Judgment No. 1999-1

Mr. "A", Applicant v. International Monetary Fund, Respondent

(August 12, 1999)

Introduction

1. On August 11 and 12, 1999, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Agustín Gordillo, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "A", a former contractual employee of the Fund.

2. Mr. "A" contends that the Fund violated its internal law and principles of international administrative law when it engaged him on a contractual basis to perform functions of the same nature as those performed by staff members, renewed his contract several times over a continuous period of nine years, and then allowed his contract to expire. Applicant seeks as relief that he be installed as a member of the staff, retroactive to 1993, with all attendant rights and benefits.

3. The Fund has responded to Mr. "A"'s Application with a Motion for Summary Dismissal, contending that the Administrative Tribunal lacks jurisdiction *ratione personæ* and *ratione materiæ* over Applicant's claim because its Statute limits access to those individuals who are members of the staff and to those claims that challenge decisions taken in the administration of the staff. Applicant has filed an Objection to the Motion, arguing that the Fund's allegedly illegal classification of Applicant as a contractual employee, rather than as a member of the staff, should not determine whether the Tribunal has jurisdiction to decide the issue of that alleged illegality.

The procedure

4. On April 16, Mr. "A" filed an Application with the Administrative Tribunal. In accordance with the Tribunal's Rules of Procedure, the Application was transmitted to the Respondent on April 19, 1999. On April 22, 1999, pursuant to Rule XIV, para. 4[1], the Office of the Registrar issued a summary of the Application within the Fund.

---

[1] Rules XIV, para. 4 provides:

> "In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund."

5. On May 18, 1999, the Respondent filed a Motion for Summary Dismissal under Rule XII[2] of the Rules of Procedure, seeking dismissal of the Application for lack of jurisdiction under Article II, para. 1 and para. 2 a, b, and c.[3] On May 19, 1999, the Motion was transmitted to Applicant.

---

[2] Rule XII provides:

"*Summary Dismissal*

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.

2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.

3. The complete text of any document referred to in the motion shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VIII, paragraphs 2 and 3, shall apply to the motion.

4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Applicant.

5. The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him.

6. The complete text of any document referred to in the objection shall be annexed thereto in accordance with the rules established for the application in Rule VII. The requirements of Rule VII, Paragraphs 4 and 8, shall apply to the objection to the motion.

7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy thereof to the Fund.

8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests."

[3] Article II provides in pertinent part:

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

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

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

2. For purposes of this Statute:

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

(continued)

6. Under Rule XII, para. 5[4], the Applicant may file an Objection to a Motion for Summary Dismissal within thirty days from the date on which the Motion is transmitted to him. Applicant's Objection was filed on June 18, 1999.

7. The Tribunal decided on August 2, 1999 that oral proceedings, which Applicant had requested, would not be held, as the condition laid down in Rule XIII, para. 1[5] that they be "necessary for the disposition of the case" had not been met.

8. Pursuant to para. 2 of Rule XII, a Motion for Summary Dismissal suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. Hence, the present consideration of the claim is confined to the jurisdictional issues of the case. Its substantive aspects are referred to only to the extent necessary for disposition of the jurisdictional issues.

The factual background of the case

9. Mr. "A" was initially engaged by the Fund as a consultant under its Technical Assistance Program for a two-year period commencing in January 1990. His letter of appointment provided:

> "You will not be a staff member of the Fund and will not be eligible for any benefits other than those specified in this letter."

It stated in addition:

---

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

c. the expression "member of the staff" shall mean:

(i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;

(ii) any current or former assistant to an Executive Director; and

(iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund; . . ."

[4] Rule XII, para. 5 provides:

"The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him."

[5] Rule XIII, para. 1 provides:

"Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them."

> "This appointment can be terminated by you or the Fund on one month's notice, or by mutual agreement."

This basic contract was renewed several times, and apart from increases in Mr. "A"'s remuneration, the terms of his appointment remained unchanged.

10. Applicant's contract also provided that he would keep the same working hours and accrue annual leave on the same basis as a regular staff member. Likewise, he would be entitled, on the same terms as regular staff, to participate in the Fund's medical benefits plan; to receive employer contributions to medical and group life insurance plans; and to be eligible for spouse and dependency allowances, travel allowance, and travel insurance coverage. Mr. "A"'s remuneration was stated on the basis of annual gross salary, and -- unlike regular staff –the contract included the proviso that the Fund would not reimburse Applicant for any national, state or other taxes arising in respect of his remuneration.

11. Applicant was initially assigned to Department "1"[6], where he served until September 1993. There he headed missions; administered technical assistance for member countries; and commented on staff papers on behalf of the Department. Department "1"'s Director stated that in performing these functions, "Mr. ["A"] performed essentially the same work as the regular staff members who were Advisors in the Department during his tenure…"

12. Mr. "A" asserts that when he was first recruited in December 1989, he was told both by an Advisor in Department "1" and by an official of the Recruitment Division of the Administration Department that if his work was satisfactory he could be converted to regular staff at the end of the initial two-year period. When he inquired with his Department Head in November 1991 about a regular staff appointment, Applicant alleges that he was told that he would have to continue for one more year before a decision could be made.

13. Later, according to Mr. "A", it was suggested to him that if he were interested in obtaining a permanent position with the Fund, he should undertake "mobility" within the organization. To that end, Applicant in May 1993 wrote to an official of Department "2", expressing his interest in transferring to that Department. Applicant was reassigned to Department "2" in October 1993, where he continued his work as a headquarters-based consultant under the Technical Assistance Program until his final contract expired in February 1999.

14. In Department "2", Applicant served as the only consultant among the five members of his profession in his unit. The official in Department "2" responsible for supervising Mr. "A"'s work stated:

---

[6] Pursuant to the Fund's Decision on the protection of privacy and method of publication (December 23, 1997), the Fund departments in which Applicant worked will be designated by numerals.

> "Mr.["A"]'s work was materially the same as work done by other headquarters based full-time consultants and regular IMF staff members alike, on [Applicant's area of expertise], including going on missions to IMF member countries and providing advice to their government or central bank officials, alone or together with other IMF staff, preparing mission reports and memoranda . . ., and commenting on behalf of [Department "2"] on papers prepared by staff of other IMF Departments."

One of Applicant's Department "2"colleagues concluded that Applicant "performed essentially the same function as his colleagues who are regular staff members" and acted as a representative of Department "2" "in a manner indistinguishable" from these staff. Another commented that Mr. "A" was a "fully integrated member of the Department".

15. According to Applicant, shortly before transferring to Department "2" in 1993, the official charged with coordinating his unit of that Department held out the prospect of Mr. "A"'s being promoted to a supervisory position following an anticipated retirement in the Department in 1998. In March 1998, however, Applicant's Department Head allegedly told him that that position would not be filled and that any vacancies in the Department for new regular staff would be lower level positions likely not to be of interest to Applicant.

16. In August 1998, Applicant's Department Head allegedly informed him that the Fund intended to end his contractual employment. By letter of September 14, 1998, Applicant received another extension of his contract, with the notation that "this will be the final extension of your contract". This final contract expired by its terms February 26, 1999.

