FOR AGENDA

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EBAP/90/309

November 28, 1990

To: Members of the Executive Board

From: The Secretary

Subject: Establishment of an Administrative Tribunal for the Fund - Further Issues for Consideration

The attached paper containing further issues for consideration on the establishment of an administrative tribunal for the Fund will be brought to the agenda for discussion on a date to be announced. A conclusion appears on page 18.

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--Further Issues for Consideration

Prepared by the Legal Department

(In consultation with the Administration Department)

Approved by François Gianviti

November 27, 1990

At EBM/89/88 (7/7/89), Executive Directors continued their discussion of the establishment of an administrative tribunal for the Fund. 1/ The discussion focused on the issues presented in EBAP/89/160 (6/19/89), particularly the desired structure of the tribunal and the ongoing role of the Grievance Committee.

In these respects, most Executive Directors expressed a clear preference for the first model presented in the staff paper. Under that model, an administrative tribunal, consisting entirely of persons external to the Fund, would be established and empowered to pass judgment on the legality of employment-related decisions. Individual decisions would be subject to prior review by advisory bodies established for this purpose, such as the Grievance Committee, with authority to make recommendations to management concerning the applicability of the Fund's rules and regulations in individual cases. Once the internal channels of review had been exhausted, including recourse to the Grievance Committee, the staff member would be able to submit his claim to the tribunal. Executive Directors did not support affiliation with the World Bank Administrative Tribunal ("WBAT"), and endorsed the establishment of a separate Fund tribunal. 2/

In the course of the discussion, Executive Directors resolved, in principle, a number of other issues concerning the tribunal. In particular, there was support for conferring only prospective jurisdiction on the tribunal, i.e., the tribunal would be competent to review the legality of

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1/ The question of an administrative tribunal for the Fund has been examined in EBAP/89/160 (6/19/89), EBAP/89/23 (1/27/89), EBAP/88/151 (6/22/88) and EBAP/86/309 (12/10/86).

2/ The statute of the tribunal could provide for affiliation by other international organizations with the agreement of the Fund.

decisions taken after, but not before, the date on which it is established and its jurisdiction begins. This means that any regulatory decision in place before that time would not be open to challenge, either directly or in the context of the tribunal's review of an individual decision. 1/

The principal remaining issue for resolution is the competence of the tribunal, i.e., its authority to review and pass judgment, with respect to regulatory decisions, in particular, decisions taken by the Executive Board regarding the terms and conditions of Fund employment. The previous discussions left open the question of the tribunal's authority to review such decisions, and the extent to which that authority should be limited or circumscribed in some manner by the statute governing the tribunal.

Another, though less significant, issue has arisen since the original proposal was put forward as a result of the review by the Administration Department of the nature and extent of the employment of contractual personnel by the Fund. As part of the original proposal for a tribunal, these employees (and technical assistance experts) were to be given access to the tribunal on the same basis as members of the staff. In the interim period, however, the question of providing these employees with access to the tribunal has been carefully reconsidered in the light of the nature of contractual employment and of the principal purposes that the tribunal is designed to serve. The employment relationship of contractual employees with the Fund is governed solely by the terms of their contracts, which provide the exclusive basis for the respective rights and obligations. Accordingly, the resolution of any disputes will normally only involve questions of contract interpretation. Assuming that present practices are continued, administrative decisions concerning contractual employees are not likely to involve questions of consistency with Executive Board decisions or with higher legal norms, including the general principles of international administrative law that govern the Fund's relationship with the staff and the limitations on its unilateral power of amendment.

This strongly suggests that it may not be necessary or appropriate to give contractual employees access to an administrative tribunal, the principal purpose of which would be to address such questions and to provide decisions that would guide the Fund in its employment relationships with its regular staff. Disputes with contractual employees could be resolved more simply and expeditiously by including in their contracts provision for such disputes to be submitted to binding arbitration by a single arbitrator, rather than through the more elaborate, and probably more time-consuming, procedures of the tribunal. The same procedure could be applied to technical assistance experts, whose terms and conditions of appointment are

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1/ The term "regulatory decision" is defined in the draft statute as "any rule concerning the terms and conditions of employment, including the General Administrative Orders and the Staff Retirement Plan." It would thus cover not only employment-related decisions of the Executive Board but also general administrative orders and other staff rules issued by management.

not as extensive as those of the staff. It is proposed, therefore, that access to the tribunal not be extended to contractual employees and technical assistance experts. The attached draft statute indicates the modifications in the original text that would be necessary to effect this change.

Part I of this paper discusses, in general, the power of an organization to make rules governing the employment relationship with the staff, and the legal framework in which regulatory decisions are taken within the Fund. Part II examines how administrative tribunals, in construing the legal framework applicable to the decision-making organs of an organization, assert competence to review the legality of regulatory decisions, and suggests possible limitations on the review of regulatory decisions by the Fund tribunal. These limitations are, in turn, reflected in the draft statute (Attachment I), and explained in the accompanying commentary (Attachment II). The commentary also discusses each of the provisions of the draft statute and the intention underlying their drafting. 1/

I. Authority of the Fund to Establish and Amend the Conditions of Service

A. Legal Basis for Decision-Making

An international organization is empowered, either explicitly or implicitly under its constituent instrument, to make rules governing the terms and conditions of staff employment. This authority includes the power to change or amend those rules; in the de Merode case, the World Bank Administrative Tribunal (WBAT) stated that "[i]t is a well-established legal principle that the power to make rules implies in principle the right to amend them. This power flows from the responsibilities of the competent authorities of the [organization]." 2/

This power of an organization to amend the applicable rules is not, however, unfettered; certain specific constraints have been recognized. First, the authority of the decision-making organs derives from the governing instrument of the organization; as a result, their decisions must be consistent with the applicable instrument and within the scope of authority conferred on the organ. Second, in the legal hierarchy of the organization, each organ is subject to, and bound by, decisions of a higher organ. Finally, all international organizations are subject to generally-accepted principles of international administrative law regarding amendment

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1/ The attached commentary is an updating and revision of the commentary provided in EBAP/88/151 in light of subsequent Board discussions of certain issues concerning the tribunal, particularly the preference for the first model.

2/ de Merode, WBAT Reports, Dec. No. 1, at p. 15 (1981).

of the terms and conditions of employment. These points, and their applicability to employment-related decisions by the Executive Board, are examined in turn below.

B. Specific Limitations on Decision-Making

Although the authority of the Fund's decision-making organs in administrative matters is comprehensive, 1/ that authority is limited in certain respects by the internal law of the Fund. As discussed in Part II, these limitations on the authority of the Executive Board and the Managing Director would have certain implications with respect to the review of regulatory decisions by the tribunal.

1. The Articles of Agreement

The powers of each of the decision-making organs of the Fund derive from, and are circumscribed by, the Fund's Articles of Agreement. Hence, the decisions of the Executive Board and the Managing Director must be consistent with the Articles. However, the Executive Board enjoys broad authority under Article XII, Sec. 4(b), to oversee the conduct of the Fund's business, including the employment relationship with the staff. As discussed below, this provision, coupled with the power to interpret the Articles as provided in Article XXIX of the Articles, could provide a basis for limiting the tribunal's review of decisions taken pursuant to this authority.

2. Board of Governors' Resolutions

The Executive Board and the Managing Director are also bound by resolutions of the Board of Governors as the highest organ of the Fund. Such resolutions would include the formal approval and adoption of the statute creating the administrative tribunal.

3. General Principles of Law

The decision-making organs of the Fund, like those of other international organizations, are subject to general principles of law regarding amendment of the terms and conditions of employment. In the absence of any limitation on an organization's power to amend, the organization could, for example, without legal consequence, disrupt the employment relationship by refusing to recognize earned entitlements of staff, thereby abolishing a condition which a staff member could have regarded as an inducement to accept employment with the organization. It has been observed that the basic constraints on the ability of an

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1/ Section 15 of the Fund's By-Laws provides that the Executive Board is authorized to exercise all the powers of the Board of Governors except those conferred directly by the Articles of Agreement on the Board of Governors.

organization to effect such changes in the conditions of staff employment are intended to avoid the disruptive effects that these changes would undoubtedly have on the employment relationship, including the difficulties of recruiting qualified staff. 1/

Nevertheless, administrative tribunals have recognized the organization's power to amend the rules and regulations governing the employment of staff members already in service, and staff members have no legal right to insist that the terms of their service remain identical to, or at least as favorable as, those prevailing at the time they joined the organization.. As one observer has noted,

> "It would be difficult to accept the view that while rules may be created by the organization, once a staff member joins the organization conditions of service become completely immutable, because circumstances may change and render amendments to the governing rules necessary. The needs and functions of an organization may alter in the light of experience and it may be imperative to rectify errors of judgment. Thus, it becomes necessary to strike a balance between the interests of the staff in certainty and in the continuity of a regime to which they subscribed on joining the organization and the interests of the organization in being able to adjust to changing needs and to correct mistakes. The balance may, indeed, have to be tilted in favor more of the administration than of the staff in certain respects, because organizations must have some freedom to carry on their operations, but . . . tribunals have increasingly made an effort to protect the interests of staff as well." 2/

In applying this balancing approach, the international administrative tribunals have all acknowledged, in a variety of contexts, that an organization has a broad prerogative to establish and modify the terms and conditions of staff employment. Accordingly, a tribunal will not substitute its judgment for that of the competent organs and will review an organization's exercise of its discretionary powers in regulating employment conditions only on very limited grounds. In practice, staff members have rarely been successful in challenging the legality of rules regarding the terms and conditions of their employment; although certain basic limitations have been articulated by the tribunals, there are relatively few cases in which the staff member has established that the organization has transgressed those limitations.

1/ See generally Akehurst, "Unilateral Amendment of Conditions of Employment in International Organizations", The British Yearbook of International Law [1964] 286, at p. 319.

