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

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:

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

> "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;
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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;".

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.* 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 N Rules form a part of the Fund's Rules and Regulations.

> 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." (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.[3]

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 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.

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

> "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;".

(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; 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.
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> 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.
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> 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.
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> 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

[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."

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

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Stephen M. Schwebel, President

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Philine R. Lachman, Registrar

Washington, D.C.
April 2, 1996