International Monetary Fund Administrative Tribunal

Reports

Volume I
1994–1999

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INTERNATIONAL MONETARY FUND ADMINISTRATIVE TRIBUNAL 2000–2001

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Former President, International Court of Justice

Associate Judge Michel Gentot
Member, Conseil d'Etat, France
President, International Labour Organisation Administrative Tribunal

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CONTENTS

PREFACE

This volume contains the Judgments and published Orders of the International Monetary Fund Administrative Tribunal ("IMFAT" or "Tribunal") rendered from its inception through 1999. The history of the Tribunal and an analysis of its jurisprudence are provided in an introductory chapter "The International Monetary Fund Administrative Tribunal: Its First Six Years." A detailed topical Index of the IMFAT's decisions is included as well. Finally, the reader will find republished in an Appendix to this volume the Tribunal's Statute, Rules of Procedure, and the Report of the International Monetary Fund's Executive Board on the establishment of the Tribunal.

Celia Goldman
Registrar

Washington, D. C.
June 2000

The International Monetary Fund Administrative Tribunal: Its First Six Years*

BY CELIA GOLDMAN**

Established in 1994, the International Monetary Fund Administrative Tribunal ("IMFAT" or "Tribunal") is one of the youngest of the international administrative tribunals that serve as fora of last resort for the adjudication of employment disputes arising between international civil servants and their employing organizations.[1] While the IMFAT's contribution to the growing corpus of international administrative law is necessarily limited by the number of cases presented to date, the IMFAT in its formative years has addressed a rich diversity of issues, both substantive and procedural. This paper considers some of the most significant of these issues.

Background

In 1986, the Executive Board of the International Monetary Fund ("IMF" or "Fund") began to consider the possible establishment of an administrative tribunal for the Fund. There followed an extensive review of the features of

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*An earlier version of this paper was prepared for the 20th Anniversary Conference of the World Bank Administrative Tribunal, held in Paris, France on May 16, 2000 and will be published with the proceedings thereof.

**Registrar, International Monetary Fund Administrative Tribunal.

[1]The first such tribunal, the League of Nations Tribunal, was established in 1927. With the demise of the League of Nations, the tribunal was reconstituted as the International Labour Organisation Administrative Tribunal ("ILOAT") in 1946. The establishment of the United Nations Administrative Tribunal ("UNAT") followed in 1949. The NATO Appeals Board and the Council of Europe Appeals Board were established in 1965. Later established administrative tribunals include the Organization of American States Administrative Tribunal ("OASAT") (1971), the World Bank Administrative Tribunal ("WBAT") (1980), the Inter-American Development Bank Administrative Tribunal ("IDBAT") (1981), the Asian Development Bank Administrative Tribunal ("AsDBAT") (1991), and, recently, the African Development Bank Administrative Tribunal ("AfDBAT"), whose statute entered into force in 1998. *See generally* C. F. Amerasinghe (ed.), *Documents on International Administrative Tribunals* (1989).

the major existing tribunals, culminating in a draft Statute and a Report by the Fund's Executive Board to the Board of Governors recommending its adoption.[2]

The Statute of the International Monetary Fund Administrative Tribunal entered into force as of October 15, 1992. The Tribunal was formally established January 13, 1994 when, pursuant to the Statute, the Managing Director notified the staff of the Fund of the appointment of the Tribunal's members.[3] The Tribunal adopted its Rules of Procedure on February 18, 1994. These were thereafter amended on August 31, 1994.

The Tribunal is composed of a President, two associate members and two alternates, each appointed for two-year terms and eligible for reappointment.[4] The composition of the International Monetary Fund Administrative Tribunal has remained unchanged since its inception, with one member who formerly had served as an alternate now serving as an associate member and vice-versa. All members must satisfy the statutory requirement that they possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.[5] The present composition not only ably fulfills this requirement but also reflects major legal systems of the world.[6] In its six-year history, the International Monetary Fund Administrative Tribunal has rendered eight Judgments and four published Orders.

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[2]The complete text of the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund ("Report of the Executive Board") is included in the Appendix to this volume.

[3]Article XX (2).

[4]Article VII (1)(a) and (b), (2).

[5]Article VII (1)(c).

[6]The composition of the International Monetary Fund Administrative Tribunal (2000–2001):

Judge Stephen M. Schwebel (United States), President
(Former President, International Court of Justice);
Associate Judge Michel Gentot (France)
(Member, Conseil d'Etat, France; President, International Labour Organisation Administrative Tribunal);
Associate Judge Nisuke Ando (Japan)
(Professor of International Law, Faculty of Law, Doshisha University, Kyoto);
Alternate Judge Agustín Gordillo (Argentina)
(Professor of Administrative Law and Professor of Human Rights, University of Buenos Aires School of Law);
Alternate Judge Georges Abi-Saab (Egypt)
(Professor of International Law, Graduate Institute of International Studies, Geneva).

The Tribunal's Jurisdiction

An important task of the IMFAT in its early years has been to interpret the scope of its jurisdictional grant. In its first two cases, the Tribunal considered the limitations on its jurisdiction *ratione temporis* imposed by Article XX of the Statute. Later cases have addressed equally significant issues—arising under Article II of the Statute—of who may bring complaints before the Tribunal (jurisdiction *ratione personæ*) and the compass of the subject matter that may be entertained in those complaints (jurisdiction *ratione materiæ*).

Jurisdiction Ratione Temporis

A distinguishing feature of the IMFAT Statute is that applicants may bring challenges only to "administrative acts" of the Fund.[7] An "administrative

[7]Article II (1) provides:

> 1. The Tribunal shall be competent to pass judgment upon any application:
>   a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
>   b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.

In this respect, the IMFAT Statute most closely resembles the constitutive instrument of the Council of Europe Administrative Tribunal, which provides:

> 1. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General.

(Council of Europe Administrative Tribunal Statute, Article 59 (1).) More typical, however, is the language of the WBAT Statute:

> 1. The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. The words "contract of employment" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement Plan.

(WBAT Statute, Article II (1).) The WBAT provision appears to be modeled on those of the UNAT (UNAT Statute, Article 2) and ILOAT (ILOAT Statute, Article II). Very similar terms are also found in the jurisdictional grants of the OASAT (OASAT Statute, Article II), the IDBAT (IDBAT Statute, Article II), and the AsDBAT (AsDBAT Statute, Article II). Notably, the AfDBAT Statute appears to incorporate both approaches:

> The Tribunal shall be competent to hear and pass judgement upon any application by a member of the staff of the Bank contesting an administrative decision for non-observance of the contract of employment or the terms of appointment of such staff member.

(AfDBAT Statute, Article III (1).) "Administrative decision" is defined in the AfDBAT Statute as "a determination by the Bank concerning the terms and conditions of employment of a staff member[.]" (AfDBAT Statute, Article II (1) (i).)

act" is defined as "any individual or regulatory decision taken in the administration of the staff of the Fund[.]"[8] Article XX excludes from the Tribunal's jurisdiction challenges to administrative acts taken before the entry into force of the Statute.[9]

In *Mr. "X", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1994-1 (August 31, 1994) and *Ms. "S", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1995-1 (May 5, 1995), the Tribunal granted the Fund's motions for summary dismissal[10] on the basis of the time-bar of Article XX. In each of these cases, the Tribunal was required to construe the term "administrative act," laying the foundation for later jurisprudence in respect of its jurisdiction *ratione materiæ.*

In *Mr. "X"* and *Ms. "S"*, the Tribunal rejected arguments that jurisdiction could be conferred upon the Tribunal because past administrative acts may continue to have effect in the period of the Tribunal's competence. In *Mr. "X"*, the substantive dispute between Applicant and the Fund centered on

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[8]Article II (2)(a).

[9]Article XX (1) provides:

1. The Tribunal shall not be competent to 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.

[10]Rule XII of the IMFAT Rules of Procedure provides a procedure for summary dismissal of an inadmissible application:

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.
2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.
3. The complete text of any document referred to in the motion shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VIII, paragraphs 2 and 3, shall apply to the motion.
4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Applicant.
5. The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him.
6. The complete text of any document referred to in the objection shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VII, Paragraphs 4 and 8, shall apply to the objection to the motion.
7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Fund.
8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests.

the duration of Mr. "X"'s pensionable period of service and hence the amount of his pension payments. The jurisdictional question required the Tribunal to identify the allegedly illegal "administrative act" (in the sense of Article II) taken by the Fund, and to pinpoint when it took place.

The Tribunal concluded that it was the determination in 1986 of the period of Mr. "X"'s pensionable service rather than the calculation and disbursement of his pension payments beginning in 1993 that qualified as an "administrative act" under Article II:

> The calculation of Mr. "X"'s pension in 1993 was a purely arithmetical act governed by the decision of 1986 as to the extent of his pensionable service. . . . The fact that that decision of 1986 produces consequences for Mr. "X" now can have no effect upon the extent of the jurisdiction of the Tribunal; if it were otherwise, then the limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts may well be felt for years after the date when the Tribunal's Statute came into force. Equally, the Applicant's claim that the 1986 decision was open to reconsideration does not mean that it was not taken when it was taken. . . . Continued discontent with the results of an administrative act and eventual renewal of a challenge to its legality cannot put in question the fact that the act was taken, and taken when it was taken.[11]

Later, in *Ms. "S"*, the Tribunal expanded on the principles developed in *Mr. "X"*. There, the Applicant contested the legality of a provision of the Staff Retirement Plan (and its application to her) that excluded prior part-time contractual service from the contractual service that could be credited retroactively as qualified service under the Plan. While the Tribunal held that rejections by the Plan's Administration Committee of Ms. "S"'s requests for inclusion of her part-time service were "decisions" within the meaning of Article II of the IMFAT Statute, it concluded that the "administrative act" whose legality Applicant challenged, was, in fact, the Plan provision itself, a provision that pre-dated the Tribunal's competence:

> The denial of requests for exceptional application or amendment of a "pre-existing" provision equally cannot confer jurisdiction on the Tribunal it otherwise lacks, nor can a refusal to refer a request for amendment to the Pension Committee do so. That a current complaint about a rule which came into force before October 15, 1992 is not sufficient to give rise to jurisdiction which otherwise is absent follows from the principle that formed the basis of the Tribunal's judgment in the case of *Mr. "X" v. International Monetary Fund*.[12]

[11] *Mr. "X"*, para. 26, p. 45.

[12] *Ms. "S"*, para. 21, pp. 55–56.

Hence, in *Ms. "S"*, the Tribunal applied the time-bar of Article XX to preclude the admissibility of post-Statute reaffirmations of pre-existing administrative acts.

Jurisdiction Ratione Personæ

The important question of who may bring cases before the Tribunal was considered in the recent case of *Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999). Article II of the Statute confines the IMFAT's jurisdiction *ratione personæ* to "member[s] of the staff" or "enrollee[s] in, or beneficiar[ies] under, any retirement or other benefit plan maintained by the Fund as employer."[13]

Before *Mr. "A"*, all cases brought to the Tribunal had been filed either by staff members or former staff members of the Fund.[14] *Mr. "A"* presented the claim of a former "contractual employee"[15] of the Fund who alleged that,

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[13]Article II (1) (a) and (b).

Article II (1) provides in its entirety:

1. The Tribunal shall be competent to pass judgment upon any application:
   a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
   b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.

[14]The question of the IMFAT's jurisdiction *ratione personæ* also had arisen in the earlier case of *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996). In that case, the Applicant was a member of the staff at the time he filed his Application; however, at the time of the challenged administrative act—the offer of a position at a given grade and salary—, he had not yet become a staff member. The Tribunal concluded that ". . . since the offer and acceptance of a particular grade and salary thereupon and thereafter affected him as a member of the staff, the Tribunal is competent to adjudge his case." (*D'Aoust*, para. 10.) (The IMFAT's jurisdiction in this case is considered further under the heading ***Jurisdiction* Ratione Materiæ,** *infra* at pp. 9–11.)

[15]Under Fund guidelines, "contractual employees" comprise a separate category of employment from "staff members." Contractual appointments are normally to be used to fill positions in which the Fund has little or no expertise, those for which the skills required are likely to change dramatically over time, and continuity within the staff performing the tasks is not critical, as well as positions in which services are needed for only a relatively short period of time. Recruitment and compensation practices applicable to contractual employees differ from those governing staff members. In addition, employment disputes involving contractuals are to be resolved by binding arbitration; staff members, by contrast, have access to the Grievance procedure and Administrative Tribunal. (*Mr. "A"*, paras. 37–43, pp. 142–144.)

Contractual appointees should not be confused with "fixed-term" appointees, who are considered members of the staff and are expressly included within the Tribunal's jurisdiction. (*Mr. "A"*, note 11, pp. 142–143.)

based on the nature of his work and successive contractual appointments, he should have been categorized as a "staff member" and accorded the benefits thereof.

Article II defines "member of the staff" as "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff[.]"[16] Mr. "A"'s letter of appointment expressly stated: "You will not be a staff member of the Fund and will not be eligible for any benefits other than those specified in this letter."[17] Relying on general principles of international administrative law[18] and citing the jurisprudence of a number of other international administrative tribunals,[19] the Applicant sought to persuade the IMFAT to look beyond the language of his letter of appointment to hold that he was a "de facto" member of the staff entitled to seek a remedy before the Administrative Tribunal.

The case of *Mr. "A"* occasioned an extensive examination by the IMFAT of the jurisprudence of other tribunals, revealing a wide range of conclusions on the general questions raised by Mr. "A"'s complaint.[20] The Tribunal observed that it found the interplay of cases in the other tribunals of interest, but asserted its duty to decide the admissibility of Mr. "A"'s Application within the strictures of the jurisdictional provisions of its own Statute and the factual circumstances of the wording of the Applicant's letter of appointment.[21]

In so concluding, the Tribunal noted that the IMFAT Statute is distinctive in expressly predicating the Tribunal's jurisdiction *ratione personæ* on the language of the letter of appointment. Furthermore, the Tribunal concluded, based on the Statute's legislative history, that exclusion of contractual employees from the Tribunal's jurisdiction was not only explicit, but inten-

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[16]Article II (2)(c)(i).

Also included in the term "member of the staff" are:

> (ii) any current or former assistant to an Executive Director; and
> (iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund[.]

(Article II (2) (c).)

[17]*Mr. "A"*, para. 9, p. 136.

[18]Article III of the IMFAT Statute provides *inter alia*:

> . . . 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. . . .

[19]*E.g., Jorge O. Amora v. Asian Development Bank*, AsDBAT Decision No. 24 (1997).

[20]*Mr. "A"*, paras. 63–91, pp. 151–162.

[21]*Mr. "A"*, para. 86, p. 160.

tional. It was a considered choice of the drafters, reflecting a recognition that a separate dispute settlement mechanism exists for resolution of employment disputes with contractual employees, disputes which may be of a different character than those involving staff members.[22]

The difficulty that arose in *Mr. "A"*, was that Applicant's claim—that he should have been classified as a member of the staff—was not within the scope of either the arbitration procedures available to contractual employees[23] or, concluded the Tribunal, the jurisdiction of the IMFAT. This result led the Tribunal to express its "disquiet and concern" at a practice that may leave employees of the Fund without judicial recourse, an outcome " . . . not consonant with norms accepted and generally applied by international governmental organizations." However, observed the Tribunal, it is for the policy-making organs of the Fund, rather than for the Tribunal, to consider and adopt means of providing appropriate avenues for the resolution of disputes of the kind at issue in the case of *Mr. "A"*.[24]

International Administrative Tribunals as Tribunals of Limited Jurisdiction

The Tribunal rejected Mr. "A"'s contention that equitable or other considerations enable the Administrative Tribunal to extend its jurisdiction to claims falling outside the express language of Article II. Instead, the Tribunal affirmed that international administrative tribunals do not sit as courts of general jurisdiction, but rather operate under the limited jurisdiction granted by their statutes. [25] This principle is enunciated explicitly in the first sentence of Article III of the IMFAT Statute, which states: "The Tribunal shall not have any powers beyond those conferred under this Statute."

That the powers of the IMFAT are derived solely from its statutory grant, noted the Tribunal, is buttressed by Article IV, which provides that "[a]ny issue concerning the competence of the Tribunal shall be settled by the Tribunal in accordance with this Statute." In the words of the Report of the Executive Board, this provision confirms that the task of the IMFAT is to "interpret but not expand" its statutory authority in deciding upon its jurisdiction over a particular case.[26] Further support for the view that the IMFAT

[22]*Mr. "A"*, paras. 44–48, pp. 145–146.
[23]*Mr. "A"*, para. 18, p. 139.
[24]*Mr. "A"*, para. 97, p. 164.
[25]*Mr. "A"*, paras. 56–59, 100 (4), pp. 148–150, 165.
[26]Report of the Executive Board, p. 21; *Mr. "A"*, para. 57, p. 149.

is a tribunal of limited jurisdiction, said the IMFAT in *Mr. "A"*, is found in the third sentence of Article III,[27] providing for distribution of power among the Administrative Tribunal and the legislative and executive organs of the Fund, and in Article XIX,[28] granting solely to the Board of Governors the authority to amend the Tribunal's Statute.

Jurisdiction Ratione Materiæ

In *Mr. "A"*, the Tribunal made clear that the Applicant's claim was barred not only because it fell outside the Tribunal's jurisdiction *ratione personæ*, but also because it lay beyond the reach of its jurisdiction *ratione materiæ*. Specifically, the Tribunal held that " . . . the Fund's decision to enter into a contract or series of contracts with an individual to serve as a contractual employee, rather than as a member of the staff, is not a 'decision taken in the administration of the staff'" as required for jurisdiction under Article II (2) (a).[29]

In reaching this conclusion, the Tribunal observed how closely intertwined are the Statute's limitations on personal and subject matter jurisdiction:

> By the terms of the Statute, actions constituting "administrative acts" are defined as restricted to those taken in the administration of the "staff". Hence, Fund actions taken with respect to others, for example, contractuals, are outside the scope of the Tribunal's jurisdiction *ratione materiæ*. Moreover, the "administrative act" at issue must adversely affect the "member of the staff" bringing the challenge to its legality. (Art. II, para. 1.a.)[30]

In holding that Mr. "A"'s claim lay outside of the IMFAT's jurisdiction *ratione materiæ*, the Tribunal was careful also to distinguish the facts of the case from other circumstances in which the Tribunal may exercise jurisdiction over complaints brought by staff members with respect to matters preliminary to their hiring. Such was the case in *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996).

In *D'Aoust*, the Applicant was not yet a member of the staff at the time of the challenged administrative act, i.e. the offer of a position at a given grade

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[27]The third sentence of Article III provides:

> Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund.

[28]Article XIX provides:

> This Statute may be amended only by the Board of Governors of the Fund.

[29]*Mr. "A"*, para. 100 (3), p. 165.

[30]*Mr. "A"*, para. 51, p. 147.

and salary. The Tribunal concluded, nonetheless, that " . . . since the offer and acceptance of a particular grade and salary thereupon and thereafter affected him as a member of the staff, the Tribunal is competent to adjudge his case."[31] While the Tribunal in *D'Aoust* had framed the question as one of jurisdiction *ratione personæ*, in *Mr. "A"* it noted the relevance of the decision to the question of jurisdiction *ratione materiæ* as well:[32]

> The Tribunal's decision in *D'Aoust* reveals that decisions taken by the Fund preliminary to an applicant's becoming a staff member may indeed be within the Tribunal's competence *ratione materiæ* as long as the challenged act affects the adversely affected individual in his capacity as a member of the staff. Mr. "A", by contrast, has never become a member of the Fund's staff.[footnote omitted][33]

While *Mr. "A"* and *D'Aoust* highlight how closely interwoven the elements of the Tribunal's jurisdiction *ratione personæ* and *ratione materiæ* may be in some cases, in other instances the issue of the IMFAT's subject matter jurisdiction has arisen independently of controversies over its personal jurisdiction. These cases have involved challenges to "regulatory decisions" of the Fund, to acts of the Staff Association Committee, and to the recommendations of the Fund's Grievance Committee.

Under the IMFAT Statute, jurisdiction *ratione materiæ* is predicated on the existence of an "administrative act."[34] "Administrative act" encompasses both "individual" and "regulatory" decisions taken in the administration of the staff of the Fund.[35] "Regulatory decision" is defined as " . . . any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund[.]"[36]

In *D'Aoust*, the Applicant challenged *inter alia* the legality of what he regarded as the "regulatory decision" by which his grade and salary were

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[31]*D'Aoust*, para. 10, pp. 60–61.

[32]*Mr. "A"*, para. 53, p. 147.

[33]*Mr. "A"*, para. 55, distinguishing *Jorge O. Amora v. Asian Development Bank*, AsDBAT Decision No. 24 (1997).

[34]Article II (1) (a) provides:

> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> a. by a member of the staff challenging the legality of an administrative act adversely affecting him[.]"

See note 7, *supra* at p. 3, contrasting this provision with the jurisdictional requirements of other international administrative tribunals.

[35]Article II (2) (a).

[36]Article II (2) (b).

determined, specifically, the methodology by which recognition for prior experience was truncated at ten years for non-economists but not for economists. While the Tribunal considered and upheld the "individual decision" by which this methodology was applied to Mr. D'Aoust,[37] it found no "regulatory decision" (within the meaning of Article II) on which to rule.[38]

For a practice to constitute a "regulatory decision," said the Tribunal, there must be a "decision" taken by an organ authorized to take it. The evidence showed that, at the time the methodology was applied to Mr. D'Aoust, it was an unpublished practice known to and employed by a small number of Fund officials. It had been " . . . distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund."[39] Therefore, the Tribunal concluded that it lacked jurisdictional competence to adjudge the legality of the practice as a "regulatory decision."[40]

The IMFAT's jurisdiction *ratione materiæ* was also at issue with respect to a claim raised in *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999). In *Mr. "V"*, the Applicant challenged the legality of the Fund's inclusion in a confidential report for limited circulation within the Fund of information relating to his separation from service, on the grounds that this act violated a settlement and release agreement he had entered into with the Fund, and Fund rules. A subsidiary allegation was that the report, which—consistent with Fund procedures—had been circulated to the Chairman of the Staff Association

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[37]*See* **Challenges to the Legality of Administrative Acts: Discretionary Authority and its Limits,** ***Challenges to Grade and Salary,*** *infra* at pp. 17–19.

[38]In view of the conclusion that there was no "regulatory decision," the Tribunal also held that there was no need to consider the Fund's argument that, insofar as it related to a "regulatory decision," the Application was time-barred. (*D'Aoust*, para. 38, p. 72.)

[39]*D'Aoust*, para. 35, p. 70.

[40]In so concluding, however, the IMFAT also took the opportunity to emphasize that "reasonable notice" given internally has been held by international administrative tribunals to be requisite for actions or decisions in order that employees be clearly informed of the working conditions in their organization. (*D'Aoust*, para. 37 (ii), p. 72.) Therefore, noted the Tribunal:

> . . . the Tribunal finds it appropriate to observe that for the Fund to generate and apply a practice that affects the determination of the salary level of 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.

(*D'Aoust*, para. 36, pp. 70–71.)

Committee ("SAC"), had been left by the SAC in the open view of staff members on an information desk in its offices.

As the SAC itself may not be a respondent before the Tribunal,[41] the Applicant's contention raised the question of whether the Fund may be answerable before the Tribunal for an alleged act of the SAC. Hence, while in *D'Aoust* the jurisdictional controversy relating to a challenge to a "regulatory decision" centered on whether there had been a "decision" for purposes of Article II (2) (b), in *Mr. "V"*, the Tribunal's task focused on determining whether an act of the SAC could have been "taken in the administration of the staff of the Fund" as required to qualify as an "administrative act" under Article II (2) (a).

In answering this question, the Tribunal in *Mr. "V"* observed that the SAC serves primarily as a representative of staff (vs. management) interests. Furthermore, the Applicant's claim suggested that if the SAC had made available to staff members copies of the confidential report it did so in furtherance of its own goals rather than the goals of the Fund.[42] In addition, the alleged act was not typical of "administrative acts" as described in the commentary on Article II found in the Report of the Executive Board.[43]

The Tribunal rejected the view that because management had transmitted the report to the SAC Chairman it had somehow blurred the distinction between Fund action and that of the SAC, or that it had afforded Fund authority to acts in contravention of Fund interests.[44] Accordingly, the Tribunal held that it could not entertain as part of the Applicant's complaint against the Fund all of the alleged consequences of the Fund's circulation of the report, including the handling of the report by the SAC after it reached its offices. As the alleged acts of the SAC were not "taken in the administration of the staff of the Fund," Mr. "V"'s contention that the Fund was legally responsible for those purported acts was not encompassed by the Tribunal's subject matter jurisdiction.[45]

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[41]*Mr. "V"*, para. 111, p. 200.

[42]*Mr. "V"*, para. 113, p. 201.

[43]The Tribunal noted:

> "This definition [of 'administrative act'] 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."

(*Mr. "V"*, para. 111, p. 200, quoting Report of the Executive Board, p. 14.)

[44]*Mr. "V"*, para. 112, p. 201.

[45]*Mr. "V"*, para. 114, pp. 201–202.

The issue of the IMFAT's jurisdiction *ratione materiæ* as it applies to challenges to the legality of recommendations of the Fund's Grievance Committee is taken up in the following section.

Exhaustion of Remedies and the Tribunal's Relationship to the Fund's Grievance Committee

The admissibility of an application to the Administrative Tribunal is governed not only by the jurisdictional provisions of the Statute, but also by its exhaustion of remedies requirement. As most "individual decisions"[46] challenged in the Administrative Tribunal are therefore first considered by the Fund's Grievance Committee, the Tribunal has had occasion to consider its relationship to that body.

The Exhaustion Requirements of Article V

A basic prerequisite to the adjudication by an international administrative tribunal of an employment dispute arising between a staff member and his or her employing organization is the exhaustion by the aggrieved employee of all internal administrative remedies prior to invoking the judicial remedy of the tribunal. As the Commentary on the Statute, presented in the Report of the Executive Board, notes:

> The exhaustion requirement is imposed by the statutes of all major administrative tribunals, presumably for the reason that the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate.[47]

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[46]"Regulatory decisions," by contrast, are not of a type over which the Grievance Committee has jurisdiction, and therefore these are brought to the Tribunal directly. (*D'Aoust*, para. 3, p. 57.)

In addition, "individual decisions" arising under the Staff Retirement Plan that fall within the competence of the Administration or Pension Committees of the Plan are excluded from the Grievance Committee's jurisdiction. (General Administrative Order No. 31, Rev. 3, Section 4.03.) In 1999, Rules of Procedure of the Administration Committee of the Staff Retirement Plan were adopted, clarifying the requirements for exhaustion of channels of administrative review for such decisions. (IMF Staff Bulletin 99/17 and attachment.)

[47]Report of the Executive Board, p. 23.

For the exhaustion requirements of other administrative tribunals, *see* AfDBAT Statute, Article III (2)(i); AsDBAT Statute, Article II (3)(a); IDBAT Statute, Article II (2)(a); ILOAT Statute, Article VII (1); OASAT Statute, Article VI (1); UNAT Statute, Article 7 (1); and WBAT Statute, Article II (2)(i).

This requirement is given effect in the IMFAT Statute by Article V.[48]

In *Ms. "Y", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1998-1 (December 18, 1998), the Tribunal considered a motion by the Fund for summary dismissal on the ground that the Applicant had failed to fulfill the exhaustion requirements of Article V. Ms. "Y", who claimed that her career had been affected by discrimination based on her gender, age and profession, had submitted her case to an ad hoc discrimination review procedure instituted by the Fund on a one-time basis to review charges of discrimination following a report by the Fund's Consultant on Discrimination. The problem presented to the Tribunal was whether the Applicant, who had not brought her complaint to the Fund's Grievance Committee, had, by invoking the ad hoc discrimination review procedure, satisfied the statutory prior review requirements.

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[48]Article V provides:

1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.
2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:
   a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;
   b. a decision denying the relief requested has been notified to the applicant; or
   c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.
3. For purposes of this Statute, where the available channels of review do not include the procedure described in Section 2, a channel of administrative review shall be deemed to have been exhausted when:
   a. three months have elapsed since the request for review was made and no decision stating that the relief requested would be granted has been notified to the applicant;
   b. a decision denying the relief requested has been notified to the applicant; or
   c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.
4. For purposes of this Statute, all channels of administrative review shall be deemed to have been exhausted when the Managing Director and the applicant have agreed to submit the dispute directly to the Tribunal.

Following a detailed examination of the categories of administrative review outlined in Article V, the Tribunal concluded that the memoranda establishing the ad hoc discrimination review lacked clarity as to the relationship between that procedure and the Fund's established Grievance procedure. It was this lack of clarity that the Tribunal termed "the distinguishing factor in this case."[49] Significantly, the Tribunal chose to resolve the ambiguity in favor of requiring Grievance Committee review where available,[50] holding that

> . . . exhaustion of the remedies provided by the Grievance Committee, where they exist, is statutorily required and that the memoranda in question do not exclude that requirement.[51]

The Tribunal in so holding underscored the importance of the exhaustion of administrative review as a corollary to the Tribunal's function as a forum of last resort. In particular, the IMFAT noted the advantage to the Tribunal's consideration of a case of having a detailed factual and legal record produced by the Grievance Committee.[52]

At the same time, signaling its flexibility in the face of the "singular circumstances"[53] presented, the Tribunal sought as well to preserve the possibility of permitting direct Tribunal review of Ms. "Y"'s complaint if recourse to the Grievance Committee proved unavailable to her. Therefore, the Tribunal concluded:

> . . . in the event that the Grievance Committee, if seized, should decide that it does not have jurisdiction over Applicant's claim, the Administrative Tribunal will reconsider the admissibility of that claim on the basis of the Application now before it.[54]

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[49]*Ms. "Y"*, para. 42, pp. 132–133.

[50]By the terms of its constitutive instrument, General Administrative Order No. 31, the Grievance Committee " . . . for the purpose of proceeding with a grievance, shall decide whether it has jurisdiction over the matter." (GAO No. 31, Rev. 3, Section 4.04.)

[51]*Ms. "Y"*, para. 42, pp. 132–133.

[52]*Ms. "Y"*, para. 42, pp. 132–133.

In this respect, the IMFAT's reasoning echoed that of *Donneve S. Rae (No. 2), Applicant v. International Bank for Reconstruction and Development, Respondent*, WBAT Decision No. 132 (1993), cited earlier in the IMFAT's Judgment. *See Ms. "Y"*, para. 32, p. 130.

[53]*Ms. "Y"*, para. 43, p. 133.

[54]*Ms. "Y"*, para. 43, p. 133.

This holding became the subject of a request by the Fund for interpretation of judgment. *See* **Finality of the Tribunal's Judgments,** *infra* at pp. 31–32.

The IMFAT does not serve as an "appellate court" vis-à-vis the Grievance Committee

The Tribunal in *Ms. "Y"* affirmed the statutory requirement of Grievance Committee review of individual complaints, where that channel is available, and noted the benefit to the Tribunal of such review. In its earlier decision in *D'Aoust*, the IMFAT explored the relationship between the Grievance process and the Tribunal's subsequent adjudication of an applicant's claim.

In *D'Aoust*, the Applicant included in his Application a challenge to the manner in which the Grievance Committee had handled his grievance, seeking review by the Tribunal of the Grievance Committee's decision. The IMFAT refused to entertain this challenge, concluding that the Grievance Committee's recommendation was not subject to direct review by the Tribunal because it did not constitute an "administrative act" under Article II of the Statute. Rather, the Grievance Committee is empowered only to make recommendations to the Managing Director, who takes the final administrative decision. It is this final administrative decision that is reviewable by the Tribunal.

The Tribunal explained in *D'Aoust* that it does not function as an appellate body with respect to the Grievance Committee:

> . . . the Tribunal's competence is not limited as it would be if it were a court of appeal; e.g., it makes findings of fact as well as holdings of law.[55]

Furthermore, in making findings of fact, the Tribunal is " . . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it."[56] This standard has provided guidance to the Tribunal in subsequent cases in which it has had the benefit of a transcript of the Grievance Committee proceedings.[57]

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[55]*D'Aoust*, para. 17, p. 64.

[56]*D'Aoust*, para. 17, p. 64.

[57]The Tribunal has had the benefit of such a transcript in all of those cases to date in which the Grievance Committee procedures have been invoked as part of the exhaustion of remedies requirement. *See D'Aoust*, para. 6, p. 58; *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 5, p. 75; *Ms. "B", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), para. 6, p. 89; and *Mr. "V"*, para. 6 and note 5, p. 169 (noting the standard set forth in *D'Aoust*).

Rule VII (3) of the Rules of Procedure requires that the Applicant attach as annexes to the Application all documents cited therein (in a complete text, unless part is obviously irrelevant). That paragraph directs that "[s]uch documents shall include a copy of any report and recommendation of the Grievance Committee in the matter." In the practice of the IMFAT thus far, the result of this Rule has been the submission to the Tribunal of the transcript of the Grievance Committee proceedings.

More recently, in *Mr. "V"*, the IMFAT reaffirmed that it is not bound by the Grievance Committee's findings but rather decides each case *de novo*. In *Mr. "V"*, the Applicant contended that the Committee's recommendation on his complaint was "misleading." The Tribunal observed that the Applicant's concerns were misplaced in light of its Judgment in *D'Aoust*. The Tribunal in *Mr. "V"* reiterated that the IMFAT " . . . makes its own independent findings of fact and holdings of law, [and] is not bound by the reasoning or recommendation of the Grievance Committee."[58]

Challenges to the Legality of Administrative Acts: Discretionary Authority and Its Limits

A fundamental function of the Administrative Tribunal as a judicial body is to determine whether a challenged decision has transgressed the applicable law of the organization. A limitation on this function is that the Tribunal may not substitute its judgment for that of the competent organs of the Fund. With respect to the exercise of managerial discretion, the jurisprudence of international administrative tribunals supports the view that discretionary decisions may be overturned only if 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.[59]

Challenges to Grade and Salary

In *D'Aoust*, the first case in which the IMFAT rendered a Judgment on the merits, the Tribunal upheld the important right of staff members to bring challenges to the legality of the initial determination of their grade and salary:

> The Tribunal sustains the Fund's position on this question as a matter of presumption; the fact that a staff member accepts an offer that he or she is free to decline does weigh against challenge to the terms of the contract so accepted. But it is a question only of presumption. The Fund and an applicant for a position in the Fund are not in an equal negotiating position; e.g., as this case shows, the Fund is in possession of relevant information not within the knowledge of an applicant. Accordingly, while the presumption holds, the staff member nonetheless can be heard to argue contrary claims,

[58]*Mr. "V"*, para. 129, p. 206.

[59]Report of the Executive Board, pp. 13, 17, 19.

> as in this case, of misrepresentation of facts or irregularity in the process of appointment. The Tribunal concludes that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of the Fund's determination of grade and salary.[60]

Accordingly, the Tribunal proceeded to examine the substance of Mr. D'Aoust's complaint, that the offer and acceptance of his grade and salary had been marked by procedural irregularity and factual errors, and that the application to him of the practice of truncating recognition for prior experience at ten years for non-economist staff (but not for economists) was unlawful.

The Tribunal observed that it is settled jurisprudence that classification and grading is an exercise of discretionary authority, subject to judicial review only for irregularity of procedure.[61] In addition, noted the IMFAT, while international administrative tribunals have emphasized the importance of observance by an organization of its procedural rules, on occasion they have held procedural irregularities and errors irrelevant when the act or omission did not affect the decision of the complainant or his financial interests.[62]

After reviewing the evidence, the IMFAT concluded that none of the alleged errors or irregularities of which Mr. D'Aoust complained could have affected his decision to accept the post offered to him at the stated grade and salary. Moreover, the Tribunal found, the salary that the Fund initially offered him was renegotiated at the time to his advantage. [63] The Tribunal also considered whether, as the Applicant had alleged, he had been deliberately misled as to the nature of the job offered to him, and found no evidence to support that assertion.[64]

Finally, the IMFAT examined Mr. D'Aoust's contention that the Fund's practice of applying different methodologies to the salary determinations of

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[60]*D'Aoust*, para. 12, p. 61.

[61]*D'Aoust*, para. 23, p. 65, citing *Lyra Pinto v. International Bank for Reconstruction and Development*, WBAT Decision No. 56 (1988), para. 36.

Tribunals have been reluctant to interfere in the grading of posts, holding that the evaluation of job responsibilities is best left to persons trained to apply the technical criteria. (*D'Aoust*, para. 26, p. 66, citing *In re Dunand and Jacquemod*, ILOAT Judgment No. 929 (1988), para. 5.)

[62]*D'Aoust*, para. 23, p. 66, citing *Ricardo Schwarzenberg Fonck v. Inter-American Development Bank*, IDBAT Judgment No. 2 (1984), para. 5.

[63]*D'Aoust*, para. 24, p. 66.

[64]*D'Aoust*, paras. 27–28, p. 67.

economist and non-economist staff unlawfully discriminated against him. Given that economics is at the heart of the mission of the Fund, concluded the Tribunal, the application to Mr. D'Aoust of the so-called non-economist matrix in the determination of his salary did not give rise to a cause of action against the Fund on the ground of inequality of treatment.[65] In light of all of these considerations, the Tribunal in *D'Aoust* held that the Fund's exercise of managerial discretion in setting the Applicant's initial grade and salary was not invalidated by the procedures followed, including the ten-year truncation of his previous experience.[66]

Validity of Personnel Policy: "Underfilling" of Position

In a subsequent case, *Ms. "B", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), the IMFAT considered another dispute relating to the classification and grading of a staff member. In *Ms. "B"*, the controversy centered on the practice of "underfilling," by which an individual is required, for an initial period, to fill a position at a lower grade than that at which it has been advertised, on the basis that the staff member does not fully meet the education or experience requirements for promotion to the post at the advertised grade. Ms. "B" challenged the legality of both the "individual decision" applying this practice to her and the "regulatory decision" (personnel policy) on which it was based.

The Tribunal dismissed at the outset Ms. "B"'s argument that the memorandum in question, the so-called Kennedy-Swain memorandum, [67] lacked legitimacy as embodying a "practice" rather than a "policy." The law-creating effect of administrative practice, said the IMFAT, has been

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[65]*D'Aoust*, para. 29, p. 67.

The Tribunal concluded that it lacked jurisdiction to consider Applicant's challenge to the legality of the methodology as a "regulatory decision" of the Fund. (*D'Aoust*, para. 35, p. 70. *See* **The Tribunal's Jurisdiction, *Jurisdiction* Ratione Materiæ,** *supra* at p. 11.)

[66]*D'Aoust*, para. 30, p. 68.

[67]The contested memorandum provided:

> " . . . if . . . the candidate does not currently fully meet the stated requirements, but nevertheless can soon be expected to meet such requirements and to perform successfully in the position with additional training and/or on-the-job experience, the candidate will initially be appointed one grade below the lowest grade indicated for the position. When positions are 'underfilled' in this fashion, promotion to the lowest grade at which the position is actually classified will occur after approximately one year . . . , provided that the incumbent has successfully carried out the duties and responsibilities of the position. . . ."

(*Ms. "B"*, para. 35, p. 97, quoting Kennedy-Swain Memorandum.)

embraced both in the Commentary on the IMFAT's Statute[68] and by international administrative jurisprudence.[69]

Next the Tribunal considered whether the contested memorandum met the criteria for a valid "regulatory decision" as developed by the IMFAT in *D'Aoust*. Specifically, the Tribunal in *Ms. "B"* considered whether there was " . . . a decision, taken by an authorized organ of the Fund, laid down in a published official document of the Fund, with a determinable effective date, of which the staff has been given reasonable notice."[70]

With respect to the matter of authority for the issuance of the personnel policy, the Tribunal ruled that the official functions of the applicable Fund divisions and of their chiefs conferred upon them sufficient authority to codify a pre-existing practice and to issue the contested policy memorandum.[71] Furthermore, said the Tribunal, the memorandum was a lawful form for the issuance of a personnel policy,[72] and the date of the memorandum itself sufficed as its effective date.[73]

The Tribunal next turned to the question of whether there had been "reasonable notice" to the staff of the personnel policy elaborated in the memorandum. The circulation of the Kennedy-Swain memorandum, observed the Tribunal, was limited to the Senior Personnel Manager and Administrative Officer of each Fund department, and the Staff Association.[74] The Tribunal

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[68]The Tribunal noted:

> "There are two unwritten sources of law within the internal law of the Fund. First, the administrative practice of the organization may, in certain circumstances, give rise to legal rights and obligations."

(*Ms. "B"*, para. 37, p. 98, quoting Report of the Executive Board, p. 18.)

[69]*Ms. "B"*, paras. 37–38, p. 98, citing *de Merode v. The World Bank*, WBAT Decision No. 1 (1981), p. 56 and *In re Connolly-Battisti (No. 5)*, ILOAT Judgment No. 323 (1977), p. 10.

[70]*Ms. "B"*, para. 39, p. 98.

[71]*Ms. "B"*, para. 45, p. 101. The Tribunal also noted:

> A consideration, though not a determinative consideration, in so concluding is that the Kennedy-Swain Memorandum liberalized existing restraints on promotions, i.e., it removed an unintended and inequitable result of Bulletin No. 89/28, namely, that staff promotions within the same job ladder were subject to time-in-grade requirements that did not apply in the same way when staff were promoted into a different job ladder.

(*Ms. "B"*, para. 45, p. 101.)

[72]*Ms. "B"*, para. 49, p. 103.

[73]*Ms. "B"*, para. 52, p. 103.

[74]It should be noted that the memorandum's circulation, although limited, contrasted with that of the challenged practice in *D'Aoust*, which the IMFAT found did not even constitute a "regulatory decision," as it was distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund. (*See Ms. "B"*, para. 60, p. 107.)

found, however, that the validity of the policy could not be impugned by the limitation of its circulation. Rather, the memorandum was the type of periodic adjustment to the implementation of time-in-grade requirements that Staff Bulletin No. 89/28, in formalizing those requirements, expressly stated might be warranted. While the distribution of the challenged memorandum was limited, the

> . . . [Staff] Bulletin was circulated to all staff members, who, thus, were, or could be, aware of the fact that periodic adjustments might be made. When it became apparent that the Bulletin led to inequities, and a modification was undertaken, all departments were informed.[75]

Furthermore, observed the Tribunal, referencing its earlier decision in *D'Aoust*, procedural irregularities and errors may be held irrelevant where the acts or omissions could have had no influence on the legal position of the complainant. "A fortiori, where the legal position of the complainant is affected, but in a positive way, lack of notice furnishes no ground for complaint."[76] In the case of Ms. "B", the "underfilling" policy that she challenged resulted in her earlier promotion, that is, before she had fully met the time-in-grade requirements applicable under Staff Bulletin No. 89/28. For this reason, the Applicant was not adversely affected by the limited measure of the Kennedy-Swain memorandum's circulation.[77]

Finally, the IMFAT considered whether the Fund correctly applied its rules in taking the "individual decision" requiring Applicant to "underfill" her position, and held that it had. Contrary to the Applicant's contention, certain exceptions provided in the Staff Bulletin would not have allowed her to receive an immediate promotion to the grade at which her new position was advertised.[78]

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[75] *Ms. "B"*, para. 60, p. 107. The Tribunal continued:

> The fact that the Memorandum codified a practice that—as evidence submitted to the Tribunal shows—had been followed in the past and, moreover, constituted an interim measure pending broad revision of the entire salary structure of the Fund, are also factors of relevance.

(*Ms. "B"*, para. 60, p. 107.)

[76] *Ms. "B"*, para. 61, p. 108.

[77] *Ms. "B"*, paras. 63–64, pp. 109–110. Later in the Judgment, the Tribunal added:

> It is also noted that the underfilling policy, as articulated in the Kennedy-Swain Memorandum, permitted the promotion of Applicant to Grade A7 without her ever attaining a university degree in human resources management, just as it permitted her promotion without her having met the three year minimum time-in-grade at Grade A6.

(*Ms. "B"*, para. 77, p. 114.)

[78] *Ms. "B"*, paras. 69–70, pp. 111–112. The Applicant's interpretation of the Staff Bulletin, said the Tribunal, would "deprive time-in-grade requirements of their essential rationale."

Equally, there was no illegality with respect to the preparation of the vacancy announcement, which, the Tribunal concluded, properly could refine and particularize qualifications set out in the Fund's Job Standards.[79] Therefore, the IMFAT in *Ms. "B"* not only sustained the personnel policy relied upon as a valid "regulatory decision," but also upheld the "individual decision" as ". . . proper, legal and in conformity with the Fund's governing practice and prescription."[80]

Alleged Breach of Settlement and Release Agreement

The case of *Mr. "V"* presented the Tribunal with the question of whether the Fund's inclusion, in a confidential report for limited circulation within the Fund, of information relating to the reasons for a former staff member's separation from service (although not identifying him by name) violated the terms of a Retirement Agreement ("Agreement") entered into between the Applicant and the Fund. The Agreement provided for Mr. "V"'s early retirement and settled all claims he may have had against the Fund arising up to the date of the Agreement. In addition, it provided, as to particular annual performance reports of Mr. "V", that copies of these would be destroyed and the originals held "under seal" in the Fund's Administration Department. Performance ratings assigned to the Applicant for the years in question would be removed from the Fund's "personnel data base," and the terms of the Agreement would remain confidential.[81]

The task of the Tribunal in *Mr. "V"* was to examine the terms of the Agreement and their negotiating history to determine whether, as Applicant contended, these had been violated by the Fund's preparation, and limited circulation within the Fund, of the 1996 Separation Benefits Fund ("SBF") Report. That Report, which tabulated disbursements from the SBF according to the reasons for separation from service and various prescribed characteristics of the recipients (e.g., their nationality and department), was designed to increase transparency and dispel concerns regarding the equitable allocation of SBF resources.[82]

The entry in the Report relating to Mr. "V" described as the reason for his separation: "Performance. Unable to produce work that met department's standards. Retired." Consistent with Fund procedures governing the

[79]*Ms. "B"*, para. 77, p. 114.
[80]*Ms. "B"*, para. 81, p. 115.
[81]*Mr. "V"*, para. 10, pp. 170–171.
[82]*Mr. "V"*, paras. 19–20, p. 174.

Report's preparation, Mr. "V"'s name was not included, and the Report was classified as "Strictly Confidential" under the Fund's information security policy as codified in the General Administrative Orders. Also consistent with the SBF reporting requirements, the Report was circulated to Fund Management, Senior Personnel Managers in each department, the Fund's Ombudsperson and the Chairman of the Staff Association Committee.[83]

In examining Mr. "V"'s contention that the Report's preparation and circulation was violative of the Agreement, the Tribunal affirmed the importance, both to staff members and to the Fund, of enforcing negotiated settlement and release agreements, like the one at issue, in which a staff member receives special compensation or benefits upon separation from service in exchange for the release of claims against the organization.[84] The IMFAT went on to conclude:

> In enforcing such agreements, international administrative tribunals have looked for exactly the elements present in this case, i.e. evidence of individualized bargaining and the exchange of consideration as indications that the agreement was entered into freely and reflected a real balancing and resolution of interests between the parties. . . . In doing so, tribunals often have noted that there are necessarily pressures in bargaining involved in relinquishing a party's goals and that not all of the terms sought may be attained.[85]

Significantly, the Tribunal found evidence that, in the course of the negotiations, the Fund had rejected a contractual provision proposed by Mr. "V" that might have afforded greater protection to Mr. "V"'s reputation than did the Agreement's final terms. The Tribunal therefore concluded that neither the language nor the negotiating history supported Mr. "V"'s broad assertion that he was able to achieve the meeting of the minds he may have sought as to the "cleansing" of his performance record:[86]

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[83] *Mr. "V"*, paras. 20–25, pp. 174–176.

[84] *Mr. "V"*, para. 78, p. 189, citing *Mr. Y v. International Finance Corporation*, WBAT Decision No. 25 (1985).

[85] *Mr. "V"*, para. 79, p. 189, citing, *e.g.*, *Arda Kehyaian v. International Bank for Reconstruction and Development (No. 2)*, WBAT Decision No. 130 (1993). The Tribunal also observed:

> These cases also emphasize the essential bargain involved in any settlement and release agreement: the value to each party of foregoing the risks of litigation. By giving up the right to challenge his treatment through litigation, Applicant relinquished the ability to present arguments in such fora for the purpose of rehabilitating his record. He received very substantial, indeed, according to the Fund, "unprecedented" consideration in exchange, particularly by way of large monetary and lasting pension benefits.

(*Mr. "V"*, para. 83, p. 191.)

[86] *Mr. "V"*, para. 77, pp. 188–189.

> [w]here, as with the Retirement Agreement between Mr. "V" and the Fund, there is evidence of vigorous, individualized negotiation of terms, it is difficult to conclude that anything other than their plain meaning should be accorded those terms. This is especially so when alternative language was proposed and rejected in the course of negotiations.[87]

Accordingly, the Tribunal held that the specific terms of the Retirement Agreement had to be enforced and Mr. "V"'s construction of those terms rejected.[88] The Tribunal's careful review of the terms of the Agreement revealed that the Fund's action was not in conflict with any of these terms.[89]

In addition to dismissing Mr. "V"'s principal contention that the Fund had violated the Retirement Agreement, the IMFAT also was unable to sustain Mr. "V"'s assertion that in preparing and circulating the 1996 SBF Report the Fund had violated its rules or regulations, including those relating to information security.[90] Likewise, the IMFAT rejected the Applicant's claims that circulation of the Report was "arbitrary and capricious" or "grossly negligent."[91] Instead, the Tribunal characterized as a "reasonable act of managerial discretion" the Fund's decision to classify the 1996 SBF Report as "Strictly Confidential" and to circulate it, on a "need-to-know" basis, to a limited number of addressees within the Fund. The Tribunal noted that the policy requiring preparation and circulation of the Report was based upon considerations of transparency and equity of personnel practices.[92]

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[87]*Mr. "V"*, para. 82, p. 191.

[88]*Mr. "V"*, para. 83, p. 191.

[89]*Mr. "V"*, paras. 50–71, pp. 181–187. Mr. "V"'s Application had raised the interesting question of which should prevail, a contractual obligation of the Fund to a former staff member or a Fund rule. As the Tribunal held that there was no conflict between the requirements of the Retirement Agreement and the Fund rules relating to the preparation and circulation of the 1996 SBF Report, this question did not require resolution by the Tribunal. (*Mr. "V"*, paras. 84–85, p. 192.) Likewise, the IMFAT dismissed Mr. "V"'s corollary argument that the Fund acted illegally in not bringing the SBF reporting requirements to the Applicant's attention during negotiation of the Agreement:

> . . . the Fund did not deliberately mislead Applicant, misrepresent facts or engage in irregularity of procedure by not disclosing to him those requirements during negotiation of the Retirement Agreement. Rather, those officials reasonably could have believed (as the Tribunal now holds) that these requirements were not in conflict with the terms negotiated in that Agreement. Moreover, disclosure to Mr. "V" might have transgressed the "Strictly Confidential" classification of the SBF Report.

(*Mr. "V"*, para. 89, p. 193.)

[90]*Mr. "V"*, paras. 91–101, pp. 194–197. Applicant had argued that a higher level of classification was required.

[91]*Mr. "V"*, paras. 102–103, p. 197.

[92]*Mr. "V"*, para. 96, p. 195.

Non-Conversion of Fixed-Term Appointment

In *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), the Tribunal considered allegations by a former staff member that the Fund's decision not to convert her fixed-term appointment to regular staff was taken in retaliation for complaints she had made of sexual harassment. Ms. "C" contested the legality of the decision as arbitrary, capricious and in violation of Fund procedures.[93] The Fund defended the non-conversion decision as a discretionary act supported by evidence that Ms. "C" did not meet the high standards with regard to interpersonal skills required for appointment to regular staff.[94]

The Tribunal in *Ms. "C"* held that a good faith claim of harassment, regardless of its sustainability, could give rise to a cause of action for retaliation. Hence, it was not necessary for the Applicant to prove that she actually had been sexually harassed in order to pursue a claim of reprisal for a complaint thereof:

> What is clear, and sufficient for the purposes of the Tribunal, is that Applicant could reasonably have believed that she was an object of sexual harassment and consequently could have made an accusation of sexual harassment in good faith (whether or not it was sustainable). The sustainability of an accusation of harassment made in good faith is not a precondition for a finding of reprisal in response to that accusation.[95]

In the case of Ms. "C", however, the Tribunal was not able to find that such retaliation had occurred.

Rather, the Tribunal determined that the Applicant had failed to meet her burden of proof to show an abuse of discretion in the decision not to convert her appointment. In reaching this conclusion, the IMFAT affirmed that deficiency in interpersonal skills lawfully may be taken into account in the assessment of performance, and that this view is supported both by the Fund's internal law[96] and by the jurisprudence of international administrative tribunals.[97] The evidence, said the Tribunal, showed a pat-

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[93]*Ms. "C"*, para. 19, pp. 79–80.

[94]*Ms. "C"*, para. 20, p. 80.

[95]*Ms. "C"*, para. 22, p. 81, citing *Belas-Gianou v. The Secretary-General of the United Nations*, UNAT Judgement No. 707 (1995), p. 45.

[96]The Fund's Guidelines for Conversion of Fixed-Term Appointments. (*See Ms. "C"*, para. 35, p. 84.)

[97]The IMFAT cited *Nualnapa Buranavichkit v. International Bank for Reconstruction and Development*, WBAT Decision No. 7 (1982), and *Soad Hanna Matta v. International Bank for Reconstruction and Development*, WBAT Decision No. 12 (1982). (*Ms. "C"*, para. 36, p. 84.)

tern of interpersonal difficulties unrelated to the allegations of sexual harassment.[98]

The IMFAT also rejected Ms. "C"'s allegation that the Fund acted improperly by transferring her to a different department during the course of her fixed term. In the Applicant's view, the transfer was designed to put distance between a decision to terminate her and the eventual implementation of that decision. The Fund asserted that the transfer was intended to provide for objective appraisal of Ms. "C"'s performance under different supervisors. In failing to find any impropriety in the transfer, the Tribunal acknowledged the discretionary authority of the organization to assign its staff:

> It is accepted that the administration of an international organization has the power to transfer staff members when and how it will, even when the statutory law does not explicitly confer that power on it. It is in keeping with this principle that there is no general requirement that the staff member transferred consent to the transfer, since, if there were, this would be an unworkable restriction on the ability of the administrative authority to organize its services and to adapt to changing requirements. The administrative authority is generally at liberty to organize its offices to suit the tasks entrusted to it and to assign its staff in the light of such tasks.[99]

Finally, the Tribunal turned to the question of whether the Fund's assessment of Ms. "C"'s performance was marked by irregularities violative of fair and reasonable procedures, and found that it was. It was on this basis that the Tribunal found against the Fund in *Ms. "C"*, not wholly, but in part.

Relying on international administrative jurisprudence and the Fund's internal law, the Tribunal ruled that adequate warning and notice are essential requirements of due process.[100] Following an examination of the evidence relating to the process by which the Fund had assessed Ms. "C"'s performance, the IMFAT concluded that two irregularities in particular stood out. First, when Ms. "C"'s appointment was extended for one additional year rather than converted to regular staff, ". . . she should have been given to understand (a) precisely why she was not converted to permanent status at the end of two years and (b) what steps should be taken by her to correct her perceived problems in interpersonal relations." Second, when her super-

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[98]*Ms. "C"*, para. 16, p. 79.

Based on the evidence, the Tribunal found that the "Applicant came across as assertive, at times, belligerent, while at the same time as defensive and unable to understand and accept, still less to learn from, legitimate criticism." (*Ms. "C"*, para. 16, p. 79.)

[99]*Ms. "C"*, para. 30, p. 83.

[100]*Ms. "C"*, para. 37, p. 84.

visor peremptorily reversed his earlier highly positive appraisal of Ms. "C" on the basis of criticisms brought to him by co-workers while Ms. "C" was on vacation, the Applicant was neither ". . . confronted . . . by her critics nor by specific and rebuttable incidents of their criticism." That in particular, said the Tribunal, was a "lapse in due process."[101]

Remedies and Costs

Therefore, although the Tribunal in *Ms. "C"* sustained the challenged decision, it found against the Fund, not wholly but in part, on the basis of procedural irregularity in the taking of the decision. The IMFAT summarized its conclusions as follows:

> The Tribunal concludes that Applicant's allegation that her denial of conversion to a permanent post was in reprisal for her complaint of sexual harassment is unfounded. It also concludes that Applicant has not met the burden of showing an abuse of discretion by the Fund in not giving her a permanent contract. Nevertheless, even if that decision of the Fund is held to be justified, imperfections and irregularities did mark the process of the Fund's decision and permit the Tribunal to find against the Fund not wholly, but in part.[102]

This finding afforded the IMFAT its first, and thus far only, opportunity to award compensation and costs to an applicant.

Remedy for Procedural Irregularity

Having concluded that procedural irregularities marked the non-conversion decision, the Tribunal held that these gave rise to a compensable claim. The Tribunal therefore ordered the Fund to pay compensation to Ms. "C" in the sum equivalent to six months of salary. At the same time, it dismissed the Applica-

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[101]*Ms. "C"*, para. 41, p. 85.

