties access to a fair and full hearing, but to focus the hearing on those issues that require proof and therefore to identify relevant documents and the witnesses that will be needed. The Chair should also be prepared to exclude repetitive evidence and witnesses, and material of limited relevance to the core material issues before the Committee. If the parties agree on these matters by or at the time of the pre-hearing conference, it would greatly limit the length of oral hearing.

187. Agreement on the facts of the case could do away with the need for oral evidence or delays to accommodate participants who are away from headquarters, and the case might well be presented on stipulated facts and written briefs. Our analysis of the transcripts of Grievance hearings suggests that some of the matters that were presented to the Committee during lengthy hearings could have been done on the basis of agreed facts. Even in cases where reliance on stipulations of fact was not possible, pre-hearing briefs or written arguments circulated before the hearing of the Committee would have helped to narrow the issues in dispute, and to limit the areas where there would be need for witnesses and/or the extensive production of exhibits. Apart from considerations of time and expense, it should be recognized that the examination and cross-examination of witnesses is unavoidably stressful and may cause lingering harm to collegial relationships; if they can be avoided, so much the better.

d. ***Elimination of reply briefs***

188. In a number of the cases we examined, after their post hearing briefs, the parties submitted extensive reply briefs (and occasionally, replies to the reply briefs) to the Committee. It was not always apparent to us that these exchanges added new information or argument to that which was already before the Committee although we understand that there have been cases where reply briefs were useful to the Committee. Depending on the circumstances, we suggest that the Committee and parties consider foregoing reply briefs in disputes if the legal issues have been well explored in pre-hearing and post-hearing briefs and in the course of the hearings. Otherwise, we suggest that the Committee guide the parties and limit the scope of their reply briefs to specific questions on which the Committee wishes to obtain views.

6. Encouraging Resolution

189. In our earlier discussion of general principles for managing workplace conflict, we observed that efforts to resolve disputes through negotiations between the parties should be encouraged at any stage of a process, and that the best solution can often be found by the parties themselves or with facilitation by a neutral third party. Based on these principles, we have recommended that the purpose of administrative review be refocused on dispute resolution, with assistance provided whenever it appears helpful by the Ombudsperson, external mediators, or coaches/counselors. We believe it is equally important for such efforts to continue after a grievance enters the formal stages of consideration and, indeed, up to the time that a final judgment is rendered by the Administrative Tribunal.

190. Although hearings before the Grievance Committee can be expected to remain more adversarial, with the parties more deeply entrenched in their positions, than we would anticipate being the case during the revised administrative review stage, the Grievance Committee hearings can also present opportunities for resolving disputes by mutual agreement outside the formal hearings. These opportunities can arise as each party brings out information that may help to clarify the facts of the case and the reasons for each side’s position. As a practical matter, access to additional documentation and the testimony of witnesses during formal hearings can also expose weaknesses in the position of one or the other party, increasing the likelihood of settlement.

191. The goal of encouraging the parties to resolve the dispute outside the Grievance Committee proceedings should be more actively pursued by the Committee Chair and members. This goal should especially be borne in mind by the Chair during the informal, early exploratory meeting, but also by the full Committee during the pre-hearing conference and throughout subsequent hearings.

a. ***Referral to the Ombudsperson***

192. The dispute settlement structure at the Fund has been most successful in utilizing the office of the Ombudsperson to resolve disputes informally. Unfortunately, the current provisions of the Terms of Reference for the Ombudsperson limits her involvement in cases

after they have been filed with the Grievance Committee (or the Administrative Tribunal). From that point on, the Ombudsperson is to "refrain from assisting the grievant in the grievance process or in furthering an application to the Tribunal, except to the extent that, in the Ombudsperson's judgment, he or she may be able to assist in mediating the settlement of a case."[97] We understand that this limitation is intended to protect the neutrality of the Ombudsperson and to avoid drawing her into an advocacy role. These are valid considerations, but we do not believe that these considerations or the limitations set out in the Terms of Reference are an insurmountable barrier to the Ombudsperson's playing a continuing, constructive role after a grievance is filed with the Committee. Accordingly, we propose that the Committee may refer an issue to (or back to) the Ombudsperson during either the preliminary, informal stage or subsequently, if the Committee or its Chair believes that the Ombudsperson could assist in resolving the dispute. Although an approach to the Ombudsperson is voluntary, requiring the concurrence of the staff member, and participation by her must be private, we consider it crucial that every opportunity be provided for the informal resolution of disputes at all stages of proceedings.

193. In our earlier discussion of the Office of the Ombudsperson, we suggested that flexibility be allowed in the interaction of the Ombudsperson, proceedings in the Grievance Committee and the time limits set in GAO No. 31 for the filing of a grievance. We would encourage greater use of the possibility of suspending the proceedings through mutual agreement of the parties, particularly if so urged by the Ombudsperson, to allow settlement discussions to take place.

b. ***Referral to mediation***

194. If the Grievance Committee considers that the grievance involves either a dispute that appears amenable to a mediated solution or interpersonal relations between the claimant and other staff members, the Committee should have the discretion to recommend the parties to submit the matter to mediation, which in the latter type of situations might be conducted by a mutually acceptable specialist in interpersonal relations. We would expect that access to acceptable mediators could be arranged in cooperation with the Ombudsperson by HRD. The cost of such mediation should, in our view, be borne by the Fund as a part of the cost of the grievance process.

