EBAP/89/23

January 27, 1989

To: Members of the Executive Board

From: The Acting Secretary

Subject: *Establishment of an Administrative Tribunal for the Fund - Some Further Considerations*

There is attached for consideration by the Executive Directors a study which provides further elaboration on points raised during the Executive Board discussion of the paper on the establishment of an administrative tribunal for the Fund (EBAP/88/151, 6/22/88). This subject has been tentatively scheduled for discussion on Wednesday, February 22, 1989.

Mr. Holder (ext. 7792) or Ms. Powers (ext. 7714) is available to answer technical or factual questions relating to this paper prior to the Board discussion.

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INTERNATIONAL MONETARY FUND

Establishment of an Administrative Tribunal for the Fund--Some Further Considerations

Prepared by the Legal Department

(In consultation with the Administration Department)

Approved by François Gianviti

January 26, 1989

During the discussion by the Executive Board of the staff paper on the "Establishment of an Administrative Tribunal for the Fund" (EBAP/88/151 (6/22/88)) on July 15, 1988, the staff was requested to elaborate on three particular matters. First, there was a request for additional information on the Fund's Grievance Committee and its method of operation. Second, further elaboration was sought as to how the Fund could structure a system of review of employment-related decisions, including the possible role of the Grievance Committee and its linkage to an administrative tribunal in such a system. The third request was for an analysis of the consequences if the Fund were to join the World Bank Administrative Tribunal ("WBAT"), or, alternatively, if the Fund were to establish its own tribunal in lieu of affiliation with the WBAT. This paper responds to those requests and concludes with a recommendation that the Fund follow the approach described in the commentary and draft statute originally proposed in EBAP/88/151 (hereinafter "draft statute").

I. The Grievance Committee of the Fund

The Grievance Committee, established in 1980, is an advisory body; it consists of two staff members and an outside Chairman. The following section discusses the background of the Committee and some of its salient features, as well as the types of cases it has heard to date.

1. Establishment

Rule N-15 of the Rules and Regulations of the Fund provides that:

> "Appropriate procedures shall be established for the consideration of complaints and grievances of individual persons on the staff of the Fund on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service."

This Rule was adopted on June 22, 1979. The first step in its implementation was the appointment of an Ombudsman. The role of the Ombudsman, as described originally, is to endeavor to resolve informally complaints and grievances that are brought to his attention by staff members. 1/

At that time, the need to establish a more formal means of resolving disputes was also recognized, especially for such matters as career performance and staff benefits, and the Managing Director appointed an advisory committee to consider the creation of a Grievance Committee.

Based upon the recommendation of this advisory committee, in July 1980 the Managing Director proposed the establishment of a Grievance Committee to the Executive Board. In his memorandum to the Executive Board, the Managing Director stated:

> "The role of the Grievance Committee will be to consider complaints and grievances brought by individual staff members and to make recommendations to Management in order to facilitate the expeditious settlement of disputes." 2/

Attached to the Managing Director's memorandum was a draft of a document which later became General Administrative Order No. 31, dated September 18, 1980. This GAO contains the terms of reference and basic procedures governing the jurisdiction of the Grievance Committee and the manner in which it is to function. 3/

2. Structure

The Grievance Committee consists of a Chairman, who has no staff relationship with the Fund, and two members appointed from the staff--one by the Managing Director and one by the SAC. There are two alternates for each of the staff member appointees. All members are appointed for a term of one year and may be reappointed. It has been the informal practice for a staff appointee to become a member of the Committee after serving as an alternate.

1/ See "Establishment of an Ombudsman in the Fund," EBAP/79/76 (3/16/79).

2/ EBAP/80/206 (7/15/80).

3/ General Administrative Order No. 31 was revised in 1981 and 1985.

The current Chairman of the Committee, a U.S. national, is a lawyer residing in Washington, D.C. who serves as an arbitrator of labor-related disputes in the public and private sectors. His compensation for services to the Fund consists of daily contractual remuneration. He does not receive any other staff benefits from the Fund, nor does he participate in the Staff Retirement Plan or the Medical Benefits Plan.

3. Conditions for Review

Before the Grievance Committee undertakes to hear a case, it must be satisfied that three conditions have been met:

First, the grievant must have exhausted all established channels for administrative review and failed to secure the relief he is seeking.

Second, the grievant must be either a present or former staff member of the Fund; under GAO No. 31, other persons, such as contractual employees or technical assistance experts, do not have access to the Grievance Committee.

Third, the case must fall within the competence of the Committee, which has jurisdiction over any question brought by a staff member concerning the interpretation or application of the Fund's rules and regulations in his individual case. The Committee is not competent to challenge any decision of the Executive Board or staff regulations as approved by the Managing Director. Moreover, even in individual cases, the Committee is not competent to consider any decision (i) arising under the SRP; (ii) concerning the termination or extension of a temporary or fixed-term appointment; (iii) concerning the appointment to the regular staff of a person serving an initial probationary period; or (iv) concerning the grading of a position in the Job Grading Exercise, which would fall in the exclusive jurisdiction of the Job Grading Appeals Committee.

4. Procedures

The procedures of the Grievance Committee vary in the degree of formality. Some cases are dealt with in a fairly informal manner. Others can be far more formal and similar to judicial proceedings; this is typically the result in cases where the grievant has received permission from the Committee to be represented by an outside lawyer. The process generally proceeds in the following manner, subject to some variation depending on the nature and complexity of the case:

(a) The grievant submits, in a standard form, a statement of his grievance. This statement identifies the decision that the grievant is challenging and the requests for review that preceded

that decision. This helps to ensure that all appropriate administrative steps to resolve the dispute have been taken before the grievance is considered by the Committee. 1/

(b) The Committee, after determining its jurisdiction to hear the case, fixes a hearing date. The panel that hears a case is always made up of three members--the Chairman, one staff member (or alternate) appointed by the Managing Director, and one staff member (or alternate) appointed by the SAC.

(c) The parties are required to submit their opening statements, documentation, and witness lists to the Committee and to each other in advance of the hearing date.