In connection with the failure to afford a meaningful opportunity for the rebuttal of criticisms by her immediate co-workers, which had occasioned the sudden reversal of Ms. "C"'s performance assessment (*see Ms. "C"*, para. 40, p. 85), the IMFAT quoted the first decision of the AsDBAT:

> "Individual complaints or adverse comments by one staff member on the conduct of another should not be taken into account unless first brought to the attention of the latter, to whom an opportunity of replying should have been given including, where appropriate, the opportunity of meeting and questioning the complainant or witness."

(*Ms. "C"*, para. 42, p. 86, quoting *Carl Gene Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992), para. 9.)

[102]*Ms. "C"*, para. 41, p. 85.

tion insofar as it requested rescission of the contested decision.[103] By fashioning a remedy in *Ms. "C"*, the IMFAT underscored the importance of due process and procedural regularity in the exercise of discretionary authority.

In asserting its authority to award compensation for procedural irregularity while sustaining the legality of the challenged decision, the Tribunal acknowledged the terms of the Statute's remedial provision[104] and the limitation contained in Article III that it shall not have any powers beyond those conferred under the Statute. The IMFAT observed that, pursuant to the second sentence of Article III, ". . . the Tribunal shall apply *inter alia* generally recognized principles of international administrative law concerning judicial review of administrative acts."[105] The remedy in *Ms. "C"*, the IMFAT noted, was consonant with the case law of other international administrative tribunals.[106]

Costs

Having found partially against the Fund in *Ms. "C"*, the Tribunal, pursuant to Article XIV (4) of the Statute, awarded the Applicant, in addition to compensation for procedural irregularity, the "reasonable costs of her legal representation."[107] Article XIV (4) authorizes the Tribunal to order the Fund to bear "totally or partially" the applicant's costs when an application "is well-founded in whole or in part[.]"[108] The Tribunal's Judgment directed that

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[103]*Ms. "C"*, para. 43 and Decision, paras. First and Second, pp. 86–87.

[104]Article XIV (1) provides for remedy with respect to challenges to the legality of an individual decision:

> If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

[105]*Ms. "C"*, para. 44, p. 86. The second sentence of Article III provides:

> 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.

[106]*Ms. "C"*, para. 44, pp. 86–87, citing *Benthin v. The Secretary-General of the United Nations*, UNAT Judgement No. 700 (1995), paras. V-VI, and *H. Patricia Broemser v. International Bank for Reconstruction and Development*, WBAT Decision No. 27 (1985), paras. 39–40.

[107]*Ms. "C"*, Decision, para. Third, p. 87.

[108]Article XIV (4) provides in full:

> If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

these costs be agreed between the parties, with the proviso that, in the event agreement could not be reached, an assessment would be made by the Tribunal on the basis of submissions by Ms. "C" and the Fund.[109]

The IMFAT's directive to the parties to negotiate the amount of costs proved fruitless, leading to a request for interpretation of judgment.[110] This request resulted in Order No. 1997-1, *Interpretation of Judgment No. 1997–1 (Ms. "C", Applicant v. International Monetary Fund, Respondent)* (December 22, 1997), establishing the important principle that "[t]he limited degree to which Applicant was successful in comparison with her total claims justifies a measure of proportionality in the determination of the costs to be borne by the Fund."[111] In addition, the Tribunal held that the term "legal representation," as used in the Tribunal's decision in *Ms. "C"*, encompassed not only the Applicant's representation before the Tribunal, but also her representation in the administrative review process that she had to exhaust under Article V prior to invoking the judicial remedy.[112]

Despite the Tribunal's clarification through Order No. 1997-1 of the terms of its Judgment, the parties remained unable to reach agreement and so informed the Tribunal. In Order No. 1998-1, *Assessment of compensable legal costs pursuant to Judgment No. 1997-1 (Ms. "C", Applicant v. International Monetary Fund, Respondent)* (December 18, 1998), the IMFAT assessed Ms. "C"'s compensable costs at $15,000. The Order expressly grounded that assessment upon the finding that the Applicant had prevailed not on her main claim but only on a related one, as well as upon the requisite statutory factors of the nature and complexity of the case, its preparation by counsel, and the amount of fees in relation to prevailing rates.[113]

In the subsequent case of *Mr. "V"*, the Fund attempted to expand on the reasoning of Order No. 1997-1, seeking, under Article XV of the Statute, an award of costs to the Fund for defending against allegedly frivolous claims earlier brought by Mr. "V" in the Grievance Committee but not pursued in the Admin-

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[109]*Ms. "C"*, Decision, para. Third, p. 87.

[110]Article XVII provides:

> The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.

[111]Order No. 1997-1, para. Fifth, p. 216.

[112]Order No. 1997-1, para. Fourth, p. 216.

The Order also interpreted the term "costs" as meaning costs that Applicant "was or is obligated to pay," and it found no legal relationship between the actual amounts of compensation and of costs. (Order No. 1997-1, paras. Third and Sixth, p. 216.)

[113]Order No. 1998-1, para. Third, p. 218.

istrative Tribunal. Article XV provides that the Tribunal may order the applicant to make reasonable compensation to the Fund for all or part of the cost of defending a case where the application is manifestly without foundation or the applicant seeks to delay resolution of the case or to harass the Fund. [114]

The Tribunal rejected the Fund's plea in *Mr. "V"* as lacking any statutory basis because the Fund had failed even to assert that the Application in the Tribunal was without foundation. Instead, the Fund grounded its request on the assertion that Mr. "V" had pursued allegedly frivolous claims in the Grievance Committee, but that these claims had not been made part of his Application before the Tribunal.[115]

In dismissing the Fund's request for costs, the Tribunal made clear that Article XIV (4), under which it had awarded costs to the Applicant in *Ms. "C"*, and Article XV, under which the Fund sought costs for itself in *Mr. "V"*, are not symmetrical statutory provisions:

> The statutory purpose of Article XIV, Section 4 is to provide for cost-shifting in favor of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members. This purpose is distinct from that of Article XV, which penalizes the bringing of frivolous claims by exacting from the offending party the cost of defending against them, thereby deterring the pursuit of cases that amount to an abuse of the review process.[116]

Hence, principles applicable in the interpretation of one of the statutory provisions might not necessarily be invoked in respect of the other. In particular, observed the Tribunal, the rationale for including in the award of costs to Ms. "C" the costs of her representation before the Grievance Committee was to give effect to the statutory purpose of affording all staff members access to the Tribunal. Unless "costs" under Article XIV (4) may

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[114]Article XV provides in full:

1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:
   a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or
   b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.
2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant.

[115]*Mr. "V"*, paras. 132–134, pp. 207–208.

[116]*Mr. "V"*, para. 138, p. 209.

encompass costs incurred during the prerequisite administrative review, that purpose would not be well served. The Tribunal also noted that had the Applicant's claim succeeded initially in the Grievance Committee (as success in the Tribunal suggests it should have), she might thereby have had the benefit of the Grievance Committee's own fee-shifting authority. In this respect also, an analogy could not be drawn with the case of *Mr. "V"*, as the Grievance Committee's constitutive instrument does not provide for it to assess costs against a grievant for pursuing frivolous claims.[117]

Finality of the Tribunal's Judgments

Essential to the powers exercised by the IMFAT is its authority to render judgments that are final and binding on the parties. This authority, which is codified in Article XIII[118] of the Statute, confirms the Tribunal's role as an independent judicial forum for the adjudication of complaints that generally lie beyond the reach of any national judicial authority. Only limited provision is made under the IMFAT Statute for the interpretation, correction[119] or revision of judgment.[120]

The IMFAT affirmed the fundamental principle of finality of judgments in Order No. 1997-1 and in Order No. 1999-1, *Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent)* (February 26, 1999). In both of these Orders, the Tribunal rejected, either in whole

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[117]*Mr. "V"*, para. 136, pp. 208–209.

[118]Article XIII (2) provides:

> Judgments shall be final, subject to Article XVI and Article XVII, and without appeal.

[119]Article XVII provides for the interpretation and correction of judgments as follows:

> The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.

[120]Article XVI provides for the revision of judgment:

> A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal, and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

The IMFAT has been presented with one request for revision of judgment, resulting in an unpublished Order of the Tribunal. That Order held that the application for revision not be admitted because the "new information" was not of a nature that might have had a decisive influence on the judgment. (*See* 1995 Annual Report on the Activities of the Administrative Tribunal of the IMF.)

or in part, requests by the Fund for interpretation of judgment to the extent that these requests threatened that fundamental principle.

The Fund, in the request for interpretation that resulted in Order No. 1997-1, not only had sought clarification of the terms of the fee award in *Ms. "C"*, but also had challenged the legality of the Judgment, in which the Tribunal found, in part, against the Fund on the basis of procedural irregularity. The Tribunal refused to entertain this challenge, responding that

> [t]he legality of the Judgment is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to issue an interpretation, because the judgment is final and without appeal [footnote omitted].[121]

Likewise, in Order No. 1999-1, the Tribunal rejected in its entirety the Fund's request that it interpret the term "jurisdiction" as used in the second paragraph of its Decision in *Ms. "Y"*[122] to mean only jurisdiction *ratione materiæ*. The Fund's request was held to be inadmissible because the term "jurisdiction" standing alone was "neither obscure nor incomplete," as required for interpretation under Article XVII.[123] Furthermore, declared the Tribunal,

> [t]he adoption of the requested interpretation would constitute an amendment of the Judgment, which is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to decide by way of an interpretation, because the Judgment is final and without appeal [footnote omitted].[124]

Conclusion

In its first six years of existence, the International Monetary Fund Administrative Tribunal has carried forth its mandate to provide an independent and binding forum for the resolution of employment disputes arising between staff members and the Fund. The Tribunal's jurisprudence demonstrates a measured application of its Statute, affirming, on the one hand, the rights of staff members to bring challenges to the legality of the Fund's

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[121]Order No. 1997-1, para. First, pp. 215–216.

[122]*Ms. "Y"*, Decision, para. Second, p. 133 reads:

> Second, the Administrative Tribunal will reconsider the Applicant's claim on the basis of the Application now before it, in the event that the Grievance Committee, if seized, decides that it does not have jurisdiction over that claim.

[123]Order No. 1999-1, para. First, p. 220.

[124]Order No. 1999-1, para. Second, p. 220.

employment decisions, while at the same time weighing the organization's discretionary authority to manage its staff.

In the course of its decisionmaking, the Tribunal has entertained challenges to a variety of employment-related decisions of the Fund, including the setting of grade and salary, the "underfilling" of a position where the staff member did not fully meet the requirements for promotion, the inclusion in a confidential report of information relating to the reasons for a former staff member's separation from service—allegedly in violation of a settlement and release agreement, and the non-conversion of a fixed-term appointment. In each of these cases the Tribunal sustained the legality of the Fund's decision. In the case in which the Tribunal held that the decision not to convert a fixed-term appointment was sustainable but was marred by procedural irregularity, it awarded compensation and costs to the Applicant, proportionate to its finding against the Fund not wholly but in part.

The IMFAT, in its early years, also has been required to undertake a careful examination of the compass of its jurisdictional grant, determining which claims are justiciable and which claimants have standing to bring them. In this endeavor, the Tribunal has been mindful of its role as a tribunal of limited jurisdiction, bound by its constitutive instrument. Finally, the IMFAT has interpreted the exhaustion of remedies requirement of its Statute and has explored the contours of its relationship with the Fund's Grievance Committee.

In the coming years it can be anticipated that the IMFAT's body of jurisprudence will grow, that the Tribunal will refine and elaborate principles already enunciated, and that it will shape new ones as well. In this process it will build upon the important decisions of its first six years.

JUDGMENTS
(Nos. 1994–1 to 1999–2)

JUDGMENT NO. 1994-1

Mr. "X", Applicant v. International Monetary Fund, Respondent
(August 31, 1994)

1. The Administrative Tribunal of the International Monetary Fund held its first judicial session in Washington, D.C., August 29–31, 1994.[1] The full membership of the Tribunal, and the Registrar, were in attendance. On August 30–31, 1994, the Tribunal, composed of Judge Stephen M. Schwebel, President, and Judge Michel Gentot and Judge Agustín Gordillo, Associate Judges, met to consider its first case, brought against the Fund by Mr. "X", a former official of the Fund.

The Procedure

2. On March 14, 1994, Mr. "X" filed an Application, elements of which did not meet the requirements set forth in provisions of the Rules of Procedure.[2]

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[1]The Statute of the Administrative Tribunal of the International Monetary Fund entered into force on October 15, 1992. The members of the Tribunal were appointed on January 1, 1994:

Stephen M. Schwebel, President
Michel Gentot, Associate Judge
Agustín Gordillo, Associate Judge
Georges Abi-Saab, Alternate Judge
Nisuke Ando, Alternate Judge.

On January 13, 1994, the staff of the International Monetary Fund was notified by the Managing Director of the Fund of the appointment of the members of the Tribunal. Pursuant to Article XX of the Statute, the Tribunal was deemed to be established as of the date of this notification, with the effect on its jurisdiction prescribed by Article XX. The members of the Tribunal adopted Rules of Procedure of the Tribunal on February 18, 1994 at an organizational meeting in Paris, and appointed Mrs. Philine R. Lachman as Acting Registrar. Mrs. Lachman was appointed Registrar on August 29, 1994, for a term running until December 31, 1995, coinciding with the date of expiration of the terms of office of the members of the Tribunal.

[2]Specifically, Rule VII, paragraphs 2(d) and 3, which require applications to state "the channels of administrative review, as applicable, that the applicant has pursued and the results thereof", and to contain as annexes all documents cited in the application.

On April 13, 1994, Mr. "X" was so informed, and was advised that a corrected and amplified Application could be filed not later than May 3, 1994. A corrected and amplified Application was filed on that date. Pursuant to Rule VII, paragraph 6,[3] the Application was considered filed on March 14, 1994.

3. In accordance with the Rules of Procedure, the Application was notified to the Fund and transmitted to the Fund's General Counsel. The Fund, on May 27, 1994, filed a Motion to Dismiss the Application, arguing lack of jurisdiction of the Tribunal.

4. The Motion was transmitted to the Applicant, who was given thirty days to file an Objection to the Motion. The Objection was received on July 5, 1994. The Objection, in turn, was transmitted to the Fund, which filed a Response on July 25, 1994. By virtue of the authority conferred on him by Rule XXI of the Rules of Procedure,[4] the President ordered that, as both parties had made, in all, an equal number of submissions—having regard to the Application (which contained a jurisdictional plea), the Motion to Dismiss, the Objection and the Response—further pleadings would not be in order.

5. On June 6, 1994, the case was placed on the agenda for the first judicial session of the Tribunal. The Tribunal decided that oral proceedings, which neither party had requested, would not be held.

6. Pursuant to the Rules of Procedure, a Motion to Dismiss suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. In view of the Fund's filing of a Motion to Dismiss, the present consideration of the claim is confined to the jurisdictional issues of the case. Its substantive aspects are referred to only to the extent necessary for disposition of the jurisdictional issues.

The Facts

7. The facts on which the claim is based, which are not in dispute between the parties, may be summarized as follows. In April 1985, the

[3]That paragraph provides in part, "If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date."

[4]"The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules."

Applicant was advised, for reasons not relevant to these proceedings, that his termination as a member of the staff was justified but that the Fund would be prepared to accept his resignation in lieu of termination. The Applicant agreed to resign and submitted his resignation on June 5, 1985. Subsequently, the Applicant was allowed to withdraw his resignation in order to be able to file a grievance with the Grievance Committee of the Fund, but he was advised that, on the basis of the record, he was in the view of the Fund's Director of Administration culpable of serious misconduct and that he would consequently be terminated, effective September 30, 1985.

8. The Applicant appealed his termination to the Grievance Committee on September 16, 1985. In accordance with the applicable General Administrative Order, he was placed on annual leave beginning October 1, 1985, pending the Committee's recommendations and final decision by the Managing Director of the Fund. It was further agreed that when his annual leave balance expired, he would be allowed to continue on leave without pay.

9. On February 14, 1986, the Grievance Committee issued a Report and Recommendation to the Managing Director, in which it found that the Applicant's termination was for just cause. It recommended that the Applicant be given another, and final, opportunity to resubmit his earlier resignation, effective September 30, 1985, in lieu of termination. The Managing Director accepted the recommendation of the Committee, and the Applicant was so informed in writing on March 3, 1986. Mr. "X" resigned from the Fund as of September 30, 1985.

10. In response to representations by Mr. "X" about his resultant financial situation, made in a letter to the Managing Director of March 3, 1986, the Director of Administration wrote to Mr. "X" on March 20, 1986, stating that "your earlier resignation has been re-instated, and became effective on September 30, 1985", and offering him an *ex gratia* payment of $10,000 under the Fund's Termination Benefits Fund. An attachment to that letter, "To inform you about the amounts payable by you to the Fund, and by the Fund to you, in connection with your resignation, effective September 30, 1985," set forth the final financial settlement between Mr. "X" and the Fund as of the date of his resignation. It included a credit to Mr. "X" for contributions to the Staff Retirement Plan after the effective date of his resignation. On March 31, 1986, Mr. "X", referring particularly to the grant from the Termination Benefits Fund, wrote to the Managing Director expressing his appreciation of the Fund's terms.

11. On April 21, 1986 the Fund's Senior Pensions Officer wrote to the Applicant "Since you terminated your service with the Fund on September 30, 1985, you are credited with 15 years and 3 months of eligible service under the Staff Retirement Plan." Fifteen years and 3 months of eligible service treated that service as terminated as of September 30, 1985. The letter listed the amount of Mr. "X"'s contributions to the Plan, and set forth the options available to him in regard to his pension under the provisions of the Plan.

12. In a letter of May 8, 1986 addressed to the Managing Director of the Fund, the Applicant requested that his resignation take effect on January 8, 1986 to coincide with the expiration of his accrued leave, rather than September 30, 1985. He stated that one of the reasons for this request was that his "position in the pension plan was adversely affected" by treating September 30, 1985 as the date of his resignation, adding, "(and I contend that it is illegal for the Fund to withdraw contributions)."

13. In response, the Director of Administration on June 12, 1986 wrote:

> "As to the timing of your resignation, you initially resigned effective September 30, 1985, and when you withdrew your resignation you were terminated with effect on that date. It was necessary to suspend implementation of this termination pending a resolution of your grievance, but the grievance process resulted in a recommendation that you be given a choice between resigning as of September 30, 1985 or being terminated as of that date. You chose to resign as of September 30, 1985. This was a final disposition of the matter, and it will not be reopened."

14. In each of the years 1988, 1989, 1990, 1991 and 1992, the Applicant wrote to the Fund regarding the amount of the pension to which he would in due course become entitled. On each of those occasions, the Senior Pensions Officer gave him the information he requested with respect to amounts of the pension to which he would be entitled under various options from which he could choose under the Staff Retirement Plan ("SRP"). All of the Fund's replies to Mr. "X" treated his pensionable period of service as terminating on September 30, 1985.

15. In anticipation of his 55th birthday on November 19, 1993, the Applicant requested, and the Senior Personnel Assistant on April 26, 1993 supplied, information on the amounts of the pension under the options set forth in the Plan. On April 29, 1993, the Applicant requested the Director of Administration to review the pension calculation set forth in the Fund's let-

ter of April 26, 1993, on the ground that his entitlements were there computed on the basis of his Fund service ending on September 30, 1985, despite contributions to the Staff Retirement Plan having been made in the subsequent period of his accrued leave. On May 12, 1993 the Senior Personnel Assistant replied:

> "An examination of our records shows clearly that everything related to your service after September 30, 1985 was reversed, and that your service terminated for all purposes with effect from that date. You were, you will recall, required to repay the Fund your salary from that date and the pension contributions you had made were effectively reversed by crediting them in the calculation of what you owed the Fund. I am enclosing a copy of the attachment to Mr. Rea's letter of March 20, 1986, and you will note the credit item for the reversal of the pension contributions."

The Respondent's Contentions in Support of the Motion to Dismiss

16. The Respondent maintains that the act complained of—in its view, the reversal in 1986 of certain pension contributions—pre-dates the commencement of the Tribunal's jurisdiction[5] and, under generally accepted principles of international administrative law, that the Application should be dismissed as untimely. The fact that the act decided upon and taken in 1986 has financial effects within the period of the Tribunal's competence does not confer jurisdiction on the Tribunal. To hold otherwise would allow a claim regarding an administrative act decided upon and implemented long in the past, e.g., a downgrading, to circumvent the time bar, because the effects of the act are continuing. The bases of calculation of the Applicant's pension were determined by the 1986 decision and are not the result of an administrative act taken in 1993. In 1988, 1989, 1990, 1991 and 1992, the Applicant made

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[5]Article XX of the Statute of the Tribunal provides:

"1. The Tribunal shall not be competent to 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.

2. In the case of decisions taken between October 15, 1992 and the establishment of the Tribunal, the application shall be admissible only if it is filed within three months after the establishment of the Tribunal. For purposes of this provision, the Tribunal shall be deemed to be established when the staff has been notified by the Managing Director that all the members of the Tribunal have been appointed."

inquiries of the Fund Pensions Officer regarding the amounts of his pension that would result from the exercise of certain options available to him under the Staff Retirement Plan when he became eligible to receive pension payments, and that information was provided to him. The amounts were always based on a period of service ending September 30, 1985.

17. A distinction must be made between an administrative decision applying the Fund's rules and a payment, the calculation of which flows from that decision. The issuance of the Applicant's pension payments simply reflects the earlier decision to treat Mr. "X"'s pensionable period of service as terminating as of the date of his resignation. Correspondence in 1993 pertaining to the 1986 disposition was merely confirmatory; it does not constitute a new administrative act and does not recommence the running of time for the purposes of a statute of limitation.

18. An individual decision is an administrative act.[6] Such a decision was made in 1986 and clearly communicated to the Applicant, who understood its effects, as his letter protesting that decision of May 8, 1986 demonstrates. The decision was communicated to him in 1986 as "a final disposition of the matter and it will not be reopened." The amount of the pension was fixed (except for cost-of-living adjustments) at the time of his separation; pension payments beginning at the end of 1993 are ministerial acts, involving no "decision."

19. The Applicant cannot reasonably have believed that the 1986 letters from the Managing Director and Director of Administration contained statements of intention subject to reconsideration rather than a final decision; this is demonstrated by the fact that on May 8, 1986 he requested a review of "this decision," stating among his reasons its effects on his prospective pension. On June 12, 1986, the Fund's Director of Administration described the arrangement as "a final disposition of the matter" and stated that "it will not be reopened".

The Applicant's Contentions in Opposition to the Motion to Dismiss

20. The gravamen of the Applicant's claim is the contention that the amount of his pension is less than it should be because the pension is calculated on a length of service ending September 30, 1985 instead of

[6]Article II(2) of the Statute provides: "For purposes of this Statute:
a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund; . . ."

January 1986, when his accrued leave expired. The contributions to the pension fund made by him between these two dates were in effect reimbursed to him in the context of a financial settlement with the Fund in March 1986. The Applicant maintains that that treatment of his contributions was unlawful pursuant to a provision in the Staff Retirement Plan which, he asserts, provides that contributions are irrevocable.[7] The Applicant maintains:

> "While the events described . . . took place sometime ago, the issue is a current one since it affects me *now*.[8] Indeed, it was in anticipation of my 55th birthday that I initiated correspondence with the Fund some months ago to determine my status in the SRP. . . ."

21. The Applicant characterizes the Fund's treatment in 1986 of pension contributions from September 25, 1985 until January 1986 as a "threat" rather than a decision. He asserts that he was not on notice of what he views as unlawful treatment of his pension contributions until December 1993, when the first pension payment was made. That was also the date on which the Fund committed its unlawful act. The Applicant maintains:

> "Had the Tribunal existed in 1986, it is clear that an application to it then, complaining of the threat, i.e., the apparent intention to withdraw amounts from Applicant's pension account and credit Applicant with an amount less than his legal entitlement, would have been dismissed as premature. The Administration Department of the Fund had several years in which to rectify what could have been regarded as a bookkeeping or clerical error. During none of that time did a 'cause of action' arise. It was only when the pension payment was made, at an illegally reduced amount that the misconduct could be discovered. Applicant cannot be held to knowledge of any improper act until the reduced payment check was actually received. Up until that time, no

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[7]The Applicant refers to Article 6, Section 2(c) of the Plan. That provision deals with "Contributions by the Employer" and provides:

> "(c) Any and all contributions made to the Plan by the Employer shall be irrevocable and shall be held by the Employer in the Retirement Fund, to be used in accordance with the provisions of the Plan in providing the benefits and paying the expenses of the Plan, and neither such contributions nor any income therefrom shall be used for, or diverted to, purposes other than for the exclusive benefit of participants and retired participants or their beneficiaries or estates under the Plan, prior to the satisfaction of all liabilities with respect thereto."

[8]Underlining in the original.

wrongdoing can be said to have occurred. Any bookkeeping error or mistake or incorrect or improper calculation could have been cured before that event."

"The unlawful plan complained of here could only have become known in December 1993 when the first pension check was received and the unlawful act committed. The unlawful act was the payment to Applicant of an amount which did not reflect the contributions made to his Retirement Account."

Grounds of the Decision

22. Article XX of the Statute of the Tribunal provides that "The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992. . . ." In order to decide upon the Motion to Dismiss, the Tribunal thus must resolve the question of what in this case is the administrative act whose legality is challenged or whose illegality is asserted, and when that administrative act was taken.

23. Despite the Applicant's contention that the challenged administrative act is the 1993 computation of his pension and payment in pursuance of it, in the view of the Tribunal the administrative act whose legality is challenged by Mr. "X", the administrative act which Mr. "X" asserts to be illegal, actually is the decision taken and confirmed by the Fund in 1986 to reverse contributions made for his benefit to the Staff Retirement Plan between September 30, 1985 and the point in January 1986 when Mr. "X"'s accrued leave expired. It is not for the Tribunal at this stage of the proceedings to express itself on that decision. The question is rather, was the dispositive act determinative of the period of the pensionable service of Mr. "X" taken in 1986, or was it taken in 1993?

24. It is clear to the Tribunal that the administrative act at issue was the decision of the Fund to treat Mr. "X"'s period of pensionable service as terminating as of the effective date of his resignation, namely, September 30, 1985, and, consequently, to reverse pension contributions made thereafter. The Fund, in settling financial accounts with Mr. "X", credited him with pension contributions made after September 1985 during the period of his accrued leave. It deducted this credit from the total amount which Mr. "X" owed to the Fund. Mr. "X" not only was aware of this decision to take September 30, 1985 as the date as of which the period of his pensionable service terminated. By a written communication of May 8, 1986, he contested

this decision, on the ground, among others, that giving effect to his resignation as of September 30, 1985 rather than January 8, 1986 "adversely affected" his "position in the pension plan". Moreover, the Applicant then contended that this withdrawal of contributions from the Plan by the Fund was "illegal". There could hardly be a plainer assertion of the illegality of an administrative act. That assertion was voiced in 1986, more than five years before the date for the commencement of the Tribunal's jurisdiction, October 15, 1992.

25. The Applicant contends that the administrative act which he challenges is the calculation of his pension in 1993 and the issuance of pension payments beginning in December 1993 which reflect a period of pensionable service which is deemed to have ended September 30, 1985 rather than in January 1986 when his accrued leave expired. He maintains that, if a decision was taken in 1986, it affects him "now"; in the alternative, he maintains that the Fund did no more in 1986 and subsequently than to "threaten" to take a decision which it could always have reconsidered and corrected up to the time when it finally calculated the amount of his pension in 1993 and issued pension payments pursuant to that calculation.

26. The Tribunal is unable to accept these contentions. The calculation of Mr. "X"'s pension in 1993 was a purely arithmetical act governed by the decision of 1986 as to the extent of his pensionable service. As was repeatedly made clear to the Applicant in response to his inquiries about his pension options, the variable that remained to be factored in was the effect of cost-of-living increases. Otherwise his pension had been determined by the 1986 disposition. The fact that that decision of 1986 produces consequences for Mr. "X" now can have no effect upon the extent of the jurisdiction of the Tribunal; if it were otherwise, then the limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts may well be felt for years after the date when the Tribunal's Statute came into force. Equally, the Applicant's claim that the 1986 decision was open to reconsideration does not mean that it was not taken when it was taken. Nor did the Fund give the Applicant reason to believe that the decision at issue was open to reconsideration or adjustment; on the contrary, he was officially informed by the Fund that the decision was "a final disposition of the matter and it will not be reopened." Continued discontent with the results of an administrative act and eventual renewal of a challenge to its legality cannot put in question the fact that the act was taken, and taken when it was taken.

Decision

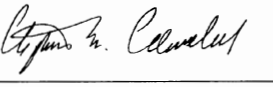
FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund, unanimously, decides summarily to dismiss the Application.

Stephen M. Schwebel, President

Michel Gentot, Associate Judge

Agustín Gordillo, Associate Judge



Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
August 31, 1994

JUDGMENT NO. 1995-1

Ms. "S", Applicant v. International Monetary Fund, Respondent
(May 5, 1995)

1. On May 3, 4 and 5, 1995, the Administrative Tribunal of the International Monetary Fund, comprised of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to hear the case brought against the International Monetary Fund by Ms. "S", a staff member of the Fund.

The Procedure

2. On August 3, 1994, Ms. "S" filed an Application with the Tribunal. In accordance with the Rules of Procedure, the Fund, on August 8, 1994, was notified of the Application. In response to an inquiry by counsel of the Fund, the President decided to allow the parties 45 days for any Motion for Summary Dismissal and Objection thereto, instead of the 30 days provided under the amended Rule XII of the Rules of Procedure, because the case had been filed prior to the adoption of the amendment of that Rule changing the period of 45 days to 30 days.

3. The Fund, on September 22, 1994, filed a Motion to Dismiss the Application, contending that the Tribunal lacked jurisdiction because "the Application challenges the legality of a decision taken before the commencement of the Tribunal's jurisdiction." In addition, the Fund argued, the Tribunal lacks jurisdiction because there had not been an "administrative act" with respect to the matter complained of.[1] On September 26, 1994, the Motion was transmitted to the Applicant who filed an Objection to the Motion on November 14, 1994.

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[1]Article II, Section 1 of the Statute of the Tribunal provides: "The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; ..."

4. Rule XII permits only one further pleading after a Motion of Summary Dismissal has been filed, i.e., an Objection by the Applicant. However, as the Fund had requested the opportunity to file further observations, and as the President was of the opinion that further observations by the parties might be helpful in the determination of the issues involved in the case, the President, in the exercise of his authority under paragraph 8 of Rule XII,[2] decided to allow each of the parties to file one additional pleading. The Fund, thereupon, filed a Response to Ms. "S"'s Objection (December 15, 1994) and the Applicant filed a Rejoinder to the Fund's Response (January 17, 1995).

5. On March 20, 1995 the case was placed on the agenda for the forthcoming judicial session of the Tribunal.

6. The Tribunal decided that oral proceedings on jurisdictional issues, which the Applicant had requested, would not be held, as the condition laid down in Rule XIII, paragraph 1 that they be "necessary for the disposition of the case" was not met.

7. Pursuant to the Rules of Procedure, a Motion to Dismiss suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. In view of the Fund's filing of a Motion to Dismiss, the present consideration of the claim is confined to the jurisdictional issues of the case. Its substantive aspects are referred to only to the extent necessary for disposition of the jurisdictional issues.

The Facts

8. Of the facts on which the claim is based some are not in dispute between the parties, while there is disagreement about at least one of these facts. The facts that are not in dispute between the parties may be summarized as follows:

a. Ms. "S" took a full-time contractual position with the Fund in 1986. She worked part-time in a contractual position from September 15, 1988 until February 24, 1993. She received an appointment to the staff on February 25, 1993.

b. On March 24, 1993, she wrote to Mr. Rea (Director of the Administration Department) requesting that her contractual service be

[2]Rule XII, para. 8 of the Rules of Procedure provides: "There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests."

considered qualified service under the Staff Retirement Plan (SRP) on an exceptional basis.

c. On April 19, 1993, Mr. Rea declined to accept her request.

d. Ms. "S" requested Mr. Rea on September 9, 1993, as Chairman of the Administration Committee of the SRP, to bring before that Committee her request that her prior contractual service be considered as qualified service under the SRP either on an exceptional basis or, alternatively, that the SRP be amended with retroactive effect to recognize part-time contractual service.

e. The Secretary of the Administration Committee replied on May 4, 1994, refusing to grant exceptional treatment and declining to recommend an amendment to the SRP.

The fact that is in dispute between the parties may be summarized as follows:

The Applicant states that the relevant provision of the SRP defining eligible service (Section 3.2(b)(ii))[3] was adopted on December 14, 1992, which is the date of the current, published text of the SRP. The Fund maintains that the provision was originally adopted in 1974, and amended on a point not pertinent to Ms. "S"'s case on April 30, 1991, with effect from May 1, 1991. The Fund has supplied as evidence of its position internal memoranda and minutes of Executive Board meetings, as well as Staff Bulletins, Fact Sheets and other documents concerning the SRP regularly furnished to the staff.

Respondent's Contentions in Support of the Motion to Dismiss

9. The following points summarize the Fund's contentions:

(i) The regulation at issue pre-dates the establishment of the Tribunal; consequently, the Tribunal lacks jurisdiction because, pursuant to Article XX, Section 1, of the Statute of the Administrative Tribunal,[4] it

[3]Section 3.2(b)(ii) provides: "(b) ... eligible service of a participant shall include: (ii) any period that commenced prior to May 1, 1991, if that period is not less than three years and immediately preceded a period of contributory service, during all of which the participant was retained by the Fund as a consultant in full-time service, provided that the consultant was employed by the Fund on May 1, 1991."

[4]Article XX, Section 1 provides that: "The Tribunal shall not be competent to 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."

is not competent to review the legality of a provision in effect prior to October 15, 1992. Additionally, a decision applying a regulation adopted prior to October 15, 1992 (the date of commencement of the Tribunal's jurisdiction) cannot be complained of, even if the decision was taken subsequent to that date.

(ii) The current version of the SRP provision at issue, Section 3.2(b)(ii), was adopted on April 30, 1991, with effect from May 1, 1991. The Applicant assumed that December 14, 1992, the date of publication of the latest text of the SRP, was the date of its adoption and effectiveness. Even assuming, *arguendo*, that the 1991 amendment to Section 3.2(b) had been adopted on December 14, 1992, the element about which there is a contest (i.e., the requirement of full-time service) has existed and remained unchanged since 1974. To allow a request for change in a term or condition of employment in existence prior to the start of the Tribunal's jurisdiction, or a request for exceptional treatment, to be a basis for jurisdiction would be contrary to the legislative history of the Statute and to the ruling in *Mr. "X" v. International Monetary Fund* (IMFAT 1994, Judgment No. 1).

(iii) The consideration of Applicant's request did not constitute a "decision" for the purposes of the Tribunal's jurisdiction. While the Administration Committee did consider the Applicant's requests, it did not take a "decision" in the sense of the Statute for the following reasons: (1) the Committee left the existing policy in place; the implementation of an existing policy is not a "decision" for the purposes of the Statute, and (2) she asked for a recommendation by the Administration Committee to the Pension Committee rather than a decision; any such decision would have to be taken by a different body. The fact that the Administration Committee declined to make a recommendation was not tantamount to a decision. There has been no "administrative act" taken with respect to Applicant altering or amending her conditions of service, and the Tribunal, consequently, has no competence over the matter.

Applicant's Contentions in Opposition to the Motion to Dismiss

10. The Applicant's opposition to the Fund's Motion must be understood in light of the arguments presented in the Application in which she (1) challenges the decision made on May 4, 1994 by the Administration Committee of the SRP; (2) contends that she has exhausted all channels of administrative

review; (3) argues that the SRP is illegal because it contains Section 3.2(b)(ii), which discriminates against women by limiting pension credit to full-time employment (virtually all part-time staff affected being women); (4) complains that the provision has been arbitrarily, capriciously and discriminatorily applied to her to deny credit, for pension benefit purposes, for what would otherwise be creditable employment time; and (5) contends that provision was adopted and promulgated on December 14, 1992. The illegal administrative acts which Ms. "S" challenges are "the deliberate and intentional failure to amend the provision cited above when it was adopted on December 14, 1992, and the application of the illegal provisions of the SRP to me by the decision taken on May 4, 1994."

11. The relief requested in the Application is for the Tribunal to instruct the Administration and Pension Committees to amend Section 3.2(b)(ii) by adding "or part-time" after the words "in full-time", and to include the entire period of Ms. "S"'s contractual service in her eligible service for pension purposes.

12. In her Objection to the Motion to Dismiss, Ms. "S" argues that a "decision" was taken and challenges the "decision" not to refer the matter to the Pension Committee and the Executive Board. She contends that the refusal and failure of the Administration Committee to recommend an amendment of the relevant SRP provision or even to refer the matter to the Pension Committee did constitute a "decision" for purposes of Article II of the Statute.[5] Applicant asked the Administration Committee to submit the matter to the Pension Committee because, she maintains, "there is no other means available to staff of the Fund to have the Pension Committee consider an amendment to the Staff Retirement Plan except through the prior endorsement of the Administration Committee," since a provision which would allow formal direct access by staff to the Pension Committee does not exist. She maintains that, by its decision of May 4, 1994, the Administration Committee blocked her access to the Pension Committee. That decision, taken at a time when the Tribunal's jurisdiction was in effect, was, the Applicant maintains, arbitrary, capricious and discriminatory. Its result was that the Pension Committee was not required to deal with the question of amending a provision of the SRP that in effect illegally discriminates against the female

[5]Article II of the Statute provides in part:

"1. The Tribunal shall be competent to pass judgment upon any application: (a) by a member of the staff challenging the legality of an administrative act adversely affecting him...

2. For the purposes of this Statute: (a) the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund."

gender. It was not the Administration Committee's failure to "recommend" such an amendment that is being challenged, but its decision to refuse to refer the matter to the Pension Committee and the Executive Board for decision.

The Fund's Response to Applicant's Objection to Motion to Dismiss

13. In its Response to Applicant's Objection to the Motion to Dismiss, the Fund argues that there is no requirement that the Administration Committee endorse or transmit a proposed amendment to the SRP in order for the Pension Committee to consider the matter.[6] The Administration Committee's refusal to recommend an amendment to the SRP does not preclude the Applicant from raising the issue with the Pension Committee, which in any event includes two members of the staff. Moreover, the Fund contends, the Applicant has not shown that the refusal to amend a rule adopted prior to the effective date of the Tribunal's jurisdiction is a "decision" for purposes of Article II of the Statute.

In any event, the Fund's Motion to Dismiss maintains that the provision in the SRP to which the Applicant is objecting pre-dated the establishment of the Tribunal and, therefore, is not within its jurisdiction. A refusal to reconsider a rule that was adopted before the effective date of the Tribunal's jurisdiction cannot, consistent with this Tribunal's earlier judgment in the case of *Mr. "X" v. International Monetary Fund*, be considered a "decision" for purposes of Article II of the Statute, given the clear jurisdictional limitation prescribed by Article XX, Section 1, of the Statute.

The Applicant's Rejoinder to the Fund's Response to Applicant's Objection to Motion to Dismiss

14. In her Rejoinder, Ms. "S" asserts that she followed the only procedure available to have the Pension Committee consider amendments to the SRP, stating that the SRP contains "no channel for administrative review of the arbitrary determinations of the Administration Committee of the Pension Committee . . . ." Ms. "S" further complains that there exists no procedure concerning the manner in which pension decisions are made or reviewed, and that proceedings are not open to staff members. Ms. "S" observes that she was not notified whether the Pension Committee was informed of, or reviewed,

[6]Section 7.1(c) of the SRP provides: "The Pension Committee shall decide all matters of a general policy nature arising under the Plan, and all other matters, including any interpretation of the provisions of the Plan, required to be decided by it under the provisions of the Plan or submitted to it by any Committee appointed by it."

the decision on her request. She further asserts that she discussed her case with some members of the Pension Committee. She refers to a memorandum to her from the Assistant Director of Administration, dated September 27, 1994 (after the filing of the Application), informing her that her request would not be referred to the Pension Committee. Finally, Ms. "S" contends that the Tribunal has jurisdiction over her Application because the Administration Committee's adverse decision was taken after October 15, 1992.

Request for Documents and Information

15. After Ms. "S"'s Application, the Fund's Motion for Summary Dismissal and the Applicant's Objection to that Motion had been submitted, it became clear to the Tribunal that the availability of certain information additional to that contained in the pleadings would better enable the Tribunal to clarify considerations bearing on the judgment that it would have to make. Accordingly, pursuant to Article X, Section 1 of the Statute[7] and Rule XVII, paragraph 3 of the Rules of Procedure,[8] the Tribunal requested the Fund to produce certain documents and information, dealing principally with the decision-making procedure in matters concerning the SRP and the communication to the staff of changes in the SRP. The requested documentation was provided by the Fund.

Grounds of the Decision

16. The Respondent in its Motion to Dismiss essentially contends that the Tribunal lacks jurisdiction over the claim because: (a) there was no administrative act, i.e., no individual or regulatory decision, such as is required for the Tribunal's competence by the terms of Article II, Sections 1 and 2 of the Statute, and (b) the pension provisions complained of pre-date the commencement of the Tribunal's jurisdiction; accordingly, the complaint concerning their application is barred by Article XX, Section 1 of the Statute.

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[7]Article X, Section 1 provides: "The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal, provided that the applicant's allegations concerning the contents of any document so withheld shall be deemed to have been demonstrated in the absence of probative evidence to the contrary. The Tribunal may examine witnesses and experts, subject to the same qualification."

[8]Rule XVII, paragraph 3 provides: "The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in possession of the Fund, and may request information which it deems useful to its judgment."

17. The Tribunal does not accept the Fund's contentions summarized in (a) of the preceding paragraph. When, in a letter of May 4, 1994, the Secretary of the Administration Committee stated: "Section 3.2(b) of the Plan clearly requires that the individual must have been employed full-time by the Fund for the whole of the three-year period immediately preceding contributory service, and your service does not meet that test," that statement reflected a decision; when the Applicant's request for an exception in her favor in the application of the pertinent SRP provision was rejected, that constituted a decision; when the Administration Committee declined to transmit the Applicant's request to the Pension Committee for amendment of the provision at issue, that constituted a decision.

18. The Respondent in its Motion to Dismiss further and principally contends that the Tribunal is not competent to pass judgment upon the Application because of the time bar of Article XX, Section 1 of the Statute. The Applicant points out that the decisions referred to in the preceding paragraph in fact were taken after October 15, 1992, the determinative date for the Tribunal's competence specified in Article XX. The ultimate position of the Respondent is that, if decisions were taken and were taken after that date, they necessarily import a challenge to the legality of a regulatory provision which pre-dates October 15, 1992. The Tribunal thus must resolve the question of when the administrative act whose legality is challenged or whose illegality is asserted was taken for the purposes of its jurisdiction as provided in the Statute.

19. On October 10, 1974, the Chairman of the Administration Committee of the Staff Retirement Plan transmitted to the Chairman of the Pension Committee a proposal for amendment of Article 3 of the Plan ("Eligible Service") to give retroactive credit under the Plan for substantial service which a participant rendered as a consultant immediately before joining the Plan. The Tribunal understands that, in the practice of the Fund, the term "consultant" embraces contractual employees as well. There was no reference to part-time contractual service in the consideration of the proposal by the Administration Committee or in the amendment as adopted by the Executive Board of the Fund shortly thereafter.[9]

20. The relevant provision of the SRP was amended in 1991 and, as amended, was brought to the attention of the participants in the SRP in the

[9]The text in Section 3.2 as adopted in 1974 read as follows:

"(b) Eligible service for a staff member shall include any period of not less than three years during all of which the staff member was retained by the Fund in full time service as a consultant or a temporary appointee and which immediately preceded a

Plan's Report on Operations as of April 30, 1991, which explained the change in the following terms:

> "Changes were made to the provisions of Article 3 concerning retroactive participation in the Plan under certain conditions for participants formerly on contractual or temporary appointments. Because the classification of 'staff member on temporary appointment' has been abandoned, the provision was removed from the Plan. The provision concerning contractual appointments gave rise to a number of problems. The contracts of contractual appointees typically state that benefits deriving from the IMF employment are limited to those specified in the contract, the compensation paid makes some allowances for the absence of pension benefits, and a specific payment is made at the end of the contract in lieu of a pension. The Pension Committee therefore recommended, and the Executive Board agreed, that participants should not be allowed in the future to convert to eligible service periods of IMF employment during which they were ineligible to participate in the Plan. As a 'grandfathering' exception, the current provisions would apply to all contractual persons who were employed by the Fund prior to May 1, 1991, if they ultimately would satisfy the conditions for validating contractual service." (At page 7)

The "grandfathering" exception applied to those persons who were eligible for conversion before the change, i.e., to full-time employees only. The 1991 amendment did not refer to or alter the situation of part-time contractual employees in respect of the Pension Plan.

21. Both the 1974 amendment to the Staff Retirement Plan and the 1991 revision of it pre-dated the establishment of the Tribunal. It follows that, pursuant to Article XX, Section 1 of the Statute, the Applicant's complaint, insofar as it challenges the legality of an element of those provisions, is time-barred. The denial of requests for exceptional application or amendment of a "pre-existing" provision equally cannot confer jurisdiction on the Tribunal it otherwise lacks, nor can a refusal to refer a request for amendment to the Pension Committee do so. That a current complaint about a rule which came into force before October 15, 1992 is not sufficient to give rise to jurisdiction which otherwise is absent follows from the principle that formed

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period of participating service, provided that the participant pays in full during such participating service and within ninety days of the commencement of his participating service, or by January 31, 1975, whichever is later, the amount he would have paid if he had been a participant throughout the entire period of such service plus regular interest thereon."

the basis of the Tribunal's judgment in the case of *Mr. "X" v. International Monetary Fund*. That principle governs in respect of assertions of the illegality of pre-existing rules. It also governs requests for changes in pre-existing rules and requests for exceptions to their application.

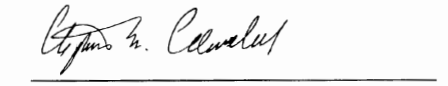
22. In a judgment confined to the question of jurisdiction, the Tribunal is not empowered to consider the issue of whether a regulation of the Fund has given rise to gender discrimination, however inadvertent. The terms of Article XX, Section 1 of its Statute require the Tribunal to dismiss the Application. The terms of Article XX are clear, categoric and compelling. While Article VI, Section 2 of the Statute provides that "the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision," that general proviso is subject to the *lex specialis* of Article XX. The specific governs the general. Moreover, although the terms of Article XX are clear and require no recourse to their *travaux préparatoires* for elucidation, it may be observed that the Report of the Fund's Executive Board to the Board of Governors prepared with a view to adoption of the Statute of the Administrative Tribunal states that the quoted provision of Article VI is "subject to the provisions of Article XX" (at page 25 of the printed version).

Decision

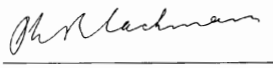
FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund, unanimously, decides summarily to dismiss the Application.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge



Stephen M. Schwebel, President



Philine R. Lachman, Registrar

Washington, D.C.
May 5, 1995

JUDGMENT NO. 1996-1

Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent
(April 2, 1996)

1. On April 1 and 2, 1996, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Michel Gentot and Agustín Gordillo, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. Michel D'Aoust, a staff member of the Fund.

The Procedure

2. On October 11, 1995, Mr. D'Aoust filed an Application challenging the legality of (i) the individual administrative decision by which the Fund determined his initial grade and salary, and (ii) the regulatory decision concerning the procedure for setting the salary of non-economist staff upon appointment. The relief requested is that the Tribunal (a) quash the administrative decision which set his salary at $65,800, and his grade at A12, and order a retroactive salary adjustment at a minimum of $76,000; (b) find the disparate treatment of economists and non-economists in the setting of salaries on appointment to be illegal; and (c) order that his starting salary be further adjusted by some $2,000 to offset the lower salary resulting from the application of the non-economist matrix.

3. The complaint under (i) was heard by the Grievance Committee of the Fund, which recommended to the Managing Director that it be rejected. The Managing Director acted in accordance with that recommendation. The second part of the complaint is not of a type over which the Grievance Committee has jurisdiction and is, thus, brought to the Tribunal directly. The Tribunal will deal with the two parts of the complaint separately.

4. In accordance with the Rules of Procedure of the Administrative Tribunal, the Application was transmitted to the Fund, which on December 4, 1995, filed an Answer maintaining that the Tribunal should conclude that

the methodology by which the starting grades and salaries of non-economist staff are determined was correctly applied in the Applicant's case and that it should reject the Applicant's allegation regarding the illegality of the methodology itself.

5. A Reply and Rejoinder were filed on December 22, 1995 and February 1, 1996 respectively.

6. Oral hearings, which neither party had requested, were not held. The Tribunal had the benefit of a transcript of oral hearings of the Grievance Committee, at which the Applicant, the Assistant Director of Administration, and witnesses, were heard.

The Facts

7. Of the facts on which the claim is based, some are not in dispute between the parties, while there is disagreement about at least one of these facts. The facts not in dispute may be summarized as follows. Mr. D'Aoust was appointed by the Fund on December 6, 1993 for a 2-year fixed-term period to the function of Personnel Officer in the Administration Department at grade A12, at a starting salary of $65,800. The facts of his recruitment may be recounted as follows:

a. In 1992 the Fund interviewed several candidates, including the Applicant, for the position of "compensation officer" which had been advertised internally at grade A13/A14. Because of certain reallocations of the responsibilities of that position as formerly held, the position as regraded was offered to (and accepted by) Mr. "X" at grade A12, at a starting salary of $63,000. After the completion of his initial two-year fixed-term, Mr. "X" was promoted to grade A13.

b. In 1993 it was decided to recruit an additional, less senior staff member; that vacancy was advertised internally at grade A10/A11. When no suitable candidates applied from within the Fund, the Deputy Division Chief of the Compensation Policy Division requested a recruitment officer to inquire from Mr. D'Aoust whether he would still be interested in working for the Fund. The officer did so without mentioning the grade, which, the Tribunal has been given to understand, is not done with candidates because IMF grades are not thought to be meaningful to them at that stage of the process. The Applicant then was interviewed by the official who would be his supervisor who, although the position had been advertised internally at grade A10/A11, concluded that because of a need for a more experienced officer the new position should be set at the A12 level. The Fund thereupon offered

the Applicant a post at grade A12 with a salary of $64,000. The Applicant responded that that salary was insufficient, whereupon the Fund offered and the Applicant accepted the salary of $65,800. These figures were arrived at through the application of a methodology, of which Mr. D'Aoust then was uninformed, described in detail during the Grievance Committee hearings as well as in the Report of an outside consultant and in an Affidavit of the Assistant Director of Administration. One element of this methodology gives, in arriving at the appropriate grade and salary, a maximum of ten years weight to relevant professional experience acquired in the case of applicants who are not economists, whereas that cap is not applied to applicants who are engaged to fill positions as economists.

c. Mr. D'Aoust commenced his work on December 6, 1993. On February 28, 1994 Mr. D'Aoust approached his supervisor with the request that his salary be increased. He pursued his claim with the Administration Department through various stages up to the Director of Administration. On February 3, 1995, the Director of Administration informed him that he denied the request but nevertheless authorized a $1,000 salary increase effective January 20, 1995, the reason being that the outside consultant whom he had engaged to perform an independent review of the matter had observed that there seemed to have been some misunderstanding between Mr. D'Aoust and the Fund as to "the exact status" of the job offered which might justify an equitable adjustment. On January 31, 1995 Mr. D'Aoust submitted his grievance to the Grievance Committee, which on June 13, 1995 recommended to the Managing Director that the grievance be denied. On July 21, 1995 the Managing Director informed Mr. D'Aoust that he accepted that recommendation.

Facts in Dispute

8. The principal fact about which there is disagreement is whether, as Mr. D'Aoust contends, he was considered for the same job twice, once in 1992 and the second time in 1993, a contention disputed by the Fund. The position open in 1992 was filled by Mr. "X". The Applicant maintains that when in 1993 he was asked whether he still would be interested in working for the Fund the question put to him was "performing the same as the one for which I had been interviewed, obviously not the same position, but the same job". Therefore, he argues, the two jobs should have carried an identical grade A13. (The Tribunal notes that the position initially advertised at the level of A/13 was offered to and accepted by Mr. "X" at the A/12 grade.)

9. Mr. D'Aoust also avers that he understood that the salary was to have been set on the basis of the total years of his relevant previous experience

and in comparison with a number of other similarly situated staff members. Instead, in the calculation of his salary only ten years of his relevant prior experience were taken into account in accordance with the Fund's practice in respect of non-economists (the methodology of truncating the value attributed to prior experience at ten years), and only the grade and salary of a single comparator (Mr. "X") were weighed. He further alleges that "factual errors" were made in the calculation of his salary by the mistaken use of the economist matrix and that "procedural anomalies" took place in that certain requirements, i.e., the formulation of a new job description and internal advertisement of the vacancy, had not been met. He accordingly concludes that his grade and salary were inappropriately set. The Respondent maintains that Mr. D'Aoust's grade and salary were set in accordance with the normal procedures and the internal law of the Fund, in the lawful exercise of reasonable discretion within its flexible system; in addition, the computational errors were irrelevant because in the observance of internal relativities the salary of Mr. "X" was a ceiling for Mr. D'Aoust's salary. No general principles of law were infringed by these procedures, the Fund maintains.

The Matter of Jurisdiction *Ratione Personae*

10. The Tribunal initially has to dispose of a preliminary issue which is one of jurisdiction *ratione personae*. At the time when the Fund decided on the grade and salary of the position which it thereupon offered to Mr. D'Aoust, he was not yet a member of the staff of the Fund. Under the terms of Article II, Section 1 of the Statute of the Tribunal:

"The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or

b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant."

Mr. D'Aoust was not a member of either of these classes at the time the terms of employment were offered to him. Nevertheless, once he had accepted the offer, signed the contract of employment, and thereby became a member of the staff of the Fund, his grade and salary were determined by the offer that had been made to and accepted by him. It is therefore concluded that since the offer and acceptance of a particular grade and salary thereupon

and thereafter affected him as a member of the staff, the Tribunal is competent to adjudge his case.

The Acceptance of the Offer of Employment

11. The Respondent argues that terms and conditions in a letter of appointment, such as grade and salary, are explicitly accepted by the staff member; that initial terms do not involve the exercise of unilateral authority by the Fund; that therefore, these terms and conditions are presumptively binding upon the staff member who accepted them, absent a showing that they are blatantly mistaken (e.g., arithmetical or typographical error) or contrary to a mandatory rule of the Fund (e.g., a salary below the range associated with the grade of the position), or that their acceptance was induced by fraud or misrepresentation.

12. The Tribunal sustains the Fund's position on this question as a matter of presumption; the fact that a staff member accepts an offer that he or she is free to decline does weigh against challenge to the terms of the contract so accepted. But it is a question only of presumption. The Fund and an applicant for a position in the Fund are not in an equal negotiating position; e.g., as this case shows, the Fund is in possession of relevant information not within the knowledge of an applicant. Accordingly, while the presumption holds, the staff member nonetheless can be heard to argue contrary claims, as in this case, of misrepresentation of facts or irregularity in the process of appointment. The Tribunal concludes that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of the Fund's determination of grade and salary.

13. Moreover, precisely what Mr. D'Aoust did accept may be open to question. When the then Director of Administration considered Mr. D'Aoust's request for a revision of his grade and salary, he found that there had occurred in the process of Mr. D'Aoust's appointment events that possibly created a certain degree of misunderstanding and confusion in his mind concerning "the exact status of the job." It was for that reason that the Director of Administration decided to adjust the initial terms of Mr. D'Aoust's service by increasing his salary by $1,000 p.a. as of January 20, 1995 and by promoting him to grade A13 as of May, 1995 under an unusual acceleration of the normal procedure, under which, as the Tribunal has been given to understand, promotions are not given to fixed-term staff before their conversion to regular staff. From these facts the Tribunal deduces that there is room for doubt as to whether there was a true meeting of the minds regarding the nature of the job at the time Mr. D'Aoust accepted his position.

If there were not such a meeting of minds, Mr. D'Aoust cannot be treated to his detriment as if there were. The Tribunal accordingly concludes on this ground as well that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of their determination.

The Individual Decision

14. Mr. D'Aoust challenges the decision by which his grade and salary were determined claiming that it disregarded both the Fund's law and general principles of law. To a significant extent, he presents the reasons for these challenges in terms of dissatisfaction with the manner in which the Grievance Committee dealt with his grievance. That approach reflects his contention that the Administrative Tribunal functions as an appellate body of the Grievance Committee, a contention that is contested by the Respondent. The Tribunal will deal with this issue first.

The Issue of the Tribunal's Competence Respecting the Grievance Committee's Procedures and Recommendations

15. Mr. D'Aoust asks the Tribunal to review the Grievance Committee's "decision" because, he alleges, substantive and procedural irregularities were committed in those proceedings. He contends:

> ". . . that the issues cannot be divorced from the recommendations of the Grievance Committee since all the proceedings undertaken in the channels of administrative review constitute part of the body of evidence before the Tribunal. Further, as the Respondent has relied, at every step of administrative review, on the findings at each previous step—and as it continues to rely heavily on these findings in its Answer—all irregularities, from the original decision to the Grievance Committee's recommendation, inclusive of the Managing Director's acceptance, are pertinent to this case. Moreover, and contrary to the Respondent's assertions, I respectfully suggest that this Tribunal is an appellate body, given that staff must first proceed through administrative review, including the Grievance Committee, before being entitled to pursue a challenge of an individual decision before the Tribunal."