7. Committee Reports and Recommendations

195. There are two aspects of the Grievance Committee's reports and recommendations and actions taken by Fund management on the basis of them that we believe could be improved.

---

[97] Paragraph 10 of the Terms of Reference of the Ombudsperson.

a. ***More reasoned opinions***

196. Our analysis of the Reports of the Grievance Committee, endorsed in discussion with staff indicates that because the scope of review is narrow, issues that were fully aired in evidence were not dealt with in the recommendations of the Committee. This has been particularly true under the present standard of "arbitrary or capricious." In most cases dealing with the exercise of managerial discretion, the Committee has tended to decide the case by finding that the claimant did not achieve that standard but the Committee did not address the substantive issue that underlay the claim. We consider that a complainant is unlikely to be satisfied with a decision that does not explain fully not only why the employee lost but why the employer's conduct was lawful or justifiable in the circumstances. We believe that the adjustment in the standard of review that we are recommending will make it easier for the Grievance Committee to produce a clear explanation of its conclusions and reasoning on the merits of the grievance. However, even with the present standard, we believe that the Committee should be able to provide a more complete explanation of its reasoning. If the protagonists are more fully apprised of the reasoning of the Committee, it may help to achieve acceptance of the result, and the circulation of periodic reports, also with more complete explanations, may help prevent similar disputes from arising in future.

b. ***Management action on the Committee's recommendations***

197. We commend Fund management for its practice of accepting the recommendations of the Grievance Committee in all cases and we strongly recommend that management continue this practice because it contributes significantly to the credibility of the Grievance Committee and the Fund's entire dispute resolution system. In the event, however, that the Managing Director were to decide to reject a recommendation of the Grievance Committee, we would urge him to explain in writing his reasons for his decision.

198. GAO No. 31 does not explicitly require the Managing Director to explain his decision if he rejects a recommendation of the Grievance Committee, nor does it set a time limit for his decision. We would suggest the GAO be revised to address both points. We further suggest a time limit of three months be set for the Managing Director's decision after the Grievance Committee has made its recommendation. This would be consistent with the provision of Article V.2 of the Statute of the IMFAT, which specifies that administrative review is exhausted for purposes of the Tribunal if an applicant has not received a decision three months after the date of a recommendation by the Grievance Committee. The reasons might be sufficiently persuasive to resolve the dispute there. If the grievant applied to the IMFAT to review the decision of the Managing Director, the reasons would form part of the record. We would note, however, that the decision to be reviewed by the IMFAT would remain the original decision or act that gave rise to the grievance, and not the Managing Director's response to the grievant.

K. Administrative Tribunal

199. The IMFAT is an important and authoritative body, with broad jurisdiction over Fund decisions on employment-related matters affecting individuals and "regulatory decisions" concerning the terms and conditions of staff employment that are adopted by either management or the Executive Board. Although it has only issued nine full judgments, it has already made an important contribution to the dispute resolution system at the Fund. However, we believe that a number of changes would improve its effectiveness.

1. Limitations on Jurisdiction over Pre-1992 Decisions

200. Article XX of the Tribunal's Statute restricts its jurisdiction to cases involving decisions taken on or after the date on which the Executive Board approved the transmission of the Statute to the Board of Governors. Accordingly, the Tribunal is not "competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992." Because an "administrative act" is defined to include the regulatory framework itself, the Tribunal has no jurisdiction to pronounce on the legality of individual administrative acts if the only grounds to the challenge to their legality is the validity of an underlying regulation that was adopted before October 15, 1992. Two cases have been dismissed on the basis of this time-bar.[98] We accept that individual administrative decisions that occurred before October 1992 should be dealt within in accordance with the substantive law prevailing at that time, and that it would be inequitable to now open pre-1992 regulatory decisions to challenge when earlier claims of employees have been barred. Yet to accord pre-1992 regulations complete institutional immunity would deprive Fund staff of any channel for resolving disputes over potentially significant aspects of their employment, and such immunity would leave these regulations in effect even if post-1992 developments eventually render them manifestly unfair or unreasonable or discriminatory in their outcome.

201. In our view, this dilemma is best resolved through a consultative process to change the regulation through a legislative rather than an adjudicative process. Adjudication can deal with only the respective rights of the parties and is retrospective in its focus, but legislative change can deal with not only vested and contingent rights but also with matters of mutual interest to the Fund and the staff; it can be as comprehensive or narrow in its focus or scope as is appropriate in the circumstances. If a pre-1992 regulation has come to have an unreasonable or discriminatory effect on staff, we would accordingly recommend that the Fund so recognize and/or for the SAC to advocate remedial changes through consultations.

---

[98] *Mr. "X", Applicant v. International Monetary Fund, Respondent,* Judgment No. 1994-1 and *Ms. "S", Applicant v. International Monetary Fund* Judgment No.1995-1.