2/ C.F. Amerasinghe, The Law of the International Civil Service, Vol. I, at pp. 392-93 (1988).

One basic and well-accepted limitation on the organization's power of amendment is the protection of "acquired rights," whether or not expressly provided for in the staff regulations. In this respect, many organizations have explicitly limited their own authority to amend the rules of staff employment by specifically conceding that the "acquired rights" of staff cannot be abrogated unilaterally. For example, Regulation 12.1 of the UN Staff Regulations provides: "These Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members." Similar language is found in the regulations of other international organizations. 1/

This limitation has been rather narrowly construed, however, and as interpreted is 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 entry into force of the change. 2/ Accordingly, respect for acquired rights would not, as such, preclude the organization from prospective alterations in the conditions of employment.

Another limited exception to the organization's broad power of amendment is the obligation not to alter the "fundamental" terms and conditions of employment. The concept of non-interference with "fundamental" or "essential" conditions of employment is not dependent on, nor related to, the doctrine of acquired rights. 3/ Rather, it depends on whether an element is of such importance that it can reasonably be said to have induced the staff member to accept his appointment. In other words, if an element is so basic to the employment relationship that its abolition or alteration would upset the balance of the relationship, then it cannot be unilaterally changed by the organization. The "essentiality" of an employment condition cannot be defined in the abstract, but depends on the

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1/ These organizations include the World Health Organization, the International Labour Organization, the United Nations Education, Scientific and Cultural Organization, the International Atomic Energy Agency, the African Development Bank, the Food and Agriculture Organization of the United Nations, the Inter-Governmental Maritime Consultation Organization and the Organization for Economic Cooperation and Development. The language of the International Civil Aviation Organization Staff Regulations is somewhat different but purports to impose some limitations on the power of amendment. Staff Regulation 12.1 makes amendment of the Staff Regulations conditional upon the amendment not adversely affecting "the entitlement of a staff member to any benefits earned through service prior to the effective date of the amendment."

2/ See, e.g., Puvrez v. Secretary-General of the International Civil Aviation Organization, UNAT Judgment No. 82 (1961).

3/ There is a trend in some tribunals, however, to use the term "acquired rights" in applying an analysis based on non-interference with fundamental or essential conditions of employment. See Ayoub (No. 1), ILOAT Judgment No. 832, pp. 13-14 (1987).

nature and context of the particular condition, and the elements and circumstances of the proposed change. In this regard, tribunals will examine the cumulative effect of changes that, when taken in their entirety, have the effect of upsetting a basic condition of employment. 1/ It should be emphasized, however, that the cases in which both the existence of a fundamental right and its breach by the organization have been established by a staff member have been quite infrequent. 2/

Moreover, even where a measure is found to breach an obligation of the organization, the administrative tribunals have recognized that there may be overriding interests of the organization requiring such a measure. In particular, the decision, if financial in nature, may be considered justified by the tribunal if unavoidable due to budgetary or other extraordinary circumstances. This was the view taken by the UN Administrative Tribunal (UNAT) in a 1987 case. 3/ There, the UNAT reviewed a decision to reduce the cost-of-living adjustment in the pension plan, which had been necessitated by actuarial imbalances in the plan. The UNAT concluded that the measure was "justified to prevent an increasingly serious diminution of the [plan's] assets, making it impossible to assure adequate benefits for beneficiaries" and, therefore, the measure could not "be considered unreasonable." 4/

Thus, the legal constraints on the Executive Board's freedom of action in prescribing the conditions of Fund service would derive from the Articles of Agreement, resolutions of the Board of Governors as the highest organ of the Fund, and certain general principles of law. In practice, however, these general principles have been applied with considerable caution and restraint by administrative tribunals in conjunction with well-accepted norms regarding judicial review of administrative decisions. Given the

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1/ See Ayoub (No. 2), ILOAT Judgment No. 986 (1989), where the tribunal concluded that successive adjustments in the formula for calculating pensionable remuneration, taken in their entirety, had the effect of infringing the acquired rights of staff.

2/ One case in which both of these elements were found was the Pinto decision of the WBAT, WBAT Reports, Dec. No. 56 (1988), in which the WBAT concluded that the Bank's decision to impose an absolute freeze on the salaries of downgraded staff whose salaries, after a grandfathering period, exceeded the maximum of their new ranges violated a fundamental right to "periodic review and adjustment of salaries based on cost of living and other factors."

3/ Gretz, UNAT Judgment No. 403 (1987). See also Ayoub (No. 1), supra, at 13; cf. Stevens and Others, Council of Europe Appeals Board, Appeals Nos. 101-113 (1985), where the imposition of a salary levy, with partly retroactive effect, was held invalid. The Appeals Board recognized, however, that the organization could "impose wage restraints, even during the period covered by the fixed scales, if they should be justified by exceptionally serious and urgent circumstances, which is not the case here."

4/ Id.

principles protecting the exercise of discretionary authority, the major tribunals have rarely concluded that the actions of international organizations, in establishing and amending the employment relationship with their staffs, violated the legal rights of staff. The implications of these norms for the review of the Fund's regulatory decisions by a tribunal are discussed in the following section.

II. Administrative Tribunal Review of Regulatory Decisions

The creation of an administrative tribunal to resolve employment-related disputes does not, as such, alter the employment relationship between an organization and its staff--that is, apart from the avenue of recourse it provides, it neither expands nor derogates from the rights of the staff, nor does it impose additional limitations or obligations on the organization. Rather, the existence of a judicial forum provides staff with access to remedies in respect of the rights they possess in the employment relationship according to the internal law of the organization, including the constituent instrument of the organization and the powers it confers on the decision-making organs.

Various questions were raised at EBM/89/88 concerning the power of the tribunal generally to review regulatory decisions, and specifically whether it would be appropriate to limit this power in some fashion. In this regard, several approaches could be considered. First, the tribunal could be denied the authority to review regulatory decisions altogether. Second, some Executive Directors expressed interest in the possibility that the tribunal could review regulatory decisions through a referral procedure that would not be binding on the Fund. Third, the tribunal could be generally empowered to review the legality of all regulatory decisions, with the possible exclusion of resolutions taken by the Board of Governors as the organ responsible for the establishment of the tribunal. These three basic approaches are now examined.

1. Non-Reviewability of Regulatory Decisions

It could be provided that the Fund tribunal would not be empowered to review, either directly or indirectly, 1/ any regulatory decision taken by the Fund; thus, the legality of any rule concerning the terms and conditions of employment would be beyond the purview of the tribunal. Under such an approach, the tribunal would be limited to determining whether the staff rules and regulations of the Fund had been correctly applied or interpreted

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1/ Indirect review of the legality of a regulatory decision by the tribunal would occur in the context of reviewing an individual decision where the staff member alleged that the regulatory decision on which the individual decision was based was illegal, thus invalidating the individual decision at issue.

in individual cases. The scope of the tribunal's competence would, in essence, be no broader than the jurisdiction now exercised by the Grievance Committee, 1/ with the principal distinction being that the decisions of the tribunal would be final and binding instead of advisory, as is the case with the Grievance Committee; if this type of competence is adopted, it would be preferable to enhance the Grievance Committee or a similar organ instead of establishing a separate administrative tribunal.

This approach, in which regulatory decisions were wholly excluded from review by the tribunal, would fall far short of the objectives and purposes for which administrative tribunals have been established. As discussed above, although an international organization has broad authority to establish and modify the terms and conditions of employment, its prerogatives are not unfettered; limitations derived from the internal law of the organization, both written and unwritten, would apply to the field of employment relations. A critical function of an administrative tribunal is to review the exercise of this regulatory authority in the light of the applicable legal norms. The creation of a tribunal without the concomitant power to review regulatory decisions as an element of the terms and conditions of employment would thus deprive staff of the protections normally afforded by the existence of a tribunal:

> "[T]he mere fact that a decision has been taken by the governing body does not remove the decision from the tribunal's competence, since it is competent to hear an appeal taken against any authority in the organization, if it alleges infringement of the contract of employment of the applicant or violation of the Staff Regulations." 3/

All of the major administrative tribunals have reviewed the legality of decisions taken by the decision-making organs of the institutions they serve. 4/ For example, the WBAT has asserted, without objection from the Bank, competence to review decisions of the Bank's Executive Board. 5/ If regulatory decisions were excluded from the Fund tribunal's competence, in the case of parallel or similar personnel rules, the WBAT could pronounce on the legality of such rules, whereas the Fund tribunal would have no such authority. As a result, the Fund would be in the anomalous position of having at least to consider, in the interests of parallelism, the impact of

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1/ Under GAO No 31, Sec. 4.01, the Grievance Committee has jurisdiction over any question brought by a staff member concerning the interpretation or application of the rules and regulations of the Fund in his individual case.

3/ C.F. Amerasinghe, supra, at pp. 210-11.

4/ See, e.g., Mullan, UNAT Judgment No. 162 (1972); Callewaert-Haezebrouck, ILOAT Judgment No. 344 (1978); Krug, Decision No. 87, OECD Appeals Board (1981).

5/ See von Stauffenberg, WBAT Reports, Dec. No. 38 (1987).

WBAT judgments on Fund rules, instead of turning to a judicial forum established by the Fund.

2. Advisory Function With Respect to Executive Board Decisions

One suggestion made at EBM/89/88 was that the tribunal would not be empowered to invalidate, either directly or indirectly, decisions taken by the Executive Board. Instead, the tribunal would be authorized to provide, upon referral of the matter by the Executive Board itself, an advisory opinion as to the legality of a decision that had been, or was to be, taken by the Executive Board and any related matters, such as questions of interpretation. The Executive Board could then take into consideration the tribunal's views in deciding whether to adopt or ratify the decision, but the tribunal's pronouncement would not be final or binding.