(d) The grievant and an official of the Administration Department, as the representative of the Fund, appear before the Committee; the grievant may be accompanied by another staff member in presenting his case. If the grievant requests the assistance of an individual who is not a member of the Fund staff, typically a lawyer, this request is considered by the three members of the Committee who are scheduled to hear the grievance; these Committee members decide whether or not to approve outside representation. If outside representation is approved, the Committee determines, usually at the conclusion of the case, the proportion of the costs involved that are to be borne by the Fund.

(e) At the hearing, the grievant or his representative is requested to make a brief opening statement outlining the nature of the dispute and his contentions. The grievant may use a previously prepared written statement or make an oral presentation. The representative for the Fund has a similar opportunity to present the Fund's position.

(f) Witnesses are subject to cross examination, and may be questioned by the members of the Committee.

(g) Each party may request any relevant documentary evidence. In the event of a dispute over obtaining records from the Fund, the question whether the documents are relevant and whether their introduction might hinder the operation of the Fund by releasing otherwise confidential or secret information is to be decided by the Managing Director.

(h) A verbatim transcript of the hearing is made for the use of the parties and the Committee. After the hearing, and after

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1/ In most cases, the final stage of administrative review before the staff member can submit a grievance to the Grievance Committee is an appeal to the Director of Administration.

the transcript is available, each party may make a further written submission.

(i) The Committee deliberates in private, and the Chairman prepares a report containing recommendations as to the relief sought by the grievant, which is then signed by the members of the Committee. The report, including the recommendations, is sent to the Managing Director with copies to the Director of Administration and the grievant. In the event that either party requests the Managing Director to overrule or deviate from the Committee's recommendations, that request must be circulated to the other party.

(j) The Managing Director takes the final decision in the matter, and informs the grievant.

5. Cases Heard by the Committee

Since its inception in 1980, the Grievance Committee has heard a total of 22 cases. 1/ Of these, 5 grievances were withdrawn by the grievant before a decision was reached. The principal issues in these 22 cases were:

career (3 regarding promotions; 3 related cases concerning staff member's relations with his supervisors 2/; 1 concerning denial of head-of-mission assignments)	7
benefits (education allowance; spouse points travel; home leave travel; repatriation travel)	4
discipline (including one termination case)	3
terms and conditions of Medical Benefits Plan (1 case settled before decision)	2
terms of separation from the Fund	2
sabbatical leave entitlement (same case was withdrawn and refiled)	2
amount of merit increase (withdrawn and referred to Ombudsman; not resubmitted)	1
Fund liability for loss of personal mail	1
Total cases heard from 1980 to present	22

1/ One case involving eligibility for home leave benefits is currently pending before the Committee.

2/ These three cases essentially restated the same grievance arising from a particular set of facts.

In all of the 17 cases in which the Committee reached a decision and issued a report to the Managing Director, the Committee's recommendation was unanimous. In all of the cases, the Managing Director accepted the recommendations made by the Committee.

Some further analysis of the cases of the Committee follows.

(a) In the seven career-related cases, the Committee has reviewed discretionary managerial decisions, such as questions of promotion and assignment. The Committee has indicated that it will review such decisions only on the grounds that the decision in question was arbitrary, capricious, or discriminatory. (This standard of review is consistent with that applied by administrative tribunals, which have consistently endorsed the view that a tribunal is not to substitute its own judgment regarding evaluations of performance.) Applying this standard, the Committee has, for example, concluded that there was no basis for overturning the decision of a department head not to recommend a staff member to head missions, based on an assessment of the individual.

(b) With respect to disciplinary cases, there has been one case challenging a termination for serious misconduct. The Committee unanimously found that the grievant was guilty of serious misconduct in violation of GAO No. 16, and that his termination was for just cause. The other two disciplinary cases concerned certain procedural aspects of the sanction of probation under GAO No. 16; in both cases, the actions taken by the responsible officials were found to be consistent with the rule and thus afforded no basis of relief to the grievant.

(c) The cases involving Fund benefits have generally concerned the interpretation or applicability of the pertinent General Administrative Orders. One case concerned the proper method of calculating the entitlement for a spouse traveling under the 300-point option. In another case, the Committee held that the grievant was not entitled to a stopover not included within the cost of the most direct route to his home leave destination. In another case, the Committee found that the grievant was entitled to repatriation by ship upon his retirement from the Fund.

The Committee has declined to hear one benefits-related case on jurisdictional grounds. There, a U.S. staff member stationed in Washington, D.C. filed a grievance against the decision of the Director of Administration to deny him an education allowance. The decision was consistent with GAO No. 21, under which the staff member was ineligible for such allowance. Accordingly, the Committee found that it lacked jurisdiction to hear the case, as it involved a challenge to a staff regulation approved by the Managing Director on the basis of Executive Board decisions.

(d) The relief recommended by the Committee has included both the payment of monetary relief (e.g., back pay or a specific travel benefit) and nonmonetary relief (such as the promotion of a staff member to a higher grade).

(e) The Committee has approved the grievant's request for participation of an outside lawyer in all three cases where such requests have been made. In the first case, the Fund paid $850 of a legal bill totalling $1,204. In the second case, hearings extended over several days, numerous documents were submitted in evidence, and several witnesses appeared, including some persons external to the Fund. The grievant, who had lost his case, requested attorney's fees of $18,000. The Committee recommended an ex gratia award of $1,500 by the Fund to the grievant, this being the full amount the grievant owed to his lawyers under a contingency fee arrangement. In the third case, in which the Committee concluded that a supervisor had acted in an arbitrary and capricious manner regarding a promotion, $43,000 was requested for outside counsel fees and costs; the Committee recommended, and the Managing Director accepted, that the Fund bear $19,250 in attorney's fees and $492.55 in other costs.

6. Assessment

The Fund's experience with the Grievance Committee has been very positive. Cases have been heard and decided in an expeditious and cost-effective manner, partly because of the ready availability of the Chairman and the staff members who serve on the Committee. Information and documents requested by the grievants have been provided by the Administration Department, subject to the protection of personal privacy in some instances. It has not been necessary to refer any documentary requests to the Managing Director for a determination whether the release of the information in question would hinder the operation of the Fund.