2. Appointment of Judges

202. The President and members of the Tribunal are appointed by the Managing Director, with the approval of the Executive Board in the case of the President. The IMFAT Statute stipulates that the President is appointed after consultation with the Staff Association and the members are appointed "after appropriate consultation". During our consultations, concerns were expressed that these procedures gave management too much and the SAC too little weight in appointments to the Tribunal, and it was suggested that the SAC have the power to veto management nominees. We see no reason to change the present procedure: there is already no bar to the SAC recommending any particular person to serve on the IMFAT or to its registering its reservations to management or the Executive Board about any pending nominees. We would, however, emphasize that it is important for the Fund to have meaningful consultations with the SAC on the appointment of *all* members of the Tribunal. Such consultations provide a means of maintaining staff confidence in the qualifications and independence of the Tribunal and the credibility of its rulings among staff.

3. Procedures in the Tribunal: Oral Hearings

203. The practice in some international administrative tribunals is to hold oral hearings in staff cases, although other tribunals do not do so routinely.[99] Article XII of the IMFAT Statute allows the Tribunal to determine on a case-by-case basis whether oral proceedings are "warranted," but the IMFAT has not, thus far, availed itself of this possibility. There is an important psychological need for a staff member to see that "her or his case is heard," particularly if there has been no oral hearing at the Grievance Committee. Hearings before the IMFAT would, in our view, enhance the credibility of the Tribunal and demystify its operation. We consider that Rule XIII, which permits the Tribunal to hold oral hearings only if these "are necessary for the disposition of the case," is unduly restrictive. We consider that either party should have the right to request oral hearing, especially if there had been no hearings in the Grievance Committee. These hearings could, if necessary, be limited to oral legal arguments. Although it could be argued that hearings would increase the cost and time spent on cases before the IMFAT, we do not find this argument persuasive. If the Tribunal announces well in advance when it will be in session, parties and their counsel will be obliged to follow the rhythm of the Tribunal and not the other way around. They will be aware of the sessions and then plan to attend a hearing during that session; if not, the matter will have to stand over until the next session of the Tribunal. Moreover, expanding the number of occasions on which oral hearings could be held need not mean that the option would be exercised in all cases. Indeed in the light of the small number of IMFAT cases to date, the addition of hearings could hardly be onerous. The vital point to offering oral

---

[99] It is not the practice of the ILOAT, United Nations Administrative Tribunal (UNAT), or World Bank Administrative Tribunal to hold oral hearings, although each is authorized to do so. Hearings are common in the Court of First Instance and the Court of Justice of the European Union, the administrative tribunals/appeals boards of the IDB, OECD, NATO, ESA, COE, and certain other regional organizations.

hearings is to declare to all employees that the IMFAT proceedings will have a new transparency that was previously lacking.

4. Findings of Fact

204. The Administrative Tribunal should defer to the Grievance Committee's findings of fact. This will obviate any need to rehear the evidence. The Tribunal's discretion to receive testimony and review factual disputes under Article X, Section 2, should be used sparingly to consider evidence if it was not available to the parties and could therefore not have been tendered to the Grievance Committee.[100]

5. Standing Before the Tribunal

205. Under the IMFAT Statute, only individual employees have the right to bring their claims before the Tribunal. The SAC (or any interested group of staff) may file *amicus curiae* briefs. The SAC may also provide legal assistance to individual applicants. We have received and considered three suggestions concerning the standing of the SAC before the Administrative Tribunal; these concern (a) group or class actions; (b) filing cases on behalf of an unidentified individual; and (c) issues concerning the status of the Staff Association itself.

a. *Group or class actions*

206. It has been suggested that the SAC should be allowed to file a grievance or to initiate actions before the IMFAT on behalf of a group or class of staff. We do not consider such actions to be appropriate or necessary. There is no barrier at present for one or more individuals initiating a complaint alleging a violation of individual rights on either a coincidental or a coordinated basis.[101] In such cases, grievants would submit individual claims, and the tribunal would be able to assess whether they raise like issues and can, therefore, be joined to form the subject of a single judgment. The ILOAT, for example, is similar to the Tribunals of the Fund and World Bank in this respect; although its statute does not explicitly empower it to combine cases, it nevertheless does so in effect. We would note that if the IMFAT were to adjudge a decision taken with respect to a single individual to be illegal, it would be unnecessary for other similarly situated staff members who have previously made a timely filing to pursue their cases separately. The Tribunal could be expected to apply their decision to them. The application of the IMFAT decision to other similarly situated staff who had not and/or could not make a timely filing with the Tribunal,

---

[100] In practice, the Tribunal weighs the record generated by the Grievance Committee as an element of the evidence before it. See *Mr. d'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT 1996-1, April 2, 1996, at paragraph 17.

[101] See *Abrahams (and 32 others) v. IDBAT*, Case No. 31 (1993).

would be a matter to be decided by the Fund. However, the Fund would, in our view, be obligated to apply the outcome to others who are similarly situated.[102]

b. ***Actions on behalf of an individual by the SAC***

207. We do not consider it appropriate that the SAC should be entitled to bring an action on behalf of an individual who is unwilling to assert that right or who is prepared to do so only on an anonymous basis. The right of staff members to seek assistance of the SAC provides adequate protection. On the other hand, we do believe that it is desirable for the SAC to be better informed about pending cases and the issues involved. Although public announcements are made of matters pending with the IMFAT, those we have seen are very brief and not sufficiently informative for the SAC or any individual staff members to determine if they raise issues of potential significance to them. We believe more complete information on issues raised in IMFAT cases should be provided in these announcements. The Registrar could also notify the SAC Chair of the nature of the issues in dispute and, the names of the claimants (if so authorized) with sufficient particulars to enable the SAC to identify systemic issues. More detailed information on pending IMFAT cases could also be provided to all staff. If staff members are reasonably informed about issues before the Tribunal, they would then be in a better position to consider any intervention as *amicus curiae* individually or with assistance from the SAC.