To limit the tribunal to an advisory function with respect to Executive Board decisions would be a significant departure from the status and authority conferred upon other administrative tribunals, which have been established not as advisory but as judicial bodies, i.e., with the power to bind the organization and all of its organs. 1/ It has been noted that "[i]t is the essence of Administrative Tribunal decisions that they are judicial pronouncements." 2/ As the International Court of Justice (ICJ) has recognized, the UN Administrative Tribunal (UNAT) has been established

> "'not as an advisory organ or a mere subordinate committee of the [decision-making organ], but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions' and that 'according to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is res judicata and has binding force between the parties to the dispute.'" 3/

This distinction between advisory and judicial functions, and its consequences for the organization, was examined extensively by the ICJ in the Effect of Awards of Compensation Case, involving the UNAT. There, the ICJ concluded that the tribunal's authority to pass judgment and order remedies, as prescribed in its statute, that the UNAT status as an independent judicial body rather than an advisory organ that was subordinate to the General Assembly. As a party to the dispute, the organization was therefore bound by, and legally obligated to give effect to, the UNAT's

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1/ In most legal systems where the courts are empowered to give advisory opinions, the advisory function is a complement to, rather than a substitute for, judicial authority.

2/ C.W. Jenks, The Proper Law of International Organisations, p. 41 (1962).

3/ Id. at p. 42, quoting from Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 ICJ Reports 47.

judgments. The ICJ's discussion suggests several important reasons for endowing an administrative tribunal with judicial rather than advisory powers with respect to employment-related decisions, including those taken by decision-making organs.

First, as the ICJ emphasized, international organizations establish administrative tribunals because of the "inevitable" need to settle disputes between the organization and staff members as to their rights and duties. This purpose would be seriously undermined if the tribunal's decisions did not bind the organization and could be overridden without legal consequence. The ICJ noted that the omission of any provision for revision of the UNAT's judgments by the General Assembly was deliberate, partly because of the potential adverse effect of such an approach on staff morale.

Second, the ICJ noted that, in creating the tribunal, the General Assembly was not delegating its own authority to the tribunal, since it did not have adjudicatory power under the UN Charter; rather, the General Assembly was exercising its power to regulate staff relations by creating an independent judicial organ. The ICJ observed that this exercise was analogous to the "common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being." 1/

Third, the opinion implied that there is a linkage between the judicial character of the tribunal's functions and the independence of its activity. Indeed, an important protection of the impartiality of judges derives from the fact that their opinions will be binding on legislative and administrative bodies; otherwise, the awareness that an opinion could thereafter be rejected or modified by the body to whom it is addressed could, in turn, affect the deliberations and undermine the impartiality of the judicial body.

Finally, the ICJ cautioned against the General Assembly deciding, in light of the ICJ's opinion, to give itself the power in future cases to review decisions of the tribunal:

> "Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ--considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable

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1/ Id. at p. 61.

> to them--all the more so as one party to the disputes is the United Nations Organization itself." 1/

Thus, on balance, there would be serious shortcomings to a system of review in which the tribunal would not act as a judicial organ with respect to review of Executive Board decisions but would instead be limited to an advisory capacity. For these reasons, the staff does not support a statutory provision authorizing an advisory function for the Fund tribunal.

It would, however, always be open to the individual members of the tribunal to give advisory opinions in their non-official capacities, whereby the parties would be guided, but not bound, by the opinion rendered in the matter. This has been done, for example, by three members of the ILO Administrative Tribunal, on the basis of an agreement between the organization and the staff union, regarding whether the introduction of a new salary scale would be in breach of the organization's commitment regarding prior negotiations with the staff union and violate the terms and conditions of staff employment. 2/

3. Reviewability of Regulatory Decisions

The major international administrative tribunals have all examined the legality of rules and regulations concerning the terms and conditions of employment at the organizations they serve, on the view that decisions taken by the decision-making organs of an institution establishing or amending the employment relationship with staff must be consistent with the legal system applicable to the organization. In this fashion, the tribunals have asserted jurisdiction to review decisions of the policy-making bodies of the organization, even though their governing statutes are not explicit on this point:

> "Apart from the cases in which tribunals have overturned resolutions or decisions of the highest legislative bodies of international organizations, there are a plethora of cases in which tribunals have examined the question whether legislative actions of such bodies had resulted in invalid administrative decisions because such legislative actions violated a higher norm of the internal law of the organization, on the assumption clearly that such legislative actions were subject to

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1/ Id. p. 56. As the ICJ recognized, decisions of the tribunal, although final and binding, were not immutable; under its statute, the tribunal had the power to revise its judgments when new facts of decisive importance had been discovered. This would serve as a safeguard in appropriate cases.

2/ See Opinion given by the members of the Administrative Tribunal of the International Labour Organization on the question put to them jointly in accordance with the decision of the Governing Body of the International Labour Office taken at its 205th Session, para. 6 (February-March 1978).

> the control of the internal law of the organization." 1/

Thus, the principle of the reviewability of regulatory decisions by administrative tribunals is firmly established.

With respect to this principle, there are three issues to be considered: the grounds for review, the limitations on review, and reviewability through direct or indirect challenges.

(a) Grounds for Judicial Review of Regulatory Decisions

As noted above, in the international organizations served by administrative tribunals, the tribunals have developed, and are continuing to develop, certain concepts regarding the organization's prerogatives as an employer. These concepts have reaffirmed, in various contexts, the wide degree of discretion enjoyed by an organization in the employment area and the principle that a tribunal will not interfere with the lawful exercise of authority by the decision-making organs. At the same time, tribunals will review the legality of decisions taken by these organs in order to safeguard the staff against the misuse of that authority. In so doing, tribunals have identified certain grounds for review, including the following:

. Scope of Authority. One basic principle is that an organ must be acting within its legal authority in taking a decision; otherwise, the decision is ultra vires and, thus, illegal.

. Observance of Applicable Requirements. Another basic principle is that decisions must be taken in accordance with higher norms and with all mandatory and applicable procedural requirements. At the Fund, this would mean that all employment-related decisions would have to be consistent with the Articles of Agreement and resolutions of the Board of Governors.

. General Principles of Law. The major administrative tribunals have recognized certain limitations, discussed above, on the ability of the organization unilaterally to amend the fundamental terms and conditions of employment. At the same time, the tribunals have reaffirmed, in a wide range of contexts, that international organizations have broad power to adopt and modify policies concerning the terms and conditions of employment, as part of their mandate to carry out the purposes of the organization. Accordingly, tribunals have sought to preserve for the organizations a substantial degree of flexibility for the accomplishment of their objectives, while affording their staffs appropriate protection against infringement of their acquired rights or unilateral disruption of the balance in the employment relationship.

1/ C.F. Amerasinghe, supra, at pp. 15-16 [citations omitted].

(b) Limitations on Judicial Review of Regulatory Decisions

Given the sources of law to which the Executive Board is subject in administrative matters, various limitations could be imposed on the Fund tribunal with respect to the review of regulatory decisions. These limitations would be intended to underscore the distinction between executive and judicial functions that the tribunal would be expected to respect.

(i) The Articles of Agreement

The powers of the Executive Board derive from, and are circumscribed by, the Fund's Articles of Agreement. Hence, the decisions of the Executive Board must be consistent with the Articles. At the same time, however, Article XXIX of the Articles of Agreement confers upon the Executive Board the power to interpret the Articles, subject to review by the Board of Governors.

The power of interpretation conferred on the Executive Board could be used as a means of limiting the authority of the administrative tribunal to pronounce on the legality of Executive Board action. 1/ Although the power of interpretation has not been used in the employment context to date, there is no reason in principle why this authority could not be exercised by the Executive Board to establish, by means of a formal interpretation, that a particular employment-related decision was taken by an organ of the Fund in accordance with the powers either vested in it or delegated to it under Article XII, Section 4. 2/ The interpretation, although subject to review by the Board of Governors in accordance with the procedures of Article XXIX, would be binding on the tribunal in the context of a challenge to the decision. Because the Articles of Agreement, as the Fund's constituent instrument, is the paramount source of law for the organization, a formal interpretation that the Executive Board was authorized to take a particular type of employment-related decision under the Articles would, in effect, mean that the decision could not be challenged as inconsistent with the Articles; nor could the decision be reviewed under general principles of international administrative law, given that these principles are subordinate to the Articles as the highest law of the Fund. Thus, as a result of the Board's interpretation, there would be no basis on which the tribunal could pass judgment on the legality of these decisions. To avoid any ambiguity, the binding effect of these interpretations on the tribunal could be stated in the statute of the tribunal.

1/ In practice, the use of this power has not been limited to cases of dispute between a member and the Fund but, rather, has been used in anticipation of a question arising as to the meaning of a provision of the Articles.

2/ This provision is the source of authority for decisions taken with respect to the terms and conditions of employment, including the organization, appointment, and dismissal of the staff.

(ii) Board of Governors Resolutions

The authority of the Board of Governors as the Fund's highest organ could provide another avenue for limiting review of Executive Board action by the administrative tribunal. As suggested in EBAP/89/160, it would be possible to remove from the competence of the tribunal any decision taken by the organ establishing the tribunal, that is, the Board of Governors. The Board of Governors has not, in practice, been involved in the establishment and amendment of the terms and conditions of Fund employment, although referral of certain decisions pertaining to the employment relationship (such as those involving such basic issues as pension and salary structure) could be envisaged. In this fashion, the Executive Board could, through referral of a decision to the Board of Governors for ultimate approval, foreclose review of the legality of that decision by the administrative tribunal.

It would also remain open to the Board of Governors, as the organ responsible for formally authorizing the establishment of a tribunal and approving the statute, to amend or abrogate the statute of the tribunal after its establishment. 1/ In this fashion, the nature of the judicial function performed by the tribunal could be limited or altered with respect to future cases.

