FOR AGENDA

0405

EBAP/91/149

June 13, 1991

To: Members of the Executive Board

From: The Secretary

Subject: Establishment of an Administrative Tribunal for the Fund - Review of the Draft Statute

Attached for consideration by the Executive Directors is a paper on a review of the draft statute on the establishment of an administrative tribunal for the Fund. This subject is tentatively scheduled for discussion on Friday, June 28, 1991.

Ms. Powers (ext. 7714) is available to answer technical or factual questions relating to this paper prior to the Board discussion.

Att: (1)

Other Distribution:
Department Heads

INTERNATIONAL MONETARY FUND

Establishment of an Administrative Tribunal for the Fund--Review of the Draft Statute

Prepared by the Legal Department

(In consultation with the Administration Department)

Approved by François Gianviti

June 13, 1991

At the Executive Board meeting on December 19, 1990, Executive Directors expressed general support for the establishment of an administrative tribunal along the lines of the draft statute contained in EBAP/90/309 (11/28/90). In particular, there appeared to be a consensus that: (i) the tribunal would be bound by interpretations of the Articles of Agreement by the Executive Board and would not be competent to pass judgment on the legality of resolutions adopted by the Fund's Board of Governors; and (ii) the effective starting date for the tribunal's jurisdiction should be the date that the Executive Board formally approves the draft statute before its submission to the Board of Governors.

The third issue on which Executive Directors expressed views was that of the costs that could be awarded by the tribunal and the related question of legal representation of applicants before the tribunal. The staff was requested to reconsider the language of Articles XIV 4. and XV of the draft statute, which respectively authorize the tribunal, in its discretion, to award reasonable costs to a successful applicant and to award the Fund its costs in defending the action, in whole or in part, against an applicant whose case is manifestly without foundation. An assessment of the possibility of appointing an advocate to assist staff before the tribunal was also requested. Part I of this paper examines these issues in turn.

Following the discussion, a number of Executive Directors circulated statements on various provisions of the draft statute. Part II of this paper reviews these comments and recommends certain amendments to the draft statute.

I. Costs and Legal Representation

A. Award of Costs by the Tribunal

Under the tribunal's statute, claims are brought by staff members against the Fund; the Fund will thus be the defendant in every action but will never be the party initiating the case. Accordingly, the Fund will be required to defend every case, which will entail the commitment of time and resources, including possible retention of outside legal assistance. Experience with the Grievance Committee indicates that the internal resources needed for the defense of cases can be considerable, involving the time of staff in the Administration and Legal Departments, as well as other departments affected by the matter. There will also be the costs of the operation of the tribunal itself in hearing cases, including travel costs and per diem fees paid to the members of the tribunal.

For the applicant, there is no fee assessed to bring an action before the tribunal. If the applicant elects to be represented by a lawyer (as is his right), there would normally be a cost associated with that representation, regardless of whether the applicant is successful.

Under the draft statute, different rules would apply to the applicant and the Fund with respect to the award of costs:

- If the applicant is successful, in whole or in part, the tribunal would be authorized to award costs against the Fund. The decision whether to award costs, and the amount of such an award, would be in the discretion of the tribunal.

- On the other hand, if the applicant loses his case, there would normally be no award of costs to the Fund, except in cases--expected to be very rare--that the applicant's claim was manifestly unfounded. In this limited circumstance, the tribunal would be authorized to impose costs on the applicant.

1. Award of costs to the applicant

The possible award of costs to a successful party is treated differently in various domestic legal systems. 1/ With respect to the major international administrative tribunals, such as those serving the World Bank, the United Nations, and the International Labor Organization,

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1/ The practice in domestic courts with regard to costs differs. In the U.S., the rule is that, absent specific statutory or contractual authorization, a prevailing litigant is ordinarily not entitled to collect his attorney's fee from the losing party. An exception to this rule has been recognized where a losing party's case was wholly devoid of merit or asserted in bad faith. In the U.K., as well as many civil law systems, the courts will normally award costs in favor of the winning party.

none of the governing statutes provides for the award of costs to a successful applicant. Thus, the presumption is that each side will normally bear its own costs.

