Judgment No. 2001-1

Estate of Mr. "D" Applicant v. International Monetary Fund, Respondent

Admissibility of the Application

(March 30, 2001)

Introduction

1. On March 29 and 30, 2001, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to decide upon the Motion for Summary Dismissal brought by the International Monetary Fund in respect of proceedings concerning the Estate of Mr. "D", who had been a non-staff member enrollee in the Fund's Medical Benefits Plan ("MBP" or "Plan").

2. The Estate of Mr. "D", represented by its Executrix Ms. "D" (Mr. "D"'s daughter), challenges the decision under the Plan to deny reimbursement of medical evacuation expenses incurred by the decedent in May-June 1998. In January 1999, following internal appeals to the Plan administrator United HealthCare ("UHC") and subsequent review by an outside consultant, a Fund personnel officer informed Ms. "D" that the claimed evacuation benefit had been denied. Almost one year later, Ms. "D", who is not a staff member, sought administrative review of that denial directly from the Fund's Director of Human Resources. The Director of Human Resources denied the request because Ms. "D" had failed to seek review by the Division Chief, which, under Fund administrative review procedures, is required within three months of the benefit's denial.

3. Thereafter, Ms. "D" filed a grievance with the Fund's Grievance Committee. The Chairman of the Grievance Committee decided that the Committee did not have jurisdiction to consider the matter because Ms. "D" had failed to pursue on a timely basis the administrative review process prerequisite to the filing of a grievance.

4. The Fund has responded to the Application in the Administrative Tribunal with a Motion for Summary Dismissal, contending that Applicant has not met the requirement of Article V of the Tribunal's Statute that, when the Fund has established channels of administrative review for the settlement of disputes applicable to the case in question, an application may be brought in the Tribunal only after the exhaustion of all available channels of administrative review. A Motion for Summary Dismissal suspends the period for answering the Application until the Motion is acted on by the Tribunal. Hence, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Application.

The Procedure

5. On October 31, 2000, the Estate of Mr. "D" filed an Application with the Administrative Tribunal. In accordance with the Tribunal's Rules of Procedure, the Application was transmitted to

the Respondent on November 3, 2000. Pursuant to Rule XIV, para. 4[1], the Office of the Registrar issued a summary of the Application within the Fund.[2]

6. On December 11, 2000,[3] the Fund filed a Motion for Summary Dismissal pursuant to Rule XII[4] of the Tribunal's Rules of Procedure. As the Motion did not comply fully with the

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[1] Rule 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."

[2] For the first time, a Summary of Application was transmitted to the Fund's staff via e-mail. This method of notification was undertaken in light of the Fund's policy favoring reduction of the circulation of paper notices. The practice has the additional benefit of including within the Notice's circulation those staff members serving outside of Fund headquarters.

[3] Under Rule XII, para 2, the Fund may file a motion for summary dismissal within thirty days of its receipt of the application. In this case, that date would have been December 4, 2000. On November 30, 2000, the President of the Tribunal, having been informed that the Fund sought to file a Motion for Summary Dismissal under Rule XII, had granted a request for a one-week extension of time until December 11 to file that motion on the grounds that additional time was required to reference newly discovered relevant information and that the principal attorney on the case had been absent due to illness. The President's action was taken pursuant to Rule XXI, para. 2, which provides:

> "The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder."

[4] 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.

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requirement of Rule XII, para. 3 that "[t]he 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 Registrar advised the Fund that, by analogy to Rule VII, para. 6,[5] it would have a fifteen-day period to supplement the Motion's annexes to comply with Rule XII, para. 3.

7. On December 27, 2000, Respondent filed its supplemented Motion for Summary Dismissal, seeking dismissal of the Application on the ground that Applicant had failed to exhaust channels of administrative review, as required by Article V, para. 1[6] of the Tribunal's Statute. The supplemented Motion, having met the requirements of Rule XII, para. 3, was transmitted to Applicant on January 2, 2001.

8. Under the Rules of Procedure, 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. However, the President of the Administrative Tribunal, in the exercise of his authority under Rule XXI, para. 2, granted Applicant an additional ten days before the start of the thirty-day period in which to amend the list of documents she had requested the Tribunal to order the Fund to produce pursuant to Rule XVII,[7] so as to limit that request to those documents relevant to the issue raised

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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."

[5] Rule VII, para. 6 provides in pertinent part:

> "If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date. …"

[6] Article V, para. 1 provides:

"When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review."

[7] Rule XVII provides: "

"Production of Documents

1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.

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by the Fund's Motion for Summary Dismissal, i.e. the admissibility of the Application.[8] Applicant submitted her Amended Document Request on January 11, 2001, on which date it was transmitted to the Fund. The Fund's Response was received on January 19.

9. Applicant's Objection to the Motion for Summary Dismissal was filed on February 12 and transmitted to Respondent.

10. Following receipt of Applicant's Objection, Respondent on February 14 filed a request for leave to submit an Additional Statement. The President of the Tribunal, pursuant to his authority under Rule XI[9] and Rule XXI, paras. 2 and 3,[10] granted the request. The Additional Statement was transmitted to Applicant on February 15, 2001. On February 21, Applicant too sought to file an Additional Statement, responding to Respondent's Statement. This request also was granted by the

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2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.

3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment.

4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

[8] A similar procedure was undertaken in Ms. "Y", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1998-1 (December 18, 1998).

[9] Rule XI provides:

"*Additional Pleadings*

1. In exceptional cases, the President may, on his own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be furnished in the original or in an unaltered copy and accompanied by any necessary translations.

