EBAP/86/326

December 30, 1986

To: Members of the Executive Board

From: The Secretary

Subject: Staff Association Committee - Access to an Administrative Tribunal

There is attached a paper prepared by the Staff Association Committee concerning the access to an administrative tribunal.

The Staff Association Committee has requested that this material be circulated for the information of the Executive Directors prior to the Executive Board meeting scheduled for Friday, January 9, 1987.

Att: (1)

Other Distribution:
Department Heads

International Monetary Fund
Staff Association

Access to an Administrative Tribunal

Prepared by the Staff Association Committee

December 30, 1986

The Staff Association Committee (SAC) welcomes the Managing Director's initiative to reopen consideration of an administrative tribunal. Since 1969, the Staff Association has sought to have an administrative tribunal available to the staff in order to establish the rule of law in the Fund. The proven usefulness to staff and the Fund, in general, of the Ombudsman, the Grievance Committee, and the Job Evaluation Appeals mechanisms have all shown that the Fund and its staff have much to gain and nothing to fear from effective and just grievance procedures. Indeed, an appellate administrative tribunal may be regarded as a means towards making these other worthwhile grievance mechanisms fully effective.

Although the SAC was not consulted in its preparation, we find that EBAP/86/309 (12/10/86), Staff Paper on Administrative Tribunals of International Organizations, provides a reasonably objective basis for subsequent discussions on the topic. We hope and trust that the SAC will be involved much more closely in subsequent work on an administrative tribunal to assure staff members that their interests are fairly represented in the outcome, and to allow them to perceive, as well as experience, greater justice.

Our remaining comments are organized according to the three questions mentioned by the Managing Director in his covering memorandum.

I. The Need for an Administrative Tribunal

The Staff Association Committee considers that an early decision to provide the staff access to an administrative tribunal is essential to protect the legitimate interests and expectations of the staff, and hence improve the ability of the Fund to recruit and retain the highly qualified staff that the mandate of the Articles demands. Basically, prospective and existing staff members would be more confident in Fund employment if they knew that their career rights were adequately protected.

The Fund is virtually alone among major international organizations in affording its staff no access to an administrative tribunal for the

final redress of grievances and disputes that might arise between an individual or group of individuals and the organization. 1/ This unavailability of means for resolving grievances is, at least, theoretically, compounded by the jurisdictional asymmetry whereby the Fund enjoys immunity from any legal action by a staff member, and at the same time the Fund may initiate judicial action in national courts against staff members.

The two grievance mechanisms that have been introduced in recent years--the office of the Ombudsman and the Grievance Committee--have made a significant contribution toward redressing inequities as they affect individual staff members, but both are constitutionally limited in their scope. The role of the Ombudsman is that of an independent mediator who uses his good offices to effect a reconciliation between the parties to a dispute; he lacks formal judicial authority and relies on his own individual persuasion and the prestige of his office. The Grievance Committee gains in impartiality and stature through its more formal structure and the fact that it has a clearly independent outside chairman. However, its authority is limited by the fact that it only has jurisdiction over "any question brought by a staff member concerning the interpretation and application of the rules of the International Monetary Fund in his individual case," (GAO No. 31, Section 4.01). Specifically, the Committee is not "competent to challenge any decision of the Executive Board or staff regulations as approved by the Managing Director" (GAO No. 31, Section 4.04). Moreover, it does not have competence to consider cases arising out of decisions concerning (1) the present or future structure of the Staff Retirement Plan, or management-mandated changes in this structure, (2) the termination or extension of a temporary or fixed-term appointment, or (3) the appointment to the regular staff of a person serving an initial probationary period.

An additional limitation that distinguishes the competence of the Grievance Committee from that of a formal administrative tribunal is that its findings take the form of recommendations to the Managing Director. The fact that the Managing Director has yet to reverse a recommendation of the Grievance Committee does not mean that he lacks the authority to do so at any time and for any reason if he chooses. This discretion raises the possibility of a conflict of interest for the Managing Director between the quasi-judicial function he performs in deciding on these recommendations and his managerial function in making personnel decisions that could be called into question on review. This potential conflict of interest might be a source of difficulty when the Grievance Committee examines certain management decisions. For these reasons, the Grievance

---

1/ In the past, questions were raised whether this situation violated Section 31(a) of the UN Convention on the Privileges and Immunities of the Specialized Agencies (Selected Decisions, (Twelfth Issue), page 458), which calls for appropriate third-party settlement of private contract disputes.

