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Washington, D.C.

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Administrative Tribunal - Correspondence 01

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WORLD BANK GROUP STAFF ASSOCIATION

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7/16/3/9

TO: Mr. Robert S. McNamara, Chairman of the Board November 27, 1979
FROM: Nicolas Gorjestani, Chairman, Staff Association
SUBJECT: Administrative Tribunal

1. The Executive Committee wishes to express its appreciation to you for inviting the Staff Association to meet informally with the Members of the Board to discuss the issues related to the establishment of an Administrative Tribunal.
2. Since our meeting with you on September 19, 1979, we have been working on a variety of approaches to resolve the issues raised by Management's paper to the Executive Directors, dated June 15, 1979, as complemented by the Legal Rights Conference's paper, dated July 6, 1979. Careful scrutiny of the pros and cons of all these issues lead us to believe that, from Staff's point of view, a Tribunal set up along the lines of the Draft Statute attached to this memorandum would be appropriate.
3. As agreed, we are distributing this paper to the Executive Directors as background documentation for discussion on November 29, 1979. We would welcome the opportunity at that time to elaborate on and answer questions the Executive Directors or Management may have as to the underlying bases of the specific differences between the Draft Statute presented by the Legal Department in its November 1, 1979, memorandum and the Draft Statute presented by the Staff Association.
4. The attached Draft Statute encompasses existing provisions in the Statutes of Tribunals of other major international organizations, and has been prepared with the close assistance of counsel specialized in the field of international administrative law. In this connection, we note that, in the past decade, there has been a trend towards further broadening of the scope of Administrative Tribunals' powers; we were, therefore, disturbed to find the Draft Statute prepared by the Legal Department falling considerably short of the general jurisdiction principle consistently applied since the establishment of the first Administrative Tribunal more than fifty years ago.
5. The principal difference between the two Draft Statutes relates to the jurisdiction question. The jurisdiction provisions in the attached Draft Statute (Article II, Sections 1, 4, and 5(b)) are of the broad nature that the Legal Department's memorandum predicted to be favored by the Staff Association. A broad jurisdiction seems to the Staff Association not only as better protecting the interests of Staff, but also as being in the fundamental interests of the Institution, which can no longer afford to be open to the criticism that it denies its Staff the right to due process. Only with a Tribunal of broad jurisdiction will the Bank:

- (i) avoid being seen acting as both judge and jury in disputes of private character, such as employment matters, which are outside the scope of constitutional issues covered by Article IX of the Bank's Articles of Agreement;
- (ii) not be perceived as depriving Staff of legal rights they would have as individuals, were they not staff members; and
- (iii) be in a less tenuous position in claiming that national courts do not have jurisdiction over Bank employment disputes.

6. In addition to the fundamental issue of jurisdiction, we would like to highlight the following major differences between the attached Staff Association Draft Statute (SADS) and the Draft Statute presented by the Legal Department (LDS):

Retroactivity

(SADS Article II, Section 2; LDS Article II, Section 4)

Unless the Tribunal is given retroactive jurisdiction to a specific date, individuals might attempt to seek redress for past claims in national jurisdictions. We, therefore, suggest that the Administrative Tribunal be empowered to review claims occurring during the three years prior to its establishment. This period is consistent with the statute of limitations for civil claims in the District of Columbia [Section XII-301 (Sub-section 7) of the DC Code], the jurisdiction in which Staff would be most likely initially to seek redress.

Advisory Opinions

(SADS Article II, Section 3; LDS - absent)

Advisory opinions before the fact, in important cases, could help avoid litigation after the fact. Advisory opinions have been issued by the ILO Tribunal, in exceptional circumstances.

Remedies

(SADS Article III, Section 1; LDS Article VI, Section 2)

Although the LDS provides for a ceiling of two years net base salary as monetary damages awarded by the Tribunal (unless exceptional cases justify a higher amount), we feel that, since the Tribunal is composed of reasonable judges, guidelines are more appropriate than an arbitrary limit, which according to the LDS may be modified. The arbitrary limit and the possibility of its modification may have a negative affect on Staff's perceptions of the Tribunal, without serving any meaningful purpose. Therefore, the SADS Article does not provide for a ceiling but sets forth safeguards to ensure that the continuing ability of the Bank to operate effectively under changing circumstances shall not be impaired by damages in excessive amounts. In this context, it should be noted that the maximum award granted by the ILO Tribunal, which has neither a ceiling nor guidelines, is five years net salary.

Non-Suspension

(SADS Article III, Section 2; LDS Article V, Section 5)

In view of the precarious situation of G(iv) visa holders being required to leave within 30 days of termination, we have added a safeguarding provision to this clause.

Number and Terms of Judges

(SADS Article IV, Sections 1 and 3; LDS Article III, Sections 1 and 2)

It is contemplated that the Tribunal shall be composed of five judges, serving for terms of six years (instead of seven judges, serving for terms of three years) in order to ensure, through a potentially deeper involvement, their genuine knowledge of the uniqueness of the Bank as an institution, and, thereafter, the continuity necessary to a consistent jurisprudence.

Selection of Judges

(SADS Article IV, Section 5; LDS Article III, Section 2)

A three-tier process is provided for the pre-selection of judges, while final appointment lies at the level of the Board of Directors. This is similar to the system recently set up for the new EEC Tribunal.

Representation

(SADS Article VII, Sections 1, 2 and 3; LDS - absent)

Provisions related to the Tribunal's proceedings have been devised to ensure proper representation of claimant's and other staff interests.

Documentation

(SADS Article VII, Section 4 and Article VIII, Section 3; LDS - absent)

Provisions of this nature should not be relegated to the rules of procedure that the Tribunal shall devise when constituted, since they bear obligations for the Bank itself. In that respect, it should be noted that the rules of procedure of the Tribunal are of extreme importance, since the Tribunal will not, for all practical purposes, be in a position to review any claims before they are established.

Enforcement

(SADS Article X; LDS - absent)

A mechanism has to be set up to ensure prompt enforcement of the decisions of the Tribunal. The approach taken in the SADS sets in statutory terms the use of the highest governing body of the institution to enforce the Tribunal's decisions, a path recently followed at the OAS. Another approach may be to apply the enforcement procedures agreed by the Bank for arbitration awards to the decisions of the Tribunal.

Effective Date and Amendments
(SADS Article XII; LDS Article IX)

The Tribunal is so important for the continued effectiveness of the Bank, which relies upon Staff, and its jurisdiction unfortunately so controversial, that it is a firm Staff Association position that only the highest governing body deciding at qualified majority should be empowered to establish, modify, or repeal its Statute.

7. Finally, we believe that a curtailment of the scope of the Bank Tribunal's powers below the norms established by existing Tribunals would run afoul of the equitable, practical and legal considerations which constitute the very underpinnings on which the Bank was established some 30 years ago and should be operating now.

Attachment

cc: Executive Directors
President's Council

dh

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Documentation
(SADS Article VII, Section 4 and Article VIII, Section 3; LDS - absent)

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WORLD BANK GROUP STAFF ASSOCIATION

November 27, 1979

DRAFT STATUTE OF THE WORLD BANK GROUP
ADMINISTRATIVE TRIBUNAL

ARTICLE I
ESTABLISHMENT

There is hereby established a Tribunal to be known as the
World Bank Group Administrative Tribunal.

ARTICLE II
JURISDICTION

1. Subject to the provisions of Paragraphs 2 and 3 of this Article II, the Tribunal shall hear and decide any claim filed by any member of the staff of the World Bank Group alleging that any administrative action or any action deemed by the Tribunal to be of an administrative nature taken by or under the authority of the President of the World Bank, or any failure to take any such action, violates the staff member's contract of employment, the [practices governing such employment], or rights acquired by such staff member by virtue of service with the World Bank Group, including rights under the Staff Retirement Plan and other benefit plans.
2. No such claim shall be receivable, however, unless:
 - (a) it arises out of an alleged violation occurring after a date three years prior to the establishment of the Tribunal;
 - (b) except under exceptional circumstances as decided by the Tribunal:
 - (i) the claimant has exhausted the administrative remedies available to him or her under the current practices of the World Bank Group; and

WORLD BANK GROUP STAFF ASSOCIATION

(ii) the claim is filed within ninety days from the date on which the remedy sought by the claimant through administrative channels is finally denied, whether by specific action or failure to act.

3. Upon petition by the President of the World Bank or by the World Bank Group Staff Association, the Tribunal may, at its discretion, render an advisory opinion on the validity of administrative action which the World Bank Group or any of its constituent organizations proposes to take.

4. The Tribunal shall have exclusive competence to decide disputes concerning its jurisdiction.

5. For the purposes of this Statute:

- (a) the phrase "member of the staff of the World Bank Group" shall include any current or former member of the staff of the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation, whether on fixed-term or regular appointment, including probation period, as well as consultants appointed for periods of more than three months, staff on secondment from other organizations, on sabbatical or leave without pay, and any person entitled to claim upon a right of a person otherwise deemed as a personal representative, or by reason of the death of a person otherwise deemed to be a member of the staff, and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

(b) the phrase "action taken by or under the authority of the President of the World Bank" shall include action taken by or under the authority of the chief executive officer of any constituent organization of the World Bank Group, whether or not such office is held by the same person who serves as President of the World Bank, and whether or not such action is taken sua sponte or to implement a policy decision by one of the World Bank Group's governing bodies.

ARTICLE III
REMEDIES

1. The Tribunal may order rescission or revision of the action complained of, or, in the case of inaction, specific performance of the action which should have been taken, or the payment of pecuniary damages, or both. If, however, in the opinion of the Tribunal, rescission or revision of the action, or specific performance of the action which should have been taken, would be contrary to the fundamental interests of the World Bank Group, the Tribunal shall limit the relief granted to pecuniary damages; provided, however, that the Tribunal's decisions as regards the amounts awarded shall take into account the necessity of maintaining the continuing ability of the World Bank Group, or any of its constituent organizations, to operate effectively under changing circumstances to achieve its statutory purposes. In addition, the Tribunal may award the costs of appearing before the Tribunal, including fees of counsel.

2. The filing of a claim shall not have the effect of suspending the execution of any action complained of, unless the Tribunal finds that irreparable harm would result; for the purpose of this Article, obligation to leave the duty station country permanently shall be deemed irreparable harm.

ARTICLE IV
ELECTION OF MEMBERS OF THE TRIBUNAL

1. The Tribunal shall be composed of five Members, no two of whom shall be nationals of the same member country, and one of whom shall serve as Chairman of the Tribunal according to the procedure set forth in Paragraph 5(d) below. The Members of the Tribunal shall enjoy full independence in the discharge of their duties.

2. The Members of the Tribunal shall be persons known for their integrity, objectivity, and legal competence. The membership of the Tribunal shall reflect the different cultural backgrounds and the different legal systems existing in various nations from which the members of the staff of the World Bank Group are recruited.

3. Subject to the provisions of Paragraphs 5 and 6 of this Article IV, the Members of the Tribunal shall serve for a term of six years.

4. The Members of the Tribunal shall be elected by the Executive Directors of the World Bank (hereinafter referred to as "the Executive Directors"). Members may be re-elected pursuant to Paragraph 6 of this Article IV.

5. The procedure for the election of the initial Members of the Tribunal shall be as follows:

(a) Within thirty days of the effective date of this Statute, (b) the President of the World Bank shall submit to the Executive Directors a list of at least four candidates

for election to the Tribunal. The Executive Directors, after consultation with the President and the World Bank Group Staff Association, shall elect two Members from the list, of whom one shall serve for two years and one for four. If the Executive Directors wish to consider additional candidates, they may request additional nominations from the President;

(b) Within thirty days of the effective date of this Statute, the Staff Association shall submit to the Executive Directors a list of at least four candidates for election to the Tribunal. The Executive Directors, after consultation with the President and the Staff Association, shall elect two Members from the list, of whom one shall serve for two years and one for four. If the Executive Directors wish to consider additional candidates, they may request additional nominations from the Staff Association;

(c) The four Members elected pursuant to sub-paragraphs (a) and (b) of this Paragraph 5 shall submit to the Executive Directors a list of two candidates for election to the Tribunal. The Executive Directors, after consultation with the President and the Staff Association, shall elect one Member from the list who shall serve for a term of six years. If the Executive Directors wish to consider additional candidates, they may request additional nominations from the Members; and

(d) The Members of the Tribunal shall annually elect one of their number to serve as Chairman for a term of one year.

6. Whenever there is a vacancy in the membership of the Tribunal, whether due to resignation, retirement, death, the expiration of the term of service prescribed in Paragraph 3 of this Article IV, or dismissal pursuant to Paragraph 7 of this Article IV, the remaining members of the Tribunal shall submit to the Executive Directors a list of two candidates for each such vacancy to serve either the remainder of an unexpired term or a full new term following an expired term. The Executive Directors, after consultation with the President and the Staff Association, shall elect a Member from the list to fill the vacancy. If the Executive Directors wish to consider additional candidates, they may request additional nominations from the Members of the Tribunal.

7. A Member of the Tribunal may be dismissed by the Executive Directors if the other Members unanimously certify to the Executive Directors that such Member is incapacitated or otherwise unfit for further service.

8. The Executive Directors may increase the number of Members of the Tribunal at any time upon certification by the Tribunal that its case load necessitates such increase, provided that the total number of Members remains uneven. The additional members shall be elected pursuant to the procedure set forth in Paragraph 6 of this Article IV.

ARTICLE V
RULES OF THE TRIBUNAL

1. Subject to the provisions of this Statute, the Tribunal shall promulgate rules governing the convening and conduct of its sessions, the

procedure for the filing and hearing of claims and any other matters pertaining to the administration of the Tribunal which are not settled by this Statute.

2. The Tribunal may at any time amend its rules of procedure.

ARTICLE VI
SESSIONS OF THE TRIBUNAL

1. The Tribunal shall hold ordinary sessions at dates to be fixed in accordance with its rules of procedure, unless all parties shall agree to a postponement. Extraordinary sessions may be called by the Chairman whenever warranted by either the number or the urgency of the claims before the Tribunal; for the purpose of this Paragraph, any case of dismissal shall be deemed to be an urgent claim.

2. The Tribunal shall hold its sessions at the headquarters of the International Bank for Reconstruction and Development, unless it considers that the efficient conduct of proceedings upon a claim necessitates holding sessions elsewhere.

3. Three judges shall constitute a quorum for the purpose of holding a session of the Tribunal.

4. The Tribunal shall decide whether oral proceedings are warranted or not in each case. Oral proceedings shall be held in public unless the Tribunal decides that exceptional circumstances require they be held privately.

5. The Chairman of the Tribunal or a Member designated by him or her may at any time, with the consent of the parties, attempt a conciliation between them.

ARTICLE VII
PROCEEDINGS OF THE TRIBUNAL

1. Once a staff member's claim is received by the Tribunal, any other member of the staff, or any group of staff members similarly situated, may petition the Tribunal for the right to intervene in the proceeding. The Tribunal shall grant such petition if it finds that the rights of the petitioning staff member or members are likely to be materially affected by the decision of the Tribunal with respect to the principal claim.

2. Upon petition by the World Bank Group Staff Association, the Tribunal may authorize the Staff Association to appear in any proceeding before the Tribunal in order to present its views concerning the case to the Tribunal. The Tribunal may also on its own motion request the Staff Association to present its views concerning any issue before the Tribunal.

3. The parties before the Tribunal shall have the right to employ persons of their own choosing to represent them.

4. Members of the Tribunal shall have free and prompt access to any document they shall deem useful for the review of any claim, including personnel files and all other evidence they shall consider pertinent. Copies of all documents made available to the Tribunal by either party shall be transmitted by the Tribunal's secretariat to the other party within five days of their receipt by the Tribunal.

ARTICLE VIII
DECISIONS OF THE TRIBUNAL

1. The Tribunal shall take decisions by a majority vote. Its decisions shall be final and binding upon the parties.

2. The Tribunal shall decide ex aequo et bono and shall, in each case, state in writing and with specificity the reasoning underlying its decision.

3. The original copy of each decision shall be filed in the archives of the Bank. A copy of the decision shall at the same time be delivered to each party in the case. In addition, a copy shall be filed in the Office of the Secretary of the World Bank Group, where it shall be made available for inspection or reproduction by any member of the staff of the World Bank Group or by any other person designated by such staff member.

ARTICLE IX
REVISION OF DECISIONS

Any of the parties to a proceeding may apply to the Tribunal for a revision of a decision on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence by the party claiming revision. The application must be made within ninety days of the discovery of the fact. Clerical or arithmetical mistakes in a decision or errors arising therein from any accidental slip or omission may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties.

ARTICLE X
ENFORCEMENT OF DECISIONS

1. The President of the International Bank for Reconstruction and Development shall be responsible for implementation of the decisions of the Tribunal.

2. If the Tribunal determines, upon application of the claimant or otherwise, that at any time after thirty days from the date of any of its decisions such decision has not been observed, it shall communicate a copy of the decision to the Executive Directors together with a request for appropriate action. If the action requested has not been taken within fifteen days of the receipt by the Executive Directors of the Tribunal's request, the Tribunal shall communicate a copy of the non-observed decision to the Governors of the International Bank for Reconstruction and Development together with a request for appropriate instructions to the Executive Directors.