17. Applicant sought redress through several channels before filing his Application with the Administrative Tribunal on April 16, 1999. On January 14, 1999, in a letter to the Fund's Director of Administration, Applicant attempted to invoke the administrative review procedures prerequisite to filing a grievance, and asked that the Fund "formally recognize my status as regular staff." The Director of Administration replied on January 25, 1999, advising Applicant that (1) the grievance procedures did not apply to contractual employees such as himself; and (2) while Applicant would be entitled to arbitration under the established procedure for dispute settlement for contractual employees, if he sought to invoke that procedure, the Fund would take the position that the decision not to extend his employment contract fell outside the scope of the arbitration process, which is limited to claims that the Fund has failed to meet an obligation under the contract itself.

18. Thereafter, on February 4, 1999, Applicant requested that the Managing Director agree to submit the dispute directly to the Administrative Tribunal pursuant to Article V, para. 4[7] of the Statute. That request was denied on February 24, 1999. The following day,

---

[7] Article V, para. 4 provides:

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

Applicant filed a submission with the Fund's Grievance Committee, challenging the Fund's decision not to renew his contract and seeking that his status be converted to regular staff. On March 1, 1999, the Grievance Committee's Chairman replied, stating that recourse to the grievance procedures of GAO No. 31 are not available to contractual employees such as Applicant,[8] and noting also that a decision not to extend the contract of a contractual employee does not fall within the scope of the Fund's arbitration procedures.[9]

Summary of parties' principal contentions

Applicant's principal contentions

19. The principal arguments presented by Applicant in his Application and his Objection to the International Monetary Fund's Motion for Summary Dismissal are summarized below.

Applicant's contentions on the merits

20. The Fund's categorization of Applicant's employment status as a "contractual employee" is arbitrary and belies the actual nature of his work.

21. The Fund's termination of its employment relationship with Applicant is contrary to the Fund's Employment Guidelines on staff appointments under which he should have been categorized as a regular staff member. The position occupied by Applicant supported the basic institutional mission of the Fund; the basic skills required were those that do not change dramatically over a short period of time; and there was a need for continuity among staff performing these tasks. Contractual appointments, by contrast, are reserved by the Guidelines for the filling of temporary needs requiring specialized skills that Fund staff does not possess or for which there is not a continuing need.

---

[8] GAO No. 31, Section 7.01.1 (i) limits the Grievance Committee's jurisdiction in terms almost identical to those of Art. II of the Statute of the Administrative Tribunal.

GAO No. 31, Section 7.01.1 (i) provides:

> "7.01 W*ho May Submit a Grievance*
>
> 7.01.1 *Present and Former Staff Members.* Any present or former staff member shall have access to the Grievance Committee. For this purpose, the expression "staff member" shall mean (i) any person currently or formerly employed by the Fund whose letter of appointment, whether regular or fixed-term, states or stated that he or she shall be a member of the staff; . . ."

[9] The Grievance Committee Chairman presently also serves as the designated arbitrator for the Fund's contractual employees.

22. Principles of international administrative law require that international organizations not classify as an independent contractor an individual doing the work of an employee when that classification does not reflect the actual relationship of the parties.

23. On a number of occasions the Fund created and then disappointed Applicant's expectations of continued employment, on which he relied to his detriment.

24. Equity requires that Applicant's employment with the Fund not be terminated, as the expiration of his contractual appointment and associated medical insurance is a particular hardship to Applicant who must provide coverage for an ailing family member.

25. Applicant seeks the following relief: a) conversion of his status to regular staff as of January 2, 1993; b) "reinstatement" as a regular staff member with all attendant rights, privileges and benefits; c) the right to seek another Fund position if reinstatement in Department "2" is refused; d) severance pay "if no other position materializes"; e) retroactive payment for long-term service annual leave days; f) participation in the Fund's retirement program when he departs from the Fund; and g) such other relief as the Tribunal deems appropriate.

Applicant's contentions on jurisdiction

26. The Fund's classification of Applicant as a contractual employee was an arbitrary administrative act that ignores the facts and should not determine the exercise of the Tribunal's jurisdiction. The argument that the Tribunal does not have jurisdiction because Applicant was not a staff member presumes as true the very fact at issue.

27. The Tribunal should exercise jurisdiction over Applicant's claim because, if it does not, he will have no opportunity for review on the merits by any impartial adjudicatory body.

28. The international administrative law doctrine of *audi alteram partem,* i.e. every disputant is entitled to be heard, which is incorporated into the internal law of the Fund, requires that the Tribunal exercise jurisdiction over Applicant's claim.

Respondent's contentions set forth in its Motion for Summary Dismissal

29. The Application should be dismissed as irreceivable because the Tribunal has jurisdiction only over "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff" (Article II, para. 2.c.(i)). Applicant does not fall within this category of persons because his letter of appointment provided that he would not be a member of the staff. This limitation on the Tribunal's jurisdiction is both explicit and intentional.

30. The Application should be dismissed as irreceivable because the Tribunal's jurisdiction is limited to challenges to decisions "taken in the administration of the staff of the Fund" (Article II, para. 2.a.) and therefore precludes judicial interference with the recruitment and selection of Fund staff.

31. The IMFAT is a tribunal of limited jurisdiction. Article III[10] makes clear that the Tribunal shall not have any powers beyond those conferred under the Statute. Therefore, it has no general jurisdiction based on equity or any other grounds not expressly provided for by the Statute.

32. The remedy sought by Applicant, retroactive appointment to a regular staff position, is not contemplated by the IMFAT Statute and would undermine the Fund's employment regime.

33. The dual employment scheme of contractual and regular staff exists for legitimate organizational reasons, providing flexibility with respect to the deployment of human resources.

34. Applicant is bound by the terms and conditions of his letter of appointment as a contractual employee. The Fund must be able to rely on the terms of employment contracts as they are written and agreed upon.

35. The Fund's Employment Guidelines on categories of employment are guidelines to assist Fund departments and the Recruitment Division; they do not give rise to a legal entitlement on the part of an individual that he or she be appointed to the staff.

36. Applicant's appointment as a contractual employee was not subject to the procedural and substantive conditions required for appointment to a staff position, and therefore his claim that he should be classified retroactively as a staff member bypasses the prerequisites for career appointment, including that of due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

Consideration of the issues of the case

Categories of Fund employment

37. Three principal categories of employment exist within the Fund: staff appointments (both regular and fixed-term); contractual appointments; and vendor arrangements. The gravamen of Mr. "A"'s complaint is that, although he was employed on a contractual basis,

[10] "Article III

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

the nature and continuity of his work indicate that he should have held a staff appointment of indefinite duration.[11]

38. The Fund has adopted Guidelines, in 1989 and again in January of this year, designed to clarify the allocation of functions among staff members, contractual employees and vendor personnel. The 1989 Guidelines distinguish between staff and contractual appointments as follows. Positions that normally should be filled by staff members are those carrying out the basic institutional mission of the Fund; those supporting that mission and requiring skills that will not change dramatically over a short period of time and for which there is a need for continuity of staff; those in which the individual is required to act on behalf of the Fund; and those involving supervisory responsibilities. By contrast, positions that normally are to be filled on a contractual basis are those in which the Fund has little or no expertise, or the skills required are likely to change dramatically over time, and continuity within the staff

---

[11] Within the Fund, the classification "staff appointments" encompasses two sub-categories: appointments of finite duration ("fixed-term staff") and appointments of indefinite duration ("regular staff"). These are set forth in GAO No. 3, Rev. 6 (May 1, 1989) (Employment of Staff Members):

> "Section 3. *Types of Appointments*
>
> 3.01 *Regular Appointments.* Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members.
>
> 3.02 *Fixed-term Appointments.* Fixed-term appointments shall be appointments for a specified period of time. Persons holding fixed-term appointments shall be designated as fixed-term staff members."