16. The Respondent contests that the Tribunal functions as an appellate body, advancing as reasons for that view that:

> ". . . if the proceedings before the Tribunal were intended as a review of the action of the Grievance Committee, this would involve two sig-

> nificant departures from the authority conferred on the Tribunal under its Statute: first, the Tribunal would be limited to reviewing questions of law and could not take evidence directly (which is not the case under the Statute); and second, the appropriate remedy would not be to order the relief the Applicant is seeking but rather to remand the case to the Grievance Committee for new proceedings, as an appellate court may reverse and remand in order for a new trial to be held, but it would not normally be empowered to make findings and award damages."

In addition, the Respondent suggests that if the Tribunal were an appellate body over the Grievance Committee, "the Tribunal would be reviewing the recommendations of the Grievance Committee and would be limited in its scope of review as to the matters considered by the Committee; this is clearly not the case."

17. The Tribunal's competence is limited to judging the legality of administrative acts, which the Tribunal's Statute defines as decisions taken in the administration of the staff.[1] By the terms of the Statute, the expression "administrative act" embraces individual and regulatory decisions taken in the administration of the staff of the Fund. Complaints about administrative acts may be brought to the Tribunal only after the exhaustion of all existing applicable internal review procedures.[2] The Tribunal must decide whether it is competent to entertain complaints about procedures or recommendations of the Grievance Committee. The basic function of the Committee is set forth in Section I of General Administrative Order No. 31 which governs it:

> "The purpose of this Order, in accordance with Rule N–15 is (1) to establish a Grievance Committee to hear cases within its jurisdiction and to make recommendations to the Managing Director in order to facilitate the fair and expeditious resolution of disputes, and (2) to establish procedures for the hearing of cases."

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[1]Article II, Section 1.a.: "The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him." and

Article II, Section 2.a.: "For purposes of this Statute:

a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;"

[2]Article V, Section 1: "When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review."

That the Grievance Committee in not competent to take final decisions in the matters which it hears follows from Section 7.09 of the same Order:

> "The Managing Director, or the Managing Director's designee, will take the final decision in the matter and will transmit the decision in writing to the grievant."

Thus, the Grievance Committee's recommendations do not constitute "administrative acts" in the sense of Article II, Sections 1.a. and 2.a., because the Committee is not qualified to take "decisions". Moreover, the Tribunal does not accept the Applicant's assertion that it functions as an appellate body from the Grievance Committee because the Tribunal's competence is not limited as it would be if it were a court of appeal; e.g., it makes findings of fact as well as holdings of law. At the same time, the Tribunal may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee. The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it.

The 1992 and 1993 Posts

18. The Applicant maintains that the position which he accepted in 1993 was the same as the position for which he was considered in 1992, and that consequently the grade of the 1993 position should be the same as that for which the 1992 position initially was intended, i.e., A13/A14. The Respondent states that the positions were dissimilar because they carried differing responsibilities from the outset. The Tribunal finds the facts to be as follows.

19. In 1992 the Compensation Policy Division put out a vacancy announcement for a position of a senior compensation officer or senior personnel officer at grade A13/A14. Mr. "X", recruited for the job from the outside, was given grade A12 rather than A13/A14 because, unlike the officer to be replaced, he lacked the experience and knowledge of the Fund necessary to operate with little supervision. The 1993 position was initially viewed as a replacement for a personnel officer with five or six years of experience. By internally advertising the opening at an A10/A11 grade it was thought to find someone with good qualifications and some experience, who, however, would need a significant amount of training. When no qualified internal candidate appeared, it was decided to engage someone from the outside with more relevant experience, able to work without a long developmental period in the job on the review of the grading system, for which there had

appeared a need. Mr. D'Aoust, it was felt, filled those requirements at the level of A12.

20. In the perception of the Fund, Mr. D'Aoust was recruited to fill a position clearly junior to that discussed with him in 1992. Mr. D'Aoust does not appear to have shared that perception. Nevertheless, on the basis of the evidence available to it, the Tribunal concludes that the 1993 position offered to and accepted by Mr. D'Aoust differed from the 1992 position discussed with him, but offered to Mr. "X", as did the qualifications to be fulfilled by the holders of these positions. Thus there was no legal obligation of the Fund to confer the same grade on both positions on the ground of an identity which did not exist.

Procedural Irregularities and Errors

21. The Applicant also alleges that procedural irregularities and factual errors in the process of his appointment caused the Fund wrongly to offer him the grade and salary that he accepted. They comprised the failure by the Fund internally to re-advertise the vacancy of the position filled by him; the fact that a new job description was not made; the use of a single peer-comparator (Mr. "X") to establish internal relativities; and the erroneous application of the economist matrix in the evaluation of his relevant pre-employment experience. These acts and omissions, he maintains, resulted in a wrongful determination of his grade and salary.

22. The Respondent replies that the Applicant's starting grade and salary were consistent with the Fund's flexible employment system, in which the use of comparators is only a discretionary component; and that computational errors in the methodology ended up being irrelevant in respect of his salary because the salary was just below the midpoint of the range, in accordance with usual practice, and because Mr. "X"'s salary necessarily constituted a cap on Mr. D'Aoust's. Truncating recognition accorded to relevant previous experience at 10 years in the determination of initial grades and salaries is the Fund's normal practice in respect of non-economists. In the determination of Mr. D'Aoust's grade and salary the Fund transgressed neither its internal law nor any general principles of law.

23. That classification and grading is an exercise of discretionary authority, subject to judicial review only for irregularity, is settled jurisprudence. (*Lyra Pinto v. IBRD*, WBAT Reports 1988, Part I, Decision No. 56, para. 36.) International administrative tribunals have emphasized the importance of observance by an organization of its procedural rules, for

instance, on the internal publication of vacancies so as to enable the staff members of the organization to apply for the vacant position. (*In re Diotallevi and Tedjini*, ILOAT, 75th Session, Judgment No. 1272, paras. 12, 15–17). At the same time, they have held procedural irregularities and errors irrelevant where the actions or omissions did not affect the decision of the complainant or his financial interests. That was the case, e.g., where the complainant was not a member of the class of persons to which an incriminated action applied or when an unlawful omission has no financial effect upon him. (*R. Schwarzenberg Fonck v. IDB*, IDBAT, Judgment Case No. 2, para. 5, page 19).

24. Before Mr. D'Aoust accepted a position with the Fund he could not have been acquainted with its procedures. Any procedural failures by the Fund of which he was then unaware, e.g., in not re-advertising the position, or any errors in the computation of the salary that the Fund offered him, accordingly could not have influenced his decision to accept the position. Moreover, the salary that the Fund initially offered him was re-negotiated at the time to his advantage. Consequently, the Tribunal does not accept Mr. D'Aoust's contentions concerning the effect of the procedural irregularities and factual errors in the process of his appointment which he cites. The question of the truncation of relevant experience is dealt with below.

Discretionary Authority

25. The Applicant asserts that the Fund abused its administrative discretionary authority in its assignment of grade and salary to his position. The Respondent emphasizes that the determination of an initial grade and salary calls for the exercise of judgment in the appreciation of a number of factors and that, as long as the starting salary is within the range associated with the position as it was in this case, it is consistent with the Fund's flexible and workable system; it did not contravene any Fund rules or general principles of law.

26. International administrative tribunals have regularly held that the assignment of grades to posts is an exercise of discretionary authority. Tribunals have been reluctant to interfere in the grading of posts, holding that the evaluation of the work to be done and the degree of responsibility involved, factors on which the grading depends, should be performed by persons trained to apply the relevant technical criteria. (*In re Dunand and Jacquemod*, ILOAT, 65th Session, Judgment No. 929, para. 5). They have substituted their own assessment or required that a new assessment be made only where the evaluation of a post was tainted by irregularity (*In re Garcia*, ILOAT, 51st Session, Judgment No. 591, paras. 3–4).

27. Mr. D'Aoust indeed asserts that he was misled as to the nature of the job offered to him; and he maintains that the fact that he was given a starting grade of A12 for a position that had been internally advertised as A10/A11 demonstrates the invalidity of the process by which the grade was determined; for these reasons, he was inappropriately graded. The Respondent denies that Mr. D'Aoust was misled and maintains that since the job content of the position initially set at grade A10/A11 had been redefined, the assertion that the job was finally graded at A10/A11 is incorrect, because the duties and responsibilities of the position had been augmented. Mr. D'Aoust's experience, the Respondent asserts, did not justify a higher entry level grade than A12. His grade and salary were lawfully determined in accordance with the system of the Fund, a system in the Fund's view not inconsistent with general principles of law.

28. The Tribunal finds no evidence of Mr. D'Aoust having been deliberately misled. The Tribunal notes that the Fund recognized that, despite the findings by the independent consultant that the system used in the Fund for determining starting grades and salaries was correctly applied in the case of Mr. D'Aoust, in the discussions between him and personnel of the Recruitment Division leading up to his decision to accept the position there seems to have been some difference in understanding as to the exact status of the job being offered relative to others in the personnel area. It was for that reason that the Fund made what it considered an equitable adjustment of Mr. D'Aoust's situation. The adjustment consisted of a $1,000 p.a. increase in salary and an accelerated promotion. The Tribunal does not equate any such misunderstanding with a deliberate misleading of Mr. D'Aoust by the Fund. Nor does this adjustment demonstrate that the initial determination of Mr. D'Aoust's grade and salary was flawed.

29. It remains to consider whether the Fund's practice of truncating the weight to be attached to previous experience of non-economist applicants at ten years when deciding upon their grade and salary was, in its application to Mr. D'Aoust, wrongfully employed to adversely affect his initial salary. Whether that practice constitutes a rule concerning the terms and conditions of staff employment is dealt with below. As to the merits or demerits of the practice as applied to Mr. D'Aoust, the Tribunal finds that the Fund may not unreasonably favor economists in deciding upon the terms of staff employment since economics is at the heart of the Fund's mission. Thus when the Fund applied the so-called non-economist matrix to the determination of the salary of Mr. D'Aoust, cutting off the credit given to his prior experience at ten years, that of itself did not give rise to a cause of action against the Fund on the ground of inequality of treatment.

30. In light of these considerations, the Tribunal concludes that the exercise of administrative discretion by the Fund in setting Mr. D'Aoust's grade and salary was not invalidated by the procedures followed, including the ten-year truncation of his previous experience and the use of a single comparator. Nor was it invalidated by irregularities alleged in those procedures which in any event have not been shown to have influenced that exercise. It may well be that, in the singular circumstances of the case, the Applicant and the Fund officials immediately concerned did not have a meeting of minds on the status of the position offered in 1993 to Mr. D'Aoust or on its relationship to the position not offered to him in 1992, but if so, that does not give rise to a sustainable complaint on the part of the Applicant.

The Regulatory Decision

31. The Applicant challenges the legality of what he construes as the regulatory decision on the basis of which his grade and salary were determined, alleging that it violates the Fund's internal law as well as general principles of law and has no basis in the Fund's policies or General Administrative Orders. In particular, he asserts:

- the methodology by which prior experience is treated differently in respect of economists as compared with non-economists (being taken into account for the latter only for a maximum of 10 years) constitutes unlawful inequality of treatment;
- the system is rooted in systemic and gender discrimination;
- the system of determining grades is arbitrary, raising the question of abuse of discretion.

32. The Respondent's arguments concern (i) the Tribunal's jurisdiction over the challenge to the long-standing practice that truncates recognition of previous experience at ten years and (ii) the legality of that practice. The Respondent concludes that the Tribunal lacks jurisdiction *ratione temporis* and asserts that the Applicant fails to demonstrate the illegality of that practice. The Respondent also contests the illegality of the other heads of contention.

The Issue of Jurisdiction *Ratione Materiae*

33. The Tribunal's jurisdiction over regulatory decisions is based on Article II, Section 2 of the Statute, which provides in part:

"For purposes of this Statute:

a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;

b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;".

As thus defined, a "regulatory decision" is "a decision taken in the administration of the staff" and a "rule covering the terms and conditions of staff employment". The extent of the Tribunal's jurisdiction in respect of regulatory decisions is explained in the Report of the Fund's Executive Board to the Board of Governors which was prepared with a view to adoption of the Statute of the Administrative 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.[3] 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. As discussed below, in most cases concerning individual administrative decisions, the staff member would be challenging the decision after unsuccessfully pursuing the established channels for administrative review of his complaint, including recourse to the Grievance Committee.
>
> The statute makes explicit that the tribunal would have jurisdiction to review regulatory decisions, either directly or in the context of a review of an individual decision based on the regulatory decision. This would encompass, for example, Executive Board decisions regarding employment policy (such as adjustments to compensation, pensions, tax allowance, benefits, and job grading), the SRP, and staff rules and

[3]The N Rules form a part of the Fund's Rules and Regulations.

> regulations promulgated by management, such as the General Administrative Orders. As provided in Article III, the tribunal would be expected to apply well-established principles for review of actions by decision-making organs, including noninterference with the proper exercise of authority by those organs." (Report, pp.14–15).

34. In order to consider the lawfulness of the practice in question as a "regulatory decision", the Tribunal must as a threshold matter address the question of jurisdiction *ratione materiae*, that is to say, it must decide whether the practice is a regulatory decision in the sense of Article II, Section 2.b.[4]

35. 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 of truncating the weight given to the previous experience of non-economists at ten years 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 to Mr. D'Aoust, 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 to Mr. D'Aoust as an "individual" rather than a "regulatory" decision.

36. At the same time, the Tribunal finds it appropriate to observe that for the Fund to generate and apply a practice that affects the determination of the salary level of a substantial proportion of its staff, but which was and is

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[4]Article II, Section 2.b. provides:

"For purposes of this Statute:

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b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;".

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.

37. 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.

(i) As for the structure of the Statute, Article VI, Section 2,[5] limits the period within which challenges may be brought to the Tribunal. The period is reckoned from the date of announcement or effectiveness if later; whether the date of effectiveness is later can be measured only in comparison with the date of announcement of the decision. That rules constituting regulatory decisions have been "announced" is presumed in the commentary on Article VI, Section 2 in the Report to the Board of Governors:

> "Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision.
>
> However, the legality of a regulatory decision could be raised as an issue at any time with respect to an individual decision taken pursuant thereto, subject to the rules involving timely filing of challenges to individual decisions. Accordingly, a staff member could contest the denial of a benefit in his particular case on the grounds that the regulation on which the denial was based was illegal, without regard to the date on which the regulation was enacted, subject to the provisions of Article XX.

[5] "An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision."

> There could, of course, be cases where an applicant sought to overturn an individual decision on several grounds, e.g., that the decision is either an incorrect application of the underlying regulatory decision, or, alternatively, that the underlying regulatory decision itself is illegal. The Grievance Committee would be competent to consider challenges based on the former grounds but not the latter grounds, insofar as the legality of a regulatory decision was at issue.
>
> In cases involving both types of grounds, the requirements of the tribunal statute regarding exhaustion of remedies and the statute of limitations should be understood as follows. The Grievance Committee would first hear the case and dispose of the issues over which it had jurisdiction (i.e., whether the decision at issue involved a correct interpretation or application of the Fund's rules). If the Grievance Committee rejected his case, the staff member could then proceed to the tribunal. At that time, it would be open to him to raise, as grounds for review, not only the issues that were before the Grievance Committee but also, if appropriate, the legality of the underlying regulatory decision, regardless of whether more than three months had passed since the individual decision at issue had been taken. In essence, the pursuit of administrative remedies as to the issue of interpretation or application would suspend the time period for seeking review of the decision on grounds for which no administrative review is available." (Report, pp. 25–26)

To find whether or not a statutory period is observed when a starting date cannot be determined would either be impossible or necessitate reliance on vague concepts such as that a practice has been observed for "many years".

(ii) In the jurisprudence of other international administrative tribunals "ample information", "ample publicity", or "reasonable notice" given internally have been held to be requisite for actions or decisions in order that the employees be clearly informed of the working conditions in their organization. Decisions are to be put in a form which clearly conveys to an official in precisely what way his rights are affected (*In re Niesing, Peeters and Roussot*, ILOAT, 66th Session, Judgment No. 963, para. 5; *In re Connolly-Battisti (No. 5)*, ILOAT, 39th Session, Judgment No. 323, para. 22). This jurisprudence lends weight to the considerations set out above in paragraph 36.

38. In view of the conclusion set out above in paragraph 35, there is no need to consider the Respondent's argument that, insofar as it relates to a regulatory decision, the Application is time-barred.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund, unanimously, decides:

(A) in respect of the individual decision determining the grade and salary of Michel D'Aoust, the Application is rejected;

(B) in respect of the alleged regulatory decision pursuant to which such determination was made, the Tribunal finds no regulatory decision within the meaning of its Statute on which to rule.

Stephen M. Schwebel, President

Michel Gentot, Associate Judge

Agustín Gordillo, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
April 2, 1996

JUDGMENT NO. 1997-1

Ms. "C", Applicant v. International Monetary Fund, Respondent
(August 22, 1997)

Introduction

1. On August 21 and 22, 1997, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "C", a former staff member of the Fund.

The Procedure

2. On January 17, 1997, Applicant, who was employed with the Fund from August 5, 1992 until August 4, 1995 on a two-year fixed-term appointment plus a one-year extension thereof, filed an Application in which she challenged the Fund's decision not to convert the fixed-term appointment into a regular staff appointment on the ground of unsatisfactory performance. The gravamen of the challenge is that that decision was arbitrary, capricious and discriminatory, essentially because it was causally related to complaints she had made during the first year of her tenure about certain remarks addressed to her by her immediate supervisor, which she characterizes as incidents of sexual harassment.

3. In accordance with the Rules of Procedure of the Administrative Tribunal, the Application, having been amended to incorporate necessary corrections, was transmitted to the Fund, which on March 31, 1997, filed an Answer in which it maintained that its decision not to offer Applicant a permanent position was entirely proper in the light of her history of interpersonal problems and that the Applicant failed to demonstrate that the decision was an abuse of discretion.

4. A Reply and a Rejoinder were filed on May 2 and June 5, 1997 respectively.

5. Oral hearings, which neither party had requested, were not held. The Tribunal had the benefit of a transcript of oral hearings by the Grievance Committee of the Fund, at which the Applicant, senior officials in the Administration Department of the Fund and witnesses were heard.

The Facts

The facts upon which this claim is based may be summarized as follows.

6. Applicant was appointed to a two-year fixed-term appointment commencing August 5, 1992, in the position of Staff Assistant, grade A4, at a salary of $28,850 p.a. She served in the African Department (AFR) under a Division Chief who, in early 1993, was succeeded by a new Division Chief (referred to hereunder as Mr."A"). Applicant alleges that on two occasions, he addressed remarks to her, once in the spring of 1993 and the second time on December 6, 1993, which she regarded as sexually harassing.

7. Three days following the December 6, 1993 incident, Ms. "C" reported the remarks by Mr. "A" to the Deputy Director of the Department, seeking some form of redress. The Deputy Director, she asserts, promised to talk to Mr. "A" and secure for her an apology from him; in addition, she alleges, he offered to recommend a raise and promotion for her if she would drop the issue of harassment. Ms. "C" further states that, on the day on which she reported the incident to the Deputy Director, the Administrative Officer of the Department took her to lunch in the Fund's Executive Dining Room and advised her not to pursue the matter further.

8. In the spring of 1993, as a result of a reorganization in AFR, a new Division Chief (referred to hereunder as "Mr. "D") became Ms. "C"'s immediate supervisor and, thus, responsible for preparing her Annual Performance Reports (APRs). The first APR covered the period from the initial date of her appointment until one year later, i.e., August 1993. That performance report was signed by Mr. "D" on December 21, 1993, by the review officer on January 19, 1994, and by the Department Head on February 24, 1994. The assessment of Applicant's performance includes the following appraisal:

> "Ms. ["C"] started her work in the Fund with a very positive attitude. She is technically very competent and performed well as a staff assistant, showing considerable initiative when she had to act for the administrative assistant, which happened on two occasions during the year, each extending over several weeks. From the beginning, Ms. ["C"] has carried out her work effectively and reliably. Under occasionally more intense work pressure, Ms. ["C"] continues to deliver quality work, but allows the pressure to affect her normally good relationship with other members of the division. . . .

> I believe that, with a calmer demeanor in pressure situations, Ms. ["C"] can assume rapidly growing responsibility in her present career stream, while at the same time pursuing her further career goals."

This APR does not appear to include a performance rating, a fact that neither Applicant nor the Fund has noted or explained. On February 24, 1994, in a meeting with the Director, Deputy Director and Administrative Officer of the Department regarding her performance report, Ms. "C" was told that there were deficiencies in the area of her interpersonal skills. Specifics, she alleges, were, however, not given. At the conclusion of this meeting she raised the matter of the unresolved complaint of harassment and was informed that the matter was closed.

9. Applicant's second APR covered the five-month period from early August 1993 through the end of December 1993. It was signed by Mr. "D" on May 2, by the review officer on May 3, and by the Department Head on May 4, 1994. The "Overall Assessment by Supervisor" comments that:

> "Solid technical skills and increasing experience in the Fund have enabled Ms. ["C"] to perform well as staff assistant, demonstrating her potential for assuming increased responsibility in her career stream. She is using every opportunity to expand her knowledge of Fund practices and procedures and is appreciative of the guidance offered by the new administrative assistant. . . .
>
> . . . [T]he mission chief for Ms. ["C"]'s first mission commented favorably on her technical skills and considered that, as she gains more experience with mission work, she should be able to perform well on future missions.
>
> I believe that, in the period ahead, Ms. ["C"]'s growing experience at Fund work and her efforts at fitting into the institution will pay off, not least in terms of greater job satisfaction for herself."

She was awarded a performance rating of "2", a 2.0 percent merit award, a promotion to grade A5, and a salary increase to $30,610 p.a. Nonetheless, rather than conversion to a regular staff appointment, the APR proposed a one-year extension of Applicant's fixed-term appointment, i.e., until August 1995. The text of the report did not note explicitly any deficiencies with regard to interpersonal skills, although it mentioned "her efforts at fitting into the institution".

10. In May 1994, upon learning that a conversion of the appointment was not being proposed, Applicant approached the Director of Administration, Mr. Graeme Rea, seeking an explanation for the extension—rather than conversion—of her appointment in light of the favorable performance review, promotion, and merit increase and asserting that the motive for the decision

not to convert her appointment was retaliation flowing from her having raised the issue of sexual harassment. Mr. Rea concluded that the decision not to convert the appointment had been taken on the merits of the case and was not a reprisal. Furthermore, he found that the incidents, even if as alleged, did not rise to the level of sexual harassment. (Mr. Rea took the occasion of the interview to ask if Ms. "C" acknowledged any respect in which her performance in AFR was open to criticism, and recorded that Ms. "C" seemed to find his question "both offensive and incomprehensible".) Nevertheless, in the light of all the circumstances he felt it preferable that the eventual decision whether to bring her on to the regular staff should be made in a new environment and under a different set of supervisors, in order to remove any basis for a perception that the decision concerning conversion was influenced by her complaint about a former supervisor. Consequently, Ms. "C" was transferred to the Staff Benefits Division of the Administration Department (ADM), effective August 29, 1994. The terms of the transfer were set forth in the following Memorandum for Files (August 29, 1994) which was copied to Applicant:

> "Subject: *Ms. ["C"]—Extension of Fixed-Term Appointment*
>
> This memorandum is to confirm the arrangements under which Ms. ["C"] will transfer, effective August 29, 1994, from the African Department to the Staff Benefits Division, Administration Department, for the remainder of her fixed-term assignment which expires on August 4, 1995. After approximately nine months, a written assessment of her performance will be prepared for the Recruitment and Staff Development Divisions, along with a recommendation as to whether her appointment should be converted from fixed-term to regular status. In the event that Ms. ["C"] is converted to regular status, she will remain in the Staff Benefits Division until a suitable staff position vacancy arises in the Administration Department. If a conversion does not occur, this would provide Ms. ["C"] a two month period to seek other employment opportunities outside the Fund. . . ."

She accepted her appointment for an additional year by signing the usual letter of appointment on August 17, 1994.

11. Applicant's third APR covered the period January 1, 1994 to December 31, 1994 and was prepared on February 1, 1995 by her supervisor in ADM (referred to below as Mr. "B"). As required, it encompassed input from the former supervisor in AFR regarding her performance in that Department during the first eight months of the review year. The combined assessment was very favorable, and does not note any difficulties with interpersonal skills. Mr. "B" held a performance discussion with Applicant on February 27, 1995 and signed off on the report that day. The review officer

signed the report the following day, noting Applicant's valuable contribution in the department. At this stage, the report was still incomplete because the signature of the Department Head, required to finalize the report, had not yet been affixed. That final step was taken only on May 1, 1995.

12. In early March 1995, while Applicant was on vacation, three immediate co-workers separately approached Mr. "B" with complaints about her interpersonal behavior within the Division. The complaints were discussed also with the review officer. At her instruction, Mr. "B" called Ms. "C" to a meeting upon her return from vacation, on March 29, 1995. On that occasion, Mr. "B" confronted her with the accusations of her colleagues that she was rude and condescending, acted like a "know it all", did not try to work towards consensus, blamed others when she performed a function incorrectly, and was not a team player. When Applicant asked whether she could confront her accusers, and respond to specific elements of their accusations, Mr. "B" declined on the grounds that her colleagues had spoken in confidence and that what was important was what was said, not who said it. When Applicant asked what all this meant for her chances of being converted at the end of the third year, Mr. "B" told her that he preferred to wait until the end of May to see how her behavior might change. A personnel officer who was present then met with Ms. "C" alone, confronting her with complaints about her interpersonal skills that had surfaced prior to her transfer to ADM, initially during a Fund training course, then in occasional confrontations or misunderstandings with a few economists.

13. The record shows that Ms. "C" was visibly surprised and deeply upset by the accusations. She called in sick the next day, was referred to the medical department of the World Bank, and she was placed on sick leave. She never returned to work. She has stated that during the remaining period of her contract she was not sure whether or when she might be physically able to return to work.

14. Mr. "B" memorialized the March 29, 1995 meeting in a Memorandum to File dated March 30, 1995 which he appended as a supplement to the third APR that he had prepared and discussed with Applicant in February, but that remained incomplete because it had not yet been finalized by the Department Head. On May 1, 1995, with Applicant still absent from work, the Department Head proceeded to sign off on the third APR, assigning a rating of "3".

15. On May 10, 1995, following a telephone call communicating the same, the review officer sent Ms. "C" a letter officially informing her that, in view of the information about her performance that had been communicated to

her by Mr. "B", her employment would expire in August, at the termination of the one-year extension of the original two-year appointment.

16. The Answer and Rejoinder submitted by the Fund contain detailed accounts of what it terms "the extensive record of complaints about her behavior, both before and after she had made . . . allegations of sexual harassment, including complaints by persons with no connection" to her supervisors in the African Department. That record alleges her disruptive behavior during a training course, her confrontational reaction to admonitions concerning incidents of unsatisfactory performance, as for instance her failure to follow instructions correctly and in a timely manner, and her inability to cope well under pressure. Testimony before the Grievance Committee also indicated that Applicant exhibited a pattern of interpersonal difficulties that were unrelated to the incidents alleged to constitute sexual harassment. Applicant came across as assertive, at times, belligerent, while at the same time as defensive and unable to understand and accept, still less to learn from, legitimate criticism.

17. After being informed of her separation, Applicant attempted to secure the completed version of her third APR. Initially, she was given a copy of which a page was missing. Ultimately, the complete report was delivered. On this version, however, the "3" rating had been replaced by a "2" rating. Moreover, it included a merit award of 1.2 percent and a new salary of $30,980 p.a. In this report the review officer noted above his July 28, 1995 signature that, having been absent from the office since March 29, 1995, Ms. "C" consequently had not been able to improve her performance. The report was signed by the Director of ADM on July 31, 1995.

18. On November 27, 1995, Applicant sent a letter appealing the decision not to convert her appointment to the Director of Administration who rejected the appeal on December 11, 1995. Thereupon, Applicant filed a Grievance with the Grievance Committee of the Fund, which issued its Recommendation and Report to the Managing Director on October 17, 1996, upholding the Fund's decision. On November 6, 1996, Applicant was informed that the Grievance Committee's recommendation had been accepted. She filed an Application with the Tribunal on January 17, 1997.

The Contentions of the Parties

19. The Applicant's principal arguments are that the Fund's decision not to convert her fixed-term appointment to a regular staff appointment on the ground of unsatisfactory performance was unlawful because it was in retal-

iation for complaints of sexual harassment that she had made against her supervisor in the African Department, complaints which were a subject of "cover-up" rather than effective responsive action, and that the decision was arbitrary, capricious and in violation of Fund procedures. She claims that she was misled by promises allegedly made by the Director of Administration to have her performance in the Administration Department to which she was transferred during the third year evaluated free from the hostile influence of the African Department, but that the promises were false because the Fund had never intended to convert her appointment following the extension and transfer. In addition, the extension of her appointment instead of its conversion was inconsistent with the promotion and salary increase she received at the end of the second year in the light of the favorable performance review in her second APR, suggesting that deficient performance was merely a pretext for her nonconversion. Additionally, the ultimate assessment by her new supervisor was tainted by information supplied by the African Department. She maintains that in the Administration Department she was not put on notice of alleged interpersonal difficulties; that she was taken by surprise by the accusations made against her in the March 29, 1995 meeting regarding her performance and not afforded the opportunity to rebut those accusations because specifics as to her alleged deficiencies were not supplied; and that the Fund thereby violated elemental principles of law.

20. The Fund's principal contention is that Applicant did not meet the high standards with regard to interpersonal skills requisite for conversion to regular staff. Concerns about those skills, neither isolated nor unsubstantial, surfaced throughout Applicant's career in the Fund, provoked by instances of confrontation between Applicant and other staff members, her belligerent style, difficulty in accepting instruction, and unwillingness to even consider that she might have been at fault. These performance problems had arisen in different work contexts under different sets of supervisors and with different co-workers. The Fund's policies emphasize that the decision to convert is a discretionary one and that where there is serious doubt as to the individual's qualifications including those relating to interpersonal relations, as in the instant case, it is appropriate to refuse to grant that person a regular staff appointment.

Considerations

21. Applicant, having held a fixed-term appointment, carries the burden of proof (*Safavi v. The Secretary General of the United Nations*, UNAT Judgment No. 465, para. V (1989)). In order to determine whether Applicant proved that the decision not to convert her appointment was unlawful because it

was retaliatory and in violation of principles of law, the Tribunal will examine her allegations concerning the incidents of harassment, the reaction to her complaints by the Fund officials involved and the modalities of her transfer to the Administration Department, as well as the assessments of her performance and the final decision.

The issue of sexual harassment

22. It is not necessary for the Tribunal to decide for the purposes of this case whether the alleged incidents qualify as sexual harassment or merely constituted inappropriate behavior. The remarks attributed to Ms. "C"'s supervisor Mr. "A", which apparently were not denied, should not have been made, and certainly not made by a Fund supervisor to a Fund subordinate on Fund premises. They may have been meant to be jocular, or may have been meant to be suggestive; in any event they were tasteless and misplaced and Ms. "C" understandably found them offensive. At the same time, there were only two remarks, separated by some six months; whether they formed a pattern of habitual repetition of suggestive comments is open to question. Moreover, the second remark was made in the course of a conversation Ms. "C" could earlier have terminated. It is clear to the Tribunal that whether or not the offensive remarks constituted sexual harassment, they required that Mr. "A" be firmly cautioned by superior authority. Mr. Rea apparently spoke to him about Ms. "C"'s allegations, but to what effect is not clear. What is clear, and sufficient for the purposes of the Tribunal, is that Applicant could reasonably have believed that she was an object of sexual harassment and consequently could have made an accusation of sexual harassment in good faith (whether or not it was sustainable). The sustainability of an accusation of harassment made in good faith is not a pre-condition for a finding of reprisal in response to that accusation (*Belas-Gianou v. The Secretary General of the United Nations*, UNAT Judgment No. 707 (1995), p. 45).

23. The relevance of the issue of sexual harassment to the case at hand is that the events surrounding the alleged incidents led Applicant to take certain actions that she maintains later constituted the basis for the reprisal of which she claims she was the victim.

24. The Applicant alleges that on two occasions her supervisor in the African Department addressed remarks to her that she felt constituted sexual harassment; that complaints to the Deputy Director of the Department about these affronts were not dealt with in the required manner; and that her mention of these events to the Head of the African Department did not produce the desired result, for which reason she approached the Director of

Administration, Mr. Rea. She complained to him of the environment in the African Department and the failure to secure the apology she had requested.

25. The Respondent did not contest Applicant's account of the incidents, but points out that the Director of Administration, even on the assumption that Applicant's account was fully accurate, considered that the incidents did not constitute sexual harassment of the kind which called for disciplinary action by the Fund or amounted to an abuse of the supervisor's authority.

26. In the course of the past few years the Fund issued a number of notices and bulletins in which it defined "harassment" and spelled out its policies regarding "harassment of any kind". One of these is the "Policy on Harassment" (January 1995), which sets forth the following definition and policy:

> ". . . any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment.
>
> Sexual harassment includes sexual assault, unsolicited requests for sexual favors, requests for sexual favors linked to implied threats or promises about career prospects, unwanted physical contact, visual displays of degrading sexual images, sexually suggestive conduct, or offensive remarks of a sexual nature.
>
> The Fund is committed under this policy to stop harassment and associated retaliatory behavior. All supervisors have a responsibility, first, to refrain from any action that could be perceived by their staff as harassment; and, second, to stop harassment in the areas under their supervision." (P. 1.)

27. The policy and related staff bulletins also describe a variety of formal and informal channels for reporting alleged incidents of harassment. The policy also makes clear that anyone bringing a complaint, whether to the advisors or through the other channels available, is protected against any form of reprisal for such complaints. (Policy on Harassment, January 1995, p. 4).

28. Assuming then that Applicant's claim of sexual harassment -whether or not justified- was made in good faith, has Applicant proven that the Fund for its part did not responsively act in good faith, but rather acted to "cover-up" its failure? Ms. "C" pursued her complaint through appropriate channels up to the Director of Administration. The Director himself investigated the complaint and concluded that it did not merit disciplinary action against Mr. "A". The facts that the Administrative Officer of AFR took Applicant to lunch in the Executive Dining Room and advised that the matter not be pursued, and that Applicant subsequently was promoted and still later transferred to ADM, do not in the view of the Tribunal demonstrate design of the Fund to "cover-up" inaction on Applicant's complaint of sexual harassment.

Extension of appointment and transfer

29. Ms. "C" alleges that her transfer to ADM was not meant to give the Fund opportunity for objective appraisal but rather was designed to put distance between a decision to terminate her and the eventual implementation of that decision. She further alleges that she made an agreement with Mr. Rea that the decision on conversion would be made by ADM on the basis of her performance in ADM, "untainted" by prior problems that had arisen in AFR.

30. It is accepted that the administration of an international organization has the power to transfer staff members when and how it will, even when the statutory law does not explicitly confer that power on it. It is in keeping with this principle that there is no general requirement that the staff member transferred consent to the transfer, since, if there were, this would be an unworkable restriction on the ability of the administrative authority to organize its services and to adapt to changing requirements. The administrative authority is generally at liberty to organize its offices to suit the tasks entrusted to it and to assign its staff in the light of such tasks. Accordingly, it would be surprising if Ms. "C"'s transfer were to have been subject to the condition that the decision on conversion exclusively turn on Ms. "C"'s performance in ADM.

31. Moreover, the Tribunal considers that it would not have been appropriate administrative procedure not to mention Ms. "C"'s prior performance difficulties to her new supervisors. Nor would it have been possible to transfer a person to another department without any explanation of the reasons for transfer.

32. Applicant also argues that the lack of budgetary provision for a permanent position demonstrates the absence of intention to retain her services. However, the record shows that a senior official of ADM testified that the Fund's budget would have been sufficiently flexible to accommodate a permanent position, as in the Tribunal's view may reasonably be presumed in view of the size of the staff of the Fund and the number of positions at the level of Ms. "C".

Performance reviews—possible irregularities

33. The Tribunal will now turn to the question of whether the Fund's assessment of Ms. "C"'s performance suffered from procedural or substantive irregularities violative of fair and reasonable procedures.

34. The promotion and salary increase at the end of the Applicant's second year of a fixed-term appointment were unusual under the Fund's policies in

respect of staff on fixed-term appointments. (*M. D'Aoust v. International Monetary Fund*, IMFAT Judgment No. 1996–1). In the Tribunal's view, that of itself should not have led Ms. "C" to expect conversion at the end of the third year. Nor does it establish Applicant's claim that the Deputy Director of the African Department offered her a raise and promotion in return for dropping the harassment matter. Whether it represented a failure to warn Applicant of perceived shortcomings in her performance that were to be relied on by the Fund in deciding not to convert her appointment is dealt with below.

35. The Guidelines for Conversion of a Fixed-Term Appointment provide that supervisors shall take into account the candidate's ability "to work effectively with superiors, peers and subordinates. . . ."

36. It is clear that deficiency in interpersonal skills equally may lawfully be taken into consideration in preparation of the Annual Performance Report. (*Nualnapa Buranavichkit v. International Bank for Reconstruction and Development* (WBAT Judgment No. 7 (1982); *Soad Hanna Matta v. International Bank for Reconstruction and Development* (WBAT Judgment No. 12 (1982)). The importance of performance evaluation systems in avoidance of arbitrariness and discrimination was emphasized in *Carl Gene Lindsey v. Asian Development Bank* (ADBAT Decision No. 1 (1992)).

37. At the same time, adequate warning and notice are requirements of due process because they are a necessary prerequisite to defense and rebuttal. (*Safavi v. The Secretary General of the United Nations* (UNAT Judgment No. 465 paras. VI - VIII (1989)). Also, the Fund's Guidelines require that reasons for nonconversion be given, at least where there is no extension.

38. In the view of the Tribunal, the first and second APRs gave Applicant notice that there were reservations about the character of her relations with her colleagues. The first APR referred to work pressures affecting Ms. "C"'s "normally good relationship with other members of the division" and referred to the need for "a calmer demeanor in pressure situations". Her immediate supervisor explained that some colleagues had found her "confrontational at times". It was agreed by them, the APR records, that Ms. "C" should adopt "a 'customer-friendly' style". Nevertheless, Ms. "C" recorded that she was "shocked and saddened that some of my colleagues apparently believe that there are problems on an interpersonal basis." The second APR referred to Ms. "C"'s effort to dissipate any doubts as to her willingness or ability "to fit into the institution". There is no explicit description of interpersonal problems, although in her own comments Ms. "C" refers to communication difficulties with an economist while on mission. Both APRs evaluated her work performance highly.

39. The version of Ms. "C"'s third APR discussed by her with Mr. "B" in February 19, 1995 was extremely positive. It spoke of her as "a valued team member" who worked out complicated problems "with the appropriate degree of tact exercised towards staff and vendors". "She soon remedies any error brought to her attention." However, she would benefit from "a course on enhancing listening skills".

40. This appraisal of Applicant's work skills and staff relations was—in respect only of staff relations—sharply reversed by her supervisor and the reviewing officer a month later. In the meantime, Mr. "B" was approached by three co-workers of Ms. "C", as described in para. 12 above. Mr. "B" consequently met with Ms. "C", conveyed their accusations to her (para. 12), and concluded that "negative feedback" reflected on Ms. "C"'s "interpersonal and team work skills". "I explicitly told her that if she was doing these behaviors, then she must stop them immediately. If she was not doing these behaviors, she had the responsibility of finding out why so many people perceived her in this way. I suggested counseling or an interpersonal skills assessment course." Mr. "B" recorded that he could do without Ms. "C"'s help rather than put "the team's esprit and its collective ability to service its customers at risk." Team work was of equal importance to technical competence.

41. The Tribunal concludes that Applicant's allegation that her denial of conversion to a permanent post was in reprisal for her complaint of sexual harassment is unfounded. It also concludes that Applicant has not met the burden of showing an abuse of discretion by the Fund in not giving her a permanent contract. Nevertheless, even if that decision of the Fund is held to be justified, imperfections and irregularities did mark the process of the Fund's decision and permit the Tribunal to find against the Fund not wholly, but in part. Two irregularities stand out. First, when Ms. "C" was accorded an extension of a year and transferred to ADM, she should have been given to understand (a) precisely why she was not converted to permanent status at the end of two years and (b) what steps should be taken by her to correct her perceived problems in interpersonal relations. Neither appears to have been done. Second, at the dispositive session of 29 March 1995, where Mr. "B"'s earlier highly positive appraisal was peremptorily overturned, Ms. "C" was confronted not by her critics nor by specific and rebuttable incidents of their criticism. That in particular was a lapse in due process.

42. It may be said in response that that session was not meant to be determinative and in fact became so only because of the extremity of Ms. "C"'s reaction to it and her failure to return to work. The Tribunal recognizes the force of this response. Nevertheless it finds that the Fund should have taken steps to

ensure that, when transferred to ADM, and in the course of her work there, Ms. "C" was fully aware of her need to improve her interpersonal skills and the possibilities of so doing. That this was not done is suggested by Mr. "B"'s ignorance of the problem only belatedly brought to his attention by her co-workers; her immediate supervisor was the last but one to see this problem, the last one being Ms. "C" herself. Moreover, and most fundamentally, when Ms. "C"'s supervisor was given evidence by her co-workers of her interpersonal deficiencies, Ms. "C" should have been afforded meaningful opportunity to rebut that evidence. Not only was this not done on March 29; Mr. "B" left it wholly to Ms. "C" either to correct her behavior or to deal with the perception of misbehavior, which suggests no disposition subsequently to afford Ms. "C" that opportunity. As the ADBAT held in its first decision, *Carl Gene Lindsey v. Asian Development Bank*, (ADBAT Decision No. 1, para. 9 (1992)):

> "Individual complaints or adverse comments by one staff member on the conduct of another should not be taken into account unless first brought to the attention of the latter, to whom an opportunity of replying should have been given including, where appropriate, the opportunity of meeting and questioning the complainant or witness."

43. In the view of the Tribunal, these failures by the Fund's administration give rise to a compensable claim of the Applicant, even though the decision not to offer Ms. "C" permanent employment stands.

44. The Tribunal recalls that its Statute prescribes, in Article III, that it shall not have "any powers beyond those conferred under this Statute". At the same time, in deciding on an application, the Tribunal shall apply *inter alia* generally recognized principles of international administrative law concerning judicial review of administrative acts. Article XIV of the Statute provides:

> "1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.
>
> . . .
>
> 4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates."

In the view of the Tribunal, which is consonant with that of other international administrative tribunals (*Benthin v. The Secretary General of the United*

Nations, (UNAT Judgment No. 700, para. V–VI (1995)); *H. Patricia Broemser v. International Bank for Reconstruction and Development* (WBAT Judgment No. 27, para. 39–40 (1985)), the Tribunal has authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides:

First, the Application is dismissed insofar as it requests rescission of the decision not to convert Ms. "C"'s term appointment to a permanent appointment;

Second, the Fund is liable to pay compensation to Applicant for the irregularities specified above, in the sum equivalent to six months of salary as her salary was established as of August 4, 1995;

Third, the Applicant shall be awarded reasonable costs of her legal representation. In the circumstances, compensable costs shall be agreed between Applicant and the Fund. In the event that agreement cannot be reached, the Tribunal will assess costs having regard to the submissions of the Applicant and of the Fund.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
August 22, 1997

JUDGMENT NO. 1997-2

Ms. "B", Applicant v. International Monetary Fund, Respondent
(December 23, 1997)

Introduction

1. On December 22 and 23, 1997, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Georges Abi-Saab and Nisuke Ando, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "B"[1], a staff member of the Fund.

2. On September 20, 1995, Applicant, who occupied a position graded A6, was appointed to a position internally advertised at Grade A7, but because, in the view of the Fund, she did not meet the requisite conditions for promotion to the advertised position at that time, she served at her then salary for approximately one year pursuant to a policy of the Fund referred to as "underfilling". At the end of the period she was promoted to Grade A7. Applicant's complaints are that the policy of "underfilling" had no basis in fact or in law, that she was entitled to immediate promotion to the grade advertised for the position she assumed, that the requirements for the promotion were unlawful, and that the decision postponing her promotion and increase of salary was in error, arbitrary and capricious, and in violation of law.

3. The relief sought in the Application is that

> ". . . salary and all associated benefits be administered retroactive from September 20, 1995, the effective date of my promotion to Grade A7, including the standard promotion increment of five-percent of such salary."

[1]In order to protect the privacy of the persons referred to in the text of the Tribunal's judgments, these persons shall be designated by acronyms; the departments and divisions of the Fund shall be referred to by numerals. However, the application of these procedures shall not prejudice the comprehensibility of the Tribunal's judgments.

Additionally, she requests

> "full reimbursement of attorney and counselor fees for services rendered, in addition to other associated costs that I have incurred, or shall incur to resolve this grievance. These costs have not yet been determined at this time."

In her Reply, Applicant asked, furthermore, that the Fund

> ". . . award Applicant the promotion to the Grade A8, effective September 20, 1997, consistent with the time-in-grade requirement in Staff Bulletin 89/28, Annex (2 years at A7) and the Job Standards Manual for the position, to include the standard five percent (5%) salary increase and all other associated benefits;
>
> Third, award Applicant *Compensatory Damages*, in the amount of three hundred percent (300%) of Applicant's gross salary, predicated on the Grade A8 salary level;
>
> Fourth, to award Applicant *Exemplary or punitive damages* in the amount of $200,000 (Two hundred thousand dollars);
>
> Fifth, compensate Applicant for all costs incurred for her legal representation to resolve this matter."

4. The Fund maintains that its decision to require Applicant to "underfill" the A7 position was based on a legitimate policy antedating her appointment and that the decision was entirely proper, as none of the applicable rules would have permitted an immediate promotion. That is because she did not as of September 1995 meet the advertised qualifications for the position. The Fund, accordingly, urged the Tribunal to reject Ms. "B"'s claim entirely and award no relief.

The Procedure

5. The Application was filed on July 3, 1997. After having been amended to incorporate necessary additions, it was transmitted to the Fund on August 1, 1997. Pursuant to para. 6 of Rule VII of the Tribunal's Rules of Procedure, the Application is considered filed on July 3, 1997. The Fund filed its Answer on September 15, 1997. A Reply and a Rejoinder were filed on October 17 and November 19, 1997 respectively.

6. Oral argument, which neither party had requested, was not held. The Tribunal had the benefit of the record of the proceedings in the Grievance Committee, including a transcript of oral hearings at which the Applicant, senior officials of the Fund, and witnesses, were heard.

The Facts

7. Applicant became employed with the Fund effective February 7, 1983. In 1986 she began working in Division 1 of Department I. She joined Section 2 of that Division in 1993, and in August 1994 was promoted to a position at Grade A6. In August 1995, while continuing to occupy that position, Applicant applied for a position advertised as Vacancy No. IV95–80, Grade A7/A8, also within Section 2.

8. A selection panel rated Applicant, whose performance had earned a "1" (outstanding) rating on her 1994 Annual Performance Report (APR), as "the best overall candidate among those interviewed in terms of relevant experience and skills necessary for the position" and unanimously selected her to fill the vacancy.

9. A difference of opinion soon arose between the selecting division, i.e., Division 1, and the Staff Development Division (SDD) of the Administration Department as to the grade at which Applicant's new appointment would be made. Applicant's supervisors testified that they believed that she was qualified for immediate promotion to A7. Indeed, they believed that they had drafted the vacancy announcement in such a manner as would permit Applicant to be found to meet fully the qualifications of the position at A7. The Senior Personnel Manager (SPM) for Department I, concurring in the view that Applicant should be appointed at A7, submitted a Request for Personnel Action requesting "Promotion—appointment to new position—filling of vacancy" to promote Applicant from Grade A6 to Grade A7.

10. The Staff Development Division, in reviewing Applicant's background against the qualifications for the position, concluded that she had not satisfied the minimum time-in-grade or the education requirements for the position as described in the vacancy announcement. Those qualifications included for Grade A7 a combination of education and specialized training equivalent to a university degree in the field in which she would be working—human resources management—or in a related field, supplemented by a minimum of three years of progressively responsible experience in the particular field at Grade A6, or equivalent. A seasoned level of competence and technical expertise, including an in-depth knowledge of precedents in the particular field, was required at this grade level. For Grade A8, in addition to the training and experience for the A7 position, a minimum of two years of progressively responsible work experience in the relevant area at Grade A7 or equivalent was required.

11. At issue was the interpretation of both the education and the experience requirements. The supervisors testified before the Grievance Commit-

tee that they believed that Applicant's university degree, which was in foreign languages, satisfied the requirement stated in the vacancy announcement of being equivalent to a university degree in the relevant field. As for the experience requirement, they believed that some of Applicant's time at Grade A5 should be counted as equivalent to time at A6, given the duration of the time she had spent at A5 and the nature of her responsibilities at that grade.

12. A senior official of the Staff Development Division, Ms. "Z", testified, however, that the phrase "or equivalent" in the experience prong of the qualifications would not permit time at A5 to count as time at A6. Rather, the "or equivalent" would refer to employment outside the Fund or during Fund service on a contractual basis. Ms. "Z" equally communicated to the SPM of Department I the SDD's view that Applicant's undergraduate and graduate degrees in foreign languages did not fulfill the educational requirement of the posted vacancy, and that, furthermore, since she had completed only one year of the three year requirement for progressively responsible experience at Grade A6, Applicant should "underfill" the position for one year:

> "Under the recent amendments to the time-in-grade policy, instead of serving the normal 3 years of minimum time-in-grade [Ms. "B"] will be required to 'underfill' the position at Grade A6 for approximately 12 months. During this time, [she] will gain experience in the full range of responsibilities attached to this position. It is expected that, during the November 1996 cycle, [the Department] can propose [her] for promotion to Grade A7, provided that fully satisfactory performance is maintained during the period of 'underfilling'."

Accordingly, she served at the A6 grade from September 20, 1995 until November 1, 1996, at which date she was promoted to Grade A7.

13. In her Annual Performance Report for 1995, Ms. "B"'s performance was given the rating of "1"(outstanding), and she was given a 5.9 percent merit increase (raising her salary to $38,550).

14. On August 19, 1996, Applicant requested the Director of Administration to review the decision requiring her to "underfill" her position at Grade A6 from September 20, 1995 through November 1, 1996 "allegedly to meet her time-in-grade requirement," claiming that the decision was arbitrary and capricious and that the rules had been disparately applied. The Director of Administration replied that Applicant did not meet either the education or experience requirements of the advertised position, emphasizing that the determination in Applicant's case was consistent with the "Amendment to Time-in-Grade Policy in Cases of Promotions to Higher Level Positions

Through the Vacancy Process," a policy laid down in a Memorandum from John P. Kennedy, Chief, Compensation Policy Division (CPD), and Peter D. Swain, Chief, Staff Development Division (SDD), of the Administration Department, and addressed to the Senior Personnel Managers of all departments, dated September 7, 1995, a copy of which she attached to the letter. It was that policy, noted the Director of Administration, that allowed Applicant to receive her promotion in November 1996 rather than being required to wait until August 1997, as would have been required under prior rules that enforced the usual time-in-grade requirements when promotions (including those consequent to filling an announced vacancy) were made within the same job ladder. Additionally, the Director justified the decision of the Staff Development Division to override the Applicant's departmental recommendation as to the grade of appointment, pointing out that the "Kennedy-Swain Memorandum" permitted "underfilling" when either the selecting department *or* the Staff Development Division concludes that the candidate does not currently fully meet the stated requirements. Applicant stated that receipt of the letter and attachment was the first notice she had of that Memorandum.

15. Applicant filed a Grievance on September 25, 1996 contesting the "underfilling" of her position at Grade A6. Following hearings held on December 11, 16, and 17, 1996, the Grievance Committee on March 19, 1997 issued to the Managing Director its Recommendation and Report denying the Grievance. Thereupon, the Managing Director informed Applicant of his acceptance of the recommendation.

Summary of Parties' Principal Contentions

Applicant's contentions

16. In denying Applicant's appeal, the Director of Administration impermissibly relied on the "Kennedy-Swain Memorandum", which does not meet the criteria of a regulatory decision. Mr. Kennedy and Mr. Swain exceeded their authority by promulgating the Memorandum because their action exceeded the functions prescribed in their job standards. They had not been cloaked by the Managing Director or Deputy Managing Director with authority to set any form of policy for the Fund. Significant changes in administrative policy must be promulgated by either the Managing Director or the Deputy Managing Director. Significant personnel policy changes may be promulgated by the Director of Administration after consultation with the Managing Director and the Deputy Managing Director. General Administra-

tive Order No. 1, Rev. 1 does not delegate the Managing Director's or Deputy Managing Director's role of making authoritative statements of administrative policy to the Director of Administration or his subordinates. Former Director of Administration Graeme Rea, who retired from the Fund before the Memorandum was issued, may have given it verbal approval, but the issuance of the Memorandum had not received the approval of the present Director.

17. By the practice of underfilling, the Administration Department was conducting illegal activity before and after the date of the Kennedy-Swain Memorandum in violation of Staff Bulletin No. 89/28.[2] The Fund does not now have, or ever had in the past, a policy on underfilling. Any and all "underfillings" take place outside of, and not in conformity with, existing Fund policies on promotions and time-in-grade requirements. The practice was used to deny some promotions and accommodate others.

18. The Memorandum was addressed only to Senior Personnel Managers, with copies to Administrative Officers and the Staff Association Committee. It was the intent of the authors to cover-up illegal acts. Applicant herself learned of the existence of the Memorandum only after initiating her request for review of her promotion. Additionally, the Memorandum bears no effective date. For all these reasons, it did not constitute a valid regulatory decision.

19. The assignment of her grade, the Applicant contended, should have been considered on the basis of Staff Bulletin No. 89/28, which would have permitted immediate promotion under the exceptions provided therein, which include: "An incumbent with a combination of superior performance

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[2] The relevant passages of Staff Bulletin No. 89/28 provide:

> *"Other factors relevant to promotions*
>
> The time-in-grade requirements are only one of several components of the Fund's career progression and promotion policies. Before an individual's promotion within a given job ladder can be considered at all, it must be established that a position with the requisite functions and responsibilities is open at the higher grade level, either because a vacancy has arisen in a position already classified at that level, or because material growth in the content of the individual's own job justifies a reclassification of that job at a higher grade. In some job ladders there may be a good deal of scope for advancement from one grade to another, while in others the job ladder itself is limited to only one or a very small number of grades. Assuming an opening exists, the individual who is a candidate for promotion must have met the relevant time-in-grade requirement. He must also be assessed as having the capacity to perform effectively at the higher grade and, for certain senior-level grades, the potential to move in due course beyond that grade."
>
> For the exceptions to the foregoing, see paragraph 65 of this Judgment.

and the assessed potential to advance rapidly through several higher grades may, on an exceptional basis, be considered for promotion to the next higher grade at a more rapid rate than indicated by the minimum time-in-grade requirements." Applicant's Annual Performance Reports for 1994 and 1995 evidenced her superior performance. Time-in-grade is irrelevant for this purpose.

20. Ms. "Z" improperly overruled the recommendations of Applicant's immediate supervisors and her SPM that she be immediately promoted to A7. It was the SPM who had responsibility and accountability for all personnel activities within his Department, as SPMs in all departments are expected to take personnel decisions on the Department's behalf for all Grade A staff.

21. The job qualification requirements for Vacancy No. IV95–80 were not consistent with the prevailing Job Standards for that position, which mention completion of a university degree program but do not require a degree in a specific field. It is those Job Standards that are controlling. Moreover, Applicant was fully qualified for promotion to Grade A7 at the time of her selection and appointment to the vacancy in September 1995 because she, in any event, met the advertised educational and experience qualifications for the position at that grade.

22. Finally, the Applicant contended that the decision to require underfilling did not benefit Applicant; it was arbitrary, capricious and in contravention of the Fund's policies and law.

The Respondent's principal arguments

23. At the time of Ms. "B"'s appointment, the practice of underfilling constituted a bona fide unwritten source of law, which had been consistently applied until it was codified in the Kennedy-Swain Memorandum, and has been applied thereafter.

24. The strict application of Staff Bulletin No. 89/28 would have required Applicant to serve a minimum of three years at Grade A6 before she would have been eligible for promotion to Grade A7. Applicant's interpretation of that Bulletin as authorizing supervisors to decide that a staff member be promoted without regard to the time-in-grade requirement (which is a minimum requirement) is without foundation, as otherwise the exceptions provided in the Bulletin would be superfluous. Supervisors may exercise a discretion only after the minimum requirement has been satisfied. Capacity to perform effectively at the higher grade is a requirement that applies in

addition to, not in place of, the time-in-grade requirement. None of the exceptions provided in the Bulletin could have been applied in the case of Ms. "B".

25. The Kennedy-Swain Memorandum was an authorized and valid document. Ms. "B" benefited from the policy set forth in the Memorandum.

26. The requirements in the vacancy announcement were valid and appropriate. Departments have a discretion to set higher qualifications than those stated in the Job Standards Manual, which describes the nature and level of work and desirable qualifications only in general terms. It was envisaged that Departments would make reasonable additions to those minimum requirements.

27. Reasonable determinations of additional requirements should not be disturbed by a judicial body where there is, as here, a rational relationship between the requirements and the position. Strengthening the professional qualifications of personnel in Department I, as by requiring training in human resources management, is an important objective that is being pursued in order to meet the specific demands expressed in a survey of the staff as a whole.