(iii) General Principles of Law

In practice, the tribunals' review of regulatory decisions has been quite narrow, not by virtue of the exclusion of such decisions from their competence, but rather by the application of well-established principles of international administrative law regarding the scope of judicial review of discretionary decisions. These principles, which have been recognized by each of the major administrative tribunals in a variety of contexts, underscore that tribunals will not interfere with the lawful exercise of the powers conferred upon the decision-making organs of the institution.

The statute of the Fund tribunal could expressly refer to the applicability of these concepts, as a limitation on the tribunal's review. Such language is proposed in Article III of the draft statute.

1/ It is always open to the highest organ to amend the statute governing the tribunal or even abolish the tribunal. For example, the WBAT's Statute may be amended by the Bank's Board of Governors; the Statute of the United Nations Administrative Tribunal may be amended by the General Assembly; the Statute of the ILO Administrative Tribunal may be amended by the Conference of the ILO or another organ of the organization as determined by the Conference.

(c) Direct or Indirect Review of Regulatory Decisions

The legality of regulatory decisions could be examined either directly or indirectly: directly, if a staff member can initiate proceedings to have a regulation declared illegal; indirectly, if a staff member is not allowed to challenge the legality of a regulation, but can only assert the illegality of a regulation as grounds to have an individual decision based on that regulation declared illegal. 1/

The possibility of direct review of a regulatory decision, within a prescribed period following its enactment or effective date, would have several advantages. It would offer a prompt resolution of the issue of legality and thus avoid delays and uncertainty. If a decision was found illegal before it had been fully implemented or relied on by the organization, it would be easier, from an administrative standpoint, to undo its effects and restore the status quo ante. Conversely, if a decision was upheld by the tribunal, it could not thereafter be nullified, and the organization could implement it on the basis of the tribunal's judgment.

Given that the governing statutes of the major international tribunals do not make clear whether the tribunal has the authority directly to review the legality of regulatory decisions, it has been a matter of interpretation by the tribunals as to whether such authority exists. Where direct review of regulations is not considered available, the tribunals have had to review their legality in the context of challenges to individual decisions. In these situations, the implications of a finding of illegality are not specified by the statute of the tribunal. As a consequence, the tribunals have, through the prescription of remedies, sought to achieve the same result as direct review would accomplish.

The WBAT, for example, has not asserted authority directly to review and annul regulations, although it has indirectly reviewed their legality through challenges to individual decisions where the Bank has agreed in advance to apply the ruling to all similarly-situated staff. In essence, the application, although nominally brought by one or several individual staff members, is treated as a de facto class action through the agreement of the parties concerned. In von Stauffenberg 2/, for example, each of the three applicants was a member of one of the three classes of staff affected by the general salary adjustment decision at issue; the Bank agreed

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1/ The draft statute would accommodate both of these avenues of challenge. In the case of review of individual decisions, a finding of illegality would not result in the annulment of the underlying regulatory decision or the invalidation of previous decisions taken in reliance on it; the individual decision at issue would be rescinded and corrective measures would be prescribed with respect to that decision only. The organization would, however, wish to consider the implications of the tribunal's judgment for other staff members.

2/ von Stauffenberg, WBAT Reports, Dec. No. 38 (1987).

in advance to apply the tribunal's decision to all similarly-situated staff. The relief requested by the applicants was to order the amendment of the decision taken by the Executive Directors of the Bank. If the tribunal had granted the relief (which it decided against on the merits), the result would have been to abrogate the decision as to the staff at large without the necessity of further individual applications in reliance upon the judgment. Thus, had the applicants been successful, the scope of relief to be implemented by the Bank would have achieved the same result, and expeditious resolution, as direct review of the regulation by the tribunal.

In Ayoub (No. 2), 1/ the ILOAT found that the organization's adjustments to the formula for calculating pensionable remuneration violated staff rights. However, the tribunal was constrained by the limitation that in order for it to prescribe relief, there had to be a challenge of an actual decision taken in respect of and applied to the staff member, and that it was not authorized to annul the impugned regulatory decision. Accordingly, the tribunal's pronouncement on the illegality of the pension changes did not annul the regulation at issue or invalidate it as such, and the ILOAT concluded that the question of remedies could not be determined with respect to the individual applicants until they in fact retired from the organization, when a calculation could be made of their pensions under the old and new systems.

In Ayoub, the ILOAT circumscribed its lack of authority to undertake direct review by rendering an interlocutory ruling on the legality of the regulation even before it had been implemented or applied in individual cases. Thus, without annulling the regulation or ordering that it could not be applied, the tribunal put the organization on notice that individual applications of the decision in the future would themselves be invalid. However, this approach does not overcome the problems of delay and uncertainty inherent in the provisional nature of the ruling.

The Ayoub case demonstrates the difficulties posed where a tribunal lacks authority directly to review regulatory decisions and order appropriate relief upon a finding of illegality. This shortcoming would be particularly acute in cases where the challenged regulation concerns prospective modifications of pension benefits because, in such cases, the tribunal cannot determine the question of relief until each individual applicant in fact retires. From the staff member's perspective, the delay in determining his lawful entitlement may well make it difficult for him to decide whether to remain at the organization and to plan his retirement, because the value of his pension cannot be calculated with certainty until that date. For the organization, the uncertainty as to its precise obligations regarding the payment of pensions would make it difficult to establish contribution rates and the funding of the retirement plan.

The basic principle that regulatory decisions, as part of the terms and conditions of staff employment, are within the competence of administrative

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1/ Ayoub (No. 2), ILOAT Judgment No. 986 (1989).

tribunals implies that the tribunal should be authorized to review directly the legality of a regulatory decision. The ability of a tribunal to review regulations only in respect of challenges to individual applications has a number of serious drawbacks, as Ayoub suggests. It follows that the governing statute should make clear not only that regulatory decisions are subject to review, but also that such decisions may be reviewed either through direct challenges or as grounds for invalidating an individual decision taken in reliance thereon. The statute should also prescribe, with respect to each type of challenge, the consequences from a remedial standpoint of a finding of illegality. This approach, which is incorporated in the draft statute, is intended to clarify the uncertainty reflected in the case law of other tribunals and avoid the need for ad hoc solutions to the questions raised by the reviewability of regulatory decisions.

CONCLUSION

The scope of outstanding issues concerning the establishment of an administrative tribunal for the Fund has gradually narrowed in light of Executive Board consideration of the question since 1986.

The primary question yet to be decided concerns the competence to be given to the tribunal with respect to regulatory decisions regarding the terms and conditions of Fund employment. In practice, each of the major international administrative tribunals has asserted competence to review the legality of regulatory decisions, based on the principle that the decision-making organs of an institution are subject to, and bound by, its internal law. It is, therefore, recommended that the Fund tribunal generally be authorized to review the legality of employment-related decisions taken by the Fund; the draft statute expressly confers this authority.

The draft statute also makes clear that the Fund tribunal would be expected to follow the principles recognized and applied by other administrative tribunals with respect to the performance of their judicial function. The tribunal would thus draw upon a well-developed body of case law concerning the narrow range of grounds for challenging the legality of an employment-related decision, and the limitations on a tribunal's power of review. In addition to these limitations, it would be possible to exclude from review altogether decisions taken by the organ responsible for the establishment of the tribunal, i.e., the Board of Governors.

Finally, it is recommended that the Fund tribunal be authorized to pass judgment upon the legality of a regulatory decision either upon a direct challenge or in connection with the review of an individual decision that was taken in reliance on the regulatory decision. The possibility of direct challenges within a limited time period would not only be consistent with the underlying principle of reviewability, but would also permit expeditious and definitive resolution of the issue of legality before substantial reliance had been placed on the measure in question.

STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

ARTICLE I

There is hereby established a Tribunal of the International Monetary Fund (hereinafter referred to as "the Fund"), to be known as the Administrative Tribunal of the International Monetary Fund (hereinafter referred to as "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" 1/ shall mean:

1/ If contractual employees are excluded from access to the tribunal, then subsection (i) would be redrafted to read as follows: "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff." Subsection (ii) would be deleted and replaced by the following: "any assistant to an Executive Director."

(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.

ARTICLE III

The Tribunal shall not have any powers beyond those conferred under this Statute. In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts. Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund. The Tribunal shall be bound by any interpretation of the Fund's Articles of Agreement decided by the Executive Board, subject to review by the Board of Governors in accordance with Article XXIX of that Agreement.

ARTICLE IV

Any issue concerning the competence of the Tribunal shall be settled by the Tribunal in accordance with this Statute.

ARTICLE V

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

2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the

consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service,* administrative review shall be deemed to have been exhausted when:

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

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

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

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

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

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

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

4. For purposes of this Statute, all channels of administrative review shall be deemed to have been exhausted when the Managing Director and the applicant have agreed to submit the dispute directly to the Tribunal.

ARTICLE VI

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

* This would apply to the Grievance Committee and to any other procedure established pursuant to Rule N-15.

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

3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.

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

5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

ARTICLE VII

1. The members of the Tribunal shall be appointed as follows:

a. The President shall be appointed for two years by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board. The President shall have no prior or present employment relationship with the Fund.

b. Two associate members and two alternates who have no prior or present employment relationship with the Fund shall be appointed for two years by the Managing Director after appropriate consultation.

c. The President and the associate members and their alternates must be nationals of a member country of the Fund at the time of their appointments and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

2. The President and the associate members and their alternates may be reappointed in accordance with the procedures for appointment set forth in Section 1 above. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

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

4. The decisions of the Tribunal shall be taken by the President and the associate members, provided that when an associate member has recused himself or, for any other reason, is unable to hear a case, an alternate shall be designated by the President, and provided further that, if the President himself is unable to hear a case, the elder of the associate members shall act as President for that case, and shall be replaced by an alternate as associate member.

5. The Managing Director shall terminate the appointment of a member who, in the unanimous opinion of the other members, is unsuited for further service.