The direct costs of the Committee have consisted of the Chairman's fee (which is proportionate to the time spent) and court reporter services, 1/ as well as the indirect cost attributable to the time spent by the staff members participating in the grievance process. This includes the time spent by the staff members of the Committee in reviewing initial submissions, deciding procedural issues, conducting hearings, and deliberating on decisions; any working time spent by the grievant and any staff representative in presenting his case to the Committee; the time spent by Administration Department and other personnel in responding to requests for information and preparing counter-arguments and presenting them to the Committee; and the time of staff called as witnesses.

1/ In recent years, the annual cost of the Grievance Committee has been between $35,000 and $40,000, exclusive of staff time.

The Committee has been well-suited to resolve the issues presented in the cases before it. Staff members have an inside knowledge of the Fund, its procedures, and the standard of conduct expected of Fund staff; this perspective is useful, such as in assessing the appropriateness of a disciplinary measure, or in deciding whether discretionary decisions, such as promotions, are within reasonable institutional standards. The outside Chairman, in turn, brings knowledge of and experience in labor arbitration, and is able to guide the Committee both in formulating legal issues and in weighing the argumentation presented by the parties. The reports submitted to the Managing Director reflect this expertise, as they have set out at length the factual and legal basis for the Committee's recommendations.

II. Models for the Review of Employment-Related Decisions

There are differences and similarities between the Grievance Committee and the internal committees that advise the management of international organizations that are also served by administrative tribunals. The function of the Grievance Committee, like that of the advisory committees of such other organizations, is to make recommendations to management; there is no authority to issue final and binding judgments. However, the Grievance Committee is distinguished from such advisory committees by certain judicial-type features and safeguards. For example, the Grievance Committee is chaired by a person external to the Fund, in contrast to the advisory committees of other organizations, which are composed entirely of staff members. Second, the Grievance Committee Chairman has, in practice, been a lawyer, whereas the staff members who serve on the advisory committees of other organizations are not required to have any legal qualifications. 1/ Third, the Grievance Committee's procedures allow for representation of a staff member by outside counsel, with the approval of the Committee; in the advisory committees of other organizations having administrative tribunals, there is no recourse to outside representation except in limited cases (e.g., termination). 2/

1/ Although both of the Grievance Committee Chairmen to date have been lawyers with experience in labor arbitration, there is no prerequisite in the Committee's rules that the Chairman have a particular background. However, experience has shown the value of having a chairman with legal expertise in a relevant background who is also skilled in conducting judicial-type hearings.

2/ E.g., IBRD Staff Rule 9.03, Section 6.01.

The Fund could draw upon these distinctions, as well as the established practices and case law of the Grievance Committee, in structuring a system of review of employment-related decisions which includes an administrative tribunal. In this respect, a basic issue to be considered is whether the Grievance Committee should remain advisory in function or, alternatively, be given enhanced authority to issue binding judgments. There would be further aspects of the system to consider under each of these basic alternatives. 1/ For example, if the Grievance Committee remains advisory, its composition could be either retained or changed. If the Committee is transformed into a judicial body, its linkage to the tribunal would need to be clarified; this could be accomplished in one of several ways. The various options available with respect to these basic features suggest four models for further discussion and analysis; a chart comparing the features of these models is presented in Attachment I.

Under the first model, the Grievance Committee would remain an advisory body in the review of employment-related decisions. As at present, it would consist of two staff members and an outside Chairman. An administrative tribunal, consisting entirely of persons external to the Fund, would be established as the judicial organ of the Fund. The tribunal would hear challenges to individual decisions, which will have been reviewed in the grievance process, and regulatory decisions, for which there are no administrative remedies to exhaust. 2/

1/ Assuming that an administrative tribunal is established and empowered to hear cases challenging the legality of individual employment-related decisions, the competence of the Grievance Committee, whether it remains advisory in function or becomes a "court of first instance", would need to be broadened in order to correspond to the competence of the tribunal with respect to individual decisions. Two basic changes would need to be introduced: (i) access to the Committee would need to be broadened to include all individuals who have the right to bring a case before the tribunal; and (ii) the existing exclusions of certain types of individual decisions from the Committee's competence would need to be removed. This would ensure that all categories of individual decisions are subject to the same stages of review. A possible exception could be considered, however, for individual decisions arising under the Staff Retirement Plan, which could be reviewed by special committees instead of the Grievance Committee before review by the tribunal; this would create a parallel channel of review for cases concerning the SRP, which would also provide for review by the administrative tribunal as the final stage.

2/ The expression "regulatory decision" is defined in the draft statute presented in EBAP/88/151 as "any rule concerning the terms and conditions of employment, including the General Administrative Orders and the Staff Retirement Plan."

The second model differs from the first model only in that the Grievance Committee would consist entirely of staff members; the outside Chairman would be eliminated.

Under the third model, the Grievance Committee would be transformed into a similarly-constituted judicial body and empowered to issue binding decisions concerning the legality of individual decisions. A separate administrative tribunal would be established to hear appeals of Grievance Committee decisions only on certain grounds; these grounds would need to be determined in the tribunal's statute. The tribunal would also hear cases challenging the legality of regulatory decisions, which would not have gone through Grievance Committee review.

The fourth model also envisages giving the Grievance Committee judicial powers, but as an integral part of the tribunal instead of as a separate entity. The Committee would become the first panel of the tribunal, and the second panel would consist of the same presiding officer and two associate members external to the Fund. Under the guidance of the presiding officer, cases would be handled by the respective panels, depending on the type of decision at issue, with the possibility that the first panel could be expanded to include the associate members of the second panel in cases that involve particularly significant issues.

The following two subsections examine these four models in more detail.