28. The Senior Personnel Manager has a limited authority in that he does not determine the grade at which an applicant for a position would be appointed. At most, his decision is the proposal of the department he serves; he makes recommendations to the appropriate division of the Administration Department which exercises central approval authority with respect to grade and salary for the Fund as a whole.

29. The Fund accordingly concluded that the Applicant is not entitled to the relief requested.

Consideration of the Issues of the Case

30. The Tribunal will now proceed to consider the principal issues posed by the conflicting views of the Applicant and the Respondent.

Staff Bulletin No. 89/28 and the Kennedy-Swain Memorandum

31. Applicant challenges the decision to require her to underfill the position on legal grounds that include the following: (a) the Kennedy-Swain Memorandum that formed the basis for the decision was without legal validity; (b) therefore, the only governing rule is the basic policy laid down in Staff Bulletin No. 89/28; (c) under the exceptions provided in that Bul-

letin, she would have received an immediate promotion if the supervisors involved had exercised their authority to press for the promotion; and (d) the vacancy notice included unlawful requirements, which she, however, satisfied.

32. In order to determine whether the decision to postpone Ms. "B"'s promotion was legally justified, the Tribunal will first examine whether the Kennedy-Swain Memorandum embodied a lawful prescription on which the decision could justifiably be based.

33. Staff Bulletin 89/28 prescribes rules concerning promotions within the same job ladder as well as into alternative ladders. Applicant's promotion fell into the former category. Promotions in that category are subject to minimum time-in-grade requirements:

> *"Other factors relevant to promotions*
>
> . . . Before an individual's promotion within a given job ladder can be considered at all, it must be established that a position with the requisite functions and responsibilities is open at the higher grade level, either because a vacancy has arisen in a position already classified at that level, or because material growth in the content of the individual's own job justifies a reclassification of that job at a higher grade. In some job ladders there may be a good deal of scope for advancement from one grade to another, while in others the job ladder itself is limited to only one or a very small number of grades. Assuming an opening exists, the individual who is a candidate for promotion must have met the relevant time-in-grade requirement." (Staff Bulletin No. 89/28, p. 4.)

For a promotion from Grade A6 to A7, the time-in-grade requirement is three years in Grade A6. (Annex to Staff Bulletin 89/28.) Applicant had served in a Grade A6 position for little more than one year at the time she applied for a promotion to Grade A7. To admit the position of the Applicant's superior officers that time spent in Grade A5 could be counted in lieu of time spent in Grade A6 would deprive time-in-grade requirements of their essential rationale. Consequently, the Tribunal concludes that the Applicant did not meet the time-in-grade requirement under Staff Bulletin 89/28.

34. A change in policy was undertaken when it was discovered that the rule set out in Staff Bulletin 89/28 led to inequities in promotions within the same ladder as compared with promotions across job ladders. On September 7, 1995, Messrs. Kennedy and Swain, the Chiefs of the two Divisions of the Administration Department with responsibility for policies concerning promotions, issued a Memorandum entitled "Amendment to Time-in-Grade Policy in Cases of Promotions to Higher Level Positions Through the Vacancy

Process". That Memorandum liberalized the time-in-grade restriction of Staff Bulletin 89/28. Its stated purpose was to offer a "simplification of the time-in-grade rules covering promotions when staff are selected for higher grade positions through the Career Opportunities (vacancy list) process." The Memorandum provides a "uniform approach" to the application of time-in-grade rules in all cases of vacancy list promotions, regardless of whether the staff member moves within or between job ladders. Under the Memorandum, a candidate may be promoted without meeting all the requirements for the promotion, including time-in-grade, but underfilling must take place for about one year when the experience or education required is lacking.

35. The new policy is stated to be as follows:

> *"Revised Policy*
>
> The principle governing the timing of the selected staff member's promotion to the higher grade will be whether he or she meets the specific experience and educational qualifications for the position as set forth in the Job Standards and/or the advertisement for the position.
>
> If the Staff Development Division and the selecting department agree that the successful candidate fully meets the education and experience criteria and the specified requirements for the position, the appointment will be made at the grade at which the position is classified and advertised. . . .
>
> On the other hand, if the Staff Development Division *or* selecting department concludes that the candidate does not currently fully meet the stated requirements, but nevertheless can soon be expected to meet such requirements and to perform successfully in the position with additional training and/or on-the-job experience, the candidate will initially be appointed one grade below the lowest grade indicated for the position. When positions are 'underfilled' in this fashion, promotion to the lowest grade at which the position is actually classified will occur after approximately one year on May 1 or November 1, provided that the incumbent has successfully carried out the duties and responsibilities of the position, as established by the Job Standards and/or advertisement for the position." (Kennedy-Swain Memorandum, pp. 1–2.)

36. Applicant attributes great significance to her distinction between a "policy" ("an authoritatively imposed rule") and "practice" ("spawns from repeated or customary action, lacking the authority of an imposed rule"). From that distinction, she concludes that the Kennedy-Swain Memorandum lacks legitimacy because it embodies a practice rather than a policy.

37. The sources of the internal law of the Fund which are discussed in the published Commentary on the Statute contained in the Report of the Execu-

tive Board to the Board of Governors on the Establishment of an Administrative Tribunal include unwritten sources of law. The second sentence of Article III of the Tribunal's Statute provides that:

> "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."

The Commentary explains that:

> "There are two unwritten sources of law within the internal law of the Fund. First, the administrative practice of the organization may, in certain circumstances, give rise to legal rights and obligations. Second, certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund." (p. 18.)

The statement on practice refers to the *de Merode* case, in which the WBAT held that the World Bank had a legal obligation, arising out of a consistent and established practice, to carry out periodic salary reviews. (*de Merode*, WBAT Reports, Dec. No. 1 (1981), at p. 56.)

38. The law-creating effect that administrative practice may have is emphasized also by the ILOAT in its Judgment No. 323:

> "Many of the obligations put upon the Organization by the Regulations are in general terms, leaving the Organization free to choose its own method of discharging them. The method chosen may be announced in an administrative circular or similar document or it may become established by practice. Once it is settled, it becomes, until it is altered, part of the obligation." (*In re Connolly-Battisti (No. 5)* (1977) p. 10.)

39. In its Judgment in re *D'Aoust* (*Mr. Michel D'Aoust v. International Monetary Fund*, Judgment No. 1996–1), the Tribunal set forth the following essential conditions for a valid regulatory decision: a decision, taken by an authorized organ of the Fund, laid down in a published official document of the Fund, with a determinable effective date, of which the staff has been given reasonable notice. The Tribunal will consider whether the Memorandum at issue satisfied these conditions.

The issue of authority

40. The Applicant contends that the Kennedy-Swain Memorandum, on which the challenged decision is based, is an invalid document because the

Division Chiefs were without authority to make policy for the Fund on personnel matters. She argues that:

> "First the Kennedy-Swain memorandum was clearly designed and intended to cover-up prior transgressions and exceptions, or illegal acts, perpetrated by the Staff Development Division in violation of the controlling bona fide internal Fund law and policy, i.e., Staff Bulletin 89/28.
>
> Second, the Kennedy-Swain memorandum was designed by Messrs. Kennedy and Swain to empower Mr. Swain and the Staff Development Division to, inter alia, decide independently, arbitrarily, and capriciously, the rationale by which the Staff Development Division could either favor or deny a staff member's promotion. In essence, Messrs. Kennedy and Swain empowered the Staff Development Division with a **veto power over all of the Fund's recruitment/advertising departments,** which was neither envisioned by Staff Bulletin 89/28 or by the Fund's management.
>
> Applicant previously pointed out that neither Mr. Kennedy nor Mr. Swain had been authorized to set out Fund policy; that their respective Job Standards authorize them, inter alia, to **only** *'[Initiate] and [participate] in drafting Fund policy and procedures in relevant areas and [oversee] implementation of policies* ***[but only]*** *when approved by management'."*

41. The Respondent maintains that the change of policy laid down in the Memorandum was authorized and that the Memorandum constituted a legitimate personnel measure. It recalled that at the time the Bulletin was issued its provisions foresaw that adaptations to the policy it laid down would need to be made. Respondent argues that Applicant "overlooks the obvious fact that", under the functional division of responsibilities prescribed by management, as confirmed in the Fund's handbook "FY 1996 Activities and Organization", issued in 1996 to the staff under the signature of the First Deputy Managing Director, ". . . ADM has both the responsibility and authority to develop, implement, and administer personnel policies. . . ." In issuing the contested Memorandum, the Division Chiefs were acting within the scope of their responsibilities to deal with a perceived inequity and oversight in the existing policy that was embodied in Bulletin No. 89/28 ; the actions taken by them were within their normal line of duty and had the endorsement of the Director of Administration.

42. The major responsibilities of the Compensation Policy Division, whose Chief is Mr. J. Kennedy, as set forth in the Handbook referred to in the preceding paragraph, include:

> "To maintain job descriptions, job grading standards, and a job titling system; to maintain a grade structure that provides for reasonably equitable relationships among positions across job ladders; to determine and recom-

mend the assignment of each position to the appropriate grade; and to conduct job audits as required."

The major activities of that Division encompass the task:

"To contribute to the development of policies to provide a program of staff benefits that supports the recruitment and retention objectives of the organization and takes into account the general competitive level of benefits in comparator organizations as well as the special requirements of an international organization." (Handbook, pp. 15 and 16.)

The responsibilities of the Staff Development Division, whose Chief is Mr. Swain, encompass:

"1. Career Development. To formulate policies and procedures and oversight for career development programs and services, which include performance evaluations, long-term career assessments, promotions, staff mobility, separations and outplacement, salary reviews and merit increases.

. . .

1. Policy planning and review: The division will continue its involvement in the development of personnel policy in a number of areas. . . "

43. Applicant's argument that the Chiefs of these Divisions lack authority to change policy is based also on the view that their Job Standards do not provide them with that authority. She refers to the following excerpts from the Standards:

"**Job Standards for Division Chief, (ADM) Compensation Policy**, dated December 2, 1991. These are excerpts from Mr. Kennedy's job standards, which state, inter alia:

'Under the direction of the Director, (ADM), supervises the overall management of the policies and programs related to compensation policy, job grading matters, personnel records, and the computerized personnel information system.

. . . Manages the smooth and timely functioning of all division activities.

Initiates and participates in drafting Fund policy and procedures in relevant areas and oversees implementation of policies when approved by management . . .

Maintains, develops, and recommends changes in the compensation system and salary administration guidelines. . .'"

"**Job Standards for Division Chief, (ADM) Staff Development**, dated December 2, 1991. These are excerpts from Mr. Swain's job standards, which state, inter alia:

> 'Under the direction of the Director, (ADM), supervises the overall management of the policies and programs related to staff development including . . . promotion policies . . .
>
> Manages the smooth and timely functioning of all division activities . . .
>
> Initiates and participates in drafting Fund policy and procedures in relevant areas and oversees implementation of policies when approved by Management.'"

44. The Tribunal notes that the Chiefs of the Compensation and Staff Development Divisions testified before the Grievance Committee that the change in the policy prescribed by Staff Bulletin 89/28 had been discussed with, and approved by, the former Director of Administration, Mr. Rea, prior to his departure from the Fund. Applicant's argument that Mr. Rea's approval could not have survived his departure is disputed by the Fund. The Fund maintains that the change in policy codified a long-standing practice and that policies approved by one Director of Administration do not lapse on his or her succession by another.

45. The Tribunal finds that the official functions of the divisions and of their chiefs confer upon them sufficient authority to codify a pre-existing practice and issue the contested policy memorandum. A consideration, though not a determinative consideration, in so concluding is that the Kennedy-Swain Memorandum liberalized existing restraints on promotions, i.e., it removed an unintended and inequitable result of Bulletin No. 89/28, namely, that staff promotions within the same job ladder were subject to time-in-grade requirements that did not apply in the same way when staff were promoted into a different job ladder.

Was the Memorandum an appropriate form for implementing a personnel policy of the Fund?

46. One of the propositions advanced by Applicant is that the Memorandum "was issued contrary to existing bona fide Fund policy documents which require that significant administrative policy changes be promulgated by either the Managing Director or the Deputy Managing Director, while significant personnel policy changes, after consultation with the Managing Director and the Deputy Managing Director, may be promulgated by the Director of Administration. Such documents, just as their respective job standards, do not delegate policy making authority" to either of the division chiefs. She relied on the "letter and spirit of existing Fund policy statements", i.e., General Administrative Order No. 1 and Staff Bulletin No. 89/28 as granting the Director of Administration "only the responsibility for main-

taining" the series of General Administrative Orders and making recommendations to management "for necessary revision". She maintains that they do not delegate the Managing Director's or Deputy Managing Director's authority to the Director of Administration or his subordinates. She also refers to *D'Aoust* in which the contested practice was held not to constitute a regulatory decision on the ground that it was "distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund". (Para. 35.)

47. Article II, Section 2.b. of the Tribunal's Statute provides in part:

> "For purposes of this Statute:
>
> .
>
> .
>
> .
>
> b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;".

Under this definition "any rule concerning the terms and conditions of employment" may be a regulatory decision. Such rules may, but need not, be in any one of the forms specifically mentioned in the provision, provided they meet other applicable criteria.

48. In its Judgment No. 117 (*José Luis Pando v. Director General of the Inter-American Institute for Cooperation on Agriculture* (1992)), the OASAT, while rejecting the complainant's appeal for failure to exhaust administrative remedies, enunciated the following principle regarding the form in which administrative actions may be clothed, recalling a previous decision that had held:

> "Administrative actions generally must be in writing or documented and must fulfill certain formal requirements necessary to ensure an effective, efficient, sure, and fair management. In this regard, it is necessary to bear in mind that the internal administrative acts of the Organization of American States (circulars, instructions, requisitions, etc.) are binding upon those issuing them and those for whom they are intended. In this sense, the will of the Organization's bodies is put in writing in documents that are the statutory source for all legal purposes. Those documents come in various forms, but they must satisfy certain minimum requirements in order for them to be valid and effective, for example, signature, date, clarity, notice, etc. As long as those documents are not declared null or invalid, they con-

> stitute full proof in terms of what they order, call for, provide for, create, oblige, authorize, amend, etc. However, to invalidate or destroy them, i.e., to modify or nullify the administration's intent as expressed therein, evidence by experts, testimony, or other appropriate proof can be brought to bear against them. (*Kouyoumdjian v. Secretary General of the OAS*, OASAT Judgment No. 94 [1986])."

49. The Tribunal concludes that the Memorandum was a lawful form for the issuance of a personnel policy. It was a written statement of an adjustment in personnel policy, based on a pattern of practice, clearly related to its antecedents, which sets forth the policy change to be made, and which was circulated to senior personnel officers of every Fund Department, to their administrative officers, and to the Staff Association.

The issue of retroactivity

50. Applicant asserts that the Memorandum was retroactively applied to her and adversely affected her interests. She argues that she:

> ". . . applied for the personnel assistant position in question on August 9, 1995, while the Kennedy-Swain memorandum was dated September 7, 1995, and presumably was written on that date. Therefore, if the Kennedy-Swain memorandum was not effective until September 7, 1995, Applicant is not affected by the memorandum. If Respondent alleges, for example, that the Kennedy-Swain memorandum was effective retroactively, then the burden of proof shifts from Applicant to Respondent to make a showing of where in that memorandum the effective date is explicitly stated to cover the Fund's staff members. In the absence thereof, as an obligating and binding document the Kennedy-Swain memorandum becomes impotent and void, thereby precluding Respondent from legally claiming that the memorandum covers Applicant."

51. The Respondent addresses this point by pointing out that "by the date of Applicant's promotion, underfilling had become a fairly standard practice in situations similar to hers," and supports this proposition by furnishing a Table captioned "Staff who have underfilled *before* the Amendment to the TIG [Time-in-grade] Policy was issued".

52. In any event, in the absence of a specific provision setting the effective date of the Memorandum, the date of the Memorandum itself denotes the date on which it became effective. That date, September 7, 1995, antedated the Fund's decision regarding Applicant's promotion (September 20, 1995). There is no legal justification for regarding the date on which she applied for promotion as controlling.

The issue of limited circulation

53. The contested Memorandum was distributed to the Senior Personnel Manager of each Department, to the Administrative Officer of each Department and to the Staff Association. Applicant impugns the Memorandum for its limited circulation:

> "In addition, there is no reason to believe that the intended audience for the 'Kennedy-Swain' memorandum was beyond the addressees: 'Senior Personnel managers' and copies to: 'Administrative Officers and the Staff Association Committee.' Therefore, based on what is known and not conjecture, it was not the intent of the authors to make known the existence of the 'Kennedy-Swain' memorandum to the staff members Fund-wide. In fact, I was not made aware of the existence of this memorandum by either my senior personnel manager or my administrative officer. I learned of its existence only after I initiated my request for review of my promotion to the director of administration on August 19, 1996."

54. In the same vein, she argues on the basis of the principles enunciated in *D'Aoust*:

> "As the Tribunal observed about the practice in 'D'Aoust,' at the time the practice of underfilling, a prominent element of the Kennedy-Swain memorandum, was applied to Applicant, underfilling was generally an unpublished practice known to, and employed by, a small number of officials of the Administration Department of the Fund. In both cases the Administration Department is consistent in its methodology of applying so-called *practices* in lieu of bona fide, management approved policies. Contrary to Respondent's representation that underfilling 'had become a fairly standard practice in situations similar to the Applicant's,' in fact, the term of 'underfilling' was used as a mechanism by which the Staff Development Division of the Administration Department—based on capricious and arbitrary decisions—could accommodate the promotion of some chosen staff members and deny the promotion of others."

55. Respondent counters that the limited distribution of the Memorandum does not affect its validity:

> "The Applicant also contends that the Kennedy/Swain memorandum was invalid because it was addressed to SPM's, Administrative Officers and the Staff Association Committee. In response to this allegation, Mr. Swain pointed out, as the rationale for this distribution, that part of the function of SPM's is to act as the promulgators of policies and practices within their departments, and it was expected that they would convey this information to the limited number of staff affected by the liberalization of the requirements . . . It was also expected that these changes would be incorporated in a broader review of promotion policies that was underway at the time.

> In any event, the extent to which the memorandum may have been distributed is simply beside the point, as the memorandum is in every way favorable to the Applicant and other similarly-situated staff. Lack of widespread publication would be material only if staff are adversely affected, for example, if they rely on incomplete information to their detriment. In this case, even if the underfilling policy was unknown to the Applicant, both the vacancy announcement, as well as the more general time-in-grade requirements, made clear that she would have to serve at Grade A6 for three years before promotion to Grade A7.[3]
>
> In summary, the underfilling policy reflected in the Kennedy-Swain memorandum resulted from an authorized and valid exercise on the part of officials responsible for career development at the Fund, which was entirely for the benefit of staff members and was properly applied to the promotion of the Applicant."

56. In *D'Aoust*, the Tribunal faulted a practice applied to Mr. D'Aoust for being "distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund" (para 35). That conclusion was based on two considerations: the structure of the Statute and general principles of international administrative law. Notice, which was at issue in *D'Aoust*, besides being an element of due process required by ample judicial authority, is also an element of the system of the Statute because it is a pre-condition for the determination of the effective date. The effective date, in turn, is an element of importance when the legality of a regulatory decision is challenged directly. These issues are considered in the following passage from the Judgment:

> "37. 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.
>
> (i) As for the structure of the Statute, Article VI, Section 2,[4] limits the period within which challenges may be brought to the Tribunal. The period is reckoned from the date of announcement or effectiveness if later;

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[3] "The Applicant also attacks the Kennedy-Swain memorandum because it does not bear an effective date. Since the memorandum merely memorialized a practice that had been in effect for some time, whether it bears an effective date or not is immaterial."

[4] "An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision."

whether the date of effectiveness is later can be measured only in comparison with the date of announcement of the decision. That rules constituting regulatory decisions have been 'announced' is presumed in the commentary on Article VI, Section 2 in the Report to the Board of Governors:

> 'Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision.
>
> However, the legality of a regulatory decision could be raised as an issue at any time with respect to an individual decision taken pursuant thereto, subject to the rules involving timely filing of challenges to individual decisions. Accordingly, a staff member could contest the denial of a benefit in his particular case on the grounds that the regulation on which the denial was based was illegal, without regard to the date on which the regulation was enacted, subject to the provisions of Article XX.'"

57. In the Application, Ms. "B" complains of an individual decision on the ground that it is based on an unlawful regulatory decision. As explained above, in such a case, the time element loses its importance. To the extent that the criterion of notice is based on systemic reasons, it is not mandatory where those reasons do not apply.

58. In contrast to the Application, Applicant's Reply challenges directly both the individual decision and the policy on which it is based. However, in the light of the provisions of the Tribunal's Statute and the Fund's Commentary on them, the time element is not dispositive in this situation either.

> "In cases involving both types of grounds, the requirements of the tribunal statute regarding exhaustion of remedies and the statute of limitations should be understood as follows. The Grievance Committee would first hear the case and dispose of the issues over which it had jurisdiction (i.e., whether the decision at issue involved a correct interpretation or application of the Fund's rules). If the Grievance Committee rejected his case, the staff member could then proceed to the tribunal. At that time, it would be open to him to raise, as grounds for review, not only the issues that were before the Grievance Committee but also, if appropriate, the legality of the underlying regulatory decision, regardless of whether more than three months had passed since the individual decision at issue had been taken. In essence, the pursuit of administrative remedies as to the

> issue of interpretation or application would suspend the time period for seeking review of the decision on grounds for which no administrative review is available." (Commentary, p. 26.)

59. In view of these considerations, the Tribunal finds that, in the case at hand, notice is not required for systemic reasons. That leaves the question whether reasonable notice of the particular change in policy would nevertheless be required by general principles of law.

60. In *D'Aoust*, the Tribunal held that a particular practice fell short of meeting the essential criteria for a regulatory decision because it did not afford reasonable notice to the staff. In *D'Aoust*, the evidence showed that:

> ". . . at the time that that practice was applied to Mr. D'Aoust, it was an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund. . . ." (Para. 35.)

Several factors distinguish the present case from *D'Aoust*. For one, unlike the measure at issue in *D'Aoust*, the Kennedy-Swain Memorandum does not constitute an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund. It was published, and circulated to all SPMs, all Administrative Officers and to the Staff Association. Moreover, the Memorandum was one of the periodic adjustments that the 89/28 Staff Bulletin, which formalized the minimum time-in-grade requirements, foresaw might be warranted:

> "The manner in which specific time-in-grade requirements are implemented is kept under review, and may be adjusted from time to time as warranted by organizational developments, such as changes in institutional growth rates, staff turnover and recruitment patterns. In administering and, as appropriate, revising these requirements, the Administration Department works in consultation with the Economist Committee, the Non-Economist Committee, and the Review and Senior Review Committees." (*Minimum Time-in-Grade Requirements*, Staff Bulletin No. 89/28, December 21, 1989, p. 1.)

That Bulletin was circulated to all staff members, who, thus, were, or could be, aware of the fact that periodic adjustments might be made. When it became apparent that the Bulletin led to inequities, and a modification was undertaken, all departments were informed. The fact that the Memorandum codified a practice that—as evidence submitted to the Tribunal shows—had been followed in the past and, moreover, constituted an interim measure pending broad revision of the entire salary structure of the Fund, are also factors of relevance.

61. The Tribunal in *D'Aoust* observed that other international tribunals have held procedural irregularities and errors irrelevant

> "where the actions or omissions did not affect the decision of the complainant or his financial interests. That was the case, e.g., where the complainant was not a member of the class of persons to which an incriminated action applied or when an unlawful omission has no financial effect upon him." (Para. 23.)

For instance, the IDBAT, in *Ricardo Schwarzenberg Fonck v. IDB* (Case No. 2) (1984), held that lack of information is immaterial when it could have had no influence on the legal position of the complainant. The Tribunal considered that:

> "4)
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>
> In the framework of these considerations it may be said once again that it is the duty of the Bank to supply its employees and staff members with the most ample information on working conditions or on the alteration of its internal rules and that the performance of that duty is advantageous not only to the workers but equally to the Bank, as it constitutes a guarantee of security and balance in relations between workers and employers.
>
> 5) The aforementioned conditions notwithstanding, in the present case, as was emphasized earlier, if there was an omission (albeit partial) of information due the complainant, that omission was irrelevant because, as was recognized by the two parties, at the time of the complainant's entrance in the Bank he was not participating in the *Retirement Plan*. Hence, the lack of information on the change in rules on retirement could have had no influence on the personal and professional decisions of the complainant.
>
> If the complainant became aware of the change in the rule in 1978, that is, two years before he became a regular staff member and a participant in the *Retirement Plan*, it is evident that he was fully aware of all that had occurred when exact knowledge of the conditions of retirement became important to him."

A fortiori, where the legal position of the complainant is affected, but in a positive way, lack of notice furnishes no ground for complaint.

62. The OASAT, in Judgment No. 118 (*René Gutiérrez v. the Secretary General of the Organization of American States*) (1992) dealt with the application by Mr. Gutiérrez for a post advertised within the Organization, for which he was not selected on the ground of inadequacy of educational achievements. The following passages of the Judgment are relevant:

"V. POLICY OF THE GENERAL SECRETARIAT

36. As can be seen in the testimony given by the former Director of the Department of Human Resources, Hernán Hurtado Prem, the possibility envisaged in the Introduction to the Classification Standards that a combination of studies and experience can be substituted for a university degree does not reflect the policy adopted by the Secretary General. In the public hearing held on November 6, 1992, the Complainant's attorney responded as follows to an answer given by Mr. Hurtado Prem:

> Did you say that the Secretary General insisted on a university degree for professional posts at that time or is he doing so now?
>
> To which Mr. Hurtado Prem replied:

. . . He changed this policy last year and it is now required. The combination of experience and studies in place of a university degree is no longer accepted.

VI. ERRORS OF PROCEDURE

37. From a study of the record and of the Complainant's specific charges, the Tribunal concludes that the following errors of procedure have been committed:

a. The Complainant was not informed promptly, as it is his subjective right to be, of the Secretary General's decision to accept the recommendation of the Advisory Committee on Selection and Promotion to withdraw Internal Vacancy Announcement No. IR/18/91 and order a new competition for external applicants.

This omission was subsequently rectified. However, the error committed by the Department of Human Resources is inexcusable; the final result of an administrative procedure must always be transmitted to those directly concerned, since failure to do so denies them the right to defend themselves and thus nullifies the procedure. Of course, until whatever personal notification or communication the law may require has been made, the action taken can have no legal effect of any kind to the detriment of the persons against whom it is taken."

63. The holding in *Gutiérrez* seems to be confined to changes that are detrimental to the claimant; it does not preclude changes that operate to the advantage of the persons concerned. In the present case, Ms. "B" received her promotion before having completed the three years at Grade A6 required under Staff Bulletin 89/28.

64. On the basis of the applicable principles and precedents, and in view of the facts of this case, the Tribunal concludes that the limited measure of the circulation of the Kennedy-Swain Memorandum did not adversely affect

the Applicant. However, if the facts of the case were such that the failure to inform the Applicant of the Kennedy-Swain Memorandum had adversely affected her, the Tribunal might attach different consequences to the inadequacy of notice.

The exceptions provided in Staff Bulletin No. 89/28

65. Applicant argues that, under the terms of the policy laid down in Staff Bulletin 89/28, an immediate promotion would have been allowed on the basis of the exceptions provided therein, a proposition that is contested by Respondent. The exceptions in question are:

> "(3) An incumbent with a combination of superior performance and the assessed potential to advance rapidly through several higher grades may, on a exceptional basis, be considered for promotion to the next higher grade at a more rapid rate than indicated by the minimum time-in-grade. Such exceptions, which are expected to be very few, could occur when a staff member is appointed to a supervisory position. Review or Senior Review Committee endorsement is required for such exceptions in the case of promotions to Grades A14 and above.
>
> (4) A newly-recruited staff member's service as a contractual employee, if doing similar work at a comparable level, will be taken fully into account in applying the time-in-grade requirements.
>
> (5) A newly-recruited staff member's first promotion to the next higher grade in a job ladder may be made without reference to the minimum time-in-grade requirements if the staff member is recruited for a probationary period at one grade lower than the normal entry level for the job ladder or one grade below the lowest level at which the position was advertised on the vacancy list, or if warranted by a combination of superior performance and relevant prior work experience." (pp. 2–3.)

66. Respondent recalls that at the time of her appointment to the position in question, the Applicant had served only a little over one year at Grade A6 and concludes that she was therefore not eligible for immediate promotion to Grade A7 under Staff Bulletin No. 89/28. The Fund characterizes as "unfounded" Applicant's assertion that she should have been promoted immediately to Grade A7 on the basis of the exceptions in the Staff Bulletin, because those exceptions are inapplicable in her case. She did not have the "assessed potential to advance rapidly through several higher grades", nor was she a newly recruited staff member.

67. The Applicant interprets Staff Bulletin 89/28 as permitting supervisors to set aside the time-in-grade requirements. She maintains that the Bulletin:

> " . . . grants the 'staff member's supervisors' the authority to decide the appropriate time to propose a career progression inasmuch as they 'are in the best position to make the necessary judgments.' The paragraph does not set out any conditions to supplant the supervisors' judgement on the matter."
>
> ". . . the time Applicant served at the Grade A6 position was irrelevant and immaterial, inasmuch as Applicant had demonstrated, sufficiently and to the satisfaction of her supervisors, *that she was well seasoned* and her supervisors recommended that she be immediately promoted to the Grade A7."

68. Respondent's understanding of the clause in question is very different, i.e., that the Bulletin prescribes minimum requirements to which supervisors are bound.

> "The Applicant is construing this language as authorizing supervisors to decide that a staff member be appointed to a vacancy without regard to the time-in-grade requirements set forth in the Bulletin.
>
> The Applicant's interpretation is neither well-founded or logical; if it were correct, the specific exceptions enumerated in the Bulletin would be superfluous. Rather, this sentence must be read in the context of the whole paragraph, which explains why the time-in-grade requirement has been defined as a *minimum*, rather than *average*, period of time-in grade. Properly read, this sentence gives some flexibility to supervisors to propose that a staff member be promoted only after the *minimum* requirement has been met, without regard to any *average* period of time-in grade. As Mr. Kennedy explained, this provision was not intended to permit a supervisor to determine that promotion should occur before the minimum time-in-grade requirements had been met; rather, it means that 'once the minimum threshold has been passed, . . . supervisors are in the best position to decide the timing [of a promotion] and ADM would not try to impose a control such as average time in grade that could interfere with that decision.'"

Consequently, Respondent argues, the Applicant could not have been promoted immediately to Grade A7 on the basis of this language.

Conclusions regarding the application of the Staff Bulletin and the Kennedy-Swain Memorandum

69. The Tribunal is not persuaded by Applicant's contention that she could have been promoted immediately by decision of her supervisor; time-in-grade as prescribed in the Bulletin is a minimum requirement. As observed above, to hold that time spent in one grade contributes to meeting

the time-in-grade requirement of another grade is to deprive time-in-grade requirements of their essential rationale. Moreover, it is noteworthy that in fact the Kennedy-Swain Memorandum allowed the Applicant to be promoted without fully meeting the conditions of the vacancy announcement, including the time-in-grade requirement.

70. In considering whether the applicable rules were correctly applied by the decision requiring underfilling, the Tribunal finds that the Staff Bulletin would not have allowed the Applicant, who was neither newly recruited nor appraised by her supervisors as having the potential to advance rapidly through several higher grades, to receive an immediate promotion. A like conclusion holds with respect to the policy laid down in the Kennedy-Swain Memorandum: the Applicant failed to meet the time-in-grade requirements.

71. The Tribunal's conclusions on remaining salient contested issues of the case will now be stated. Those issues are: (a) did the vacancy announcement violate the Fund's law; (b) was the decision that Applicant did not meet the conditions listed in the vacancy announcement justified; (c) did Ms. "Z" have the authority to block the immediate effect of the recommended promotion; and (d) was the final decision flawed because of being arbitrary, capricious, discriminatory, or in violation of law.

The vacancy announcement

72. The vacancy announcement in question advertised a position at Grade A7/A8 with the following qualifications:

> "1. For Grade A7, a combination of education and specialized training equivalent to a university degree in human resources management, or a related field, is required, supplemented by a minimum of three years of progressively responsible experience in personnel work at Grade A6, or equivalent. A seasoned level of competence and technical expertise, including an in-depth knowledge of precedents in benefits administration is required at this grade level.
>
> For Grade A8, in addition to the training and experience for Personnel Assistant/A7, a minimum of two years of progressively responsible work experience in the benefit administration area at Grade A7, or equivalent.
>
> 2. Thorough knowledge of Fund benefits policies, procedures, and precedents. . . ."

73. The Applicant argues that the posted requirements were unlawful and relies on the Job Standards for Grade A7 to argue that she met the desir-

able qualifications. The Job Standards for the Grade A7 position set forth as "desirable qualifications":

> "Educational development, including and/or supplemented by work experience, typically acquired through the completion of a university degree program; or progressively responsible experience in administrative work, including a minimum of three years of personnel work at Grade A6, or equivalent, is required."

Applicant maintains that she not only met, but exceeded, these qualifications.

74. Her argument concerning the lack of legality of the posted requirements of the vacancy announcement is based on the view that they were predicated on a "modified" set of Job Standards, not yet issued. From this, Applicant concludes that the qualifications and requirements for the vacancy announcement for the position in question were predicated on a non-existent set of Job Standards, and that "a poisonous tree, yields poisonous fruit".

75. The position of the Fund was that she failed to meet the posted requirements because, in addition to lacking the time-in-grade or its equivalent, she also did not have the required university degree, since her university degree in languages was neither a degree in the specified field nor a degree in a related field. Respondent asserts that it is not the job description, but the vacancy announcement that is controlling and that that announcement was appropriately drafted:

> "The testimony of the Fund officials responsible for the administration of the vacancy advertising procedures made clear that recruiting departments at the Fund that wish to advertise a position have the discretion to set more stringent qualifications than those stated in the Job Standards Manual. As made clear in the introduction to the Job Standards Manual, a job standard describes only in general terms the nature and level of the work and the desirable qualifications for successful performance of the work, and is meant to provide guidance and not a rigid rule. . . . As such, it must paint with a broad brush, leaving the specifics to be filled in by job descriptions or vacancy announcements, which are geared towards particular positions.
>
> Moreover, the express language of the introduction to the Job Standards Manual states that the 'desirable qualifications' section describes only the 'desirable *minimum* amount and kind of training and experience.' . . . (emphasis added). Accordingly, the Job Standards do not preclude the recruiting department, in consultation with CPD, from tailoring the requirements for a particular position by making reasonable additions to those minimum requirements. Rather, it envisions that this will be done and, as Mr. Kennedy observed in his testimony before the Grievance Committee, it has been a long standing practice for the recruiting departments

> to do so. [Footnote omitted.] Thus, with respect to whether a selected candidate meets the qualifications for appointment at the particular grade of an advertised position, the requirements set forth in the applicable vacancy announcement, rather than the Job Standards Manual, are controlling.
>
> It is undeniably a managerial prerogative to determine what qualifications are appropriate for a particular position. [Footnote omitted.] A judicial body should not disturb such a determination unless there is no rational relationship between the requirements and the position in question. With respect to the Personnel Assistant position at issue in this case, the requirements for appointment at Grade A7 were manifestly reasonable. The required combination of experience and . . . training was essentially a response to the concerns expressed during a 1992 staff survey about the lack of professionalism in some divisions in the Administration Department and the result of that Department's effort to strengthen its professional qualifications. As such, they were rationally related to the position advertised."

76. The Fund refers to the Job Standards for Grade A7 staff that Applicant maintains were illegally altered in the vacancy announcement, which require "the completion of a university degree program". These Job Standards, the Fund points out, are generic and used all over the Fund. The mere reference to a "university degree program" cannot be generically applied, but needs to be tailored to the requirements of the recruiting department and the post.

77. The Tribunal concludes that vacancy announcements may properly refine and particularize qualifications set out in the Job Standards and legally did so in the instant case. It is also noted that the underfilling policy, as articulated in the Kennedy-Swain Memorandum, permitted the promotion of Applicant to Grade A7 without her ever attaining a university degree in human resources management, just as it permitted her promotion without her having met the three year minimum time-in-grade at Grade A6.

The authority of Ms. "Z" to block the request for immediate promotion

78. Applicant contests the authority of Ms. "Z" to "overrule" the requested promotion. She argues that the personnel of the SDD "had no authority whatsoever, under Staff Bulletin No. 89/28, to overrule the decision of supervisors and senior personnel managers to promote a candidate immediately to the grade of an announced vacancy".

79. The Fund's Answer sets forth the structure of the decision-making process with respect to promotions and grading within the Fund and in that context explains the respective functions of SPMs and the SDD. It maintains

that the SPMs do not have the final authority to approve promotions; rather, the role of a Senior Personnel Manager is one of coordination and oversight in personnel matters and is not intended to supplant the responsibility of the appropriate divisions in ADM. Approval by the appropriate divisional authority in ADM is required.

80. The Tribunal concludes that the Senior Personnel Manager, in requesting approval of the Applicant's promotion rather than purporting to take a decision effecting it, acted properly. Equally, the decision of the Staff Development Division of the Administration Department declining to approve promotion of the Applicant with immediate effect was an appropriate exercise of its authority to monitor the conformity of promotions with Fund-wide rules in force.

81. On the basis of the considerations set forth above, the Tribunal decides that the decision to underfill the position to which the Applicant was promoted was proper, legal and in conformity with the Fund's governing practice and prescription.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund, unanimously, decides that:

(A) Requiring the Applicant to underfill, for approximately one year, a position to which she was promoted on September 20, 1995 did not contravene the internal law of the Fund and reflected a proper application of lawful rules concerning promotions and time-in-grade requirements;

(B) The Application is rejected and the Applicant's demands for relief are dismissed.

Stephen M. Schwebel, President
Georges Abi-Saab, Associate Judge
Nisuke Ando, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
December 23, 1997

JUDGMENT NO. 1998-1

Ms. "Y", Applicant v. International Monetary Fund, Respondent

(December 18, 1998)

Introduction

1. On December 17 and 18, 1998, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "Y", a former staff member of the Fund.

The Procedure

2. On August 7, 1998 an Application was filed by Ms. "Y", who had been employed with the Fund since 1971; in 1995 the position of which she was the incumbent was abolished. Subsequently, efforts were made to locate alternative employment for her in the Fund, which were of no avail. In 1996 she requested a review of her grade as well as of the abolition of her position under an ad hoc review procedure that had been introduced to redress past, and preclude future, discrimination in the Fund. Her allegations were that her grade and the abolition of her position had been influenced by gender, age and career stream discrimination. The review, which was carried out by an ad hoc review team consisting of an outside consultant and a senior member of the Administration Department, concluded that there was no evidence of discrimination in the grading and abolition of the position. The Director of Administration informed the Applicant that she concurred with that conclusion. It is that decision of the Director of Administration that the Applicant challenges before the Tribunal.

3. In response to the Application, the Fund filed a Motion for Summary Dismissal under Rule XII of the Tribunal's Rules of Procedure on the ground that Applicant had failed to comply with the statutory requirement that an

Application may be filed with the Tribunal only after Applicant has exhausted all available channels of administrative review. Pursuant to para. 2 of Rule XII,[1] a Motion for Summary Dismissal suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. Hence, the present consideration of the claim is confined to the jurisdictional issues of the case.

4. Rule XII, para. 5[2] of the Tribunal's Rules of Procedure allows the Applicant to file an Objection within thirty days from the date on which a Motion for Summary Dismissal is transmitted to him. However, the President, in the exercise of his authority under paragraph 2 of Rule XXI,[3] decided to grant the Applicant an additional 15 days to file her Objection, in order to enable her to revise the list of documents and other evidence which she had requested the Tribunal to order the Fund to produce[4] so as to adapt it to the purposes of the Objection. The Fund presented its views on Applicant's amended request for documents on October 23, 1998.

5. Paragraph 4 of Rule XVII provides that "When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule." On the basis of this authority, the amended request was rejected on the ground that the documents and other evidence that Applicant requested were clearly irrelevant to the case before it, which is limited to its jurisdictional aspects.

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[1]"The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal."

[2]"The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him."

[3]"The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder."

[4]Rule XVII (Production of Documents) provides:

"1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.

2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.

3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment.

4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

6. The Tribunal also denied Applicant's request for oral proceedings, as the condition laid down in Rule XIII, paragraph 1[5] that they be "necessary for the disposition of the case" which is confined to the jurisdictional issues, was not met.

The Facts

7. The relevant facts may be summarized as follows. Applicant was employed as a staff member of the Fund on July 1, 1971, and was promoted to a professional position in 1983. In 1987, after she appealed her job grade, she was promoted to grade A11, which grade she still held in 1995, when the position was abolished. From July 1985 to October 31, 1995 she worked in Department No. I. Following a merger of two Departments, the position of which she was the incumbent was abolished effective May 1, 1995. Applicant was advised of the options available to her under the Fund's policy governing abolition of posts. In accordance with that policy, efforts were made over a six-month period to find her an alternative position. In addition, on an exceptional basis, arrangements were made for her to be assigned to a Temporary Assignment Position (TAP) in Department No. II for an initial period of 10 months from January 2, 1996 through October 31, 1996. This TAP was later extended for an additional four-month period through the end of February 1997. Applicant's selection for the TAP effectively suspended the 120-day notice period and separation leave provided under the separation policy, and served as a bridge to the time when Applicant would be eligible for an early retirement pension and provide her continuous access to the Fund's health insurance.

8. On August 28, 1996, the Director of Administration issued a memorandum to the staff announcing guidelines for the review of individual cases under an ad hoc discrimination review procedure, inviting persons who felt that their careers may have been affected by discrimination to request review of their individual cases. In response to that memorandum, Applicant on September 30, 1996, requested a review on the grounds that her Fund career had been adversely affected by discrimination based on profession, gender and age, which she contended had affected the grading of her position and culminated in the abolition of her post.

9. On December 23, 1996, the Fund informed Applicant that she was not eligible to participate in the review process, as she would shortly be separat-

[5]"1. Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them."

ing from the Fund on early retirement and any remedial action would be of a forward-looking nature.

10. On June 23, 1997, Applicant filed a formal grievance with the Grievance Committee in which she contested the decision that she was not eligible to participate in the ad hoc discrimination review process.

11. Shortly thereafter, on June 27, 1997, the Director of Administration advised Applicant that upon review of the matter she had concluded that the Fund should carry out a review of Applicant's discrimination claim. Thus, the decision which Applicant was challenging before the Grievance Committee was reversed, rendering her grievance moot.

12. The review was conducted by an ad hoc review team appointed by the Fund, consisting of an outside consultant and a senior official of the Administration Department. The team met with Applicant on several occasions. The conclusion reached by the team was that there was no evidence to support the allegation that the grading of Applicant's position or the abolition of her post was influenced by factors of discrimination. The team therefore determined that it had no basis on which to recommend a regrading of Applicant's position, which was the remedy she sought.

13. Applicant was informed of that conclusion in a meeting with the team on December 19, 1997; she asserts that on that occasion the official of the Administration Department informed her that if she was not satisfied with the decision that age or gender had not affected her grade she should request the Director of Administration to hold an administrative review of the decision. Thereupon, Applicant, through counsel, by letter dated January 27, 1998, requested the Director of Administration to conduct such a review.

14. The Director of Administration replied February 10, 1998 by explaining the basis for the conclusion that no relief was warranted and offering Applicant an opportunity to meet again with the review team so that it could further explain the process, and so that Applicant could raise any new facts or arguments that she might wish to make regarding her allegations. Applicant did not take up this offer, but on March 24, 1998, her counsel wrote again to the Director of Administration, challenging the nature of the process and repeating her request for an administrative review.

15. On May 8, 1998, the Director of Administration wrote to Applicant's counsel advising that she had carefully reviewed the investigation carried out by the review team, and that she fully concurred with its recommendation. On August 7, 1998, Applicant filed a complaint with the Tribunal.

The Ad Hoc Review of Discrimination

16. The Ad Hoc Discrimination Review Process was one of the results of the issuance in early 1996 of the report of the Consultant on Discrimination. In a memorandum to staff announcing completion of that report, the Managing Director stated:

> "8. The report contains proposals for addressing the concerns of those staff who feel that they have been discriminated against, typically on grounds of race, either in terms of promotion or salary. It suggests that we might appoint an independent panel, perhaps with expert assistance from outside the Fund, to examine these cases on a confidential basis and reach conclusions as to whether the perceptions of discrimination, in career progression or in salary levels, are warranted by the facts. This is a very sensitive area, and I have asked Mr. Mohammed to consult with the Director of Administration on the nature and extent of the problems and report directly to Management on what action might be needed." (Memorandum from the Managing Director to Members of the Staff, February 9, 1996, "The Report of the Consultant on Discrimination".)

17. In July of that year the Managing Director issued a further memorandum regarding issues of diversity and discrimination within the Fund. In it he addressed the issue of the effect of possible past discrimination on the careers of Fund staff:

> "A difficult question remains: cases where discrimination may have adversely affected the careers of Fund staff in the past. One message that has come through quite clearly from Mr. Mohammed's work is that there are some staff who consider that they have been discriminated against to the detriment of their careers. Questions of past discrimination must be addressed, and even where these staff could have availed themselves of the Fund's grievance procedures I believe the onus is on us. We are already looking into some identified cases and, as noted above, I have asked the Administration Department and the two Review Committees to look more broadly at individual staff member's career progress and opportunities. I also expect departments to help ensure that any cases where corrective action may be required are brought to Management's attention. We are determined to address this issue and believe that we can do so most quickly and effectively by acting decisively within the existing framework of our procedures." (Memorandum from the Managing Director to Members of the Staff, July 26, 1996, "Measures to Promote Staff Diversity and Address Discrimination".)

18. Procedures for a one-time, ad hoc review of individual cases of alleged discrimination were announced in August 1996 (Memorandum from the Director of Administration to Members of the Staff, August 28, 1996, "Review of Individual Discrimination Cases"). That memorandum set forth

several avenues for the identification of cases for review including cases of staff members who had come forward as part of the study by the Consultant on Discrimination, and cases identified as a result of a systematic review of career patterns undertaken by the Senior Review Committee, the Review Committee, and the Administrative Assistant Review Committee. In addition, Department Heads, Senior Personnel Managers, Administrative Officers, and the Diversity Advisor were invited to submit names of potential cases of discrimination and background information to the Director of Administration by September 30, 1996. The August 28, 1996 memorandum also included a provision for self-identification by those members of the staff who believed their careers had been adversely affected by discrimination. Such individuals were asked either to contact one of the persons noted above to request submission of their names, or alternatively to submit their names directly to the Director of Administration within the same deadline. Applicant chose this latter route, sending an e-mail that stated:

> "I believe that my Fund career was adversely affected by profession-, gender-, and age-based discrimination. A background note about my case, which culminated in the abolishment of my position, is attached."

19. The ad hoc review was a one-time review of cases of alleged discrimination which were identified to the Director of Administration during a narrow time frame, concluding September 30, 1996. As to how the review process would actually work, the August 28, 1996 Memorandum stated that:

> "The way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination. In coordinating these reviews, the Administration Department will draw on the input of subordinates, peers, and supervisors. The career record will be reviewed and those undertaking the reviews may meet with the individual employees under consideration, at the initiative of the reviewer or the employee. Where warranted, the aim will generally be to suggest remedial actions that are prospective and constructive, including assignments, mobility, training, promotions, and salary adjustments."

20. The Memorandum also addressed the subject of the interrelationship between the ad hoc discrimination review process and grievance procedures available in the Fund:

> "The consideration being given to individual cases of possible discrimination is a one-time action and is not intended to replace or replicate the Fund's grievance procedures."

21. Further information regarding the ad hoc discrimination review process was communicated to staff in January 1997 (Memorandum from the

Director of Administration to Members of the Staff, January 13, 1997, "Procedures for Review of Individual Discrimination Cases"). The staff was informed that the review of individual discrimination cases would be carried out by external consultants assisted by a small number of Fund staff from both within and outside the Administration Department. The procedure and aim of the review were stated to be as follows:

> "The team of consultants and staff, working in pairs, will review the background of each individual discrimination case, meet with the individuals concerned as well as others familiar with their circumstances, and make recommendations. In cases where remedial action is warranted, the aim will generally be to suggest actions that are prospective and fall within the Fund's existing personnel policies, including reassignments, training and other development initiatives, promotions, and salary adjustments. An initial meeting will be held with each employee requesting a review to obtain background information, to discuss current and former staff members (subordinates, peers, and/or supervisor) who might be contacted by members of the review group to obtain additional information, and to identify the types of forward-looking remedies that may be considered appropriate if it is concluded that past discrimination has adversely affected the employee's career. . . .
>
> This exercise will be initiated in the second half of January. Every effort will be made to carry out this review in as discrete and sensitive a manner as possible. While feedback sessions will be undertaken with each concerned employee to inform him or her of the outcome of this review, in those cases where discrimination has been identified, this review will not be an end in itself, but just a beginning of a process for identifying opportunities. At the end of the review process, every effort will be made to utilize the lessons learned from past discrimination cases to help further strengthen the Fund's policies and practices to prevent discrimination in the future."

22. In the case of the Applicant, the review was carried out by a team consisting of the Assistant Director of Administration and an outside consultant. The team concluded that it found no evidence of discrimination either in the Applicant's grade or in the abolition of the position which she held.

Summary of Principal Arguments Concerning the Admissibility of the Claim

The Fund's arguments set forth in the Motion to Dismiss

23. In its Motion to Dismiss the Fund raises the threshold question of whether the case is admissible. It requests the Tribunal to rule the case

irreceivable "because Applicant failed to exhaust administrative remedies as required by the Statute". "To do otherwise", argues the Fund, " . . . would undermine the fundamental function of the Tribunal as described in the Executive Board Report as a forum of last resort." The request is supported with the following propositions:

- By failing to pursue her challenge to an administrative decision before the Grievance Committee in accordance with the established procedures, Applicant has not met the requirements of Article V, Section 1 of the Statute that an Applicant first exhaust all available channels of review.
- The May 8, 1998 letter from the Director of Administration cannot be considered a final individual decision for purposes of exhaustion of administrative review, because

  " . . . Under the Statute, where, as here, the available channels of review include a formal procedure for consideration of complaints and grievances of individual staff members in respect of personnel matters and conditions of service—that is the Grievance Committee—the requirement is deemed to be satisfied by one of three events: (a) if a recommendation is made to the Managing Director and the applicant has received no decision granting him the relief requested within three months; (b) if the applicant receives notice of a decision denying the request; or (c) if the applicant received a notice of a decision granting the relief requested, but the relief has not been received within two months."
- A Grievance Committee has been established for the purpose of considering individual complaints by staff members regarding the application of personnel regulations and their conditions of service. That Committee has jurisdiction to hear challenges to both discretionary and non-discretionary decisions which fall under this rubric. Applicant has not appealed the review of the decision of the discrimination review team to the Grievance Committee. Therefore, that Committee has not had a chance to consider her complaint and issue a recommendation for final decision by the Managing Director as provided under General Administrative Order (GAO) No. 31, Rev. 3, Sections 7.08 and 7.09. Hence, Applicant has not exhausted all available channels of administrative review.
- Having appealed to the Director of Administration to obtain reversal of the decision of the ad hoc discrimination review team, Applicant satisfied the requirement of exhaustion of the administrative review for purposes of submitting a complaint to the Grievance Committee under GAO No. 31, Rev. 3, Sec. 6.05, but not for purposes of admissibility before the Tribunal under Article V of the Statute. Applicant appears to have confused the distinct requirements governing exhaustion of administrative review for purposes of the Grievance Committee with those governing Tribunal cases.

- The decision that Applicant challenged before the Grievance Committee in June 1997 is distinct from the decision that Applicant seeks to challenge now. In her 1997 grievance, Applicant specifically requested that the decision not to include her case in the ad hoc discrimination review be overturned. The Director of Administration reversed that decision. The ad hoc discrimination review found no discrimination. The Applicant now seeks to challenge the finding of no discrimination. The grievance submitted in 1997 by the Applicant to the Grievance Committee was treated as moot because Applicant's request for a review—the purpose of her grievance—had been granted. Because that grievance addressed an issue different from what Applicant is complaining of in her Application to the Tribunal, it does not satisfy the requirements of exhaustion of administrative review under Article V of the Statute.

- Applicant's failure to interpret properly and apply the applicable rules cannot be attributed to any fault on the part of the Fund. Indeed, in announcing the discrimination review procedures, the Fund specifically noted that: "[T]he consideration being given to individual cases of possible discrimination is a one-time action and is not intended to replace or replicate the Fund's grievance procedures." (Memorandum from the Director of Administration to Members of the Staff, August 28, 1996, "Review of Individual Discrimination Cases".) In her February 10, 1998 letter, the Director of Administration reiterated that point: "[t]he special one-time discrimination review exercise did not, in any way, alter the existing rules or entitlements that govern the Fund's existing grievance procedures."

- The Fund contends that:

  > "It is a well-established rule of law, and one that is consistently followed by the major international organization administrative tribunals, that staff members are responsible for following the rules and procedures established for bringing complaints and appeals, and that such rules and procedures must be strictly complied with."

- Based on her review and assessment, the Director of Administration decided that the findings and conclusions of the review team were valid and should stand. The procedure of this decision is in accordance with GAO No. 31, Rev. 3, Section 6.04, which provides for appeal to the Director of Administration for review of decisions concerning a Staff Member's career.

- Applicant was aware of the administrative remedies available to her under GAO No. 31, Rev. 3, and pursued the first of those remedies, that is, an appeal to the Director of Administration but did not proceed to

> seek review by the Grievance Committee. Therefore, she did not exhaust available channels of administrative review, as is required under the Statute in order to have recourse to the Tribunal. Instead, Applicant bypassed the important and mandatory step of pursuing her claim with the Grievance Committee—the formal channel established for that purpose—and has made an Application directly to the Tribunal.

Applicant's contentions set forth in her Application and Objection

24. Applicant contends that the May 8, 1998 letter from the Director of Administration comes at the end of a series of meetings and exchanges of correspondence between Applicant and the Fund and should, at this point, be considered as a final decision appealable to the Tribunal. She maintains that the correspondence culminating in that letter "should be considered a final individual decision, and the effective end of the administrative process that Applicant has been pursuing for a period far in excess of one year and which has neither provided Applicant with any of the relief she has requested nor provided verifiable evidence that the procedure was carried out". Applicant supports this view by referring to a passage in the July 26, 1996 Memorandum from the Managing Director to Members of the Staff, "Measures to Promote Staff Diversity and Address Discrimination" in which, Applicant argues, the Managing Director has "made the grievance process superfluous and secondary to honest review and full relief to aggrieved participants". The passage in question is as follows:

> "Questions of past discrimination must be addressed, and even where these staff could have availed themselves of the Fund's grievance procedures I believe the onus is on us. We are already looking into some identified cases and, as noted above, I have asked the Administration Department and the two Review Committees to look more broadly at individual staff member's career progress and opportunities. I also expect departments to help ensure that any cases where corrective action may be required are brought to Management's attention. We are determined to address this issue and believe that we can do so most quickly and effectively by acting decisively within the existing framework of our procedures."

Admissibility of Claims Under the Tribunal's Statute—General

25. The admissibility of claims is governed by Articles V and VI of the Statute which prescribe as a pre-condition of admissibility the completion of the applicable administrative review.

"ARTICLE V

1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.

2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

3. For purposes of this Statute, where the available channels of review do not include the procedure described in Section 2, a channel of administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since the request for review was made and no decision stating that the relief requested would be granted has been notified to the applicant;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

. . .

ARTICLE VI

1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision."

26. In the published Commentary on the Statute, the reasons for the exhaustion of remedies requirement are explained as follows:

"Article V prescribes an exhaustion of remedies requirement with respect to the admissibility of applications before the tribunal. Cases otherwise falling within the tribunal's competence would be admissible only if applicable administrative remedies have been exhausted. The exhaustion requirement is imposed by the statutes of all major administrative tribunals, presumably for the reason that the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate.

Under this Article, in situations where administrative review includes recourse to formal procedures established by the Fund for this purpose, a channel of administrative review would be exhausted by any of the following events, as applicable to the circumstances. First, the requirement would be satisfied if a recommendation on the matter had been made to the Managing Director and the applicant received no decision granting him the relief requested within three months. Second, the requirement would be satisfied if the applicant received a decision denying his request; a decision which granted his request only in part would be treated as a denial for this purpose. Third, if the applicant received a decision granting him the relief requested but the relief was not forthcoming after two months had elapsed, administrative review would be considered exhausted. Finally, if the Fund and the applicant agree to bypass administrative review and submit the dispute directly to the tribunal, all channels of administrative review would be considered exhausted for purposes of this Article.

In situations where recourse to the Grievance Committee or other formal procedure is not applicable, administrative review of a request would be considered as exhausted by any of the outcomes described in Section 3." (P. 23.)

27. For the purpose of determining whether an Application satisfies the applicable exhaustion requirements, a distinction must be made between two categories of cases: those falling within the competence of the Grievance Committee; and those subject to another review process.

28. The Grievance Committee's jurisdiction is based on its constitutive instrument, GAO No. 31, Rev. 3, the pertinent provisions of which provide that:

"*Section 4. Jurisdiction of the Grievance Committee*

4.01 *Committee's Jurisdiction*. Subject to the limitations set forth at Section 4.03, the Grievance Committee shall have jurisdiction to hear any complaint brought by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was

inconsistent with Fund regulations governing personnel and their conditions of service.