c. ***Standing of the SAC***

208. The SAC as an entity has no direct access to or standing with the IMFAT because the Tribunal only has jurisdiction over disputes between members of staff and the Fund. Because the SAC is not a member of staff, as defined, it cannot bring proceedings before the IMFAT on its own behalf.[103] The SAC maintains that it should have access in its own right to the Tribunal. We do not agree. However, we would note that Rule N-14 gives "Persons on the staff of the Fund . . . the right to associate in order to present their views to the Managing Director and the Executive Board, through representatives, on matters pertaining to personnel policies and their conditions of service." While this does not ascribe to the SAC, *per se*, any particular rights or facilities, the Fund has made certain arrangements with the SAC that facilitate its operations (see Section IV.D.). It could be argued that any alterations or deprivations by the Fund of established arrangements that interfere with the freedom of staff to associate, have an adverse impact on individual staff members; as such, the interference would constitute an individual act that falls within the jurisdiction of the Grievance Committee and Administrative Tribunal. Thus, the Grievance Committee and the Tribunal could entertain a claim from ***any*** employee that alleged changes to arrangements for consultations or the withdrawal of facilities that had been previously agreed between the

---

[102] Another approach would be to agree on a representative case with a commitment by the Fund that the outcome would be applied to all similar cases. This approach was recently adopted by the World Bank.

[103] Article II.c of the Tribunal statute. The same applies to the Grievance Committee.

SAC and Fund violated his or her freedom of association.[104] The most appropriate persons to bring such a claim before the Tribunal would be the Chair and/or members of the SAC.

6. Remedies

a. *Reinstatement*

209. The IMFAT has the right to mandate, and the Grievance Committee to recommend, the rescission of the contested decision or other conduct. This authority includes the possibility to order, "all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision," provided that, when prescribing measures other than the payment of money (such as reinstatement or other specific performance by the Fund), the Tribunal is to fix an amount of compensation to be paid to the applicant if the Managing Director decides, in the interest of the Fund, that such measures shall not be implemented. The amount of compensation in this circumstance is not to exceed the equivalent of three years' salary, unless the Tribunal concludes in exceptional cases that a higher amount is justified.[105]

210. We consider that reinstatement should be the primary remedy in a termination case if the IMFAT were to find, for example, that there were simply no valid grounds to terminate the employment of the staff member, that the decision to terminate involved manifest bad faith on the part of the Fund and/or that termination was patently disproportionate to the offense involved. Such a person should be placed in the position he or she would have occupied but for the Fund's action and should, at a minimum, be reimbursed for all lost earnings and benefits. If the Fund has erred in terminating a staff member, the Fund should bear the costs of this decision rather than the individual employee.

211. We acknowledge, however, that reinstatement would not be an appropriate remedy if the Tribunal were to find, on application from the Fund, that the continued employment relationship had been irreparably damaged. We also accept that the more senior the position, the more likely it may be that reinstatement would not be practicable or if the trust relationship inherent in an employment has broken down.

212. To balance these competing considerations, we believe it is desirable for the IMFAT to adopt special procedures for cases when it finds that the decision to terminate was invalid for the reasons specified above. Specifically, we propose that the Tribunal revise its procedures to provide in these cases for separate pleadings and consideration of the remedy. Such hearings would permit the Fund to address fully the institutional consequences of

---

[104] See *Popineau11*, ILOAT Judgment No. 1542 (1996) in which the ILOAT ruled that the Tribunal had jurisdiction to consider a matter brought by any official who alleges breach of the facilities. See also Article 9 of ILO Recommendation 143 on Workers' Representatives, regarding facilities that ought to be offered to employee representatives even if they are not trade unions.

[105] Article XIV, Section 1 of the IMFAT Statute.

reinstatement and the staff member to set out his or her claim for compensation, including whether exceptional circumstances warrant an amount greater than 3 years' salary, in the event that the IMFAT orders and the Fund decides against reinstatement.

b. ***Awards of cost***s

213. Some of the staff complaints and reluctance to utilize the Fund's formal dispute resolution procedures concern the actual or perceived costs of litigating against the Fund. These concerns encompass the employee's own costs and costs that might be ordered against an unsuccessful complainant. In employment law disputes that are resolved in specialist employment tribunals, costs are not usually awarded to successful employer parties. The law recognizes that the disparity in bargaining power between the parties is such that to burden an employee party by adverse costs orders would act as a disincentive to use the system of dispute resolution. This is reflected in Article XIV, Section 4, which empowers the Tribunal to order costs to an applicant who is successful but not to the Fund when it is successful Indeed, the Tribunal has expressly stated that Article XIV, Section 4, is not a parallel for Article XV. Article XIV, Section 5, provides for "cost-shifting in favor of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members."[106]