ARTICLE IX
REVISION OF DECISIONS

ARTICLE XI
MISCELLANEOUS

1. The World Bank Group shall provide the Tribunal with an Executive Secretary and such other staff and other administrative support as may be necessary. The Executive Secretary and other staff of the Tribunal shall be responsible only to the Tribunal.
2. The Executive Directors shall determine the emoluments of Members of the Tribunal, which shall reflect the time spent by Members on the work of the Tribunal. These emoluments and other expenses of the Tribunal shall be paid by the World Bank Group.
3. Pecuniary damages awarded by the Tribunal shall be paid by the organization within the World Bank Group of which the claimant is or was a staff member.
4. No Member of the Tribunal may accept any staff or consulting position with the World Bank Group for a period of two years following the conclusion of his or her service on the Tribunal.

5. Any other public international organization may avail itself of the facilities of the Tribunal on such terms and conditions as may be agreed by the Executive Directors and approved by the Board of Governors of the World Bank.

ARTICLE XII
EFFECTIVE DATE AND AMENDMENT

This Statute shall become effective upon approval by the Boards of Governors of the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation deciding according to the procedures set forth in Article 8.A of the Articles of Agreement. Amendments to the Statute shall require approval by the same bodies, deciding according to the procedures set forth in Article 8.A of the Articles of Agreement.

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OFFICE MEMORANDUM

TO: Members of the President's Council

DATE: November 19, 1979

FROM: Martijn J.W.M. Paijmans

SUBJECT: Administrative Tribunal

As per the request made this morning in the PC, attached for your information is the Staff Association's paper on the Administrative Tribunal which was circulated to all staff. This is now being considered by the Association's membership.

cc: Mr. Koch-Weser

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WORLD BANK GROUP STAFF ASSOCIATION

TO: All Staff

DATE: November 1, 1979

FROM: Elizabeth M. Wetzel-Apitz, ^{LWA} Acting Chairperson, Staff Association

SUBJECT: Administrative Tribunal

1. Staff have shown, through their overwhelming response to the petition circulated by the Executive Committee on May 17, 1979 (over 2,100 signatures were received in a few days) that the establishment of an Administrative Tribunal competent to adjudicate legal claims by staff members against the World Bank Group, with a jurisdiction and remedies sufficiently broad to comprehend the legitimate interests of the staff and to inspire staff confidence, was one of their major concerns.

2. This petition was one of the actions initiated by the Staff Association in dealing with legal matters pertaining to the recognition and protection of staff rights. These actions are running parallel in several fields:

- a) Informal discussions with Management representatives within the Legal Rights Conference (a joint Staff/Management group created on Sept. 21, 1978) as to what could be a suitable definition of "staff rights and obligations";
- b) Obtaining several legal opinions of prominent legal counsel on the subject of "acquired rights" as they relate to Bank staff terms of employment and the possible breach of such rights through the implementation of some of the administrative decisions taken pursuant to the Kafka Committee recommendations;
- c) Creation of a Task Force on Legal Aspects of Tax Reimbursement and Pensions (TFLATP) to investigate, with assistance of outside tax lawyers, possible ways to protect the interests of staff, all of whom would be affected either directly by the proposed change in the tax reimbursement system or through its possible impact on net salaries and pensions.
- d) Monitoring over 1300 appeals filed with the Appeals Committee challenging the administrative decisions taken in the implementation of certain recommendations of the Kafka Committee;
- e) Filing briefs in US Federal Courts on the matter of their jurisdiction over World Bank employment disputes, attempting to leave recourse to local courts open to staff, at least in the absence of other acceptable channels of recourse; and
- f) Extensive work on the features of an Administrative Tribunal which would be adequate to ensure reasonable protection of staff rights.

WORLD BANK GROUP STAFF ASSOCIATION

DATE: November 1, 1979

TO: All Staff

FROM: Elizabeth M. Wetzel-Agita, Acting Chairperson, Staff Association

3. The attached paper, prepared with the assistance of our counsel, encompasses the Executive Committee's preliminary views on the necessity of establishing an Administrative Tribunal and the major issues to be considered prior to its establishment. We urge interested staff members to convey their comments through their delegates to enable the Executive Committee to finalize a Staff Association paper on the main features of an adequate Administrative Tribunal, to be officially transmitted to Management and the Executive Directors.

Attachment

2. This petition was one of the actions initiated by the Staff Association in dealing with legal matters pertaining to the recognition and protection of staff rights. These actions are running parallel in several fields:
- a) Informal discussions with Management representatives within the Legal Rights Conference (a Joint Staff/Management Group created on Sept. 21, 1978) as to what could be a suitable definition of "staff rights and obligations";
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 - d) Monitoring over 1300 appeals filed with the Appeals Committee challenging the administrative decisions taken in the implementation of certain recommendations of the Karkka Committee;
 - e) Filing briefs in US Federal Courts on the matter of their jurisdiction over World Bank employment disputes, attempting to leave recourse to local courts open to staff, at least in the absence of other acceptable channels of recourse; and
 - f) Extensive work on the features of an Administrative Tribunal which would be adequate to ensure reasonable protection of staff rights.

WORLD BANK GROUP STAFF ASSOCIATION

ESTABLISHMENT OF AN ADMINISTRATIVE TRIBUNAL

Introduction

1. The purpose of this paper is to set out the Executive Committee's views as regards the necessity of establishing an Administrative Tribunal (the Tribunal) and its main features.
2. At the outset, it should be stressed that the League of Nations found it appropriate as early as 1927 to establish a Tribunal, the purpose of which was to be a judicial body to pronounce finally upon any allegation that the administration had refused to give any League official the treatment to which the official was legally entitled, or had violated the official's rights under the terms of his or her appointment.
3. Upon the dissolution of the League in 1946, the League Tribunal was taken over by the ILO, which changed its name to the ILO Tribunal. In the same year, the UN General Assembly at its very first session called for the study of a UN Tribunal open to any of the UN specialized agencies. Over the next few years, almost all of the specialized agencies headquartered in Europe decided to join the ILO Tribunal in Geneva (except for pension cases), with ICAO and IMCO joining the UN Tribunal in New York. A substantial number of non-UN international agencies have also joined the ILO Tribunal, while several others have established their own tribunals, including the EEC (with jurisdiction over the FED and EIB), NATO, the Council of Europe, OECD and OAS. At the present time, all major international organizations have either established an administrative tribunal or joined an existing tribunal, except for a handful of organizations such as the Bank, the Fund, IDB, ADB and AFDB.

1. Is the Bank Justified in Having Failed to Establish an Adequate Tribunal?

4. The Executive Committee believes that neither on grounds of equity nor on practical or legal grounds is there justification for the Bank's failure to act in this matter until now.

A. Equity

5. In most countries, laws (and independent mechanisms to enforce them) exist and govern terms of employment and conditions of service of civil servants and salaried employees of the private sector alike. In contrast, an individual joining the Bank staff appears to be uniquely unprotected. He or she loses the protection afforded under the municipal law of last residence and yet does not obtain, in exchange, a system of legal protection of equivalent scope, or even, if the Bank's contention as expressed in the legal opinion produced by Messrs. Wilmer, Cutler and Pickering and distributed to all staff on May 1, 1979, is right, no legal protection at all. This situation, if not remedied, most likely makes the Bank staff, together with the employees of some of the other international financial institutions, the only citizens of the Bank's member countries not to be afforded legal protection in employment matters.

B. Practical Considerations

6. In this perspective, if national courts were to accept the views of the Bank and not to assume jurisdiction over employment disputes, and there were to be no adequate Tribunal, the Bank would increasingly be subjected to open criticism that it is oblivious to principles of fairness in dealing with its staff. The Bank's relations with its staff would suffer increasingly and the efficiency of the Bank's activities might, as a result, be impaired.

7. It should be recalled that, under its Articles of Agreement, (Art. VII, Sec. 3), actions can be brought against the Bank in the courts of any country in which the Bank has an office or has issued securities. However, the Bank has taken the position, both in its amicus curiae brief in the Broadbent v.

OAS case and in a recent case which has been brought against the Bank in the U.S. federal courts by a former Bank staff member, that, despite that provision of its Articles, the Bank is immune from suit before national courts on issues involving employment and conditions of service. Clearly, the Bank would be on much stronger ground to resist attempts to have staff issues relating to terms of employment and conditions of service litigated in national courts, if there were an adequate alternative channel of recourse. If national courts do take jurisdiction, there is a risk that the outcome of such suits would be influenced by national laws and policies, and conflicting judgments on the same or similar issues might well be rendered in different jurisdictions. Moreover, political pressures might influence courts in some countries. Thus, if the staff is forced to have recourse to national courts instead of to an appropriate Tribunal, it might prove difficult for the Bank to apply personnel policies uniformly to all staff and this could ultimately result in divisiveness among the staff. In contrast, a Tribunal would apply legal principles governing Bank employment uniformly without regard to the staff member's nationality, and would act with a better understanding of the Bank's processes and objectives than is likely to be attained by national courts throughout the world.

C. Legal Perspective

8. If the issue is examined from a purely legal perspective, the failure to create an adequate Tribunal has put the Bank in a wholly untenable position.

9. As pointed out in the Staff Association's presentation to the Executive Directors on May 24, 1979, the Bank in its acceptance of the Convention on Privileges and Immunities of Specialized Agencies of the UN, did not specifically exclude Section 31 of that Convention. The absence of such exclusion can only be construed as an admission by the Bank that at the time it considered itself subject to the jurisdiction of national courts, or as an implicit acceptance of Section 31, which imposes on the Bank an obligation to create

"appropriate modes of settlement of disputes arising out of contracts or of other disputes of private character." The argument which has been made by the Bank and the Fund alike -- namely, that Section 31 covers only disputes with outside parties and not with employees -- runs counter to the statement of the UN itself, in its amicus brief in the Broadbent case, that the establishment of a Tribunal is one way of fulfilling the obligations of Section 31. The UN further conceded in its brief that a provision in the Convention granting privileges and immunities to the OAS, nearly identical to Section 31, is fully applicable to contractual disputes between the OAS and its employees. Similarly, Covington and Burling, lawyers for the IMF Staff Association, have concluded in a detailed and well researched memorandum of August 1, 1979 on the Fund's obligation to provide an appropriate mode of settlement of employment disputes, that "the Fund has undertaken and is bound by an obligation under Section 31(a) of the Convention to provide an appropriate mode of settlement for such disputes" (emphasis added).

10. Quite apart from the obligation imposed by Section 31, it is relevant to note that the International Court of Justice, in the Effect of Awards case, Opinion of 13VII 54, emphasized that consideration of justice required the establishment of an appropriate mechanism to adjudicate disputes between the UN and its staff:

"It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them." I.C.J. Reports, 1954, p.57.

only be construed as an admission by the Bank that at the time it considered itself subject to the jurisdiction of national courts, or as an implicit acceptance of Section 31, which imposes on the Bank an obligation to create

11. This statement by the International Court of Justice summarizes the situation which the Bank is currently facing: not only is there a direct legal obligation on the Bank to set up promptly an adequate Tribunal, but fulfillment of this obligation is required by the considerations of equity and morality which constitute the very underpinnings on which the Bank was established some 30 years ago and continues to operate now.

II. What Should Be the Main Features of an Adequate Tribunal?

12. Many issues will need to be dealt with before any assessment of the adequacy of a Tribunal to fully protect the interests of the staff can be made. Particular attention must be given to the composition of the panel of judges in order to ensure its professionalism, objectivity and political independence. In addition, it is essential that the panel be composed of highly qualified judges or lawyers coming from different legal backgrounds, appropriately balanced to reflect the cultural differences among the staff. Wide acceptance of the decisions of the Tribunal, by both Staff and Management, will be achieved only if all parties involved are persuaded that the Tribunal is impervious to considerations extraneous to the purposes of the Bank, and that standards of fairness required in the administration of justice are consistently applied.

13. Even if the Tribunal were to enjoy Bank-wide confidence because of the appropriateness of its procedures and the quality of its judges, another major subject of staff concern would be the enforceability of the Tribunal's decisions. Should they be final and automatically enforceable against the Bank or the concerned staff member or members, as the case may be, or should, in certain instances, appeal be possible, by either one or both parties, (for instance, recourse to the International Court of Justice)?

14. For the time being, however, the Executive Committee limits itself to the review of two principal issues: the scope of the Tribunal's jurisdiction and the remedies which the Tribunal may provide to staff members who bring complaints before it.

A. Jurisdiction

15. In the Executive Committee's opinion, provision of an appropriate mode of settlement for employment matters necessarily means that the scope of the Tribunal's jurisdiction must be sufficiently broad to encompass all complaints alleging non-observance of the terms of employment and conditions of service of staff members (including staff retirement provisions).

This would endow the Tribunal with substantially the same jurisdiction as has been provided for both the UN Tribunal and the ILO Tribunal.

16. Any curtailment of the scope of the Tribunal's jurisdiction would run afoul of the equitable, practical and legal considerations mentioned above. In particular, the Tribunal must be competent to review all decisions affecting employment matters whether made by the management on its own initiative or in implementation of decisions of the Executive Directors or the Board of Governors. Unless the Tribunal has such competence, a staff member, in contending that a national court should accept jurisdiction over the Bank, could argue convincingly that there is a justiciable void which the national courts should fill.

17. It is interesting to note in this connection the statement of Professor Akehurst (in The Law Governing Employment in International Organizations, p.10, 1967) that:

"If an official is not guaranteed sufficient protection by law, he will be tempted to try to enlist the support of his national government or of other member states -- and this will have disastrous results on his impartiality, as well as exposing the whole secretariat to the most undesirable pressures" (emphasis added).

18. Review by Tribunals of actions taken to implement the decisions of the governing bodies of an international organization (i.e., the UN General Assembly, the Executive Directors or the Board of Governors) is not a novel issue; the International Court of Justice has dealt with it in advisory opinions on judgments rendered by Tribunals:

"...the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted" (emphasis added).

19. Just as the International Court of Justice felt that it would be improper to draw a distinction between changes in employment terms made pursuant to decisions of the UN General Assembly and those made on the sole authority of the Secretary-General, so too, in defining the jurisdiction of the proposed Bank Tribunal, it would be improper to distinguish between actions on employment matters taken by the management on its own authority and those taken pursuant to decisions of the governing bodies of the organization. Indeed, to draw such a distinction would be so unfair to the staff as to be unconscionable. Assume for the sake of illustration that the implementations of a decision of the Executive Directors or the Board of Governors clearly violates the contractual rights of one or more staff members. Would it not be totally unfair for the Bank to take the position that the action must stand without any recourse by the staff member(s) concerned to the Tribunal (or to the courts), simply because the action was taken pursuant to the decision of the Executive Directors rather than by the President on his own authority? To be sure, the Tribunal must give due weight to the views and responsibilities of the Executive Directors in passing upon the validity of actions taken to implement their decisions. But just as surely, if the implementation of any such decision should turn out to be plainly in violation of a staff member's rights, it must be within the Tribunal's

jurisdiction so to decide. To maintain otherwise is to argue that staff members may be deprived of their legal rights without any legal recourse (except possibly to the national courts) -- a position that the Bank would surely not wish to support.

20. In this connection, it should be recognized that the Bank's Articles of Agreement draw a clear distinction between the handling of disputes on issues of a constitutional nature and of disputes on other matters. Thus, it is within the exclusive province of the Executive Directors to decide any question of interpretation of the Articles arising between any member and the Bank or between any members of the Bank subject to review only by the Board of Governors (Art. IX). But there is no comparable provision giving the Executive Directors authority to decide disputes between the Bank and private parties, whether involving the Bank's bonds, its other contracts with third parties, or employment issues. Thus, it is a fair implication from the Articles that disputes of this kind are to be adjudicated by outside parties, whether they are local courts (as is the present case for disputes concerning bonds of the Bank), or a Tribunal, provided it is adequate to fully protect staff rights, existing or future, in respect of employment matters. Any decision with respect to the scope of jurisdiction of the Tribunal which makes the supreme organs of the Bank (i.e., the Executive Directors or the Board of Governors) the sole judge of the Bank's obligations vis-a-vis the staff would be considered to be a serious abuse by the Executive Directors of the powers entrusted to them in the Articles. Moreover, it is highly likely that such a decision would lead to extensive litigation before national courts; and, as already noted, many national courts might well feel impelled to fill the justiciable void left by such an approach.

plainly in violation of a staff member's rights, it must be within the Tribunal's

B. Remedies

21. The second principal issue which has been considered by the Executive Committee concerns the extent and nature of remedies available to a court of equity such as the Tribunal, including the power either (i) to compel the organization to rescind a decision and restore the applicant to his or her original status, or (ii) to order payment of damages in lieu of rescission of the decision, or (iii) to grant both remedies concurrently.
22. The statutes of the UN Tribunal, and those of the OAS Tribunal, grant to the executive heads of those organizations the discretion to determine, in the case the Tribunal rules against a decision having adversely affected a staff member, whether the staff member whose rights have been impaired should be compensated by monetary damages or by rescission of the action found to be invalid. However, knowledgeable authorities in this field are of the opinion that the Tribunals, and not the Management, should decide whether rescission of the decision appealed is advisable, or whether compensation should be granted instead. This view is consistent with the statutes of the ILO Tribunal which provide specifically that the Tribunal itself decides whether compensation should be awarded or the action appealed should be rescinded. It is the view of the Executive Committee that the ILO approach, vesting into an independent body of justice the decision-making authority on subjects which are of contention by their very nature, is the most sensible.
23. As concerns monetary damages which can be awarded, their amount has no limitation in the majority of instances (EEC, OECD, ILO, most national civil services, and most courts of law having jurisdiction over private employment). It is statutorily limited to a maximum of three years of net salary for the OAS and two years of net salary for the UN. It is the firm opinion of the Executive Committee that the Bank Tribunal should be authorized to award monetary damages without any statutory limits. Many staff members have long periods of service,

sometimes in specialties which are vital to the organization but not much in demand outside of it.