4.02 *Exhaustion of Administrative Review.* The Committee shall have jurisdiction to hear a case only after the grievant has exhausted the applicable channels of administrative review set forth in Section 6 of this Order, unless the Managing Director, or the Managing Director's designee, agrees that the grievance may be submitted directly to the Committee.

. . .

4.04 *The Grievance Committee's Examination of its Jurisdiction.* The Committee, for the purpose of proceeding with a grievance, shall decide whether it has jurisdiction over the matter."

29. In order to be receivable by the Grievance Committee, a grievant must first satisfy a review requirement, namely, he must have sought the applicable administrative review of his complaint. That requirement is spelled out in GAO No. 31 as follows:

"Section 6. Administrative Review

6.01.1 *Administrative Review.* The applicable channels of administrative review and the procedures to be followed are set forth below. . . .

. . .

6.02 *Grievances Concerning a Staff Member's Work or Career.* With respect to decisions that pertain to a staff member's work or career in the Fund, the staff member shall first submit a request for review in writing to his or her Department Head or other official designated by the Department Head for this purpose, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. Except as provided in Section 6.02.1, the request must be submitted within six months after the challenged decision was made or communicated to the staff member, whichever is later. The Department Head, or his or her designee, shall have 15 days in which to respond in writing to the request for review.

. . .

6.02.2 With respect to a decision concerning a staff member's work or career that was taken directly by his or her Department Head, the staff member may appeal the decision to the Director of Administration within six months after the challenged decision was made or communicated to the staff member, whichever is later, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31.

6.03 *Grievances Regarding Staff Benefits.* For decisions regarding the application of a staff benefit, the staff member shall first submit a request for

review in writing to the division chief in the Administration Department whose division is responsible for the administration of the benefit in question, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. The request must be submitted within three months after the staff member was informed of the intended application of the benefit. The division chief shall have 15 days to respond in writing.

6.04 *Appeal to the Director of Administration.* If dissatisfied with the response to a request under either Section 6.02 or 6.03, or if no response is received within 15 days after submission of such a request, then the staff member may request in writing a review by the Director of Administration. The written request must be submitted within 30 days after the response from the division chief or Department Head, as applicable, has been received or the deadline for a response has passed, whichever is earlier.

6.05 *Exhaustion of Administrative Review.* The channels of administrative review shall be considered exhausted, for purposes of filing a grievance with the Committee, when the staff member has received a response to his or her written request or no response has been received within 15 days of its submission to the Director of Administration.

6.06 *Decisions Taken by Managing Director or Director of Administration.* With respect to any decision that was taken directly by the Director of Administration or by the Managing Director, or by the Managing Director's designee, the staff member may file a grievance with the Committee within six months after the challenged decision was made or communicated to the staff member, whichever is later.

6.07 *Time Limits.* A staff member shall be required to exhaust the applicable channels of administrative review within the required time limits before submitting a grievance to the Grievance Committee. . . ."

30. Where the Grievance Committee has jurisdiction, the review requirement in Article V is met (a) by a decision by the Managing Director not granting the requested relief; (b) by the notification of a decision granting the relief, which, however, remains uncomplied with after two months; or, (c) in the absence of a decision granting the relief, three months after a recommendation was made to the Managing Director. When a channel of review different from that provided for in paragraph 2 of Article V is in question, the exhaustion requirements are met when the provisions of Article V, paragraph 3, subparts a or b or c have been met.

31. The issue in the phase of this case that is now before the Administrative Tribunal is whether the ad hoc discrimination review constitutes an alternative channel of review and hence one not involving the Grievance Committee.

32. Administrative Tribunals of international organizations have emphasized the importance of exhaustion of administrative remedies before recourse to them. The *raison d'être* for the requirement of exhaustion of administrative remedies was emphasized by the World Bank Administrative Tribunal in *Rae (No. 2)*:

> "42. More to the point, the Bank has made available to all staff members who sought to challenge the soundness of their job grading a procedure for administrative review that would have brought their case to the Job Grading Appeals Board. The Applicant failed to invoke such administrative review in a timely manner after October 1987, and she is therefore barred by Article II, para. 2, of the Statute of the Administrative Tribunal from presenting this issue to the Tribunal many years later. The wisdom of requiring exhaustion of such internal administrative remedies is evidenced in this very case, where the Applicant seeks to have the Tribunal assess *ab initio* the fairness of the level 17 grade of the Applicant's position as Staff Planning Assistant, without the benefit of the kind of full evidentiary record, and prior informed review, that would have been assured had the case been presented in good time to the Job Grading Appeals Board. *(Donneve S. Rae (No. 2), Applicant v. International Bank for Reconstruction and Development, Respondent*, World Bank Administrative Tribunal, 1993, No. 132.)

Admissibility of Applicant's Complaint

33. The admissibility of Applicant's claim depends on whether it fulfills requirements set forth in Article V. For the purpose of this problem, three of Article V's four sections are relevant. Section 1 deals with the situation in which the Fund has established channels of administrative review. What such channels might be is explained in Sections 2 and 3. Established channels covered by Section 2 involve the Managing Director in the decision-making process. Section 3 deals with situations in which the established review channels do not include the procedure described in Section 2.

34. Whether in any particular case the available channels have been exhausted is to be determined in accordance with Section 2 or 3. The Commentary explains:

> "In situations where recourse to the Grievance Committee or other formal procedure is not applicable, administrative review of a request would be considered as exhausted by any of the outcomes described in Section 3." (P. 23.)

The question thus is: under which of these categories does the present case fall? A further question is: has the review procedure pertaining to the category in question been exhausted?

35. Applicant argues that the ad hoc review was not a formal channel of review. The gist of the argumentation presented in the Applicant's Objection to the Fund's Motion for Summary Dismissal is that the discrimination review procedure was an informal exercise, rather than an established review channel, which was intended to be alternative, rather than prerequisite, to the review of claims by the Grievance Committee. The one-time ad hoc discrimination review was designed primarily to provide relief to staff members whose cases fell outside the jurisdiction of the Grievance Committee, e.g., as time-barred. There is no contemporaneous indication in the memoranda circulated by the Administration that by bringing a complaint to the ad hoc review a staff member would be entitled to pursue a dispute before the Grievance Committee that otherwise would be barred from its review. Applicant maintains that under Article V, Section 3(b), the channel of administrative review is deemed to have been exhausted by the decision of the Director of Administration denying the relief sought. Accordingly, Applicant contends, she has completed the required administrative review under Article V, Section 3, which applies "where the available channels of review do not include the procedure described in Section 2", and has properly filed her complaint with the Tribunal.

36. The Fund's Motion does not discuss the point whether Section 3 might apply, with the result that the claim would be admissible; it advocates dismissal of the claim on the ground that the Grievance Committee would have had jurisdiction to hear the case because the ad hoc review did not replicate or replace the grievance procedure.

> "The Fund has established a Grievance Committee for the purpose of considering individual complaints by staff members regarding the application of regulations and their conditions of service. That Committee has jurisdiction to hear challenges to both discretionary and non-discretionary decisions which fall under this rubric. Applicant has not appealed the review of the decision from the discriminatory [sic] review team to the Grievance Committee. That Committee has not had a chance to consider her complaint and issue a recommendation for final decision by the Managing Director as provided under GAO No. 31, Rev. 3, Sections 7.08 and 7.09, and therefore Applicant has not exhausted all available channels of administrative review."

37. As noted above, the admissibility of Applicant's claim depends, first, on the category in Article V in which it falls, and, second, on whether the exhaustion requirements applicable to that category have been met. Article V, Section 2 would apply if the Grievance Committee would have had jurisdiction over the claim. The Committee's jurisdiction, in the particular case, would be conditional upon its prior review requirements having been met.

38. The Fund could, presumably, have instituted a review procedure for past discrimination expressly stated to replace the jurisdiction of the Grievance Committee for those matters. That it did not do; to the contrary, the Fund on several occasions emphasized that the ad hoc review did not confer new rights, and did not replicate or replace the grievance procedure. The Fund also, in internal and external communications, contrasted the formal character of established review procedures with the informal character of the ad hoc procedure, presumably indicating thereby that the ad hoc review was not intended to be a replacement of any formal grievance procedure.

39. In order to assess the validity of the Fund's argument that after the decision of the Director of Administration sustaining the holding of no discrimination Applicant could have come to the Grievance Committee, it is useful to refer to the provisions of GAO No. 31, Rev. 3 which spell out the prior review requirements for a grievance. The hierarchy of officials a grievant must have approached and the time periods of each approach, in order to have exhausted the prior review requirements and have his or her claim admitted to the Grievance Committee, are listed.

40. The ad hoc review of Applicant's complaint did not go through the steps outlined in Section 6.02, 6.03, 6.04 and 6.05 of the GAO, and could not have done so, because the mandatory time periods for each of these steps had expired when the review was undertaken. The review procedure also did not involve any of the supervisory officials mentioned in the provisions referred to above. Instead, it involved an outside consultant and an official of the Administration Department, both outside the hierarchy that constitutes the channel of review within the meaning of the GAO, up to, but not including, the Director of Administration. However, since her decision was not a follow-up of the mandatory preceding steps, it should be considered as taken "directly" by the Director of Administration within the meaning of Section 6.06.

41. Article V of the Statute governs the exhaustion of remedies. Paragraph 1 of Article V generally prescribes that an Application may be filed with the Tribunal only after an Applicant has exhausted "all available channels of administrative review". Paragraph 2 treats established channels of administrative review including the Grievance Committee. Paragraph 3 treats channels of review that do not embrace such established channels. The ad hoc discrimination review procedure could be seen as an illustration of this latter possibility, but it is not clearly so indicated.

42. In the view of the Tribunal, the memoranda establishing the ad hoc discrimination review procedure and explaining that it was not meant to be in lieu of, and not meant to obviate recourse to, the Grievance Committee,

could have been more explicit. The lack of clarity on the point—and this is the distinguishing factor in this case—understandably may have led Applicant to conclude that exhaustion of Grievance Committee channels was not required in her case. However, it is the view of the Tribunal that exhaustion of the remedies provided by the Grievance Committee, where they exist, is statutorily required and that the memoranda in question do not exclude that requirement. Moreover, recourse to the Grievance Committee would have the advantage of producing a detailed factual and legal record which is of great assistance to consideration of a case by the Administrative Tribunal.

43. The Tribunal accordingly holds that Applicant has not exhausted the channels of administrative review as required by Article V of the Statute, and, therefore, that the Fund's Motion for Summary Dismissal is granted. Given the singular circumstances of this case, in the event that the Grievance Committee, if seized, should decide that it does not have jurisdiction over Applicant's claim, the Administrative Tribunal will reconsider the admissibility of that claim on the basis of the Application now before it.

Decision

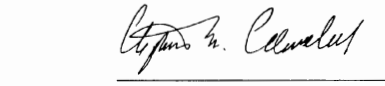
FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides:

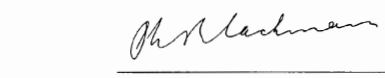
First, the Fund's Motion for Summary Dismissal is granted;

Second, the Administrative Tribunal will reconsider the Applicant's claim on the basis of the Application now before it, in the event that the Grievance Committee, if seized, decides that it does not have jurisdiction over that claim.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge



Stephen M. Schwebel, President



Philine R. Lachman, Registrar

Washington, D.C.
December 18, 1998

JUDGMENT NO. 1999-1

Mr. "A", Applicant v. International Monetary Fund, Respondent

(August 12, 1999)

Introduction

1. On August 11 and 12, 1999, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Agustín Gordillo, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "A", a former contractual employee of the Fund.

2. Mr. "A" contends that the Fund violated its internal law and principles of international administrative law when it engaged him on a contractual basis to perform functions of the same nature as those performed by staff members, renewed his contract several times over a continuous period of nine years, and then allowed his contract to expire. Applicant seeks as relief that he be installed as a member of the staff, retroactive to 1993, with all attendant rights and benefits.

3. The Fund has responded to Mr. "A"'s Application with a Motion for Summary Dismissal, contending that the Administrative Tribunal lacks jurisdiction *ratione personæ* and *ratione materiæ* over Applicant's claim because its Statute limits access to those individuals who are members of the staff and to those claims that challenge decisions taken in the administration of the staff. Applicant has filed an Objection to the Motion, arguing that the Fund's allegedly illegal classification of Applicant as a contractual employee, rather than as a member of the staff, should not determine whether the Tribunal has jurisdiction to decide the issue of that alleged illegality.

The Procedure

4. On April 16, Mr. "A" filed an Application with the Administrative Tribunal. In accordance with the Tribunal's Rules of Procedure, the Application

was transmitted to the Respondent on April 19, 1999. On April 22, 1999, pursuant to Rule XIV, para. 4[1], the Office of the Registrar issued a summary of the Application within the Fund.

5. On May 18, 1999, the Respondent filed a Motion for Summary Dismissal under Rule XII[2] of the Rules of Procedure, seeking dismissal of the Application for lack of jurisdiction under Article II, para. 1 and para. 2 a, b, and c.[3] On May 19, 1999, the Motion was transmitted to Applicant.

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[1]Rule XIV, para. 4 provides:

"In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund."

[2]Rule XII provides:

"Summary Dismissal

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.

2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.

3. The complete text of any document referred to in the motion shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VIII, paragraphs 2 and 3, shall apply to the motion.

4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Applicant.

5. The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him.

6. The complete text of any document referred to in the objection shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VII, Paragraphs 4 and 8, shall apply to the objection to the motion.

7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Fund.

8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests."

[3]Article II provides in pertinent part:

"1. The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or

b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.

2. For purposes of this Statute:

a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;

6. Under Rule XII, para. 5[4], the Applicant may file an Objection to a Motion for Summary Dismissal within thirty days from the date on which the Motion is transmitted to him. Applicant's Objection was filed on June 18, 1999.

7. The Tribunal decided on August 2, 1999 that oral proceedings, which Applicant had requested, would not be held, as the condition laid down in Rule XIII, para. 1[5] that they be "necessary for the disposition of the case" had not been met.

8. Pursuant to para. 2 of Rule XII, a Motion for Summary Dismissal suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. Hence, the present consideration of the claim is confined to the jurisdictional issues of the case. Its substantive aspects are referred to only to the extent necessary for disposition of the jurisdictional issues.

The Factual Background of the Case

9. Mr. "A" was initially engaged by the Fund as a consultant under its Technical Assistance Program for a two-year period commencing in January 1990. His letter of appointment provided:

> "You will not be a staff member of the Fund and will not be eligible for any benefits other than those specified in this letter."

It stated in addition:

> "This appointment can be terminated by you or the Fund on one month's notice, or by mutual agreement."

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b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;

c. the expression 'member of the staff' shall mean:

(i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;

(ii) any current or former assistant to an Executive Director; and

(iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund; . . . "

[4]Rule XII, para. 5 provides:

"The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him."

[5]Rule XIII, para. 1 provides:

"Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them."

This basic contract was renewed several times, and apart from increases in Mr. "A"'s remuneration, the terms of his appointment remained unchanged.

10. Applicant's contract also provided that he would keep the same working hours and accrue annual leave on the same basis as a regular staff member. Likewise, he would be entitled, on the same terms as regular staff, to participate in the Fund's medical benefits plan; to receive employer contributions to medical and group life insurance plans; and to be eligible for spouse and dependency allowances, travel allowance, and travel insurance coverage. Mr. "A"'s remuneration was stated on the basis of annual gross salary, and—unlike regular staff—the contract included the proviso that the Fund would not reimburse Applicant for any national, state or other taxes arising in respect of his remuneration.

11. Applicant was initially assigned to Department "1"[6], where he served until September 1993. There he headed missions; administered technical assistance for member countries; and commented on staff papers on behalf of the Department. Department "1"'s Director stated that in performing these functions, "Mr. ["A"] performed essentially the same work as the regular staff members who were Advisors in the Department during his tenure. . . ."

12. Mr. "A" asserts that when he was first recruited in December 1989, he was told both by an Advisor in Department "1" and by an official of the Recruitment Division of the Administration Department that if his work was satisfactory he could be converted to regular staff at the end of the initial two-year period. When he inquired with his Department Head in November 1991 about a regular staff appointment, Applicant alleges that he was told that he would have to continue for one more year before a decision could be made.

13. Later, according to Mr. "A", it was suggested to him that if he were interested in obtaining a permanent position with the Fund, he should undertake "mobility" within the organization. To that end, Applicant in May 1993 wrote to an official of Department "2", expressing his interest in transferring to that Department. Applicant was reassigned to Department "2" in October 1993, where he continued his work as a headquarters-based consultant under the Technical Assistance Program until his final contract expired in February 1999.

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[6]Pursuant to the IMFAT's Decision on the protection of privacy and method of publication (December 23, 1997), the Fund departments in which Applicant worked will be designated by numerals.

14. In Department "2", Applicant served as the only consultant among the five members of his profession in his unit. The official in Department "2" responsible for supervising Mr. "A"'s work stated:

> "Mr. ["A"]'s work was materially the same as work done by other headquarters based full-time consultants and regular IMF staff members alike, on [Applicant's area of expertise], including going on missions to IMF member countries and providing advice to their government or central bank officials, alone or together with other IMF staff, preparing mission reports and memoranda . . . , and commenting on behalf of [Department "2"] on papers prepared by staff of other IMF Departments."

One of Applicant's Department "2"colleagues concluded that Applicant "performed essentially the same function as his colleagues who are regular staff members" and acted as a representative of Department "2" "in a manner indistinguishable" from these staff. Another commented that Mr. "A" was a "fully integrated member of the Department".

15. According to Applicant, shortly before transferring to Department "2" in 1993, the official charged with coordinating his unit of that Department held out the prospect of Mr. "A"'s being promoted to a supervisory position following an anticipated retirement in the Department in 1998. In March 1998, however, Applicant's Department Head allegedly told him that that position would not be filled and that any vacancies in the Department for new regular staff would be lower level positions likely not to be of interest to Applicant.

16. In August 1998, Applicant's Department Head allegedly informed him that the Fund intended to end his contractual employment. By letter of September 14, 1998, Applicant received another extension of his contract, with the notation that "this will be the final extension of your contract". This final contract expired by its terms February 26, 1999.

17. Applicant sought redress through several channels before filing his Application with the Administrative Tribunal on April 16, 1999. On January 14, 1999, in a letter to the Fund's Director of Administration, Applicant attempted to invoke the administrative review procedures prerequisite to filing a grievance, and asked that the Fund "formally recognize my status as regular staff." The Director of Administration replied on January 25, 1999, advising Applicant that (1) the grievance procedures did not apply to contractual employees such as himself; and (2) while Applicant would be entitled to arbitration under the established procedure for dispute settlement for contractual employees, if he sought to invoke that procedure, the Fund would take the position that the decision not to extend his employment contract fell

outside the scope of the arbitration process, which is limited to claims that the Fund has failed to meet an obligation under the contract itself.

18. Thereafter, on February 4, 1999, Applicant requested that the Managing Director agree to submit the dispute directly to the Administrative Tribunal pursuant to Article V, para. 4[7] of the Statute. That request was denied on February 24, 1999. The following day, Applicant filed a submission with the Fund's Grievance Committee, challenging the Fund's decision not to renew his contract and seeking that his status be converted to regular staff. On March 1, 1999, the Grievance Committee's Chairman replied, stating that recourse to the grievance procedures of GAO No. 31 are not available to contractual employees such as Applicant,[8] and noting also that a decision not to extend the contract of a contractual employee does not fall within the scope of the Fund's arbitration procedures.[9]

Summary of Parties' Principal Contentions

Applicant's principal contentions

19. The principal arguments presented by Applicant in his Application and his Objection to the International Monetary Fund's Motion for Summary Dismissal are summarized below.

Applicant's contentions on the merits

20. The Fund's categorization of Applicant's employment status as a "contractual employee" is arbitrary and belies the actual nature of his work.

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[7]Article V, para. 4 provides:

> "For purposes of this Statute, all channels of administrative review shall be deemed to have been exhausted when the Managing Director and the applicant have agreed to submit the dispute directly to the Tribunal."

[8]GAO No. 31, Section 7.01.1(i) limits the Grievance Committee's jurisdiction in terms almost identical to those of Art. II of the Statute of the Administrative Tribunal.

GAO No. 31, Section 7.01.1(i) provides:

> "7.01 *Who May Submit a Grievance*
>
> 7.01.1 *Present and Former Staff Members.* Any present or former staff member shall have access to the Grievance Committee. For this purpose, the expression 'staff member' shall mean (i) any person currently or formerly employed by the Fund whose letter of appointment, whether regular or fixed-term, states or stated that he or she shall be a member of the staff; . . . "

[9]The Grievance Committee Chairman presently also serves as the designated arbitrator for the Fund's contractual employees.

21. The Fund's termination of its employment relationship with Applicant is contrary to the Fund's Employment Guidelines on staff appointments under which he should have been categorized as a regular staff member. The position occupied by Applicant supported the basic institutional mission of the Fund; the basic skills required were those that do not change dramatically over a short period of time; and there was a need for continuity among staff performing these tasks. Contractual appointments, by contrast, are reserved by the Guidelines for the filling of temporary needs requiring specialized skills that Fund staff does not possess or for which there is not a continuing need.

22. Principles of international administrative law require that international organizations not classify as an independent contractor an individual doing the work of an employee when that classification does not reflect the actual relationship of the parties.

23. On a number of occasions the Fund created and then disappointed Applicant's expectations of continued employment, on which he relied to his detriment.

24. Equity requires that Applicant's employment with the Fund not be terminated, as the expiration of his contractual appointment and associated medical insurance is a particular hardship to Applicant who must provide coverage for an ailing family member.

25. Applicant seeks the following relief: a) conversion of his status to regular staff as of January 2, 1993; b) "reinstatement" as a regular staff member with all attendant rights, privileges and benefits; c) the right to seek another Fund position if reinstatement in Department "2" is refused; d) severance pay "if no other position materializes"; e) retroactive payment for long-term service annual leave days; f) participation in the Fund's retirement program when he departs from the Fund; and g) such other relief as the Tribunal deems appropriate.

Applicant's contentions on jurisdiction

26. The Fund's classification of Applicant as a contractual employee was an arbitrary administrative act that ignores the facts and should not determine the exercise of the Tribunal's jurisdiction. The argument that the Tribunal does not have jurisdiction because Applicant was not a staff member presumes as true the very fact at issue.

27. The Tribunal should exercise jurisdiction over Applicant's claim because, if it does not, he will have no opportunity for review on the merits by any impartial adjudicatory body.

28. The international administrative law doctrine of *audi alteram partem*, i.e. every disputant is entitled to be heard, which is incorporated into the internal law of the Fund, requires that the Tribunal exercise jurisdiction over Applicant's claim.

Respondent's contentions set forth in its Motion for Summary Dismissal

29. The Application should be dismissed as irreceivable because the Tribunal has jurisdiction only over "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff" (Article II, para. 2.c.(i)). Applicant does not fall within this category of persons because his letter of appointment provided that he would not be a member of the staff. This limitation on the Tribunal's jurisdiction is both explicit and intentional.

30. The Application should be dismissed as irreceivable because the Tribunal's jurisdiction is limited to challenges to decisions "taken in the administration of the staff of the Fund" (Article II, para. 2.a.) and therefore precludes judicial interference with the recruitment and selection of Fund staff.

31. The IMFAT is a tribunal of limited jurisdiction. Article III[10] makes clear that the Tribunal shall not have any powers beyond those conferred under the Statute. Therefore, it has no general jurisdiction based on equity or any other grounds not expressly provided for by the Statute.

32. The remedy sought by Applicant, retroactive appointment to a regular staff position, is not contemplated by the IMFAT Statute and would undermine the Fund's employment regime.

33. The dual employment scheme of contractual and regular staff exists for legitimate organizational reasons, providing flexibility with respect to the deployment of human resources.

34. Applicant is bound by the terms and conditions of his letter of appointment as a contractual employee. The Fund must be able to rely on the terms of employment contracts as they are written and agreed upon.

35. The Fund's Employment Guidelines on categories of employment are guidelines to assist Fund departments and the Recruitment Division; they do

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[10] "*Article III*
The Tribunal shall not have any powers beyond those conferred under this Statute. . . ."

not give rise to a legal entitlement on the part of an individual that he or she be appointed to the staff.

36. Applicant's appointment as a contractual employee was not subject to the procedural and substantive conditions required for appointment to a staff position, and therefore his claim that he should be classified retroactively as a staff member bypasses the prerequisites for career appointment, including that of due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

Consideration of the Issues of the Case

Categories of Fund employment

37. Three principal categories of employment exist within the Fund: staff appointments (both regular and fixed-term); contractual appointments; and vendor arrangements. The gravamen of Mr. "A"'s complaint is that, although he was employed on a contractual basis, the nature and continuity of his work indicate that he should have held a staff appointment of indefinite duration.[11]

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[11]Within the Fund, the classification "staff appointments" encompasses two sub-categories: appointments of finite duration ("fixed-term staff") and appointments of indefinite duration ("regular staff"). These are set forth in GAO No. 3, Rev. 6 (May 1, 1989) (Employment of Staff Members):

> "Section 3. *Types of Appointments*
>
> 3.01 *Regular Appointments*. Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members.
>
> 3.02 *Fixed-term Appointments*. Fixed-term appointments shall be appointments for a specified period of time. Persons holding fixed-term appointments shall be designated as fixed-term staff members."

Fixed-term appointments are generally used as a probation to test employees who are seen as having potential for a career with the Fund. Conversion to regular status depends on individual performance and the staffing needs of the organization. (Guidelines for Conversion of Fixed-Term Appointments.)

It is not disputed that both fixed-term and regular staff are within the definition of "member of the staff" for purposes of the jurisdiction *ratione personæ* of the Administrative Tribunal, which includes "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff." (Statute, Art. II, 2.c(i).) In *Ms. "C", Applicant v. International Monetary Fund, Respondent*, Judgment No. 1997-1 (August 22, 1997), the Tribunal entertained a challenge to the Fund's decision not to convert a fixed-term appointment to a regular staff appointment.

Applicant has made certain assertions apparently designed to suggest that he initially held a "fixed-term" rather than a "contractual" appointment with the Fund, thereby

38. The Fund has adopted Guidelines, in 1989 and again in January of this year, designed to clarify the allocation of functions among staff members, contractual employees and vendor personnel. The 1989 Guidelines distinguish between staff and contractual appointments as follows. Positions that normally should be filled by staff members are those carrying out the basic institutional mission of the Fund; those supporting that mission and requiring skills that will not change dramatically over a short period of time and for which there is a need for continuity of staff; those in which the individual is required to act on behalf of the Fund; and those involving supervisory responsibilities. By contrast, positions that normally are to be filled on a contractual basis are those in which the Fund has little or no expertise, or the skills required are likely to change dramatically over time, and continuity within the staff performing these tasks is not critical to their effective performance, as well as positions in which services are needed for only a relatively short period of time. According to the 1989 Guidelines, contractual appointees and vendor personnel generally should not perform the same tasks as staff members, except on a short-term basis or where individual circumstances warrant.

39. The Fund in its Motion for Summary Dismissal maintains that these Guidelines are intended to provide guidance to the Recruitment Division and Fund departments, but that they do not give rise to any legal entitlements on the part of individuals. The Fund's Motion, nonetheless, echoes the Guidelines' basic principles:

> "Appointments to the regular staff are intended to meet the long-term needs of the organization; in comparison, contractual employment is more flexible, in order to meet a particular work requirement, often in a specialized area for which there may be no long-term need."

The Fund also notes that " . . . staff members and contractual employees are both considered as employees of the Fund. . . ."

40. According to Respondent, the employment of staff and contractual employees differs with regard to a number of factors. For example, with respect to recruitment, no constraints exist regarding the geographical dis-

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providing a predicate for his request for relief—conversion to regular staff as of January 2, 1993. These assertions are not borne out by the terms of his contract or by the fact that his performance was regularly evaluated by way of the "Contractual Appointments Performance Report" rather than the Annual Performance Reports completed for "staff", fixed-term and regular alike. Applicant's reliance on the Guidelines for Conversion of Fixed-Term Appointments is misplaced; and, furthermore, any complaint that Mr. "A" should have been converted to regular staff as of January 1993 would now be untimely.

tribution of contractuals. Likewise, these employees are not subject to a competitive appointment process. With regard to compensation, greater flexibility is afforded to contractual employees, who are exempt from the salary structure that governs the remuneration of members of the staff.

41. In addition, staff members are subject to the strictures of the Fund's N Rules which, for example, restrict staff in engaging in political activity and outside employment, whereas contractual employees are not. Finally, staff members and contractuals have access to different avenues of dispute resolution: contractual employees have recourse to an arbitration procedure, while staff have access to the grievance procedure and the Administrative Tribunal.

42. In Department "2", asserts the Fund, Applicant provided technical assistance ("TA") functions as a contractual employee " . . . because the long-term need for these functions, and the particular . . . specialities in question, is uncertain; the use of contractual employees permits sufficient flexibility to adjust to changes in the demand for TA services by member countries". The Fund also points out that contractual employees performing TA services in Department "2" do not receive the same training, supervisory authority or career development opportunities as do members of the staff.

43. The appropriate allocation of personnel functions among the various categories of Fund employment has long been a matter of some controversy within the Fund[12] and presently is undergoing revision. Both the adoption of the 1989 Guidelines and the revised Policy on Categories of Employment[13] approved January 20, 1999 by the Fund's Executive Board have been prompted by concerns that contractual and vendor personnel may be performing functions for which there is a long-term need and that should be performed by Fund staff. The Fund in its Motion for Summary Dismissal acknowledges "anomalies in the current system of contractual employment", but maintains that these difficulties must continue to be addressed on a systemic basis rather than through the litigation of individual cases.

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[12]For example, the Fund's Ombudsperson has referred to " . . . the arbitrary and unfair treatment of contractual and vendor employees as a major systemic problem at the Fund. . . ." (Nineteenth Annual Report of the Ombudsperson, December 10, 1998, pp. 7–8.)

[13]The 1999 revised Policy limits the cumulative duration of contractual appointments to a four-year maximum. While functions that are expected to be needed for two years or more are normally to be performed by employees on staff appointments, the Policy maintains flexibility with respect to headquarters-based TA experts, for whom individual circumstances may justify hiring on a contractual basis for more than two years. (Policy on Categories of Employment, January 20, 1999.)

The Administrative Tribunal's jurisdiction ratione personæ

44. In its Motion for Summary Dismissal, the Fund contends that the Application should be dismissed as irreceivable on the grounds that, as a former contractual employee, Mr. "A" does not have standing to bring a case before the Administrative Tribunal. Therefore, argues the Fund, Applicant is not within the Tribunal's jurisdiction *ratione personæ*.

45. The Tribunal's jurisdiction *ratione personæ* is prescribed by the following provision of Article II of the Statute:

> ***"Article II***
>
> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> a. by a member of the staff challenging the legality of an administrative act adversely affecting him;
>
> . . .
>
> 2. For purposes of this Statute:
>
> . . .
>
> c. the expression 'member of the staff' shall mean:
>
> (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;
>
> (ii) any current or former assistant to an Executive Director; and
>
> (iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund;"

46. The question presented, therefore, is whether Applicant is a "person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff". (Art. II, para. 2.c.(i).) As noted above, Applicant's contract of employment expressly provided:

> "You will not be a staff member of the Fund and will not be eligible for any benefits other than those specified in this letter."

47. The Fund points out that exclusion of contractual employees from the Tribunal's jurisdiction is not only explicit, but also intentional. The Report of the Executive Board accompanying the Tribunal's Statute notes with respect to Article II:

> "Nor would persons employed under contract to the Fund have access to the tribunal."

(Report of the Executive Board, p. 15.) This view finds further support in the Statute's legislative history, which suggests that the exclusion of contractual employees from the Tribunal's jurisdiction *ratione personæ* was a considered choice of its drafters, reflecting a recognition that a separate dispute settlement mechanism exists for resolution of disputes with contractual employees. These disputes are likely to be of a different character than those with members of the staff, as their employment is governed by the terms of their contracts. By contrast, the terms and conditions of staff members' employment are fixed by the Fund's generally applicable regulations.[14]

48. Finally, it should be noted that the statutory provision defining the IMFAT's jurisdiction *ratione personæ* appears to be unique among international administrative tribunals in expressly predicating the Tribunal's jurisdiction on the language of the letter of appointment, thereby leaving little room for doubt as to whether a particular individual is or is not a "member of the staff".[15] Applicant, nonetheless, has asked the Tribunal to look beyond the language of his letter of appointment to determine that he was a "de facto" member of the staff entitled to bring his complaint to the Administrative Tribunal.

The Administrative Tribunal's jurisdiction ratione materiæ

49. Respondent also contends that the Application should be dismissed as not falling within the Tribunal's jurisdiction *ratione materiæ*.

50. Article II limits the IMFAT's subject matter jurisdiction to challenges by a staff member to "the legality of an administrative act adversely affecting him". (Art. II, para. 1.a.) "Administrative act" is defined as follows:

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[14]GAO No. 3, Rev. 6 (May 1, 1989) Section 7.02(3) provides that the letter of appointment of each staff member shall include *inter alia:*

> "The statement that the staff member shall be subject to the Fund's administrative regulations, as amended and supplemented from time to time."

[15]For example, the jurisdictional provision of the Asian Development Bank Administrative Tribunal, which is also quite narrowly drawn, is not as explicit as that of the IMFAT. It provides:

> "For the purpose of this statute, the expression 'member of the staff' means any current or former member of the Bank staff who holds or has held a regular appointment or a fixed-term appointment of two years or more, . . . " (Statute of the ADBAT, Art. II, para. 2.)

"Article II

. . .

2. For purposes of this Statute,

a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;"

The accompanying Report of the Executive Board comments:

> "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."[16]

(Report of the Executive Board, p. 14.)

51. The limitations on the Tribunal's jurisdiction *ratione personæ* and *ratione materiæ* appear to be closely intertwined. By the terms of the Statute, actions constituting "administrative acts" are defined as restricted to those taken in the administration of the "staff". Hence, Fund actions taken with respect to others, for example, contractuals, are outside the scope of the Tribunal's jurisdiction *ratione materiæ*. Moreover, the "administrative act" at issue must adversely affect the "member of the staff" bringing the challenge to its legality. (Art. II, para. 1.a.)

52. The Fund notes the following comment in the Executive Board Report:

> "The statute would not allow unsuccessful candidates to the staff to bring claims before the tribunal."

(Report of the Executive Board, p. 15.) On the basis of this comment, the Fund argues that the Statute's jurisdictional provisions preclude "judicial interference with the recruitment and selection of staff" and that "staff appointments are not within the Tribunal's competence *ratione materiæ*."

53. In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, Judgment No. 1996–1 (April 2, 1996), the IMFAT had occasion to consider the scope of its jurisdiction over matters preliminary to the hiring of a member of the staff. Although the Tribunal framed the question as one of jurisdiction *ratione personæ*, the decision is relevant to the issue of jurisdiction *ratione materiæ* as well.

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[16] The By-Laws, Rules and Regulations of the Fund contain a Section N, "Staff Regulations", which sets out fundamental provisions governing recruitment and performance of staff members.

54. In *D'Aoust* there was no question that the applicant was a member of the staff. Nonetheless, at the time of the act complained of, i.e. the decision to offer him a particular grade and salary, he was not yet a staff member. The Tribunal observed that once Mr. D'Aoust accepted the offer and thereby became a member of the staff, the grade and salary under which he was employed were determined by that offer:

> "It is therefore concluded that since the offer and acceptance of a particular grade and salary thereupon and thereafter affected him as a member of the staff, the Tribunal is competent to adjudge his case." (Para. 10.)

55. The Tribunal's decision in *D'Aoust* reveals that decisions taken by the Fund preliminary to an applicant's becoming a staff member may indeed be within the Tribunal's competence *ratione materiæ* as long as the challenged act affects the adversely affected individual in his capacity as a member of the staff. Mr. "A", by contrast, has never become a member of the Fund's staff.[17]

The Administrative Tribunal as a tribunal of limited jurisdiction

56. In considering the issue of jurisdiction in this case, the Tribunal is mindful that international administrative tribunals are tribunals of limited jurisdiction and may not exercise powers beyond those granted by their statutes. This principle is enunciated in the first sentence of Article III of the IMFAT's Statute, which states:

> ***"Article III***
>
> The Tribunal shall not have any powers beyond those conferred under this Statute. . . ."

According to the Report of the Executive Board:

> "The first sentence of this Article, in providing that the powers of the tribunal are limited to those set forth in the statute, states the general principle recognized in international administrative law that tribunals have limited jurisdiction rather than general jurisdiction.[5] As a consequence, administrative tribunals have competence only to the extent that their statutes or governing instruments confer authority to decide disputes. Thus, the statutory provision defining the competence of the tribunal is, at

[17]In this respect, Applicant's case is distinguishable from that considered in *Jorge O. Amora v. Asian Development Bank*, Asian Development Bank Administrative Tribunal ("ADBAT") Decision No. 24 (1997), in which the applicant had already become a staff member before bringing a claim that he was entitled to the benefits of staff membership for a period preceding his appointment to the staff.

the same time, a prohibition on the exercise of competence outside the jurisdiction conferred.

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[5]See, e.g., the advisory opinion of the ICJ concerning the competence of the ILOAT in *Judgments of the Administrative Tribunal of the International Labour Organisation*, ICJ Reports (1956) 77, at p. 97."

(Report of the Executive Board, p. 16.)

57. Article IV of the Statute applies this general limitation on the IMFAT's powers to the specific issue of the Tribunal's competence to adjudge particular cases. While granting the Administrative Tribunal power to decide issues regarding its own competence, Article IV requires that these be settled "in accordance with this Statute":

"Article IV

Any issue concerning the competence of the Tribunal shall be settled by the Tribunal in accordance with this Statute."

The commentary notes that the Tribunal's task is to "interpret but not expand" its statutory authority:

"The tribunal would have the authority to determine its own competence within the terms of its statute. Comparable authority has been accorded to virtually every international administrative tribunal,[14] which is intended to allow the tribunal to interpret but not expand its competence with respect to a particular case.

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[14]E.g., UNAT Statute, Article 2(3); ILOAT Statute, Article II(7); WBAT Statute, Article III."

(Report of the Executive Board, p. 21.)

58. Finally, other limitations on the jurisdiction of the IMFAT are set forth in the third sentence of Article III, which provides for distribution of power among the Administrative Tribunal and the legislative and executive organs of the Fund, and in Article XIX, which grants to the Board of Governors the power to amend the Tribunal's Statute.

The third sentence of Article III provides:

"Article III

. . .

Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund."

The commentary emphasizes that the Tribunal " . . . must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization."[18]

59. That the Administrative Tribunal may not exercise powers beyond those conferred on it by the Statute is underscored by the fact that the IMFAT's Statute was adopted by the Board of Governors of the Fund (Resolution No. 48–1, Establishment of the Administrative Tribunal of the International Monetary Fund), and Article XIX provides that it may be amended only by that body:

"Article XIX

This Statute may be amended only by the Board of Governors of the Fund."

The accompanying commentary states:

> "This provision is similar to its counterpart in the WBAT Statute. It would thus remain open to the Board of Governors, as the organ responsible for formally authorizing the establishment of a tribunal and approving the statute, to amend or abrogate the statute of the tribunal after its establishment. In this fashion, the nature of the judicial function performed by the tribunal could be limited or altered with respect to future cases."

(Report of the Executive Board, p. 41.)

Does the nature of Applicant's allegation on the merits require the Tribunal to exercise jurisdiction in this case?

60. The principal issue raised by this case is whether the nature of Applicant's allegation on the merits, i.e. that he was illegally classified as a con-

[18]"The third sentence of Article III incorporates, as part of the governing instrument of the tribunal, the concept of separation of power between the tribunal, on the one hand, and the legislative and executive organs of the institution, on the other hand, by stating that the establishment of the tribunal would not in any way affect the authority conferred on other organs of the Fund under the Articles of Agreement. This provision would be particularly significant with respect to the authority conferred under Article XII, Section 3(a), which authorizes the Executive Board to conduct the business of the Fund, and under Section 4(b) of that Article, which instructs the Managing Director to conduct the ordinary business of the Fund, subject to the general control of the Executive Board.

This provision is consistent with well-established case law in which judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred. [Footnote omitted.] Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions. [Footnote omitted.]"
(Report of the Executive Board, p. 20.)

tractual employee when he should have been hired as a member of the staff of the Fund, requires the Administrative Tribunal to exercise jurisdiction over his claim even though its jurisdiction *ratione personæ* is limited to claims brought by members of the staff and its jurisdiction *ratione materiæ* is limited to challenges to the legality of decisions taken in the administration of the staff.

61. As reviewed above, the terms of the Statute's jurisdictional provision expressly define a "member of the staff" as "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff" (Art. II, para. 1.a.) and Applicant's letter of appointment expressly states that he "will not be a staff member of the Fund". Nonetheless, Applicant asks the Tribunal to look beyond the language of his letter of appointment to determine that he was a "de facto" member of the staff. He contends, furthermore, that the view that the Tribunal does not have jurisdiction because Applicant was not a staff member presumes as true the very fact at issue. Applicant argues that the Fund's allegedly illegal classification of him as a contractual employee should not control the exercise of the Tribunal's jurisdiction.

62. On the Motion for Summary Dismissal, the question before the Administrative Tribunal is whether it shall exercise jurisdiction in this case. In making this determination, the Administrative Tribunal is presented with two alternatives. One is to enforce the language of the contract and deny jurisdiction on the basis of the narrowly drawn wording of the IMFAT Statute and the express language of Applicant's letter of appointment. The other alternative is for the Tribunal first to examine the merits of Applicant's claim, i.e. that he should be accorded the benefits of staff membership based on the nature and continuity of his work, and then decide as the result of that examination whether it may exercise jurisdiction *ratione personæ* and *ratione materiæ*, despite the language of the letter of appointment to the contrary.

Must the Administrative Tribunal reach the merits of Applicant's claim in order to decide whether to exercise jurisdiction or may it rely on the language of Applicant's letter of appointment and the applicable jurisdictional provision of the Statute?

63. Other international administrative tribunals, interpreting different jurisdictional provisions, on occasion have determined that it was necessary to consider the merits of a claim in order to determine whether to exercise jurisdiction. In *Joel B. Justin, Applicant v. The World Bank, Respondent*, World Bank Administrative Tribunal ("WBAT") Decision No. 15 (1984), the WBAT

was seized by an application alleging breach of contract, brought by an individual who had been notified of his "selection" for a particular post, but who later was denied employment by the Bank on the basis of his age and medical condition. The WBAT considered that:

> "23. The question whether or not the Applicant holds a contract of employment with the Respondent and, therefore, is a staff member under Article II of the Statute can be decided only after a substantive consideration of the case. . . ."

64. The WBAT concluded after a detailed examination of the factual circumstances, principles of contract law, and the Bank's personnel practices that a contract with applicant had, in fact, been formed but that it later came to an end when he was officially informed that he was no longer eligible for the appointment. (Para. 39.) Hence, *Justin* is significant not only because the tribunal chose to examine the merits of the case in order to determine its jurisdiction but also because it determined to exercise jurisdiction over the claim even though applicant never actually became employed with the Bank.

65. A similar approach was taken by the International Labour Organisation Administrative Tribunal ("ILOAT") in *In re Labarthe*, ILOAT Judgment No. 307 (1977). The ILOAT noted the congruence of the jurisdictional question and the question on the merits:

> "If the complainant does establish that he has such a contract, it is not disputed that in the circumstances of this case his claim must succeed. Thus, the issue between the parties on jurisdiction is also the issue between them on the merits, and it is convenient to deal with it under the latter head." (Para. 4.(d).)

After examining the facts, the tribunal found that a contract had existed to appoint applicant to the post and awarded compensation for its breach.

66. The same approach was taken by the United Nations Administrative Tribunal ("UNAT") in *Camargo v. The Secretary-General of the United Nations*, UNAT Judgement No. 96 (1965), although with different results:

> "The question whether or not the Applicant must be regarded as the holder of a contract of employment with the United Nations can therefore be decided only after a substantive consideration of the case, which it is incumbent on the Tribunal to carry out." (P. 87.)

In *Camargo*, the UNAT decided that the applicant had not made a valid acceptance of a valid offer of employment and therefore was not the holder of a contract of employment. (P. 88.)

67. While international administrative tribunals thus occasionally have found it necessary to examine the merits of a case before determining whether to exercise jurisdiction, there is also support for the view that jurisdiction may be denied on the basis of the language of the applicant's contract of employment and the applicable statutory provision. In addition, some decisions have rejected on the merits claims that contractual employees have employment rights beyond those prescribed by their contracts. Still others have come to the opposite conclusion, sometimes taking a broad view of jurisdictional prerogatives.

68. In *In re Privitera*, ILOAT Judgment No. 75 (1964), the applicant sought "restoration of his rights as a staff member" after he received notice that the organization did not intend to offer him a third contract on the expiry of his second. The ILOAT observed that the applicant's legal status was defined by his contract, which stipulated "the present contract does not confer upon the holder the title of official of the World Health Organization" (para. 2.) and declined jurisdiction. The tribunal emphasized:

> "2. In order to determine, in the present case, the legal nature of the relations between the complainant and the Organisation, only the contract concluded between them on 27 December 1961 must be taken into account. The complainant signed this contract voluntarily and with full knowledge of its terms. . . ."

69. It should be noted that in *Privitera*, unlike the case presently before the IMFAT, the applicant apparently alleged no factual basis for his claim of staff status, apart from the fact that previously he had held a contract governed by the Staff Rules. The tribunal observed that the contract at issue was of a "special character" and the " . . . tasks entrusted to the complainant were outside the scope of the normal functions of the Organisation and were connected with an exceptional, as well as a temporary, mission." (Para. 3.)

70. In *In re Darricades*, ILOAT Judgment No. 67 (1962), the ILOAT also denied jurisdiction on the basis of the language of a contract of employment and the applicable statutory provisions. In that case, the tribunal had occasion to interpret the following provisions of Article II of its Statute:

> "1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.
>
> . . .
>
> 5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials

> and of provisions of the Staff Regulations of any other intergovernmental international organization approved by the Governing Body which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure."

71. In *Darricades,* the applicant's employment relationship was with UNESCO rather than with the ILO. Hence, the ILOAT was required to apply the Staff Regulations and Rules of that agency in deciding the matter of the tribunal's jurisdiction. These Staff Regulations and Rules granted the right to appeal to the Administrative Tribunal to a "staff member", defined as " . . . a person engaged by the Director-General other than . . . a person specifically engaged for a conference or meeting." (Para. 1.) In denying jurisdiction over applicant's complaint, the ILOAT enforced this specific definition of "staff member", finding that the evidence confirmed that the applicant entered the service of UNESCO "solely and specifically" for the duration of a month-long meeting. The tribunal noted as well that the contract of appointment had specified that "the undersigned shall not be regarded as a staff member". The ILOAT concluded that the applicant was "a purely casual employee" and not subject to its jurisdiction. (Para. 2.)

72. In *In re Amezketa,* ILOAT Judgment No. 1034 (1990), the tribunal considered the complaint of an applicant who formerly had been employed under a series of "special services agreements" and later became a staff member. Following abolition of his post, applicant complained that the amount of his termination indemnity and pension entitlements improperly excluded his periods of service under the special services agreements. The tribunal dismissed his claims on the merits.

73. Although no jurisdictional issue arose in *Amezketa,* presumably because he was a staff member at the time his employment was terminated, the case is instructive in upholding the terms of the employment agreements despite claims that the agreements were a "legal fiction" unsuited to the functions applicant was performing. (Under the agreements, he had been employed as a teacher of Spanish; as a staff member, he was a "language-training officer".) In rejecting applicant's contentions, the ILOAT noted that any rights arising during applicant's period of service under the special services agreements were limited to those set forth in the agreements themselves, and that disputes thereunder were subject to arbitration procedures:

> "3. . . .Under the provisions of Section 319 of the FAO Administrative Manual the holder of a special services agreement is referred to as a 'subscriber'. A subscriber is not considered to be a staff member, and the Staff Regulations and Staff Rules do not apply to him: his rights and obligations as such

> are strictly limited to the terms and conditions set out in the agreement and any dispute that may arise is to be settled by arbitration."

74. In *Teixeira v. The Secretary-General of the United Nations*, UNAT Judgement No. 233 (1978), the applicant sought a ruling from the tribunal that "he had in fact become a staff member" of the employing organization, while it had, for improper purposes, continued to employ him under a special service agreement even though he performed work that formed part of the normal functioning of the organization. Jurisdiction over Teixeira's complaint had been established in an earlier decision, *Teixeira v. The Secretary-General of the United Nations*, UNAT Judgement No. 230 (1977). In that decision, the UNAT ruled that because the applicant claimed certain rights under the Staff Regulations and Rules, the dispute could be heard by the consent of the parties " . . . without [the tribunal's] affirmation of its competence leading to the conclusion that the Applicant is a staff member or former staff member of the United Nations". (Para. IV., citing, *inter alia, Camargo.)*

75. In its decision on the merits, the UNAT rejected Teixeira's attempt to " . . . use his factual situation as an argument to claim a legal status different from his contractual status." (Para. IV.) In so deciding, the tribunal noted that the applicant shared responsibility with the organization for his contractual status and that the contract itself expressly deprived him of staff member status:

> "II. The Tribunal notes that the Applicant himself at least contributed to the creation and renewal of that situation by agreeing to conclude with the Administration, during a period of almost 10 years, special service agreements under which he accepted the legal status of an independent contractor and expressly and unambiguously waived being 'considered in any respect as being a staff member of the United Nations.'
>
> III. . . . On this point, it suffices for the Tribunal to observe that in law the Applicant was free to refrain from entering into those agreements. . . ."

76. The tribunal reached its conclusion despite noting the organization's acknowledgement that use of the special service agreements in applicant's case was contrary to its own personnel directives; the agency for which the applicant worked had been unable to obtain the necessary funding from Headquarters to offer him a regular post and hence continued to have recourse to these agreements. In the tribunal's view, however, applicant had not shown that he was adversely affected by this improper practice:

> "VI. . . . although improper, this practice, which is criticized by the Applicant, was favourable to him, since it enabled him to continue rendering services and receiving remuneration.

. . .

VIII. In these circumstances, the Tribunal considers that the Applicant is not entitled to claim that he sustained any injury. . . ."

The tribunal therefore rejected the claim that the applicant was treated unequally vis-à-vis staff members with respect to his remuneration, right to rest, or social security. (Para. XI.) Claims of unequal treatment, noted the tribunal, could be made only vis-a-vis other individuals employed on special service agreements. (Para. X.) The UNAT did, nonetheless, award a termination indemnity based on Teixeira's length of service and the quality of his work. (Para. XII.)

77. In *In re Bustos*, ILOAT Judgment No. 701 (1985), by contrast, the ILOAT took a different view, looking beyond the language of a continuous series of short-term employment contracts renewed over a period of eleven years between the applicant and the Pan American Health Organization (PAHO), holding that these formed a single contract of indefinite duration.

78. The organization challenged the tribunal's jurisdiction on the grounds that the applicant was an independent contractor whose contract expressly stated that it was "a lease of work and not a relation of subordination". (Para. 4.) The tribunal chose not to answer the question of whether the true relationship of the parties was as an "independent contractor" or as "master and servant", observing that there were facts supporting either view. (Para. 6.) Instead, it took a broad view of its jurisdictional mandate, declaring that jurisdiction need not depend on staff membership, but rather could be exercised here because applicant's link with the organization was "more than a purely casual one":

"1. The Organization objects to the jurisdiction of the Tribunal on the ground that the complainant was never a staff member. But in the jurisprudence of the Tribunal its jurisdiction does not depend upon staff membership. In re Chadsey (Judgement 122) the Tribunal said:

'While the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognized so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently may not lawfully be ignored in individual contracts. This applies in particular to the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.'

> The facts hereinafter set out show that the complainant's link with the Organization was more than a purely casual one. Accordingly the objection is overruled."

79. The ILOAT framed the question on the merits in *Bustos* as "whether the relationship between the parties was truly expressed by a series of separate contracts for fixed periods or whether it could be properly expressed only by a single contract for an indefinite period" (para. 6.), and answered as follows:

> "9. The mutual intention, formed . . . was that the complainant should be employed for as long as his services were required and he was willing to give them. To an agreement of such character the law adds the term that reasonable notice of termination must be given. . . ."

80. It should be noted that in *Bustos* the tribunal awarded compensation, but did not order retroactive reinstatement as the applicant had sought. Likewise, it rejected the claim that compensation should be assessed as a sum equal to the difference between the amount he received during the contract period and that which he would have received as a regular employee, noting that "[t]he Tribunal has no power to reconstruct the contract retroactively nor to reform the version of it in which until its termination the complainant acquiesced." (Para. 11.)

81. The ILOAT in *Bustos* also underscored the exceptional nature of its decision to override the express language of the short-term contracts under which the applicant had been engaged:

> "5. The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties—or at any rate the party which is in a position to formulate the document—do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties—or at any rate the stronger of them—do not wish to face. . . . In the circumstances in which the parties to the present case operate, the situation might be that the parties—or one or other of them—do not wish the contracts to be governed by the Staff Regulations: the easiest way of achieving that is for the parties to exhibit in the document a relationship which does not make the employee a staff member. . . .
>
> . . .
>
> 10. The present case is of a very exceptional, if not unique, character. It can only be very rarely indeed that a case comes before the Tribunal in which it

> will look behind the documents to ascertain the intention of the parties. . . . In any event the Tribunal's decision does not affect short-term appointments in general."

82. Finally, in *Jorge O. Amora v. Asian Development Bank*, Asian Development Bank Administrative Tribunal ("ADBAT") Decision No. 24 (1997), the ADBAT also looked behind the express language of a contract of employment to afford the applicant the benefits of staff membership. In *Amora*, the applicant worked from 1979 until 1993 under a series of contractual agreements, until he was appointed as a regular staff member in 1993. Upon reaching mandatory retirement age in 1995, he sought retirement and other benefits on the basis of his service dating back to 1979. The tribunal upheld his claims.

83. Among the terms of Amora's contracts of employment were the following provisions:

> "'Nothing contained in the terms and conditions herein . . . shall be construed as establishing or creating any relationship other than that of independent contractor between the Bank and [him].'
>
> '[He] shall not be entitled to any compensation, allowances, benefits or rights from or against the Bank other than expressly provided therein. . . .'"

(Para. 3.) Nonetheless, examining the facts, the tribunal held that the applicant had been a staff member in regular employment of indefinite duration since 1979 and, as such, could not be excluded from the benefits of staff membership. Hence, the ADBAT declared the above clauses of the contract "inoperative". (Para. 44.) The tribunal explained its decision as follows:

> "22. Usually, a contract signed by the parties is binding upon them. There are, however, some circumstances in which a contract may be set aside or varied by a competent tribunal. This happens, for example, when the contract fundamentally disregards reality.
>
> 23. It is the Tribunal's conclusion that in the present case, the MOAs [Memoranda of Agreement] did not reflect the true relationship between the Bank and the Applicant.
>
> . . .
>
> 27. The Tribunal holds that recourse to successive short-term or temporary contractual appointments to jobs which are essentially of a permanent nature is not a fair employment practice, particularly if such appointments can be shown to have been made only to deny employees security of tenure or other conditions and benefits of service. Such appointments are permissible only if they have a clear functional justification and rationale in the exigencies of management and the nature of the job in question, and are subject to limitations based on norms of good administration."

84. In reaching its decision, the tribunal first considered whether Amora was an independent contractor or an employee of the Bank:

> "31. Although every MOA under which the Applicant worked contained references to his 'services', it is quite clear that he was not engaged under a contract for 'services' to perform a specified piece of work, for a stipulated fee or price, under his own responsibility and according to his own methods, without being subject to the control of the Bank (except as to the results of his work), and investing his own resources, in regard to tools, equipment, materials and the like.
>
> 32. The MOAs did not describe the work which the Applicant was required to do; he was to work, in the Bank's premises, under the direction of the Bank's officers and in accordance with their instructions; he was not to be paid for the job or the result, but was to receive a regular, stated monthly remuneration; indeed, he even received increments mid-way through several contracts, just like an ordinary employee; he had to work full-time in accordance with the Bank's working hours, and could even be required to work overtime or on shifts; and he was entitled to annual, medical and casual leave. One of his obligations was 'at *all* times [to] refrain from actively engaging in any political activity' (emphasis supplied). All along, the Applicant was neither carrying on an independent business nor could he assign the performance of the work to anyone else. On the contrary, his work was part of, or ancillary to, the Bank's business."

Concluding on the basis of the above evidence that the applicant was a staff member and not an independent contractor, the ADBAT went on to decide that he was not a staff member "appointed on contractual basis" but rather held a regular appointment of indefinite duration. It was this distinction that meant that Amora could not be excluded from coverage of the Staff Regulations:

> "41. . . . In the light of the successive extensions and renewals of the Applicant's service with the Bank for an unbroken term of almost 14 years, the Tribunal, in the absence of any convincing explanation by the Bank, holds that the Applicant's employment was intended to be of indefinite duration.
>
> 42. In the present case, the Tribunal finds no functional reason whatsoever, justifying the recourse to short-term contracts, in the face of a continuing relationship. It is clear that the work done by the Applicant for the Bank was a continuous whole, even though he had held different positions during his career in the Bank, just as regular staff members do. Thus the separation of his work with the Bank into individual yearly contracts was a pure fiction.