ARTICLE VIII

The members of the Tribunal shall be completely independent in the exercise of their duties; they shall not receive any instructions or be subject to any constraint. In the performance of their functions, they shall be considered as officers of the Fund for purposes of the Articles of Agreement of the Fund.

ARTICLE IX

1. The Managing Director shall make the administrative arrangements necessary for the functioning of the Tribunal.

2. The Managing Director shall designate personnel to serve as a Secretariat to the Tribunal. Such personnel, in the discharge of duties hereunder, shall be under the authority of the President. They shall not, at any time, disclose confidential information received in the performance of their duties.

3. The expenses of the Tribunal shall be borne by the Fund.

ARTICLE X

1. The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal. The Tribunal may examine witnesses and experts.

2. Subject to the provisions of this Statute, the Tribunal shall establish its own Rules of Procedure. The Rules of Procedure shall include provisions concerning:

a. presentation of applications and the procedure to be followed in respect to them;

b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment;

c. presentation of testimony and other evidence;

d. summary dismissal of applications without disposition on the merits; and

e. other matters relating to the functioning of the Tribunal.

3. Each party may be assisted in the proceedings by counsel of his choice and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV.

ARTICLE XI

The Tribunal shall hold its sessions at the Fund's headquarters at dates to be fixed in accordance with its Rules of Procedure.

ARTICLE XII

The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

ARTICLE XIII

1. All decisions of the Tribunal shall be by majority vote.

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

3. Each judgment shall be in writing and shall state the reasons on which it is based.

4. The deliberations of the Tribunal shall be confidential.

ARTICLE XIV

1. If the Tribunal concludes than an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission

of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund.

5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain.

ARTICLE XV

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

ARTICLE XVI

A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal, and which at the time the judgment was delivered was unknown both to the Tribunal and to that

party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

ARTICLE XVII

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

ARTICLE XVIII

1. The original of each judgment shall be filed in the archives of the Fund. A copy of the judgment, attested to by the President, shall be delivered to each of the parties concerned.

2. Copies may also be made available by the Secretariat on request to interested persons, provided that the President may decide that the identities or any other means of identification of the applicant or other persons mentioned in the judgment shall be deleted from such copies.

ARTICLE XIX

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

ARTICLE XX

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.

ARTICLE XXI

The competence of the Tribunal may be extended to any international organization upon the terms established by a special agreement to be made with each such organization by the Fund. Each such special agreement shall provide that the organization concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization and shall include, inter alia, provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

COMMENTARY ON THE DRAFT STATUTE

Introduction

The draft statute reflects the structure of the model preferred by Executive Directors at EBM/89/88. Under this model, the tribunal would consist of a President and two associate members (as well as their alternates), all of whom would be external to the Fund, as provided in Article VII. 1/

The major unresolved issues that are reflected in square bracketed provisions in the draft statute are:

(i) review of regulatory decisions, including the exclusion of Board of Governors' resolutions;

(ii) access by persons other than regular staff and retirees; and

(iii) access by the Staff Association as a party.

Each of these issues would affect the drafting of Article II of the draft statute; the review of regulatory decisions has implications for Articles III, VI and XIV as well.

Specific Provisions

ARTICLE I

> There is hereby established a Tribunal of the International Monetary Fund ("the Fund"), to be known as the Administrative Tribunal of the International Monetary Fund ("the Tribunal").

Article I, like its counterpart in the statutes of other tribunals, performs a constitutive function and also names the tribunal. As noted above, it envisages the establishment of a tribunal to serve the Fund

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1/ The selection of the first model has also required some modification of Article V of the draft statute dealing with exhaustion of administrative review, in order to take into account the process of review conducted by the Grievance Committee and any other advisory bodies, and the resulting decision by the Managing Director.

exclusively, although provision is made in Article XXI for other international organizations to affiliate with the Fund tribunal.

ARTICLE II

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

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

Article II sets forth the competence of the tribunal. The power of an international administrative tribunal to pass judgment in a particular case brought before it derives from the statute which establishes the tribunal. The scope of competence of the proposed tribunal is defined by this instrument, and the limitations imposed in it establish the bounds of the tribunal's authority.

Section 1(a) provides that the tribunal would be empowered to review a staff member's challenge to the legality of an administrative act (defined below) that adversely affects him. The statutes of several other tribunals contain similar language as regards jurisdiction. 1/ Although the Fund has not adopted a formal statement of principles of staff employment, the employment relationship between the Fund and the staff is subject to legal rights and obligations, one element of which is the obligation of the employer to take employment-related decisions in accordance with the law of the Fund, including applicable rules, procedures and recognized norms. It would be the function of the tribunal, as a judicial body, to determine whether a decision transgressed the applicable law of the Fund. However, a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.

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

Section 1(b) sets forth the competence of the tribunal with respect to the retirement and other benefit plans maintained by the Fund, such as the Staff Retirement Plan (SRP), the Medical Benefits Plan (MBP) and the Group

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1/ E.g., European Court of Justice: EEC Treaty, Article 173; NATO Appeals Board: Resolution of the North Atlantic Council, Article 4.21; Council of Europe Appeals Board: Staff Regulations, Article 59(1).

Life Insurance Plan. 1/ This provision would allow individuals who are not members of the staff but who have rights under these plans to bring claims before the tribunal concerning decisions taken under or with respect to the plan. Such individuals would include beneficiaries under the SRP and nonstaff enrollees in the MBP, e.g., a deceased staff member's widow who continues to participate in the MBP. Such individuals would, however, be entitled to assert claims only with respect to decisions arising under or concerning the Fund's retirement or benefit plans; they would not have the right to challenge other types of administrative acts before the tribunal.

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

The draft statute includes, in brackets, a provision that would permit the Staff Association to bring an action in its own name, directly challenging a regulatory decision that adversely affects its members as a whole or in part (within the applicable time limit for such direct challenges, as prescribed in Article VI(2)). In the absence of such authority, the Staff Association would only be able to participate as an amicus curiae or by assisting a staff member in bringing a case of potentially broader applicability. 2/ At EBM/89/88, various Executive Directors raised questions as to the appropriateness of such a provision, but indicated that the issue would be considered in connection with the review of regulatory decisions generally.

Assuming that the tribunal would be authorized to consider direct challenges to regulatory decisions, it is considered appropriate to give the Staff Association access to the tribunal in its own name in this limited category of cases. As a representative of the interests of affected staff members, the Staff Association would have the resources to present a case on behalf of staff in cases that would be expected to involve the broader and more important legal issues.

1/ The tribunal would be authorized to review decisions relating to or arising under the Staff Retirement Plan (SRP), whether of an individual or general nature. Other tribunals, including the WBAT, have jurisdiction to consider whether there has been nonobservance of the provisions of a staff retirement plan. See, e.g., WBAT Statute, Article II(1). It should be noted that this would require an amendment of the SRP in order to permit the tribunal to exercise such jurisdiction.

2/ The WBAT has ruled that, under its statute, the Bank's Staff Association may not bring an action in its own name, but has permitted the Staff Association to participate as an amicus in various cases involving the legality of Bank decisions. See World Bank Staff Association, WBAT Dec. No. 40 (1987).

The effect of the Staff Association's suit, if successful, would be to have the regulatory decision declared illegal and annulled by the tribunal, as prescribed in Article XIV, Section 3 of the draft statute. Although the Staff Association could not itself seek corrective action on behalf of individual staff members, any decision in its favor which invalidated and annulled a regulatory decision would have certain consequences for individuals who had been adversely affected by the decision; such individuals could, in turn, challenge the failure of the Fund to take corrective action in their individual cases.

2. For purposes of this Statute,

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

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

Subsections (a) and (b) of Section 2 provide two definitions which are critical to construing the competence of the tribunal; the definitions of "administrative act" and "regulatory decision" delineate the types of cases which comprise the subject matter jurisdiction, or competence ratione materiae, of the tribunal. There are several aspects of this competence.

The tribunal would be competent to hear cases challenging the legality of an "administrative act," which is defined as all individual and regulatory decisions taken in the administration of the staff of the Fund. This definition is intended to encompass all decisions affecting the terms and conditions of employment at the Fund, whether related to a staff member's career, benefits or other aspects of Fund appointment, including the staff regulations set forth in the N Rules. In order to invoke the jurisdiction of the tribunal, there would have to be a "decision," whether taken with respect to an individual or a broader class of staff, identified in the application filed by the staff member. As discussed below, in most cases concerning individual administrative decisions, the staff member would be challenging the final decision resulting from the administrative review of his complaint, including recourse to the Grievance Committee.

The draft 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 Staff Retirement Plan, 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 non-interference with the proper exercise of authority by those organs.

One option that could be considered is the exclusion from the tribunal's competence of resolutions taken by the organ establishing the tribunal, that is, the Board of Governors. In this fashion, the Executive Board could, through referral of a decision to the Board of Governors for ultimate approval, foreclose review of the legality of that decision by the tribunal.

> c. the expression "member of the staff" 1/ 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;

The definition of "member of the staff" would include any individual who is a current or former officer or employee of the Fund. The expression "officer or employee" as used in the draft statute is derived from Article IX, Section 8, of the Fund's Articles of Agreement and would have the same meaning and scope as under the Articles. This expression, as drafted, would include regular and fixed-term staff members as well

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1/ If contractual employees are excluded from access to the tribunal, then subsection (i) would be redrafted to read as follows: "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff." Subsection (ii) would be deleted and replaced by the following: "any assistant to an Executive Director."

as contractual employees. 1/ It would also include the secretarial staff in Executive Directors' offices and Assistants to Executive Directors, who are considered "officers or employees" of the Fund. It would not include, however, Advisors to Executive Directors, who fall in a separate category of persons who enjoy privileges and immunities under Article IX, Section 8. Advisors would be able to assert claims before the tribunal as participants in the SRP and other benefit plans, as provided in Article II, Section 1(b) of the draft statute.