214. The IMFAT has ruled that Article XV only permits costs to be awarded to the Fund for its costs in the Tribunal and not before the Grievance Committee, and only if the IMFAT finds that the matter brought to the Tribunal was frivolous or vexatious and amounted to an "abuse of the review process." [107] Article XV, Section 3, reflects this in providing that an applicant may be ordered to compensate the Fund for some or all of its costs if the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the claim was based on a good faith argument for an extension, modification, or reversal of existing law. This would relate to the issue itself, its pursuit beyond rationality, or the conduct of a representative in the hearing or in the context of a hearing. We are not convinced that the principles governing the award of costs in national and local courts should apply equally to the Fund. The Fund is immune from domestic courts; the SAC does not act as a trade union by prosecuting cases and assuming costs on behalf of individual members; cases are not heard in open forum and there is a real apprehension the individuals do not know that their cases lack merit. In addition, the concept of a "frivolous" case can have a chilling effect because it seems to be subjective and the claimant has no reliable standard to determine what is frivolous. Indeed, the fear of having to bear costs may cause justifiable disputes to fester unresolved. Furthermore, the Tribunal itself has never had an occasion to issue such an order.

215. We acknowledge the employer's frustration if it has to respond to a claim that is patently without merit. Even so, we do not think it is fair that employees should have to pay

---

[106] *Mr. "V," Applicant v. International Monetary Fund, Respondent* Judgment No. 1999–2, August 13, 1999.

[107] *Mr. "V"*, op cit., paragraph 137.

the employer's costs, and we believe our proposal for expedited dismissal by the Grievance Committee of "de minimis" or vexatious claims, or frivolous filings, will effectively deter the submission of such matters to the Committee and the Tribunal. However, we believe that the Fund's objective of providing an open and honest forum for resolving what the employees perceive as unfair or illegal treatment can be frustrated if staff believe they are at risk of having to pay the Fund's costs if they pursue what they believe to be a just claim, notwithstanding that the Tribunal has never awarded such costs against a staff member. We accordingly propose that the Fund adopt a policy that formally restricts the circumstances in which it would request IMFAT to award costs against a staff member. Such awards should, in our view, be limited to cases involving false or fraudulent claims. Such a policy would protect the Fund against true abuse of the dispute resolution process, while alleviating one perceived deterrent to staff members' use of it.

L. Arbitration for Contractual Employees

216. In the Fund, personnel engaged on a contractual basis are used to cover a wide variety of functions, which differ largely in terms of tasks, level of responsibility and duration. Contractual personnel have been employed as medium- and long-term advisors to member countries, for ad hoc expert work as consultants, and as supplementary resources for brief and more extended periods on tasks that fall within the ongoing operational or administrative activities of the Fund. In all cases, the contractual personnel and the regular staff of the Fund have been regarded as separate and distinct categories of employment. The main employment terms and conditions of the contractual employees are spelled out in individual contracts, supplemented by a contractual employment manual; these differ in many respects from the employment terms and conditions of the Fund's regular staff. The contractual employees are also not subject to many of the staff regulations and rules applicable to Fund staff.

217. Historically, the work performed by contractual employees did not always differ significantly from that performed by regular staff, but during the past two years, the Fund has adopted a new employment framework that is intended to define clearly the circumstances in which persons will be employed on a contractual basis and on staff appointments. To bring its actual employment practices into line with the new framework, the Fund has also changed the employment status of more than 200 persons. Although this realignment has reduced the number of employees engaged on fixed contracts and the new employment framework establishes a policy that such contracts may not be extended for more than one renewal, this category of Fund employee will continue even if there are fewer incumbents.

218. We do not consider that it is inherently unfair for the Fund to engage people on contracts for fixed periods rather than for permanent employment. Persons who are hired on such contracts are aware of the terms of their employment, and they do not have a legitimate expectation that their status will be converted to staff status or even that their contracts will be extended beyond the specified term. It goes without saying that the terms and conditions of their employment, together with any restrictions imposed on them by their status, should be fully explained to contractual personnel during their recruitment and at the time of hire. We understand that this is done.

219. Access to the formal staff dispute settlement system and procedures (i.e., the Grievance Committee and Administrative Tribunal) is at present barred to contractual employees. Any disputes regarding the terms of their contract are addressed first through administrative review and failing resolution, then by binding arbitration before the Chair of the Grievance Committee sitting alone.

220. Although most of the international organizations we examined have a single structure for all categories of employee, we do not think that the process of arbitration is in itself inappropriate or unfair. In the case of the Fund, contractual employees are engaged through a separate process than staff. Contractual recruitment, for example, is generally subject to less rigorous international competition and less weight is given to considerations of nationality distribution in the employment of contractual personnel than is the case for regular staff. Given these differences, we do not find any inherent unfairness in establishing arbitration as the mechanism for resolving all disputes between the contract employee and the Fund, and we do not consider that any employee right or legitimate interest is violated merely by the fact that contractual employees do not have access to the Grievance Committee or the Tribunal.