24. Suppose a staff member with such a specialty is 45 or 50 years old, and has 15 or 20 years of service with the organization; that staff member is then wrongfully terminated, can find no outside work in his or her specialty (this appears to be increasingly the case for certain segments of the Bank staff), and has to accept unspecialized work at a considerably lower salary than he or she had been earning. The ex-staff member's standard of living plummets as a result, the educational opportunities of his/her children are curtailed, and the whole family suffers seriously. In such a case, it is not reasonable to attempt to limit damages in advance. Therefore, considerations of equity, practicality and parity with the situation generally enjoyed by others clearly highlight the necessity of allowing the Tribunal to decide itself, based on individual circumstances, the magnitude of its awards.

25. Any restriction to the authority of the Tribunal to make final determination of the course to be followed as regards rescission versus monetary compensation, as well as the imposition of any statutory limit on the amount of damages that the Tribunal may decide to grant would unduly restrict the authority of the Tribunal to deal justly with staff members whose rights have been impaired and would virtually exclude the wide acceptance and credibility required for the efficient operation of the Tribunal.

III. Conclusions

26. Many other issues will have to be dealt with at the time of the creation of the Tribunal. Particular attention must be given to procedures ensuring quasi-automatic enforcement of the final decisions of the Tribunal, to avoid an OAS-type situation where some of the Tribunal's decisions in favor of staff have, for the last three years, not been implemented. Mechanisms must also be found to provide simple access to the Tribunal, making certain that complicated procedural rules do not deter staff members from seeking recourse, while at the same time preventing frivolous claims from producing a backlog of cases and an undesirable escalation of cost in rendering justice.

27. Much work remains to be done on all these issues. However, the Executive Committee considers it appropriate at this stage to focus its views on the principal issues. Since, without a sound position of the main features of an adequate Tribunal, detailed work on other issues may well prove in the long run irrelevant.

November 1, 1979

OFFICE MEMORANDUM

TO: Executive Directors and Alternates
FROM: P. N. Damry, Vice President and Secretary
SUBJECT: Administrative Tribunal

DATE: November 6, 1979

P. N. Damry

716/3/7

Attached, together with an accompanying explanatory memorandum from General Counsel, is a draft statute for a Bank administrative tribunal, which will be the basis for an informal discussion between Mr. McNamara and the Directors at 3:00 p.m. on Thursday, November 29 in the Board Room.

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WBG ARCHIVES

November 1, 1979

MEMORANDUM RELATING TO DRAFT
STATUTE FOR BANK ADMINISTRATIVE TRIBUNAL

The purpose of this memorandum is to explain the attached draft statute for a Bank administrative tribunal.

Article I: This generally is a standard provision. The tribunal has been structured as a joint Bank-Association-Corporation entity.

Article II, Section 1: This provision establishes the jurisdiction of the tribunal. The language contemplates that the tribunal can hear allegations by a staff member that the President or his staff has failed to observe the terms of appointment or conditions of service of the complaining staff member. For example, a complaint that a staff member's termination by the Director of the Personnel Management Department did not comply with a personnel rule on termination would be within the tribunal's jurisdiction. The reference to President, officer and employee is taken from the Bank's Articles.

Following the views expressed by many Executive Directors at the last informal meeting to discuss an administrative tribunal, the language of this section is intended to make clear that decisions of the Executive Directors and the Governors are outside the tribunal's competence, meaning that the tribunal would be obliged to decline to review complaints challenging the justification or effects of such decisions. In this respect, this provision is intended to

differ from the language of the UN and ILO tribunal statutes, which do not specifically exclude review of decisions of the UN or ILO governing or plenary bodies. The relationship between the governing bodies and tribunals at other international organizations has on occasion been hotly disputed, with the governing bodies of several organizations claiming that a tribunal is without jurisdiction to review personnel or budgetary decisions of a governing body. Such challenges to jurisdiction have been rejected by tribunals which have held with few exceptions that the broad nature of their statutes' jurisdictional clauses gives them authority to review the decisions of governing bodies which allegedly violate a staff member's rights and to award compensation if the allegation is proven. Although in most of these cases the tribunals have ultimately found the action of the governing body did not violate a staff member's rights, in some instances tribunals have awarded damages after finding that a governing body decision violated staff rights.

The present draft would settle this issue as to the Bank by stating that the role of the Executive Directors, or Board of Governors, under the Bank's Articles of exercising general control over the President's responsibilities to organize, appoint and dismiss the staff would not be subject to review by a tribunal under any circumstances.

In contrast to the jurisdiction represented by the attached draft, it would be possible to have a broad jurisdictional clause similar to that used for the UN and ILO tribunals. It is believed that this type of clause is favored by the Staff Association. Aside from either the restricted clause in the attached draft or the broader clause it would also be possible to establish a jurisdictional middle ground. This could be done, for example, by excluding review of decisions of the Board of Governors or Executive Directors which

(a) are specified by those bodies at the time of making the decision to be non-reviewable, (b) relate to specified topics, such as general salary levels, or (c) are determined by those bodies to be in the fundamental interests of the Bank.

Article II, Section 2: This section sets out the access to the tribunal. Normally the term "staff member" would include individuals who receive and accept appointments to the Bank staff or to the staff of any other organizations joining the tribunal. Applicants to the staff who do not become staff members would be excluded but individuals such as widows or widowers asserting the rights of a deceased staff member would be included, as would a beneficiary (but not a creditor of a beneficiary) under the pension plan. Further, an executive director or his assistant participating in the pension plan could appear before the tribunal.

Article II, Section 3: This provision is similar to ones for the UN and ILO and allows other organizations to submit to the tribunal's jurisdiction. These organizations might include the Fund, the IDB, the ADB, Intelsat, the CDB and the AfDB, none of which currently has a tribunal. If the Fund wishes to join at the outset, the tribunal could be restructured to be a joint Bank/Fund tribunal.

Article II, Section 4: This provision is similar to those of other tribunals with the exception, discussed below, that the judgments of the UN and ILO tribunals may be appealed to the International Court of Justice as having exceeded the tribunal's jurisdiction.

Article III, Section 1: This section is similar in content to the UN and ILO tribunals except that it is an express condition that judges be nationals of members. Although the qualifications of judges would not be specified in the statute, it would be expected that in accordance with the procedures of those other organizations they would not be former Executive Directors or staff members of the Bank and they would possess qualifications required in their countries for appointment to high judicial office or have recognized competence in international law. One difference in this section from other tribunals is the possibility that decisions could be made by the full tribunal; this is intended to take care of cases of such significance that the President or the panel of three would wish to have the views of the full tribunal.

Article III, Section 2: Although the appointment of judges would be up to the Governors, it is contemplated that the staff and any other organizations joining the tribunal would be consulted, as is the UN and ILO practice. At the UN appointments are made by the General Assembly and at the ILO they are made by the General Conference.

Article III, Section 3: As a result of this section the tribunal, as have other tribunals, will adopt detailed rules. As to intervention by third parties, it is contemplated that the tribunal, similarly to others, would allow staff members who are asserting essentially identical claims to file briefs, otherwise participate and be named in the judgment. It would be up to the tribunal to decide if intervention was warranted in a particular case.

Article III, Section 4: The sessions could be on a regular basis, say twice a year, or called specially if a case justified it. This is to be decided by the tribunal or, if its rules so specified, by the president of the tribunal.

Article III, Section 5: As at other tribunals, the tribunal would have the power to dispense with oral proceedings.

Article IV, Sections 1 and 2: The concept of majority vote is common to all tribunals, as are written judgments.

Article IV, Section 3: All tribunals provide that judgments are final except for the UN and ILO tribunals which have a mechanism for obtaining an advisory opinion from the International Court of Justice in certain circumstances. This mechanism has not been added as to the Bank tribunal for several reasons. First, the mechanism itself has been criticised by the ICJ and a similar attempt at the Bank to channel cases to the ICJ may present similar difficulties. Second, although the Bank as a Specialized Agency has access to the ICJ, the Bank has usually established dispute settlement machinery which does not involve the ICJ, such as Article IX of the Bank's Articles or arbitration under Bank loan agreements. Third, there appears to be no compelling reason to have a stage beyond a properly constituted tribunal.

Article V, Section 1: This provision, usual in such statutes, contemplates that in the normal case the staff member must first exhaust the internal remedies within the Bank, which at present are the Appeals Committee.

on certain personnel matters, the Committee on Outside Activities on conflict of interest questions and the Pension Benefits Administration Committee. Since the jurisdiction of each of these committees is defined there may be some cases for which the only internal remedy would be an appeal through administrative channels culminating in the decision of the Vice President, Administration, Organization and Personnel Management. In this latter type of case the appeal through administrative channels would have to be exhausted before the case could be taken to the tribunal.

Article V, Section 2: This specifies the time period in which an appeal must be brought and prevents the bringing of old claims.

Article V, Section 3: This is usual in other tribunals.

Article V, Section 4: This essentially is an override provision to safeguard the staff member. It is drawn primarily from the ILO tribunal and does not exist at the UN tribunal, where the staff member cannot file with the UN tribunal until all internal remedies have been exhausted, no matter how long that takes. Under the provision, the tribunal would have power to hear a complaint if the period of time had passed even if a final decision had not been reached internally. Since it is preferable to allow disputes an opportunity to be resolved through normal administrative stages it is provided that the tribunal would by-pass these stages only under the conditions stated in the section.

Article V, Section 5: This provision is similar to provisions in other tribunals. It makes it clear that administrative decisions, such as a termination, are not held in abeyance while a case is before the tribunal.

Article VI, Sections 1 and 2: These sections define the relief which the tribunal may grant and are drawn mainly from the UN tribunal. Under the UN statute the tribunal may order specific performance, such as reinstatement, but the Secretary-General has the option to pay monetary damages, which must be set as alternative relief by the tribunal in all cases where performance of a non-monetary obligation is ordered. Such damages may not exceed two years' net salary except in exceptional cases. At the ILO the tribunal also may order specific performance but the tribunal, not the Director-General, decides if monetary damages should be paid as alternative relief. There is no set limit on damages at the ILO. In practice, the ILO tribunal has not ordered specific performance when to do so would be impractical, such as when a termination occurred some time in the past. Nor has the ILO tribunal awarded high amounts of damages.

The present draft follows the UN provision and would give the President the right to decide to pay damages as sole relief. Such damages would be set by the tribunal and could not exceed two years' net salary unless the tribunal found a higher amount justified in exceptional cases. Similarly to the UN and ILO tribunals, it is expected that the tribunal would decide what costs to allow.

Article VI, Section 3: This provision allows for reconsideration of a judgment for a mistake of law or fact, at the tribunal's discretion.

Article VII, Section 1: As in the case of other tribunals, it is intended that the tribunal would have its own staff and budget and that its decisions would be published.

Article VII, Section 2: This section obligates the organizations joining the tribunal to share expenses in a manner to be agreed between such organizations.

Article VIII: The power to enter into agreements with other organizations would be given to the Bank, without separate action by the Association or the Corporation, and would be exercised by the Board of Governors pursuant to Article V, Section 2(b)(v) of the Bank's Articles. One issue not resolved by this provision is whether other organizations could modify as to themselves provisions in the tribunal's statute. At the ILO this is left to the ILO Governing Body; at the UN it appears that significant changes can only occur if the General Assembly authorizes them. Presumably, an agreement with another organization could specify any exceptions to the statute applicable to a joining organization which the Board of Governors would find acceptable.

Article IX: This gives the power to amend or repeal solely to the Board of Governors of the Bank. This is a combination of the provisions under the UN and ILO tribunals.

DRAFT
November 1, 1979

STATUTE OF THE
ADMINISTRATIVE TRIBUNAL
OF THE
INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT,
INTERNATIONAL DEVELOPMENT ASSOCIATION
AND
INTERNATIONAL FINANCE CORPORATION

ARTICLE I

This Statute establishes the Administrative Tribunal of the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation (all referred to hereinafter as the "Bank").

ARTICLE II

1. The Tribunal shall be competent to hear and decide upon complaints against the Bank alleging nonobservance by the President or any other officer or employee of the Bank of a staff member's terms of appointment and conditions of service, and of the provisions of the Staff Retirement Plan, but the Tribunal shall not be competent to hear complaints arising from decisions made by the Board of Governors or the Executive Directors.

2. Complaints may be presented to the Tribunal by any staff member or former staff member, by any person who is presently entitled to claim upon a right of a staff member as a personal representative or by reason of the staff member's death, and by any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

3. The Tribunal shall be competent to hear and decide upon complaints arising in public international organizations other than the Bank as provided in agreements concluded pursuant to Article VIII.

4. The Tribunal shall not be competent, however, to hear or decide upon a complaint where the cause therefor arose before the establishment of the Tribunal.

5. Subject to the foregoing Sections of this Article, when the competence of the Tribunal is in doubt, the Tribunal shall decide it.

ARTICLE III

1. The Tribunal shall have seven judges, all of whom shall be nationals of members of the International Bank for Reconstruction and Development, but no two of whom shall be nationals of the same member. A Panel of three judges shall hear each complaint and shall exercise the powers and be subject to the obligations of the Tribunal set forth in this Statute, unless the President of the Tribunal or a Panel decides that the Tribunal itself should hear the complaint.

2. The judges shall be appointed by the Board of Governors upon recommendation of the President after consultation with the Executive Directors. Each judge shall be appointed for three years, or for the time remaining to an appointment when it becomes vacant before it expires, except that of the first seven judges, two shall be appointed for four years and two shall be appointed for five years. A judge may be removed from office if the other judges unanimously agree that he is not suited for further service.

3. The Tribunal shall elect a President and a Vice President and shall adopt rules not inconsistent with this Statute about:

- (a) the selection of judges who will comprise a Panel;
- (b) the presentation and dissemination of complaints and answers and other pleadings;
- (c) the conduct of oral proceedings;
- (d) intervention by persons entitled to have complaints heard whose rights may be affected by the judgment rendered upon another complaint and the consolidation of proceedings involving common issues of law or fact; and
- (e) other matters relating to the functioning of the Tribunal.

4. The Tribunal shall hold its sessions at the headquarters of the International Bank for Reconstruction and Development unless the efficient conduct of proceedings upon a complaint necessitates holding sessions elsewhere.

5. The Tribunal may decide whether to have oral proceedings upon a complaint. Oral proceedings shall be held in public unless the Tribunal decides that exceptional circumstances require they be held privately.

ARTICLE IV

1. Judgments shall be rendered, and all other decisions during proceedings upon a complaint shall be taken, by a majority of the judges designated to hear the complaint.

2. The reasons for a judgment shall be stated in writing and shall be delivered to the parties.

3. A judgment shall be final and without appeal.

ARTICLE V

1. The Tribunal shall hear a complaint only if the complainant has first exhausted any other remedies available within the Bank or if the complainant and the Bank agree that the Tribunal shall hear the complaint without the exhaustion of other remedies.

2. The Tribunal shall hear a complaint only if it is presented within ninety days after the later of the following:

- (a) the occurrence of the event giving rise to the complaint;
- (b) receipt of notice, after the complainant has used all other means of remedy available within the Bank, that the relief asked for or recommended will not be granted; or
- (c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after the receipt of such notice.

3. In exceptional cases, the Tribunal may suspend any of the time limits specified in Section 2 above.

4. The Tribunal may also hear a complaint, however, even if the conditions of Sections 1 and 2 of this Article have not been satisfied, if the Bank has not decided upon a request for relief within twelve months after it was first made and if, in the Tribunal's opinion, the delay was unjustified.

5. The presentation of a complaint to the Tribunal shall not suspend the execution of the decision complained of.

ARTICLE VI

1. If the Tribunal decides that a complaint is well founded, it may order that the decision giving rise to the complaint be rescinded. It may order the performance of the obligation in question or it may order that the complainant be paid damages in money or do both. It may order that a complaint be remanded for further administrative consideration.

2. In every case in which the Tribunal grants relief other than the payment of damages in money, the Tribunal shall also fix the amount of money which will compensate the complainant for the damages the complainant will have suffered if the other relief granted is not given by the Bank. The President or his delegate may, within thirty days after the judgment of the Tribunal has been delivered to the Bank, decide in the interests of the Bank to pay the complainant the amount so fixed, and the payment of that amount without further action will extinguish the complainant's cause for complaint. The amount of money fixed by the Tribunal shall not exceed the equivalent of two years' net base salary of the complainant unless the Tribunal determines, in exceptional cases, that a higher amount is justified.