Fixed-term appointments are generally used as a probation to test employees who are seen as having potential for a career with the Fund. Conversion to regular status depends on individual performance and the staffing needs of the organization. (Guidelines for Conversion of Fixed-Term Appointments.)

It is not disputed that both fixed-term and regular staff are within the definition of "member of the staff" for purposes of the jurisdiction *ratione personæ* of the Administrative Tribunal, which includes "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff." (Statute, Art. II, 2.c(i).) In Ms. "C", Applicant v. International Monetary Fund, Respondent, Judgment No. 1997-1 (August 22, 1997), the Tribunal entertained a challenge to the Fund's decision not to convert a fixed-term appointment to a regular staff appointment.

Applicant has made certain assertions apparently designed to suggest that he initially held a "fixed-term" rather than a "contractual" appointment with the Fund, thereby providing a predicate for his request for relief --- conversion to regular staff as of January 2, 1993. These assertions are not borne out by the terms of his contract or by the fact that his performance was regularly evaluated by way of the "Contractual Appointments Performance Report" rather than the Annual Performance Reports completed for "staff", fixed-term and regular alike. Applicant's reliance on the Guidelines for Conversion of Fixed-Term Appointments is misplaced; and, furthermore, any complaint that Mr. "A" should have been converted to regular staff as of January 1993 would now be untimely.

performing these tasks is not critical to their effective performance, as well as positions in which services are needed for only a relatively short period of time. According to the 1989 Guidelines, contractual appointees and vendor personnel generally should not perform the same tasks as staff members, except on a short-term basis or where individual circumstances warrant.

39. The Fund in its Motion for Summary Dismissal maintains that these Guidelines are intended to provide guidance to the Recruitment Division and Fund departments, but that they do not give rise to any legal entitlements on the part of individuals. The Fund's Motion, nonetheless, echoes the Guidelines' basic principles:

> "Appointments to the regular staff are intended to meet the long-term needs of the organization; in comparison, contractual employment is more flexible, in order to meet a particular work requirement, often in a specialized area for which there may be no long-term need."

The Fund also notes that ". . . staff members and contractual employees are both considered as employees of the Fund. . . ."

40. According to Respondent, the employment of staff and contractual employees differs with regard to a number of factors. For example, with respect to recruitment, no constraints exist regarding the geographical distribution of contractuals. Likewise, these employees are not subject to a competitive appointment process. With regard to compensation, greater flexibility is afforded to contractual employees, who are exempt from the salary structure that governs the remuneration of members of the staff.

41. In addition, staff members are subject to the strictures of the Fund's N Rules which, for example, restrict staff in engaging in political activity and outside employment, whereas contractual employees are not. Finally, staff members and contractuals have access to different avenues of dispute resolution: contractual employees have recourse to an arbitration procedure, while staff have access to the grievance procedure and the Administrative Tribunal.

42. In Department "2", asserts the Fund, Applicant provided technical assistance ("TA") functions as a contractual employee ". . . because the long-term need for these functions, and the particular . . . specialities in question, is uncertain; the use of contractual employees permits sufficient flexibility to adjust to changes in the demand for TA services by member countries". The Fund also points out that contractual employees performing TA services in Department "2" do not receive the same training, supervisory authority or career development opportunities as do members of the staff.

43. The appropriate allocation of personnel functions among the various categories of Fund employment has long been a matter of some controversy within the Fund[12] and presently is undergoing revision. Both the adoption of the 1989 Guidelines and the revised Policy on Categories of Employment[13] approved January 20, 1999 by the Fund's Executive Board have been prompted by concerns that contractual and vendor personnel may be performing functions for which there is a long-term need and that should be performed by Fund staff. The Fund in its Motion for Summary Dismissal acknowledges "anomalies in the current system of contractual employment", but maintains that these difficulties must continue to be addressed on a systemic basis rather than through the litigation of individual cases.

The Administrative Tribunal's jurisdiction *ratione personæ*

44. In its Motion for Summary Dismissal, the Fund contends that the Application should be dismissed as irreceivable on the grounds that, as a former contractual employee, Mr. "A" does not have standing to bring a case before the Administrative Tribunal. Therefore, argues the Fund, Applicant is not within the Tribunal's jurisdiction *ratione personæ*

45. The Tribunal's jurisdiction *ratione personæ* is prescribed by the following provision of Article II of the Statute:

> "Article II
>
> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> a. by a member of the staff challenging the legality of an administrative act adversely affecting him;
>
> . . .
>
> 2. For purposes of this Statute:
>
> . . .
>
> c. the expression 'member of the staff' shall mean:

[12] For example, the Fund's Ombudsperson has referred to "…the arbitrary and unfair treatment of contractual and vendor employees as a major systemic problem at the Fund…." (Nineteenth Annual Report of the Ombudsperson, December 10, 1998, pp. 7-8.)

[13] The 1999 revised Policy limits the cumulative duration of contractual appointments to a four-year maximum. While functions that are expected to be needed for two years or more are normally to be performed by employees on staff appointments, the Policy maintains flexibility with respect to headquarters-based TA experts, for whom individual circumstances may justify hiring on a contractual basis for more than two years. (Policy on Categories of Employment, January 20, 1999.)

(i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;

(ii) any current or former assistant to an Executive Director; and

(iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund;"

46. The question presented, therefore, is whether Applicant is a "person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff". (Art. II, para. 2.c.(i).) As noted above, Applicant's contract of employment expressly provided:

> "You will not be a staff member of the Fund and will not be eligible for any benefits other than those specified in this letter."

47. The Fund points out that exclusion of contractual employees from the Tribunal's jurisdiction is not only explicit, but also intentional. The Report of the Executive Board accompanying the Tribunal's Statute notes with respect to Article II:

> "Nor would persons employed under contract to the Fund have access to the tribunal."

(Report of the Executive Board, p. 15.) This view finds further support in the Statute's legislative history, which suggests that the exclusion of contractual employees from the Tribunal's jurisdiction *ratione personæ* was a considered choice of its drafters, reflecting a recognition that a separate dispute settlement mechanism exists for resolution of disputes with contractual employees. These disputes are likely to be of a different character than those with members of the staff, as their employment is governed by the terms of their contracts. By contrast, the terms and conditions of staff members' employment are fixed by the Fund's generally applicable regulations.[14]

48. Finally, it should be noted that the statutory provision defining the IMFAT's jurisdiction *ratione personæ* appears to be unique among international administrative tribunals in expressly predicating the Tribunal's jurisdiction on the language of the letter of

---

[14] GAO No. 3, Rev. 6 (May 1, 1989) Section 7.02(3) provides that the letter of appointment of each staff member shall include inter alia:

> "The statement that the staff member shall be subject to the Fund's administrative regulations, as amended and supplemented from time to time."

appointment, thereby leaving little room for doubt as to whether a particular individual is or is not a "member of the staff". [15] Applicant, nonetheless, has asked the Tribunal to look beyond the language of his letter of appointment to determine that he was a "de facto" member of the staff entitled to bring his complaint to the Administrative Tribunal.