221. At present, the scope of arbitration is understood to be limited to allegations "that the Fund has failed to meet any of its obligations. . . under. . .the employment contract," read with the employee's rights to any specific benefits that are provided for in the Fund's manual relating to contractual employees. This is apparently also understood to exclude concerns about issues that arise from obligations that are not expressly recorded in the written contract or manual for contractual employees. All employees, whatever their status, have certain implied rights and obligations, which arise from the employment relationship.[108] The arbitration forum is appropriate for issues arising from the employee's claim that the Fund has failed to live up to its offered terms of employment or has abused its discretion in its application. In resolving such disputes the arbitrator should not substitute his judgment for that of the employer, but rather seek to conform to the standards of review we propose above for staff employees. In some cases the correction of a contract violation or finding of abuse of discretion may conflict with the employer having terminated the contract. Should that occur the remedial authority of the arbitrator would permit monetary compensation or the extension of the agreement to rectify that wrong. We are mindful that selection of staff is a prerogative of the Fund and that conversion of a contract employee to a staff member is beyond the province of the contract arbitrator.

222. The source of these rights and obligations may be, but is not necessarily, in formal contract. The ILOAT held that, "rights under a contract of employment may be express or implied, and include any that flow from general principles of the international civil

[108] See developments in the UK and in other jurisdictions of the implied term of good faith in the common law contract of employment. See Douglas Brodie, 'Beyond Exchange: The new Contract of Employment' (1998) 27 Industrial Law Journal p. 79 and The Hon Mr. Justice Lindsay, 'The Implied Term of Trust and Confidence' (2001) 30 *Industrial Law Journal* 1; *Malik v BCCI* (1997) *Industrial Relations Law Reports* 462 (H.L.)

service"[109] and "[u]nder any contract of appointment the Organization, even in the absence of express provision, is bound to respect an official's dignity and reputation—in other words to beware or (sic) putting him needlessly in a difficult personal position. If the Organization fails in that duty it may be ordered to pay compensation even if there is no decision to be set aside. Compensation will be awarded, however, only for serious wrong likely to prove damaging to a staff member's career."[110]

223. For these reasons, we consider that the arbitration structure should continue for contract employees, but that the jurisdiction of the arbitration should be slightly expanded to permit challenge to conduct that is alleged to have adversely affected the contractual employee's rights and legitimate interests. For example, if the performance of contractual employee is assessed for the purposes of deciding whether to renew the contract, that assessment must be done and it must comply with the contractual requirements. A person would therefore be entitled to challenge failure to assess or improper assessment. It is not appropriate within the scope of the terms of reference of this review to consider what remedies might be appropriate, but the scope of the remedies that an arbitrator might include limited extension of the contract. However, we recognize that this ought to not include the jurisdiction to determine issues of employment status, let alone to order a change in status from contractual to staff status.[105]

V. CONCLUSIONS

224. As we have indicated earlier, the Fund has a well-developed body of internal law, and the Fund's informal and formal dispute resolution systems and processes are, on the whole, soundly designed; they also compare favorably with those of other international organizations. Employees who are willing to use the current systems can expect to receive effective, objective advice and assistance through the Office of the Ombudsperson and a generally fair and independent hearing before the Grievance Committee and Administrative Tribunal.

225. Any system, no matter what its strengths, can still be improved, and the systems of the Fund are no exception. The recommendations that we have offered in the preceding pages will, we believe, build on the strengths of the current arrangements and provide the Fund with more responsive and effective means of dealing with employment related conflict and disputes and of addressing any violations of the employment rights of staff. It is our particular hope that the implementation of a number of our proposals would help to

---

[109] *Awoyemi*, ILOAT Judgment No. 1756 (1998) Consideration No. 3.

[110] See *Guisset*, ILOAT Judgment No. 396 (1980).

[105] *Hoefer*, ILOAT Judgment No. 406 (1980); see also *Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT 1999-1, August 12, 1999.

overcome the reluctance or unwillingness of some staff to use the dispute resolution processes. It is in the interest of both the Fund and its staff to bring workplace conflicts and disputes into the open where there is an opportunity to resolve them, rather than allowing disputes to fester and undermine relations between the Fund and staff.

*   *   *   *   *

TERMS OF REFERENCE

REVIEW OF THE FUND'S DISPUTE RESOLUTION SYSTEM

1. **Introduction.** As part of the ongoing effort to ensure the adequacy of the Fund's dispute resolution system for staff and other employees, a comprehensive review of the existing system will be undertaken. For purposes of this review, the term "employees" includes all staff,[111] contractual employees, and assistants in Executive Directors' Offices.

2. **Objectives and Output.** The primary objectives of the review are to assess the extent to which the system facilitates the resolution of employment-related disputes in a timely and cost-effective manner, while providing employees with fair and impartial channels of recourse and meeting the institutional needs of the Fund. The review should result in a report analyzing the strengths and shortcomings of the current system and its implementation, based on the particular needs of the Fund, while taking into account the practices of other international organizations and other practices, where relevant, with a view to identifying elements that could be adapted to the Fund. The report should make recommendations as to changes considered necessary or appropriate to make the system more effective and less burdensome.

3. **Scope of Review.** The review will cover informal mechanisms for resolving disputes (supervisors, Senior Personnel Managers, human resource officers, advisors against harassment, and the Ombudsperson), as well as formal mechanisms (binding arbitration for contractual employees, administrative review by the Director of HRD and/or the Managing Director, relevant functions of the Ethics Officer, the Grievance Committee, and the Administrative Tribunal). With respect to formal mechanisms, the review will encompass both the **procedural** (e.g., opportunity to be heard; conduct of hearings; time limits) and **substantive** (e.g., decisions subject to review; grounds for review; remedies) aspects of the dispute resolution system.