3. If, after the end of proceedings on a complaint, a party discovers a fact not theretofore known to the party and to the Tribunal, or the party maintains that the Tribunal has made an error of law, the Tribunal may, upon the request of the party within thirty days after the party received the judgment, reopen proceedings upon the complaint, but only if the Tribunal decides that consideration of the fact or of the question of law is likely to change its judgment. The Tribunal may correct clerical or arithmetical errors in a judgment at any time.

ARTICLE VII

1. The President or his delegate shall make the administrative arrangements necessary for the functioning of the Tribunal.
2. The expenses of the Tribunal shall be borne by the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation, and other public international organizations who make agreements pursuant to Article VIII.

ARTICLE VIII

The International Bank for Reconstruction and Development, in consultation with the Tribunal, may make agreements with other public international organizations for the submission of complaints to the Tribunal and for sharing the expenses of the Tribunal.

ARTICLE IX

The Board of Governors of the International Bank for Reconstruction and Development may amend or repeal this Statute.

File

ANNEX I

716/3/5

UNITED NATIONS
ADMINISTRATIVE TRIBUNAL

STATUTE AND RULES

Provisions in force with effect from 3 October 1972



UNITED NATIONS

New York, 1972

STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

as adopted by the General Assembly by resolution 351 A (IV) on 24 November 1949 and amended by resolution 782 B (VIII) on 9 December 1953 and by resolution 957 (X) on 8 November 1955

ARTICLE 1

A Tribunal is established by the present Statute to be known as the United Nations Administrative Tribunal.

ARTICLE 2

1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words "contracts" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.

2. The Tribunal shall be open:

(a) To any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death;

(b) To any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.

4. The Tribunal shall not be competent, however, to deal with any applications where the cause of complaint arose prior to 1 January 1950.

ARTICLE 3

1. The Tribunal shall be composed of seven members, no two of whom may be nationals of the same State. Only three shall sit in any particular case.

2. The members shall be appointed by the General Assembly for three years, and they may be re-appointed; provided, however, that of the members initially appointed, the terms of two members shall expire at the end of one year and the terms of two members shall expire at the end of two years. 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. The Tribunal shall elect its President and its two Vice-Presidents from among its members.

4. The Secretary-General shall provide the Tribunal with an Executive Secretary and such other staff as may be considered necessary.

5. No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service.

6. In case of a resignation of a member of the Tribunal, the resignation shall be addressed to the President of the Tribunal for transmission to the Secretary-General. This last notification makes the place vacant.

ARTICLE 4

The Tribunal shall hold ordinary sessions at dates to be fixed by its rules, subject to there being cases on its list which, in the opinion of the President, justify holding the session. Extraordinary sessions may be convoked by the President when required by the cases on the list.

ARTICLE 5

1. The Secretary-General of the United Nations shall make the administrative arrangements necessary for the functioning of the Tribunal.

2. The expenses of the Tribunal shall be borne by the United Nations.

ARTICLE 6

1. Subject to the provisions of the present Statute, the Tribunal shall establish its rules.

2. The rules shall include provisions concerning:

(a) Election of the President and Vice-Presidents;

(b) Composition of the Tribunal for its sessions;

(c) Presentation of applications and the procedure to be followed in respect to them;

(d) Intervention by persons to whom the Tribunal is open under paragraph 2 of article 2, whose rights may be affected by the judgement;

(e) Hearing, for purposes of information, of persons to whom the Tribunal is open under paragraph 2 of article 2, even though they are not parties to the case; and generally

(f) Other matters relating to the functioning of the Tribunal.

ARTICLE 7

1. An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.

2. In the event of the joint body's recommendations being favourable to the application submitted to it, and in so far as this is the case, an application to the Tribunal shall be receivable if the Secretary-General has:

(a) Rejected the recommendations;

(b) Failed to take any action within the thirty days following the communication of the opinion; or

(c) Failed to carry out the recommendations within the thirty days following the communication of the opinion.

3. In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous.

4. An application shall not be receivable unless it is filed within ninety days reckoned from the respective dates and periods referred to in paragraph 2 above, or within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant. If the circumstance rendering the application receivable by the Tribunal, pursuant to paragraphs 2 and 3 above, is anterior to the date of announcement of the first session of the Tribunal, the time limit of ninety days shall begin to run from that date. Nevertheless, the said time limit on his behalf shall be extended to one year if the heirs of a deceased staff member or the trustee of a staff member who is not in a position to manage his own affairs, file the application in the name of the said staff member.

5. In any particular case the Tribunal may decide to suspend the provisions regarding time limits.

6. The filing of an application shall not have the effect of suspending the execution of the decision contested.

7. Applications may be filed in any of the five official languages of the United Nations.

ARTICLE 8

The oral proceedings of the Tribunal shall be held in public unless the Tribunal decides that exceptional circumstances require that they be held in private.

ARTICLE 9

1. If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.

2. Should the Tribunal find that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits, order the case remanded for institution or correction of the required procedure. Where a case is remanded, the Tribunal may order the payment of compensation, not to exceed the equivalent

of three months' net base salary, to the applicant for such loss as may have been caused by the procedural delay.

3. In all applicable cases, compensation shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under article 14.

ARTICLE 10

1. The Tribunal shall take all decisions by a majority vote.

2. Subject to the provisions of articles 11 and 12, the judgements of the Tribunal shall be final and without appeal.

3. The judgements shall state the reasons on which they are based.

4. The judgements shall be drawn up, in any of the five official languages of the United Nations, in two originals, which shall be deposited in the archives of the Secretariat of the United Nations.

5. A copy of the judgement shall be communicated to each of the parties in the case. Copies shall also be made available on request to interested persons.

ARTICLE 11

1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.

2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.

3. If no application is made under paragraph 1 of this article, or if a decision to request an advisory opinion has not been taken by the Committee, within the periods prescribed in this article, the judgement of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court.

4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to

request advisory opinions of the Court. The Committee shall be composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. The Committee shall meet at United Nations Headquarters and shall establish its own rules.

5. In any case in which award of compensation has been made by the Tribunal in favour of the person concerned and the Committee has requested an advisory opinion under paragraph 2 of this article, the Secretary-General, if satisfied that such person will otherwise be handicapped in protecting his interests, shall within fifteen days of the decision to request an advisory opinion make an advance payment to him of one-third of the total amount of compensation awarded by the Tribunal less such termination benefits, if any, as have already been paid. Such advance payment shall be made on condition that, within thirty days of the action of the Tribunal under paragraph 3 of this article, such person shall pay back to the United Nations the amount, if any, by which the advance payment exceeds any sum to which he is entitled in accordance with the opinion of the Court.

ARTICLE 12

The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties.

ARTICLE 13

The present Statute may be amended by decisions of the General Assembly:

ARTICLE 14

The competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Each such special agreement shall provide that the agency concerned shall be bound by the judgements of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency and shall include, inter alia, provisions concerning the agency's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

→ L.F. Administrative Tribunals

1972 EDITION

INTERNATIONAL LABOUR ORGANISATION
ORGANISATION INTERNATIONALE DU TRAVAIL

Statute and Rules of Court
of the Administrative Tribunal

Statut et Règlement
du Tribunal administratif

International Labour Office
Bureau international du Travail
Geneva — Genève

Statute of the Administrative Tribunal of the International Labour Organisation

Adopted by the International Labour Conference on 9 October 1946
and Amended by the said Conference on 29 June 1949

ARTICLE I

There is established by the present Statute a Tribunal to be known as the International Labour Organisation Administrative Tribunal.

ARTICLE II

1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.

2. The Tribunal shall be competent to settle any dispute concerning the compensation provided for in cases of invalidity, injury or disease incurred by an official in the course of his employment and to fix finally the amount of compensation, if any, which is to be paid.

3. The Tribunal shall be competent to hear any complaint of non-observance of the Staff Pensions Regulations or of rules made in virtue thereof in regard to an official or the wife, husband or children of an official, or in regard to any class of officials to which the said Regulations or the said rules apply.

4. The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organisation is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution.

5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure.

6. The Tribunal shall be open—

- (a) to the official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death ;
- (b) to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.

7. Any dispute as to the competence of the Tribunal shall be decided by it, subject to the provisions of article XII.

Administrative Tribunal

4

ARTICLE III

1. The Tribunal shall consist of three judges and three deputy judges who shall all be of different nationalities.
2. Subject to the provisions set out at paragraph 3 below, the judges and deputy judges shall be appointed for a period of three years by the Conference of the International Labour Organisation.
3. The terms of office of the judges and deputy judges who were in office on 1 January 1940 are prolonged until 1 April 1947 and thereafter until otherwise decided by the appropriate organ of the International Labour Organisation. Any vacancy which occurs during the period in question shall be filled by the said organ.
4. A meeting of the Tribunal shall be composed of three members, of whom one at least must be a judge.

ARTICLE IV

The Tribunal shall hold ordinary sessions at dates to be fixed by the Rules of Court, subject to there being cases on its list and to such cases being, in the opinion of the President, of a character to justify holding the session. An extraordinary session may be convened at the request of the Chairman of the Governing Body of the International Labour Office.

ARTICLE V

The Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be public or *in camera*.

ARTICLE VI

1. The Tribunal shall take decisions by a majority vote; judgments shall be final and without appeal.
2. The reasons for a judgment shall be stated. The judgment shall be communicated in writing to the Director-General of the International Labour Office and to the complainant.
3. Judgments shall be drawn up in a single copy, which shall be filed in the archives of the International Labour Office, where it shall be available for consultation by any person concerned.

ARTICLE VII

1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.
2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.

Administrative Tribunal

5

3. Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration.

4. The filing of a complaint shall not involve suspension of the execution of the decision impugned.

ARTICLE VIII

In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him.

ARTICLE IX

1. The administrative arrangements necessary for the operation of the Tribunal shall be made by the International Labour Office in consultation with the Tribunal.

2. Expenses occasioned by sessions of the Tribunal shall be borne by the International Labour Office.

3. Any compensation awarded by the Tribunal shall be chargeable to the budget of the International Labour Organisation.

ARTICLE X

1. Subject to the provisions of the present Statute, the Tribunal shall draw up Rules of Court covering—

- (a) the election of the President and Vice-President ;
- (b) the convening and conduct of its sessions ;
- (c) the rules to be followed in presenting complaints and in the subsequent procedure, including intervention in the proceedings before the Tribunal by persons whose rights as officials may be affected by the judgment ;
- (d) the procedure to be followed with regard to complaints and disputes submitted to the Tribunal by virtue of paragraphs 3 and 4 of article II ; and
- (e) generally, all matters relating to the operation of the Tribunal which are not settled by the present Statute.

2. The Tribunal may amend the Rules of Court.

ARTICLE XI

The present Statute shall remain in force during the pleasure of the General Conference of the International Labour Organisation.

Administrative Tribunal

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It may be amended by the Conference or such other organ of the Organisation as the Conference may determine.

ARTICLE XII

1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding.

OFFICE MEMORANDUM

7 16/3/4

TO: Members of the Personnel Management Committee

DATE: September 14, 1979

FROM: Martijn J.W.M. Paijmans

PERSONAL & STRICTLY CONFIDENTIALSUBJECT: Administrative Tribunal

Mr. McNamara has asked me to distribute to you the attached note which I addressed to him. It is the President's intention to discuss this note at an early opportunity following the Belgrade meeting and at a time when we will review the draft statute now being prepared for the Board members by Legal Department.

cc: Mr. Koch-Weser

DECLASSIFIED**NOV 30 2012****WBG ARCHIVES**

September 12, 1979

Mr. McNamara:

STRICTLY CONFIDENTIAL

Re: Administrative Tribunal

1. As you know, I have written to you on the above subject on a number of occasions in the context of its implications for staff morale and confidence as well as in the context of good personnel management. Since then, there have been a number of developments and I thought it might be useful to trace these in chronological sequence, to share with you some of my major concerns and to alert you to some of the immediate difficulties we face.
2. The staff has for some time expressed a growing interest in the need for establishing an impartial judicial machinery. The emergence of the Kafka report and the questions it gave rise to in respect of the employer's right to unilaterally change conditions of service, the subsequent legal opinions presented by the Bank's counsel all served to reinforce and lend urgency to this feeling. The Executive Directors, when discussing the Kafka report and management recommendations, picked up on this theme and there was a general sentiment at the Board that the setting up of an Administrative Tribunal be given serious consideration.
3. Following this, the Legal Department was asked to prepare a paper, setting out the issues involved in the consideration of setting up an Administrative Tribunal which might form a basis for a preliminary discussion with the Executive Directors on this subject. Concurrently with this initiative, and in the context of the ongoing work of the Legal Rights Conference we reassured the Conference and the Staff Association that the management did not intend to present to the Board any final proposals on this subject without full consultation with the staff.
4. Legal Department's draft issues paper which devoted considerable effort to setting out a broad spectrum of alternative formulations of the critical issues, among which that of jurisdiction is the most important, was discussed at the meeting of the full President's Council on June 6. While there was no clear-cut consensus in favor of any specific jurisdictional alternative it was equally clear that no-one wanted either of the extreme formulations, be it the broadest or the narrowest. Following the discussions at the President's Council, the issues paper presenting the full spectrum of alternative formulations was distributed to the Executive Directors as well as the Legal Rights Conference on June 15. The Executive Directors met informally on June 20 to discuss the issues involved. As was to be expected, most of the attention was focussed on the crucial question of jurisdiction and the Executive Directors felt that, to be better able to focus on this matter, the Legal Department should provide them with draft clauses dealing with jurisdiction which might be included in a statute establishing an Administrative Tribunal. The issues paper was concurrently discussed in the Legal Rights Conference where staff representatives had been convinced to limit the Conference review to

cont....

Mr. McNamara

September 12, 1979

formulating comments and not to come forward at this stage with specific recommendations in order to maintain a constructive dialogue with management and Board. On July 6 the Conference provided their comments which were also distributed, with your approval, to the Executive Directors. These comments were well balanced and set out - various further alternatives which fell between the two extremes of jurisdictional formulae. Subsequently, the draft jurisdictional clauses requested by the Executive Directors from management were distributed to the Board and also to the Staff Association on August 3. These again covered the whole spectrum of alternatives available. The Executive Directors then met on August 8 in an informal session. Of about eight Executive Directors who spoke, six favored the narrowest of the approaches set out. On the basis of that discussion our Legal Department has been asked to prepare a complete draft statute of an Administrative Tribunal on the basis only of the narrowest interpretation of jurisdiction. When this document is ready it will be distributed to the Board and the Staff Association.

5. I am quite concerned by the potential repercussions of this development because of misinterpretations which may follow, by member countries and staff alike, both of whom are very likely to believe that the management of the Bank has now chosen among the various jurisdictional alternatives and is in favor of, and in effect proposes, the narrowest possible interpretation. This would have serious consequences for reasons as explained below. While I fully appreciate the sensitivities of formulating specific management recommendations on this issue which involves impinging on the powers of the Board, I do ask myself a question as to whether following the present course will not inevitably lead to serious disruptions and endanger the ability of this institution to function adequately and effectively. In such a situation I believe that the management has an obligation to at least clearly expose to the Executive Directors the dangers that we face.

6. Irrespective of the question as to who will be seen to have made the proposal at issue, it cannot be denied that the fact that it only contains the narrowest possible jurisdictional interpretation is bound to create serious problems. It will do so within the management group itself, with the staff and also with the Board. In practice, such a position will also be very difficult to defend as it would almost beg the question as to why have an Administrative Tribunal at all, a question already asked at the President's Council on June 6, when the narrowest alternative was discussed in turn. I believe we would be very hard-pressed to explain why our staff, amongst all international organizations, should be singled out for an arrangement, granting a protection far narrower than that which would be afforded them under the laws of most of the countries which the Executive Directors represent. If reactions to the promulgation of the travel policy which affect less than half the staff of the Bank and the strong reactions to the new U.S. tax arrangements which affect less than 25% of the staff, and the reactions to Kafka in general and the accompanying legal opinions,

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Mr. McNamara

September 12, 1979

are any guide at all, the presentation of a statute - which will be seen as a proposal - of an extremely narrowly-conceived tribunal will perhaps be the harshest blow to staff morale and their sense of security.

7. Also I personally feel very uncomfortable that we now focus only on the most narrow provisions and do believe that some opening up of these provisions to permit the review of staff-related Board decisions is certainly not out of line with considerations of common law and equity. The statute now being formulated would lead to the establishment of a Tribunal with extremely limited powers. It would do little to address the deeply-felt concerns of the staff for an independent recourse mechanism on matters such as those affecting terms and conditions of employment. Such an arrangement would also seem to be out of line with the growing trends in social and labor legislation in many of our member countries (U.S., Europe and elsewhere). It would furthermore prima facie deny to our staff certain legal safeguards readily available to staff of other international organizations, while certain safeguards to protect the integrity of our different - financial - character could certainly be formulated. In this context, re-reading the memorandum from Mr. Hanfland of July 26 to the Legal Department, where he conveys the views of his authorities, I am not sure that the Germans, for example, fully understand the difference between the narrow formulation of the jurisdictional clause that they seem to have blessed and the comparison they are using. They are talking of something akin to OECD but the OECD formulation on jurisdiction is broader.