In practice, however, each of these tribunals has concluded that it has implicit discretionary authority to make such awards in appropriate circumstances. A tribunal's decision to impose costs in favor of one party is based on the nature, importance and complexity of the case, and on the actual contribution of the party's counsel to the proceedings. 1/ As the tribunals themselves 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. 2/ 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.

Under the approach proposed in the draft statute, 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 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.

2. Award of costs to the Fund

With respect to cases in which the applicant is not successful, the draft statute would not authorize the award of costs in favor of the Fund as the prevailing party except in very limited circumstances, as described below. Thus, individual applicants would be in a more advantageous position than the Fund as regards the recovery of costs in successful suits. This is considered reasonable and fair, since staff members should not be

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1/ See Lamadie, ILOAT Judgment No. 262 (1975), at p. 7. In the UN system, some costs may be recovered even by the losing party (Gretz, UNAT Judgment No. 403 (1987), at p. 10).

2/ 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.

discouraged from pursuing cases because of the uncertainty of whether they will be assessed costs if they ultimately lose.

The draft statute proposes, however, that applicants who pursue cases that are clearly devoid of merit could be required by the tribunal to bear all or part of the costs incurred by the Fund in defending against such claims, such as the staff time and resources devoted to the case, 1/ and most Executive Directors supported that idea. Although their statutes are silent on this question, other international administrative tribunals have recognized their authority to award costs against applicants who bring frivolous cases. 2/ The staff was asked to consider refining the language of Article XV to clarify the circumstances in which such an award would be appropriate.

The approaches used in various domestic legal systems offer some instructive examples. In many domestic legal systems, courts are authorized to assess costs against a losing party or even impose a fine, especially when, in the view of the court, there has been a clear abuse of the legal process (e.g., dilatory or malicious purpose). 3/

Under U.S. federal court rules, for example, sanctions may be imposed on a litigant or his attorney if a pleading or other filing is legally or factually baseless or is intended to harass, cause unnecessary delay, or needlessly increase the cost of litigation. 4/ The rule requires that all pleadings, motions and papers be signed, and provides that the signature certifies "that to the best of the signer's knowledge, information and

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1/ These costs would not include the expenses incurred in the operation of the tribunal.

2/ For example, in the Bauta case, OASAT Judgment No. 112 (1990), the administrative tribunal of the OAS awarded $5,000 in costs against a pensioner who contended that he was entitled to a cost-of-living adjustment for a lump sum pension payment received several years earlier. The tribunal rejected these claims as "manifestly unfounded," and cited the principle established in one of its earlier decisions that "a party who has brought a clearly frivolous claim or defense or who has not had well-founded reasons for litigating, or who, even if he had such well-founded reasons has been totally defeated, is liable to having costs awarded against him." Id., p. 22, citing Alemán, OASAT Judgment No. 69 (1983). The award of costs was intended to compensate the retirement and pension committee for the cost incurred in defending itself in the suit.

3/ See generally French Code of Civil Procedure (articles 32-1, 118, 123, 559, 581, 628); Italian Code of Civil Procedure (Art. 96, paras. 1 and 2); German Code of Civil Procedure (Paragraph 96); Japanese Code of Civil Procedure (Art. 90); in the U.K., the courts are empowered to restrain a vexatious litigant from instituting or continuing any legal action without leave of court. See Section 42 of the Supreme Court Act 1981, Supreme Court of Judicature (Consolidation) Act 1924, S. 51.

4/ Rule 11 of the U.S. Federal Rules of Civil Procedure.

belief formed after reasonable inquiry [the document] is well grounded in fact and ... law ...." The attorney's or party's signature also certifies that the document has not been "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The standard under the rule requires that a reasonable inquiry be made into both the facts and the law to determine whether the pleading, motion or other paper is (i) well-grounded in fact, and (ii) warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law. The rule is designed to discourage dilatory or abusive tactics and to help streamline the litigation process by penalizing frivolous claims or defenses. 1/ The rules provide essentially two types of standards for assessing such costs--first, an "objective" standard, based on the obvious lack of factual or legal basis for the case, and second, a "subjective" standard, based on the improper motive of the litigant in bringing the action, e.g., where the action is dilatory, vexatious, or based on economic or personal harassment.