4. **Review Panel.** The review will be conducted by a panel convened by HRD consisting of three external members with expertise in the relevant legal, human resources, and organizational fields, one of whom will chair the panel. The external members shall be selected with a view to geographical diversity. As convenor of the panel, HRD will arrange for the provision of administrative support to the panel and will facilitate the panel's work, including making arrangements for interviews and access to information as provided in these Terms of Reference. A record of the meetings of the panel will be kept. The report will set forth the recommendations of the panel; the panel will brief representatives from management and SAC on its preliminary conclusions and observations prior to finalizing its report.

[111]The term "staff" refers to any person whose current or former letter of appointment, whether regular or fixed-term, provides that he/she shall be a member of the staff; it includes the Deputy Managing Directors.

5. **Access to Information.** The panel will have access to all relevant information, except for personnel-related information that cannot be made available for reasons of confidentiality without the consent of the affected party. For purposes of conducting such interviews as it deems appropriate, the panel may request interviews with Fund employees, including grievants and managers whose decisions have been the subject of a review, present and former members of the Grievance Committee (including its Chairman), and members of the Administrative Tribunal and its Registry. As part of its analysis of comparative international practice, the panel will also have the opportunity to interview personnel at selected international organizations.

March 6, 2001

MEMBERS OF THE REVIEW PANEL

Mr. Arnold M. Zack, who is the Chair of the panel, has extensive experience in the arbitration and mediation of employment disputes in both the public and private sector, and consults internationally on the design of dispute resolution systems. He is the author of numerous books and articles on grievance arbitration and mediation; was President of the U.S. National Academy of Arbitrators in 1994–95; and has taught dispute resolution at Yale Law School and at Harvard University's Trade Union Program. Mr. Zack is the recipient of the Distinguished Service Award of the American Arbitration Association, the Cushing Gavin Award of the Archdiocese of Boston and the Mildred Spaulding Award. He is in his second term as a member of the Visiting Committee on Human Relations of the Board of Governors of Harvard University and is from the United States.

Ms. Sarah Christie is a mediator and arbitrator in labor relations and has been Senior Convening Commissioner of the South African Commission for Conciliation, Mediation, and Arbitration. She teaches labor law and dispute resolution at the Institute of Development and Labor Law at the University of Cape Town. Ms. Christie is from South Africa.

Mr. Chris de Cooker is currently Head of Privileges, Immunities, and Staff Regulations at the European Space Agency (ESA). Before joining ESA he was a senior lecturer in international law, the law of international organizations and international administration. He is the author of numerous articles on the law of international organizations, and the editor of the handbook, "International Administration, Law and Management Practices in International Organizations." He is a member of the editorial committee of the International Review of Administrative Sciences. Mr. de Cooker is from the Netherlands.

List of Organizations Visited or Consulted by the Panel

Council of Europe, and COE Administrative Tribunal
European Central Bank
European Commission
European Organization for Nuclear Research
European Space Agency
Food and Agricultural Organization
Inter-American Development Bank, and IDB Administrative Tribunal
International Labour Organization, and ILO Administrative Tribunal
Organization for Economic Co-Operation and Development, and OECD Administrative Tribunal
United Nations
United Nations Development Program
World Bank, and World Bank Administrative Tribunal
World Health Organization
World Trade Organization

IMF Staff Retirement Plan: Dispute Resolution Procedures

1. We have examined the dispute resolution processes available with respect to the IMF SRP which, in keeping with the nature and distinct identity of the Plan, are separate from the systems and procedures applied in employment-related disputes. In this Annex, we summarize the procedures used for disputes concerning our plan and provide our assessment of them. We recommend only minor changes in the current procedures.

Administration of the Plan: Description

2. The SRP of the Fund is a defined benefit pension plan, which like most such plans is administered for the sole benefit Plan participants and beneficiaries. While the Executive Board of the Fund has the authority for establishing and amending the terms of the SRP, the SRP is managed separately from the Fund *per se* with its own decision-making structure and procedures for the review of decisions on its administration:

- The **SRP Pension Committee** (SRP-PC) has the overall responsibility for the operation of the Plan, for establishing policies and rules for the administration of the Plan (which are binding on the Fund), and for deciding matters of a general policy nature. The Fund's Managing Director (ex officio) is Chair of the Pension Committee. Members include four Executive Directors, who are elected by the Executive Board, one staff member who is appointed by the Managing Director (following consultations with the SAC), and one staff member who is directly elected by the staff participants in the Plan.

- The **SRP Administration Committee** (SRP-AC), whose members are appointed by the Pension Committee, is responsible for administering the Plan and for interpreting and applying its provisions to individual active participants and retirees. The Chair of the Administration Committee is the Director of Human Resources. Of the Committee's other members one is usually from the Treasurer's Department and one from the LEG. One member is selected in consultation with the SAC.

- Day-to-day administration of the SRP is carried out, subject to the authority of the SRP-AC, by staff in the HRD.

Procedures for Initial Decisions

3. Most administrative decisions on the SRP (e.g., enrollment, benefit calculations,) are taken by the responsible HRD staff; others are decided or recommended to the SRP-PC by the SRP-AC (e.g., disability pensions). Any SRP participant, beneficiary or other person claiming a benefit under the Plan may seek a decision by the SRP-AC on any matter concerning the administration, application or interpretation of the Plan in his or her individual case. The SRP-AC may consider the issue on its own or it refers to the SRP-PC matters of a general policy nature and matters specifically to be decided by the Pension Committee.