Committee lacks the status that would be accorded to a fully independent judicial Tribunal.

As the Legal Department has stated in EBAP/86/309, an administrative tribunal differs in two significant respects from an internal grievance committee. First, it manifests greater formality and emphasis on legal issues and procedures. Second, its decisions are regarded as final and binding on the organs of the institution. A third consideration mentioned in the paper, that of cost, is one that must be taken into account, but, under the circumstances, should not be allowed to outweigh the staff's and the Fund's need for justice to be done and to be seen to be done. 1/

Prompt access to an administrative tribunal has become even more urgent recently owing to certain recent developments that have directly affected the staff and vividly brought home to staff members their complete lack of enforceable contractual rights. The recent job grading exercise and some of the compensation decisions, with their widespread effects on the morale, sense of commitment, and future career prospects of large groups of the staff, have demonstrated that the staff can no longer continue, as in the past, to count on the institution's benevolence. These events heightened the sense of a need for an impartial judicial review of decisions that affect directly the life and welfare of the staff. The effect of an administrative tribunal on staff recruitment, morale, and retention is bound to be salutary.

In spite of the absence of any formal means of enforcing staff contractual rights, the Fund has a compelling duty to treat its employees according to elementary principles of justice, and the staff must perform in conformity with the standards set by the Fund as the employer. Justice and equity demand that both Fund and staff have the means of ensuring fair and proper treatment by the other party. Creating an independent administrative tribunal will ensure that staff complaints are heard promptly and in an impartial setting.

It should also be emphasized that the existence of an administrative tribunal in the Fund would have the effect of improving day-to-day decision making and the observance of rules and regulations governing staff conduct. This would be very much in the interest of both the staff and the institution as a whole, by providing managers and subordinates alike with a continuing assurance that means are available to correct abuses of power that might occur. We note that this point is reinforced by the 1980 memorandum of

---

1/ Administrative costs have not been a major constraint for existing Tribunals. The UN Administrative Tribunal cost $141,000 and the ILO Administrative Tribunal cost $230,000 in 1981, and the World Bank Administrative Tribunal is reported to cost about $250,000 per year. The prorated cost for an organization using one of these Tribunals would be much less.

President McNamara proposing the establishment of an administrative tribunal in the World Bank (Attachment II to EBAP/86/309). He noted that in an organization of the size of the Bank, it is not unusual that a staff member might feel a decision violates his or her rights, or for those who take administrative decisions to encroach on the rights of a staff member, either by inadvertence or by error of judgment. This can happen in the best of organizations, and management should not feel embarrassed in acknowledging the possibility of such errors. Rather, it should have the confidence to assure staff members that there is a mechanism in place to hear claims concerning possible inequities in the application of administrative decisions or the interpretation of the rules and regulations pertaining to the staff. An ordinarily competent manager has nothing to fear and much to gain from effective third-party grievance procedures. In sum, the Board of Governors should act expeditiously to give the Fund's staff access to an administrative tribunal.

II. Jurisdiction of Tribunal

The SAC believes that the Tribunal's jurisdiction should be as wide as possible, that there should be no exceptions to justice and the rule of law in the Fund.

More specifically, we believe that the scope of jurisdiction of an administrative tribunal should extend to:

(1) any nonobservance of the rules applicable to the staff;

(2) any decisions or acts relating to specific staff members which, though technically consistent with the applicable law, are demonstrated to be improperly motivated (e.g., discrimination inconsistent with Rule N-2, personal gain, or sexual harassment);

(3) similar decisions or acts relating to former [or prospective] staff members, potential recipients of Fund personnel benefits, and individuals providing services to the Fund under direct contractual relationships;

(4) the effective implementation of the Fund's grievance procedures, including measures to ensure adequate representation of grievants, and jurisdiction to interpret its own jurisdiction;

(5) any of the above areas of jurisdiction not settled to the mutual satisfaction of all parties within the Grievance Committee or other grievance mechanisms; and

(6) class actions and advisory opinions.

Each of these six dimensions of jurisdiction deserves discussion.

1. Nonobservance of law

Staff members are confronted with a very complex, often unavailable, and sometimes contradictory set of N-Rules, Executive Board decisions, General Administrative Orders, Staff Bulletins, Administrative Circulars, and written and oral instructions to the staff in general or individual staff members in particular. Thus, alleged nonobservances of the law relating to staff members are bound to arise and need to be settled by an impartial third party such as an administrative tribunal. This is the type of jurisdiction that constitutes the bulk of the work of the existing administrative tribunals.