These types of standards could be incorporated into Article XV of the draft statute as follows:

ARTICLE XV

"1. The Tribunal may order that 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."

Under this provision, the tribunal could, either on its own or upon a motion by the Fund, assess an amount against an applicant in respect of the costs incurred by the Fund in defending the case. The costs would not include the expenses incurred by the Fund in the operation of the tribunal.

1/ For an annotation of cases discussing the imposition of sanctions under Rule 11, see Annot., 95 ALR Fed 107.

B. Legal Representation for Staff

At EBM/90/178, the staff was asked to evaluate the possibility of providing, under some type of formal arrangement, an advocate to assist staff in bringing cases before the tribunal. The experience of other organizations has been examined with respect to the availability of such assistance either from within or outside the organization.

1. Internal Panel of Advocates

Most of the major international administrative tribunals permit applicants to be represented either by another staff member or by a lawyer authorized to practice in any member country of the organization involved. 1/

Since 1956, the United Nations has had a formal policy regarding the availability to staff members of counsel from within the organization. 2/ On the proposal of the Staff Council, the Secretary-General of the United Nations established a Panel of Counsel whose members are prepared to undertake the function of counsel for applicants in cases before the UNAT, and serve without a fee. The Panel is composed of serving and retired staff members of the United Nations who are available and willing to assist and, if necessary, represent their colleagues in appeals and disciplinary proceedings or informal settlement procedures. Members of the Panel observe established standards and principles in the fulfillment of their role as counsel, as set out in the guidelines of the Panel of Counsel. The choice of counsel from the Panel is left to the decision of each staff member, with the possible advice of a coordinator who will help him select appropriate counsel; the tribunal may, if requested, choose a member of the Panel as counsel for the applicant. The existence of the Panel of Counsel does not preclude a staff member from having his or her case presented by any other staff member of the UN or of a specialized agency, or by counsel authorized to practice in any member country, or, with the permission of the tribunal, by a retired staff member of the UN or of a specialized agency. 3/

Applicants before the Fund tribunal could be encouraged to seek out other staff members for assistance, just as they are presently encouraged to do with respect to the Grievance Committee. The draft statute provides that each party may be assisted by "counsel of his choice"; there is no requirement that such counsel be admitted to practice law. It could be clarified in the commentary that applicants could seek assistance from other

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1/ See, e.g., WBAT Rules, Rule 14(1); UNAT Rules, Article 13; ILOAT Rules, Article 13; OASAT Rules, Article 22 (applicant cannot be represented by member of the Legal Department).

2/ See Administrative Instruction ST/AI/351 (5/25/88).

3/ UNAT Rules, Article 13.

persons (including present or former staff members of the Fund, except for present members of the Legal Department); the text would also be redrafted to make clear that members of the Legal Department could not provide such assistance, so that Article X 3. would read as follows:

> "Each party may be assisted in the proceedings by counsel of his choice, other than members of the Legal Department, and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV."

2. External Staff Advocate

Among the major international organizations, none has an established arrangement whereby an outside lawyer or advocate provides assistance to staff in cases brought against the organization (either at the internal administrative review stage or before the administrative tribunal).

Nonetheless, it has been suggested that the Fund should provide staff with legal assistance in order to bring cases before the tribunal. It is for consideration, therefore, whether it is reasonable and appropriate for the organization to undertake such a contribution.

In assessing the merits of this suggestion, several factors are relevant.

First, it might be questioned, in the circumstances of the tribunal, whether it would be necessary for a lawyer to be involved in such cases, in light of the type of issue faced by the tribunal.