8. As mentioned above, all this makes me wonder whether we need to go beyond just telling the Executive Directors what they have asked for, i.e. a draft statute based on the narrowest jurisdictional provision, particularly since these papers will be transmitted to their authorities, or whether we should in addition also set out, as impartially as possible, a clear statement comparing the major provisions with those of other major institutions and pointing out the risks we run in terms of staff morale and confidence.

9. At the moment we also have a very practical problem about which I would like to keep you informed. In view of the fact that the management does not have any clearly-articulated position on the scope and nature of the Administrative Tribunal, and the fact that discussions held by the Executive Directors in a private session cannot be disclosed we face a most difficult problem in terms of what I can ask the management group at the Legal Rights Conference to respond to questions concerning the Tribunal issue which is the main subject the staff is interested in. Even saying that the subject of the Administrative Tribunal cannot be discussed begs more questions than it answers. There are also a number of other matters which the Conference has on its agenda and which pertain to questions of legal rights of staff. The General Counsel has advised

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Mr. McNamara

September 12, 1979

that discussions of these matters in this forum, while various types of litigations are in progress or in prospect would be unwise, and I will discuss with the Staff Association the desirability of a suspension sine die of the Legal Rights Conference. But this just crosses today's problems. If we are to maintain that we do consult with the staff in good faith on certain issues and that we believe that the management role on a particular issue is limited, would it be improper to at least make a clean breast of things with the staff, telling them exactly how things seem to be developing so that they have an opportunity of formulating their own views and take such action as is possible before the die is cast?

Martijn J. W. M. Paijmans

OFFICE MEMORANDUM

TO: Executive Directors

DATE: August 3, 1979

FROM: P. N. Damry, Vice President and Secretary

SUBJECT: Informal Meeting on Administrative Tribunal

DECLASSIFIED

NOV 30 2012

WBG ARCHIVES

Appended is a paper which will be the basis for an informal discussion between Mr. McNamara and the Executive Directors to be scheduled after the convenience of the Executive Directors has been ascertained.

P. N. Damry

August 3, 1979

ADMINISTRATIVE TRIBUNAL: JURISDICTION
ALTERNATIVES

This memorandum discusses a range of possible jurisdiction bases which an administrative tribunal could have. It amplifies Section IV (A and B) of the Principal Issues Memorandum dated June 15, 1979.

As was stated in the Principal Issues Memorandum the Executive Directors or Governors of the Bank have the authority to decide the extent of the jurisdiction to be conferred upon a tribunal. Such jurisdiction could range from permitting only review of administrative decisions made by management in applying existing personnel policies in individual cases to review of a decision made at any level of the Bank which allegedly violates a staff member's rights.

If the Governors or the Executive Directors wish to retain authority to make changes in Bank personnel policies and not have such changes challenged by Bank staff members before a tribunal, a tribunal with restricted jurisdiction would be appropriate.

Whether a tribunal should have jurisdiction to review personnel decisions made by an organization's governing body has been a controversial matter since the first tribunal was established by the League of Nations. The tribunals of the League, the ILO, the UN and the OAS all have jurisdiction

clauses permitting such tribunals to hear complaints by staff of non-observance of conditions of employment, without specifically insulating decisions of the governing bodies from tribunal review if such decisions are alleged to conflict with conditions of employment.

Before each of these tribunals, however, the organizations have unsuccessfully argued that the actions of the governing bodies are in effect legislative acts which fall outside the competence of the tribunals. This argument has been invoked in several cases where a staff member claimed before a tribunal that an action of the governing body which amended an existing personnel rule, such as eliminating a benefit, revising termination rules or altering pay scales and allowances, breached the staff member's conditions of employment. Without exception, because the jurisdiction clauses of these tribunals do not specifically insulate decisions of governing bodies from tribunal review, the tribunals have felt free to review actions of the governing bodies. While permitting such review, however, most but not all of the tribunal judgments have found the decisions being challenged not in violation of the rights of the staff members. In those cases where the decision of the governing body has been found to violate the staff member's rights, the tribunals have ordered damages or have ordered that the decision not be applied to the staff member in question.

An issue closely connected with jurisdiction is the law to be applied by a tribunal. Although the statutes of existing tribunals specify that the terms of appointment include staff rules and regulations adopted by the organization, the statutes do not indicate what substantive law applies to the interpretation of such terms, rules and regulations. Tribunals have reacted

to this by applying general principles of equity and administrative law, without relying upon the specific legal principles of any particular member country or legal system. These general principles are a mixture of legal and equitable concepts.

One question of applicable law which has produced controversy at existing tribunals concerns the concept in employment relations of "acquired rights". This concept, which has no developed counterpart in common law countries, springs from civil service principles of some European countries as a stated but undefined limitation on the government's ability to unilaterally alter existing employment terms to the detriment of civil servants who previously enjoyed the rights and benefits revoked.

The concept was introduced to international organizations when the League of Nations adopted a staff regulation stating that the staff regulations could be amended, but without prejudice to the "acquired rights" of League officials. Similar staff regulations have since been adopted by most major international organizations including the UN, the ILO, the OECD and the Specialized Agencies, with the exception of the Bank and the Fund. All of such clauses authorize the governing bodies to change staff employment terms, but without prejudice to "acquired rights".

Since the concept of "acquired rights" is not defined anywhere, it has been subjected to various interpretations. Generally, tribunals have rejected extreme positions which have advocated that the concept prevents an organization from making any changes to employment terms.

A tribunal with no specific limitation on its jurisdiction and the power to interpret its jurisdiction might conclude that some version of acquired

rights is applicable to the Bank and therefore limits the ability of the Governors, the Executive Directors or the management to change employment terms as to existing staff, even though in the Bank's case there is no personnel policy which refers to acquired rights.^{1/} Accordingly, if the Bank wishes to ensure that the Governors and the Executive Directors will not have their decisions to change employment conditions reviewed by a tribunal, the statute of the tribunal should make this clear.

One additional point should be made as to the scope of jurisdiction. If the Bank creates a tribunal, whether it be with restricted or unrestricted jurisdiction, it will not necessarily mean that personnel decisions of the Executive Directors or Governors will not be challenged by staff. This is because under the Articles of Agreement the Bank does not have general immunity from lawsuits in national courts. The Bank has taken the position that national courts lack jurisdiction to hear suits brought by staff against the Bank because the action of the court could constitute interference in the internal affairs of the Bank not permitted by the Articles. If decisions of the Executive Directors or Governors cannot be reviewed by a tribunal, no doubt a staff member in contending that a national court should accept jurisdiction over the Bank would argue that there is a judicial void which national courts should fill. If decisions of the Executive Directors or Board of Governors can be

^{1/} The Pension Plan provides that it cannot be amended so as to deprive participants of benefits theretofore "vested" under the Plan by reason of prior service or for which contributions have been made.

reviewed by the tribunal, but the staff member disagrees with the tribunal's judgment, he may still seek to challenge the decisions in a national court.

Finally, a decision regarding the jurisdiction of an administrative tribunal relating to the Bank should take account of possible effects on the International Monetary Fund.

Below are examples of the range of possible jurisdiction clauses, with the choice among them depending upon the policy decision on the extent of jurisdiction felt appropriate.

A. Type: Review of management actions but not those of the Executive Directors or Governors.

1. "The tribunal shall be competent to hear complaints alleging misapplication by the President or staff of the terms and conditions of employment, including retirement provisions, of staff members but shall not be competent to hear complaints arising from decisions by the Board of Governors or the Executive Directors.

Remarks: Jurisdiction is narrow and is intended only to permit review of the application or misapplication to an individual of personnel policies as they may be in effect from time to time. An example would be a termination case where the staff member alleged the Director of Personnel did not comply with the existing termination policy. Review would not extend to decisions of the Executive Directors or Governors in any form.

B. Type: Review of actions affecting staff made at any level, but excluding changes specified to be not subject to review.

2. "The tribunal shall be competent to hear complaints alleging non-observance of the terms and conditions of employment of staff members, including the staff retirement provisions; provided, however, the tribunal shall not be competent to hear complaints arising from decisions of the Board of Governors or the Executive Directors and due implementation thereof which the Board of Governors or the Executive Directors have specified to be not subject to review."

Remarks: This version permits review of any decision within the Bank which allegedly violated a staff member's rights except if the Executive Directors or Governors have specifically decided to remove the issue from review. For example, if the Executive Directors felt it was necessary to make basic changes in personnel policies, such as substantial modifications in compensation and benefits policies, they could remove their decision from review by the tribunal, if they so wished.

C. Type: Reviews of actions not specifically limited.

3. "The tribunal shall be competent to hear complaints alleging non-observance of the terms and conditions of employment of staff members, including staff retirement provisions."

Remarks: This version is substantially the same as the jurisdiction base of the UN and ILO tribunals. There is no specific limitation on the tribunal's powers to review decisions at any level which affect staff members' rights.

4. "The tribunal, having due regard to vested rights, shall be competent to hear complaints alleging non-observance of contracts of employment of staff members or of the terms of their appointment, including conditions of employment and staff retirement provisions."

Remarks: This provision is broader than the UN or ILO tribunal because it specifically requires the tribunal to take vested or acquired rights into consideration. It prevents an organization from arguing that acquired rights are never to be taken into account. Since other tribunals have considered the issue of acquired rights without such language in their jurisdictional clauses, it is doubtful that such language is necessary if an organization wants its tribunal to deal with such issue. If, however, an organization wants to preclude a tribunal from dealing with acquired rights cases, then restrictive jurisdictional language of the type found in Category A or, to some extent, B, is necessary.

OFFICE MEMORANDUM

CK u keep?
(We buy one in file) B,

TO: Mr. Robert S. McNamara, President

DATE: June 1, 1979

FROM: Lester Nurick, VPG, and Martijn J.W.M. Paijmans, VPAOP

P
7/16/3/2

SUBJECT: The Bank and an Administrative Tribunal; the Staff Association and the Executive Directors~~CONFIDENTIAL~~
DECLASSIFIED

NOV 30 2012

WBG ARCHIVES

Attached is a draft, dated today, of a memorandum describing the main issues raised in connection with the establishment of an administrative tribunal. The memorandum is intended primarily to acquaint you, not only with the issues and their background, but also with the consequences of different courses of action.

As you know, we have to take decisions on what should be the involvement of the Conference on Bank/Staff Rights and Obligations in working out the issues connected with the establishment of an administrative tribunal. The Chairman of the Staff Association sent you a memorandum on January 26 noting that, as a result of the ongoing work of the Conference, an administrative tribunal might be established within a reasonable time period and requesting that no action be taken on any Kafka recommendations that might be considered in breach of acquired rights until such a tribunal was available to staff. In your reply of February 27 you noted that you had asked the Legal Department to make a study on a priority basis of technical questions that would be involved in establishing such a tribunal, the product of this study to be made available to the Conference. The Legal Department has prepared papers on remedies, selection of judges and the legislative history of the United Nations Tribunal; the product of that work is reflected in the attached memorandum. These papers have been distributed to the Conference.

With your agreement, we have recently advised the Staff Delegation to the Conference that a fully worked out proposal for an administrative tribunal will not be sent to the Executive Directors for approval before the Conference has had an opportunity to consider the issues involved. As the Staff Association has advised the Executive Directors, it believes that an agreement in principle by the Executive Directors is warranted immediately.

As the memorandum points out, the proposal for a tribunal raises some very delicate and important problems, primarily in relation to the extent of its jurisdiction and its power to review decisions by the Executive Directors and the Board of Governors. It is clear that the Staff Association will want the tribunal to have the power to review decisions by the Executive Directors and the Board of Governors, including the power to deal with the recent decisions taken by the Executive Directors on compensation policy. It is likely that the Executive Directors will be sharply divided on this issue. It is interesting to note that of the eleven Executive Directors who spoke about a tribunal at the Board meeting last Thursday, two (Mr. Zain and Mr. Madinga) implied that Executive Directors' decisions should not be subject to review and one (Mr. El-Naggar) implied that they should be subject to review. The Executive Directors for the U.S., U.K., Germany, France, Japan and India did not refer to the tribunal at all.

June 1, 1979

As for procedure, we suggest that we handle the matter substantially as we handled the proposal for the establishment of IFC, IDA and IIIA, but coupled with the steps necessary to obtain comments from the Staff Association.

As to the procedure, we suggest that the matter be handled as follows:

1. Subject to your approval, after you review the attached issues paper we immediately prepare a modified version of the issues paper which would, in an objective way, list the issues and describe the background and implications but would not contain any conclusions or recommendations.
2. This issues paper would then be provided to the Legal Rights Conference asking that their comments be submitted so that such comments could be taken into consideration by management in finalizing the study of the possible introduction of a tribunal requested by the Executive Directors. These comments would be restricted to a consideration of the adequacy of the presentation of the issues, their background and their consequences; they would not include conclusions or recommendations.
3. We would then finalize the study for submission to the Executive Directors, taking into account the comments of the Conference.
4. The study would be circulated to the Executive Directors and simultaneously to the Staff Association so that they can formulate their views.
5. After a suitable interval, we would have an informal meeting of the Executive Directors to discuss procedure. If the Executive Directors agree, we would schedule a series of meetings (possibly seminars) with the Executive Directors on individual issues, with the staff preparing further papers on each of the issues if that seems appropriate; comments from the Staff Association would also be given to the Executive Directors.

Mr. Nurick believes that in view of the highly sensitive and controversial issues involved any timetable would be too speculative to be useful. Therefore, none is attached.

Attachment

REVISED CONFIDENTIAL DRAFT
June 1, 1979

DECLASSIFIED
NOV 30 2012
WBG ARCHIVES

TO: Mr. Robert S. McNamara
FROM: Lester Nurick
SUBJECT: The Bank and an Administrative Tribunal

This memorandum discusses the major issues which need to be resolved if the Bank decides to establish an administrative tribunal or tie into an existing tribunal. In particular, it discusses

- (a) the current situation, including a discussion of litigation pending in the U.S.;
- (b) the advantages and disadvantages of joining an existing tribunal (e.g., the UN Tribunal or the ILO Tribunal) or creating a new one;
- (c) the jurisdiction to be conferred upon the tribunal, including the issue of acquired rights and retroactivity, possible limitations on jurisdiction, remedies and appeals;
- (d) the mechanics for establishment of a tribunal, e.g., selection of judges, administration and rules;
- (e) the tribunal and lawsuits against the Bank.

Current Situation

The Conference on Bank/Staff Rights and Obligations established last September, composed of staff and management representatives, has been examining, among other things, the terms and conditions of employment at the Bank to ascertain whether they should be enforceable by means of staff access to an independent tribunal. Events outside the Conference are moving faster than the pace of the Conference itself, so that, although the unanimous view of participants in the Conference is that some form of independent administrative tribunal will be recommended, the Conference has not yet started to consider detailed recommendations.

There are three events which make it desirable promptly to consider the establishment of a binding mechanism to hear and determine employment disputes at the Bank. First, a lawsuit (Broadbent v. OAS) was brought in the local federal court a year ago by seven staff members of the OAS who had been terminated due to a reduction in force required by cuts in the OAS budget. Although the OAS administrative tribunal reviewed the terminations and awarded each of the employees damages for breach of contract, the employees are suing for reinstatement and additional damages averaging \$500,000 each. The OAS is claiming immunity. The Bank is not a party to the Broadbent case, but we have participated as amicus curiae along with several other international organizations, including the U.N., because the suit might have the result that international organizations which do not have absolute immunity from lawsuits may be subjected to litigation of employment cases in courts of the U.S. and possibly other countries as well.

The second event was the release of the Kafka report and the adoption by the Executive Directors of the changes in compensation policy and practices. As the Chairman of the Staff Association has stated, the issues raised are

fundamental for the staff. The question is whether the adoption of these changes has created a breach of the terms of employment of staff members, and in particular, whether staff have a contractual right to the continuance of certain employment terms, such as methods of setting salary levels or computing tax reimbursement, which cannot be amended without the consent of each staff member adversely affected. The point of the staff is that these changes are being made at a time when it is not clear whether U.S. courts will hear Bank employment cases, and at a time, moreover, when the Bank has not established a tribunal empowered to make binding decisions in such cases.

The third event, which has brought the other two into sharper focus, is the lawsuit against the Bank filed in early March by George Novak in local federal court. Novak, an American L level professional, was terminated for unsatisfactory service. He charged discrimination before our Appeals Committee, which unanimously found that he had failed to prove it. His court suit charges violation of various U.S. civil rights statutes on the grounds of discrimination because of age and nationality. We believe (as does the Staff Association) that Novak has a very weak case on the merits, but if the U.S. court grants our motion to dismiss for lack of jurisdiction, the staff will have little chance of getting claims of breach of contract heard by any independent body if no tribunal has been empowered to hear them. As a result the Staff Association has hired a Washington lawyer and has filed an amicus brief to contest the Bank's motion to dismiss.

These events raise an important question which almost all international organizations have faced, namely, whether there should be a judicial mechanism to render binding decisions in staff administrative disputes. All large international organizations, other than the international financial organizations, have answered this question affirmatively and have chosen to establish or use existing administrative tribunals, and to resist attempts to have internal staff issues litigated in national courts.