A. Grievance Committee as Advisory Body and Establishment of a Tribunal: First and Second Models

Under the first and second models, the Grievance Committee would function, as at present, as an advisory body in the administrative review process, with prescribed competence to review certain types of individual decisions and make recommendations to management. An administrative tribunal with no formal link to the Grievance Committee would be established and empowered to adjudicate challenges to all employment-related decisions taken by the Fund, including those that had been subject to the grievance procedure. This approach could be accommodated either through affiliation with the WBAT or the establishment of a Fund tribunal; these alternatives are discussed more fully in Part III.

A structure of administrative and judicial review consisting of the Grievance Committee, as an advisory body, and an administrative tribunal, as a judicial body, would be similar to the structures found in other international organizations, such as the World Bank and the UN. At these organizations, there is no prescribed linkage between the internal committees that advise management, on the one hand, and the administrative tribunal, on the other hand. While recourse to a tribunal normally requires prior exploration and exhaustion of

available administrative remedies, including recourse to the internal committees, in these organizations the tribunal does not, in a legal sense, consider "appeals" of the conclusions and recommendations of the internal advisory committee. As a result, the tribunal must duplicate the taking of evidence and testimony in its own proceedings, unless it chooses to rely, in whole or in part, on the factual record developed in the course of administrative review, including the hearings before the internal committee. This approach was considered by the staff in the course of preparing EBAP/88/151, but was rejected largely because of this potential duplication of effort.

Assuming that the Grievance Committee is to remain advisory in function, two models could be considered, which would differ only with respect to the composition of the Committee.

In the first model, the Committee would be retained in its present form, i.e., with two staff members and an outside Chairman who has experience in resolving employment-related legal questions.

In the second model, which would conform to the models of other international organizations, the Grievance Committee would be composed entirely of staff. The replacement of the outside Chairman with a third staff member would reduce the cost of the Committee to the Fund to the extent that it would obviate the daily remuneration paid to the Chairman, although it would require a considerable proportion of the time and attention of a senior staff member to perform the duties currently undertaken by the outside Chairman. This change would also, however, eliminate the substantial legal expertise which the Chairman now contributes to the Committee and could make its proceedings appear less impartial and independent.

B. Transformation of the Grievance Committee into a Judicial Body with Linkage to an Administrative Tribunal: Third and Fourth Models

Alternatively, the Grievance Committee could be transformed into a judicial body as part of the decision to establish an administrative tribunal. A question would then arise as to whether the Grievance Committee should be independent of, or a part of, such an administrative tribunal.

Under the third model, the Grievance Committee would be given judicial powers and would decide employment-related disputes as a "court of first instance," i.e., as the first level of judicial review. Those decisions would be final unless the unsuccessful party took an appeal to the administrative tribunal, which would be a separate judicial body. The tribunal would also have "original jurisdiction" to review the legality of regulatory decisions. The tribunal would consist entirely of legal experts external to the Fund, and its President would not serve as Chairman of the Grievance Committee. The main features of this approach would be as follows:

(a) The Grievance Committee would retain its present composition of two staff members and an outside chairman.

(b) The Grievance Committee's decisions would be binding on both parties, i.e., the grievant and the Fund. However, the unsuccessful party would have the right to appeal on certain specified grounds, which would be defined in the statute of the tribunal. This would ensure that the Grievance Committee would remain as the principal forum for the review of individual decisions, and the scope of review to be conducted at the level of the administrative tribunal, in its appellate function, would be substantially limited. In particular, the tribunal's scope of review of Grievance Committee decisions could be delineated in certain respects. For example, whereas findings of fact by the Committee would not be subject to review, conclusions of law by the Grievance Committee regarding the interpretation or application of nondiscretionary rules and decisions (such as the interpretation of a General Administrative Order concerning eligibility for benefits) would be fully reviewable by the tribunal. It would also be appropriate to spell out the bases for review by the tribunal in cases challenging the legality of discretionary decisions (such as promotion decisions).

(c) Whereas a majority of the members of the Grievance Committee would be staff members with no particular training in law, the tribunal would consist entirely of persons external to the Fund who possessed certain legal qualifications. Hence, as the Fund would have the right to appeal adverse decisions, it could ensure that an interpretation of a staff rule that the Fund considered wrong or inappropriate could not be definitively established without review by a panel of outside legal experts. Although it is not expected that the Fund would exercise this right of appeal in all cases adverse to it, the ability to have such questions reviewed by the tribunal on appeal would be an important safeguard.

(d) The administrative tribunal would exercise "original jurisdiction" with respect to regulatory decisions. That is, cases directly challenging the legality of a regulatory decision would not go to the Grievance Committee but would be brought directly to the tribunal. In addition, in cases brought before the Grievance Committee where the grievant, in challenging the legality of the individual decision at issue, has asserted that the regulatory decision on which it was based is illegal, the Grievance Committee would refer the issue to the tribunal. The tribunal's ruling on the legality of the regulatory decision would be binding on the Committee. Thus, the Grievance Committee would not, under

any circumstance, decide the legality of a regulatory decision.

Under the fourth model, the Grievance Committee would be incorporated into the administrative tribunal; this is the approach proposed in the draft statute and commentary in EBAP/88/151. Under this model, the administrative tribunal would consist of two panels. A first panel, identical in composition to the present Grievance Committee, would hear cases challenging individual decisions. This first panel would differ from the Grievance Committee as presently established in several respects.

(a) The first panel's competence would be broader than the present Grievance Committee's, in that it would be authorized to hear challenges to all types of individual decisions arising out of the employment relationship with the Fund.

(b) Decisions of the panel would be final and binding (i.e. not appealable), as is the case with administrative tribunals of other international organizations.

(c) In cases involving fundamental issues for the staff member's career (such as termination cases) or significant legal questions, the first panel could be expanded to include the two associate members of the second panel, thus creating a five-member panel in these cases. The decision to expand could be taken either at the initiative of a majority of the first panel itself, as suggested in EBAP/88/151, or, alternatively, by the Chairman. Thus, the panel would be expanded in cases where additional legal expertise was considered necessary for the resolution of the case.