In most cases, especially those involving a challenge to the legality of individual decisions, the case will already have had an elaborate process of administrative review, including recourse to the Grievance Committee; a substantial record will have been accumulated surrounding the applicant's claim, containing the relevant findings of law and fact. Indeed, this elaborate process would already have consumed considerable time, effort and expense of the Fund at the different levels of review. With such an existing record available to the tribunal, resort to an advocate arguably should be left to the judgment - and the cost - of the applicant.

In individual cases in which the legality of a regulatory decision is at issue, while there may be no administrative review or Grievance Committee views on this issue, a similar conclusion might be drawn. Under the draft statute, the Staff Association will already have had the opportunity to

challenge the legality of the regulatory decision upon its promulgation. 1/ If the Staff Association was unsuccessful in overturning the regulatory decision or decided not to challenge it, there is no compelling reason for the Fund to provide legal representation, and bear the associated expenses, for an individual who chooses to challenge the decision in the context of his own individual case. Additionally, such challenges to regulatory decisions would not raise complex issues of proof of fact. The legal issues would be contained within an easily comprehensible legal system, and the members of the tribunal would be experienced jurists.

A second question would be the determination of the appropriate fee arrangement for the advocate. An arrangement in which the advocate's costs were imposed directly on the Fund strictly on the basis of time spent on applicants' cases would obviously be undesirable; there would be no incentive to limit the time or effort to reasonable levels, or to agree upon settlements, stipulations and other time-saving measures in the legal process. On the other hand, to fix the amount of compensation in advance, without adjustment for the actual effort expended on cases or the complexity of the issues, would likewise be problematic.

A third and more fundamental aspect to be considered is whether the direct provision by the Fund of legal assistance to the staff in bringing their applications before the tribunal would not pose sensitive issues of conflicts of interest for the Fund. On the one hand, the Fund is the defendant in these claims, and must decide what efforts and resources are to be devoted to marshalling the defense. On the other hand, were it to provide staff with legal assistance, it would (through the Executive Board) also need to decide, on a continuing and annual basis, the size of the contribution to the staff.

Therefore, if Executive Directors were to consider it appropriate for the Fund to provide legal assistance for applicants before the tribunal by funding a staff advocate, several difficult issues would need to be examined, including the selection and appointment of an advocate, the determination of the terms of reference and remuneration, and the potential conflict of interest that would arise because the Fund would be paying an advocate who is to represent its adversary in legal proceedings.

In light of these difficulties, another form of assistance to staff applicants might be considered. The Staff Association (rather than the Fund) would select and remunerate an external lawyer who would be available to assist staff members in their individual applications. Under this

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1/ Under Article XX, only regulatory decisions taken after the specified starting date can be challenged, either directly or indirectly. Thus, in the context of individual cases involving challenges to the legality of the underlying regulatory decision, because the regulatory decision would have been taken after the specified date, it would already have been open to a direct challenge, as provided under Article VI 2.

arrangement, the Fund would not have any control over the selection and remuneration of the staff advocate. However, the Fund could provide a subsidy to the Staff Association on an annual basis, to be devoted to legal advice and assistance. It would thus be for the Staff Association to decide upon the best allocation of such funds, to winnow out potential cases that are not meritorious, and to assure that qualified and competent assistance would be provided in appropriate cases, which would inure to the benefit of the tribunal in general. Such a contribution would supplement the other financial resources of the Staff Association. Such funds could be applied either towards legal costs in cases brought by the Staff Association (challenging the legality of regulatory decisions), or by individual applicants. The decision as to the selection of cases to be funded and amount of funding with the resources contributed by the Fund would be left to the Staff Association. It would remain open to successful applicants to seek an award of costs against the Fund; if a case had been initially funded out of the Staff Association funding, the award would replenish the amount expended on the case.