> 43. . . . Here, as no reason exists objectively, and no good reason was provided by the Bank, for the use of annual contracts for what was in reality a long-term employment, the Tribunal concludes that the use of annual contracts *without any functional justification* is an abuse of power. Thus, the true legal relationship of the Applicant to the Bank was that of a staff member holding a regular appointment. [Emphasis in original.]
>
> . . .
>
> 45. The Tribunal holds that it has jurisdiction *ratione personæ*, as the Applicant was a member of the Bank's staff holding a regular appointment within the meaning of Article II of the Statute of the Tribunal."

85. It is important to observe that in *Amora* the question of jurisdiction *ratione personæ* arguably was never really at issue, since by the time the applicant filed his application with the tribunal he had indisputably acquired the status of a regular staff member of indefinite duration by virtue of his new appointment in 1993. Nonetheless, it may be of some significance that the ADBAT chose to place its holding on jurisdiction following its conclusions on the merits. Moreover, the exercise of jurisdiction over issues arising before Amora's formal staff appointment in 1993 perhaps suggests an expansive approach to the ADBAT's jurisdiction *ratione materiæ*.

86. While the Tribunal finds the interplay of the cases of other administrative tribunals of interest, the case before it falls to be decided on the basis of the particular provisions of this Tribunal's Statute and its *travaux préparatoires*, and of the specifications of the Applicant's contract. The Administrative Tribunal concludes that it lacks jurisdiction in this case in view of the express language of that contract, which denies Applicant staff membership, and of the explicit wording of the IMFAT Statute, granting the Tribunal jurisdiction only over complaints brought by a "member of the staff"(Article II, 2.c.(i) of the Statute, *supra*, para. 45) challenging a "decision taken in the administration of the staff".

Is the Administrative Tribunal required to exercise jurisdiction in this case on the ground that otherwise Applicant's complaint may escape review by an impartial adjudicatory body?

87. Applicant has also argued that the Administrative Tribunal is required to exercise jurisdiction in this case because otherwise his claim will escape judicial review. In support of this view, he has invoked the principle of *audi alteram partem*.

88 Applicant has cited *Shkukani v. The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)*, UNAT Judgement No. 628 (1993) and related cases for the proposition that the IMFAT should exercise jurisdiction over his claim because he otherwise would be left without judicial redress for his grievance. *Shkukani*, however, did not involve the expiration of an agreement with a contractual employee. Rather, in *Shkukani*, the applicant sought review of the termination of his staff appointment for alleged misconduct. At the time of that termination, regulations governing the Area Staff of UNRWA did not provide for recourse to the UNAT, whereas those governing International Staff did.

89. In considering its power to interpret its statute so as to afford judicial redress equitably to all staff members of UNRWA, the UNAT in *Shkukani* referred to the advisory opinion of the International Court of Justice concerning the competence of the ILOAT, *Judgments of the Administrative Tribunal of the International Labour Organisation*, ICJ Reports (1956) 77, at p. 97, which it quoted as follows:

> "X. . . . 'However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between UNESCO and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization.'
>
> The Tribunal therefore has consistently held the view that it is competent to entertain cases, such as this one, where the primary concern is the absence of any judicial procedure established by the Area Staff Regulations and Rules for the settlement of disputes submitted to JAB."

90. Unlike the situation in the case of Mr. "A", involving a contractual employee, in *Shkukani* the tribunal's concern was the differing treatment of different categories of staff members (international staff v. area staff) with respect to the procedures available for redress of their grievances:

> "XI. . . . The bodies to which the Applicant had recourse were both internal bodies as indicated by the method of appointment of their members. The Applicant should have had available to him, in fairness and equity, an external judicial body to which he could have appealed. Indeed, the fact that the international staff members of UNRWA had such recourse, shows even more starkly the bias which existed against the Applicant and his class of staff members. Why should not all staff have similar

protection? The Tribunal, therefore, rejects the Respondent's first argument."[19]

91. By contrast, in *Darricades* (*supra*, paras. 70–71), a case involving a contractual employee, the ILOAT was not persuaded by the argument that by denying jurisdiction the applicant would be left without any forum in which to press her claim. The ILOAT also referred to the principle that international administrative tribunals are forums of limited jurisdiction, but used that principle in support of its refusal to exercise jurisdiction:

> "3. The Tribunal recognises that as a result of holding that it lacks jurisdiction, complainant is thereby regrettably deprived of any means of judicial redress against the injury sustained as a result of the alleged violations of her contract but the Tribunal, being a Court of limited jurisdiction, is bound to apply the mandatory provisions governing its competence."

92. Applicant also cites the principle of *audi alteram partem*, and the Administrative Tribunal's obligation to apply generally recognized principles of international administrative law, in support of his contention that the Administrative Tribunal must exercise jurisdiction over his claim so that it will not escape judicial review. Applicant specifically refers to the second sentence of Article III of the Tribunal's Statute and accompanying commentary. Article III provides in pertinent part:

> ***"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."

According to the commentary:

> " . . . There are two unwritten sources of law within the internal law of the Fund. First, the administrative practice of the organization may, in certain

[19]*Zafari v. The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, UNAT Judgement No. 461 (1990), also cited by Applicant, likewise concerns extending rights to tribunal review to staff members who are governed by Area Staff Regulations. In *Bohn v. The United Nations Joint Staff Pension Board*, UNAT Judgement No. 378 (1986) and *Gilbert v. The United Nations Joint Staff Pension Board*, UNAT Judgement No. 379 (1986), the UNAT exercised jurisdiction over complaints by UNESCO staff relating to the pension adjustment system because these were "related to" the Regulations of the Joint Pension Fund. Allegations concerning the non-observance of the Regulations of the Joint Pension Fund fell expressly within the terms of the tribunal's jurisdiction under the agreement extending jurisdiction of the UNAT to UNESCO staff. In exercising jurisdiction, the tribunal considered that otherwise these complaints would not be subject to redress.

> circumstances, give rise to legal rights and obligations. [Footnote omitted.] Second, certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund."

(Report of the Executive Board, p. 18.)

93. Applicant's reliance on the principle of *audi alteram partem*, as incorporated in the internal law of the Fund, to contend that the IMFAT should exercise jurisdiction over his complaint would appear to be misplaced. The purpose of the second sentence of Article III of the Tribunal's Statute is to prescribe what law the IMFAT "shall apply", i.e. "the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." This statutory provision does not relate to the Tribunal's jurisdiction, but rather states what law should be applied by the Tribunal in carrying out its judicial functions in those cases in which it has jurisdiction.

94. The principle of *audi alteram partem* is, in Applicant's own words, applicable to "decisions taken by the Fund." That principle provides a standard for assessing the legality of an administrative act of the Fund that comes before Administrative Tribunal for review. For example, the principle of *audi alteram partem* has been applied by international administrative tribunals in considering challenges by staff members to the legality of particular disciplinary procedures. (C. F. Amerasinghe, *The Law of the International Civil Service*, Vol. II, pp. 210–11 (2nd ed. 1994.)) Likewise, the IMFAT in *Ms. "C", Applicant v. International Monetary Fund, Respondent*, Judgment No. 1997–1 (August 22, 1997), adverted to the same principle, although not employing the term "*audi alteram partem*", when it concluded that a lapse in due process giving rise to a compensable claim occurred when Ms. "C" was not afforded meaningful opportunity to rebut adverse evidence regarding her performance. (Paras. 41–43.)

95. The Administrative Tribunal concludes that the fact that Applicant's claim will otherwise not be judicially examined does not require or entitle the Tribunal to exercise jurisdiction in this case. The complaint lies outside the Tribunal's limited grant of jurisdictional competence.

96. The Administrative Tribunal also concludes that, while the principle of *audi alteram partem* may supply a standard for judging the legality of a decision of the Fund that comes within the Tribunal's jurisdiction, this principle does not determine which decisions are justiciable. Nor does it require

that jurisdiction of this Tribunal be extended because a claim otherwise may or will escape review by an adjudicatory body. The jurisdiction of the Administrative Tribunal is conferred exclusively by the Statute itself. This Tribunal is not free to extend its jurisdiction on equitable grounds, however compelling they may be.

97. At the same time, the Tribunal feels bound to express its disquiet and concern at a practice that may leave employees of the Fund without judicial recourse. Such a result is not consonant with norms accepted and generally applied by international governmental organizations. It is for the policy-making organs of the Fund to consider and adopt means of providing contractual employees of the Fund with appropriate avenues of judicial or arbitral resolution of disputes of the kind at issue in this case, notably disputes over whether the functions performed by a contractual employee met the criteria for a staff appointment rather than those for contractual status.

98. It is pertinent to note that, on January 20, 1999, the Fund's Executive Board approved a Policy on Categories of Employment which provides, *inter alia*, that:

> "Functions that are needed for two years or more would be performed by employees on staff appointments. Functions that are expected to be performed for less than two years would be performed by contractual employees. Contractual appointments are used only for short-term employment, and can be extended if needed to a maximum cumulative period of four years. Extensions beyond two years require the approval of the Director of Administration."

This Policy has been communicated to the employees of the Fund by its placement on the Fund's internal website. This Policy mirrors a similar Policy promulgated in 1989, with the critical difference that the 1989 Policy did not prescribe the two-year and four-year limitations embodied in the 1999 Policy.

99. Had the foregoing Policy been in force and implemented in the course of Mr. "A"'s tenure, the matter now at issue before the Tribunal presumably would not have arisen. In respect, however, of headquarters-based technical assistance experts, the 1999 Policy retains an option for "long-term contracts when such an approach is justified"; in this regard, the 1999 Policy states that it "may need to be applied flexibly". In view of the revised Policy, Mr. "A"'s kind of predicament, and that of any other contractual employees in similar circumstances, may be transient. That, however, provides no solace for Mr. "A". The adoption of the new Policy on Categories of Employment nonetheless strengthens the equitable basis of certain of Mr. "A"'s contentions, which

the Fund should, in the Tribunal's view, endeavor to respond to insofar as governing regulations and practical possibilities permit. In that regard, the Tribunal notes that Mr. "A" has the benefit of maintenance of group medical coverage for eighteen months after the expiration of his contract, without however financial contribution by the Fund.

100. On the basis of the considerations set forth above, the Tribunal decides:

1. The Administrative Tribunal does not have jurisdiction to decide whether the Fund acted illegally when it entered into a series of contracts for contractual employment of the Applicant, allegedly in violation of its 1989 Employment Guidelines and principles of international administrative law, because Applicant apparently performed the same work as regular staff under contracts renewed several times in the course of nine years and then allowed to expire.

2. The Administrative Tribunal does not have jurisdiction *ratione personæ* over Applicant's complaint since his letter of appointment stated that he "will not be a staff member of the Fund" and the Administrative Tribunal's jurisdiction is restricted by its Statute to applications brought by a "member of the staff" (Art. II, para. 1.a.), defined as "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff" (Art. II, para. 2.c.(i)).

3. The Administrative Tribunal does not have jurisdiction *ratione materiæ* over Applicant's claim; the Fund's decision to enter into a contract or series of contracts with an individual to serve as a contractual employee, rather than as a member of the staff, is not a "decision taken in the administration of the staff" (Art. II, para. 2.a.).

4. Equitable or other considerations do not enable the Administrative Tribunal to extend its jurisdiction to claims falling outside the express language of Article II of its Statute, when Articles III, IV, and XIX limit its powers to those conferred by the Statute.

5. The Administrative Tribunal is not entitled to exercise jurisdiction in this case because otherwise Applicant's complaint may escape examination by an impartial adjudicatory body. The principle of *audi alteram partem* does not authorize or require this Administrative Tribunal to exercise jurisdiction in this case.

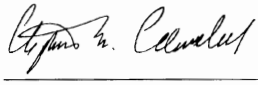
6. The Administrative Tribunal need not examine the merits of Applicant's claim in order to decide whether it has jurisdiction in this case. It may base that decision on the language of Applicant's letter of appointment and the Statutory provisions governing jurisdiction.

Decision

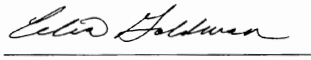
FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that the Fund's Motion for Summary Dismissal is granted.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Agustín Gordillo, Associate Judge



Stephen M. Schwebel, President



Celia Goldman, Acting Registrar

Washington, D.C.
August 12, 1999

JUDGMENT NO. 1999-2

Mr. "V", Applicant v. International Monetary Fund, Respondent

(August 13, 1999)

Introduction

1. On August 11, 12 and 13, 1999, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Agustín Gordillo, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "V", a former staff member of the Fund.

2. Mr. "V" contends that the Fund violated the terms of a Retirement Agreement ("Agreement") with him. That Agreement was entered into in settlement of differences between Mr. "V" and the Fund. The Agreement provides for Mr. "V"'s early retirement and settles all claims he may have had against the Fund arising up to the date of the Agreement, May 9, 1996. It further provides that all copies of Mr. "V"'s 1992 and 1994 performance reports are to be destroyed and the originals kept under seal in the Administration Department, subject to review only by the Director of Administration and General Counsel acting jointly, and that the performance rating assigned to Mr. "V" in 1992 and 1994 be removed from the Fund's "personnel data base."

3. The essence of Mr. "V"'s complaint is that the Fund violated the Agreement when it included in its 1996 Report of the Separation Benefits Fund ("SBF Report" or "Report") an entry pertaining to Applicant, but not identifying him by name, which listed as the reason for his separation: "Performance. Unable to produce work that met department standards. Retired," and circulated this Report to Fund Management, the Personnel Committee (Senior Personnel Managers in each department), the Ombudsperson, and the Chairman of the Staff Association Committee in whose office, Mr. "V" alleges, it became available for staff members to read. He also alleges that the preparation and distribution of this information violated GAO No. 35 (Information Security) and other Fund rules and regulations.

The Procedure

4. The Application was filed on October 9, 1998. In accordance with the Rules of Procedure of the Administrative Tribunal, the Application, having twice been amended to bring it into compliance with those Rules[1], was transmitted to the Respondent on December 4, 1998.

5. The Fund's Answer was filed on January 19, 1999[2]. The Applicant's Reply and the Fund's Rejoinder were filed on February 19, 1999[3] and April 16, 1999 respectively.

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[1]Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Office of the Registrar advised Applicant that his Application did not fulfill the requirements of para. 3 of that Rule, which requires that all documents cited in the Application be attached as Annexes in a complete text unless part is obviously irrelevant, Applicant was given fifteen days to correct these deficiencies. On November 3, 1998, Applicant filed a Corrected Application, which complied only partially with the instructions of the Office of the Registrar. As Applicant presented legal argumentation as to why he should not comply fully with those instructions, the views of the President of the Tribunal were sought by the Registry. Thereafter, Applicant was informed that the President had considered his arguments but did not find them persuasive. Therefore, at the direction of the President of the Tribunal, and pursuant to Rule VII, para. 6(i) of the Rules of Procedure, the period for compliance with Rule VII was further extended until December 1, 1998, on which date the Application was brought into full compliance with the earlier instructions of the Office of the Registrar. Accordingly, by Rule VII, para. 6, the Application is considered filed on October 9, 1998, which is within the statutory period specified in Article VI, Section 1 of the Statute of the Administrative Tribunal.

[2]Applicant contends that the Answer was not timely filed because it was due on January 18, 1999. As the Fund explains in its Rejoinder, January 18, 1999 was a Fund holiday, and therefore, by operation of Article II, Section 2.d. of the Statute and Rule XVI of the Rules of Procedure, both of which include in the calculation of time limits "the next working day of the Fund when the last day of the period is not a working day," the Answer was timely filed on January 19, 1999.

[3]The original Reply was timely filed but failed to include as annexes all of the documents cited therein as required by Rule IX, paragraph 2; nor did it comply with the requirement of Rule IX, paragraph 3 that an original and four copies of the Reply be filed with the Office of the Registrar. Applicant included with his Reply a request that he be allowed additional time to file an amended Reply with appropriate annexes attached, as a family emergency had necessitated his travel out of the country. Applicant's request for additional time to comply with the procedural requirements was granted by the President of the Tribunal pursuant to Rule XXI which provides in part:

> "...
>
> 2. The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder.
>
> 3. The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules."

The Reply, having been brought into compliance within the prescribed period, is considered filed on the original date.

6. On April 14, 1999, the Tribunal denied Applicant's request for oral proceedings, as the condition laid down in Rule XIII, para. 1[4] that they be held only if "necessary for the disposition of the case" in its view was not met. The Tribunal had the benefit of a transcript of oral hearings by the Fund's Grievance Committee, at which Applicant and senior officials of the Fund were heard.[5]

7. On April 27, 1999, at the request of Applicant, the President of the Administrative Tribunal exercised his authority under Rule XI[6] of the Rules of Procedure to call upon the parties to submit additional written statements. According to the schedule fixed by the President, Applicant was given until April 30 to submit his additional written statement and Respondent was given until May 6 to submit its responsive written statement. Applicant included in his additional written statement a request for production of documents. This request was denied by the President[7] on July 12, 1999, on the ground that the documents requested were irrelevant to the case.[8] At the same time, the President denied the Fund's request, included in its responsive written statement, for a copy of the text of Applicant's April 21, 1999 request for additional pleadings, noting that the Rules of Procedure of the Adminis-

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[4] "1. Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them."

[5] "The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." (*Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, Judgment No. 1996–1 (April 2, 1996), para. 17.)

[6] Rule XI provides:

"*Additional Pleadings*

1. In exceptional cases, the President may, on his own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be furnished in the original or in an unaltered copy and accompanied by any necessary translations.

2. The requirements of Rule VII, Paragraphs 4 and 8, or Rule VIII, Paragraphs 2 and 3, as the case may be, shall apply to any written statements and additional documents.

3. Written statements and additional documents shall be transmitted by the Registrar, on receipt, to the other party or parties."

[7] Rule XVII, para. 4 provides:

"When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

[8] Rule XVII, para. 2 provides:

"2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested."

trative Tribunal do not provide for a request by a party for additional pleadings to be transmitted to the other party or for any response to that request.

The Factual Background of the Case

8. Applicant began his employment with the Fund in 1969 as a staff member in one of the Fund's departments. He received promotions in 1979 and 1986. During the later course of Mr. "V"'s employment, disputes apparently arose regarding his performance and its evaluation, notably in Annual Performance Reports. In May 1996, Applicant and the Fund entered into a Retirement Agreement providing for the termination of his career with the Fund. The Agreement permitted Mr. "V" to remain in his department until May 1997, at which time he was placed on separation leave and nominally transferred to a different department. His early retirement, more than a decade before the retirement age of 65, took effect on November 30, 1998, two and one-half years after the signing of the Retirement Agreement.

9. Mr. "V"'s separation leave was financed by the Fund's Separation Benefits Fund ("SBF"). Pursuant to Fund decision, in 1996 the Fund produced a Report (as it had the previous year, for the first time) describing disbursements from the SBF, which included identifying characteristics of recipients but did not state their names, along with the reasons for their separation from service. In accordance with established practice, this Report was transmitted to Fund Management, the Personnel Committee, the Ombudsperson, and the Chairman of the Staff Association Committee. During the period in which he was on separation leave, Mr. "V", then Vice-Chairman of the Staff Association Committee, visited the Office of the Staff Association. There, he contends, he happened upon several copies of the 1996 SBF Report, which had been placed on an information desk. It was then that he first became aware of the existence of the Report and that it contained information about himself.

The Retirement Agreement

10. The Fund's alleged breach of the Retirement Agreement ("Agreement") forms the core of Applicant's complaint before the Tribunal. That Agreement provides in its entirety as follows:

> "In conjunction with your early retirement from the Fund staff effective November 30, 1998, it has been agreed that:
>
> 1. You will remain in the [ ] Department until May 9, 1997, and continue to receive regular assignments from your [ ] Department supervisors during this period.

2. In the period while you are on separation leave from May 12, 1997 through your early retirement effective November 30, 1998, you will be allocated an office in International Square, a computer, and a telephone. You will also have access to a fax and photocopy machines.

3. The originals of your performance reports for 1992 and 1994 will be held under seal in the Administration Department and will not be subject to review in any way by any person other than the Director of Administration and the General Counsel, acting jointly. It is understood, however, that this undertaking will not govern in the event that (i) you seek to reopen issues relating to your performance in the [ ] Department, whether such action is internal or external to the Fund, or (ii) in the opinion of the Director of Administration, you make disparaging statements about the integrity or competence of any member of the Fund's staff. All copies of your 1992 and 1994 performance reports will be destroyed within ten days from the signing of your separation agreement.

4. The performance rating of [ ] allocated to you in 1992 and 1994 will be removed from the Fund's personnel data base.

5. No performance reports will be prepared for you for 1995 and 1996.

6. On May 1, 1996 and May 1, 1997, you will receive a merit pay increase equivalent to the maximum of the range of possible merit increases associated with a '2' rating and your salary quartile.

7. In consideration of the above, any and all causes of action, demands and claims, of every nature, known or unknown, which you may have as of the date of this agreement against the Fund or any of its officials or former officials are hereby settled. Accordingly, you hereby agree, on behalf of yourself and your successors and assignees, that you shall not institute, prosecute, assert or voluntarily aid in the institution, prosecution, or assertion of any claim, suit, appeal or action, within or outside the Fund, against the Fund or any of its officials or former officials by virtue or arising out of any matter whatever up to the date hereof.

8. The above terms and conditions shall remain confidential and shall not be disclosed by you, either during or after your employment with the Fund.

9. The Ombudsperson will, if required, help ensure compliance with this agreement.

10. Please indicate your agreement with this arrangement outlined above by signing and returning to me a copy of this memorandum."

11. The conclusion of the Retirement Agreement was the result of intensive negotiations between Applicant and the Fund. The Assistant Director of the Administration Department (ADM) testified before the Grievance Committee

that he had been involved in talking with Mr. "V" about working out a separation agreement for at least five years before the Agreement was actually concluded in May 1996. Mr. "V" testified that negotiation of the actual Agreement began in December 1995. These negotiations involved both oral and written communications. Several documents exchanged in the course of these negotiations were included in the dossier and were reviewed by the Tribunal. Among the matters considered by the parties were: the amount of retroactive salary increases for 1992 and 1994; the length of the period of salary continuation; the length of time Mr. "V" would remain in his department; the location of office space for him once he concluded work in his department; and the preparation of a "To Whom It May Concern" letter regarding the absence of performance reports for the years 1992, 1994, 1995, and 1996.

12. In more than one of Applicant's written proposals to the Fund, he sought "expungement" of portions of the 1992 and 1994 APRs as "necessary to repair wide-spread reputational damage in the community", urging that a notation that the evaluations were "seriously flawed" (rather than "disputed") would be required. These requests were rejected and never agreed to by the Fund. Instead, the final agreement provided that the originals of these performance reports would be kept under seal in the Administration Department, all copies would be destroyed, and the performance ratings for these years would be removed from the Fund's personnel data base.

13. In the course of the negotiations, Applicant, through counsel, also proposed that paragraph 3 of the Agreement include the following sentence: "The assessment of your performance for 1992 and 1994 shall not be referred to or communicated, orally or in writing, to anyone except as provided in this paragraph." This proposal was rejected by the Fund and is not included in the final Agreement.

14. By April 30, 1996, negotiations had progressed sufficiently so that Applicant signed a standard letter confirming his separation arrangements from the Fund. Three days later, on May 2, 1996, Applicant signed a document similar to the final Retirement Agreement at issue in this case, but not including paragraphs 7 and 8. According to the Fund, the May 2 agreement never took effect as it did not yet have management's approval.

15. In any event, on May 3, Mr. "V" filed a grievance seeking reconsideration of his 1994 Annual Performance Report (APR). Thereupon Applicant was informed that the May 2 agreement had not become effective as management's approval remained to be obtained, and that that approval would not be forthcoming unless the agreement served to resolve the underlying dispute between Applicant and his supervisors regarding his performance. Hence, a

new Agreement (adding paragraphs 7 and 8) was drafted—the one at issue in this case—dated May 7, 1996 and issued by the Deputy Director of Administration. Applicant signed the Agreement on May 9, 1996, releasing the Fund from all pre-existing claims and providing for confidentiality of the Agreement. The next day, Mr. "V" withdrew his request for review of the 1994 APR.

Implementation of the Agreement

16. Promptly after conclusion of the final Agreement, the Fund took steps to implement its provisions. On May 17, 1996, Mr. "V" was notified by the Assistant Director of Administration that, pursuant to the Retirement Agreement, the originals of the 1992 and 1994 performance reports had been sealed, all copies had been destroyed, and the numerical ratings for those years had been removed from the personnel data base. Applicant has not disputed that these actions were taken.

17. In addition, a "To Whom It May Concern" letter, dated April 26, 1996 was issued by the Assistant Director of Administration stating: "The unavailability of a completed performance report for 1992, 1994, 1995 and 1996 does not in any way reflect adversely on Mr. ["V"]'s performance during those years or on his career." Although the issuance of this letter was not provided for by the terms of the Retirement Agreement, the negotiating history indicates that it was negotiated collaterally with that Agreement.

The Separation Benefits Fund (SBF) and reporting requirements

18. The regulatory basis for the Separation Benefits Fund (SBF) is found in GAO No. 16, Rev. 5 (Separation of Staff Member), which provides for both mandatory and discretionary use of the Separation Benefits Fund.[9] Manda-

[9]"4.06 *Payments Under the Separation Benefits Fund.* Whenever, under this Order, a staff member is entitled to a payment on separation from the Separation Benefits Fund (separation for medical reasons without access to a disability pension, abolition of position, reduction in strength, or change in job requirements), the payment shall be in an amount equivalent to one and one-fourth months' salary for each year of service, subject to a maximum that is the smaller of:

(a) the equivalent of 22-1/2 months' salary; and

(b) the amount of salary that would otherwise have been payable to the staff member between the last day on duty and his mandatory retirement age of 65.

The salary rate used for calculating the payment shall be the salary the staff member is receiving on the last day on duty;[footnote omitted] and length of service shall be computed to the nearest full month served.

4.07 *Discretionary Payments Under Separation Benefits Fund to Facilitate Separation.* In exceptional circumstances, the Director of Administration may offer a separation

tory SBF benefits are provided in cases of separation for medical reasons without access to disability pension, and in cases of abolition of position, reduction in strength, or change in job requirements. SBF benefits may also be awarded on a discretionary basis to facilitate separation. Such payments are distinct from the automatic separation payments provided under the mandatory provisions of GAO No. 16 and are granted at the sole discretion of the Director of Administration. It was under this latter provision that benefits were afforded to Mr. "V".

19. The SBF has been in existence for several decades. In 1995, in the interest of promoting transparency and in response to concerns that had arisen over the years with respect to the allocation of these funds, the Administration Department (ADM) adopted a policy of preparing and circulating to the Fund's Personnel Committee (Senior Personnel Managers in each Department) an annual SBF Report. While previously an annual report had been prepared strictly for internal ADM use, the new reporting policy was designed to provide Fund-wide reactions by placing information in the hands of the Senior Personnel Managers in each department, along with the Managing Director, Deputy Managing Directors, the Ombudsperson and the Chairman of the Staff Association Committee who, by agreement, receives all materials circulated to the Personnel Committee.

The 1996 Separation Benefits Fund (SBF) Report

20. The 1996 SBF Report at issue in this case is marked *"STRICTLY CONFIDENTIAL"* and consists of a memorandum from the Director of Administration to the Deputy Managing Director, summarizing the use of SBF resources for the year and discussing the underlying policies governing their use. As required by the new reporting policy, it includes a table listing each case of SBF disbursement, identifying recipients according to the following characteristics: nationality; age at separation; department; grade; date of entry on duty; years of service; type of SBF; SBF months; effective date; and reasons for separation. Another table analyzes the distribution of SBF funds by grade, nationality, age, length of service and the like.

21. The 1996 SBF Report documents a total of twenty cases, encompassing both mandatory and discretionary uses of the SBF funds. Four cases,

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payment to a staff member to facilitate his separation. Such payments, which are distinct from the automatic separation payments described in Section 4.06 above, are granted at the sole discretion of the Director of Administration. The maximum amount that may be granted is set out in Section 4.06 above." (GAO No. 16, Rev. 5.)

including that of Applicant, are designated as performance related. With respect to performance-related use of SBF Funds, the Report states:

> "**Performance Problem**: SBF resources for performance related problems are used only where such problems have been fully documented, where other remedies have failed and where separation is clearly in the best interest of the institution. Use of SBF on the grounds of performance was made for four staff members in FY 1996."

The entry pertaining to Applicant, Case No. 10, lists as the reason for his separation: "Performance. Unable to produce work that met department's standards. Retired." Unlike the entry for Case No. 4, also a performance-related case, no notation is made of Mr. "V"'s numerical performance ratings.

22. The Assistant Director of Administration who had been involved in negotiating Applicant's separation from the Fund testified before the Grievance Committee that, in preparing the 1996 SBF Report, it was he who supplied the reason for Applicant's separation on the basis of his own knowledge of the case. He also testified that he was aware of the terms of the Retirement Agreement prior to the drafting of this conclusion and that there was no discussion as to the appropriateness of including the information provided.

23. Consistent with the SBF reporting policy, Applicant's name was not included, except, as required, on the copy of the Report transmitted to the Deputy Managing Director. Nonetheless, the Assistant Director of Administration acknowledged in his testimony before the Grievance Committee that the entry pertaining to Applicant was identifiable on the basis of the information provided as to nationality, departmental affiliation and age, noting that beginning with the 1997 SBF Report, in the interest of confidentiality, the annual SBF Reports no longer reveal the nationalities of SBF recipients.

24. In accord with the reporting policies described above, the 1996 SBF Report was transmitted to the Fund's Managing Director, Deputy Managing Directors, Senior Personnel Managers, the Ombudsperson and the Chairman of the Staff Association Committee, a total of thirty individuals. According to Applicant, he became aware that the 1996 SBF Report contained information about himself when he happened upon several copies of the Report in August 1997 on an information desk in the Office of the Staff Association Committee.

Information Security within the IMF

25. The 1996 SBF Report, like all information and records in the ownership or possession of the Fund, is governed by the Information Security poli-

cies set forth in GAO No. 35, which provides for four information classification levels: NOT FOR PUBLIC USE; CONFIDENTIAL; STRICTLY CONFIDENTIAL; and SECRET. (Section 3.03.1.) The 1996 SBF Report was classified and labeled "STRICTLY CONFIDENTIAL." This designation is used to protect both information sensitive to the Fund and information involving matters of personal privacy:

> "3.04.3 STRICTLY CONFIDENTIAL
>
> (i) information entrusted to the Fund on a confidential basis that, in the opinion of the staff or responsible authorities, is not adequately protected by the CONFIDENTIAL classification; or,
>
> (ii) information generated by the Fund, including the views of the staff on policy or country issues, or information pertaining to discussions between the Fund and its members, the unauthorized disclosure of which would likely cause embarrassment or difficulties for the Fund or one or more of its members and/or compromise Fund or members' objectives or operations; or,
>
> (iii) information involving matters of strict personal privacy (e.g. medical and financial information related to benefit entitlements); or,
>
> (iv) other information for which it is judged necessary to restrict access only to those who have a specific need to know the information."

Access to information classified as STRICTLY CONFIDENTIAL is limited to those having a specific need to know the information:

> "4.02.3 For information classified STRICTLY CONFIDENTIAL, access shall be limited to those having a specific need to know the information, as determined by the originating office or by those having authority for clearance, in consultation with the originating office."

Finally, Section 7 of GAO No. 35 is designed to assure compliance with the information security policies. It provides in part:

> "7.02 Any person in the possession of information or records that are subject to this Order shall safeguard them, as applicable, in accordance with:
>
> (i) the Rules and Regulations of the International Monetary Fund (specifically Rules N4, N5, N6 and N11),
>
> (ii) the provisions of this Order and the standards, procedures and guidelines issued pursuant to this Order, and
>
> (iii) the agreements, arrangements or understandings under which the information or records were provided."

Applicant's efforts to secure alternative employment

26. Applicant testified that following conclusion of the Retirement Agreement in May 1996, he made a number of efforts to secure alternative employment, all to no avail.

27. In the autumn of 1996, Applicant sought the assistance of the Assistant Director of Administration in an attempt to secure a particular senior position open in another international organization. A general employment background letter was provided for use in his job search, summarizing Applicant's employment history with the Fund and the matters on which he had worked. A copy of this letter was transmitted to an official of the organization with which Applicant was seeking the position in question. Although Applicant had sought a letter of reference that would come directly from the Managing Director or from his former department, an institutional decision was made that, in view of the circumstances of Applicant's separation from the Fund, the letter should come from the Administration Department. The Senior Personnel Manager of Applicant's former department also testified before the Grievance Committee that he was prepared to provide positive references on Applicant's behalf if he were approached by a prospective employer, but that no such inquiries had come.

28. Although the Assistant Director of Administration testified that the personnel director of the organization in question told him that Applicant's prospects were not good as there were other candidates with background in the particular subject matter of the position, Applicant testified that he had been told by a very senior official of that organization that he was the top candidate. Testimony before the Grievance Committee by Applicant and by his former immediate supervisor indicate that the Managing Director personally and verbally recommended Mr. "V" to the Director-General of the organization concerned. Applicant speculated that he was not selected for the position because the organization's personnel director was a former Fund staff member who may have been aware of his performance ratings.

29. Applicant also testified that he has had difficulty getting interviews and finding out about positions that are not advertised. He contends as well that in his negotiations with another potential employer, persons in that organization referred to his difficulties with his department chief at the Fund. Additionally, Applicant claims that when interviewers inquire about the circumstances that led to his resignation, he is "put into a situation of having to fend off conflicting official records" on account of the information about him included in the 1996 SBF Report. Finally, Applicant has alleged that, subsequent to his separation from the Fund at the end of November

1998, he was denied a consulting opportunity with one of the Fund's departments.

Summary of Parties' Principal Contentions

Applicant's principal contentions

30. The Administration Department violated the terms and conditions of the Retirement Agreement by including information that was inconsistent with Applicant's record or with information it specifically agreed to seal and keep confidential, thereby damaging Applicant's reputation and career. It was inherently unfair and inconsistent with the Retirement Agreement to create thereafter a new document that discussed Applicant's performance before May 1996.

31. Documents that had been sealed formed the basis for the information included in the SBF Report. Sealing a document refers not only to the physical piece of paper, but also to its contents. The Fund agreed to cleanse Applicant's record; Applicant would not have waived his right to pursue a grievance without having his record cleansed of all collateral negative comments.

32. The circulation of the information through the 1996 SBF Report was at least grossly negligent, if not intentional. The Administration Department's knowledge of the policy requiring preparation and dissemination of the SBF Report demonstrates at least bad faith, if not fraud, on its part in negotiating with Applicant. Applicant had no knowledge of these reporting requirements, as the source of funding for Applicant's continued status with the Fund was not even mentioned during negotiations.

33. Distribution of the Report damaged Applicant's reputation within the Fund, and created conflicting official records, impairing his ability to obtain supportive references in seeking outside employment.

34. An internal policy of the Administration Department, particularly one unknown to staff members, does not excuse the Fund from performing its obligations under an independently negotiated agreement. Even if the Agreement did not exist, the Fund acted in an arbitrary and capricious manner by publishing the Report.

35. Circulation of the Report violated GAO No. 35, Section 7.02(iii),which requires the Fund to honor agreements, arrangements and understandings under which information and documents are provided. It also violated the N

Rules (Staff Regulations) which regulate transmission of information. In preparing the Report, the Fund breached the guidelines for the scope and content of the Report.

36. The dispute between Applicant and the Fund pertained to a defined contractual relationship, not to the exercise of administrative discretion, and therefore it was outside the Grievance Committee's jurisdiction. The Grievance Committee's scope of review, GAO No. 31, Section 5 improperly "disapplies law other than 'applicable Fund rules and regulations'".

37. Article X, Section 3 of the Tribunal's Statute prohibits the Fund's Legal Department from representing the Fund before the Administrative Tribunal.

38. Applicant seeks the following remedies: a) rescission of the decision of the Managing Director accepting the recommendation of the Grievance Committee rejecting his claim; b) "rescission, annulment and expungement" of the Recommendation and Report of the Grievance Committee; c) declaration of those provisions of GAO No. 31 illegal that "unlawfully or wrongfully derogate from the exact performance by the Fund of its contractual obligations"; d) issuance of an order directing the Fund to comply with its commitments under the Retirement Agreement; e) "recall" of the 1996 SBF Report and redaction of comments pertaining to Applicant; f) conversion of Applicant's leave of absence to leave with pay "'in the interest of the Fund'" and extension of the leave for an additional year (to November 30, 1999), or, at Applicant's option, reinstatement to the position he held prior to May 1997; g) rescission of Applicant's undated notice of resignation; h) compensation in the amount of three times Applicant's annual gross pay, with interest; and i) costs and attorneys' fees.

Respondent's principal contentions

39. The preparation and limited circulation of the 1996 SBF Report did not violate any duty owed to Applicant, either under the Retirement Agreement or the rules and regulations of the Fund.

40. The Fund did not agree to maintain total secrecy regarding Applicant's performance or the reasons why SBF funds were expended for his benefit. The provision of the Retirement Agreement (Paragraph 8) that requires that the terms "remain confidential and shall not be disclosed by you" was not violated by circulation of the Report as this provision applied only to Applicant and not to the Fund. The Fund would in any event, under its practice, treat such a document as "confidential" but as such it would be subject to limited availability and disclosure consistent with the regulations of the organi-

zation. The term "confidential" is understood within the Fund to mean available only on a need-to-know basis, for legitimate institutional purposes.

41. The Fund rejected proposals from Applicant and his counsel regarding expungement of his performance records. Correspondence between the parties shows the Fund was not willing to accept language that would have amounted to an obligation of secrecy respecting his performance and instead agreed to specific, narrower constraints, consistent with its institutional needs.

42. The reference in the SBF Report to the Applicant's performance problems did not emanate from unauthorized access to the sealed performance reports, but from the Assistant Director of Administration's own knowledge of Applicant's history.

43. Circulation of the SBF Report to the Personnel Committee, as well as to the Chairman of the Staff Association and the Ombudsperson, was designed to enhance the credibility of the SBF policy and avoid any perception of abuse by ensuring its uniform application across the Fund. The information about age, nationality, grade, and department was highly relevant to the objectives of transparency and accountability.

44. GAO No. 35, Section 4.02.3 expressly authorizes access to documents classified as "Strictly Confidential" by those "having a specific need to know the information, as determined by the originating office. . . ."

45. Assuming, as Applicant alleges, that copies of the Report were left on the table in the Staff Association Office, then the responsible officials of the Staff Association acted inconsistently with the "Strictly Confidential" designation placed on the document by the Fund. However, the Fund is not responsible for the actions of the Staff Association and is not liable for misfeasance on its part.

46. Applicant has not established any nexus between the circulation of the SBF Report and any harm to his ability to find subsequent employment or to his professional reputation. His claim with regard to alleged improper interference, following his separation from the Fund, on November 30, 1998, with a proposed consultancy arrangement with the Fund is not properly before the Tribunal.

47. Article X, Section 3 of the Tribunal's Statute does not prohibit the Fund's Legal Department from representing the Fund before the Administrative Tribunal.

48. The Grievance Committee was competent to determine whether the Fund breached the Retirement Agreement with Applicant.

49. Finally, the Fund seeks reasonable attorneys' fees for the costs that it incurred before the Grievance Committee in respect of allegedly frivolous claims brought by Applicant in that forum. These claims, originally advanced by Applicant in his grievance, were shown to be manifestly without foundation in law or fact, and they have not been included in the Application to the Tribunal.

Consideration of the Issues of the Case

Did the Fund breach the Retirement Agreement by preparing and circulating the 1996 SBF Report?

50. The core of Applicant's complaint before the Tribunal is that the Fund breached the Retirement Agreement by disseminating in the 1996 SBF Report information that reflected adversely on his performance, i.e. that gave as the reason for his separation from service that he was "[u]nable to produce work that met department's standards." Applicant's argument appears to be based upon three specific provisions of the Agreement: a) the sealing of the 1992 and 1994 performance reports and destruction of all copies thereof (paragraph 3 of the Agreement); b) the removal of the 1992 and 1994 ratings from the "personnel data base" (paragraph 4 of the Agreement); and c) the confidentiality clause (paragraph 8 of the Agreement). In addition, Applicant asserts that the underlying purpose of the Agreement was to "cleanse his record" and that publication of the information in the SBF Report violated that purpose.

51. The Fund argues, to the contrary, that it carried out fully the requirements of the Agreement dealing with Applicant's performance record, which were limited to the sealing of the original 1992 and 1994 performance reports, destruction of copies, and the removal of the ratings for those years from the personnel data base. The Fund also contends that the confidentiality clause applies only to Applicant's conduct and not to its own, but that, in any event, the Fund has treated the terms of the Agreement as confidential. Finally, in the Fund's view, the Agreement did not provide for a blanket cleansing of Applicant's performance record.

1. Sealing of original 1992 and 1994 performance reports and destruction of copies

52. Paragraph 3 of the Retirement Agreement provides:

> "3. The originals of your performance reports for 1992 and 1994 will be held under seal in the Administration Department and will not be subject to

> review in any way by any person other than the Director of Administration and the General Counsel, acting jointly. It is understood, however, that this undertaking will not govern in the event that (i) you seek to reopen issues relating to your performance in the [ ] Department, whether such action is internal or external to the Fund, or (ii) in the opinion of the Director of Administration, you make disparaging statements about the integrity or competence of any member of the Fund's staff. All copies of your 1992 and 1994 performance reports will be destroyed within ten days from the signing of your separation agreement. "

53. There is no dispute that, as provided for by this paragraph of the Agreement, the originals of Applicant's performance reports for 1992 and 1994 were placed under seal in the Administration Department and all copies destroyed. Applicant asserts, nonetheless, that " . . . sealing a document refers not only to the physical piece of paper, but also to its contents." He also contends that information contained in the sealed documents must have formed the basis for the entry about Applicant in the 1996 SBF Report, as the SBF policy requires that performance problems be documented.

54. The Fund argues, to the contrary, that the information regarding Applicant in the SBF Report was supplied independently of the sealed Annual Performance Reports (APRs). The Assistant Director of Administration who was involved in negotiating the Retirement Agreement testified that it was he who supplied the information regarding the reason for Mr."V"'s separation as it appeared in the Report, and that in doing so he relied on his own knowledge of the case, not upon the sealed documents.

55. Applicant does not explain his view that information, as opposed to documents, may be "sealed". As regards the sealing of records, to seal means "to close by any kind of fastening that must be broken before access can be obtained." For example, "[s]tatutes in some states permit a person's criminal record to be sealed and thereafter such records cannot be examined except by order of the court or by designated officials." (*Black's Law Dictionary*, 6th ed., 1990.) The procedure described by paragraph 3 of the Agreement for the review of the sealed documents only by the Director of Administration and the General Counsel acting jointly is consistent with this definition. It is also consistent with Applicant's own testimony before the Grievance Committee, in which he explained his understanding of the requirements of paragraph 3:

> *"Q Was there a discussion of what the term 'under seal' meant?*
>
> A The discussion 'under seal' meant that there would be a container, metal or plastic, whatever, that would have glued upon it the statement that pursuant to this agreement, this can be only opened by joint action of the director of Administration and the general counsel, presuming that both would

> have to be present, upon satisfaction that there is a legal case that has my name as a plaintiff under it pertaining to the period before May, whatever the May date was, pertaining to the period before signing of the agreement."

Applicant also testified that he understood that the sealing of the APRs was agreed to as an alternative to the "expungement" he had proposed because the Fund sought to retain one copy for its defense should he attempt to reopen performance issues.

56. The Administrative Tribunal concludes that the provisions of paragraph 3 of the Retirement Agreement did not prohibit the Assistant Director of Administration from preparing an entry in the 1996 SBF Report based on his knowledge of Applicant's case. Pursuant to paragraph 3, the originals of Applicant's 1992 and 1994 Annual Performance Reports had been placed "under seal" and all copies destroyed. The Fund thus complied with the express requirements of paragraph 3. Moreover, it respected not only the letter of this paragraph. In view of its rejection of Applicant's requests for "expungement" of his "flawed" Annual Performance Reports, the Fund did not undertake to conceal or obfuscate the broader contours of Mr. "V"'s performance. It may indeed be asked whether a public, legally governed institution such as the Fund could have properly entered into such an undertaking.

2. Removal of 1992 and 1994 performance ratings from "personnel data base"

57. Paragraph 4 of the Retirement Agreement provides:

> "4. The performance rating of [ ] allocated to you in 1992 and 1994 will be removed from the Fund's personnel data base."

On May 17, 1996, Applicant was informed by the Assistant Director of Administration that his numerical ratings for 1992 and 1994 had been "deleted from the personnel data base." This notice was based on communications from the responsible officials to the Assistant Director of Administration that the " . . . ratings for CY 1992 and 1994 have been removed and replaced with a blank entry in the personnel database . . . " and " . . . the copies of these [1992 and 1994] performance reports maintained in the APR database have been deleted and . . . all other known copies of said reports have been destroyed."

58. Applicant has not disputed that these actions took place. His argument as to the alleged violation of Paragraph 4 seems to be that there may have been some ambiguity as to the meaning of the term "personnel data base," so that it may have encompassed something more than the electronic records referred to in these communications.

59. In his testimony before the Grievance Committee, Applicant expressed the view that the term "personnel data base" must be understood " . . . as a part and parcel of the Clause Number 3. In other words, . . . after the reports were sealed, if there was any additional data in the Fund that would disclose these, that data would be removed." According to Applicant, there was discussion during the negotiations about the fact that the term was not defined. His position is that he accepted use of "personnel data base" as a "general term" rather than as a "Fund specific term of art."

60. The Assistant Director of Administration involved in negotiating the Agreement on behalf of the Fund testified to his understanding of the term "personnel data base" as referring solely to an electronic record, but that there was no discussion of the term during negotiations. He thought that Applicant understood the term as a reference to an electronic record because he had expressed concern as to the significance of having a blank space in that electronic record.

61. In considering the question of whether the term "personnel data base" refers solely to an electronic record or more broadly to other Fund records as well, the Tribunal observes that the Retirement Agreement, both in paragraph 4 (removal of the 1992 and 1994 numerical performance ratings from the personnel data base) and paragraph 3 (sealing of 1992 and 1994 APRs and destruction of copies) expressly refers to the sealing or removal only of records in existence at the time of the Agreement. Accordingly, these clauses would not appear to offer protection against the creation of a future record regarding Applicant's past performance, such as the 1996 SBF Report, particularly one that does not refer to the specific performance ratings at issue. In this regard it is noted that, unlike one of the other entries in the 1996 SBF Report that includes the beneficiary's performance ratings, the entry pertaining to Mr. "V" does not supply that information.

62. The negotiating history of the Retirement Agreement is again significant. As noted above in para. 13, Applicant's counsel proposed the inclusion of the following language to supplement the terms of paragraph 3 (sealing of the 1992 and 1994 APRs): "The assessment of your performance for 1992 and 1994 shall not be referred to or communicated, orally or in writing, to anyone except as provided in this paragraph." This provision might have offered some protection against the creation of future records relating to Mr. "V"'s performance. But the Fund rejected its inclusion.

63. The Administrative Tribunal concludes that there is credible evidence that the basis for the preparation of the entry in the 1996 SBF Report pertaining to Applicant's performance was the knowledge of the Assistant

Director of Administration, who had been fully involved over a span of years in negotiating with Applicant regarding performance issues and his separation from the Fund, rather than the records that had been sealed or destroyed pursuant to the Retirement Agreement. Furthermore, the Administrative Tribunal concludes that nothing in the Agreement barred the Fund from relying on such knowledge or prevented it from creating, subsequent to the Agreement, a report stating that inability to produce work that met department's standards was the reason for Applicant's separation from service.

3. Confidentiality clause

64. Paragraph 8 of the Retirement Agreement provides:

> "8. The above terms and conditions shall remain confidential and shall not be disclosed by you, either during or after your employment with the Fund."

An initial issue with respect to paragraph 8 is on which party or parties does this paragraph impose express obligations. Applicant contends that this provision restricts the Fund from disseminating information about the Agreement through the 1996 SBF Report. The Fund's position, by contrast, is that paragraph 8 applies only to the Applicant and not to the Fund.

65. With respect to the negotiating history, Applicant claims, on the one hand, that it was he who had sought confidentiality and that he had raised the matter during negotiations, as documented by one of the memoranda that he had sent to the Assistant Director of Administration. On the other hand, paragraph 8 was not part of the original draft of the Agreement that Applicant had signed initially on May 2, 1996. Instead, it was one of the two paragraphs (the other was paragraph 7 providing for the release of all claims) required by Fund management as part of the final Agreement signed on May 9, 1996. The Fund explains that it sought this provision to prohibit the disclosure by Applicant of the "exceptional" and "unprecedented" benefits it had bestowed on him.

66. The Tribunal concludes that despite the contested origins of the confidentiality clause, its language suggests that both parties were required to keep confidential the terms of the Agreement. The wording of paragraph 8 is that its terms and conditions "shall remain confidential", an obligation that apparently applies to both parties. However, the Applicant's obligation is elaborated since the provision states additionally that these terms and conditions "shall not be disclosed by you". Clearly, "you" refers to Applicant, as the Agreement is styled as a memorandum from Fund management to Mr. "V".

67. Holding that the Fund as well as Applicant are bound by the Agreement to keep its terms "confidential," the question arises as to what that obligation requires. In other words, what is the meaning of "confidential" for purposes of interpretation of the Agreement? Does the obligation of confidentiality prohibit the Fund from including a comment regarding Applicant's performance in a "Strictly Confidential" Report of the Separation Benefits Fund?

68. A reasonable interpretation of the term "confidential" for these purposes can be found in the usage of the Fund. "Confidential" is given specific meaning in the course of the Fund's work and practices through GAO No. 35, which regulates information security. The General Administrative Orders form part of the Fund's internal law and govern all staff members. Hence an understanding of the term consistent with GAO No. 35 is appropriately applied to an agreement between the Fund and one of its staff. It should be noted as well that the Fund has taken the view that, while paragraph 8 of the Retirement Agreement does not impose any contractual obligation on itself, as a matter of policy it treats such personnel documents as "Confidential" within the meaning of GAO No. 35 and that it did so in this case.

69. The Tribunal observes that, moreover, the SBF Report was accorded an even higher level of security than the confidentiality requirement imposed by the Retirement Agreement. The 1996 SBF Report was classified "Strictly Confidential", permitting its circulation only to those staff members with a "need to know" as determined by the originating office under GAO No. 35, Section 4.02.3.

70. Finally, Applicant contends that the "sealing" requirement of paragraph 3 requires that an even higher level of information security than "Confidential" or "Strictly Confidential" should apply to the SBF Report. Specifically, he contends that "[i]n permitting ADM to distribute the information to those 'with a need to know', the Managing Director overlooked the fact that the leaked information had been sealed in addition to being classified as confidential. . . ." This argument fails to consider whether the obligation imposed by paragraph 3 to "seal" the originals of the 1992 and 1994 APRs can reasonably be understood to govern only those documents rather than all information relating to Applicant's performance. It may be added that "sealing" of documents is not dealt with by GAO No. 35 and hence is not part of the Fund's standard policy relating to information security.

71. Accordingly, the Administrative Tribunal concludes that the confidentiality clause (paragraph 8) of the Retirement Agreement, which required the Fund to keep the terms of the Agreement "confidential", did not prohibit

the Fund from commenting critically on Applicant's performance in the "Strictly Confidential" SBF Report, the purpose of which was to explain the uses of the Separation Benefits Fund.

4. Did the Fund agree to "cleanse" Applicant's record?

72. Underlying Applicant's arguments relating to the alleged breach of the Retirement Agreement is his contention that it was the intention of the parties to "cleanse" Applicant's performance record, that the preparation and circulation of the 1996 SBF Report entry relating to Applicant ran counter to this intention, and that therefore it was prohibited by the Agreement. The Fund counters that it was not the intent of the Agreement to maintain total secrecy regarding Applicant's performance or the reasons why SBF funds were expended for his benefit.

73. By "cleanse" his record, Applicant seems to mean that the Fund would not maintain any record that reflected negatively on his performance, so that a favorable recommendation of him by a staff member (or indeed his own representation of his performance history) could not be impeached by Fund documents to the contrary. In his testimony before the Grievance Committee, Applicant explained that in concluding the Retirement Agreement his "basic concern was reputational damage", that he needed a "completely clean record from the Fund" in order to secure new employment, and that he "was willing to make sacrifices to have this record." He emphasized in his testimony before the Grievance Committee that this purported "cleansing" was essential to the bargain he struck with the Fund:

> "The Applicant would not have settled certain disputes without the assurance that he would be able to obtain an equivalent position in another international organization based on his official performance record. Clearly the Applicant would not have waived his right to pursue a grievance without having his record cleansed of all collateral negative comments."

He testified further that his expectation was that there would not be references to performance problems in Fund documents created after the date of the Agreement.

74. Applicant expressed his concerns about the existence of "conflicting records". In particular, he was concerned that, given the existence of the 1996 SBF Report, he could not

> " . . . represent to prospective employers that I have a record that doesn't indicate any performance problems. In other words, if I apply for a job and this is brought up, I would be embarrassed and I could be fired at any time for having misrepresented my credentials."

Likewise, he expressed the concern that he could not ask Fund staff members for references because

> " . . . to have people to state that I had a satisfactory career with the Fund required . . . them to state a falsehood. They have been informed by the Administration Department that this was the reason for my departure."

75. The Tribunal is unable to find sufficient support in the record for Applicant's claim in his Application that " . . . the Fund agreed to cleanse the Applicant's record". In fact, as noted above, the Fund rejected a provision proposed by Applicant, through counsel, which would have applied broader protection to Applicant's reputation than that embodied in paragraph 3 (sealing of the 1992 and 1994 APRs) by stating: "The assessment of your performance for 1992 and 1994 shall not be referred to or communicated, orally or in writing, to anyone except as provided in this paragraph." In addition, Applicant had sought "expungement" of portions of the 1992 and 1994 APRs as "necessary to repair wide-spread reputational damage in the community." This proposal too was rejected by the Fund.

76. It appears from the negotiating history that both parties did share an understanding that the intention of sealing the performance records was to facilitate Applicant's ability to secure employment outside of the Fund. The Assistant Director of Administration testified that he understood Mr. "V"'s motivation for sealing the 1992 and 1994 performance reports was to ensure that they not get outside the Fund to prospective employers, and so prejudice his job search. However, it was also the testimony of the Assistant Director of Administration that, in his view, inclusion of the information about Mr. "V" in the 1996 SBF Report did not infringe on the "spirit of the Agreement" because it was unlikely that information from the Report would be revealed to any future employer. The Report was for internal circulation. Any inquiry from a prospective employer regarding Applicant's performance would most likely be made of individuals in his department who would have first-hand knowledge of his work. It would be quite unlikely that inquiry would be made of a Senior Personnel Manager of another department whose information was derived from the SBF Report. In any event, staff members were prohibited from disclosing information from the Report outside the Fund.

77. Accordingly, the Administrative Tribunal concludes that neither the language nor the negotiating history of the Retirement Agreement supports Applicant's view that he was able to achieve the meeting of the minds he may have sought as to the "cleansing" of his performance record. That record remained in existence. Only access to elements of it to which Mr. "V"

made specific objection was blocked. Mr. "V"'s objective was doubtless more far-reaching. But the negotiating history indicates that he failed to carry that objective.

78. In reaching these conclusions, the Administrative Tribunal is mindful of the importance both to staff members and to the Fund of enforcing negotiated settlement and release agreements, like the one entered into with Mr. "V", in which a staff member receives special compensation or benefits upon separation from service in exchange for the release of claims against the organization. As the World Bank Administrative Tribunal ("WBAT") commented in *Mr. Y, Applicant v. International Finance Corporation, Respondent*, WBAT Decision No. 25 (1985):

> "26. In an enterprise employing as many staff members as does the World Bank Group, it is inevitable that there will be claims of improper treatment, as witness the appeals to the Appeals Committee and applications to this Tribunal. It would unduly interfere with the constructive and efficient resolution of these claims if the Bank could not negotiate—in exchange for concessions on its part—for a return promise from the staff member not to press his or her claim further. If such an agreed settlement were not binding upon the affected staff member, there would be little incentive for the Bank to enter into compromise arrangements, and there might instead be an inducement to be unyielding and to defend each claim through the process of administrative and judicial review. It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements."

79. In enforcing such agreements, international administrative tribunals have looked for exactly the elements present in this case, i.e. evidence of individualized bargaining and the exchange of consideration as indications that the agreement was entered into freely and reflected a real balancing and resolution of interests between the parties. (*Mr. Y, Applicant v. International Finance Corporation, Respondent*, WBAT Decision No. 25 (1985); *Alexander Frederick Kirk, Applicant v. International Bank for Reconstruction and Development, Respondent*, WBAT Decision No. 29 (1986); *Arda Kehyaian, Applicant v. International Bank for Reconstruction and Development, Respondent (No. 2)*, WBAT Decision No. 130 (1993).) In doing so, tribunals often have noted that there are necessarily pressures in bargaining involved in relinquishing a party's goals and that not all of the terms sought may be attained. For example, in *Mr. Y*, the WBAT observed:

> "33. Even though the Applicant may have felt under some pressure to sign the release, it was no more than the pressure derived from the fact that he was urgently seeking an extension of his special-leave period and

other perquisites and that he appears to have regarded those additional benefits as more important than the release of his claims against the Respondent. . . ."