Under the option envisaged in the text of the draft statute, technical assistance experts appointed by the Fund, regardless of whether they were considered officers or employees of the Fund for other purposes, 2/ would also have access to the tribunal to the extent their letters of appointment so provided. Access could, for instance, be limited to certain categories of decisions affecting the expert, or to experts whose appointments exceeded a certain minimum period.

Alternatively, if it is considered preferable to give contractual employees another form of redress instead of access to the administrative tribunal, the definitions in Subsections c(i) and (ii) could be redrafted so as to include only staff members (i.e., persons on regular or fixed-term appointments to the staff) and Assistants to Executive Directors (i.e., persons employed on the recommendation of an Executive Director to assist him on a clerical, secretarial or technical capacity). If contractual employees are excluded from access to the tribunal, it would be logical also to exclude technical assistance experts, whose relationship with the Fund (regardless of whether they are considered Fund employees) is typically limited in scope and duration.

The definition also includes persons who would be entitled to assert the rights of the staff member in the event of his death; thus, if an issue as to the termination payments due to a staff member were unresolved at the time of his death, that claim could be pursued by the personal representative of the estate.

The statute would not allow unsuccessful candidates to the staff to bring claims before the tribunal; almost no tribunal statute permits access by such persons.

1/ "Employees" of the Fund would not include individuals under contract to the Fund who are employees of another employer. The tribunal would not, for example, be available to persons who work on the Fund premises but are not employed directly by the Fund (e.g., security guards).

2/ Under the terms of their appointment letters, CBD experts (unlike FAD experts) are normally not considered to be employees of the Fund and are instructed to report to the institution of assignment. There is no reason in principle, however, to differentiate between these categories of technical assistance experts for purposes of access to the tribunal.

> d. the calculation of a period of time shall not include the day of the event from which the period runs, and shall include the next working day of the Fund when the last day of the period is not a working day;

This provision clarifies how the periods of time stated in the statute (e.g., the time limits for filing an application in Article VI) are to be calculated. Basically, the period would start to run on the day after the date on which the challenged decision is rendered; if the last day of the period fell on a weekend or holiday, the deadline would be extended through the next working day. 1/

> e. the masculine pronoun shall include the feminine pronoun.

This provision makes clear that the statute applies equally to males and females; it enables the universal use of the masculine pronoun for the sake of simplicity.

ARTICLE III

(first sentence)

> The Tribunal shall not have any powers beyond those conferred under this Statute.

The first sentence of this Article, in providing that the powers of the tribunal are limited to those set forth in the statute, states the general principle recognized in international administrative law that tribunals have limited jurisdiction rather than general jurisdiction. 2/ As a consequence, administrative tribunals have competence only to the extent that their statutes or governing instruments confer authority to decide disputes. Thus, the statutory provision defining the competence of the tribunal is, at the same time, a prohibition on the exercise of competence outside the jurisdiction conferred.

This principle would have other consequences with respect to the functioning of the tribunal. In particular, the draft statute does not give the tribunal the authority to compel the production of documents

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1/ For an example of how periods are calculated under this provision, see p. 39 infra.

2/ See, e.g., the advisory opinion of the International Court of Justice concerning the competence of the ILOAT in Judgments of the Administrative Tribunal of the International Labour Organisation, ICJ Reports (1956) 77, at 97.

or the appearance of witnesses. 1/ This reflects the concurrence of Executive Directors at EBM/89/88 with the staff's position on this question.

In the absence of such express authority, the tribunal would be limited to requesting, but not ordering, that such information and testimony be provided in a case. The decision whether to comply with such a request, when directed to the Fund, would be left to the Managing Director. The intention is not to impede the tribunal or to prevent the appearance of witnesses; indeed, the Fund would have a interest in bringing the full facts of a case to the attention of the tribunal. This safeguard would, however, serve to protect the confidentiality of sensitive documents and information whose release might be prejudicial to the interests of the Fund's membership or other entities or persons. The tribunal could, of course, make whatever adverse inference or decision it felt was appropriate in light of a refusal to comply with such a request.

(second sentence)

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

The second sentence of this Article calls upon the tribunal to adhere to and apply generally recognized principles for judicial review of administrative acts. These principles have been extensively elaborated in the case law of both international administrative tribunals and domestic judicial systems, particularly with respect to review of decisions taken under discretionary powers. Through case law, judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred. 2/ Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions. 3/

As applied to the review of regulatory decisions, the case law of administrative tribunals in general demonstrates that although there

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1/ Under its Rules of Procedure, the WBAT, through its President, "may obtain any necessary information from any party, witnesses or experts". See WBAT Rule 11(3).

2/ See generally S.A. de Smith, Judicial Review of Administrative Action at 278-79 (4th ed. 1980).

3/ See von Stauffenberg, WBAT Reports, Dec. No. 38 (1987), at para. 126; Decision No. 36, NATO Appeals Board (1972), Collection of the Decisions (1972).

exists a competence to review regulatory decisions, the scope of that review is quite narrow. There are broad and well-recognized principles protecting the exercise of authority by the decision-making organs of an institution from interference by a judicial body. The Fund tribunal would have to respect those principles in reviewing the legality of regulatory decisions.

Likewise, with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures. 1/ This principle is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities, such as decisions whether to confirm a probationary appointment or renew a contract, promotions, and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility. 2/

(third sentence)

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

The third sentence of Article III incorporates, as part of the governing instrument of the tribunal, the concept of separation of power between the tribunal, on the one hand, and the legislative and executive organs of the institution, on the other hand, by stating that the establishment of the tribunal would not in any way affect the authority conferred on other organs of the Fund under the Articles of Agreement. This provision would be particularly significant with respect to the authority conferred under Article XII, Section 3(a), which authorizes the Executive Board to conduct the business of the Fund, and under Section 4(b) of that

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1/ E.g., Durrant-Bell, WBAT Reports, Dec. No. 24 (1985), at paras. 24, 25.

2/ See generally M. Akehurst, The Law Governing Employment in International Organizations at 118-23 (1967); C.W. Jenks, The Proper Law of International Organisations at 86-88 (1962).

Article, which instructs the Managing Director to conduct the ordinary business of the Fund, subject to the general control of the Executive Board.

The statute could also explicitly provide that interpretation of the Articles of Agreement rendered by the Executive Board would be binding on the tribunal. In this manner, the power of interpretation conferred on the Executive Board could be used as a means of limiting the authority of the administrative tribunal to pronounce on the legality of Executive Board action. Although the power of interpretation has not been used in the employment context to date, there is no reason why, in principle, this authority could not be exercised by the Executive Board to establish, by means of a formal interpretation, that a particular employment-related decision was taken in accordance with the powers delegated to the organs of the Fund under, e.g., Article XII, Section 4. The interpretation, although subject to review by the Board of Governors in accordance with the procedures of Article XXIX, would be binding on the tribunal in the context of a challenge to the decision. Because the Articles of Agreement, as the Fund's constituent instrument, is the paramount source of law for the organization, a formal interpretation that an employment-related decision was authorized by the Articles would, in effect, foreclose review of that issue by the tribunal.

ARTICLE IV

> Any issue concerning the competence of the Tribunal shall be settled by the Tribunal in accordance with this Statute.

The tribunal would have the authority to determine its own competence within the terms of its statute. Comparable authority has been accorded to virtually every international administrative tribunal, 1/ which is intended to allow the tribunal to interpret but not expand its competence with respect to a particular case.

ARTICLE V

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

1/ E.g., UNAT Statute, Article 2(3); ILOAT Statute, Article II(7); WBAT Statute, Article III.

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

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

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

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

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

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

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

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

* This would apply to the Grievance Committee and to any other procedure established pursuant to Rule N-15.

4. For purposes of this Statute, all channels of administrative review shall be deemed to have been exhausted when the Managing Director and the applicant have agreed to submit the dispute directly to the Tribunal.

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

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

In situations where recourse to the Grievance Committee or other formal procedure is not applicable, administrative review of a request would be considered as exhausted by any of the outcomes described in Section 3.

ARTICLE VI

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

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

Sections 1 and 2 of Article VI set forth the time limits in which an application must be filed with the tribunal in order to be admissible. In most cases involving individual decisions, a staff member will have three months from the date on which all available channels of administrative review have been exhausted (as prescribed in Article V) in which to bring an action.

An illustration of the interaction of the exhaustion of remedies requirement of Article V and the time limits of Article VI with respect to individual decisions may be helpful. If, on January 2, the Grievance Committee made a recommendation to the Managing Director regarding the disposition of an individual decision, the three-month period prescribed in Article V, Section 2 would run from January 3 to April 2, inclusive. 1/ Thus, if the staff member received a response denying his request on the last day of the period, or had not received a response granting his request by that date, he would have exhausted administrative review. 2/ He would thereupon have three months, i.e., from April 3 to July 2, in which to file an application with the tribunal. If July 2 was not a working day, the deadline would fall on the next working day thereafter, as prescribed in Article II, Section 2(d). If the staff member received a favorable decision on April 2 granting his request, but did not receive the relief requested by June 2, inclusive, he would have three months, i.e., from June 3 to September 2, inclusive, in which to bring an action before the tribunal. Of course, if the relief was, in fact, granted in that period, there would be no case to go forward.

Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision.

1/ Or on the next working day, if April 2 is not a working day.

2/ If a response denying the request was received before April 2, the three-month period for filing an application would run from the date of receipt. For instance, if the response was received on March 19, the application could be filed until June 20, inclusive.

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.

> 3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.

The tribunal would have discretion, in exceptional circumstances, to waive the time limits for filing imposed under the Article; this might be appropriate, for example, in situations where, due to extensive mission travel, prolonged illness, or other exigent personal circumstances, a staff member was unable to file his application within the prescribed period. The staff member could request a waiver either before the deadline if he anticipated that he would be unable to file on time, or after the deadline had passed. However, such a waiver would have to be predicated on a finding that the delay was justified under the circumstances.