The Administrative Tribunal's jurisdiction *ratione materiæ*

49. Respondent also contends that the Application should be dismissed as not falling within the Tribunal's jurisdiction *ratione materiæ*.

50. Article II limits the IMFAT's subject matter jurisdiction to challenges by a staff member to "the legality of an administrative act adversely affecting him". (Art. II, para. 1.a..) "Administrative act" is defined as follows:

> "Article II
>
> . . .
>
> 2. For purposes of this Statute,
>
> a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;"

The accompanying Report of the Executive Board comments:

> "This definition is intended to encompass all decisions affecting the terms and conditions of employment at the Fund, whether related to a staff member's career, benefits, or other aspects of Fund appointment, including the staff regulations set forth in the N Rules."[16]

(Report of the Executive Board, p. 14.)

---

[15] For example, the jurisdictional provision of the Asian Development Bank Administrative Tribunal, which is also quite narrowly drawn, is not as explicit as that of the IMFAT. It provides:

> "For the purpose of this statute, the expression "member of the staff" means any current or former member of the Bank staff who holds or has held a regular appointment or a fixed-term appointment of two years or more, . . ." (Statute of the ADBAT, Art. II, para. 2.)

[16] The By-Laws, Rules and Regulations of the Fund contain a Section N, "Staff Regulations", which sets out fundamental provisions governing recruitment and performance of staff members.

51. The limitations on the Tribunal's jurisdiction *ratione personæ* and *ratione materiæ* appear to be closely intertwined. By the terms of the Statute, actions constituting "administrative acts" are defined as restricted to those taken in the administration of the "staff". Hence, Fund actions taken with respect to others, for example, contractuals, are outside the scope of the Tribunal's jurisdiction *ratione materiæ*. Moreover, the "administrative act" at issue must adversely affect the "member of the staff" bringing the challenge to its legality. (Art. II, para. 1.a.).

52. The Fund notes the following comment in the Executive Board Report:

> "The statute would not allow unsuccessful candidates to the staff to bring claims before the tribunal."

(Report of the Executive Board, p. 15.) On the basis of this comment, the Fund argues that the Statute's jurisdictional provisions preclude "judicial interference with the recruitment and selection of staff" and that "staff appointments are not within the Tribunal's competence *ratione materiæ*."

53. In Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, Judgment No. 1996-1 (April 2, 1996), the IMFAT had occasion to consider the scope of its jurisdiction over matters preliminary to the hiring of a member of the staff. Although the Tribunal framed the question as one of jurisdiction *ratione personæ,* the decision is relevant to the issue of jurisdiction *ratione materiæ* as well.

54. In D'Aoust there was no question that the applicant was a member of the staff. Nonetheless, at the time of the act complained of, i.e. the decision to offer him a particular grade and salary, he was not yet a staff member. The Tribunal observed that once Mr. D'Aoust accepted the offer and thereby became a member of the staff, the grade and salary under which he was employed were determined by that offer:

> "It is therefore concluded that since the offer and acceptance of a particular grade and salary thereupon and thereafter affected him as a member of the staff, the Tribunal is competent to adjudge his case." (Para. 10.)

55. The Tribunal's decision in D'Aoust reveals that decisions taken by the Fund preliminary to an applicant's becoming a staff member may indeed be within the Tribunal's competence *ratione materiæ* as long as the challenged act affects the adversely affected individual in his capacity as a member of the staff. Mr. "A", by contrast, has never become a member of the Fund's staff.[17]

[17] In this respect, Applicant's case is distinguishable from that considered in Jorge O. Amora v. Asian Development Bank, Asian Development Bank Administrative Tribunal ("ADBAT") Decision No. 24 (1997), in

(continued)

The Administrative Tribunal as a tribunal of limited jurisdiction

56. In considering the issue of jurisdiction in this case, the Tribunal is mindful that international administrative tribunals are tribunals of limited jurisdiction and may not exercise powers beyond those granted by their statutes. This principle is enunciated in the first sentence of Article III of the IMFAT's Statute, which states:

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

According to the Report of the Executive Board:

> "The first sentence of this Article, in providing that the powers of the tribunal are limited to those set forth in the statute, states the general principle recognized in international administrative law that tribunals have limited jurisdiction rather than general jurisdiction.[5] As a consequence, administrative tribunals have competence only to the extent that their statutes or governing instruments confer authority to decide disputes. Thus, the statutory provision defining the competence of the tribunal is, at the same time, a prohibition on the exercise of competence outside the jurisdiction conferred.
>
> [5] See, e.g., the advisory opinion of the ICJ concerning the competence of the ILOAT in *Judgments of the Administrative Tribunal of the International Labour Organisation*, ICJ Reports (1956) 77, at p. 97."

(Report of the Executive Board, p. 16.)

57. Article IV of the Statute applies this general limitation on the IMFAT's powers to the specific issue of the Tribunal's competence to adjudge particular cases. While granting the Administrative Tribunal power to decide issues regarding its own competence, Article IV requires that these be settled "in accordance with this Statute":

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

The commentary notes that the Tribunal's task is to "interpret but not expand" its statutory authority:

---

which the applicant had already become a staff member before bringing a claim that he was entitled to the benefits of staff membership for a period preceding his appointment to the staff.

> "The tribunal would have the authority to determine its own competence within the terms of its statute. Comparable authority has been accorded to virtually every international administrative tribunal,[14] which is intended to allow the tribunal to interpret but not expand its competence with respect to a particular case.
>
> [14] E.g., UNAT Statute, Article 2(3); ILOAT Statute, Article II(7); WBAT Statute, Article III."

(Report of the Executive Board, p. 21.)

58. Finally, other limitations on the jurisdiction of the IMFAT are set forth in the third sentence of Article III, which provides for distribution of power among the Administrative Tribunal and the legislative and executive organs of the Fund, and in Article XIX, which grants to the Board of Governors the power to amend the Tribunal's Statute.

The third sentence of Article III provides:

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

The commentary emphasizes that the Tribunal "…must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization."[18]

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

This provision is consistent with well-established case law in which judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred. [Footnote omitted.] Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to

(continued)

59. That the Administrative Tribunal may not exercise powers beyond those conferred on it by the Statute is underscored by the fact that the IMFAT's Statute was adopted by the Board of Governors of the Fund (Resolution No. 48-1, Establishment of the Administrative Tribunal of the International Monetary Fund), and Article XIX provides that it may be amended only by that body:

> "Article XIX
>
> This Statute may be amended only by the Board of Governors of the Fund."

The accompanying commentary states:

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

(Report of the Executive Board, p. 41.)

> Does the nature of Applicant's allegation on the merits require the Tribunal to exercise jurisdiction in this case?

60. The principal issue raised by this case is whether the nature of Applicant's allegation on the merits, i.e. that he was illegally classified as a contractual employee when he should have been hired as a member of the staff of the Fund, requires the Administrative Tribunal to exercise jurisdiction over his claim even though its jurisdiction *ratione personæ* is limited to claims brought by members of the staff and its jurisdiction *ratione materiæ* is limited to challenges to the legality of decisions taken in the administration of the staff.