It might be possible to convince all national courts to dismiss on the grounds of lack of jurisdiction actions brought by staff against the Bank (following our contention in the Novak case) and at the same time not to establish a tribunal, with the result that staff members would have no independent forum anywhere to judge their claims.*

In the long run, however, that would not, in my view, be appropriate for the Bank. If national courts do not take jurisdiction and there is no tribunal, the Bank will be charged with being oblivious to principles of fairness and its relations with its staff will suffer. If national courts do take jurisdiction** the outcome of such suits will be influenced by national laws and policies, and conflicting judgments on similar issues are likely to occur in different jurisdictions. Political pressures may influence courts in some countries. This would make it difficult for the Bank to apply personnel policies uniformly to all staff.

The better approach for any international organization is a tribunal independent of any one member country's laws and procedures which would apply the internal law of the organization uniformly and with a better understanding of the Bank's processes and objectives than local courts would have. A tribunal would also provide greater protection against lawsuits in national courts, although as discussed below it would not absolutely assure that a national court would not take jurisdiction of an employee suit against the Bank.

* The IMF is totally immune from suit. Thus, IMF staff members will remain in that position unless the IMF establishes a tribunal.

** Under its Articles of Agreement, actions can be brought against the Bank in the courts of any country in which the Bank has an office or has issued securities.

Existing Versus New Tribunal

If the principle that the Bank should submit employment cases to an independent tribunal for binding decisions is accepted, the first issue is whether it should be an existing administrative tribunal or a new tribunal created by the Bank alone or possibly with the Fund and the IDB.

There are several existing international organization tribunals, including ones at the UN, ILO, EEC, NATO, Council of Europe, OECD and OAS, but the only ones whose statutes would empower them to accept Bank cases are the ILO and UN tribunals. The ILO tribunal was originally established in 1927 as the tribunal of the League of Nations. The statute of the ILO tribunal permits any intergovernmental international organization approved by the ILO Governing Body to submit disputes between the organization and its staff to the jurisdiction of the tribunal. A number of international organizations headquartered in Europe, including the FAO, ITU, UNESCO, WHO and GATT, have tied into the ILO tribunal.

The UN administrative tribunal was established in 1949. Although its statute differs somewhat from that of the ILO, it is quite similar in concept, jurisdiction and powers.* The UN tribunal statute provides for extension of its jurisdiction to a specialized agency by an agreement between the specialized agency and the UN Secretary-General. Under the provisions of the statute, the agreement must provide that the Bank will be bound by judgments of the tribunal and be responsible for payment of awards against it and share the administrative costs of the tribunal. A few other

* The UN General Assembly has proposed examination of the possibility of merging the UN and ILO tribunals into a single entity. The ILO is cool to this.

specialized agencies have tied into the UN tribunal, including ICAO in Montreal and IMCO in London.

If the Bank decided to tie into an existing tribunal, the UN tribunal would seem preferable to the ILO's. This is due to several reasons. First, the Bank is, after all, a specialized agency of the UN and as such has entered into an international agreement to cooperate and exchange information with the UN. No similar formal or even informal arrangement exists with the ILO. Second, the ILO tribunal does not deal with pension cases as all UN common system organizations refer such matters to the UN tribunal. If the Bank tied into the ILO tribunal pension cases would have to be dealt with separately due to the ILO's lack of expertise. Tying into the UN tribunal would not cause such a split. Third, the U.S. is not a member of the ILO and may well not want the Bank to be subject to a tribunal to which the U.S. cannot appoint judges. Lastly, there would be logistic problems of dealing with the ILO tribunal in Geneva, even if sessions could be arranged in Washington.

Assuming then that the most appropriate existing tribunal would be the UN tribunal, the issue centers on the advantages and disadvantages of using the UN tribunal as against establishing a new tribunal.*

* Our Fund colleagues say that the Fund is not considering a tribunal, although it is inevitable that Bank action in this regard will affect the atmosphere within the Fund. The same can be said for the IDB. There is thus a possibility that a Bank tribunal would evolve into a joint Bank-Fund tribunal or even a tribunal open to all the international financial institutions. For present purposes, however, it is assumed that a Bank tribunal would be established solely by the Bank.

The advantages of tying into the UN tribunal are that it is a known entity which is established as a workable institution with a thirty-year body of cases. Negotiations for submission of Bank cases to the UN tribunal would be simple, unless the Bank wanted to change some of the basic elements of the UN system. If the Bank were willing to take the UN tribunal's statute as it is, it would not have to decide how to deal with provisions on jurisdiction, selection of judges, remedies, limitation of damages, costs, appeal mechanism and rules of procedure, etc., some of which are bound to be controversial. While the agreement between the UN and the Bank would allow for some special provisions, such as when jurisdiction over Bank cases would commence, whether Washington sessions would be held and whether further appeal would be allowed (a committee composed of UN members decides if certain types of cases can go on to the International Court of Justice), the tribunal and its statute could be accepted in their present form.

If, however, the Bank wants to change some basic features of the UN system, say, regarding jurisdiction and judges, then it would probably be necessary, first, to agree thereon with the Secretary-General and, second, to obtain the approval of the General Assembly.

Another convenience of the UN tribunal is that the Bank could submit to its jurisdiction relatively quickly. Although the consent of the Board of Governors would be required in view of Article V, Section 2(b)(v) of the Articles,* the whole process could probably be managed in a few months after approval by the Executive Directors and submission to the Board of Governors.

* Under this provision the making of arrangements to cooperate with other international organizations (other than of a temporary and administrative character) requires the approval of the Board of Governors.

Setting up the Bank's own tribunal, on the other hand, will involve not only the time to agree on detailed provisions, but also to locate suitable judges and get the machinery in place with proper staff.* Another advantage is that the UN tribunal is a known entity, accepted by the organizations which use it, their staff and virtually all of the member countries that belong to the Bank. While some of its decisions, like any judicial body, have produced opposition, no responsible group after thirty years is calling for its abolition. While it is very difficult to summarize the law which has been decided by the tribunal, and even if one could, it would not provide much evidence on how it will decide controversies in the future with different judges, it is generally agreed that the tribunal has been fair to both the organization and the staff, while allowing the organization a sufficient amount of administrative flexibility. The UN tribunal has been criticized, however, by the staff as being too pro-administration. Since the ILO tribunal has been viewed by the ILO staff as more pro-staff than the UN tribunal, some Bank staff might seek to tie into the ILO tribunal solely for that reason.

The security of tying into an existing tribunal like the UN's must be compared with the situation the OAS is going through with its tribunal. The OAS set up its own tribunal in 1971 modelled very closely on the statutes of the ILO and UN tribunals. For several years the tribunal worked fairly well and issued decisions acceptable to both the organization and the staff. Recently, however, the OAS has become the center of a political controversy between the

* It is possible to tie into the UN tribunal for a limited period of time until the Bank could establish its own tribunal, but pulling out of the UN tribunal would be difficult if rulings favorable to the Bank or the staff were made by the tribunal. That would induce one side to want to remain.

U.S. and Latin America on who should pay for the OAS' budget, with the U.S. moving to reduce its share from 66% to 49%. At the same time the OAS came under attack for what some members felt were excessively high salaries and benefits. The result was a forced reduction in staff and the refusal of the OAS General Assembly to pass a budget to pay cost-of-living increases specifically required by the OAS staff rules. Various staff members of the OAS brought claims against the OAS before its tribunal as a consequence. The tribunal, based on principles it applied in holding it a breach of staff rights to remove a regulation on seniority, found that the OAS Secretary-General's refusal to pay salary parity with the UN, as required by OAS staff rules, was a violation of an obligation existing on the organization. This has caused a major constitutional crisis at the OAS because the OAS General Assembly has refused so far to pass a budget with amounts to pay the benefits the tribunal says the staff are legally entitled to.* Responsible members of the OAS Secretariat have questioned whether the OAS tribunal should be abolished.

* The League of Nations Assembly refused to pay an adverse award rendered by its tribunal in 1946 as one of its last acts. This was severely criticized and when it was suggested in 1954 that the UN General Assembly had the same power, the issue went before the International Court of Justice. The ICJ held the UN General Assembly was compelled to pay awards made by the tribunal since the General Assembly had given the tribunal the power to make binding judgments. If the OAS General Assembly continues not to pay for the staff benefits, the outcome may well be similar to the 1946 League of Nations action. Due to the OAS' immunities, however, this might mean merely that the OAS tribunal judgment would be unenforceable. If a similar crisis ever developed out of a Bank tribunal decision, it is not clear if the Bank could prevent attachment of its assets in a national court to enforce the tribunal's decision. This is due to the fact that the Bank can be sued.

The OAS experience shows a disadvantage of establishing a new tribunal, namely that such a tribunal may lack the restraint shown by an existing tribunal and permit itself to get into confrontations with the organization or its members. Although a careful choice of judges could help avoid such a situation, the UN tribunal would be an advantage in that it has been restrained and generally has avoided issuing decisions which could produce a confrontation with the UN General Assembly.

The disadvantages of tying into the UN tribunal chiefly involve its effect on the Bank's independence. Although the UN tribunal would judge disputes between the Bank and its staff primarily on the basis of the staff rules in effect within the Bank, the tribunal would no doubt make comparisons with the employment law and practices of the UN common system. If UN staff are found by the tribunal to have certain rights, such as rights to benefits or the right to strike, Bank staff may consider such rights applicable to them as well, since, if they brought a claim, the same tribunal would likely reach a similar conclusion as to their rights.

It is also a disadvantage that the Bank and its staff would have little control over the statute and mechanics of the UN tribunal. Thus, the Bank cannot reasonably expect to select new judges on the tribunal (several of whom are close to retirement) who would appreciate the Bank's special circumstances and purposes. Already we have indications from one judge on the UN tribunal that she considers the Bank to be much more restricted in its ability to change employment terms than is the UN. Such preconceived ideas may be hard to dispel. Further, if UN tribunal judgments became politically

motivated, either due to the selection of political judges* or if the UN General Assembly amended the tribunal's statute in a political manner, the Bank's only alternative would be to pull out of the UN tribunal.

Another disadvantage of the UN tribunal is that it is inherently objectionable that the Bank, which has been careful to keep its distance from the UN on staff matters, would be subject to binding decisions of a UN judicial organ. In nearly every other way, including avoidance of the International Court of Justice in Articles interpretation and loan disputes, the Bank has stood aside. To submit to the jurisdiction of the tribunal created by the UN seems to go against a policy the Bank has strived for years to maintain.

On balance the advantages of tying into the UN tribunal seem to be outweighed by the disadvantages. Although the convenience and relative stability of the UN tribunal are attractive, it is doubtful that they would compensate for possible long term detrimental effects on the Bank which association with the UN tribunal could produce. Aside from the possible loss of independence, tying into the UN tribunal would subject Bank personnel matters to scrutiny by an organ of an organization which has an entirely different complexion and objectives than the Bank. Although all members of the Bank are members of the UN, the converse is not true. Although the number of cases per year to go through a Bank tribunal should average less than ten if the Bank's experience parallels other organizations, the overall benefits for the institution, its staff and its members should justify a separate tribunal.

* Since UN judges are appointed by the UN General Assembly, it is almost certain that geographic and political considerations will lead to selection of at least one judge from Eastern Europe or the Soviet Union. The current judge from this area is from Hungary.

Bank Tribunal

A. Jurisdiction; Retroactivity

Any proposal for a tribunal raises as a basic question the issue of jurisdiction, or more specifically, the related issues of acquired rights, retroactivity and remedies. The Staff Association, supported by opinions of their outside counsel, has asserted that the recent changes in compensation policy and practices have violated the staff's acquired rights and consequently the Staff Association would want the tribunal's jurisdiction to cover the issues arising from these changes, including a recognition of the doctrine of "acquired rights".

This section considers these jurisdictional issues; first it describes the jurisdiction of existing tribunals and then it describes a number of possible alternative ways in which these issues might be handled. It is important to note that the extent of the jurisdiction to be conferred upon a tribunal is for the Bank itself to decide.

The statutes of all tribunals specify the tribunal's jurisdiction. (Those of the UN and ILO are attached as Annex I.) The provision in the ILO tribunal statute, which was taken over from the statute of the League of Nations tribunal, is typical in this regard and provides:

"The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case."

Jurisdiction also extends to claims brought by third parties asserting rights through a staff member, such as a widow or widower. (The jurisdiction of the OAS tribunal closely parallels that of the ILO tribunal.)

The provision in the UN tribunal statute is as follows:

"The tribunal shall be competent to hear and pass judgment upon applications alleging non-observation of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations."

There has been controversy, starting with cases arising under the League of Nations, as to whether the jurisdiction of the tribunals under these statutes permits them to overturn decisions of the governing bodies of the institutions involved. The situation is complicated by the fact that the Staff Rules of the ILO and the UN both provide that the governing body may amend employment terms but without prejudice to the "acquired rights" of staff. The OAS staff rules do not have such a limitation on the amendment power. The League of Nations tribunal found in the Mayras case (1946) that the Assembly of the League could not amend the regulations to change the separation benefits current at the time of the staff member's appointment. In a much criticized action, the League of Nations Assembly refused to implement that decision.

Because of the League of Nations affair, the question whether the UN tribunal should have jurisdiction to review decisions of the General Assembly amending staff rules was debated in 1949 in connection with the creation of the UN tribunal. The Committee recommending the tribunal's statute to the General Assembly stated:

"... the Tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require. It was understood that the Tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary."

In the General Assembly the U.S. delegation proposed that the draft be amended to state that nothing in the statute could be construed to limit the authority of the General Assembly or the Secretary-General acting on instructions of the General Assembly to alter staff rules and regulations, inter alia, to reduce salaries, allowances and benefits to which staff members may have been entitled. This proposal was withdrawn because it was believed unnecessary in order to reserve sufficient flexibility to the General Assembly and the Secretary-General. It was noted that "the tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require." Because of this legislative history, the UN Legal Department takes the view that the UN tribunal should not review an action by the General Assembly of a major nature such as a general salary reduction. However, the UN tribunal itself has reviewed decisions of the governing bodies of two international organizations which have submitted to its jurisdiction, as have the ILO and the OAS tribunals.* The International Court of Justice has held in two advisory opinion that judgments of tribunals are binding on the organizations concerned even if they are wrong as a matter of law. No distinction was made by the Court between changes in employment terms made by the General Assembly and those made only on the

* The OAS tribunal has held that when the OAS Secretary-General does not pay cost-of-living increases required by the staff rules, the refusal of the OAS General Assembly to pass a budget providing for such increases does not excuse the organization's liability for the breach of contract. The OAS tribunal noted:

"The Tribunal ratifies its previous ruling that decisions of the General Assembly form part of the contracts and may not be rescinded unilaterally"

authority of the Secretary-General. Instead, the ICJ said

"It has been argued that an authority exercising a power to make regulations is inherently incapable of creating a subordinate body competent to make decisions binding its creator. There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by replacing the statute, that it can amend the statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted."

Wilmer, Cutler and Pickering take the view that there is no apparent obstacle to the assertion by the UN tribunal of jurisdiction over disputes relating to legislative acts of the General Assembly changing employment practices.

(Their opinion is attached as Annex II.)

If the Bank were to create a tribunal having a jurisdictional provision similar to those of the UN and ILO tribunals, it is likely that such a tribunal would take jurisdiction if a staff member alleged his rights had been violated even if the action complained of had been approved by the Executive Directors. Therefore, if the Bank wanted to limit the jurisdiction of the tribunal to exclude review of decisions of the Executive Directors and the Board of Governors, the tribunal statute should make this clear.

B. Jurisdictional Alternatives

The Bank will have to decide the issue of jurisdiction. The main alternatives are as follows:

(a) It could be stated that the purpose of the tribunal is to pass on actions by the President in implementing and executing staff personnel policies, but without interfering with the powers of the Executive Directors to adopt or change personnel policies. This could be done by expressly limiting the tribunal's jurisdiction to the interpretation and enforcement of the Bank's employment contracts and employment regulations as they exist from time to time, subject to the express right of the Executive Directors to make prospective changes in the Bank's general employment policies, without liability to any employee for so doing. If this course is followed, it would have the effect of barring the application by the tribunal of any "acquired rights" principle if to do so would conflict with a decision taken by the Executive Directors.

(b) Instead of excluding action by the Executive Directors generally from the jurisdiction of the tribunal, the exclusion as desired could be derived either by defining in detail the subjects open to review by the tribunal or, conversely, by listing the subjects in respect of which the tribunal would not have jurisdiction. In the latter case, for example, it could be stated that the tribunal would not have the power to pass on changes in compensation practices approved by the Executive Directors, including such matters as choice of comparators and cost-of-living practices.

(c) The tribunal could be given the broad power of review, as in the UN tribunal; but in order to preserve some measure of freedom for the Executive Directors to protect fundamental interests of the Bank under changing circumstances,

it could also be provided that the tribunal would have no jurisdiction over decisions by the Executive Directors which they have determined to be in the fundamental interest of the Bank, possibly by a qualified majority.

(d) Finally, the tribunal could be given the broad power of review as in the UN tribunal and other tribunals, without limitation.