> 4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.
>
> 5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

Section 4 follows the principle applicable to other tribunals that the filing of an application does not stay the effectiveness of the decision being challenged. 1/ This is considered necessary for the efficient operation of the organization, so that the pendency of a case would not disrupt day-to-day administration or the effectiveness of disciplinary measures, including removal from the staff in termination cases.

1/ E.g., WBAT Statute, Article XII(4).

Under Section 5, it would be open to the applicant and the Fund to reach an agreement on the dispute involved in the application; thereupon, the application could not be pursued.

ARTICLE VII

1. The members of the Tribunal shall be appointed as follows:

   a. The President shall be appointed for two years by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board. The President shall have no prior or present employment relationship with the Fund.

   b. Two associate members and two alternates who have no prior or present employment relationship with the Fund shall be appointed for two years by the Managing Director after appropriate consultation.

   c. The President and the associate members and their alternates must be nationals of a member country of the Fund at the time of their appointments and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

Article VII, Section 1 of the draft statute governs the appointment of the tribunal's members. A President (who could not be a present or former Fund staff employee) would be appointed by the Managing Director after appropriate consultation, subject to the approval of the Executive Board. Two associate members and two alternates (none of whom having a prior or present employment relationship with the Fund) would be appointed by the Managing Director after appropriate consultation.

The President and the associate members and their alternates would be required to be nationals of member countries of the Fund at the time of their appointments; subsequent changes in nationality or in the membership of their country of nationality would not disqualify them. They would

also have to possess the qualifications and background which are generally required of members of administrative tribunals. 1/

Their terms of service would be two years.

> 2. The President and the associate members and their alternates may be reappointed in accordance with the procedures for appointment set forth in Section 1 above. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.
>
> 3. Any member who has a conflict of interest in a case shall recuse himself.
>
> 4. The decisions of the Tribunal shall be taken by the President and the associate members, provided that when an associate member has recused himself or, for any other reason, is unable to hear a case, an alternate shall be designated by the President, and provided further that, if the President himself is unable to hear a case, the elder of the associate members shall act as President for that case, and shall be replaced by an alternate as associate member.
>
> 5. The Managing Director shall terminate the appointment of a member who, in the unanimous opinion of the other members, is unsuited for further service.

Sections 2 through 5 establish the rules by which the President and the associate members of the tribunal may be reappointed, replaced or dismissed from their duties.

The President and both associate members could be reappointed at the end of their terms.

A member who had a conflict of interest in a particular case would be required to recuse himself. A conflict of interest could arise in an individual case, for example, if a member had a personal relationship with the applicant.

Section 4 prescribes that cases will ordinarily be decided by the President and the two associate members. It provides for the temporary replacement by an alternate of an associate member of the tribunal who is unable to hear a case (for instance, due to illness or scheduling problems) or who, in his own judgment, decides to recuse himself in a particular case

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1/ E.g., WBAT Statute, Article IV(1); IDBAT Statute, Article III(1).

for reasons of conflict of interest. In the event that the President was unable to hear a case, he would be replaced by the elder of the two associate members, who would in turn be replaced by an alternate.

Section 5 provides the exclusive means by which a member could be removed from his position on the tribunal by the Managing Director. This provision would apply to any member of the tribunal (including the President); however, dismissal of the member would be authorized only if all of the other members agreed that he was unfit for further service.

ARTICLE VIII

> The members of the Tribunal shall be completely independent in the exercise of their duties; they shall not receive any instructions or be subject to any constraint. In the performance of their functions, they shall be considered as officers of the Fund for purposes of the Articles of Agreement of the Fund.

This Article, in providing that the members of the tribunal cannot be subject to instructions from any source, is intended to protect the independence necessary for the performance of judicial duties. It further provides that in the performance of their functions, the members of the tribunal will be considered as officers of the Fund for purposes of the Articles of Agreement.

This provision would confer upon the President and the other members the privileges and immunities enjoyed by officers and employees of the Fund under Article IX, Section 8 of the Articles of Agreement including, in particular, the immunity from judicial process. Such protection would further ensure the independence and impartiality of the tribunal in carrying out its functions. It would also provide a basis for dismissal, on immunity grounds, of any lawsuit brought in a national court of a member country of the Fund by an unsuccessful applicant against a member of the tribunal with respect to the member's performance of his official duties.

ARTICLE IX

> 1. The Managing Director shall make the administrative arrangements necessary for the functioning of the Tribunal.
>
> 2. The Managing Director shall designate personnel to serve as a Secretariat to the Tribunal. Such personnel, in the discharge of duties hereunder, shall be under the authority of the President. They shall not, at any

time, disclose confidential information received in the performance of their duties.

3. The expenses of the Tribunal shall be borne by the Fund.

This Article addresses certain administrative aspects of the tribunal. It contemplates that administrative support will be provided to the tribunal by personnel who will be designated for such purpose by the Managing Director, but who will be responsible to the President. Administrative tribunals are usually serviced by a small secretariat. The WBAT, for example, has the services of a full-time professional Secretariat whose members are staff members of the Bank but who are responsible only to the tribunal. The personnel assigned to serve the tribunal would be required to refrain from disclosing confidential information which they receive in carrying out their duties; this would apply to disclosure both outside of and within the Fund, where personnel information is not available to staff except on a need-to-know basis.

The Fund would bear the expenses of the tribunal. These expenses would include the fees paid to and expenses incurred by the President and the associate members in connection with the performance of their duties.

ARTICLE X

1. The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal. The Tribunal may examine witnesses and experts.

2. Subject to the provisions of this Statute, the Tribunal shall establish its own Rules of Procedure. The Rules of Procedure shall include provisions concerning:

a. presentation of applications and the procedure to be followed in respect to them;

b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment;

c. presentation of testimony and other evidence;

d. summary dismissal of applications without disposition on the merits; and

e. other matters relating to the functioning of the Tribunal.

3. Each party may be assisted in the proceedings by counsel of his choice and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV.

With respect to the issue of document production, most Directors at EBM/89/88 accepted the approach recommended in the staff paper, i.e., that the tribunal would be able to require the production of documents from the Fund, except that the Managing Director would retain authority to decide, on a case by case basis, whether there was a compelling institutional need to protect the confidentiality of the requested document. In this event, the Managing Director's decision would be binding on the tribunal. However, if the tribunal felt that the refusal to produce a document was unwarranted or unreasonable, it could draw an appropriate inference against the Fund. Like other tribunals, the tribunal would be able to hear testimony from witnesses and experts, although most administrative tribunals, in practice, rely largely on written evidence and pleadings in deciding cases.

Like other administrative tribunals, the tribunal would be authorized to establish, consistent with its statute, its own rules of operation and procedure. The matters listed in the statute are those considered essential, but the list is not exhaustive.

It would be expected that the rules adopted by the tribunal would address such issues as the procedures for filing applications and other pleadings; the obtaining of information by the tribunal; the presentation of cases and oral proceedings; participation of amicus curiae; and the availability of judgments. 1/ The tribunal could also adopt a rule establishing a procedure for summary dismissal of applications without disposition on the merits. 2/

Section 3 makes clear that each party could be assisted by counsel in the proceedings. Thus, an applicant would have the opportunity to be advised by counsel at any stage of the case; the tribunal, in adopting its own rules, would be free to prescribe the rules regarding the signing of applications and other pleadings, presentation of oral

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1/ See also Article XVIII of the draft statute, discussed infra.

2/ There is authority in Article 8(3) of the Rules of the ILOAT and in Rule 7(11) of the WBAT, for example, for summary dismissal of cases that are considered to be "clearly irreceivable or devoid of merit."

argument, and other matters concerning the involvement of counsel. The Administration Department, which would respond on behalf of the Fund in tribunal cases, could be assisted by the Legal Department or by outside counsel in presenting its case.

As a general rule, each side would bear its own costs, including attorney's fees; however, the tribunal would have authority under Article XIV to order the Fund to bear the costs incurred by a successful applicant in bringing an action, including attorney's fees, in whole or in part, and, under Article XV, it could award costs against an applicant whose claims were manifestly without foundation.

ARTICLE XI

> The Tribunal shall hold its sessions at the Fund's headquarters at dates to be fixed in accordance with its Rules of Procedure.

The tribunal would be required to hold its sessions at Fund headquarters. This would contrast with the WBAT, which is not confined to Washington, D.C., and which holds one of its annual sessions in London.

ARTICLE XII

> The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

As with the WBAT and other tribunals, the Fund tribunal would be empowered to decide whether to hold oral proceedings in a given case. 1/ As noted in the previous staff paper, oral proceedings are somewhat rare in the practice of international administrative tribunals, which generally decide cases on the basis of written submissions, including the record developed in the course of administrative review and the internal appeals process.

Any oral proceedings conducted by the tribunal would be open to "interested persons," unless the tribunal decided that the nature of

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1/ Under the Rules of the UNAT, Article 15(1), oral proceedings are held "if the presiding member so decides or if either party so requests and the presiding member agrees." In the ILOAT, they are held "if the Tribunal so decides, either on its own motion or on the request of one of the parties" (Article 16).

the case required that such proceedings be held in private, for example, if sensitive information or matters of personal privacy were involved.

ARTICLE XIII

1. All decisions of the Tribunal shall be by majority vote.

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

3. Each judgment shall be in writing and shall state the reasons on which it is based.

4. The deliberations of the Tribunal shall be confidential.

As with other tribunals, decisions would be taken by majority vote and would not require unanimity. Although dissents would not need to be registered, dissenting opinions would be possible under the draft statute.

Judgments of the tribunal would be final and without appeal. It is not proposed that further recourse to the International Court of Justice be available. Although the UNAT and ILOAT Statutes authorize appeal to the International Court of Justice under highly limited circumstances, this avenue of recourse was not adopted by other tribunals, including the WBAT.