On balance, this second approach would seem to raise fewer difficulties than the appointment of a staff advocate by the Fund. It would distance the Fund from the selection and remuneration of lawyers assisting staff members. Nevertheless, it would not resolve entirely the latent conflict of interest that is inherent in the scheme. It would still require a decision by the Fund as an institution to finance legal proceedings against itself. The size of the allocation would become the measure of the Fund's willingness to be taken to court, and a discontinuation of the subsidy would be seen as an obstructive measure, which might be invoked as a basis for action before the tribunal as a deprivation of a fundamental right. For these reasons, this course of action is not recommended.

II. Comments on the Draft Statute

Ten Executive Directors have circulated statements commenting on various provisions of the draft statute. The following discussion summarizes and responds to those comments.

A. Jurisdiction of 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;

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; or

c. [by the Staff Association challenging the legality of a regulatory decision adversely affecting any or all of its members.]

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 current or former officer or employee of the Fund;

(ii) any current or former technical assistance expert appointed by the Fund, whether or not an officer or employee of the Fund, provided that such an expert shall have access to the Tribunal in the event of dispute only to the extent that his letter of appointment so provides; 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."

One Executive Director reserved his position on the jurisdiction of the tribunal over regulatory decisions. The same Executive Director suggested that, in Article II 2.a., the phrase "taken in the administration of the staff" be replaced by "related to the contract of employment or the terms and conditions of employment." The reference to a contract of employment, however, would not be accurate for regular or fixed-term staff members; it would only apply to contractual employees, and one issue for resolution by the Executive Board is precisely whether the tribunal should have jurisdiction over decisions relating to contractual employees.

In EBAP/90/309, the staff had proposed that disputes concerning contractual employees be submitted to arbitration rather than to the jurisdiction of the tribunal. Of the four Executive Directors who commented on the staff proposal, two supported the proposal and two opposed it. Given the absence of strong opposition to the proposal, the text of Article II of the draft statute has been redrafted to incorporate the staff proposal, with the understanding that the Administration Department would provide for contractual employees to resort to arbitration regarding disputes arising out of their contracts with the Fund; the arbitral award would be as binding on both parties as would be a decision of the tribunal.

On the Staff Association's access to the tribunal, four Executive Directors supported the proposal in Article II 1.c. and two opposed it. Based on the experience of other international organizations, challenges to regulatory decisions often involve the de facto participation of staff associations, but, as they are not authorized to bring the action in their own name, the application has to be filed by individual staff members.

The resort to individual applications can be explained by the traditional principle that only individual decisions, rather than regulations, can be challenged before administrative tribunals. The practice of other organizations shows, however, that this principle has now become largely ineffective, as individual applications may assert the illegality of the regulations on the basis of which the individual decisions being challenged have been taken. These individual applications have thus become a vehicle to challenge the legality of regulations. Since it is proposed, in the draft statute, to authorize direct challenges to staff regulations, there is no need to maintain the fiction that only individual interests are at stake in a particular action. Therefore, the Staff Association could be allowed to bring suits in its own name challenging the legality of such regulations.

However, on this approach, which has no precedent in international administrative tribunals, Executive Directors are not in agreement. It is not yet clear that there is sufficient support in the Executive Board to endorse this approach. Therefore, clarification of the views of all Executive Directors is needed for the resolution of this point.

The text of Article II would then read as follows: 1/

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

a. by a current or former member of the staff challenging the legality of an administrative act concerning or arising under the terms and conditions of his employment as a regular or fixed-term staff member and adversely affecting the applicant;

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 and adversely affecting the applicant;

c. by the Staff Association challenging the legality of a regulatory decision that could be challenged under a. or b. above.

2. When a person referred to in Section 1 a. or b. of this Article is deceased, the application may be made or the action continued by the administrator of his estate or his successor in interest.

3. For purposes of this Statute:

a. the expression "administrative act" shall mean any individual or regulatory decision of the Fund;

b. the expression "regulatory decision" shall mean any rule concerning the terms and conditions of Fund 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 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;

1/ It would remain to be decided whether assistants to Executive Directors, who are neither (regular or fixed-term) staff members nor contractual employees should be given access to the tribunal for their disputes with the Fund (other than as enrollees of a benefit plan; see draft Article II 1.b.).

d. the masculine pronoun shall include the feminine, and the singular noun shall include the plural."

