WORLD BANK / INTERNATIONAL FINANCE CORPORATION

OFFICE MEMORANDUM

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TO: Mr. Robert S. McNamara, President DATE: June 1, 1979

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

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

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CONFIDENTIAL

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.

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

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.

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* 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.*

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* 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.

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* 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

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* 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.

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* 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.

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* 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

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* 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).

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* 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

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* 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.

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* 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.

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* 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

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* 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.

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* 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.