A variation of this model might be contemplated, in which the Grievance Committee would be given judicial authority as an entity separate from the tribunal; the tribunal would be composed entirely of persons external to the Fund. Because of the separation of the Committee and the tribunal, the two forums would not be served by a common Chairman or President. In cases raising fundamental questions for the staff member's career or important legal issues, the Committee, instead of expanding to include the associate members of the tribunal, would refer the case in its entirety to the tribunal for resolution and have no further involvement in the matter.

In the staff's view, this variation would be undesirable for several reasons. First, it would not be prudent to give a judicial body (whether designated as the Grievance Committee or the first panel of the tribunal) the option to decline to hear a case that falls within its competence. In particular, this poses the risk that cases would be turned over to the tribunal for reasons unrelated to the

statutory criteria, such as in cases involving controversial or accusatory situations.

Moreover, the complete separation of the Grievance Committee and the administrative tribunal would eliminate certain advantages of the approach in which the two panels of the tribunal would share a common President and would be merged in appropriate cases. First, the existence of a common President would link the two panels; this would contribute to the orderly resolution of cases involving both panels (e.g., where the legality of a regulatory issue is raised as an issue in a case challenging an individual decision). Second, the possibility of expansion of the first panel to include the associate members of the second panel would be beneficial to all of the members of the tribunal. The first panel would gain additional legal expertise in such cases, and the members of the second panel would gain insight into the Fund as an institution from the staff members on the first panel.

C. Assessment of the Four Models

Prior to the presentation of the draft statute and commentary in EBAP/88/151 to the Executive Board, the staff gave extensive consideration to each of the four models and concluded that the fourth model would be the most appropriate for the Fund. Several considerations support this conclusion.

The fourth model draws on the features that have contributed to the orderly administration of grievances in the Fund--namely, the ready availability of locally-based members, including the Chairman; the familiarity of the staff appointees with the Fund; the experience of the Chairman in conducting hearings and resolving legal issues; and the relative informality and expediency of the proceedings.

In addition, the fourth model is the only model presented which would provide for a single level of review at which hearings would be conducted and issues resolved with finality. Under the other three models, complainants challenging individual decisions would have a right of access to three distinct levels of review: internal administrative review; review by an independent administrative or lower-level judicial body; and review by an administrative tribunal. These other models could, therefore, be excessively complex, duplicative and expensive in comparison to the fourth model.

Under the fourth model, cases challenging individual decisions would generally be heard by the first panel. This would tend to reduce the cost of the tribunal, since the only major direct expense associated with the first panel would be the remuneration paid to the President. In this regard, the experience of the WBAT and other tribunals indicates that a relatively small number of cases involve the legality of regulatory decisions; most cases have concerned the legality of the application or interpretation of a rule in an

individual case. If the Fund tribunal had a similar experience, it would not be necessary to convene the second panel frequently, and most cases could be handled by the first panel. This would tend to reduce not only the cost but also the delays in adjudicating disputes, as the President and the two staff appointees could be convened more readily than a tribunal composed entirely of persons external to the Fund and not residing in the Washington, D.C. area. The difficulty of finding a mutually convenient date would be intensified if the tribunal consisted of a larger number of members, as is the case with the WBAT, which has seven members.

The first model would be the next most advantageous approach, in that the Grievance Committee would continue to function under this approach largely as it does at present. Although there would be the cumulative cost attributable to both the Grievance Committee Chairman and the tribunal in cases considered by both bodies, this would be offset by the advantages of retaining an outside Chairman for the Grievance Committee. First, his legal expertise assists the Committee in making well-reasoned recommendations to the Managing Director; this would tend to reduce the number of appeals to the tribunal, or at least narrow the scope of argument in the event of an appeal. Second, the Grievance Committee's receipt of evidence and testimony under the guidance of the Chairman would provide a factual record on which the tribunal could rely, in whole or in part, instead of conducting extensive hearings on its own.

The second model, in which the outside Chairman would be replaced by a staff member and a separate administrative tribunal would be created, is not favored. Although this model would mirror the structures found in other organizations, it would eliminate the positive experience of the Grievance Committee that is attributable to the outside Chairman and the considerable expertise which he contributes. Moreover, the appointment of a staff member as Chairman of the Committee would require a substantial commitment of time on the part of that individual, who could not reasonably be expected to maintain his present workload in addition to his duties as Chairman.

Finally, the third model is perhaps the most difficult to structure. No other international organization allows its staff to have recourse to two levels of judicial review, and there is no experience on which to draw in structuring an appellate role for an administrative tribunal in individual cases. Thus, it is difficult to predict how, in practice, the decisions of the Grievance Committee, as a court of first instance, would be reviewed by the tribunal on appeal. Moreover, under this structure, the resolution of a case would probably require more time than under the fourth model, in which all issues would be resolved with finality at one stage.

III. Comparison of Affiliation with the WBAT and Establishment of a Fund Tribunal

The decision to establish an administrative tribunal could be accomplished either through affiliation with the WBAT or the creation of a new tribunal to serve the Fund exclusively. 1/ At EBM/88/106, a further assessment and comparison of these alternatives was requested, including an examination of the consequences if the organizations were to be served by separate tribunals. The following section makes several points in this regard.

A. Costs and Delays to be Incurred

In the view of the staff, affiliation with the WBAT (assuming that it would continue to be governed by its present statute) would be potentially more costly and less efficient than the operation of a separate tribunal. This view is based on several factors.

First, the estimated cost of operations for the WBAT in FY 1989 was about $1.1 million, inclusive of staff costs. 2/ This level of cost is attributable in part to the size of the WBAT (seven members) and the fact that the WBAT has not, to date, invoked its authority to decide cases by a panel of three members. In practice, all seven WBAT members, who reside in different countries, convene twice a year--once in London and once in Washington. This practice results in substantial cost to the Bank in terms of the travel expenses and fees paid to the members, who are compensated on a per diem basis.