61. As reviewed above, the terms of the Statute's jurisdictional provision expressly define a "member of the staff" as "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff" (Art. II, para. 1.a.) and Applicant's letter of appointment expressly states that he "will not be a staff member of the Fund". Nonetheless, Applicant asks the Tribunal to look beyond the language of his letter of appointment to determine that he was a "de facto" member of the staff. He contends, furthermore, that the view that the Tribunal does not have jurisdiction because Applicant was not a staff member presumes as true the very fact at issue. Applicant argues

---

the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions. [Footnote omitted.]"

(Report of the Executive Board, p. 20.)

that the Fund's allegedly illegal classification of him as a contractual employee should not control the exercise of the Tribunal's jurisdiction.

62. On the Motion for Summary Dismissal, the question before the Administrative Tribunal is whether it shall exercise jurisdiction in this case. In making this determination, the Administrative Tribunal is presented with two alternatives. One is to enforce the language of the contract and deny jurisdiction on the basis of the narrowly drawn wording of the IMFAT Statute and the express language of Applicant's letter of appointment. The other alternative is for the Tribunal first to examine the merits of Applicant's claim, i.e. that he should be accorded the benefits of staff membership based on the nature and continuity of his work, and then decide as the result of that examination whether it may exercise jurisdiction *ratione personæ* and *ratione materiæ,* despite the language of the letter of appointment to the contrary.

> Must the Administrative Tribunal reach the merits of Applicant's claim in order to decide whether to exercise jurisdiction or may it rely on the language of Applicant's letter of appointment and the applicable jurisdictional provision of the Statute?

63. Other international administrative tribunals, interpreting different jurisdictional provisions, on occasion have determined that it was necessary to consider the merits of a claim in order to determine whether to exercise jurisdiction. In Joel B. Justin, Applicant v. The World Bank, Respondent, World Bank Administrative Tribunal ("WBAT") Decision No. 15 (1984), the WBAT was seized by an application alleging breach of contract, brought by an individual who had been notified of his "selection" for a particular post, but who later was denied employment by the Bank on the basis of his age and medical condition. The WBAT considered that:

> "23. The question whether or not the Applicant holds a contract of employment with the Respondent and, therefore, is a staff member under Article II of the Statute can be decided only after a substantive consideration of the case. . . ."

64. The WBAT concluded after a detailed examination of the factual circumstances, principles of contract law, and the Bank's personnel practices that a contract with applicant had, in fact, been formed but that it later came to an end when he was officially informed that he was no longer eligible for the appointment. (Para. 39.) Hence, Justin is significant not only because the tribunal chose to examine the merits of the case in order to determine its jurisdiction but also because it determined to exercise jurisdiction over the claim even though applicant never actually became employed with the Bank.

65. A similar approach was taken by the International Labour Organisation Administrative Tribunal ("ILOAT") in In re Labarthe, ILOAT Judgment No. 307 (1977). The ILOAT noted the congruence of the jurisdictional question and the question on the merits:

> "If the complainant does establish that he has such a contract, it is not disputed that in the circumstances of this case his claim must succeed. Thus, the issue between the parties on jurisdiction is also the issue between them on the merits, and it is convenient to deal with it under the latter head." (Para. 4.(d).)

After examining the facts, the tribunal found that a contract had existed to appoint applicant to the post and awarded compensation for its breach.

66. The same approach was taken by the United Nations Administrative Tribunal ("UNAT") in Camargo v. The Secretary-General of the United Nations, UNAT Judgement No. 96 (1965), although with different results:

> "The question whether or not the Applicant must be regarded as the holder of a contract of employment with the United Nations can therefore be decided only after a substantive consideration of the case, which it is incumbent on the Tribunal to carry out." (p. 87.)

In Camargo, the UNAT decided that the applicant had not made a valid acceptance of a valid offer of employment and therefore was not the holder of a contract of employment. (p. 88.)

67. While international administrative tribunals thus occasionally have found it necessary to examine the merits of a case before determining whether to exercise jurisdiction, there is also support for the view that jurisdiction may be denied on the basis of the language of the applicant's contract of employment and the applicable statutory provision. In addition, some decisions have rejected on the merits claims that contractual employees have employment rights beyond those prescribed by their contracts. Still others have come to the opposite conclusion, sometimes taking a broad view of jurisdictional prerogatives.

68. In In re Privitera, ILOAT Judgment No. 75 (1964), the applicant sought "restoration of his rights as a staff member" after he received notice that the organization did not intend to offer him a third contract on the expiry of his second. The ILOAT observed that the applicant's legal status was defined by his contract, which stipulated "the present contract does not confer upon the holder the title of official of the World Health Organization" (para. 2.) and declined jurisdiction. The tribunal emphasized:

> "2. In order to determine, in the present case, the legal nature of the relations between the complainant and the Organisation, only the contract concluded between them on 27 December 1961 must be taken into account. The complainant signed this contract voluntarily and with full knowledge of its terms…."

69. It should be noted that in Privitera, unlike the case presently before the IMFAT, the applicant apparently alleged no factual basis for his claim of staff status, apart from the fact

that previously he had held a contract governed by the Staff Rules. The tribunal observed that the contract at issue was of a "special character" and the "…tasks entrusted to the complainant were outside the scope of the normal functions of the Organisation and were connected with an exceptional, as well as a temporary, mission." (Para. 3.)

70. In In re Darricades, ILOAT Judgment No. 67 (1962), the ILOAT also denied jurisdiction on the basis of the language of a contract of employment and the applicable statutory provisions. In that case, the tribunal had occasion to interpret the following provisions of Article II of its Statute:

> "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.
>
> …
>
> 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 organization approved by the Governing Body which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure."

71. In Darricades, the applicant's employment relationship was with UNESCO rather than with the ILO. Hence, the ILOAT was required to apply the Staff Regulations and Rules of that agency in deciding the matter of the tribunal's jurisdiction. These Staff Regulations and Rules granted the right to appeal to the Administrative Tribunal to a "staff member", defined as "…a person engaged by the Director-General other than…a person specifically engaged for a conference or meeting." (Para. 1.) In denying jurisdiction over applicant's complaint, the ILOAT enforced this specific definition of "staff member", finding that the evidence confirmed that the applicant entered the service of UNESCO "solely and specifically" for the duration of a month-long meeting. The tribunal noted as well that the contract of appointment had specified that "the undersigned shall not be regarded as a staff member". The ILOAT concluded that the applicant was "a purely casual employee" and not subject to its jurisdiction. (Para. 2.)

72. In In re Amezketa, ILOAT Judgment No. 1034 (1990), the tribunal considered the complaint of an applicant who formerly had been employed under a series of "special services agreements" and later became a staff member. Following abolition of his post, applicant complained that the amount of his termination indemnity and pension entitlements improperly excluded his periods of service under the special services agreements. The tribunal dismissed his claims on the merits.

73. Although no jurisdictional issue arose in Amezketa, presumably because he was a staff member at the time his employment was terminated, the case is instructive in upholding the terms of the employment agreements despite claims that the agreements were a "legal fiction" unsuited to the functions applicant was performing. (Under the agreements, he had been employed as a teacher of Spanish; as a staff member, he was a "language-training officer".) In rejecting applicant's contentions, the ILOAT noted that any rights arising during applicant's period of service under the special services agreements were limited to those set forth in the agreements themselves, and that disputes thereunder were subject to arbitration procedures:

> "3….Under the provisions of Section 319 of the FAO Administrative Manual the holder of a special services agreement is referred to as a 'subscriber'. A subscriber is not considered to be a staff member, and the Staff Regulations and Staff Rules do not apply to him: his rights and obligations as such are strictly limited to the terms and conditions set out in the agreement and any dispute that may arise is to be settled by arbitration."