ARTICLE XIV

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

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such

person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

Article XIV, Section 1 provides for the remedies which the tribunal may order when it concludes that an individual decision is illegal. Section 2 provides that, with respect to nonmonetary relief ordered by the tribunal in individual cases, the Managing Director may opt for monetary relief instead of taking the remedial measures.

Under Section 1, if the tribunal finds that an individual decision is illegal, it shall order the rescission of the decision and all other appropriate corrective measures. These measures may include the payment of a sum of money, or the specific performance of prescribed obligations, such as the reinstatement or promotion of a staff member.

In cases where the tribunal concludes that an individual decision is illegal by virtue of the illegality of the regulatory decision pursuant to which it was taken, the judgment would not invalidate or rescind the underlying regulatory decision, nor would it invalidate or rescind other individual decisions already taken pursuant to that regulatory decision. 1/ If a regulatory decision had been in effect by the organization for over three months, an application directly challenging its legality would not be admissible. A finding by the tribunal, in the context of reviewing an individual decision, that the regulatory decision was illegal would not nullify the decision as such. Thus, previous decisions taken in reliance on, or on the basis of, the regulatory decision would not be invalidated; the organization could decide as a policy matter whether, and to what extent, to reopen those decisions and take further action in light of the tribunal's judgment. The judgment would, however, render the regulatory decision unenforceable against the applicant in the immediate case. The regulatory decision would also, for all practical purposes, become ineffective vis-à-vis other staff members, since future applications in other individual decisions would themselves be subject to challenge, within the applicable time limits for such claims.

Section 2 provides that where the consequences of the rescission of an individual decision or the corrective measures prescribed by the tribunal are not limited to the payment of money, the Managing Director would be authorized to determine whether, in the interest of the Fund, the applicant should be paid an amount of monetary compensation that has been determined by the tribunal in accordance with the limitations

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1/ Other staff members to whom the regulatory decision had already been applied could seek relief in light of the tribunal's holding only if their applications were made within the specified time limits for challenging individual decisions.

prescribed in the statute, as an alternative to rescission of the individual decision or performance of the prescribed obligations. 1/ For example, if the tribunal prescribed, as a corrective measure, that a staff member be promoted or reinstated, the Managing Director, might conclude that such a remedy was not possible or advisable. Such a situation might arise where an applicant was arbitrarily denied a position which has, in the meantime, been filled by another qualified individual. In general, the monetary award could not exceed three times the individual's current or last salary from the Fund, as applicable. The tribunal could, however, exceed this limit in exceptional cases, if it was considered justified by the particular circumstances.

> 3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

Section 3 sets forth the consequences of a ruling in favor of an application challenging the legality of a regulatory decision. In that case, the draft statute provides that the tribunal shall annul the decision. As a result, the decision could not thereafter be implemented or applied by the organization in individual cases.

Annulment would have certain consequences with respect to individual decisions taken pursuant to the annulled regulatory decision, whether taken before or after the date of annulment. Such individual decisions would be null and void. Accordingly, it would be incumbent on the Fund to take corrective measures with respect to each adversely affected staff member. The failure to take proper corrective measures in an individual case would itself be subject to challenge as an administrative act adversely affecting the staff member. For example, if the tribunal annulled a regulatory decision retroactively reducing a

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1/ The statutes of administrative tribunals permit the award of monetary compensation as an alternative to be chosen by the organization's management in lieu of nonmonetary remedies. As is shown at page 27 of EBAP/86/309, three of the seven tribunals studied had no limit on the amount of monetary compensation to be awarded, three place a limit equal to two years' net pay, and the WBAT has a limit of three years' net pay. In all cases with limits, however, there is a provision similar to that in Article XII, Section 1 of the WBAT Statute, to the effect that "[t]he Tribunal may, in exceptional cases, when it considers it justified, order the payment of higher compensation. A statement of the specific reason for such an order shall be made."

benefit, all staff members to whom that decision had been applied would be entitled to the restoration of that benefit for that period. The failure to restore the benefit in an individual case could then be challenged before the tribunal.

> 4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund.

Section 4 authorizes the tribunal to award costs, including attorney's fees, to a successful applicant, in an amount to be determined by the tribunal. Costs, apart from attorney's fees, that might fall within this provision could include such items as transportation to Washington, D.C. for applicants not working at Fund headquarters and the fees of expert witnesses who testify before the tribunal. With respect to unsuccessful applicants whose claims nevertheless had prima facie merit or significance, the tribunal could always recommend that an ex gratia payment be made by the organization.

Most administrative tribunals, whether pursuant to their rules or as a matter of practice, have comparable authority to award costs. For example, the UNAT has declared in a statement of policy that costs may be granted "if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the tribunal." 1/ The tribunals have, however, been rather conservative and cautious in deciding whether, and to what extent, to award costs in a case. 2/

> 5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain.

Section 5 of draft Article XIV permits corrective measures in respect of procedural errors committed by the Fund to be implemented after adjournment of a case in lieu of proceeding to decision on the merits. There is a comparable provision in Article XII of the WBAT Statute.

1/ A/CN.5/R.2 (Dec. 18, 1950).

2/ E.g., Powell, UNAT Judgment No. 237 (1979), in which the applicant requested payment of costs in excess of $100,000 and was awarded $2,000 by the tribunal.

ARTICLE XV

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

This Article would authorize the tribunal to award costs against applicants who bring cases which the tribunal determines are patently without foundation. The award of costs against an applicant could be enforced through deductions from amounts he is owed by the Fund (such as salary or separation payments) or through such other means as management deems appropriate; other means would have to be implemented if the applicant was not owed any money from the Fund so as to preclude the possibility of setoff.

Such a provision would serve as a deterrent to the pursuit of cases that are manifestly without factual basis or legal merit. Unless an application is summarily dismissed by the tribunal, 1/ the tribunal must hear the case and dispose of the matter on the merits. This could involve lengthy proceedings and substantial costs, even if the tribunal ultimately concluded that the applicant's claims were manifestly unsound or devoid of support. Such cases can be expected to be very rare, but when they arise they can be prolonged and costly. It is considered appropriate that an applicant who abuses the review process and imposes substantial cost on the organization in defending the case should assume some responsibility for the consequences of his actions.

At EBM/89/88, most Executive Directors favored the inclusion of a provision in the draft statute that would authorize the tribunal to award costs against an applicant whose case was manifestly without foundation. It was felt that such a sanction would not be used except in extreme situations, where an applicant was patently misusing the review process.

1/ The tribunal would be authorized to adopt a rule providing for summary dismissal of applications. This would permit disposal of a case that was clearly irreceivable on its face without disposition on the merits, thus minimizing the time and expense involved.

ARTICLE XVI

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

This Article is the same as in the WBAT and other statutes. It is intended to serve two purposes. First, it provides that no material fact that was known to a party before a case was decided but was not presented to the tribunal can be presented to the tribunal after it has rendered its decision. Second, it provides that a case may be reopened if a material fact is discovered by a party after the decision has been rendered in order to permit the tribunal to revise its judgment in light of that fact.

ARTICLE XVII

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

Article XVII authorizes the tribunal, once a judgment has been rendered, to correct typographical or arithmetical errors and to interpret its own judgment, under certain circumstances. Judgments could be corrected by the tribunal on its own initiative or upon application by one of the parties.

The tribunal would be empowered to interpret its own judgment upon the request of a party if the terms were unclear or incomplete in some respect, as demonstrated by the party requesting the interpretation. Similar authority is conferred upon other tribunals, including the Court of Justice of the European Communities. 1/ The ability of the tribunal to interpret its own judgments where the parties are unable to discern the intended meaning would help to insure that judgments are given effect in accordance with the tribunal's findings and conclusions.

1/ See Article 40 of the Statute of the Court of Justice of the European Community.

ARTICLE XVIII

1. The original of each judgment shall be filed in the archives of the Fund. A copy of the judgment, attested to by the President, shall be delivered to each of the parties concerned.

2. Copies may also be made available by the Secretariat on request to interested persons, provided that the President may decide that the identities or any other means of identification of the applicant or other persons mentioned in the judgment shall be deleted from such copies.

The statutes of the WBAT and other tribunals provide that the judgments of the tribunal will be published or made available to interested persons. It is proposed that the judgments of the Fund tribunal would be made available to interested persons.

This Article further provides that the President would be authorized to decide whether to conceal the identity of the applicant or any other person mentioned in the judgment, such as a witness (e.g., the complainant in a sexual harassment case in which the disciplinary measures imposed on the perpetrator are being challenged), in copies of the judgment. The President would be guided by concerns for protecting the privacy of the individual involved or the confidentiality of the matter to the organization.

ARTICLE XIX

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

This provision is similar to its counterpart in the WBAT Statute. It would thus remain open to the Board of Governors, as the organ responsible for formally authorizing the establishment of a tribunal and approving the statute, to amend or abrogate the statute of the tribunal after its establishment. In this fashion, the nature of the judicial function performed by the tribunal could be limited or altered with respect to future cases.

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.

As a result of this Article, the tribunal would be competent to hear cases involving only those decisions taken after the establishment of the tribunal. At EBM/89/88, Executive Directors felt that it would be appropriate to provide for a prospective effective date.

ARTICLE XXI

> The competence of the Tribunal may be extended to any international organization upon the terms established by a special agreement to be made with each such organization by the Fund. Each such special agreement shall provide that the organization concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization and shall include, inter alia, provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

Article XXI would permit the affiliation of other international organizations with the tribunal pursuant to an agreement with the Fund. As a condition of such affiliation, the organization would have to agree to be bound by the tribunal's judgments, including the obligation to pay compensation as awarded by the tribunal. The agreement with the Fund would need to cover such areas as the sharing of the tribunal's expenses by the affiliating organization and its role in the administrative arrangements of the tribunal. The affiliating organization would not, however, have any authority with respect to appointment of the tribunal's members or amendment of the governing statute.