80. In *Alexander Frederick Kirk, Applicant v. International Bank for Reconstruction and Development, Respondent*, WBAT Decision No. 29 (1986), the WBAT also enforced the release provisions of a settlement agreement as against the applicant's contention that it did not preclude the particular claim that he had presented to the administrative tribunal. The WBAT considered both the language and the negotiating history of the agreement:

> "32. The conclusion that the broad release provision embraced the Applicant's preexisting salary claim is confirmed by consideration of the circumstances surrounding the negotiation of the separation agreement. . . ."

In addition, the tribunal found that the agreement was supported by consideration, as the applicant had received substantial benefits in exchange for the broad release provision:

> "39. . . . The arrangements for paid leave, for other financial benefits, and for outplacement assistance, were not entitlements of staff members retiring early; to a significant degree, the grants were within the Respondent's discretion. The only promise made by the Applicant in exchange for these benefits was expressed in the release provision he challenges here. The Tribunal therefore concludes that that promise was supported by a valid cause or consideration."

Furthermore, the tribunal noted:

> "35. . . . By accepting the terms of his separation agreement, the Applicant secured a substantial amount of money and other benefits. The alternative to concluding that agreement—continued service in OED, where the Applicant was allegedly unwelcome and unappreciated and at odds with his supervisor—may have been unpleasant for the Applicant to contemplate, but the desire to avoid a less pleasant alternative is always the motivation for entering into a settlement agreement, and cannot provide a basis for overturning it. . . ."

81. Finally, the WBAT also pointed out that, given the clarity of the language of the agreement, if applicant had intended a narrower release of claims than afforded by that language, he should have expressly sought such a limitation in the agreement's wording:

> "31. . . . In view of the clarity of this language, it might have been expected that, had the Applicant sought to confine its breadth in the manner he now

> contends, he would have expressly sought some qualification or limitation in the wording of the contract. . . ."

This point is significant in the consideration of the case of Mr. "V". Applicant did seek additional wording in the Agreement that might have protected him against the actions of which he now complains, but that wording was rejected by the Fund. (See para. 13 above.) In that effort, Applicant was assisted by counsel (although he apparently was not assisted by counsel in all of the negotiations), providing yet another indication that the balancing of interests reflected in the terms of the Retirement Agreement was a considered choice of Applicant. As the WBAT stated in *Arda Kehyaian, Applicant v. International Bank for Reconstruction and Development, Respondent (No. 2)*, WBAT Decision No. 130 (1993):

> "26. . . . In all cases of release agreements the staff member is assumed to have balanced the benefits resulting from the different options he or she has, and finally to have decided to consent to the proposed agreement. In each case the staff member must have been under certain pressures leading him to opt for what appeared to him to be the more advantageous alternative. This kind of pressure is inherent in the process and cannot be treated as by itself constituting duress. The fact that the Applicant's counsel took part in negotiating the terms of the agreement and finally conveyed to the Respondent that these terms were accepted by the Applicant shows clearly that the Applicant's acquiescence in the release agreement was a free and considered choice."

82. Although in the present case Mr. "V" does not challenge the validity of the Retirement Agreement as such, but rather seeks a remedy for its alleged breach, the WBAT's reasoning in the above cases is instructive. Where, as with the Retirement Agreement between Mr. "V" and the Fund, there is evidence of vigorous, individualized negotiation of terms, it is difficult to conclude that anything other than their plain meaning should be accorded those terms. This is especially so when alternative language was proposed and rejected in the course of negotiations.

83. These cases also emphasize the essential bargain involved in any settlement and release agreement: the value to each party of foregoing the risks of litigation. By giving up the right to challenge his treatment through litigation, Applicant relinquished the ability to present arguments in such fora for the purpose of rehabilitating his record. He received very substantial, indeed, according to the Fund, "unprecedented" consideration in exchange, particularly by way of large monetary and lasting pension benefits. Accordingly, the Administrative Tribunal concludes that the specific terms of the Retirement Agreement must be enforced and that Applicant's construction of those terms must be rejected.

Is there a conflict between the Fund's internal law, requiring preparation and circulation of the SBF Report, and its contractual obligations to Applicant under the Retirement Agreement? If so, which should prevail?

84. Applicant contends that the Fund's contractual obligations under the Retirement Agreement prevail over the Fund's internal law requiring reporting of disbursements from the Separation Benefits Fund. This contention is predicated on the assumption, inherent in Applicant's complaint, that there was a conflict between what was required of the Fund under the Retirement Agreement and the reporting requirements relating to the SBF.

85. The Tribunal has concluded that inclusion in the 1996 SBF Report of the information relating to Applicant's performance did not violate the Retirement Agreement entered into between Mr. "V" and the Fund. Therefore, the terms agreed to by the Fund (requiring the sealing of his 1992 and 1994 performance reports and destruction of copies, removal of the numerical ratings for those years from the personnel data base, and the obligation to keep confidential the terms of the Agreement) were not in conflict with its reporting requirements under the Separation Benefits Fund (requiring it to include in a "Strictly Confidential" report with limited circulation in the Fund a listing of cases, not identified by name, which gave the reasons for expenditure of SBF funds in each case). The question whether the Retirement Agreement prevails does not arise.

Did the Fund act illegally in not disclosing during negotiations with Applicant the SBF reporting requirements?

86. As a corollary to Applicant's argument that the Retirement Agreement conflicted with the SBF reporting requirements, Applicant contends that the Fund acted illegally in not disclosing those requirements during negotiation of the Agreement. The Fund has not disputed Applicant's claim that in negotiations, the Fund did not mention the source of funding for the Applicant's continued status as staff member at the Fund, or that there were any reporting obligations.

87. In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996–1 (April 2, 1996), the Administrative Tribunal had occasion to consider whether a staff member had been misled by the Fund in the process of negotiating his appointment. The Tribunal examined the problem of inequality of information and bargaining power between the Fund and a staff member, and held that the fact that Mr. D'Aoust accepted

his initial grade and salary did not bar him from challenging the legality of their determination:

> "12. The Tribunal sustains the Fund's position on this question as a matter of presumption; the fact that a staff member accepts an offer that he or she is free to decline does weigh against challenge to the terms of the contract so accepted. But it is a question only of presumption. The Fund and an applicant for a position in the Fund are not in an equal negotiating position; e.g., as this case shows, the Fund is in possession of relevant information not within the knowledge of an applicant. Accordingly, while the presumption holds, the staff member nonetheless can be heard to argue contrary claims, as in this case, of misrepresentation of facts or irregularity in the process of appointment. The Tribunal concludes that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of the Fund's determination of grade and salary."

88. In *D'Aoust*, the Fund's own actions suggested that there was room for doubt as to whether there had been a true meeting of the minds, and this fact also supported the conclusion that the applicant was not barred from challenging the legality of the determination of his grade and salary. (Para. 13.) The Administrative Tribunal, nonetheless, held that the complaint was not sustainable, rejecting the applicant's challenge to his terms of appointment because it found "no evidence of Mr. D'Aoust having been deliberately misled" as to the nature of the job. (Paras. 27–28.)

89. Accordingly, consistent with the reasoning of *D'Aoust*, the Administrative Tribunal concludes that assuming that the SBF reporting requirements were "relevant information" in the possession of the Fund, the Fund did not deliberately mislead Applicant, misrepresent facts or engage in irregularity of procedure by not disclosing to him those requirements during negotiation of the Retirement Agreement. Rather, those officials reasonably could have believed (as the Tribunal now holds) that these requirements were not in conflict with the terms negotiated in that Agreement. Moreover, disclosure to Mr. "V" might have transgressed the "Strictly Confidential" classification of the SBF Report.

Did circulation of the 1996 SBF Report violate any Fund rules or regulations or breach any duty owed by the Fund to Applicant independent of the Retirement Agreement?

90. In addition to contending that the preparation and circulation of the 1996 SBF Report violated the Retirement Agreement between himself and the Fund, Applicant also asserts that the Fund's actions violated GAO No. 35, the N Rules, and the guidelines governing the preparation of the Report.

He claims as well that the Fund's actions in circulating the Report were "arbitrary and capricious" and "at least grossly negligent, if not intentional". These claims are considered below.

1. GAO No. 35 (Information Security)

91. As described above, GAO No. 35 prescribes policies and guidelines governing the security of information in the Fund, including information classification and the handling of classified information.

92. Applicant's argument that the Fund violated GAO No. 35 appears to have two prongs:

(1) the Retirement Agreement required that information pertaining to Applicant in the 1996 SBF Report be classified at a higher level of information security than "Strictly Confidential", which permitted access to those with a "need to know" under GAO No. 35, Section 4.02.3 ; and

(2) by allegedly violating the Retirement Agreement, the Fund also violated Section 7.02(iii) of GAO No. 35, which requires the Fund to honor agreements under which information is provided.

93. The first argument, that classification of the SBF Report as "Strictly Confidential" (thereby limiting access "to those having a specific need to know the information, as determined by the originating office" (Section 4.02.3)) violated the terms of the Retirement Agreement has been addressed above. Specifically, Applicant contends that because his 1992 and 1994 APRs have been "sealed" pursuant to the Agreement, a higher level of information classification should have attached to the SBF Report. This argument, as pointed out above, conflates the content of the sealed documents (his individual performance reports) with the summary content of the SBF Report which does not mention Mr. "V"'s performance ratings.

94. Furthermore, the only level of information security higher than "Strictly Confidential" is "Secret". The "Secret" classification is reserved for the following:

> "3.04.4 SECRET
>
> (i) extremely sensitive information entrusted to or generated by the Fund, the secrecy of which, in the opinion of management or the heads of departments, bureaus, or offices, is essential to the success of Fund initiatives or operations or of the plans of one or more of its members to which the Fund is privy; or,
>
> (ii) other information for which management or the heads of departments, bureaus, and offices judge the level of protection associated with the SECRET classification necessary."

Section 3.05.3 limits the use of the "Strictly Confidential" and "Secret" classifications, noting that "[t]he STRICTLY CONFIDENTIAL classification should be used sparingly, and the SECRET classification only in exceptional circumstances."

95. The requirements of GAO No. 35 must also be considered in light of the overall objective of the information security policy to balance the need for protecting sensitive information against the need for information flow and organizational efficiency:

> "1.02 The objective of these policies and guidelines is to ensure that necessary and sufficient levels of protection against unauthorized access and disclosure are afforded to all sensitive information in a manner that neither unnecessarily impedes the flow of information nor inhibits organizational efficiency and that balances the costs of protection against the risks and consequences of unauthorized access and disclosure."

96. The Administrative Tribunal concludes that it was a reasonable act of managerial discretion for the Fund (a) to classify the 1996 SBF Report as "Strictly Confidential", and (b) to decide that the Fund's Managing Director, Deputy Managing Directors, Senior Personnel Managers, the Ombudsperson and the SAC Chairman had a "need to know" this information. The classification as "Strictly Confidential" appears entirely appropriate as that classification level is designed, among other things, to protect "information involving matters of strict personal privacy (e.g. medical and financial information related to benefit entitlements)." (Section 3.04.3(iii).) As for the determination as to which Fund personnel had a "need to know", the Fund has explained and documented its rationale for circulating the Report to this limited group of individuals. The policy was undertaken in the interest of promoting transparency of personnel practices and to provide Fund-wide reactions, in response to criticisms that had arisen over the years with respect to the equitable allocation of scarce resources of the SBF.

97. The second prong of Applicant's argument alleging violation of GAO No. 35 is that the Fund's alleged failure to comply with the terms of the Retirement Agreement was a violation of Section 7.02(iii). That provision reads:

> "7.02 Any person in the possession of information or records that are subject to this Order shall safeguard them, as applicable, in accordance with:
>
> . . .
>
> (iii) the agreements, arrangements or understandings under which the information or records were provided."

98. The Tribunal concludes that this provision is not applicable in the circumstances of this case, as no information or records were provided to any

person under the Retirement Agreement. Moreover, Applicant's argument that the Fund violated Section 7.02(iii) of GAO No. 35 appears to be predicated on a finding of breach of the Agreement itself, a conclusion which, as indicated above, the Tribunal does not sustain.

2. The N Rules

99. Applicant also asserts that circulation of the SBF Report violated the Fund's N Rules, which regulate the conduct of the staff. Although Applicant does not cite any particular N Rule, the only N Rule that appears to pertain to protection of information is N-6, which provides:

> "N-6. Persons on the staff of the Fund, and persons formerly on the staff of the Fund, shall not, at any time, without the express authorization of the Managing Director: (i) reveal any unpublished information known to them by reason of their service with the Fund to a person not authorized by the Fund to receive the information; or (ii) use, or allow the use of, unpublished information known to them by reason of their service with the Fund for private advantage, directly or indirectly, or for any interest contrary to that of the Fund as determined by the Managing Director. *Adopted as part of N-5 September 25, 1946, amended June 22, 1979.*"

Rule N-6 expressly governs the transmission of Fund information to parties outside of the Fund. As the 1996 SBF Report was circulated only to addressees within the Fund, the Tribunal is unable to conclude that this Rule applies to the circumstances of this case.

3. Rules regarding preparation of the SBF Report

100. Applicant also contends that in preparing and circulating the 1996 SBF Report, the Fund violated the guidelines for the scope and content of the Report. Specifically, he alleges that under the ADM Policy, as set forth in a memorandum from the Director of Administration to the Deputy Managing Director, the names of beneficiaries are to be disclosed only to the Managing Director. The memorandum in fact notes that the name of each recipient of SBF resources is to be provided to the Deputy Managing Director.

101. Applicant's argument on this point is obscure. Perhaps it is intended as a complaint that, while the names of the recipients of SBF resources were to be provided only to the Managing Director or Deputy Managing Director, the Report as circulated to the Personnel Committee had the effect of revealing names because the identities of recipients might be deduced from the identifying characteristics provided. In testimony before the Grievance Committee, the Assistant Director of Administration conceded that the entry pertaining to Applicant was identifiable on the basis of the information

given as to his nationality, departmental affiliation and age, and that, beginning with the 1997 Report, in the interest of confidentiality, the annual SBF Reports no longer reveal the nationalities of SBF recipients. Nonetheless, the Administrative Tribunal is unable to conclude that the possibility that some SBF recipients may have been identifiable in the Report that was circulated beyond the Deputy Managing Director constituted a violation of the guidelines governing the preparation of the Report.

4. Any other duty of confidentiality

102. Finally, Applicant also claims that the Fund acted in an "arbitrary and capricious" manner in circulating the 1996 SBF Report. As noted above, the policy requiring preparation and circulation of the Report was based upon considerations of transparency and equity of personnel practices. Furthermore, the selection of the thirty high-level Fund personnel to receive the Report was reasonably designed to support the objective of providing Fund-wide response to the allocation of SBF resources.

103. Applicant contends, further, that the circulation of "sensitive information" about himself was "at least grossly negligent, if not intentional". In *Ronald K. Chan v. Asian Development Bank*, Asian Development Bank Administrative Tribunal ("ADBAT") Decision No. 20 (1996), the ADBAT addressed a somewhat analogous claim. The tribunal concluded that limited notification within the organization of the suspension of a staff member's dependency allowance as the result of a domestic relations matter was "strictly limited to the needs of the good administration of the Bank and that this very restricted communication did not amount to 'insensitive and negligent (if not deliberate and malicious) publicity' as claimed by the Applicant." (Para. 46.) While, in this case, the Assistant Director of Administration who provided the information on the reason for Mr. "V"'s separation would have done well to consider more fully any relevant implications of the Retirement Agreement, any arguable lack of sensitivity on his part was not, in the view of the Tribunal, grossly negligent.

Is the Fund liable for actions of the Staff Association Committee with respect to the handling of the 1996 SBF Report?

104. Applicant asserts that the Staff Association Committee ("SAC"), in furtherance of its goals, provided copies of the 1996 SBF Report at its information desk, making it available for unfettered review by any staff member. He does not make the argument directly that the Staff Association Committee (the governing board of the Staff Association) was either bound by the Retirement Agreement between himself and the Fund or that the Fund is responsible for

acts of the SAC or its Chairman that might violate the Fund's requirements for information security. Nonetheless, the thrust of this contention is to ask the Tribunal to conclude that, by circulating the Report to the SAC Chairman, the Fund became responsible for damage allegedly resulting from the SAC's actions. The Tribunal concludes that this argument fails because the activities of the SAC are not "administrative acts" taken in the administration of the staff of the Fund and accordingly are not within its jurisdiction.

105. The Fund circulated to the SAC Chairman a copy of the 1996 SBF Report, as it has been the Fund's practice since the late 1980s to transmit all materials circulated to the Personnel Committee to the SAC Chairman as well. The Report was classified and marked "Strictly Confidential" pursuant to GAO No. 35. The evidence before the Tribunal that the Report was reproduced and left in the view of visiting staff members in the office of the Staff Association is Applicant's own testimony before the Grievance Committee, which has not been challenged. Applicant also testified that at the time of the alleged actions by the SAC he was serving as its Vice-Chairman.

106. The Fund in its Answer asserts that it takes no legal responsibility for the actions of the Staff Association Committee in the circumstances of this case. Specifically, it states that if the SBF Report were left out on a table in the Staff Association office available for anyone to view, this action would be "clearly inconsistent with the 'Strictly Confidential' designation placed on the document by the Fund." It goes on to conclude:

> "Thus, the Staff Association may well have transgressed its duty of confidentiality. However, the Staff Association is not part of the structure of the Fund nor under the control of Fund management. Accordingly, the Fund is not responsible for the actions of the Staff Association, and is not liable for misfeasance on its part. Therefore, even if it could be shown that the actions of the Staff Association resulted in injury to the Applicant, this cannot legally be attributed to the Fund."

In order to assess this argument, it is necessary to examine the legal status of the Staff Association, the jurisdiction of the Administrative Tribunal, and the acts that allegedly transpired in this case.

107. The right of staff members to associate for the presentation of their views to management is guaranteed by the Fund's N Rules (Staff Regulations). Rule N-14 provides:

> "Persons on the staff of the Fund shall have 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."

(IMF Rules and Regulations, Rule N-14, Adopted June 22, 1979.) The Staff Association is, however, a self-governing organization, bound by its own Constitution and Bylaws. All members of the staff, including Assistants to Executive Directors, are eligible for membership in the Association, which is governed by a seven-member Staff Association Committee, including a Chairman, Vice-Chairman and Secretary-Treasurer elected from the membership. The Association may also be dissolved by its membership, pursuant to referendum with the approval of two-thirds of the membership. (Constitution of the Staff Association, Articles IV, V and XV.)

108. As set forth in its Constitution, the Staff Association has determined its purposes to be two-fold:

> "a. to promote the interests and general welfare of the staff; and
>
> b. to cooperate with the Managing Director in furthering the efficient conduct of the work of the staff."

(Constitution of the Staff Association, Article II.) Similarly, its activities are defined to encompass the following:

> "a. arrange for communicating the views of the staff to the management with respect to any matter affecting the staff;
>
> b. assist the Managing Director, at his request, in matters relating to the staff; and
>
> c. organize and provide facilities for recreational, educational, and welfare activities for the staff."

(Constitution of the Staff Association, Article III.)

109. The question raised in this case is whether a complaint may be brought before the Administrative Tribunal by an allegedly adversely affected staff member, not directly against the SAC, but against the Fund complaining of an act of the SAC.

110. The Administrative Tribunal is a forum of limited subject matter jurisdiction. Its jurisdiction *ratione materiæ* is delineated by Article II of the Statute, which restricts its scope to challenges by an adversely affected staff member to the legality of an "administrative act." An "administrative act" is defined as "any individual or regulatory decision taken in the administration of the staff of the Fund." (Statute, Article II, Sections 1.a. and 2.a.) Hence, the question arises, can an action taken by a staff member in his capacity as Chairman of the Staff Association be regarded as a "decision taken in the administration of the staff of the Fund" for purposes of the jurisdiction of the Administrative Tribunal?

111. As the Fund has sole responsibility for the administration of the staff, only the Fund is contemplated as a respondent before the Tribunal, and the Tribunal's Rules confirm that pleadings are always exchanged between an applicant and the Fund.[10] The question raised here is whether an act of the Staff Association Committee could be imputed to the Fund and thereby regarded as a decision taken in the administration of its staff. In other words, did the Fund's decision to circulate the SBF Report to the SAC Chairman, which itself may have been a "decision taken in the administration of the staff of the Fund", also encompass the SAC's alleged actions thereafter? The Commentary on the Statute lists some of the kinds of decisions that are typical of administrative acts:

> "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."

(Report of the Executive Board, p. 14.)[11] In the view of the Tribunal, the alleged act of the SAC in this case is not such an administrative act.

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[10]The Tribunal's Statute and Rules of Procedure also make clear that the Staff Association may be neither an applicant (Art. II, Section 1) nor an intervenor (Rule XIV, para. 1) before the Tribunal. The Report of the Executive Board notes: "The Staff Association would not be entitled to bring actions in its own name before the tribunal."(pp. 15–16.) Nonetheless, the Tribunal's Rule XV makes provision for the possibility that the views of the Staff Association may be communicated as *amicus curiae:* "The Tribunal may, at its discretion, permit any persons, including the duly authorized representatives of the Staff Association, to communicate their views to the Tribunal." (Rule XV.)

[11]The term "decision" as it is used in the context of "regulatory decision" (Article II, Section 2.b. of the Statute) has been given definition by the Administrative Tribunal in *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent,* Judgment No. 1996–1 (April 2, 1996), in which it was held:

> "35. 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 of truncating the weight given to the previous experience of non-economists at ten years 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 to Mr. D'Aoust, 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

112. Applicant's allegation seems to suggest that because management had transmitted the Report to the SAC Chairman, it had blurred the distinction between Fund action and SAC action or that thereby the SAC acted as an extension of Fund management. In the Tribunal's view, this argument confuses the Fund's act in transmitting the Report with the SAC's subsequent handling of that Report. While it is true that there is a certain congruency between the interests of Fund management and that of the Staff Association with respect to the SBF Report, inasmuch as both share the twin concerns that SBF resources be fairly apportioned and that the confidentiality interests of staff beneficiaries be protected, this concordance of interests does not afford Fund authority to acts by the SAC taken in contravention of those interests.

113. Furthermore, it is clear from the Staff Association's constitutive documents and from its actual work that it acts independently of the Fund. While it may sometimes function in an advisory role to management, its primary purpose is to act as representative of staff (vs. management) interests. There is nothing in the circumstances of this case to suggest that its purpose was otherwise here. Indeed, even Applicant alleges that if the SAC made available to staff members copies of the SBF Report it did so "in furtherance of its goals", not the goals of the International Monetary Fund. If the SAC Chairman regarded it as within the scope of his responsibilities as representative of staff interests to make the Report available to members of the staff at large, it would be difficult to treat such an act as a "decision taken in the administration of the staff of the Fund" within the meaning of Article II of the Tribunal's Statute.

114. Accordingly, the Administrative Tribunal concludes that, whatever complaint or remedy Applicant may or may not have against the Staff Association Committee for its actions with respect to the 1996 SBF Report, that complaint or remedy cannot be pursued in the Administrative Tribunal. Nor may the Administrative Tribunal entertain as part of Applicant's complaint against the Fund (for breach of the Retirement Agreement and violation of GAO No. 35) all of the alleged consequences of the Fund's circulation of the 1996 SBF Report, including the handling of the Report by the SAC after it reached its offices. Such an extension of the Tribunal's jurisdiction to acts taken by the SAC would be inconsistent with the statutory limitation on the Tribunal's jurisdiction to consideration of "decision[s]

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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 to Mr. D'Aoust as an 'individual' rather than a 'regulatory' decision."

taken in the administration of the staff of the Fund". Hence, Applicant's allegation that the Fund is liable for acts of the Staff Association Committee in handling the 1996 SBF Report is not within the Tribunal's jurisdiction *ratione materiæ*.

Has Applicant established that he suffered injury as a result of the Fund's alleged breach of the Retirement Agreement, or any other alleged violation by the Fund, in preparing and circulating the 1996 SBF Report?

115. Applicant contends that distribution of the 1996 SBF Report damaged his reputation within the Fund, and created conflicting official records, impairing his ability to obtain supportive references in seeking outside employment. The Fund counters that Applicant has established no nexus between the preparation and circulation of the Report and his inability to find employment outside the Fund or any damage to his professional reputation and that absent any injury attributable to an illegal act on the part of the Fund, no remedy is authorized under the Tribunal's statute.

116. Applicant's efforts to secure alternative employment following the conclusion of the Retirement Agreement were reviewed above. Applicant has introduced no evidence as part of the dossier of this case that anyone responsible for denying him employment subsequent to his separation from the Fund acted on knowledge obtained from the SBF Report.

117. Applicant speculated that a former Fund staff member, now with another organization with which Mr. "V" had applied for a position, may have been aware of his performance ratings. He offered no proof, nor did he claim that that person had access to the SBF Report or that his possible knowledge of Applicant's performance history was a result of preparation and distribution of the Report. Applicant offered similar speculation that information about his history was known by another potential employer. Again, no proof was offered and no particular connection with the SBF Report was alleged. Finally, Applicant's claim that his former department intervened in preventing him from obtaining a consultancy with the Fund is inapposite as it too bears no relation to the circulation of the SBF Report.[12]

[12] The Tribunal rejected Applicant's document request concerning the matter of alleged improper interference with a consultancy contract because the requested documents were "irrelevant" to the case before the Tribunal. The Fund argued that the entire issue of the consultancy contract was not properly before the Tribunal because the acts complained of allegedly took place after Applicant's separation from the Fund on November 30, 1998. Applicant claimed there had been a pattern of interference pre-dating his separation.

118. More generally, Applicant complains that his job search has been hampered by having to "fend off conflicting official records." Once again, the assertion that "conflicting official records" have caused injury is speculative. Applicant expresses concern that he or a recommendation of him might be subject to a claim of misrepresentation should the 1996 SBF Report come to light with a potential employer, and that therefore his ability to secure references is adversely affected.

119. Not only is this argument speculative, it also ignores the reality of Applicant's circumstances. As the Fund has pointed out, it would be most unlikely for a potential employer to seek references from persons other than those in Applicant's own department with whom he had worked over the course of his extended career. The Retirement Agreement does not prevent such individuals from drawing on their own recollections and evaluations of his performance. Furthermore, the suggestion that circulation of the Report has damaged Applicant's professional reputation also tends to ignore the reality, attested to by Applicant himself, that "wide-spread reputational damage in the community" pre-existed the Retirement Agreement. While he may have sought to repair this damage through the Retirement Agreement, that Agreement does not serve to obscure completely the fact that—rightly or wrongly—Applicant's performance was at issue during his career at the Fund, at any rate in its late stage.

120. Accordingly, the Administrative Tribunal concludes that Applicant has not shown that he has suffered injury to his professional reputation or to his ability to find alternative employment as a result of the Fund's allegedly illegal or negligent action in preparing and circulating the 1996 SBF Report.

Additional issues raised by Applicant

1. Representation of Fund by its Legal Department before the Administrative Tribunal

121. In his Reply, Applicant objects to the representation of the Fund by its Legal Department in these proceedings before the Administrative Tribunal as allegedly violative of Article X, Section 3 of the Tribunal's Statute, which provides:

> "3. Each party may be assisted in the proceedings by counsel of his choice, other than members of the Fund's Legal Department, and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV."

122. Contrary to Applicant's contention that this statutory provision excludes members of the Legal Department from representing the Fund as a

party before the Tribunal, the purport of Article X, Section 3 is to prohibit members of the Legal Department from representing Applicants before the Tribunal. As the Statute's Commentary elaborates:

> "Section 3 makes clear that each party may be assisted by counsel in the proceedings. Thus, *an applicant* would have the opportunity to be assisted by any person of his choice (other than members of the Fund's Legal Department, given the inherent conflict of interest such assistance would pose) at any stage of the case." (emphasis added)

(Report of the Executive Board, p. 32.) The "inherent conflict of interest" noted by the Commentary adverts to the responsibility imposed on members of the Legal Department to their own client, the Fund.

123. That the prohibitions of Article X, Section 3 operate only to bar Legal Department attorneys from representing Applicants (but not from representing the Fund) before the Administrative Tribunal is indicated by the Tribunal's Rules of Procedure. The Rules apparently contemplate representation of the Fund by the Legal Department. Rule VII, paragraph 7, provides that the Registrar shall notify the Fund when an application has been filed, and "shall transmit a copy of it to the General Counsel". Moreover, in practice, the Legal Department has represented the Fund from the outset of the Tribunal's operations.

124. Accordingly, the Administrative Tribunal concludes that Applicant's objection to the Legal Department's representation of the Fund in these proceedings cannot be sustained.

2. Applicant's challenge to the Grievance Committee's jurisdiction and standard of review

125. Applicant contends that the Grievance Committee did not have subject matter jurisdiction over the dispute between himself and the Fund regarding the alleged violation of the Retirement Agreement because "[t]he complaint pertained to a defined contractual relationship not to the exercise of administrative discretion." Applicant appears to argue both that the Grievance Committee's standard of review is inappropriate, and that, on the basis of that standard of review, the Grievance Committee did not have jurisdiction over his complaint.[13]

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[13]The relevant legal provision, GAO No. 31, Rev. 3 includes the following provisions with respect to the Grievance Committee's jurisdiction and standard of review:

> "*Section 4. Jurisdiction of the Grievance Committee*
>
> 4.01 *Committee's Jurisdiction.* Subject to the limitations set forth at Section 4.03, the Grievance Committee shall have jurisdiction to hear any complaint

126. The Fund contests Applicant's reading of the Grievance Committee's jurisdictional competence as too narrow. It argues instead that the Grievance Committee's authority to " . . . hear any complaint by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service" embraces contractual as well as regulatory requirements. Therefore, concludes the Fund, the Grievance Committee had jurisdiction to decide Applicant's claim.

127. Having submitted his case to the Grievance Committee, it is odd for Applicant now to argue that that body was without jurisdiction. Ordinarily an argument that the Grievance Committee lacked jurisdiction would be raised by an applicant—as it was in *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998)— only as a defense to a motion to dismiss for failure to exhaust applicable channels of review. Furthermore, if, as Applicant now contends, the Grievance Committee did not have jurisdiction over his complaint, an issue would arise as to the timeliness of his Application with the Tribunal; in the

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brought by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service.

4.02 *Exhaustion of Administrative Review.* The Committee shall have jurisdiction to hear a case only after the grievant has exhausted the applicable channels of administrative review set forth in Section 6 of this Order, unless the Managing Director, or the Managing Director's designee, agrees that the grievance may be submitted directly to the Committee.

4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to (i) a decision of the Executive Board; (ii) staff regulations as approved by the Managing Director; or (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan.

4.04 *Grievance Committee's Examination of its Jurisdiction.* The Committee, for the purpose of proceeding with a grievance, shall decide whether it has jurisdiction over the matter.

Section 5. Standard of Review

5.01 *Non-Discretionary Decisions.* The Grievance Committee shall review each non-discretionary decision challenged by the grievant and shall determine whether the challenged decision was consistent with and taken in accordance with applicable Fund rules and regulations.

5.02 *Review of Discretionary Decisions.* When 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."

absence of the existence of applicable channels of administrative review, an Application must be filed no more than three months after notification of the challenged decision.[14]

128. Applicant suggests that the recommendation of the Grievance Committee was "misleading" because, he contends, the Committee was not authorized to settle contractual disputes. By contrast, he argues, "[T]he Tribunal, however, can recognize an agreement between the Fund, on the one hand, and a staff member, on the other, and settle all or any differences which arise between the contracting parties in respect of the determined legal relationship, whether contractual or not." Perhaps by asserting that the Grievance Committee did not have jurisdiction and stressing its standard of review, which he seems to suggest differs from that of the Administrative Tribunal, Applicant seeks to persuade the Tribunal not to accord deference to the Grievance Committee's decision or reasoning.

129. Applicant's concern that the Tribunal may be misled by the Grievance Committee's decision is misplaced. In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (1996), the Tribunal discussed at some length the interrelationship between the Grievance Committee and the Administrative Tribunal. *D'Aoust* held that the Tribunal is authorized only to weigh the record generated by the Grievance Committee as part of the evidence and does not stand in the position of an appellate court reviewing the actions of that Committee:

> "17 . . . Moreover, the Tribunal does not accept the Applicant's assertion that it functions as an appellate body from the Grievance Committee because the Tribunal's competence is not limited as it would be if it were a court of appeal; e.g., it makes findings of fact as well as holdings of law. At the same time, the Tribunal may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee. The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it."

As the Tribunal makes its own independent findings of fact and holdings of law, it is not bound by the reasoning or recommendation of the Grievance Committee.

130. Assuming that Applicant intends his challenge to the Grievance Committee's standard of review as a challenge to a "regulatory decision" of

[14]Article VI, Section 1 provides: "An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision."

the Fund under Article II of the Statute, then he must establish that he has been "adversely affect[ed]" (Article II, Section 1.a.)[15] by that decision. Given the holding of *D'Aoust* that the Tribunal decides each case *de novo*, it would be difficult for Applicant to show that he had been adversely affected either by the Grievance Committee's exercise of jurisdiction in his case or by the application of its standard of review. Furthermore, GAO No. 31 grants to the Grievance Committee itself authority to decide, for the purpose of proceeding with a grievance, whether it has jurisdiction over a matter. (GAO No. 31, Section 4.04.) (Applicant has not specifically challenged the legality of this provision of the GAO.)

131. The Administrative Tribunal accordingly concludes that it cannot entertain Applicant's contentions about the Grievance Committee's exercise of jurisdiction.

Respondent's request that the Tribunal award it costs for defending allegedly frivolous claims brought by Applicant in the Grievance Committee

132. The Fund requests, on the basis of Article XV of the Statute of the Administrative Tribunal and the Tribunal's Order No. 1997-1 (December 22, 1997), Interpretation of Judgment No. 1997-1 (*Ms. "C", Applicant v. International Monetary Fund, Respondent*), that the Tribunal award it costs incurred in defending allegedly frivolous claims brought by Applicant in the underlying Grievance Committee proceedings, claims which have not been made part of the Application before the Tribunal.

133. Article XV of the Tribunal's Statute provides:

> "1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:
>
> a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or
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> b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.

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[15] Article II, Section 1.a. provides:

"The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; . . . "

> 2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant."

134. The Fund does not allege that Applicant has brought frivolous claims before the Tribunal, noting that the allegedly unfounded claims brought in the administrative review process "have not been included in the Application to the Tribunal." Hence, the Fund has failed to allege the predicate required for an award of reasonable compensation under Article XV, i.e. that "a. *the application* was manifestly without foundation . . . " (emphasis supplied) or that "b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees."

135. Nonetheless, the Fund suggests that the Tribunal's Order No. 1997-1 provides a basis for the relief it seeks because that Order "made clear . . . that costs of legal representation during the administrative review process may be the subject of fee awards by the Tribunal." In Order No. 1997-1, the Tribunal was presented with a question of interpretation of a decision rendered under Article XIV, Section 4, another statutory provision from that at issue here. Article XIV, Section 4 provides:

> "4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates."

136. In the case that gave rise to Order No. 1997-1, the statutory predicate for the award of costs, that the "application is well-founded in whole or in part" had already been determined to have been met. (*Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997).) The Tribunal was later confronted with the question of whether the costs of legal representation in the administrative review that the applicant had to exhaust before coming to the Tribunal, as required by Article V of the Statute, should be included in the award of costs, and it decided that they should. The rationale for the Tribunal's Interpretation was that the preparation of a claim that ultimately succeeds in the Tribunal necessarily involves the presentation of that claim to, and its rejection by, the Grievance Committee. The Tribunal reasoned that unless awards under Article IV, Section 4 of the Statute could encompass costs incurred in pressing such claims in the Grievance Committee, the statutory purpose of giving all staff members access to the Tribunal would not be well served. The

Tribunal considered as well that had the claim succeeded initially in the Grievance Committee (as success in the Tribunal suggests it should have), the grievant could have had the benefit of the Grievance Committee's own fee-shifting authority.[16]

137. The decision and rationale of interpretative Order No. 1997-1 are readily distinguishable from what the Fund asks the Tribunal to do in this case. First, while in the circumstances of *Ms. "C"* the statutory trigger that the Application be "well-founded in whole or in part" (Article XIV, Section 4) had been met, here the statutory trigger that the Application be "manifestly without foundation" (Article XV) has not even been alleged. The allegedly frivolous claims complained of were made not in the Tribunal but in the administrative review process itself. Second, the rationale of Order No. 1997-1 was to give effect to a principle embodied in the Grievance Committee's constitutive instrument GAO No. 31. By contrast, if the Tribunal were to adopt the Fund's argument in the case of Mr. "V", it would not give effect to GAO No. 31 but, rather, in essence, supply a provision absent from that General Administrative Order, i.e. that costs could be awarded against a grievant for pressing frivolous claims. Whether or not there may be good reasons for such a rule, it is not within the competence of the Tribunal to so amend GAO No. 31.

138. Finally, Article XIV, Section 4 and Article XV are not symmetrical provisions and should not be interpreted as such. The statutory purpose of Article XIV, Section 4 is to provide for cost-shifting in favor of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members. This purpose is distinct from that of Article XV, which penalizes the bringing of frivolous claims by exacting from the offending party the cost of defending against them, thereby deterring the pursuit of cases that amount to an abuse of the review process. (See Report of the Executive Board, p. 39.)

139. Accordingly, the Administrative Tribunal concludes that there is no basis, either in Article XV of the Statute or in the Tribunal's interpretation of Article XIV, Section 4 in Order No. 1997-1, for the Tribunal to award costs to the Fund for defending any frivolous claims brought by Applicant in the Grievance Committee.

---

[16] GAO No. 31, Rev. 3, para. 7.05 provides:

"... At the conclusion of the case, if the Committee concludes that a grievance is well-founded in whole or in part, it may recommend that the Fund reimburse the grievant for some or all of the reasonable costs, including legal fees, incurred by the grievant in pursuing the grievance. ..."

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides:

1. The Fund did not act illegally, either with respect to the Retirement Agreement it had entered into with Applicant or with respect to any Fund rule or regulation, when it prepared and circulated the 1996 SBF Report, in accordance with Fund Policy.

2. The preparation of the SBF Report and its circulation to a limited number of addressees within the Fund, which by way of explanation for the disbursement of SBF resources on Applicant's behalf characterized his performance as "[u]nable to produce work that met department's standards", did not violate any of the following clauses of the Retirement Agreement: paragraph 3 (sealing of Applicant's 1992 and 1994 APRs); paragraph 4 (removal of the numerical APR ratings for 1992 and 1994 from the "personnel data base"); or paragraph 8 (confidentiality clause). Nor did the Fund agree as part of the Retirement Agreement to "cleanse" Applicant's record or to refrain from producing any document subsequent to the conclusion of that Agreement that might reflect on his performance.

3. There is no conflict between the Fund's internal law, requiring circulation of the SBF Report, and its contractual obligations to Applicant under the Retirement Agreement. Likewise, the Fund did not act illegally or improperly in not bringing to Applicant's notice during negotiations with Applicant the SBF reporting requirements.

4. The preparation and circulation of the 1996 SBF Report did not violate any Fund rules or regulations or breach any duty owed by the Fund to Applicant independent of the Retirement Agreement, either under GAO No. 35, the N Rules, the SBF reporting requirements themselves, or any other duty of confidentiality.

5. Applicant's claim that the Fund is liable for alleged acts of the Staff Association Committee (SAC) with respect to the handling of the 1996 SBF Report that was circulated on a "Strictly Confidential" basis to the SAC Chairman is not within the Tribunal's jurisdiction *ratione materiæ*, which is limited to "decision[s] taken in the administration of the staff".

6. As the Tribunal holds that the Fund did not breach the Retirement Agreement or violate any Fund rule or regulation in its preparation and distribution of the 1996 SBF Report, and that Applicant's claim that the Fund is

responsible for acts of the SAC is not within the Tribunal's jurisdiction, it is therefore not necessary to reach the question of whether Applicant suffered any injury thereby. In any event, it holds that Applicant has not established any nexus between the Fund's acts in the preparation and distribution of the 1996 SBF Report and Applicant's failure to obtain new employment.

7. The Tribunal holds that the representation of the Fund by its Legal Department before the Administrative Tribunal does not violate Article X, Section 3 of the Tribunal's Statute.

8. The Tribunal cannot entertain Applicant's challenge to the Grievance Committee's exercise of jurisdiction in his case or its application of its standard of review.

9. Finally, as there is no supportive statutory basis, the Tribunal holds that it cannot grant the Fund's request for an award of costs for defending allegedly frivolous claims brought by Applicant in the Grievance Committee.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Agustín Gordillo, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Acting Registrar

Washington, D.C.
August 13, 1999

ORDERS
(Nos. 1997-1 to 1999-2)

ORDER NO. 1997-1

Interpretation of Judgment No. 1997-1 (Ms. "C", Applicant v. International Monetary Fund, Respondent)

(December 22, 1997)

The Administrative Tribunal of the International Monetary Fund,

- having received a request by the Fund for an interpretation of certain parts of Judgment No. 1997-1, (*Ms. "C", Applicant v. International Monetary Fund, Respondent*, August 22, 1997), and
- having regard to the limited authority to interpret its judgments conferred upon the Tribunal by Article XVII[1] of the Statute of the Administrative Tribunal and Rule XX[2] of the Rules of Procedure, and
- having considered the views of the Fund and the Applicant concerning the Fund's request,

unanimously adopts the following decision in respect of the Fund's application for interpretation of Judgment No. 1997-1:

First: The legality of the Judgment is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the

[1]"The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error."

[2]"*Interpretation of Judgments*

1. In accordance with Article XVII of the Statute, after a judgment has been rendered, any party may apply to the Tribunal requesting an interpretation of the operative provisions of the judgment.

2. The application shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure or incomplete.

3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the application for interpretation. If the application is admitted, the Tribunal shall issue its interpretation, which shall thereupon become part of the original judgment."

Tribunal to issue an interpretation, because the judgment is final and without appeal.[3]

Second: The Tribunal decides to admit, on the basis of Article XVII and Rule XX, the Fund's application for interpretation of Judgment No. 1997-1.

Third: The term "costs", which appears in para. "Third" of the Decision in Judgment No. 1997-1, denotes the costs that Applicant was or is obligated to pay for her legal representation.

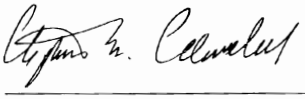
Fourth: The phrase "legal representation" in para. "Third" of the Decision in Judgment No. 1997-1 embraces Applicant's representation in the administrative review that she had to exhaust pursuant to Article V of the Statute prior to the filing of an Application with the Tribunal, as well as the proceedings before the Tribunal.

Fifth: The limited degree to which Applicant was successful in comparison with her total claims justifies a measure of proportionality in the determination of the costs to be borne by the Fund.

Sixth: The Tribunal finds no legal relationship between the amount of compensation awarded to Applicant and the costs of legal representation to be borne by the Fund.

This Order shall be annexed to Judgment No. 1997-1 and become part thereof.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge



Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
December 22, 1997

[3]Article XIII, Section 2: "Judgments shall be final, subject to Article XVI and Article XVII, and without appeal."

ORDER NO. 1998-1

Assessment of compensable legal costs pursuant to Judgment No. 1997-1 (Ms. "C", Applicant v. International Monetary Fund, Respondent)

(December 18, 1998)

The Administrative Tribunal of the International Monetary Fund,

- having decided in Judgment No. 1997-1 (*Ms. "C", Applicant v. International Monetary Fund, Respondent*, August 22, 1997) that:

  " . . . the Applicant shall be awarded reasonable costs of her legal representation. In the circumstances, compensable costs shall be agreed between Applicant and the Fund. In the event that agreement cannot be reached, the Tribunal will assess costs having regard to the submissions of the Applicant and of the Fund.",

  and

- having issued Order No. 1997-1, interpreting terms of the above decision, and

- having received communications from the parties to the effect that they are unable to reach agreement as to the method of calculating compensable costs and the amount thereof, and hence seek the Tribunal's assistance in the matter, and

- having reviewed the parties' arguments regarding the method of calculation of compensable costs in the light of Article XIV of the Tribunal Statute[1], as well as the Tribunal's Order No. 1997-1 and Explanatory Memorandum, and relevant jurisprudence,

[1]Art. XIV, para. 4: "If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates."

unanimously adopts the following decision regarding assessment of costs pursuant to Judgment No. 1997-1:

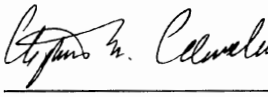
First: The parties are unable to reach agreement as to the reasonable costs of Applicant's legal representation awarded in Judgment No. 1997-1,

Second: The Tribunal will now, therefore, assess the costs, having regard to the submissions of the Applicant and of the Fund,

Third: Given the limited degree to which Applicant was successful in comparison with her total claims, that is, that she prevailed not on her main claim but only on a related claim, and taking into account the nature and complexity of the case, its preparation by her counsel, and the amount of their fees in relation to prevailing rates, the Fund is liable to pay the reasonable costs of Applicant's legal representation in the amount of $15,000.

This Order shall be annexed to Judgment No. 1997-1 and, along with Order No. 1997-1, shall become part thereof.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge



Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
December 18, 1998

ORDER NO. 1999-1

Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent)

(February 26, 1999)

1. The Administrative Tribunal of the International Monetary Fund has received a request by the Fund for an interpretation of language found in paragraph 43 of Judgment No. 1998-1, (*Ms. "Y", Applicant v. International Monetary Fund, Respondent*, December 18, 1998). The Tribunal understands this request as a request for interpretation of paragraph "Second" of the operative provisions of the Judgment, which provides as follows:

> "Second, the Administrative Tribunal will reconsider the Applicant's claim on the basis of the Application now before it, in the event that the Grievance Committee, if seized, decides that it does not have jurisdiction over that claim."

2. The Fund requests the Tribunal to interpret the term "jurisdiction" appearing in that paragraph to refer only to jurisdiction *ratione materiae*.

3. Having regard to Article XVII[1] of the Statute of the Administrative Tribunal and Rule XX[2] of the Rules of Procedure which confer upon it the limited authority to interpret judgments whose terms appear obscure or

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[1] "The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error."

[2] "*Interpretation of Judgments*

1. In accordance with Article XVII of the Statute, after a judgment has been rendered, any party may apply to the Tribunal requesting an interpretation of the operative provisions of the judgment.

2. The application shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure or incomplete.

3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the application for interpretation. If the application is admitted, the Tribunal shall issue its interpretation, which shall thereupon become part of the original judgment."

incomplete, and having considered the views of the Fund and the Applicant concerning the Fund's request, the Administrative Tribunal unanimously adopts the following decision:

First: The Tribunal decides on the basis of Article XVII and Rule XX, not to admit the Fund's application, on the ground that the term "jurisdiction" in paragraph "Second" of Judgment No. 1998-1 is neither obscure nor incomplete;

Second: The adoption of the requested interpretation would constitute an amendment of the Judgment, which is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to decide by way of an interpretation, because the Judgment is final and without appeal.[3]

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
February 26, 1999

[3] Article XIII, Section 2: "Judgments shall be final, subject to Article XVI and Article XVII, and without appeal."

ORDER NO. 1999-2

Mootness of Application (Mr. "P", Applicant v. International Monetary Fund, Respondent)

(August 12, 1999)

The Administrative Tribunal of the International Monetary Fund,

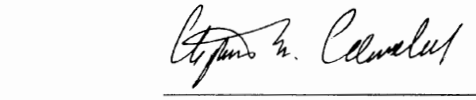
Considering that Mr. "P" filed an Application with the Administrative Tribunal, dated November 20, 1998, in which he challenged the decision of the Administration Committee of the Staff Retirement Plan to withhold part of his monthly pension payments pending the resolution of a dispute relating to a domestic relations matter; and

Considering further that the Tribunal has been informed that on March 19, 1999 the Administration Committee reversed its decision to withhold part of his monthly pension payments, and also decided to pay Mr. "P" all amounts withheld, plus interest;

Considering therefore that Mr. "P"'s position has been satisfied;

The Administrative Tribunal decides to treat the Application as moot.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Agustín Gordillo, Associate Judge



Stephen M. Schwebel, President

Celia Goldman, Acting Registrar

Washington, D.C.
August 12, 1999

INDEX TO
IMFAT JUDGMENTS AND ORDERS
1994–1999

(References are made to Judgment, Order and
paragraph numbers, as well as to
pages of this volume.)

INDEX TO
IMFAT JUDGMENTS AND ORDERS
1994–1999

APPENDIX

The following documents, previously published, are reproduced herein for the convenience of the reader. The original pagination of these documents has been retained for clarity.

Statute of the Administrative Tribunal of the International Monetary Fund

Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund

Resolution No. 48-1 Establishment of the Administrative Tribunal of the International Monetary Fund

Rules of Procedure of the Administrative Tribunal of the International Monetary Fund

Administrative Tribunal

of the

International Monetary Fund

Statute of the Administrative Tribunal

Report of the Executive Board to the Board of Governors

Resolution of the Board of Governors

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Statute of the Administrative Tribunal of the International Monetary Fund

ARTICLE I

There is hereby established a tribunal of the International Monetary Fund ("the Fund"), to be known as the Administrative Tribunal of the International Monetary Fund ("the Tribunal").

ARTICLE II

1. The Tribunal shall be competent to pass judgment upon any application:

   a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or

   b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.

2. For purposes of this Statute:

   a. the expression "administrative act" shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;

   b. the expression "regulatory decision" shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;

   c. the expression "member of the staff" shall mean:

      (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;

(ii) any current or former assistant to an Executive Director; and

(iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund;

d. the calculation of a period of time shall not include the day of the event from which the period runs, and shall include the next working day of the Fund when the last day of the period is not a working day;

e. the masculine pronoun shall include the feminine pronoun.

ARTICLE III

The Tribunal shall not have any powers beyond those conferred under this Statute. 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. Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund. The Tribunal shall be bound by any interpretation of the Fund's Articles of Agreement decided by the Executive Board, subject to review by the Board of Governors in accordance with Article XXIX of that Agreement.

ARTICLE IV

Any issue concerning the competence of the Tribunal shall be settled by the Tribunal in accordance with this Statute.

ARTICLE V

1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the

Tribunal only after the applicant has exhausted all available channels of administrative review.

2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

3. For purposes of this Statute, where the available channels of review do not include the procedure described in Section 2, a channel of administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since the request for review was made and no decision stating that the relief requested would be granted has been notified to the applicant;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

4. For purposes of this Statute, all channels of administrative review shall be deemed to have been exhausted when the Managing Director and the applicant have agreed to submit the dispute directly to the Tribunal.

ARTICLE VI

1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.

2. An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.

3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.

4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.

5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

ARTICLE VII

1. The members of the Tribunal shall be appointed as follows:

   a. The President shall be appointed for two years by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board. The President shall have no prior or present employment relationship with the Fund.

   b. Two associate members and two alternates who have no prior or present employment relationship with the Fund shall be appointed for two years by the Managing Director after appropriate consultation.

   c. The President and the associate members and their alternates must be nationals of a member country of the Fund at the time of

their appointments and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

2. The President and the associate members and their alternates may be reappointed in accordance with the procedures for appointment set forth in Section 1 above. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

3. Any member who has a conflict of interest in a case shall recuse himself.

4. The decisions of the Tribunal shall be taken by the President and the associate members, provided that when an associate member has recused himself or, for any other reason, is unable to hear a case, an alternate shall be designated by the President, and provided further that, if the President himself is unable to hear a case, the elder of the associate members shall act as President for that case, and shall be replaced by an alternate as associate member.

5. The Managing Director shall terminate the appointment of a member who, in the unanimous opinion of the other members, is unsuited for further service.

ARTICLE VIII

The members of the Tribunal shall be completely independent in the exercise of their duties; they shall not receive any instructions or be subject to any constraint. In the performance of their functions, they shall be considered as officers of the Fund for purposes of the Articles of Agreement of the Fund.

ARTICLE IX

1. The Managing Director shall make the administrative arrangements necessary for the functioning of the Tribunal.

2. The Managing Director shall designate personnel to serve as a Secretariat to the Tribunal. Such personnel, in the discharge of duties hereunder, shall be under the authority of the President. They shall not, at

any time, disclose confidential information received in the performance of their duties.

3. The expenses of the Tribunal shall be borne by the Fund.

ARTICLE X

1. The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal, provided that the applicant's allegations concerning the contents of any document so withheld shall be deemed to have been demonstrated in the absence of probative evidence to the contrary. The Tribunal may examine witnesses and experts, subject to the same qualification.

2. Subject to the provisions of this Statute, the members of the Tribunal shall, by majority vote, establish the Tribunal's Rules of Procedure. The Rules of Procedure shall include provisions concerning:

a. presentation of applications and the procedure to be followed in respect to them;

b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment;

c. presentation of testimony and other evidence;

d. summary dismissal of applications without disposition on the merits; and

e. other matters relating to the functioning of the Tribunal.

3. Each party may be assisted in the proceedings by counsel of his choice, other than members of the Fund's Legal Department, and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV.

ARTICLE XI

The Tribunal shall hold its sessions at the Fund's headquarters at dates to be fixed in accordance with its Rules of Procedure.

ARTICLE XII

The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

ARTICLE XIII

1. All decisions of the Tribunal shall be by majority vote.

2. Judgments shall be final, subject to Article XVI and Article XVII, and without appeal.

3. Each judgment shall be in writing and shall state the reasons on which it is based.

4. The deliberations of the Tribunal shall be confidential.

ARTICLE XIV

1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain.

ARTICLE XV

1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:

a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or

b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.

2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant.

ARTICLE XVI

A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal, and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

ARTICLE XVII

The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.

ARTICLE XVIII

1. The original of each judgment shall be filed in the archives of the Fund. A copy of the judgment, attested to by the President, shall be delivered to each of the parties concerned.

2. A copy shall also be made available by the Secretariat on request to any interested person, provided that the President may decide that the identities or any other means of identification of the applicant or other persons mentioned in the judgment shall be deleted from such copies.

ARTICLE XIX

This Statute may be amended only by the Board of Governors of the Fund.

ARTICLE XX

1. The Tribunal shall not be competent to 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.

2. In the case of decisions taken between October 15, 1992 and the establishment of the Tribunal, the application shall be admissible only if it is filed within three months after the establishment of the Tribunal. For purposes of this provision, the Tribunal shall be deemed to be established when the staff has been notified by the Managing Director that all the members of the Tribunal have been appointed.

ARTICLE XXI

The competence of the Tribunal may be extended to any international organization upon the terms established by a special agreement to be made with each such organization by the Fund. Each such special agreement shall provide that the organization concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization and shall include, inter alia, provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund

Part I. Introduction

1. In 1986, the Executive Board began to consider the possible establishment of an administrative tribunal to adjudicate employment-related disputes at the Fund. The first stage in this process was to review the major administrative tribunals established by other international organizations, including the major features of these tribunals and their general practices and procedures. Having agreed, in principle, that the Fund should have an administrative tribunal, the Executive Board conducted a comprehensive review of the various issues raised by the establishment of a tribunal. Particular attention was given to (1) the role of tribunals in reviewing employment-related decisions; (2) the types of cases which tribunals are authorized to hear; (3) access to tribunals; (4) composition and structure of tribunals; and (5) the remedies and costs which tribunals are authorized to award. On that basis, a draft statute providing for the establishment of an administrative tribunal for the Fund was prepared, with an accompanying commentary.

2. The Executive Board is hereby proposing the adoption by the Board of Governors of the statute. The commentary in Part II of this report explains the meaning of each provision of the proposed statute. Part III describes the procedure for the adoption of the proposed statute. Part IV proposes a resolution for adoption by the Board of Governors. The text of the proposed statute is attached to the proposed resolution.

Part II. Commentary on the Proposed Statute

This commentary explains each provision of the proposed statute in turn.[1]

ARTICLE I

There is hereby established a tribunal of the International Monetary Fund ("the Fund"), to be known as the Administrative Tribunal of the International Monetary Fund ("the Tribunal").

Article I, like its counterpart in the statutes of other tribunals, performs a constitutive function and also names the tribunal. As noted above, it envisages the establishment of a tribunal to serve the Fund exclusively, although provision is made in Article XXI for other international organizations to affiliate with the Fund tribunal.

ARTICLE II

1. The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or

Article II sets forth the competence of the tribunal. The power of an international administrative tribunal to pass judgment in a particular case brought before it derives from the statute which establishes the tribunal. The scope of competence of the proposed tribunal is defined by this instrument, and the limitations imposed in it establish the bounds of the tribunal's authority.

Section 1(a) provides that the tribunal would be empowered to review a staff member's challenge to the legality of an administrative act (de-

[1]The following acronyms will be used herein: Administrative Tribunal of the Bank for International Settlements ("BISAT"); Court of Justice of the European Communities ("CJEC"); European Economic Community ("EEC"); International Court of Justice ("ICJ"); Inter-American Development Bank Administrative Tribunal ("IDBAT"); International Labour Organisation Administrative Tribunal ("ILOAT"); North Atlantic Treaty Organization ("NATO"); Administrative Tribunal of the Organization of American States ("OASAT"); United Nations Administrative Tribunal ("UNAT"); World Bank Administrative Tribunal ("WBAT").

fined below) that adversely affects him. The statutes of several other tribunals contain similar language as regards jurisdiction.[2] Although the Fund has not adopted a formal statement of principles of staff employment, the employment relationship between the Fund and the staff is subject to legal rights and obligations, one element of which is the obligation of the employer to take employment-related decisions in accordance with the law of the Fund, including applicable rules, procedures, and recognized norms. It would be the function of the tribunal, as a judicial body, to determine whether a decision transgressed the applicable law of the Fund. However, a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.

b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.