B. Applicable Legal Rules

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."

Several Executive Directors commented on Article III and the proposed limitations on the competence of the tribunal.

First, support was expressed for explicitly including the principle of judicial self-restraint in Article III, particularly in light of the prerogative of the Executive Board regarding salary adjustment. Other Executive Directors likewise endorsed the view that there be specific reference to the Executive Board's intention that the tribunal act in a restrained way.

Second, with respect to the final sentence of this provision regarding the binding nature of Executive Board interpretations on the tribunal, one Executive Director favored the retention of this sentence, while another felt it was unnecessary and preferred to treat the delineation of the Board's powers in the commentary rather than the text.

Finally, one Executive Director felt that the reference to "generally recognized principles of international administrative law" as a source of law was unnecessarily restrictive, while another felt that the phrase was overly broad and would result in the application to the Fund of principles regarding the scope of staff rights that were not intended by the Executive Board in establishing the terms and conditions of employment.

The reference to general 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 would not go beyond those applied by other tribunals, and that the tribunal would be 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. 1/ Second, certain 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.

1/ For example, in the de Merode case, the World Bank Administrative Tribunal held that the 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, at p. 56 (1981).

At the same time, the reference to general principles is not intended to introduce concepts that are inapplicable to, or inappropriate for, the Fund. One Executive Director expressed 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, and gave several examples of decisions taken by other tribunals invalidating decisions taken by the organization in question.

In this regard, 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 organs of the Fund, including the Executive Board, under the Articles of Agreement.

The Fund, like all international organizations, has reserved to itself broad powers to alter the terms and conditions of employment on a prospective basis. 1/ 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 as urgent and unavoidable financial imbalances, may authorize certain adjustments if they are reasonably justified. 2/

With respect to one example given by an Executive Director, namely the Board's approval of an element in a downgrading program which prevents downgraded employees at the maximum of the lower grade from receiving periodic pay increases after a fixed period, the starting point for analyzing the legality of such a decision would be the elements of the employment relationship between the organization and its staff. In the context of the Fund, for example, there are no commitments for automatic

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1/ 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.

2/ Gretz, UNAT Judgment No. 403 (1987).

salary adjustments. Thus, the Fund has retained a substantial degree of discretion regarding structural salary adjustment, as part of its general authority to prescribe the conditions of employment.

In short, the application of general principles of international administrative law would not authorize the tribunal to find legal obligations on the part of the Fund that may exist in other organizations but have no basis in light of the terms and conditions of employment prescribed by the Executive Board. Indeed, the reference to such general principles in Article III is intended as a limitation on the tribunal's authority in reviewing the legality of decisions, i.e., it would be expected to recognize the broad discretion reserved to the decision-making organs, including the power to amend the conditions of employment, in adjudging the legal obligations of the Fund. These points will be elaborated in the commentary to Article III of the tribunal's statute.

C. Time Limit for Applications

Article VI 1.

> "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."

Six of the Executive Directors' statements expressed support for the Staff Association's contention that the statute of limitations for bringing individual cases before the tribunal should be expanded from three to six months, and one felt three months was adequate, particularly given the tribunal's authority to waive the time limit in appropriate cases. Several relevant points should be noted, however, that support retention of the existing proposal.

First, it should be clarified that 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.

Second, 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.

Third, 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. 1/

Finally, in truly exceptional circumstances, such as delays occasioned by illness or work exigencies, the tribunal has the power to extend the three-month period. This would appear to ensure that applicants would not be denied access to the tribunal for reasons beyond their control.

D. Effectiveness of Decision Challenged

Article VI 4.

"4. The filing of an application shall not have the effect of suspending the implementation of the decision contested."

Two Executive Directors agreed that the filing of an application should not automatically suspend the effectiveness of the challenged administrative action, but felt that the statute should make clear that the tribunal would have the authority to stay the effectiveness of the decision pending the outcome of the case where an applicant otherwise would suffer irreparable harm.