2. Improper Motives

This field of jurisdiction, generally referred to as abus de droit or detournement de pouvoir, is an implicit part of the jurisdiction of all existing administrative tribunals, and has been important in practice as a restraint against administrative corruption. A sale of promotion or a demotion for refusal of sexual favors are possible examples of such abuses. The complaining party has a heavy burden of proof, so that proper or even questionable use of discretionary authority cannot be hampered, but the exercise of this jurisdiction, when appropriate, is vital to the integrity of the organization and its staff. The ILO and UN Tribunals exercise this type of jurisdiction often, but the World Bank Administrative Tribunal has shown a reluctance to do so to date.

3. Non-staff Members

The need for an administrative tribunal or other satisfactory means of third-party settlement of disputes extends to all of the Fund's administrative activities, and not only those relating to current staff members. The Fund's immunity precludes normal third-party justice for anyone in a contractual relation to the Fund. The Fund's administrative contracts with corporations conventionally have arbitration clauses to perform this function, but direct administrative contract relationships with individuals do not include such clauses and need to have some similar means of resolution. This applies particularly to the large and increasing number of so-called "contract employees" performing work similar to the staff. A number of violations of rules or contractual provisions and improperly motivated decisions have been brought to our attention, and these need to be deterred. Although only the ILO Tribunal has this kind of jurisdiction, we believe that the Fund needs to provide for binding and impartial third party resolution of disputes under these contracts. In addition, the SAC should be entitled to intervene to represent the interests of the staff as a whole in cases involving decisions with general implications.

4. Procedure-Related Grievances

Each administrative tribunal needs and has affirmative authority to ensure the effectiveness of its processes. This authority should

extend to interpreting the extent of the Tribunal's jurisdiction, protecting those who are involved with it against reprisals because of that involvement, ensuring that its procedures are used to promote rather than retard justice, providing adequate remedies, ensuring the availability and protection of evidence relevant to the issues in dispute, and eliminating cost as a barrier to recourse to the Tribunal. With respect to the last, it is particularly important to relatively low-paid staff that there be some mechanism to ensure their effective representation before the Tribunal. In this connection, it may be noted that since the Fund's Administration Department gets expert legal advice from the Fund's Legal Department, whose lawyers may not represent complainants, the Tribunal should be empowered to award legal fees or other costs in order to "level the playing field". With respect to the adequacy of remedies generally, the SAC believes that justice and the interests of the institution require reinstatement or promotion when appropriate, or at least full and unlimited monetary compensation for the lost value of these actions when they cannot be accomplished.

5. Where Other Remedies Are Effectively Unavailable

The SAC agrees generally with the principles of exhaustion of administrative remedies and Grievance Committee procedures, as well as a limit on the time for initiating a claim, for most cases that would come before an administrative tribunal; however, we believe that the Tribunal should be empowered to waive either of those principles when the interests of justice would require it. For instance, a disciplinary action should not have to proceed through the Grievance Committee before going to the Tribunal, when the staff member could suffer irreparable harm in the interim. Similarly, appeal of a denial of staff benefits for improper reasons evidenced by documents that were not available for several years should not be barred by the statute of limitations.

6. Decisions with General Effects

Two specific types of jurisdiction which have been mentioned in previous discussions might be considered for an administrative tribunal: class actions and advisory opinions. Jurisdiction for class actions, although not contemplated for existing Tribunals, would simplify filing, representation, and implementation procedures for large groups of staff members affected by a single decision or regulation. Although the De Merode case in the World Bank's Tribunal showed that it is possible for the interests of a large group to be adequately represented in a consolidated case in an administrative tribunal, the weakness of this procedure is that any judgment for the complaining parties in such a case must be limited in its direct legal effect to them alone, leaving the illegal decision giving rise to the case untouched in relation to any others similarly situated.

Jurisdiction for advisory opinions, which has been exercised formally in the European Court of Justice and informally in the ILO Administrative

Tribunal, can be of equal help to management and staff in resolving "close calls" or complex interpretations presenting strongly conflicting concerns. Both of these types of jurisdiction would give a Tribunal's decision a legally binding effect extending beyond the immediate parties to a case (i.e., a legislative function), which could either be obviated by a management that corrected general deficiencies brought to light in particular cases, or could be warranted by a management that failed to correct such deficiencies.