Second, because the WBAT's members cannot be readily convened on short notice, the resolution of a case must await the semi-annual meeting of the tribunal. In the meantime, and notwithstanding the uncertainty of the outcome, the organization might have to decide in some cases how to apply, and whether to suspend the application of, a regulatory decision pending the tribunal's review of its legality, with the risk that any action taken in the interim might have to be undone.

Finally, if the Fund decided to affiliate with the WBAT, it is not clear what type of cost-sharing arrangement would be implemented. *Since the WBAT Statute provides only that such agreements shall*

1/ If the Fund affiliated with the WBAT, the Grievance Committee would not be transformed into a judicial forum, as under the third and fourth models.

2/ The WBAT is currently served by a Registry consisting of three professional staff who are lawyers and two support staff. The Fund would presumably have to share in the cost of the remuneration (salary and benefits) of these four individuals, which would be incurred regardless of the volume of cases heard by the WBAT.

include provisions concerning the "sharing of the expenses of the Tribunal," the specific aspects of the arrangement would have to be negotiated between the institutions. One cost-sharing arrangement would be to divide costs on an equal basis, as is done with respect to the joint compensation surveys and certain costs of the Bank/Fund Conferences Office at the Annual Meeting. Assuming that affiliation by the Fund would increase the cost of the WBAT by approximately one-fourth to $1,250,000 and that the overall level of usage remained constant, this formula would impose an annual cost of roughly $625,000 on the Fund, exclusive of the shared cost of the Registry. Another arrangement would be to allocate costs solely on the basis of relative number of staff; the Fund would bear approximately one-fifth of the annual cost, or $250,000. Neither of these formulae, however, takes into account the amount of time spent by the tribunal members on each case. For example, the cost-sharing arrangements for the Joint Library and the Medical Department are based on actual staff usage. This approach would be difficult to apply in the context of a shared tribunal, which would normally be convened to adjudicate cases brought by staff members of both organizations; an allocation of costs based on usage would require that the tribunal's members kept account of their time spent on a case-by-case basis. Finally, costs could be allocated on the basis of the number of cases brought by staff of the respective institutions; this formula would not, however, take into account the complexity or length of time involved in the cases.

If the Fund had its own tribunal, the cost could be reduced, for instance, through the appointment of a lesser number of members, the confinement of tribunal sessions to Washington, D.C., and the simplification of its procedural arrangements. These features are incorporated in Articles VII, XI and XII of the draft statute.

B. Application of the WBAT Statute

If the Fund affiliated with the WBAT, it would be assumed that the provisions of the WBAT Statute and the system of review that it envisages would be accepted as the basis for review of employment-related decisions taken by the Fund. This assumption is based on the fact that a principal objective of affiliation would be to achieve the same jurisprudence between the organizations; a decision by the Fund to adopt a different system of review in which the WBAT was simply designated as the judicial forum to which Fund staff had recourse would not facilitate this objective. The Fund would have no authority to amend the WBAT Statute, which may be amended or supplemented only by a decision of the Board of Governors of the Bank. 1/

The WBAT Statute, like the Statute of the United Nations Administrative Tribunal from which it was derived (which dates back to 1949), contains a number of provisions that, in retrospect, are

1/ See Article XVI of the WBAT Statute.

ambiguous or silent with respect to a number of key issues. As a result of this lack of guidance and predictability, the tribunals have had to resort to broad-ranging interpretation of their statutory authority (and limits thereon), as well as reliance on general principles of law that are not enunciated in the statutes themselves. Several examples illustrate this observation.

1. With respect to competence, Article II of the WBAT Statute provides that the tribunal is competent to hear applications alleging "non-observance of the contract of employment or terms of appointment . . . includ[ing] all pertinent regulations and rules in force at the time of the alleged non-observance . . . " It is not clear from this language whether the WBAT may pass judgment on the legality of the rules themselves that have been prescribed by the Executive Board or management of the Bank in the administration of the Bank staff. Moreover, the reference to "regulations and rules in force at the time of the alleged non-observance" would seem to imply that there are no legal constraints on the right of the Bank to change the terms and conditions of employment, although the tribunal has squarely rejected this proposition in its first decision (de Merode), where it held that the Bank may not unilaterally alter the "fundamental" conditions of Bank employment, and that the power to amend non-fundamental terms was "subject to certain limitations" and could not be exercised in an arbitrary or otherwise improper manner. 1/

The draft statute attempts to alleviate these ambiguities in its Article II. There, it is prescribed that the Fund tribunal shall be competent to pass judgment on the legality of any "administrative act," which is in turn defined to mean any individual or regulatory decision taken in the administration of the staff. The concepts of individual and regulatory decision are critical to the system of review contemplated in the draft statute, including the question of which panel will decide the case and the remedies that may be ordered upon a finding of illegality.

2. With respect to access to the tribunal, the WBAT Statute defines "member of the staff" to include "any current or former member of the staff of the Bank Group"; this definition does not make clear whether it is intended to include all persons who have an employment relationship with the Bank, including contractual employees, technical assistance experts, and assistants and advisors to Executive Directors.

By comparison, such categories of persons are expressly included in the definition of "member of the staff" found in Article II(2)(c) of the draft statute. In addition, the draft statute makes clear that enrollees or beneficiaries in the Fund's benefit plans may challenge decisions arising under those respective plans; the WBAT Statute, in

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1/ de Merode, WBAT Reports, Dec. No. 1, paras. 44-48 (1981).

contrast, does not indicate whether persons other than staff members, personal representatives of deceased staff members or beneficiaries under the Bank's staff retirement plan would have access to the WBAT and, if so, what types of decisions they may challenge.

3. With respect to remedies, the WBAT Statute is deficient in several respects. First, it does not require the tribunal to prescribe the measures, both retroactive and prospective, that the Bank must implement if the tribunal orders the rescission of an illegal decision. Second, just as the Statute does not expressly contemplate the review of regulatory decisions as such, it fails to prescribe the consequences of a finding by the WBAT that a regulatory decision is illegal. These deficiencies can create considerable uncertainty for the parties.