The Staff Association obviously would prefer alternative (d) and would argue that restrictions of the kind described in (a), (b) and (c) would make the existence of a Bank tribunal meaningless or almost so.

A related matter that will have to be considered before a tribunal is established is whether the existing Personnel Manual and other documents expressing personnel policy and practice first should be recast into a more formal set of staff rules and regulations. This question is currently being examined by the Conference on Bank/Staff Rights and Obligations. The issue is that the existing personnel documents often contain statements of general policy as well as rights and obligations, without always distinguishing which is which. With a tribunal the Bank's flexibility in employment matters will not only depend on the tribunal's jurisdiction but also on the provisions of the personnel rules which the tribunal will review. For example, if a staff member brings a complaint before the tribunal that his promotion has been improperly denied, the tribunal will examine the personnel rules on promotions. If these rules do not provide clearly for management discretion in promotion decisions, the concern would be that the tribunal might substitute its judgment for management's on whether a particular promotion should be made. If, however, management's discretion is provided for, the tribunal's review would be expected to be limited to procedural defects (e.g., failure to follow agreed procedures) or basic substantive defect (e.g., lack of rational basis for decision).

Consequently, it might be necessary not only to define the scope of jurisdiction of the tribunal but also to recast some personnel rules into more precise staff regulations. This need not be done prior to establishing a tribunal although it would be advisable to review key areas of personnel rules simultaneously with the creation of a tribunal to insure that management discretion is clearly specified when required. The issue of the Bank's ability to change employment rules is one of those areas where a specific personnel rule could be enacted prior to a tribunal commencing its work.

C. Retroactivity

The second important jurisdictional issue is retroactivity. When the UN tribunal was established in 1949, its statute provided that it would hear complaints which arose only from January 1, 1950. The OAS tribunal, created in 1971, also was given jurisdiction to hear cases arising only after its creation. The issue the Bank will have to face is whether cases before its tribunal should relate to claims arising only after the creation of the tribunal or before as well.*

There are several ways to deal with this issue. First, retroactivity could be rejected. That would not necessarily exclude review of all the recent changes if the tribunal were established before the change in question becomes effective. If it is decided to exclude review of the recent changes, and the tribunal came into being before some of the changes had become effective, it might be necessary to add a special transitional provision to the statute excluding the changes from review. No doubt the staff would object to this. Second, retroactivity could run until January 1, 1979, thus including the recent changes but excluding several decisions of the Appeals Committee which went into operation in September 1977. Third, retroactivity could run back to various dates in 1978, such as September 1, 1978 (which would include two termination cases which went through the Appeals Committee), March 1, 1978 (which might open up review of the change in travel policy), or January 1, 1978 (which would allow review of all decisions of the Appeals Committee).

* The issue also exists if the Bank ties into the UN tribunal, because the agreement between the Bank and the UN can specify that the UN tribunal can hear Bank cases which arose on or after a certain date in the past.

D. Remedies

Many staff, of course, will want to endow a tribunal with the full range of powers of a court, including the power to compel the organization to revoke a decision and restore the applicant to his original status and order payment of damages as well. Organizations creating tribunals, however, have not given tribunals such wide powers and in one notable case involving the UN tribunal, discussed below, have even amended the statute of a tribunal to restrict its remedies.

The provision of the UN tribunal on remedies is fairly similar in substance to that of the ILO, OECD and OAS tribunal. It provides:

"If the tribunal finds that the application is well founded it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of notification of the judgment, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity."

As can be seen, the UN tribunal is limited substantially in the relief it can order to remedy a breach of employment terms. Although it has the power to order rescission of a decision like termination or a refusal to pay a benefit, the Secretary-General specifically is permitted to refuse to rescind the decision if he determines "in the interest of the United Nations" that the applicant's sole relief should be compensation, which must be fixed by the tribunal in advance and stated in the judgment. Further, compensation

cannot exceed two years' net salary, except in exceptional circumstances.*

We understand that the UN tribunal has never exceeded the two year net salary figure.

With variations, the alternative of paying monetary damages instead of rescinding an action also exists in the statutes of the tribunals of the ILO (no limit on damages), OECD (no limit on damages) and OAS (maximum three years' net salary). For the UN, OECD and OAS it is the Secretary-General who makes the decision in his discretion whether to pay compensation rather than to rescind the improper act. Under the ILO tribunal statute, however, the tribunal decides if compensation should be awarded if rescinding a decision "is not possible or advisable."

While all of these clauses limit in various degrees the relief which a staff member may receive, they are a means of permitting the organization latitude in dealing with its staff. Even at the ILO where the tribunal itself determines if compensation should be awarded as alternative relief, the tribunal has not confronted the organization with a rescission order, such as in a termination case, when rescission would serve no constructive purpose.

Another issue of relief is the awarding of costs. Neither the statutes nor rules of existing tribunals (except the OECD tribunal) mention awarding costs or legal fees, but in practice the tribunals have awarded certain costs to a winning staff member. At the UN the tribunal adopted a

* The original version of the UN statute did not have a limitation on damages nor could the Secretary-General refuse to give effect to a tribunal order to rescind a decision except in exceptional circumstances. The statute was amended in 1955 to its present form, however, after the tribunal in the McCarthy era had found several terminations improper after staff members had refused to testify to the U.S. Congress on allegedly Communist activities and the Secretary-General had fired them for unsatisfactory service.

Statement of Policy that in view of the simplicity of the tribunal's proceedings it would not, as a general rule, grant costs to applicants. It would award costs, however, if they were shown to have been unavoidable and reasonable in amount and if they exceeded normal expenses of litigation before the tribunal. Since the UN provides a list of staff lawyers to argue before the tribunal, the tribunal has stated it will not award legal fees unless the case involves special difficulties.* In a recent case, the staff member hired Surrey, Karasik & Morse, which presented a bill for over \$100,000. The tribunal awarded \$2,000. In creating a Bank tribunal, it would be wise to provide what costs, if any, shall be awarded.

* The UN's internal policy is that members of the UN Legal Department are not permitted to represent staff in front of the tribunal. This restriction appears to exist at most organizations.

E. Mechanics - Judges, Administration and Rules

Establishment of a Bank tribunal will involve numerous decisions about judges, proceedings, rule of procedure and staffing. Most of these decisions are unlikely to involve difficult policy choices or deviation from fairly standard provisions inserted in statutes of tribunals of other organizations.

The questions about selection of judges are who will select them and with what participation by representatives of the staff. At the UN there are seven judges (they are called "members") on the tribunal, three of whom sit on a particular case. No two judges come from the same country. At the ILO there are three judges and three deputies, all of whom are of different nationalities. Tribunal judges generally are appointed for fixed term by the governing body of the organization (i.e. UN General Assembly, ILO Conference, OECD Council, OAS General Assembly). Staff associations do not have an institutionalized role in the selection of judges and at the UN, for example, the staff does not even have any advance knowledge about the selection. The final appointment, therefore, is left to the governing body after receiving nominations from member countries. Organizations differ on whether judges need to have legal training but generally agree that judges should come from outside the organization, thus excluding former officials and staff.

If the Bank were to follow the example of other organizations, the Executive Directors would select six or seven judges for renewable terms of three years, without the participation of the staff or management in the selection process. Judges would be of different nationalities and would likely represent the major legal systems and geographic areas. The Bank, however, would be free to choose judges in other ways. For example, the statute could

provide for selection by the Governors or a committee of the Governors. Selection could also be made by the Executive Directors from a list of candidates nominated by management with the concurrence of, or prior consultation with, the Staff Association. One benefit of selection by the Governors is that the tribunal would be made more attractive to the Fund because the selection would be made by a largely common body.

A Bank tribunal would require a small staff including a registrar (or Executive Secretary) and at least one secretary. The practice at other organizations is that such a staff works exclusively on tribunal matters and has a separate departmental budget. Expenses include transportation and fees for judges, staffing, administration and publication of judgments.*

Statutes of existing tribunals contain very few details about rules of procedure other than to state the period of time in which applications for relief must be filed, to require that applicants first exhaust the internal appeals process (the counterpart of the Bank's Appeals Committee) and to allow oral proceedings (which are frequently omitted at the UN). Detailed rules of procedure generally are adopted by the tribunal itself and cover the internal organization of the tribunal, the requirements of pleadings and submission of documents. Unlike litigation in national courts such as those of the U.S., proceedings are rather simple and consist almost entirely of an application, an answer and reply. Production of documents and witnesses generally may be accomplished only with the consent of the tribunal, so that extensive discovery of evidence would be unusual. Presentation of the case is thus more continental in character, without pretrial motions, delays and depositions found in U.S. court proceedings.

* The 1978 budget for the UN tribunal, which serves several organizations with a total staff several times that of the Bank's, was \$118,000.

Class actions, common in U.S. litigation, are not permitted, but tribunal rules do permit parties similarly situated to intervene in a case. This can produce cases with hundreds of staff presenting the same issue, which is one characteristic of a class action.

In general, the organizational provisions adopted for other tribunals seem to be easily adaptable to a Bank tribunal. They seem to have provoked few disputes and lend themselves to quick resolution of cases. In fact, it appears most tribunals are able to decide a case within several months after the application is filed by the staff member.

F. Appeal from the Tribunal

Although a tribunal is created to render final decisions on administrative matters, the two major tribunals have provisions in their statutes which permit a limited form of appeal to the International Court of Justice. The possibility of seeking an advisory opinion from the ICJ is created under the UN Charter and is open to the UN and its specialized agencies, including the Bank.* Both the UN and ILO have stipulated in their tribunal's statutes that any such advisory opinion will be treated as binding.

Under the procedures set out in the UN tribunal's statute, a member state, the Secretary-General or the staff member involved may apply to a special UN committee and claim that the tribunal has exceeded its jurisdiction or competence, erred on a matter of law relating to the UN Charter or committed a fundamental error in procedure. If the committee decides there is a substantial basis for the application, an advisory opinion is sought from the ICJ.

The ILO tribunal statute also provides for seeking an advisory opinion of the ICJ, but only when the ILO Governing Body challenges a decision of the ILO tribunal on jurisdiction or considers the tribunal decision vitiated by a fundamental fault in procedure.

The UN mechanism has been used once by the Secretary-General and once by a staff member. The ILO mechanism has been used once. Although the grounds for obtaining an ICJ opinion are similar, the machinery is quite different at the

* The 1947 Agreement between the Bank and the UN specifically authorizes this.

UN and ILO. The UN machinery involves a special committee to screen out appropriate cases.* At the ILO, on the other hand, the governing body itself initiates requests and determines on its own which cases should go on to the ICJ.

If the Bank tied into the UN tribunal, a decision would have to be made whether the UN appeal mechanism should be used. Not all organizations which use the UN tribunal have agreed to do so, and some have agreed to consider the tribunal decision unappealable. If the Bank did tie into the UN tribunal, it would have the option of not using the ICJ appeal route. If the Bank did accept it, one of the grounds for appeal, whether a decision was incorrect as a matter of law under the organization's charter, would appear to conflict with Article IX of the Bank's Articles, which gives the Executive Directors the power to interpret the Articles. To this extent the Bank would have to modify its use of the UN mechanism.

If the Bank set up its own tribunal an important question would be whether some type of review mechanism would be appropriate. Although it must be emphasized that neither the UN nor ILO mechanism allows an appeal if the tribunal judgment is wrong as a matter of law (apart from error which violates the organization's charter), a limited review on grounds of procedural defects may provide a useful safety valve since judgments are otherwise binding.

Owing to the Bank's status as a specialized agency, the Bank could appeal to the ICJ, either after going through its own ad hoc committee like the UN's or through the Executive Directors similarly to the ILO's machinery.

* The UN committee is composed of the twenty-five member states which are represented on the General Committee, which is composed of the President of the General Assembly, the seventeen General Assembly Vice President and seven main committee chairmen. The screening committee is thus composed of states chosen primarily for political purposes, although the actual delegates are usually legal officers from such states.

Review by the ICJ is only one form of review. The Bank might set up almost any other type of review machinery, including an ad hoc committee of jurists, a standing committee of the Executive Directors or even all the Executive Directors or the Governors themselves. However, the latter ideas would be inconsistent with the notion of an independent, binding tribunal whose decisions cannot be overturned by the Executive Directors or the Governors. Such mechanism would lack the independence and strictly legal character which the ICJ provides and would interject an element not found at any other organization with a tribunal.

A Tribunal and Lawsuits Against the Bank

If the Bank decides to tie into or establish a tribunal, the possibility that national courts will concurrently assert jurisdiction over employment suits is reduced, but it remains. The charters of most international organizations provide for immunity from suit, but the Articles of the Bank provide that actions can be brought against it in any country where it has an office or has issued securities. As stated above, we are arguing in the Novak case that the Articles should be interpreted so as to oust national courts in employment disputes. This question will not be resolved for several months or possibly several years if appeals are taken. There is also the possibility that the District Court will accept jurisdiction, but dismiss Novak's complaint on other grounds. That would mean the Bank could not appeal the jurisdictional question. Even if we get a decision that United States courts do not have jurisdiction over employee suits, the question remains to be tested in other countries where actions can be brought against the Bank.

One issue is whether the Bank should delay establishing a tribunal until we obtain a definitive judgment of United States courts on whether they have jurisdiction over Bank employment matters. A major justification for establishing a tribunal is to provide staff an independent mechanism to enforce their rights. If United States courts do have jurisdiction, this reason for a tribunal is diminished. Access to both a tribunal and a United States court might mean that a staff member could engage in jurisdiction shopping for the most favorable outcome, or might begin a new action in a court after his claim was rejected by a tribunal. However, it is difficult to say whether the possibility of concurrent jurisdiction in United States courts would have much practical

significance. Courts might require the staff member to raise the matter first with the Bank tribunal and require that great weight be given to the tribunal's decision in a subsequent court case. Further, litigating employment matters in a United States court would be expensive and would discourage most staff from resorting to court, unless of course the Staff Association decided to become involved, as in the Novak case.

There are several possibilities to eliminate or reduce the exercise of concurrent jurisdiction. First, Article VII, Section 3 might be amended to limit the types of lawsuits which can be brought against the Bank to those in connection with the Bank's borrowings or its purchase or sale of securities. This limitation has been included in the articles of the Asian Development Bank. However, we understand that the Inter-American Development Bank recently considered amending its articles in the same way, but could not obtain the support of the United States Government. Another possibility is that the Executive Directors would issue an interpretation under Article IX that Article V, Section 5 prevents national courts from accepting jurisdiction of employment disputes under Article VII, Section 3. An interpretation of this kind might be difficult to obtain from the Executive Directors. Finally, the Executive Directors could include in their resolution approving a tribunal language on the undesirability of concurrent jurisdiction in national courts. Such an expression of intent and the existence of a remedy before a tribunal might influence a national court to decline jurisdiction, although serious limitations on the jurisdiction of the tribunal or the amount or nature of the damages it can award might influence a court to accept jurisdiction. And finally, the Executive Directors in approving a tribunal could make it clear that if national

courts did exert concurrent jurisdiction they would consider whether to abolish the tribunal.

**UNITED NATIONS
ADMINISTRATIVE TRIBUNAL**

STATUTE AND RULES

Provisions in force with effect from 3 October 1972



UNITED NATIONS

New York, 1972

STATUTE OF THE ADMINISTRATIVE TRIBUNAL
OF THE UNITED NATIONS

as adopted by the General Assembly by resolution 351 A (IV) on 24 November 1949 and amended by resolution 732 B (VIII) on 9 December 1953 and by resolution 957 (X) on 8 November 1955

ARTICLE 1

A Tribunal is established by the present Statute to be known as the United Nations Administrative Tribunal.

ARTICLE 2

1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words "contracts" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.

2. The Tribunal shall be open:

(a) To any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death;

(b) To any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.

4. The Tribunal shall not be competent, however, to deal with any applications where the cause of complaint arose prior to 1 January 1950.

ARTICLE 3

1. The Tribunal shall be composed of seven members, no two of whom may be nationals of the same State. Only three shall sit in any particular case.

2. The members shall be appointed by the General Assembly for three years, and they may be re-appointed; provided, however, that of the members initially appointed, the terms of two members shall expire at the end of one year and the terms of two members shall expire at the end of two years. 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. The Tribunal shall elect its President and its two Vice-Presidents from among its members.

4. The Secretary-General shall provide the Tribunal with an Executive Secretary and such other staff as may be considered necessary.

5. No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service.

6. In case of a resignation of a member of the Tribunal, the resignation shall be addressed to the President of the Tribunal for transmission to the Secretary-General. This last notification makes the place vacant.

ARTICLE 4

The Tribunal shall hold ordinary sessions at dates to be fixed by its rules, subject to there being cases on its list which, in the opinion of the President, justify holding the session. Extraordinary sessions may be convoked by the President when required by the cases on the list.

ARTICLE 5

1. The Secretary-General of the United Nations shall make the administrative arrangements necessary for the functioning of the Tribunal.