During the earlier round of discussions on an administrative tribunal, concerns were expressed that an administrative tribunal with wide jurisdiction could interfere with ordinary discretionary decisions, and so hamstring personnel management in the Fund. Experience in the existing Tribunals has shown this concern to be groundless. Administrative tribunals are particularly anxious to exercise judicial restraint in such matters, and will not, without cause, challenge decisions about post assigments, grading, promotion, benefits, aptitude, conduct, etc. 1/

III. Choice of Tribunal

The SAC is not so concerned about the choice of a Tribunal as that there be one and that it be able to make the relations between the Fund and its staff more just. We note that most of the existing Tribunals are effectively unavailable to the Fund because of the limited scope of their membership. These considerations probably would preclude the use of the OAS Tribunal, for instance. The ILO Tribunal and the UN Tribunal work within a somewhat different context of personnel rules, practices, and organizational membership than does the World Bank's Tribunal. Thus the comments that follow will be focussed on the choice between the World Bank Administrative Tribunal (WBAT) and a Fund Administrative Tribunal (IMFAT).

Before examining pros and cons it must be observed, however, that the choice is not "either-or", but along a continuum, because any involvement with the WBAT would have to be negotiated with the World Bank and could range from a simple agreement to use the services of their Executive Secretary, through a substantive modification of the WBAT Statute as it applies to Fund personnel, to a simple accession under Article XV of that Statute. Indeed, the World Bank could decide to use the occasion of the Fund's involvement in the WBAT to make some improvements in the operation of that Tribunal as it applies to the World Bank.

The principal criteria for choosing among institutional alternatives that the SAC would recommend are these:

1/ See cases cited in Plantey, The International Civil Service; Law and Management (1977, Paris; Engl. Trans. 1981, New York), pages 245-256.

a. The Tribunal should have wide jurisdiction, as discussed above;

b. The Tribunal should be accessible to all who cannot get their grievances resolved to their satisfaction under current procedures;

c. The Tribunal should have fair and open structure and procedures, developed and acceded to in close collaboration between employer and employees;

d. The Tribunal should be operational as soon as is consistent with the three criteria listed above.

With these criteria in mind, we have these comments on the two main options. Although its decisions are fair, the WBAT in its present form is not easily seen as meeting the first three of these criteria. It is too timid in relation to settling real questions of substance, and costs and other requirements hamper its availability to a degree that precludes its serving as a satisfactory Tribunal for the Fund staff. An IMFAT could have the same weaknesses and worsen employment relationships rather than improve them. What is needed is effective negotiations within the Fund or with the World Bank, preferably with active SAC involvement, to provide the Fund staff with an administrative tribunal that would be an important element in assuring justice.

In favor of the WBAT, it is solidly established and immediately available, subject to negotiations mentioned above. The Fund might expect a greater willingness of the WBAT to adapt to the Fund's needs than would be the case for other organizations with Tribunals. There is a danger that the WBAT could mistakenly apply World Bank policies to the Fund. The World Bank's Staff Association and interested staff members are not entitled to intervene in cases affecting their interests, and the WBAT ordinarily does not award costs of counsel to complaining parties. The selection of judges, without any consultation with the World Bank Staff Association, may have, on occasion, appeared to give higher priority to factors other than what was needed to effect justice. The Tribunal, which usually meets in London, is unwieldy, unwilling to try questions of fact, and more costly than it needs to be.

While the creation, staffing, and operation of an IMFAT would take considerable time, effort, and money, it would not necessarily involve more of these than negotiations with the World Bank. An IMFAT could be much simpler in structure and smaller in size than a WBAT. The IMFAT's jurisdiction and structure, if they develop as proposed above, would be better for the Fund and its personnel than alternative Tribunals, and would warrant the time and difficulties in creating an IMFAT. The administrative costs could be controlled by the Fund, and in any event would not be very substantial. In its early years an IMFAT would need to have a clear and expansive jurisdictional mandate in order to avoid heavy reliance on existing authorities for its precedents. An IMFAT

would not be unduly influenced by the personnel policies of other organizations, and would be able to avoid conflict with the holdings of other Tribunals by a careful examination of precedents.

IV. Conclusion

In summary, the SAC hopes that the Executive Board will be guided in its deliberations on this topic by the Fund's interest in both the appearance and reality of justice for the staff and the Fund. We are hopeful that those deliberations soon will result in access to an administrative tribunal, preferably created by the Fund.