74. In Teixeira v. The Secretary-General of the United Nations, UNAT Judgement No. 233 (1978), the applicant sought a ruling from the tribunal that "he had in fact become a staff member" of the employing organization, while it had, for improper purposes, continued to employ him under a special service agreement even though he performed work that formed part of the normal functioning of the organization. Jurisdiction over Teixeira's complaint had been established in an earlier decision, Teixeira v. The Secretary-General of the United Nations, UNAT Judgement No. 230 (1977). In that decision, the UNAT ruled that because the applicant claimed certain rights under the Staff Regulations and Rules, the dispute could be heard by the consent of the parties "…without [the tribunal's] affirmation of its competence leading to the conclusion that the Applicant is a staff member or former staff member of the United Nations". (Para. IV., citing, *inter alia*, Camargo.)

75. In its decision on the merits, the UNAT rejected Teixeira's attempt to "…use his factual situation as an argument to claim a legal status different from his contractual status." (Para. IV.) In so deciding, the tribunal noted that the applicant shared responsibility with the organization for his contractual status and that the contract itself expressly deprived him of staff member status:

> "II. The Tribunal notes that the Applicant himself at least contributed to the creation and renewal of that situation by agreeing to conclude with the Administration, during a period of almost 10 years, special service agreements under which he accepted the legal status of an independent contractor and expressly and unambiguously waived being 'considered in any respect as being a staff member of the United Nations.'
>
> III…..On this point, it suffices for the Tribunal to observe that in law the Applicant was free to refrain from entering into those agreements…."

76. The tribunal reached its conclusion despite noting the organization's acknowledgement that use of the special service agreements in applicant's case was contrary to its own personnel directives; the agency for which the applicant worked had been unable to obtain the necessary funding from Headquarters to offer him a regular post and hence continued to have recourse to these agreements. In the tribunal's view, however, applicant had not shown that he was adversely affected by this improper practice:

> "VI….although improper, this practice, which is criticized by the Applicant, was favourable to him, since it enabled him to continue rendering services and receiving remuneration.
> …
>
> VIII. In these circumstances, the Tribunal considers that the Applicant is not entitled to claim that he sustained any injury…."

The tribunal therefore rejected the claim that the applicant was treated unequally vis-a-vis staff members with respect to his remuneration, right to rest, or social security. (Para. XI.) Claims of unequal treatment, noted the tribunal, could be made only vis-a-vis other individuals employed on special service agreements. (Para. X.) The UNAT did, nonetheless, award a termination indemnity based on Teixeira's length of service and the quality of his work. (Para. XII.)

77. In In re Bustos, ILOAT Judgment No. 701 (1985), by contrast, the ILOAT took a different view, looking beyond the language of a continuous series of short-term employment contracts renewed over a period of eleven years between the applicant and the Pan American Health Organization (PAHO), holding that these formed a single contract of indefinite duration.

78. The organization challenged the tribunal's jurisdiction on the grounds that the applicant was an independent contractor whose contract expressly stated that it was "a lease of work and not a relation of subordination" (para. 4.) The tribunal chose not to answer the question of whether the true relationship of the parties was as an "independent contractor" or as "master and servant", observing that there were facts supporting either view. (Para. 6.) Instead, it took a broad view of its jurisdictional mandate, declaring that jurisdiction need not depend on staff membership, but rather could be exercised here because applicant's link with the organization was "more than a purely casual one":

> "1. The Organization objects to the jurisdiction of the Tribunal on the ground that the complainant was never a staff member. But in the jurisprudence of the Tribunal its jurisdiction does not depend upon staff membership. In re Chadsey (Judgement 122) the Tribunal said:
>
> > 'While the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified

> therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognized so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently may not lawfully be ignored in individual contracts. This applies in particular to the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.'
>
> The facts hereinafter set out show that the complainant's link with the Organization was more than a purely casual one. Accordingly the objection is overruled."

79. The ILOAT framed the question on the merits in Bustos as "whether the relationship between the parties was truly expressed by a series of separate contracts for fixed periods or whether it could be properly expressed only by a single contract for an indefinite period" (para. 6.), and answered as follows:

> "9. The mutual intention, formed…was that the complainant should be employed for as long as his services were required and he was willing to give them. To an agreement of such character the law adds the term that reasonable notice of termination must be given…."

80. It should be noted that in Bustos the tribunal awarded compensation, but did not order retroactive reinstatement as the applicant had sought. Likewise, it rejected the claim that compensation should be assessed as a sum equal to the difference between the amount he received during the contract period and that which he would have received as a regular employee, noting that "[t]he Tribunal has no power to reconstruct the contract retroactively nor to reform the version of it in which until its termination the complainant acquiesced." (Para. 11.)

81. The ILOAT in Bustos also underscored the exceptional nature of its decision to override the express language of the short-term contracts under which the applicant had been engaged:

> "5. The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties – or at any rate the party which is in a position to formulate the document – do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties – or at any rate the stronger of them – do not wish to face…..In the circumstances in which the parties to the present case operate, the situation

> might be that the parties – or one or other of them – do not wish the contracts to be governed by the Staff Regulations: the easiest way of achieving that is for the parties to exhibit in the document a relationship which does not make the employee a staff member….
>
> …
>
> 10. The present case is of a very exceptional, if not unique, character. It can only be very rarely indeed that a case comes before the Tribunal in which it will look behind the documents to ascertain the intention of the parties…In any event the Tribunal's decision does not affect short-term appointments in general."

82. Finally, in Jorge O. Amora v. Asian Development Bank, Asian Development Bank Administrative Tribunal ("ADBAT") Decision No. 24 (1997), the ADBAT also looked behind the express language of a contract of employment to afford the applicant the benefits of staff membership. In Amora, the applicant worked from 1979 until 1993 under a series of contractual agreements, until he was appointed as a regular staff member in 1993. Upon reaching mandatory retirement age in 1995, he sought retirement and other benefits on the basis of his service dating back to 1979. The tribunal upheld his claims.

83. Among the terms of Amora's contracts of employment were the following provisions:

> "'Nothing contained in the terms and conditions herein..shall be construed as establishing or creating any relationship other than that of independent contractor between the Bank and [him].'
>
> '[He] shall not be entitled to any compensation, allowances, benefits or rights from or against the Bank other than expressly provided therein….'"

(Para. 3.) Nonetheless, examining the facts, the tribunal held that the applicant had been a staff member in regular employment of indefinite duration since 1979 and, as such, could not be excluded from the benefits of staff membership. Hence, the ADBAT declared the above clauses of the contract "inoperative". (Para. 44.) The tribunal explained its decision as follows:

> "22. Usually, a contract signed by the parties is binding upon them. There are, however, some circumstances in which a contract may be set aside or varied by a competent tribunal. This happens, for example, when the contract fundamentally disregards reality.
>
> 23. It is the Tribunal's conclusion that in the present cases, the MOAs [Memoranda of Agreement] did not reflect the true relationship between the Bank and the Applicant. "
>
> …..