4. In considering matters within its responsibility, the SRP-AC may rely on written submissions or it may convene an oral hearing. The participant will have an opportunity to examine and to respond to non-confidential information (or to cross-examine persons providing oral testimony) and summaries of confidential information relied on by the Committee. The SRP-AC has 120 days to notify the participant of its decision.

Appeals

5. A participant, beneficiary or other person claiming a benefit under the Plan who wishes to dispute a decision may request the SRP-AC to review any decision reached in the above manner; the SRP-AC may also undertake such reviews on its own initiative or at the request of the SRP-PC. (The review by the SRP-AC may not be adverse to the original decision except in cases of misrepresentation of a material fact, the receipt of new material evidence, or a dispute between two or more persons claiming rights under the Plan.) Policy issues that are raised in appeals may be referred to the SRP-PC. In considering appeals, the SRP-AC follows the same procedures regarding submissions and hearings as indicated above. Such reviews are to be decided within three months.

6. Decisions taken by the SRP-AC (or, in the absence of a decision, after three months) or by the SRP-PC on policy matters may be submitted to the Fund's Administrative Tribunal for review.

Special Provisions Regarding Divorced Spouses and Children

7. The Plan (Section 11.3) permits a participant to direct that a portion of a SRP benefit payable to him or her be paid to one or more former spouses or to a legally separated spouse when such payments (including both spousal and child support) have been ordered by a court as part of a divorce or separation settlement. In the event that the participant does not direct the Plan to make such court-ordered payments, the former spouse may request the SRP-AC to give effect to the order.[112] The court order reflected in the request of the former spouse is, in the absence of an objection from the Plan participant, presumed to be valid if it (a) reflects a reasonable methods of notification to the parties and affords reasonable opportunity for the parties to be heard, (b) is rendered by a court of competent jurisdiction operating in accordance with the applicable requirements of the state, (c) is the produce of fair hearings, and (d) is final and binding on the parties. In all cases, the Plan participant is informed of such a request and has an opportunity to respond to it before it is put into effect.

8. When disputes arise over the efficacy, finality or meaning of a court order or when there are conflicting orders, the SRP-AC may suspend the activation of the request and the

[112] These provisions were adopted in 1999. Detailed information on them is available on the Fund's intranet and is provided, on request, to former spouses and their representatives.

payment of the amount in dispute to either party; suspended amounts are placed in escrow. Disputes may arise if the SRP-AC concludes that the court order does not meet the criteria, outlined above, on the validity and finality of the order, or if the two parties disagree on the meaning or applicability of one or more orders. Where there are conflicts between the parties, the SRP-AC does not undertake to resolve the disputes; this responsibility remains with the court(s) having jurisdiction over the matter and with the parties themselves.

9. A decision by the SRP-AC to make or to suspend payments may be submitted to the Fund's Administrative Tribunal for review by the Plan participant. In such cases, the Tribunal has ruled that the former spouse may intervene with pleadings.[113]

Assessment

10. The Fund's process for resolving disputes regarding SRP matters is generally sound. It provides for initial decisions to be reviewed or reconsidered by the Administration Committee and for issues concerning policy matters to be referred to the governing Pension Committee. The direct access provided to former spouses on issues involving court orders on the division of SRP pension benefits is commendable. The separate structure of the Plan makes it appropriate for its appeal procedures to be separate from those that apply in disputes over other employment rights. We regard these channels for appeals under the SRP to be appropriate, particularly because the membership of both Committees includes representatives selected by and/or in consultation with the staff participants of the Plan. Final recourse to the Administrative Tribunal is also available.

11. Information on the procedures for appealing decisions on the SRP has been made generally available to staff on the Fund's internal Web site. The rules of the SRP-AC regarding its consideration of court-ordered directions of benefits to a (former) spouse are also posted on the Web site. As we have proposed in our discussion of information and communications (Section II.B.), we recommend that that the SRP-AC make additional efforts to communicate to all Plan participants—retirees and beneficiaries, as well as current employees—more complete and timely information on its rules and on decisions. This should include all rules of the SRP-AC that govern its administration of the Plan, changes to substantive policies, practices and procedures, and changes to interpretations and/or application of policies and procedures that would apply in subsequent cases. Given that many of the Fund's retirees and beneficiaries do not have access to or use the Internet, arrangements should be made to provide this information together with regular pension payments or by other means of direct, individual communication. Specific information on rights and procedures for appealing adverse decisions should also be conveyed to retirees and beneficiaries together with the decision itself.

---

[113] See *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT 2001-02, November 20, 2001.

12. We have noted that the present appeals arrangements do not ensure that disputes over court-ordered divisions of SRP benefits will be resolved if, for example, conflicting or inconsistent court orders are issued in different jurisdictions. However, we accept that, as a practical matter, the Committees managing the Fund's Retirement Plan are not in a position to judge the relative merits of different court rulings, and the international character of the Fund generally does not permit the Fund to give greater weight in this area to any single member country's jurisprudence.[114]

[114] See generally *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT 2001-02, November 20, 2001.