This point is illustrated by a recent WBAT decision concerning salary administration for staff downgraded in the Bank's job grading exercise. In Pinto, 1/ the WBAT found that the Bank had "a consistent practice" of periodic adjustment of salaries "reflecting changes in the cost of living and other factors." The tribunal concluded that the Bank's decision to deny any general salary adjustments to downgraded staff so long as their salary levels exceeded the maximum of their new grades was impermissible.

The Pinto case was brought by a downgraded staff member seeking to reverse the individual grading decision taken in her case. The tribunal concluded that the downgrading of her position was not improper, but it rescinded the individual grading decision "so far as it does not provide for the payment to the Applicant, as from [the end of the grandfathering period] of the periodic salary increases approved by the [Bank]" for staff members in the applicant's grade before she was downgraded. The decision does not indicate, however, whether the applicant will be entitled in the future to the identical periodic salary increase as was approved for staff in her previous grade for as long as she remains in the downgraded position, or whether any differentiation in salary administration between the applicant and others in her previous grade would violate her "right to benefit from periodic adjustments reflecting changes in the cost of living and other factors." Thus, the Bank, in deciding on future periodic salary increases, must attempt to implement the decision as it stands and be subject to further challenge as to the legality of the course of action it chooses, or return to the tribunal and request a clarification of the original judgment. Moreover, insofar as the judgment rescinds only an individual decision taken by the Bank, it is not clear whether the ruling has any legal effect on other downgraded individuals.

1/ WBAT Reports, Dec. No. 56 (1988).

This ambiguity could be avoided by providing, as is done in Article XV(1) of the draft statute, that the tribunal in individual cases shall prescribe all of the measures required to correct the effects of a rescinded decision. With respect to regulatory decisions found to be illegal, Article XV(3) provides that if certain conditions were met, the tribunal would be authorized to annul such decisions, with prescribed consequences with respect to individual decisions already taken on the basis of that regulatory decision. An invalid decision could not be enforced or applied in the future.

4. The WBAT Statute is silent as to whether, and under what circumstances, the WBAT may award costs to either party regarding their expenses in bringing or defending actions before the tribunal. As a result, an applicant who is considering retaining a lawyer to represent him before the tribunal has no firm basis for weighing the financial risks posed by outside representation. The WBAT has no express authority to award attorneys fees, and it has not adopted a formal statement of policy regarding such matters. If the WBAT were to award costs, its decision would not be fettered by any statutory criteria. This absence of statutory guidance and predictability also exists with respect to the authority of the tribunal to award costs to the Bank against an applicant whose case is manifestly without merit.

In comparison, Article XV(4) of the draft statute provides that the costs incurred by a successful applicant may, in the tribunal's discretion, be assessed against the Fund, in whole or in part. Conversely, under Article XVI of the draft statute, costs may be awarded against an applicant whose case is manifestly without foundation.

5. The WBAT Statute is also silent with respect to whether, and through what procedures, the appointment of a member of the WBAT may be compulsorily terminated. Nor does it require a member to recuse himself if he has a conflict of interest in a specific case. In the absence of such provisions, it is not clear whether there would be a legal basis for removing a member from the WBAT, even in cases of extreme dereliction of duty, or whether an applicant (or the Bank) could challenge the impartiality of a tribunal member in a particular case.

These points are all addressed in Article VII of the draft statute, which sets forth the rules on the appointment, recusal and removal of the tribunal's members.

C. Selection and Appointment of WBAT Members

One principal difference between affiliating with the WBAT and establishing a separate tribunal for the Fund would concern the right of the Fund to select and appoint the members of the tribunal. If the Fund affiliated with the WBAT, it would not, without an amendment of the WBAT's statute, have a prescribed role in the selection of the WBAT's members. If the Fund established its own tribunal, the authority to select the members of the Fund's tribunal would, of course, rest solely with the organization.

D. Jurisprudential Implications

During the discussion at EBM/88/106 (7/15/88), certain questions were raised regarding the consequences if the Fund were to establish its own tribunal instead of affiliating with the WBAT and one of the tribunals rendered a judgment regarding a decision or rule that was common to both organizations. In particular, the question was raised whether that judgment would be binding on the other organization or its tribunal. The further question was raised whether the existence of a common tribunal would ensure uniformity of results regarding the legality of the organizations' rules and practices. In this regard, several observations may be made in comparing the alternatives of affiliation and separate tribunals for the Fund and the Bank.

First, if the Fund had its own tribunal, the tribunal would be fully independent of the WBAT; each tribunal would be charged with adjudicating disputes brought by staff members of the respective organizations. Neither tribunal would be bound by the prior decisions of the other, and decisions of the WBAT would not give rise to any legal obligations on the part of the Fund vis-à-vis its own staff. Each tribunal could, however, draw upon the case law of the other in developing its jurisprudence. As the WBAT noted in the de Merode case, because there are differences between international organizations, tribunals have worked out a somewhat divergent jurisprudence adapted to each organization. Generally, therefore, tribunals have exercised caution in citing judgments of other tribunals as precedents. At the same time, as the WBAT also noted in de Merode, since organizations often apply common solutions to certain issues and the tribunals turn to general principles of international civil service law, there appears to be a tendency towards a certain convergence in the case law of the major tribunals. 1/

As an example, the ruling of the WBAT in the Pinto case, like other judgments of international administrative tribunals, has no direct legal effect on the Fund and the legal relationship between the Fund and the staff. The WBAT's decisions are legally binding only on

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1/ See generally Amerasinghe, C.F., The Law of the International Civil Service, Vol. I, at 195 (1988).

the organization whose decision is at issue and would not require, as a matter of law, that the Fund adhere to its conclusions. However, given the basically harmonious and consistent jurisprudence of the major administrative tribunals, it is unlikely that decisions of the Fund tribunal, if called upon to pass judgment on the Fund counterpart of the staff regulation reviewed by the WBAT, would yield a different or irreconcilable result. In the unlikely event of irreconcilable decisions by the two tribunals, each organization would be legally required to comply with the ruling of its own tribunal. If, for example, the WBAT invalidated a regulation identical to one that the Fund tribunal had upheld, the Fund could decide, on policy grounds, whether to leave the regulation unchanged or to modify it in light of the WBAT judgment for the sake of conformity with the Bank in this regard.