> 27. The Tribunal holds that recourse to successive short-term or temporary contractual appointments to jobs which are essentially of a permanent nature is not a fair employment practice, particularly if such appointments can be shown to have been made only to deny employees security of tenure or other conditions and benefits of service. Such appointments are permissible only if they have a clear functional justification and rationale in the exigencies of management and the nature of the job in question, and are subject to limitations based on norms of good administration."

84. In reaching its decision, the tribunal first considered whether Amora was an independent contractor or an employee of the Bank:

> "31. Although every MOA under which the Applicant worked contained references to his 'services', it is quite clear that he was not engaged under a contract for 'services' to perform a specified piece of work, for a stipulated fee or price, under his own responsibility and according to his own methods, without being subject to the control of the Bank (except as to the results of his work), and investing his own resources, in regard to tools, equipment, materials and the like.
>
> 32. The MOAs did not describe the work which the Applicant was required to do; he was to work, in the Bank's premises, under the direction of the Bank's officers and in accordance with their instructions; he was not to be paid for the job or the result, but was to receive a regular, stated monthly remuneration; indeed, he even received increments mid-way through several contracts, just like an ordinary employee; he had to work full-time in accordance with the Bank's working hours, and could even be required to work overtime or on shifts; and he was entitled to annual, medical and casual leave. One of his obligations was 'at <u>all</u> times [to] refrain from actively engaging in any political activity' (emphasis supplied). All along, the Applicant was neither carrying on an independent business nor could he assign the performance of the work to anyone else. On the contrary, his work was part of, or ancillary to, the Bank's business."

Concluding on the basis of the above evidence that the applicant was a staff member and not an independent contractor, the ADBAT went on to decide that he was not a staff member "appointed on contractual basis" but rather held a regular appointment of indefinite duration. It was this distinction that meant that Amora could not be excluded from coverage of the Staff Regulations:

> "41….. In the light of the successive extensions and renewals of the Applicant's service with the Bank for an unbroken term of almost 14 years, the Tribunal, in the absence of any convincing explanation by the Bank, holds that the Applicant's employment was intended to be of indefinite duration.

> 42. In the present case, the Tribunal finds no functional reason whatsoever, justifying the recourse to short-term contracts, in the face of a continuing relationship. It is clear that the work done by the Applicant for the Bank was a continuous whole, even though he had held different positions during his career in the Bank, just as regular staff members do. Thus the separation of his work with the Bank into individual yearly contracts was a pure fiction.
>
> 43. . . . Here, as no reason exists objectively, and no good reason was provided by the Bank, for the use of annual contracts for what was in reality a long-term employment, the Tribunal concludes that the use of annual contracts without any functional justification is an abuse of power. Thus, the true legal relationship of the Applicant to the Bank was that of a staff member holding a regular appointment." (emphasis in original)
>
> . . .
>
> "45. The Tribunal holds that it has jurisdiction *ratione personæ* as the Applicant was member of the Bank's staff holding a regular appointment within the meaning of Article II of the Statute of the Tribunal."

85. It is important to observe that in Amora the question of jurisdiction *ratione personæ* arguably was never really at issue, since by the time the applicant filed his application with the tribunal he had indisputably acquired the status of a regular staff member of indefinite duration by virtue of his new appointment in 1993. Nonetheless, it may be of some significance that the ADBAT chose to place its holding on jurisdiction following its conclusions on the merits. Moreover, the exercise of jurisdiction over issues arising before Amora's formal staff appointment in 1993 perhaps suggests an expansive approach to the ADBAT's jurisdiction *ratione materiæ*.

86. While the Tribunal finds the interplay of the cases of other administrative tribunals of interest, the case before it falls to be decided on the basis of the particular provisions of this Tribunal's Statute and its *travaux préparatoires*, and of the specifications of the Applicant's contract. The Administrative Tribunal concludes that it lacks jurisdiction in this case in view of the express language of that contract, which denies Applicant staff membership, and of the explicit wording of the IMFAT Statute, granting the Tribunal jurisdiction only over complaints brought by a "member of the staff"(Article II, 2.c. (i) of the Statute, *supra,* para. 45) challenging a "decision taken in the administration of the staff".

> **Is the Administrative Tribunal required to exercise jurisdiction in this case on the ground that otherwise Applicant's complaint may escape review by an impartial adjudicatory body?**

87. Applicant has also argued that the Administrative Tribunal is required to exercise jurisdiction in this case because otherwise his claim will escape judicial review. In support of this view, he has invoked the principle of *audi alteram partem*.

88. Applicant has cited Shkukani v. The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), UNAT Judgement No. 628 (1993) and related cases for the proposition that the IMFAT should exercise jurisdiction over his claim because he otherwise would be left without judicial redress for his grievance. Shkukani, however, did not involve the expiration of an agreement with a contractual employee. Rather, in Shkukani, the applicant sought review of the termination of his staff appointment for alleged misconduct. At the time of that termination, regulations governing the Area Staff of UNRWA did not provide for recourse to the UNAT, whereas those governing International Staff did.

89. In considering its power to interpret its statute so as to afford judicial redress equitably to all staff members of UNRWA, the UNAT in Shkukani referred to the advisory opinion of the International Court of Justice concerning the competence of the ILOAT, Judgments of the Administrative Tribunal of the International Labour Organisation, ICJ Reports (1956) 77, at p. 97, which it quoted as follows:

> "X…. 'However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between UNESCO and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization.'
>
> The Tribunal therefore has consistently held the view that it is competent to entertain cases, such as this one, where the primary concern is the absence of any judicial procedure established by the Area Staff Regulations and Rules for the settlement of disputes submitted to JAB."

90. Unlike the situation in the case of Mr. "A", involving a contractual employee, in Shkukani the tribunal's concern was the differing treatment of different categories of staff members (international staff v. area staff) with respect to the procedures available for redress of their grievances:

> "XI….The bodies to which the Applicant had recourse were both internal bodies as indicated by the method of appointment of their members. The Applicant should have had available to him, in fairness and equity, an external judicial body to which he could have appealed. Indeed, the fact that the international staff members of UNRWA had such recourse, shows even more starkly the bias which existed against the Applicant and his class of staff

> members. Why should not all staff have similar protection? The Tribunal, therefore, rejects the Respondent's first argument." [19]

91. By contrast, in Darricades (*supra,* paras. 70-71), a case involving a contractual employee, the ILOAT was not persuaded by the argument that by denying jurisdiction the applicant would be left without any forum in which to press her claim. The ILOAT also referred to the principle that international administrative tribunals are forums of limited jurisdiction, but used that principle in support of its refusal to exercise jurisdiction:

> "3. The Tribunal recognises that as a result of holding that it lacks jurisdiction, complainant is thereby regrettably deprived of any means of judicial redress against the injury sustained as a result of the alleged violations of her contract but the Tribunal, being a Court of limited jurisdiction, is bound to apply the mandatory provisions governing its competence."