Section 1(b) sets forth the competence of the tribunal with respect to the retirement and other benefit plans maintained by the Fund, such as the Staff Retirement Plan (SRP), the Medical Benefits Plan (MBP), and the Group Life Insurance Plan.[3] This provision would allow individuals who are not members of the staff but who have rights under these plans to bring claims before the tribunal concerning decisions taken under or with respect to the plan. Such individuals would include beneficiaries under the SRP and nonstaff enrollees in the MBP, for example, a deceased staff member's widow who continues to participate in the MBP. Such individuals would, however, be entitled to assert claims only with respect to decisions arising under or concerning the Fund's retirement or benefit plans; they would not have the right to challenge other types of administrative acts before the tribunal.

[2]E.g., CJEC: EEC Treaty, Article 179; NATO Appeals Board: Resolution of the North Atlantic Council, Article 4.21; Council of Europe Appeals Board: Staff Regulations, Article 59(1).

[3]The tribunal would be authorized to review decisions relating to or arising under the Staff Retirement Plan (SRP), whether of an individual or general nature. Other tribunals, including the WBAT, have jurisdiction to consider whether there has been nonobservance of the provisions of a staff retirement plan. See, e.g., WBAT Statute, Article II(1). It should be noted that the SRP, Art. 7.1(d), permits the tribunal to exercise such jurisdiction.

2. For purposes of this Statute,

a. the expression "administrative act" shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;

b. the expression "regulatory decision" shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;

Subsections (a) and (b) of Section 2 provide two definitions which are critical to construing the competence of the tribunal; the definitions of "administrative act" and "regulatory decision" delineate the types of cases which comprise the subject matter jurisdiction, or competence *ratione materiae*, of the tribunal. There are several aspects of this competence.

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. As discussed below, in most cases concerning individual administrative decisions, the staff member would be challenging the decision after unsuccessfully pursuing the established channels for administrative review of his complaint, including recourse to the Grievance Committee.

The statute makes explicit that the tribunal would have jurisdiction to review regulatory decisions, either directly or in the context of a review of an individual decision based on the regulatory decision. This would encompass, for example, Executive Board decisions regarding employment policy (such as adjustments to compensation, pensions, tax allowance, benefits, and job grading), the SRP, and staff rules and regulations promulgated by management, such as the General Administrative Orders. As provided in Article III, the tribunal would be expected to apply well-established principles for review of actions by decision-

making organs, including noninterference with the proper exercise of authority by those organs.

The statute excludes from the tribunal's competence resolutions taken by the organ establishing the tribunal, that is, the Board of Governors. In this fashion, the Executive Board could, through referral of a decision to the Board of Governors for ultimate approval, foreclose review of the legality of that decision by the tribunal. Underlying this provision is the recognition that the Board of Governors is the organ responsible for establishing the tribunal and determining the scope of its jurisdiction. Therefore, it could, at any time, limit the tribunal's jurisdiction by a resolution. Moreover, the Board of Governors is the highest organ of the Fund, and its resolutions should be regarded as the highest expression, short of an amendment of the Articles, of the will of the membership.

c. the expression "member of the staff" shall mean:

(i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;

(ii) any current or former assistant to an Executive Director; and

(iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund;

The definitions in subsections (c)(i) and (ii) include only staff members (i.e., persons on regular or fixed-term appointments to the staff) and assistants to Executive Directors (i.e., persons employed on the recommendation of an Executive Director to assist him in a clerical, secretarial, or technical capacity).

The definition also includes persons who would be entitled to assert the rights of the staff member in the event of his death; thus, if an issue as to the termination payments due to a staff member were unresolved at the time of his death, that claim could be pursued by the personal representative of the estate.

The statute would not allow unsuccessful candidates to the staff to bring claims before the tribunal. Nor would persons employed under contract to the Fund have access to the tribunal. The Staff Association

would not be entitled to bring actions in its own name before the tribunal.

d. the calculation of a period of time shall not include the day of the event from which the period runs, and shall include the next working day of the Fund when the last day of the period is not a working day;

This provision clarifies how the periods of time stated in the statute (e.g., the time limits for filing an application in Article VI) are to be calculated. The period would start to run on the day after the date on which the challenged decision is rendered; if the last day of the period fell on a weekend or holiday, the deadline would be extended through the next working day.[4]

e. the masculine pronoun shall include the feminine pronoun.

This provision makes clear that the statute applies equally to males and females; it enables the universal use of the masculine pronoun for the sake of simplicity.

ARTICLE III

(first sentence)

The Tribunal shall not have any powers beyond those conferred under this Statute.

The first sentence of this Article, in providing that the powers of the tribunal are limited to those set forth in the statute, states the general principle recognized in international administrative law that tribunals have limited jurisdiction rather than general jurisdiction.[5] As a consequence, administrative tribunals have competence only to the extent that their statutes or governing instruments confer authority to decide disputes. Thus, the statutory provision defining the competence of the tribunal is, at the same time, a prohibition on the exercise of competence outside the jurisdiction conferred.

[4]For an example of how periods are calculated under this provision, see pp. 24–25 below.

[5]See, e.g., the advisory opinion of the ICJ concerning the competence of the ILOAT in *Judgments of the Administrative Tribunal of the International Labour Organisation,* ICJ Reports (1956) 77, at p. 97.

(second sentence)

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.

The second sentence of this Article calls upon the tribunal to adhere to and apply generally recognized principles for judicial review of administrative acts. These principles have been extensively elaborated in the case law of both international administrative tribunals and domestic judicial systems, particularly with respect to review of decisions taken under discretionary powers.

The reference to recognized principles of international administrative law is intended to limit the powers of the tribunal by making clear that the standards of review applied by the tribunal should not go beyond those applied by other tribunals, and that the tribunal is expected to recognize the limitations observed by other administrative tribunals of international organizations in reviewing the exercise of discretionary authority by the decision-making organs of the Fund. In other words, the fact that the tribunal has been given competence to review employment-related decisions by the Fund would not mean that it had greater latitude in the exercise of that power than that exercised by other administrative tribunals. In particular, the tribunals have reaffirmed, in a variety of contexts, that they will not substitute their judgment for that of the competent organs and will respect the broad, although not unlimited, power of the organization to amend the terms and conditions of employment.

This limitation on the tribunal's power to review regulatory decisions underscores the basic premise that the creation of an administrative tribunal to resolve employment-related disputes would not alter the employment relationship as such between the Fund and its staff—that is, apart from the avenue of recourse it provides, it neither expands nor derogates from the rights and obligations found in the internal law of the organization.

With respect to employment-related matters, the internal law of the Fund includes both formal, or written, sources (such as the Articles of Agreement, the By-Laws and Rules and Regulations, and the General

Administrative Orders) and unwritten sources. These sources of internal law apply to, and circumscribe, the exercise of discretionary authority by the Executive Board in prescribing the terms and conditions of Fund employment.

With respect to formal sources of law, insofar as the Executive Board derives its authority from the Articles of Agreement, its decisions must be consistent with the Articles as a higher authority of law. Likewise, the Executive Board is also bound by resolutions of the Board of Governors as the highest organ of the Fund.

There are two unwritten sources of law within the internal law of the Fund. First, the administrative practice of the organization may, in certain circumstances, give rise to legal rights and obligations.[6] Second, certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund.

The Fund, like all international organizations, has reserved to itself broad powers to alter the terms and conditions of employment on a prospective basis.[7] However, an important limitation on the exercise of this authority would be where the Fund has obligated itself, either through a formal commitment or through a consistent and established practice, not to amend that element of employment. In the absence of such a commitment by the Fund, there would be no basis for a finding by the tribunal that a decision changing an element of employment violated the rights of the staff. Moreover, even where the organization has voluntarily undertaken such a commitment, subsequent developments, such

[6]For example, in the *de Merode* case, the WBAT held that the World Bank had a legal obligation, arising out of a consistent and established practice, to carry out periodic salary reviews. *de Merode*, WBAT Reports, Dec. No. 1 (1981), at p. 56.

[7]One basic limitation on an organization's power of amendment is the protection of acquired or vested rights, whether or not expressly provided for in the staff regulations. However, even this limitation has been very narrowly construed and interpreted as essentially synonymous with the principle of non-retroactivity. In other words, an amendment cannot deprive a staff member of any benefit or emolument that has been earned or accrued before the effective date of the change. Accordingly, respect for acquired rights would not preclude the organization from prospective alterations in the conditions of employment.

as urgent and unavoidable financial imbalances, may authorize certain adjustments if they are reasonably justified.[8]

As applied to the review of regulatory decisions, the case law of administrative tribunals in general demonstrates that although there exists a competence to review regulatory decisions, the scope of that review is quite narrow. There are broad and well-recognized principles protecting the exercise of authority by the decision-making organs of an institution from interference by a judicial body. The Fund tribunal would have to respect those principles in reviewing the legality of regulatory decisions.

Likewise, with respect to review of individual decisions involving the exercise of managerial discretion, the 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.[9] This principle is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.[10]

At the same time, the reference to general principles is not intended to introduce concepts that are inapplicable to, or inappropriate for, the Fund. With respect to the concern that the application of the principles enunciated by other administrative tribunals may have the unintended result of interfering with the responsibilities entrusted to the Executive Board, it should be noted that, to the extent that a tribunal's decision is dependent on the particular law of the organization in question (such as the precise language of a staff regulation), the decision would be regarded as specific to the organization in question and not part of the general principles of international administrative law. Moreover, in applying general principles of international administrative law, an administrative tribunal cannot derogate from the powers conferred on the

[8]*Gretz*, UNAT Judgment No. 403 (1987).

[9]E.g., *Durrant-Bell*, WBAT Reports, Dec. No. 24 (1985), at paras. 24, 25.

[10]See generally M. Akehurst, *The Law Governing Employment in International Organizations,* at 118–23 (1967); C.W. Jenks, *The Proper Law of International Organisations,* at 86–88 (1962).

organs of the Fund, including the Executive Board, under the Articles of Agreement. This is made explicit in the third sentence of Article III.

(third sentence)

Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund.

The third sentence of Article III incorporates, as part of the governing instrument of the tribunal, the concept of separation of power between the tribunal, on the one hand, and the legislative and executive organs of the institution, on the other hand, by stating that the establishment of the tribunal would not in any way affect the authority conferred on other organs of the Fund under the Articles of Agreement. This provision would be particularly significant with respect to the authority conferred under Article XII, Section 3(*a*), which authorizes the Executive Board to conduct the business of the Fund, and under Section 4(*b*) of that Article, which instructs the Managing Director to conduct the ordinary business of the Fund, subject to the general control of the Executive Board.

This provision is consistent with well-established case law in which judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred.[11] Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions.[12]

(fourth sentence)

The Tribunal shall be bound by any interpretation of the Fund's Articles of Agreement decided by the Executive Board, subject to review by the Board of Governors in accordance with Article XXIX of that Agreement.

[11] See generally S.A. de Smith, *Judicial Review of Administrative Action,* at 278–79 (4th ed. 1980).

[12] See *von Stauffenberg*, WBAT Reports, Dec. No. 38 (1987), at para. 126; *Decision No. 36*, NATO Appeals Board (1972), Collection of the Decisions (1972).

The statute also explicitly provides that interpretations of the Articles of Agreement rendered by the Executive Board would be binding on the tribunal. This provision would not deprive the tribunal of the authority to interpret the Articles. However, in situations where the Executive Board has adopted a certain interpretation of the Articles, that interpretation, although subject to review by the Board of Governors in accordance with the procedures of Article XXIX, would be binding on the tribunal in the context of a challenge to a decision. The purpose of this provision is to avoid an irreconcilable conflict between interpretations made by the Executive Board, on the one hand, and the tribunal, on the other hand.

With respect to interpretations of the Articles, there is a distinction between interpretations and findings of legality. An interpretation clarifies the meaning of a provision of the Articles; it does not dispose of a particular case. Therefore, a finding of legality of a particular regulatory or individual decision would still be made by the tribunal. This finding would have to be consistent with the interpretation adopted by the Executive Board. Given that interpretations of the Articles of Agreement by the Executive Board are binding on the Fund and all its members,[13] this sentence, which makes such interpretations binding on the tribunal as well, adheres to the general principle of consistency within any legal system, in order that the same provision will have only one meaning.

ARTICLE IV

Any issue concerning the competence of the Tribunal shall be settled by the Tribunal in accordance with this Statute.

The tribunal would have the authority to determine its own competence within the terms of its statute. Comparable authority has been accorded to virtually every international administrative tribunal,[14] which is intended to allow the tribunal to interpret but not expand its competence with respect to a particular case.

[13]Article XXIX of the Fund's Articles of Agreement.

[14]E.g., UNAT Statute, Article 2(3); ILOAT Statute, Article II(7); WBAT Statute, Article III.

ARTICLE V

1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.

2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

3. For purposes of this Statute, where the available channels of review do not include the procedure described in Section 2, a channel of administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since the request for review was made and no decision stating that the relief requested would be granted has been notified to the applicant;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

4. For purposes of this Statute, all channels of administrative review shall be deemed to have been exhausted when the Managing Director and the applicant have agreed to submit the dispute directly to the Tribunal.

Article V prescribes an exhaustion of remedies requirement with respect to the admissibility of applications before the tribunal. Cases otherwise falling within the tribunal's competence would be admissible only if applicable administrative remedies have been exhausted. The exhaustion requirement is imposed by the statutes of all major administrative tribunals, presumably for the reason that the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate.

Under this Article, in situations where administrative review includes recourse to formal procedures established by the Fund for this purpose, a channel of administrative review would be exhausted by any of the following events, as applicable to the circumstances. First, the requirement would be satisfied if a recommendation on the matter had been made to the Managing Director and the applicant received no decision granting him the relief requested within three months. Second, the requirement would be satisfied if the applicant received a decision denying his request; a decision which granted his request only in part would be treated as a denial for this purpose. Third, if the applicant received a decision granting him the relief requested but the relief was not forthcoming after two months had elapsed, administrative review would be considered exhausted. Finally, if the Fund and the applicant agree to bypass administrative review and submit the dispute directly to the tribunal, all channels of administrative review would be considered exhausted for purposes of this Article.

In situations where recourse to the Grievance Committee or other formal procedure is not applicable, administrative review of a request would be considered as exhausted by any of the outcomes described in Section 3.

ARTICLE VI

1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.

2. An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.

Sections 1 and 2 of Article VI set forth the time limits in which an application must be filed with the tribunal in order to be admissible. In most cases involving individual decisions, a staff member will have three months from the date on which all available channels of administrative review have been exhausted (as prescribed in Article V) in which to bring an action.

The three-month period would not include the time required for administrative review; the period would not begin to run until administrative review, including recourse to internal committees like the Grievance Committee (if applicable), is fully exhausted and the Managing Director has decided whether to implement the Committee's recommendation. At this point, of course, an applicant should have a reasonably good assessment of the issues presented and the strengths and weaknesses of his case.

Under the current rules of the Grievance Committee, grievants have up to one year from the event giving rise to the grievance to bring an action. In cases where the Grievance Committee would have jurisdiction over the question, this year-long period, which would precede the three-month statute of limitations for the tribunal, should give a staff member ample opportunity to assess whether he or she wishes to proceed with the case.

The comparable period in other international administrative tribunals is generally 60 days or 90 days; except in cases of death, the statute of limitations in other tribunals does not exceed 90 days.[15]

An illustration of the interaction of the exhaustion of remedies requirement of Article V and the time limits of Article VI with respect to individual decisions may be helpful. If, on January 2, the Grievance Committee made a recommendation to the Managing Director regard-

[15]Compare the WBAT Statute (90 days); UNAT Statute (90 days); IDBAT Statute (60 days).

ing the disposition of an individual decision, the three-month period prescribed in Article V, Section 2 would run from January 3 to April 2, inclusive.[16] Thus, if the staff member received a response denying his request on the last day of the period, or had not received a response granting his request by that date, he would have exhausted administrative review.[17] He would thereupon have three months, i.e., from April 3 to July 2, in which to file an application with the tribunal. If July 2 was not a working day, the deadline would fall on the next working day thereafter, as prescribed in Article II, Section 2(d). If the staff member received a favorable decision on April 2 granting his request, but did not receive the relief requested by June 2, inclusive, he would have three months, i.e., from June 3 to September 2, inclusive, in which to bring an action before the tribunal. Of course, if the relief was, in fact, granted in that period, there would be no case to go forward.

Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision.

However, the legality of a regulatory decision could be raised as an issue at any time with respect to an individual decision taken pursuant thereto, subject to the rules involving timely filing of challenges to individual decisions. Accordingly, a staff member could contest the denial of a benefit in his particular case on the grounds that the regulation on which the denial was based was illegal, without regard to the date on which the regulation was enacted, subject to the provisions of Article XX.

There could, of course, be cases where an applicant sought to overturn an individual decision on several grounds, e.g., that the decision is either an incorrect application of the underlying regulatory decision, or, alternatively, that the underlying regulatory decision itself is illegal. The Grievance Committee would be competent to consider challenges based

[16]Or on the next working day, if April 2 is not a working day.

[17]If a response denying the request was received before April 2, the three-month period for filing an application would run from the date of receipt. For instance, if the response was received on March 19, the application could be filed until June 20, inclusive.

on the former grounds but not the latter grounds, insofar as the legality of a regulatory decision was at issue.

In cases involving both types of grounds, the requirements of the tribunal statute regarding exhaustion of remedies and the statute of limitations should be understood as follows. The Grievance Committee would first hear the case and dispose of the issues over which it had jurisdiction (i.e., whether the decision at issue involved a correct interpretation or application of the Fund's rules). If the Grievance Committee rejected his case, the staff member could then proceed to the tribunal. At that time, it would be open to him to raise, as grounds for review, not only the issues that were before the Grievance Committee but also, if appropriate, the legality of the underlying regulatory decision, regardless of whether more than three months had passed since the individual decision at issue had been taken. In essence, the pursuit of administrative remedies as to the issue of interpretation or application would suspend the time period for seeking review of the decision on grounds for which no administrative review is available.

3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.

The tribunal would have discretion, in exceptional circumstances, to waive the time limits for filing imposed under the Article; this might be appropriate, for example, in situations where, due to extensive mission travel, prolonged illness, or other exigent personal circumstances, a staff member was unable to file his application within the prescribed period. The staff member could request a waiver either before the deadline if he anticipated that he would be unable to file on time, or after the deadline had passed. However, such a waiver would have to be predicated on a finding that the delay was justified under the circumstances.

4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.

Section 4 follows the principle applicable to other tribunals that the filing of an application does not stay the effectiveness of the decision being challenged.[18] This is considered necessary for the efficient opera-

[18]E.g., WBAT Statute, Article XII(4).

tion of the organization, so that the pendency of a case would not disrupt day-to-day administration or the effectiveness of disciplinary measures, including removal from the staff in termination cases. This rule is also consistent with the principle, strictly applied in the employment context, that an aggrieved employee will not be granted a preliminary injunction unless he would suffer irreparable injury without the injunction. In this regard, courts are loath to conclude that an injury would be "irreparable," given the nature of the employment relationship and the possibility of compensatory relief if the employee ultimately succeeds in his claim. With respect to potential cases where an applicant in G-4 visa status has been terminated and would otherwise be out of visa status under U.S. law pending the pursuit of administrative remedies and the outcome of his case before the tribunal, it would be preferable to address this as an administrative matter in the staff rules on leave. Apart from this situation, it is difficult to envisage a situation in which the harm to an applicant, in the absence of interim measures, would be "irreparable," as that concept has been construed by the courts. Nevertheless, the statute would not preclude the tribunal from ordering such measures if warranted by the circumstances of a particular case.

5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

Under Section 5, it would be open to the applicant and the Fund to reach an agreement on the dispute involved in the application; thereupon, the application could not be pursued.

ARTICLE VII

1. The members of the Tribunal shall be appointed as follows:

a. The President shall be appointed for two years by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board. The President shall have no prior or present employment relationship with the Fund.

b. Two associate members and two alternates who have no prior or present employment relationship with the Fund shall be appointed for two years by the Managing Director after appropriate consultation.

c. The President and the associate members and their alternates must be nationals of a member country of the Fund at the time of their appointments and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

Article VII, Section 1 of the statute governs the appointment of the tribunal's members. A President (who could not be a present or former Fund staff employee) would be appointed by the Managing Director after appropriate consultation, subject to the approval of the Executive Board. Two associate members and two alternates (none of whom having a prior or present employment relationship with the Fund) would be appointed by the Managing Director after appropriate consultation.

The President and the associate members and their alternates would be required to be nationals of member countries of the Fund at the time of their appointments; subsequent changes in nationality or in the membership of their country of nationality would not disqualify them. They would also have to possess the qualifications and background which are generally required of members of administrative tribunals.[19]

Their terms of service would be two years.

2. The President and the associate members and their alternates may be reappointed in accordance with the procedures for appointment set forth in Section 1 above. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

3. Any member who has a conflict of interest in a case shall recuse himself.

4. The decisions of the Tribunal shall be taken by the President and the associate members, provided that when an associate member has recused himself or, for any other reason, is unable to hear a case, an alternate shall be designated by the President, and provided further that, if the President himself is unable to hear a case, the elder of the associate members shall act as President for that case, and shall be replaced by an alternate as associate member.

5. The Managing Director shall terminate the appointment of a member who, in the unanimous opinion of the other members, is unsuited for further service.

[19]E.g., WBAT Statute, Article IV(1); IDBAT Statute, Article III(1).

Sections 2 through 5 establish the rules by which the President and the associate members of the tribunal may be reappointed, replaced, or dismissed from their duties.

The President and both associate members could be reappointed at the end of their terms.

A member who had a conflict of interest in a particular case would be required to excuse himself. A conflict of interest could arise in an individual case, for example, if a member had a personal relationship with the applicant.

Section 4 prescribes that cases will ordinarily be decided by the President and the two associate members. It provides for the temporary replacement by an alternate of an associate member of the tribunal who is unable to hear a case (for instance, due to illness or scheduling problems) or who, in his own judgment, decides to recuse himself in a particular case for reasons of conflict of interest. In the event that the President was unable to hear a case, he would be replaced by the elder of the two associate members, who would in turn be replaced by an alternate.

Section 5 provides the exclusive means by which a member could be removed from his position on the tribunal by the Managing Director. This provision would apply to any member of the tribunal (including the President); however, dismissal of the member would be authorized only if all of the other members agreed that he was unfit for further service.

ARTICLE VIII

The members of the Tribunal shall be completely independent in the exercise of their duties; they shall not receive any instructions or be subject to any constraint. In the performance of their functions, they shall be considered as officers of the Fund for purposes of the Articles of Agreement of the Fund.

This Article, in providing that the members of the tribunal cannot be subject to instructions from any source, is intended to protect the independence necessary for the performance of judicial duties. It further provides that in the performance of their functions, the members of the tribunal will be considered as officers of the Fund for purposes of the Articles of Agreement.

This provision would confer upon the President and the other members the privileges and immunities enjoyed by officers and employees of the Fund under Article IX, Section 8 of the Articles of Agreement including, in particular, the immunity from judicial process. Such protection would further ensure the independence and impartiality of the tribunal in carrying out its functions. It would also provide a basis for dismissal, on immunity grounds, of any lawsuit brought in a national court of a member country of the Fund by an unsuccessful applicant against a member of the tribunal with respect to the member's performance of his official duties.

ARTICLE IX

1. The Managing Director shall make the administrative arrangements necessary for the functioning of the Tribunal.

2. The Managing Director shall designate personnel to serve as a Secretariat to the Tribunal. Such personnel, in the discharge of duties hereunder, shall be under the authority of the President. They shall not, at any time, disclose confidential information received in the performance of their duties.

3. The expenses of the Tribunal shall be borne by the Fund.

This Article addresses certain administrative aspects of the tribunal. It contemplates that administrative support will be provided to the tribunal by personnel who will be assigned for such purpose by the Managing Director, but who will only take instructions from, and act under the direction of, the President of the tribunal in the performance of their duties. Such personnel would be independent from the Fund in the performance of their duties. Administrative tribunals are usually serviced by a small secretariat. The personnel assigned to serve the tribunal would be required to refrain from disclosing confidential information which they receive in carrying out their duties; this would apply to disclosure both outside and within the Fund, where personnel information is not available to staff except on a need-to-know basis.

The Fund would bear the expenses of the tribunal. These expenses would include the fees paid to and expenses incurred by the President and the associate members in connection with the performance of their duties.

ARTICLE X

1. The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal, provided that the applicant's allegations concerning the contents of any document so withheld shall be deemed to have been demonstrated in the absence of probative evidence to the contrary. The Tribunal may examine witnesses and experts, subject to the same qualification.

2. Subject to the provisions of this Statute, the members of the Tribunal shall, by majority vote, establish the Tribunal's Rules of Procedure. The Rules of Procedure shall include provisions concerning:

a. presentation of applications and the procedure to be followed in respect to them;

b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment;

c. presentation of testimony and other evidence;

d. summary dismissal of applications without disposition on the merits; and

e. other matters relating to the functioning of the Tribunal.

3. Each party may be assisted in the proceedings by counsel of his choice, other than members of the Fund's Legal Department, and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV.

With respect to the issue of document production, the tribunal would be able to require the production of documents from the Fund, except that the Managing Director would retain authority to decide, on a case-by-case basis, whether there was a compelling institutional need to protect the confidentiality of the requested document. In this event, the Managing Director's decision would be binding on the tribunal. However, if an applicant made an assertion regarding the content of a particular document and the Managing Director decided to withhold that document from the tribunal, the applicant's assertion would be prima

facie evidence as to that content, and would create a rebuttable presumption as to the accuracy of the assertion. Accordingly, the tribunal would accept the applicant's assertion as to its content, so long as there was no other evidence presented to contradict that assertion. If there was other probative evidence presented, the tribunal would have to weigh all of the evidence before it in order to make an appropriate finding.

Like other tribunals, the tribunal would be able to hear testimony from witnesses and experts, although most administrative tribunals, in practice, rely largely on written evidence and pleadings in deciding cases.

Like other administrative tribunals, the tribunal would be authorized to establish, consistent with its statute, its own rules of operation and procedure. The matters listed in the statute are those considered essential, but the list is not exhaustive. The rules would be adopted by a majority of the entire membership of the tribunal, i.e., the President, the associate members, and their alternates.

The rules adopted by the tribunal could address such issues as the procedures for filing applications and other pleadings; the obtaining of information by the tribunal; the presentation of cases and oral proceedings; participation of *amicus curiae*; and the availability of judgments.[20] The tribunal could also adopt a rule establishing a procedure for summary dismissal of applications.[21]

Section 3 makes clear that each party may be assisted by counsel in the proceedings. Thus, an applicant would have the opportunity to be assisted by any person of his choice (other than members of the Fund's Legal Department, given the inherent conflict of interest such assistance would pose) at any stage of the case. The tribunal, in adopting its own rules, would be free to prescribe the rules regarding the signing of applications and other pleadings, presentation of oral argument, and other matters concerning the involvement of counsel.

[20]See also Article XVIII of the statute, discussed below.

[21]There is authority in Article 8(3) of the Rules of the ILOAT and in Rule 7(11) of the WBAT, for example, for summary dismissal of cases that are considered to be "clearly irreceivable or devoid of merit." The Rules of Procedure of the tribunal of the Bank for International Settlements authorize summary dismissal of applications that are "manifestly irreceivable in form or manifestly abusive."

As a general rule, each side would bear its own costs, including attorney's fees; however, the tribunal would have authority under Article XIV to order the Fund to bear the reasonable costs, including attorney's fees, incurred by an applicant in bringing an action that is successful in whole or in part, and, under Article XV, it could award reasonable costs against an applicant whose claims were manifestly without foundation.

ARTICLE XI

The Tribunal shall hold its sessions at the Fund's headquarters at dates to be fixed in accordance with its Rules of Procedure.

The tribunal is required to hold its sessions at Fund headquarters. The frequency and scheduling of these sessions would be determined in accordance with rules to be adopted by the tribunal.

ARTICLE XII

The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

As with the WBAT and other tribunals, the Fund tribunal would be empowered to decide whether to hold oral proceedings in a given case.[22] However, oral proceedings are somewhat rare in the practice of international administrative tribunals, which generally decide cases on the basis of written submissions, including the record developed in the course of administrative review and the internal appeals process.

Any oral proceedings conducted by the tribunal would be open to "interested persons," unless the tribunal decided that the nature of the case required that such proceedings be held in private, for example, if sensitive information or matters of personal privacy were involved.

[22]Under the Rules of the UNAT, Article 15(1), oral proceedings are held "if the presiding member so decides or if either party so requests and the presiding member agrees." In the ILOAT, they are held "if the Tribunal so decides, either on its own motion or on the request of one of the parties" (Article 16).

ARTICLE XIII

1. All decisions of the Tribunal shall be by majority vote.

2. Judgments shall be final, subject to Article XVI and Article XVII, and without appeal.

3. Each judgment shall be in writing and shall state the reasons on which it is based.

4. The deliberations of the Tribunal shall be confidential.

As with other tribunals, decisions would be taken by majority vote and would not require unanimity. Although dissents would not need to be registered, dissenting opinions would be possible under the statute.

Judgments of the tribunal would be final and without appeal. Further recourse to the ICJ would not be available. Although the UNAT and ILOAT Statutes authorize appeal to the International Court of Justice under highly limited circumstances, this avenue of recourse was not adopted by other tribunals, including the WBAT.

ARTICLE XIV

1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

Article XIV, Section 1 provides for the remedies which the tribunal may order when it concludes that an individual decision is illegal. Sec-

tion 2 provides that, with respect to nonmonetary relief ordered by the tribunal in individual cases, the Managing Director may opt for monetary relief instead of taking the remedial measures.

Under Section 1, if the tribunal finds that an individual decision is illegal, it shall order the rescission of the decision and all other appropriate corrective measures. These measures may include the payment of a sum of money, or the specific performance of prescribed obligations, such as the reinstatement of a staff member.

In cases where the tribunal concludes that an individual decision is illegal by virtue of the illegality of the regulatory decision pursuant to which it was taken, the judgment would not invalidate or rescind the underlying regulatory decision, nor would it invalidate or rescind other individual decisions already taken pursuant to that regulatory decision.[23] If a regulatory decision had been in effect by the organization for over three months, an application directly challenging its legality would not be admissible. A finding by the tribunal, in the context of reviewing an individual decision, that the regulatory decision was illegal would not nullify the decision as such. Thus, previous decisions taken in reliance on, or on the basis of, the regulatory decision would not be invalidated; the organization could decide as a policy matter whether, and to what extent, to reopen those decisions and take further action in light of the tribunal's judgment. The judgment would, however, render the regulatory decision unenforceable against the applicant in the immediate case. The regulatory decision would also, for all practical purposes, become ineffective vis-à-vis other staff members, since future applications in other individual decisions would themselves be subject to challenge, within the applicable time limits for such claims.

Section 2 provides that where the consequences of the rescission of an individual decision or the corrective measures prescribed by the tribunal are not limited to the payment of money, the Managing Director would be authorized to determine whether, in the interest of the Fund, the applicant should be paid an amount of monetary compensation that has been determined by the tribunal in accordance with the limitations prescribed in the statute, as an alternative to rescission of the individual

[23]Other staff members to whom the regulatory decision had already been applied could seek relief in light of the tribunal's holding only if their applications were made within the specified time limits for challenging individual decisions.

decision or performance of the prescribed obligations.[24] For example, if the tribunal prescribed, as a corrective measure, that a staff member be reinstated, the Managing Director might conclude that such a remedy was not possible or advisable. Such a situation might arise where the applicant's position has, in the meantime, been filled by another qualified individual. In general, the monetary award could not exceed three times the individual's current or last salary from the Fund, as applicable. The tribunal could, however, exceed this limit in exceptional cases, if it was considered justified by the particular circumstances.

3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

Section 3 sets forth the consequences of a ruling in favor of an application challenging the legality of a regulatory decision. In that case, the statute provides that the tribunal shall annul the decision. As a result, the decision could not thereafter be implemented or applied by the organization in individual cases.

Annulment would have certain consequences with respect to individual decisions taken pursuant to the annulled regulatory decision, whether taken before or after the date of annulment. Such individual decisions would be null and void. Accordingly, it would be incumbent on the Fund to take corrective measures with respect to each adversely affected staff member. The failure to take proper corrective measures in an individual case would itself be subject to challenge as an administrative act adversely affecting the staff member. For example, if the tribunal annulled a regulatory decision retroactively reducing a benefit, all staff members to whom that decision had been applied would be en-

[24]The statutes of most international administrative tribunals permit the award of monetary compensation as an alternative to be chosen by the organization's management in lieu of nonmonetary remedies. Of the major administrative tribunals, three (ILOAT, EC Court of Justice, Council of Europe Appeals Board) have no limit on the amount of monetary compensation to be awarded, three (UNAT, OASAT, IDBAT) place a limit equal to two years' net pay, and the WBAT has a limit of three years' net pay. In all cases with limits, however, there is a provision similar to that in Article XII, Section 1 of the WBAT Statute, to the effect that "[t]he Tribunal may, in exceptional cases, when it considers it justified, order the payment of higher compensation. A statement of the specific reason for such an order shall be made."

titled to the restoration of that benefit for that period. The failure to restore the benefit in an individual case could then be challenged before the tribunal.

4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

Section 4 authorizes the tribunal to award reasonable costs, including attorney's fees, to a successful applicant, in an amount to be determined by the tribunal, taking into account the factors set forth in the provision. Costs, apart from attorney's fees, that might fall within this provision could include such items as transportation to Washington, D.C. for applicants not working at Fund headquarters and the fees of expert witnesses who testify before the tribunal. With respect to unsuccessful applicants whose claims nevertheless had prima facie merit or significance, the tribunal could always recommend that an ex gratia payment be made by the organization.

Most administrative tribunals, whether pursuant to their rules or as a matter of practice, have comparable authority to award costs. For example, the UNAT has declared in a statement of policy that costs may be granted "if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the tribunal."[25] The tribunals have, however, been rather conservative and cautious in deciding whether, and to what extent, to award costs in a case.[26]

Under this provision, the tribunal would be authorized to award costs against the Fund only where an applicant has succeeded in whole or in part, i.e., the tribunal's decision has found in favor of all or a portion of his claims for relief. With respect to determining the amount of costs incurred that were "reasonable" under the circumstances, the tribunal would be expected to take into account such factors as the nature and

[25]A/CN.5/R.2 (Dec. 18, 1950).

[26]E.g., *Powell*, UNAT Judgment No. 237 (1979), in which the applicant requested payment of costs in excess of $100,000 and was awarded $2,000 by the tribunal.

complexity of the case, as well as the nature and quality of the work performed and the amount of the fees in relation to prevailing rates. These factors reflect the practice of other tribunals[27] and domestic courts in making similar assessments. As the tribunals have recognized, there may be circumstances where, although an applicant has succeeded in one aspect of his claims, the bulk of his claims has been rejected by the tribunal, and considerable and unnecessary time has been devoted to the consideration of these claims.[28] In such circumstances, it would not be fair or reasonable to have an automatic requirement that the organization bear the applicant's costs. Similarly, the effort expended by the applicant's counsel, and the consequent costs, may have been wholly disproportionate to the magnitude and nature of the issues involved. Thus, it is considered appropriate to give the tribunal discretion to determine whether, and to what extent, to award costs to a successful applicant.

The tribunal would be authorized to award costs only to the parties, i.e., an applicant or the Fund (see Article XV), and could not award costs to other persons.

5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain.

Section 5 of Article XIV permits corrective measures in respect of procedural errors committed by the Fund to be implemented after adjournment of a case in lieu of proceeding to decision on the merits.[29]

ARTICLE XV

1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:

[27]See *Lamadie*, ILOAT Judgment No. 262 (1975), at p. 7.

[28]In *Carrillo*, ILOAT Judgment No. 272 (1976), the applicant obtained only partial satisfaction, and the point decided by the tribunal was relatively simple. The record, however, was far more voluminous than necessary for the tribunal's information. Therefore, the ILOAT awarded the staff member only one-tenth of the amount claimed for legal fees as costs reasonably incurred.

[29]There is a comparable provision in Article XII of the WBAT Statute.

a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or

b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.

2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant.

This Article authorizes the tribunal, either on its own or upon a motion by the Fund, to assess an amount in respect of the reasonable costs incurred by the Fund in defending the case against applicants who bring cases which the tribunal determines are patently without foundation. The award of costs, which would not include the expenses incurred by the Fund in the operation of the tribunal, could be enforced through deductions from amounts to the applicant by the Fund (such as salary or separation payments) or through such other means as management deems appropriate; other means would have to be implemented if the applicant was not owed any money from the Fund so as to preclude the possibility of setoff.

This provision is intended to serve as a deterrent to the pursuit of cases that are manifestly without factual basis or legal merit. Unless an application is summarily dismissed by the tribunal,[30] the tribunal must hear the case and dispose of the matter on the merits. This could involve lengthy proceedings and substantial costs, including the commitment of staff time, even if the tribunal ultimately concluded that the applicant's claims were manifestly without any basis in law or fact. Such cases can be expected to be very rare, but when they arise they can be prolonged and costly. This provision is directed at applications that amount to an abuse of the review process[31]; it is not intended to deter an application based on a good faith argument for an extension, modification, or reversal of existing law.

[30]The tribunal would also be authorized to adopt a rule providing for summary dismissal of applications. This would permit disposal of a case that was clearly irreceivable, thus minimizing the time and expense involved.

[31]Compare Article III of the Statute of the Appeals Board of the Council of Europe, which authorizes the Board, "if it considers that an appeal constituted an abuse of procedure, [to] order the appellant to pay all or part of the costs incurred."

ARTICLE XVI

A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal, and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

This Article is the same as in the WBAT and other tribunal statutes. It is intended to serve two purposes. First, it provides that no material fact that was known to a party before a case was decided but was not presented to the tribunal can be presented to the tribunal after it has rendered its decision. Second, it provides that a case may be reopened if a material fact is discovered by a party after the decision has been rendered in order to permit the tribunal to revise its judgment in light of that fact.

ARTICLE XVII

The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.

Article XVII authorizes the tribunal, once a judgment has been rendered, to correct typographical or arithmetical errors and to interpret its own judgment, under certain circumstances. Judgments could be corrected by the tribunal on its own initiative or upon application by one of the parties.

The tribunal would be empowered to interpret its own judgment upon the request of a party if the terms were unclear or incomplete in some respect, as demonstrated by the party requesting the interpretation. Similar authority is conferred upon other tribunals, including the Court of Justice of the European Communities.[32] The ability of the tribunal to interpret its own judgments where the parties are unable to discern the intended meaning would help to ensure that judgments are given effect in accordance with the tribunal's findings and conclusions.

[32]See Article 40 of the Statute of the CJEC.

ARTICLE XVIII

1. The original of each judgment shall be filed in the archives of the Fund. A copy of the judgment, attested to by the President, shall be delivered to each of the parties concerned.

2. A copy shall also be made available by the Secretariat on request to any interested person, provided that the President may decide that the identities or any other means of identification of the applicant or other persons mentioned in the judgment shall be deleted from such copies.

Judgments of the Fund tribunal are to be made available to interested persons upon request; they would be in the public domain and could be cited or published.[33] This Article further provides that the President would be authorized to decide whether to conceal the identity of the applicant or any other person mentioned in the judgment, such as a witness (e.g., the complainant in a sexual harassment case in which the disciplinary measures imposed on the perpetrator are being challenged), in copies of the judgment. The President would be guided by concerns for protecting the privacy of the individual involved or the confidentiality of the matter to the organization.

ARTICLE XIX

This Statute may be amended only by the Board of Governors of the Fund.

This provision is similar to its counterpart in the WBAT Statute. It would thus remain open to the Board of Governors, as the organ responsible for formally authorizing the establishment of a tribunal and approving the statute, to amend or abrogate the statute of the tribunal after its establishment. In this fashion, the nature of the judicial function performed by the tribunal could be limited or altered with respect to future cases.

[33]The statutes of the WBAT and other tribunals provide that the judgments of the tribunal will be published or made available to interested persons.

ARTICLE XX

1. The Tribunal shall not be competent to 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.

2. In the case of decisions taken between October 15, 1992 and the establishment of the Tribunal, the application shall be admissible only if it is filed within three months after the establishment of the Tribunal. For purposes of this provision, the Tribunal shall be deemed to be established when the staff has been notified by the Managing Director that all the members of the Tribunal have been appointed.

As a result of this Article, the tribunal would be competent to hear cases involving only those decisions taken on or after the effective starting date of the tribunal's jurisdiction, which is the date on which the Executive Board formally approved the transmittal of the proposed statute to the Board of Governors. Accordingly, administrative acts taken on or after October 15, 1992 would be reviewable by the tribunal. Administrative acts taken before that date would not be reviewable, even if administrative review of the act was still pending on the effective starting date of the tribunal's jurisdiction. Section 2 provides a transitional provision to extend the period of time specified in Article VI for the initiation of proceedings before the tribunal.

ARTICLE XXI

The competence of the Tribunal may be extended to any international organization upon the terms established by a special agreement to be made with each such organization by the Fund. Each such special agreement shall provide that the organization concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization and shall include, inter alia, provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

Article XXI would permit the affiliation of other international organizations with the tribunal pursuant to an agreement with the Fund. As a condition of such affiliation, the organization would have to agree to be bound by the tribunal's judgments, including the obligation to pay compensation as awarded by the tribunal. The agreement with the Fund would need to cover such areas as the sharing of the tribunal's expenses by the affiliating organization and its role in the administrative arrangements of the tribunal. The affiliating organization would not, however, have any authority with respect to appointment of the tribunal's members or amendment of the governing statute.

Part III. Procedure

1. The procedure for the adoption of the proposed statute is as follows. The proposed resolution in Part IV, including the proposed statute, is to be communicated to the Board of Governors. The Executive Board recommends, as proposed in Article XX of the proposed statute, if approved by the Board of Governors, that the statute enter into force as of October 15, 1992, the date on which the Executive Board formally decided to transmit the report and resolution to the Board of Governors.

2. Part IV of this report contains the text of a resolution, to which is attached the text of the proposed statute discussed above. The Chairman of the Board of Governors has requested that the Secretary of the Fund bring the resolution and proposed statute before the Board of Governors for its approval. It is pursuant to this request that the Secretary is transmitting this report to the Board of Governors.

3. In the judgment of the Executive Board, the action requested of the Board of Governors should not be postponed until the next regular meeting of the Board and does not warrant the calling of a special meeting of the Board. For this reason, the Executive Board, pursuant to Section 13 of the By-Laws, requests Governors to vote without meeting. To be valid, votes must be received at the seat of the Fund before 6:00 p.m., Washington time, on December 21, 1992. The resolution will be adopted if replies are received from a majority of the Governors exercising a majority of the total voting power and if a majority of the votes is cast in favor of the resolution. The resolution must be voted on as a whole.

Part IV. Resolution

WHEREAS the Executive Board has considered the establishment of an administrative tribunal to serve the Fund; and

WHEREAS the Executive Board has proposed a statute for the establishment of such a tribunal and prepared a Report on the same; and

WHEREAS the Chairman of the Board of Governors has requested the Secretary of the Fund to bring the proposal of the Executive Board before the Board of Governors; and

WHEREAS the Report of the Executive Board setting forth its proposal has been submitted to the Board of Governors by the Secretary of the Fund; and

WHEREAS the Executive Board has requested the Board of Governors to vote on the following resolution without meeting, pursuant to Section 13 of the By-Laws of the Fund;

NOW, THEREFORE, the Board of Governors, noting the said Report of the Executive Board, hereby RESOLVES that the proposed Statute of the Administrative Tribunal of the International Monetary Fund is hereby adopted.

Resolution No. 48-1
Establishment of the Administrative Tribunal of the International Monetary Fund

WHEREAS the Executive Board has considered the establishment of an administrative tribunal to serve the Fund; and

WHEREAS the Executive Board has proposed a statute for the establishment of such a tribunal and prepared a Report on the same; and

WHEREAS the Chairman of the Board of Governors has requested the Secretary of the Fund to bring the proposal of the Executive Board before the Board of Governors; and

WHEREAS the Report of the Executive Board setting forth its proposal has been submitted to the Board of Governors by the Secretary of the Fund; and

WHEREAS the Executive Board has requested the Board of Governors to vote on the following resolution without meeting, pursuant to Section 13 of the By-Laws of the Fund;

NOW, THEREFORE, the Board of Governors, noting the said Report of the Executive Board, hereby RESOLVES that the proposed Statute of the Administrative Tribunal of the International Monetary Fund is hereby adopted.

RULES OF PROCEDURE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND[1]

RULE I

General

1. These Rules of Procedure shall apply to the Administrative Tribunal of the International Monetary Fund (hereinafter "Tribunal").

2. These Rules shall be subject to the provisions of:

(a) the Fund's Articles of Agreement;

(b) the Statute of the Tribunal.

3. For purposes of these Rules, the masculine pronoun shall include the feminine pronoun.

RULE II

Official Language

The working language of the Tribunal shall be English.

RULE III

President

The President of the Tribunal shall:

(a) preside over the consideration of cases by the Tribunal;

(b) direct the Registry of the Tribunal in the performance of its functions;

[1]These Rules entered into force on February 18, 1994 and were amended on August 31, 1994.

(c) prepare an annual report on the activities of the Tribunal; and

(d) perform the functions entrusted to the President by these Rules of Procedure.

RULE IV

Registry

Under the authority of the President, the Registrar of the Tribunal shall:

(a) receive applications instituting proceedings and related documentation of the case;

(b) be responsible for transmitting all documents and making all notifications required in connection with cases before the Tribunal;

(c) make for each case a dossier which shall record all actions taken in connection with the case, the dates thereof, and the dates on which any document or notification forming part of the procedure are received in or dispatched from his office;

(d) attend hearings, meetings, and deliberations of the Tribunal;

(e) keep the minutes of these hearings and meetings as instructed by the President; and

(f) expeditiously perform the functions entrusted to the Registrar by the Rules of Procedure and carry out tasks as assigned by the President.

RULE V

Recusal

1. Pursuant to Article VII, Section 3 of the Statute, a member of the Tribunal shall recuse himself:

(a) in cases involving persons with whom the member has a personal, familial or professional relationship;

(b) in cases concerning which he has previously been called upon in another capacity, including as advisor, representative, expert or witness on behalf of a party; or

(c) if there exist other circumstances such as to make the member's participation seem inappropriate.

2. Any member recusing himself shall immediately inform the President of the Tribunal.

RULE VI

Counsel

In accordance with Article X, Section 3 of the Statute, each party may at any time choose to be assisted by counsel, whose designation shall be notified to the Registrar.

RULE VII

Applications

1. Applications shall be filed by the Applicant or his duly authorized representative, following the form attached as Annex A hereto. If an Applicant wishes to be represented, he shall complete the form attached as Annex B hereto.

2. Applications instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:

(a) the name and official status of the Applicant;

(b) the name of the Applicant's representative, if any, and whether such representative or another person shall act as counsel for the Applicant;

(c) the decision being challenged, and the authority responsible for the decision;

(d) the channels of administrative review, as applicable, that the Applicant has pursued and the results thereof;

(e) the reasons why he believes the decision is illegal;

(f) a statement of the supporting facts; and

(g) the relief or remedy that is being sought, including the amount of compensation, if any, claimed by the Applicant and the specific performance of any obligation which is requested.

3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.

4. Four additional copies of the application and its attachments shall be submitted to the Registrar.

5. An application shall satisfy the provisions of Article XX, and be submitted to the Tribunal within the time limits prescribed by Article VI, of the Statute.

6. If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date. Otherwise, the Registrar shall:

(i) notify the Applicant that the period of time within which to make the appropriate changes has been extended, indicating the length of time thereof;

(ii) make the necessary corrections when the defects in the application do not affect the substance; or

(iii) by order of the President, notify the Applicant that the submission does not constitute an application and cannot be filed as such.

7. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall notify the Fund of the application and shall transmit a copy of it to the General Counsel.

8. The application shall be signed on the last page by the Applicant or the representative, if any, whom he has designated in accordance with Paragraph 1 above. In the event of the Applicant's incapacity, the required signature shall be furnished by his legal representative.

RULE VIII

Answer

1. Once an application has been duly notified by the Registrar to the Fund, the Fund shall answer the application in writing and submit any

additional documentary evidence within forty-five days unless, upon request, the President sets another time limit. The Fund's answer shall be submitted to the Tribunal and to the Applicant through the Registrar. The Fund shall include as annexes all documents referred to in the answer in accordance with the rules established for the application in Rule VII.

2. The answer shall be signed on the last page by the representative of the Fund.

3. Four additional copies of the answer and its attachments shall be submitted to the Registrar.

4. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Fund's answer to the Applicant.

RULE IX

Reply

1. The Applicant may file with the Registrar a written reply to the answer within thirty days from the date on which the answer is transmitted to him, unless, upon request, the President sets another time limit.

2. The complete text of any document referred to in the written reply shall be annexed thereto in accordance with the rules established for the application in Rule VII.

3. The requirements of Rule VII, Paragraphs 4 and 8, shall apply to the reply.

4. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Applicant's reply to the Fund.

RULE X

Rejoinder

1. The Fund may file with the Registrar a written rejoinder within thirty days of receiving the Applicant's reply, unless, upon request, the President sets another time limit.

2. The complete text of any document referred to in the written rejoinder shall be annexed thereto in accordance with the rules established for the application in Rule VII.

3. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the rejoinder.

4. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Fund's rejoinder to the Applicant.

5. Without prejudice to Rule XI, after the rejoinder has been filed, no further pleadings may be received.

RULE XI

Additional Pleadings

1. In exceptional cases, the President may, on his own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be furnished in the original or in an unaltered copy and accompanied by any necessary translations.

2. The requirements of Rule VII, Paragraphs 4 and 8, or Rule VIII, Paragraphs 2 and 3, as the case may be, shall apply to any written statements and additional documents.

3. Written statements and additional documents shall be transmitted by the Registrar, on receipt, to the other party or parties.

RULE XII

Summary Dismissal

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.

2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.

3. The complete text of any document referred to in the motion shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VIII, paragraphs 2 and 3, shall apply to the motion.

4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Applicant.

5. The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him.

6. The complete text of any document referred to in the objection shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VII, Paragraphs 4 and 8, shall apply to the objection to the motion.

7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Fund.

8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests.

RULE XIII

Oral Proceedings

1. Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them.

2. At a time specified by the Tribunal, before the commencement of oral proceedings, each party shall inform the Registrar and, through him, the other parties, of the names and description of any witnesses and experts whom the party desires to be heard, indicating the points to which the evidence is to refer. The Tribunal may also call witnesses and experts.

3. The Tribunal shall decide on any application for the hearing of witnesses or experts and shall determine, in consultation with the parties

or their counsel, the sequence of oral proceedings. Where a witness is not in a position to appear before the Tribunal, the Tribunal may decide that the witness shall reply in writing to the questions of the parties. The parties shall, however, retain the right to comment on any such written reply.

4. The parties or their counsel may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.

5. Each witness shall make the following declaration before giving evidence:

> "I solemnly declare upon my honor and conscience that my testimony shall be the truth, the whole truth and nothing but the truth."

6. Each expert shall make the following declaration before giving evidence:

> "I solemnly declare upon my honor and conscience that my testimony will be in accordance with my sincere belief."

7. The Tribunal may disregard evidence which it considers irrelevant, frivolous, or lacking in probative value.

8. The Tribunal may limit oral testimony where it considers the written documentation adequate.

9. The President is empowered to issue such orders and decide such matters as are necessary for the orderly disposition of cases, including ruling on objections raised concerning the examination of witnesses or the introduction of documentary evidence.

RULE XIV

Intervention

1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal. Such person shall for that purpose draw up and file an application to intervene in accordance with the conditions laid down in this Rule.

2. The rules regarding the preparation and submission of applications specified above shall apply *mutatis mutandis* to the application for intervention.

3. Upon ascertaining that the formal requirements of this Rule have been complied with, the Registrar shall transmit a copy of the application for intervention to the Applicant and to the Fund, each being entitled to present views on the issue of intervention within thirty days. Upon expiration of that deadline, whether or not the parties have replied, the President, in consultation with the other members of the Tribunal, shall decide whether to grant the application to intervene. If intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party.

4. In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund.

RULE XV

Amicus Curiae

The Tribunal may, at its discretion, permit any persons, including the duly authorized representatives of the Staff Association, to communicate their views to the Tribunal.

RULE XVI

Time Limits

The calculation of time limits prescribed in these Rules of Procedure, all of which refer to calendar days, shall not include the day of the event from which the period runs, and shall include the next working day of the Fund when the last day of the period is not a working day.

RULE XVII

Production of Documents

1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence

which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.

2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.

3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment.

4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule.

RULE XVIII

Judgments

1. All deliberations of the Tribunal shall be in private. The judgment shall be adopted by majority vote.

2. Once the final text of the judgment has been approved and adopted, the judgment shall be signed by the President and the Registrar and shall contain the names of the members who have taken part in the decision.

3. Any member differing as to the grounds upon which the judgment was based or some of its conclusions, or dissenting from the judgment, may append a separate or dissenting opinion.

4. The judgment and any appended opinions shall be transmitted to the parties and to *amici curiae*. They shall be available to interested persons upon request to the Registrar, who shall arrange for their publication.

5. Clerical and arithmetical errors in the judgment may be corrected by the Tribunal.

RULE XIX

Revision of Judgments

1. A party may request revision of a judgment issued by the Tribunal, but only in the event that a fact or a document is discovered which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time of the judgment was unknown to the Tribunal and to the party to the case making application for the revision and such ignorance was not the responsibility of that party.

2. The revision must be requested within thirty days from the date on which the fact or document is discovered and, in any event, within one year from the date on which the party requesting the revision was notified of the judgment unless, upon request, the President sets another time limit.

3. The procedure set forth in Rules VIII through XI shall be applied, *mutatis mutandis*, to the request for revision.

4. The Tribunal shall decide whether to admit the application for revision. If the application is admitted, the Tribunal shall pass judgment on the matter at issue in accordance with these Rules.

RULE XX

Interpretation of Judgments

1. In accordance with Article XVII of the Statute, after a judgment has been rendered, a party may apply to the Tribunal requesting an interpretation of the operative provisions of the judgment.

2. The application shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure or incomplete.

3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the application for interpretation. If the application is admitted, the Tribunal shall issue its interpretation, which shall thereupon become part of the original judgment.

RULE XXI

Miscellaneous Provisions

1. The President shall, in consultation with the other members of the Tribunal, fix the dates of the Tribunal's sessions.

2. The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder.

3. The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules.

ANNEX A[1]

Administrative Tribunal of the International Monetary Fund

FORM OF APPLICATION

I. Information concerning the personal status of the Applicant:

1. full name of Applicant:

2. if Applicant's claim is based on the employment rights of another person:

(a) name and official status of person whose rights are relied upon:

(b) the relation of Applicant to person whose status entitles Applicant to come before the Tribunal:

3. address for purposes of the proceedings:

telephone number:
fax number:

II. Official status of Applicant or of the person whose status entitles Applicant to come before the Tribunal:

1. Beginning and ending dates of each period of employment with the Fund:

2. Employment status at time of decision contested (whether in active service or in retirement):

3. Type of appointment:

III. Decision being challenged, date of the decision, and the authority responsible for the decision:

[1]Separate application forms of Annexes A and B are available from the Office of the Registrar.

IV. Channels of administrative review of the decision that Applicant has pursued and the results:

V. Reasons why Applicant challenges the decision and its legality:

VI. Statement of supporting facts:

VII. The relief or remedy that is being sought, including the amount of compensation, if any, claimed by Applicant and/or the specific performance of any obligation which is requested:

VIII. Annexes to be attached pursuant to Rule VII, para. 3 of the Tribunal's Rules of Procedure:

"3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof."

IX. Any additional information that Applicant wishes to present to the Tribunal.

ANNEX B

Form of Appointment of Representative (and Counsel)*

APPOINTMENT OF REPRESENTATIVE (AND COUNSEL)*

I, _____

do hereby designate _____
[Name]

_____
[Address]

as my duly authorized representative [and counsel] to file/maintain (circle as appropriate) an application with the IMF Administrative Tribunal. [If known, give case number.] To this end, the above-named representative [and counsel]* is authorized to sign pleadings, appear before the Tribunal, and take all other necessary action in connection with the pursuance of the case on my behalf. This designation shall take effect immediately and shall remain in effect until revoked by me and the Tribunal has been so informed in writing.

_____ _____
Date Signature

*Delete the brackets if your representative will also assist you as counsel. If not, delete the words "and counsel" in the caption and below.

Office of the Registrar
International Monetary Fund Administrative Tribunal
700 19th Street, N.W., HQ1-3-544
Telephone: (202) 623-6008 **Washington, DC 20431** **Fax: (202) 623-6016**