If, on the other hand, the organizations were served by the same tribunal, the extent to which a judgment involving the Bank affected the Fund (or vice versa) would be less clear; there is a risk that the tribunal would attempt to produce decisions that apply equally to both institutions, notwithstanding the deliberate discrepancies between them in certain employment-related matters. In the context of the Pinto case, for example, had the Fund been subject to the WBAT's jurisdiction at the time the judgment was rendered, it would have been necessary for the Fund to assess whether, and to what extent, the Pinto decision applied to the Fund or was legally distinguishable, whether the differences between the decisions and practices of the Bank and the Fund regarding the salary administration of downgraded staff would support a different legal conclusion with respect to the Fund. The course of action (or inaction) taken in light of the WBAT's decision would itself be subject to challenge before the tribunal. If such a case were brought, the WBAT would in all likelihood adhere to the legal principles it had enunciated in Pinto as the established case law on the issues presented, and the Fund would be constrained, if not precluded, from reopening the questions of law settled in the earlier decision. Thus, the existence of a joint tribunal could, in a practical sense, subject the Fund to case law involving the Bank that the Fund had little or no role in developing.

E. Assessment

If the Fund decided to establish an administrative tribunal consisting entirely of persons external to the Fund, it could either affiliate with the WBAT or establish its own tribunal. On the one hand, affiliation could have some advantages, in that it would eliminate the risk of having irreconcilable decisions applicable to the two organizations. Moreover, it may be more convenient in the short term to join an entity that is already in existence and has an established mode of operation.

On balance, however, it is the staff's view that the Fund would be much better served by establishment of its own tribunal. This would enable the Fund to draw on the substantial experience of other tribunals, as well as the experience of the Grievance Committee, in creating a system for the review of employment-related decisions that is appropriate to the needs of the organization and its staff. The Fund would have more control over such fundamental aspects of the system as the drafting and amendment of the tribunal's statute, the appointment of the tribunal's members, and the type of administrative review preceding the tribunal's consideration. Finally, a separate Fund tribunal, if appropriately structured, would be less costly than affiliation with the WBAT, and would be able to resolve cases in a more expeditious manner.

IV. Conclusion

The Fund has been unique among international organizations in establishing a Grievance Committee as an advisory body chaired by an outside legal expert. The Chairman's experience in conducting arbitration proceedings thus contributes to the Committee's performance of the types of functions that tribunals and courts undertake, such as the development of a record and the reasoned consideration of legal issues.

The structure of review of employment-related decisions taken by the Fund should draw upon this positive experience by retaining the Grievance Committee in its present form or, alternatively, with some adaptation in which it would be given the authority to render binding decisions. This could be accomplished by making the Committee an integral part of an administrative tribunal.

The fourth model discussed above (Part II(B)) would achieve this result by incorporating the Grievance Committee into an administrative tribunal and giving it the authority, as the first panel of the tribunal, to decide cases challenging individual employment-related decisions. This model would tend to reduce the complexity, cost and time of the review process generally by consolidating the consideration of cases into one stage of review. In the staff's view, this model presents the most effective and efficient system of review, involving no duplication of effort beyond the stage of administrative review.

If the Executive Board favors an approach in which the Grievance Committee would remain as an advisory body and a separate administrative tribunal would be established, the Fund would be better served by establishing its own tribunal than by affiliating with the WBAT. This would allow the Fund to formulate a statute taking into account the experience of other tribunals over the years. If this approach is pursued, it would be advisable, in the view of the staff, to retain an outside Chairman for the Grievance Committee. Although

there would be costs attributable to the outside Chairman that other organizations do not incur with respect to their internal advisory committees, experience has shown the importance of the contribution of the outside Chairman to the orderly and reasoned consideration of cases; moreover, the retention of an outside Chairman could be more cost-effective in the long run, in that the Grievance Committee would be able to develop a record and clarify the issues at stake in a case prior to judicial review by the administrative tribunal. The first model discussed above would achieve this result.

Given the advantages of the fourth model, the staff proposes that the Executive Board endorse this approach.

ATTACHMENT

COMPARISON OF MODELS

	First Model	Second Model	Third Model	Fourth Model
Structure of System	Grievance Committee as advisory body; Administrative tribunal as judicial body	Same as first model	Grievance Committee as judicial body; Administrative tribunal as judicial body	Administrative tribunal consisting of first and second panels
Competence of Grievance Committee 1/	Competent to review the legality of any individual decision taken by the Fund in the administration of the staff and advise Managing Director	Same as first model	Competent to pass judgment on the legality of any individual decision taken by the Fund in the administration of the staff	N/A. First panel to pass judgment on applications challenging individual decisions. Second panel to pass judgment on applications challenging regulatory decisions.
Competence of Administrative Tribunal	Competent to pass judgment on the legality of any individual or regulatory decision taken by the Fund in the administration of the staff, the latter defined as any rule concerning the terms and conditions of employment, including the GAO's and the SRP	Same as first model	Competent to review decisions of the Grievance Committee on specified grounds and to pass judgment on the legality of any regulatory decision	Same as first model
Composition	Grievance Committee: two staff members and one Chairman external to the Fund Administrative tribunal: three members, all of whom are external to the Fund and (1) possess certain legal qualifications, and (2) are of different nationalities	Grievance Committee: three staff members Administrative tribunal: same as first model	Same as first model	First panel: two staff members and one President external to the Fund. Second panel: Same President as first panel and two members external to the Fund who (1) possess certain legal qualifications and (2) are of different nationalities.

1/ At present, the Grievance Committee has "[j]urisdiction 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." The Committee is not, however, competent to hear cases arising under the Staff Retirement Plan or concerning the grading of positions, non-renewal or termination of fixed-term or temporary appointments, or the appointment of a staff member in probationary staff to the regular staff. GAO No. 31 would have to be amended to accommodate any of the models described above in this and other respects.