92. Applicant also cites the principle of *audi alteram partem*, and the Administrative Tribunal's obligation to apply generally recognized principles of international administrative law, in support of his contention that the Administrative Tribunal must exercise jurisdiction over his claim so that it will not escape judicial review. Applicant specifically refers to the second sentence of Article III of the Tribunal's Statute and accompanying commentary. Article III provides in pertinent part:

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

According to the commentary:

> ". . . There are two unwritten sources of law within the internal law of the Fund. First, the administrative practice of the organization may, in certain

[19] Zafari v. The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, UNAT Judgement No. 461 (1990), also cited by Applicant, likewise concerns extending rights to tribunal review to staff members who are governed by Area Staff Regulations. In Bohn v. The United Nations Joint Staff Pension Board, UNAT Judgement No. 378 (1986) and Gilbert v. The United Nations Joint Staff Pension Board, UNAT Judgement No. 379 (1986), the UNAT exercised jurisdiction over complaints by UNESCO staff relating to the pension adjustment system because these were "related to" the Regulations of the Joint Pension Fund. Allegations concerning the non-observance of the Regulations of the Joint Pension Fund fell expressly within the terms of the tribunal's jurisdiction under the agreement extending jurisdiction of the UNAT to UNESCO staff. In exercising jurisdiction, the tribunal considered that otherwise these complaints would not be subject to redress.

> circumstances, give rise to legal rights and obligations. [Footnote omitted.] Second, certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund."

(Report of the Executive Board, p. 18.)

93. Applicant's reliance on the principle of *audi alteram partem*, as incorporated in the internal law of the Fund, to contend that the IMFAT should exercise jurisdiction over his complaint would appear to be misplaced. The purpose of the second sentence of Article III of the Tribunal's Statute is to prescribe what law the IMFAT "shall apply", i.e. "the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." This statutory provision does not relate to the Tribunal's jurisdiction, but rather states what law should be applied by the Tribunal in carrying out its judicial functions in those cases in which it has jurisdiction.

94. The principle of *audi alteram partem* is, in Applicant's own words, applicable to "decisions taken by the Fund." That principle provides a standard for assessing the legality of an administrative act of the Fund that comes before Administrative Tribunal for review. For example, the principle of *audi alteram partem* has been applied by international administrative tribunals in considering challenges by staff members to the legality of particular disciplinary procedures. (C. F. Amerasinghe, The Law of International Civil Service, Vol. II, pp. 210-11 (2nd ed. 1994).) Likewise, the IMFAT in Ms. "C.", Applicant v. International Monetary Fund, Respondent, Judgment No. 1997-1 (August 22, 1997), adverted to the same principle, although not employing the term "*audi alteram partem*", when it concluded that a lapse in due process giving rise to a compensable claim occurred when Ms. "C." was not afforded meaningful opportunity to rebut adverse evidence regarding her performance. (Paras. 41-43.)

95. The Administrative Tribunal concludes that the fact that Applicant's claim will otherwise not be judicially examined does not require or entitle the Tribunal to exercise jurisdiction in this case. The complaint lies outside the Tribunal's limited grant of jurisdictional competence.

96. The Administrative Tribunal also concludes that, while the principle of *audi alteram partem* may supply a standard for judging the legality of a decision of the Fund that comes within the Tribunal's jurisdiction, this principle does not determine which decisions are justiciable. Nor does it require that jurisdiction of this Tribunal be extended because a claim otherwise may or will escape review by an adjudicatory body. The jurisdiction of the Administrative Tribunal is conferred exclusively by the Statute itself. This Tribunal is not free to extend its jurisdiction on equitable grounds, however compelling they may be.

97. At the same time, the Tribunal feels bound to express its disquiet and concern at a practice that may leave employees of the Fund without judicial recourse. Such a result is not consonant with norms accepted and generally applied by international governmental organizations. It is for the policy-making organs of the Fund to consider and adopt means of providing contractual employees of the Fund with appropriate avenues of judicial or arbitral resolution of disputes of the kind at issue in this case, notably disputes over whether the functions performed by a contractual employee met the criteria for a staff appointment rather than those for contractual status.

98. It is pertinent to note that, on January 20, 1999, the Fund's Executive Board approved a Policy on Categories of Employment which provides, *inter alia*, that:

> "Functions that are needed for two years or more would be performed by employees on staff appointments. Functions that are expected to be performed for less than two years would be performed by contractual employees. Contractual appointments are used only for short-term employment, and can be extended if needed to a maximum cumulative period of four years. Extensions beyond two years require the approval of the Director of Administration."

This Policy has been communicated to the employees of the Fund by its placement on the Fund's internal website. This Policy mirrors a similar Policy promulgated in 1989, with the critical difference that the 1989 Policy did not prescribe the two-year and four-year limitations embodied in the 1999 Policy.

99. Had the foregoing Policy been in force and implemented in the course of Mr. "A"'s tenure, the matter now at issue before the Tribunal presumably would not have arisen. In respect, however, of headquarters-based technical assistance experts, the 1999 Policy retains an option for "long-term contracts when such an approach is justified"; in this regard, the 1999 Policy states that it "may need to be applied flexibly". In view of the revised Policy, Mr. "A"'s kind of predicament, and that of any other contractual employees in similar circumstances, may be transient. That, however, provides no solace for Mr. "A". The adoption of the new Policy on Categories of Employment nonetheless strengthens the equitable basis of certain of Mr. "A"'s contentions, which the Fund should, in the Tribunal's view, endeavor to respond to insofar as governing regulations and practical possibilities permit. In that regard, the Tribunal notes that Mr. "A" has the benefit of maintenance of group medical coverage for eighteen months after the expiration of his contract, without however financial contribution by the Fund.

100. On the basis of the considerations set forth above, the Tribunal decides:

1. The Administrative Tribunal does not have jurisdiction to decide whether the Fund acted illegally when it entered into a series of contracts for contractual employment of the Applicant, allegedly in violation of its 1989 Employment Guidelines and principles of international administrative law, because Applicant apparently performed the same work as

regular staff under contracts renewed several times in the course of nine years and then allowed to expire.

2. The Administrative Tribunal does not have jurisdiction *ratione personæ* over Applicant's complaint since his letter of appointment stated that he "will not be a staff member of the Fund" and the Administrative Tribunal's jurisdiction is restricted by its Statute to applications brought by a "member of the staff" (Art. II, para. 1.a.), defined as "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff" (Art. II, para. 2.c.(i)).

3. The Administrative Tribunal does not have jurisdiction *ratione materiæ* over Applicant's claim; the Fund's decision to enter into a contract or series of contracts with an individual to serve as a contractual employee, rather than as a member of the staff, is not a "decision taken in the administration of the staff" (Art. II, para. 2.a.).

4. Equitable or other considerations do not enable the Administrative Tribunal to extend its jurisdiction to claims falling outside the express language of Article II of its Statute, when Articles III, IV, and XIX limit its powers to those conferred by the Statute.

5. The Administrative Tribunal is not entitled to exercise jurisdiction in this case because otherwise Applicant's complaint may escape examination by an impartial adjudicatory body. The principle of *audi alteram partem* does not authorize or require this Administrative Tribunal to exercise jurisdiction in this case.

6. The Administrative Tribunal need not examine the merits of Applicant's claim in order to decide whether it has jurisdiction in this case. It may base that decision on the language of Applicant's letter of appointment and the Statutory provisions governing jurisdiction.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that the Fund's Motion for Summary Dismissal is granted.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

AgustPn Gordillo, Associate Judge

_____
Stephen M. Schwebel, President

_____
Celia Goldman, Acting Registrar

Washington, D.C.
August 12, 1999