The purpose of allowing interim relief is to avoid irreparable harm to an applicant, i.e., consequences that are beyond the control of the Fund and could not be corrected at the conclusion of the case, even if the applicant were to prevail. In particular, an applicant who is challenging a termination decision may face the loss of his visa status unless he is retained on the staff pending the outcome of the case. Under GAO No. 16, the Fund may, but is not required to, grant administrative leave without pay status to a staff member who is appealing his dismissal. The draft statute could authorize the President of the tribunal to require the Fund to provide such leave, by the addition of the following sentence:

> "Provided, however, that in cases involving termination of employment, the President of the Tribunal may order that the applicant be placed on administrative leave without pay pending the outcome of the case."

1/ Compare the WBAT Statute (90 days); UNAT Statute (90 days); IDBAT Statute (60 days).

E. Appointment of Members of the Tribunal

Article VII 1.b.

> "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."

Several suggestions were made regarding the process of consultation and approval regarding appointment of the tribunal's members.

Several Executive Directors felt that the same procedure applied for the appointment of the tribunal's President, i.e., consultation with the Staff Association and approval of the Executive Board, should apply with respect to the appointment of the two associate members and their alternates.

It was also suggested that the tribunal consist of a larger number of members (five), who would be appointed in the manner of arbitration proceedings: each party would appoint an equal number of tribunal members, who would in turn collectively choose another member.

It is recommended that the present proposal be retained; thus, the Managing Director would engage in such consultation as he felt was appropriate before appointing the associate members and the alternates. The Executive Board could adopt a rule, once the tribunal statute is in place, that would require prior notification to Executive Directors of any intended appointments to the tribunal, as is the case under Rule N-12 with appointments to the senior staff. This would give each Executive Director the opportunity to express his views on the proposed appointment and have the matter placed on the Board's agenda for discussion.

F. Recusal of Members of the Tribunal

Article VII 3.

> "3. Any member who has a conflict of interest in a case shall recuse himself."

The issue was raised whether this provision should be expanded to allow the parties to request the withdrawal of a member from a particular case on conflict of interest grounds, in addition to the requirement of sua sponte recusal already mentioned. A request for withdrawal would always be possible, but forced recusal of a member of the tribunal would have serious implications for his participation in future cases after his colleagues had concluded that he had acted improperly in not voluntarily recusing himself in a case. In light of these considerations, the draft statute proposes that the Managing Director be authorized to terminate the appointment of a

member who, in the unanimous opinion of the other members, is unsuited for further service. If either party felt that a member of the tribunal had improperly failed to recuse himself on grounds of conflict of interest, the matter could be taken up by the tribunal as a whole. If the other members agreed that the member in question should have recused himself, that decision would warrant his dismissal from the tribunal.

G. Secretariat

Article IX 2.

"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."

A question was raised regarding the loyalty of the Secretariat and the meaning of the phrase "under the authority of the President." The draft statute is intended to make clear that the personnel performing services for the tribunal, even if employed by the Fund, owe their duty of loyalty entirely to the tribunal. Because the President of the tribunal will be responsible for its administrative functioning, the personnel of the Secretariat would take instructions from, and report to, the President.

H. Production of Evidence

Article X 1. 1/

"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. The Tribunal may examine witnesses and experts, subject to the same qualification." 2/

Several Executive Directors commented on the power of the Managing Director to withhold documents from the tribunal; one supported the existing clause, which had been broadly supported at a previous Board discussion, while others questioned whether there could be a "middle ground" sufficient to protect the Fund's interests. It is certainly envisaged that certain

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1/ One sentence ("Such a determination shall be binding on the Tribunal") has been deleted from this provision in light of the ambiguity it might have created regarding the ability of the tribunal to draw an inference from the Fund's decision to withhold evidence.