2. The expenses of the Tribunal shall be borne by the United Nations.

ARTICLE 6

1. Subject to the provisions of the present Statute, the Tribunal shall establish its rules.

2. The rules shall include provisions concerning:

(a) Election of the President and Vice-Presidents;

(b) Composition of the Tribunal for its sessions;

(c) Presentation of applications and the procedure to be followed in respect to them;

(d) Intervention by persons to whom the Tribunal is open under paragraph 2 of article 2, whose rights may be affected by the judgement;

(e) Hearing, for purposes of information, of persons to whom the Tribunal is open under paragraph 2 of article 2, even though they are not parties to the case; and generally

(f) Other matters relating to the functioning of the Tribunal.

ARTICLE 7

1. An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.

2. In the event of the joint body's recommendations being favourable to the application submitted to it, and in so far as this is the case, an application to the Tribunal shall be receivable if the Secretary-General has:

(a) Rejected the recommendations;

(b) Failed to take any action within the thirty days following the communication of the opinion; or

(c) Failed to carry out the recommendations within the thirty days following the communication of the opinion.

3. In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous.

4. An application shall not be receivable unless it is filed within ninety days reckoned from the respective dates and periods referred to in paragraph 2 above, or within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant. If the circumstance rendering the application receivable by the Tribunal, pursuant to paragraphs 2 and 3 above, is anterior to the date of announcement of the first session of the Tribunal, the time limit of ninety days shall begin to run from that date. Nevertheless, the said time limit on his behalf shall be extended to one year if the heirs of a deceased staff member or the trustee of a staff member who is not in a position to manage his own affairs, file the application in the name of the said staff member.

5. In any particular case the Tribunal may decide to suspend the provisions regarding time limits.

6. The filing of an application shall not have the effect of suspending the execution of the decision contested.

7. Applications may be filed in any of the five official languages of the United Nations.

ARTICLE 8

The oral proceedings of the Tribunal shall be held in public unless the Tribunal decides that exceptional circumstances require that they be held in private.

ARTICLE 9

1. If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.

2. Should the Tribunal find that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits, order the case remanded for institution or correction of the required procedure. Where a case is remanded, the Tribunal may order the payment of compensation, not to exceed the equivalent

of three months' net base salary, to the applicant for such loss as may have been caused by the procedural delay.

3. In all applicable cases, compensation shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under article 14.

ARTICLE 10

1. The Tribunal shall take all decisions by a majority vote.

2. Subject to the provisions of articles 11 and 12, the judgements of the Tribunal shall be final and without appeal.

3. The judgements shall state the reasons on which they are based.

4. The judgements shall be drawn up, in any of the five official languages of the United Nations, in two originals, which shall be deposited in the archives of the Secretariat of the United Nations.

5. A copy of the judgement shall be communicated to each of the parties in the case. Copies shall also be made available on request to interested persons.

ARTICLE 11

1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.

2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.

3. If no application is made under paragraph 1 of this article, or if a decision to request an advisory opinion has not been taken by the Committee, within the periods prescribed in this article, the judgement of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court.

4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to

request advisory opinions of the Court. The Committee shall be composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. The Committee shall meet at United Nations Headquarters and shall establish its own rules.

5. In any case in which award of compensation has been made by the Tribunal in favour of the person concerned and the Committee has requested an advisory opinion under paragraph 2 of this article, the Secretary-General, if satisfied that such person will otherwise be handicapped in protecting his interests, shall within fifteen days of the decision to request an advisory opinion make an advance payment to him of one-third of the total amount of compensation awarded by the Tribunal less such termination benefits, if any, as have already been paid. Such advance payment shall be made on condition that, within thirty days of the action of the Tribunal under paragraph 3 of this article, such person shall pay back to the United Nations the amount, if any, by which the advance payment exceeds any sum to which he is entitled in accordance with the opinion of the Court.

ARTICLE 12

The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties.

ARTICLE 13

The present Statute may be amended by decisions of the General Assembly.

ARTICLE 14

The competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Each such special agreement shall provide that the agency concerned shall be bound by the judgements of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency and shall include, inter alia, provisions concerning the agency's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

→ L.F. Administrative Tribunals

1972 EDITION

INTERNATIONAL LABOUR ORGANISATION
ORGANISATION INTERNATIONALE DU TRAVAIL

Statute and Rules of Court
of the Administrative Tribunal

Statut et Règlement
du Tribunal administratif

International Labour Office
Bureau international du Travail
Geneva — Genève

Statute of the Administrative Tribunal of the International Labour Organisation

Adopted by the International Labour Conference on 9 October 1946
and Amended by the said Conference on 29 June 1949

ARTICLE I

There is established by the present Statute a Tribunal to be known as the International Labour Organisation Administrative Tribunal.

ARTICLE II

1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.

2. The Tribunal shall be competent to settle any dispute concerning the compensation provided for in cases of invalidity, injury or disease incurred by an official in the course of his employment and to fix finally the amount of compensation, if any, which is to be paid.

3. The Tribunal shall be competent to hear any complaint of non-observance of the Staff Pensions Regulations or of rules made in virtue thereof in regard to an official or the wife, husband or children of an official, or in regard to any class of officials to which the said Regulations or the said rules apply.

4. The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organisation is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution.

5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure.

6. The Tribunal shall be open—
(a) to the official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death ;
(b) to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.

7. Any dispute as to the competence of the Tribunal shall be decided by it, subject to the provisions of article XII.

Administrative Tribunal

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ARTICLE III

1. The Tribunal shall consist of three judges and three deputy judges who shall all be of different nationalities.

2. Subject to the provisions set out at paragraph 3 below, the judges and deputy judges shall be appointed for a period of three years by the Conference of the International Labour Organisation.

3. The terms of office of the judges and deputy judges who were in office on 1 January 1940 are prolonged until 1 April 1947 and thereafter until otherwise decided by the appropriate organ of the International Labour Organisation. Any vacancy which occurs during the period in question shall be filled by the said organ.

4. A meeting of the Tribunal shall be composed of three members, of whom one at least must be a judge.

ARTICLE IV

The Tribunal shall hold ordinary sessions at dates to be fixed by the Rules of Court, subject to there being cases on its list and to such cases being, in the opinion of the President, of a character to justify holding the session. An extraordinary session may be convened at the request of the Chairman of the Governing Body of the International Labour Office.

ARTICLE V

The Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be public or *in camera*.

ARTICLE VI

1. The Tribunal shall take decisions by a majority vote; judgments shall be final and without appeal.

2. The reasons for a judgment shall be stated. The judgment shall be communicated in writing to the Director-General of the International Labour Office and to the complainant.

3. Judgments shall be drawn up in a single copy, which shall be filed in the archives of the International Labour Office, where it shall be available for consultation by any person concerned.

ARTICLE VII

1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.

2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.

Administrative Tribunal

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3. Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration.

4. The filing of a complaint shall not involve suspension of the execution of the decision impugned.

ARTICLE VIII

In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him.

ARTICLE IX

1. The administrative arrangements necessary for the operation of the Tribunal shall be made by the International Labour Office in consultation with the Tribunal.

2. Expenses occasioned by sessions of the Tribunal shall be borne by the International Labour Office.

3. Any compensation awarded by the Tribunal shall be chargeable to the budget of the International Labour Organisation.

ARTICLE X

1. Subject to the provisions of the present Statute, the Tribunal shall draw up Rules of Court covering—

- (a) the election of the President and Vice-President ;
- (b) the convening and conduct of its sessions ;
- (c) the rules to be followed in presenting complaints and in the subsequent procedure, including intervention in the proceedings before the Tribunal by persons whose rights as officials may be affected by the judgment ;
- (d) the procedure to be followed with regard to complaints and disputes submitted to the Tribunal by virtue of paragraphs 3 and 4 of article II ; and
- (e) generally, all matters relating to the operation of the Tribunal which are not settled by the present Statute.

2. The Tribunal may amend the Rules of Court.

ARTICLE XI

The present Statute shall remain in force during the pleasure of the General Conference of the International Labour Organisation.

Administrative Tribunal

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It may be amended by the Conference or such other organ of the Organisation as the Conference may determine.

ARTICLE XII

1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding.

WILMER, CUTLER & PICKERING
1666 K STREET, N.W.
WASHINGTON, D. C. 20006

716/3/1

May 9, 1979

MEMORANDUM FOR LESTER NURICK, ESQ.,
VICE PRESIDENT AND GENERAL COUNSEL,
INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Subject: Jurisdiction of United Nations Administrative
Tribunal to Review Acts by the General Assembly

You have asked us to consider whether the United Nations Administrative Tribunal ("the Tribunal") has jurisdiction to review decisions of the U.N. General Assembly ("the Assembly") as they relate to the rights of staff members of the U.N. Secretariat. We address only the jurisdictional question in this memorandum; our memorandum of May 1, 1979, on the legality of several proposed changes in the Bank's employment practices, examines the considerations that would affect the Tribunal's decision on the merits if it exercised jurisdiction. We have reviewed the provisions and legislative history of the U.N. Charter and of the Statute creating the Tribunal, the administrative decisions of the Tribunal, the pertinent opinions issued by the International Court of Justice (I.C.J.) and treatises and articles addressing this issue.

We conclude that there are no apparent restrictions on the Tribunal's jurisdiction to hear cases of this nature, although it is arguable that the intent of the Assembly in creating the Tribunal was to limit its competence to hear cases involving the alleged abridgement of "acquired rights" by actions of the Assembly.^{*/} It is clear that some legislative powers of the Assembly may be restricted by decisions of the Tribunal and it would seem to follow that the Tribunal has jurisdiction over claims that these restrictions have been violated. It is not clear, however, whether the Tribunal would choose to exercise jurisdiction over such disputes.

I. The Provisions of the Statute of the United Nations Administrative Tribunal

The Statute creating the Tribunal provides that:

The Tribunal shall be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words "contracts" and "terms of appointment" include all pertinent regulations and rules in

^{*/} There is no doubt that the Assembly, which created the Tribunal by a legislative act, has the power to change the jurisdiction of the Tribunal at any time with a superceding legislative act. See Effect of Awards of Compensation Made By the U.N. Administrative Tribunal, Advisory Opinion of July 13, 1954, I.C.J. Reports 1954, p. 47, 61 (hereinafter cited as "Effect of Awards"). Our analysis assumes that the terms of the present Statute of the Tribunal will remain in effect.

force at the time of alleged non-observance, including the staff pension regulations. */

The Statute further provides that:

In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal. **/

This broad grant of jurisdiction to the Tribunal should be considered in conjunction with the legislative history of the Statute. The Assembly's "Fifth Committee" reported the proposed Statute to the Assembly with the statement that:

... the Tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require. It was understood that the Tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary. ***/

The views of the Fifth Committee were reiterated during the Assembly's consideration of the Statute when an amendment proposed by the United States explicitly

*/ Statute of the United Nations Administrative Tribunal (November 24, 1949), Article 2, Paragraph 1.

**/ Id., Article 2, Paragraph 3.

***/ Report of the Fifth Committee, A/1127, Paragraph 9, reproduced in U.N.G.A.O.R., 4th Session, S.R. Plenary Meeting and Annexes, Agenda Item #44.

recognizing the authority of the General Assembly to alter the rules and regulations^{*/} was withdrawn because Article 2(1) of the Statute was "broad enough to give sufficient scope to the General Assembly . . . to carry out the necessary functions of the United Nations, in spite of the fact that such action might require changes and reductions in the existing benefits granted to the staff."^{**/}

Thus, the Assembly expressed its concern that the creation of the Tribunal not be viewed as restricting its legislative authority to alter the employment practices of the Organization. But there is no clear

^{*/} The proposed amendment provided that "Nothing in this Statute shall be construed in any way as a limitation on the authority of the General Assembly . . . to alter at any time the rules and regulations of the Organization including, but not limited to, the authority to reduce salaries, allowances and other benefits to which staff members may have been entitled." A/C.5/L.4 Rev. 2, reproduced in U.N.G.A.O.R., 4th Session, Fifth Committee, Annexes, Agenda Item #44, p. 165, as cited in Memorandum from Erik Suy to Helmut Debatin dated October 3, 1977 at p. 3.

^{**/} A/C.5/SR.214, paragraph 40, as cited in Memorandum from Erik Suy to Helmut Debatin dated October 3, 1977 at p. 3. It appears that this sensitivity regarding the authority of the General Assembly was the result of the earlier decision by the League of Nations Administrative Tribunal in Mayras v. Secretariat of the League of Nations, Judgment No. 24 (February 25, 1946), which purported to limit the authority of the League's Assembly to legislate changes in employment practices. See M. Akehurst, The Law Governing Employment In International Organizations (1967) at pp. 210-14; Statement By the U.N. Secretary-General, I.C.J. Pleadings, United Nations Administrative Tribunal, at pp. 221-26.

evidence of the Assembly's intention to limit the jurisdiction of the Tribunal, as opposed to protecting its legislative power by limitations of substantive law. In view of this ambiguity, the broad terms of the grant of jurisdiction support the assertion of jurisdiction by the Tribunal over such controversies, even if the claims are ultimately destined to fail on the merits.

II. The Decisions of the International Court of Justice and the U.N. Tribunal

In the Effect of Awards case, the I.C.J. gave an advisory opinion at the request of the Assembly that the Assembly could not refuse to give effect to an award of compensation made by the Tribunal to a staff member whose employment had been terminated without his consent. The I.C.J. stated that the Assembly, as part of the U.N., is legally bound by judgments of the Tribunal against the Secretary-General, who represents the Organization.^{*/} The Court specifically rejected the contention that the Assembly's legislative powers, particularly its power over the budget, would be unacceptably constrained by such decisions of the Tribunal:

^{*/} See Effect of Awards, supra at p. 53.

[T]he function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements. The question, therefore, to be decided by the Court is whether these obligations comprise the awards of compensation made by the Administrative Tribunal in favor of staff members. The reply to this question must be in the affirmative. */

The Effect of Awards case considered the effect of Tribunal decisions regarding disputed actions of the Secretary-General, not the Assembly. **/ It, therefore, does not speak directly to the propriety of review by the Tribunal of acts of the Assembly. Nevertheless, it has implications which are germane to this issue. First, the I.C.J. recognized the concept of obligations of the Organization that were not subject to being lawfully overturned by the Assembly. This in turn implies that acts of the Assembly can be the subject of employment disputes,

*/ Id. at p. 59.

**/ Before its request for an advisory opinion, however, the Assembly enacted changes in the Staff Regulations which expanded the Secretary-General's powers to dismiss employees. See M. Cohen, The United Nations Secretariat -- Some Constitutional and Administrative Developments, 49 Am. J. Int. L. 295, 309-12 (1955). To our knowledge, these changes were never challenged before the Tribunal.

which, under the Tribunal's grant of jurisdiction, would be subject to review by the Tribunal. Second, the I.C.J. clearly held that insofar as disputes encompassed within the Tribunal's grant of jurisdiction are concerned, it is of no significance that the Tribunal was created, and could be abolished, by the Assembly. As long as such a judicial organ remains in existence, its judgments in the context of particular disputes are paramount to those of the Assembly. These views would appear to contradict any contention that the Tribunal is not competent to review legislative acts of the Assembly.

The Tribunal has never, to our knowledge, decided any case which challenges the legality of any act of the Assembly. Neither are we aware of any decision in which it chose not to exercise jurisdiction over such a dispute. It has, however, accepted jurisdiction over other, non-U.N., cases which involved its review of actions of the legislative body of an organization. Thus, in Puvrez v. Secretary-General of the International Civil Aviation Organization, Judgment No. 82 (December 4, 1961, the Tribunal reviewed on the merits a claim based upon the Secretary-General's enforcement of the I.C.A.O. Council's decision to alter the rules regarding dependency

allowances. ^{*/}

It would, therefore, appear that the pertinent decisions of the I.C.J. and the Tribunal do not inhibit the Tribunal from exercising the authority, under its jurisdictional grant, to review acts of the Assembly in the context of individual labor disputes.

III. Conclusion

In summary, we believe that, while there can be no clear-cut answer to your question, there is no apparent obstacle to the assertion by the U.N. Tribunal of jurisdiction over disputes relating to legislative acts of the U.N. General Assembly. Although the legislative history of the Statute creating the Tribunal might support an argument that jurisdiction was not granted over disputes involving legislative acts changing employment practices, the Statute's provisions and the relevant judicial decisions would provide substantial support for the Tribunal if it

^{*/} See also Mankiewicz v. Secretary-General of the International Civil Aviation Organization, Judgment No. 110 (October 20, 1967) (review of same legislative act of I.C.A.O. Council). Cf. Poulain d'Andevy v. Food and Agriculture Organization, I.L.O. Judgment No. 51 (September 23, 1960) (I.L.O. Tribunal review of F.A.O. Council's decision to amend non-resident's allowance); Lamadie v. International Patent Institute, I.L.O. Judgment No. 365 (November 13, 1978) (I.L.O. Tribunal review of rules applied to staff after merger of I.P.I. into European Patent Office; the Tribunal explicitly rejected the contention that it was not competent to review the dispute).

chose to entertain such cases.

As stated earlier, however, this judgment regarding the jurisdiction of the Tribunal has no bearing upon the consideration by the Tribunal of the merits of such controversies. Although we do not address that issue in this memorandum, the legislative history of the Statute of the U.N. Tribunal clearly supports the view that in creating such a Tribunal, the Assembly had no intent to relinquish its legislative authority to alter rules and regulations affecting the U.N. staff.

WILMER, CUTLER & PICKERING