2/ The words "subject to the same qualification" have been added to indicate that the limitation concerning confidential or secret information will apply to witnesses and experts.

measures, such as the sanitizing of confidential or private information in documents, as well as "in camera" review procedures, could be used where appropriate, in order to provide the tribunal with relevant and necessary evidence while safeguarding institutional and personal interests in privacy and confidentiality. The commentary could be amplified to make this clear. However, it is considered prudent to allow the Managing Director to have the final decision whether the withholding of information is justified on the grounds set forth in the statute. In such a case, the tribunal could consider the Fund's explanation for the decision to withhold the information and draw whatever inference it felt appropriate; for example, the tribunal could presume that the information would have been unfavorable to the Fund's position in the case or, in extreme cases, that the failure to submit the information warrants a decision in favor of the applicant.

I. Award of Costs to Applicant

Article XIV 4. 1/

"4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that a reasonable amount be paid by the Fund to cover all or part of the costs incurred by the applicant in the case, including the cost of applicant's counsel."

Two Executive Directors felt that the award of costs to a successful applicant should be mandatory, while others endorsed the position in the draft statute that such awards would be discretionary with the tribunal. It was also suggested that, although the Fund should not have to bear the full costs of an unsuccessful applicant, the cost of a staff advocate could be shared by the Fund and the Staff Association.

As discussed in Part I, it is recommended to retain the approach of allowing the tribunal discretion to award a reasonable amount of costs to a successful applicant.

J. Award of Costs to the Fund

Article XV

[existing]

"Should the Tribunal find that an application is manifestly without foundation, it may order that compensation be made by the applicant to the Fund for all or part of the administrative and other costs of the case. The Managing Director shall determine the means of enforcing the compensation, including by way of

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1/ This provision has been reformulated to make clear that any award of costs against the Fund would have to be reasonable under the circumstances.

deductions from payments owed by the Fund to the applicant, and may, in particular cases, waive the claim of the Fund against the applicant."

[alternative]

"1. The Tribunal may order that 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."

One Executive Director who generally endorsed the notion of a "frivolous case" provision suggested that such a clause not be invoked where an application has been summarily dismissed and the need for further expenditure of time and resources has thus been obviated. This notion is already incorporated in the draft statute, in that the tribunal could only award actual costs incurred by the Fund with respect to a frivolous case; if a case has been summarily dismissed and the costs to the Fund of defending the action have been avoided or minimized, it would presumably be less likely that an award of costs would be warranted. As noted in Part I above, Article XV could be redrafted to clarify the standard for a finding by the tribunal that an application was manifestly without foundation; the existing text and an alternative formulation are presented above. The alternative provision also clarifies that the cost to be awarded would be in respect of the Fund's defense of the action, such as staff time and dedication of resources; the cost to the Fund of the operation of the tribunal itself in connection with the case would not be an element of the award.

K. Amendment of Statute

Article XIX

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

One Executive Director favored giving the power to amend the tribunal's statute to the Executive Board rather than the Board of Governors, but this view was not shared. Given that the tribunal will have the authority to review decisions of the Executive Board (but not resolutions adopted by the Board of Governors), it is considered appropriate to confer the power to amend solely on the Board of Governors, the organ responsible for establishing the tribunal and the highest organ of the Fund.

L. Entry Into Force

Article XX

> "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 [date], even if the channels of administrative review concerning that act have been exhausted only after that date."

Two Executive Directors endorsed the prevailing view at EBM/90/178 that prospective jurisdiction only be conferred on the tribunal. There was support expressed for using either the date of Executive Board approval of the draft resolution proposing the statute for adoption by the Board of Governors or the date of the Board of Governors' resolution as the operative date for the commencement of jurisdiction. Another Executive Director reaffirmed his earlier view favoring some degree of retroactivity by allowing review of the legality of regulatory decisions in the context of individual decisions, even if the regulatory decision at issue predated the effective date of the tribunal's jurisdiction.

It is proposed that the date of Executive Board approval of the proposed resolution be the operative date for the application of Article XX. In that case, a transitional provision would be needed to extend the period of time specified in Article VI for the initiation of proceedings before the tribunal. This provision would be added at the end of Article XX and read as follows:

> "In the case of decisions taken between [date] 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."