2. The requirements of Rule VII, Paragraphs 4 and 8, or Rule VIII, Paragraphs 2 and 3, as the case may be, shall apply to any written statements and additional documents.

3. Written statements and additional documents shall be transmitted by the Registrar, on receipt, to the other party or parties."

[10] Rule XXI, paras. 2 and 3 provide:

"2. The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder.

3. The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules."

President, pursuant to the same Rules. Applicant's Additional Statement was transmitted to Respondent on February 23, 2001.

11. On February 26, the President of the Administrative Tribunal, having considered the views of the Applicant and the Fund, and acting on the authority granted to him by Rule XVII, paras. 2 and 4, denied Applicant's Amended Request for Documents. Applicant's Request had encompassed five separate document requests.[11] Three of the requests were denied as "clearly irrelevant" because they were not supported by the pleadings in the case. Another was dismissed as moot. Still another was rejected as ambiguous in failing to state precisely what documents were being sought.[12]

12. On the same date, the President issued a Request for Information to the Fund, pursuant to paras. 3 and 4 of Rule XVII, which permits the Administrative Tribunal (or the President, when the Tribunal is not in session) to request "information that it deems useful to its judgment." The Request was designed to elicit information as to the context of the Grievance Committee's decision-making, the extent to which Applicant's case may have been an unusual one, and the flexibility of the Fund and its Grievance Committee with respect to the time periods required for exhaustion of administrative review under GAO No. 31.[13]

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[11] Applicant's Amended Request for Documents sought the following:

1) The internal review claimed to have been made by the Fund, as stated in [the Director of Human Resources]'s letter of February 1, 2000;

1) Any document evidencing Respondent's statement that the ["D"]s were encouraged by Fund Officers to pursue the Fund's internal grievance procedure;

1) Any document evidencing that the ["D"]s were told by Fund Officers about the procedures for filing grievances or given GAO No. 31, Rev. 3;

1) All Grievance Committee decisions on jurisdiction; and

1) All instances in which the Fund has exercised its power under GAO No. 31, Rev. 3 to submit cases for consideration by the Grievance Committee without regard for time limits.

[12] In reaching the merits of Applicant's Amended Request for Documents, the President rejected two procedural objections to the Request that had been raised by the Fund. The first objection was that Applicant had failed to allege, pursuant to Rule XVII, para. 1, that there was a prior request and denial of access to the documents. The President, pursuant to Rule XXI, paras. 2 and 3, modified the application of Rule XVII, para. 1, as the Amended Request for Documents had been made at the invitation of the Tribunal to tailor the document request to the issues raised by the Motion for Summary Dismissal. Likewise, the President rejected as without merit the Fund's objection that the Amended Request improperly broadened the initial request, observing that new requests for documents may be brought, according to para. 1 of Rule XVII, at any time before the closure of the pleadings.

[13] The Request for Information sought the following:

1) How many grievances have been filed since the Grievance Committee's inception in 1981?

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13. The Fund's response to the Tribunal's Request for Information was received on March 9. Thereafter, each party was accorded a brief period in which, simultaneously, to submit Comments on the information prior to the Tribunal's session on March 29-30.

14. The Tribunal decided that oral proceedings, which neither party had requested on the Motion for Summary Dismissal, would not be held, as they were not "necessary for the disposition of the case" which at this stage is confined to the question of the admissibility of the Application. [14]

The Factual Background of the Case

15. The relevant facts, some of which are disputed between the parties, may be summarized as follows.

Mr. "D"'s medical condition

16. Mr. "D" was a retired staff member of the World Bank. He was enrolled under a family policy in the Medical Benefits Plan maintained by the International Monetary Fund, where his wife had been a staff member. Following his wife's retirement from the IMF in 1996, and later her death in 1997, Mr. "D" remained an enrollee in the Fund's MBP.

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2) How many grievances have been dismissed by the Grievance Committee for failure to meet the requirements for exhaustion of administrative review under GAO No. 31?

3) How many grievances have been filed by:

a) non-staff members who are enrollees in a benefit plan maintained by the Fund as employer, or

b) non-staff members who are successors in interest to deceased enrollees in a benefit plan maintained by the Fund as employer?

What has been the disposition of each of these cases?

4) In how many of the grievances over which the Grievance Committee has exercised jurisdiction, has the Fund consented to:

a) direct Grievance Committee review under GAO No. 31, Section 7.01.2, or

b) the extension of time limits for completion of the administrative review process under GAO No. 31, Section 6.07.1, or

c) any other extension or waiver of time limits for the exhaustion of administrative review under any applicable provision of GAO No. 31?

[14] Article XII of the Statute requires that "The Tribunal shall decide in each case whether oral proceedings are warranted." Rule XIII provides that "Oral proceedings shall be held if the Tribunal decides that they are necessary to the disposition of the case."

17. In May 1998, Mr. "D", who had begun treatment for metastasized lung cancer, traveled (with his doctor's permission) to his home country to take care of personal business. While there, Mr. "D" became ill with pneumonia and had to be placed on a ventilator. Mr. "D"'s adult children, who had accompanied him on the trip, deemed conditions in the hospital "deplorable"[15] and, in consultation with the doctors on the scene, decided to arrange for the medical evacuation of their father to the Maryland hospital in which he earlier had been receiving treatment. Mr. "D" was evacuated on June 2. He died in September 1998.

Family's contacts with United HealthCare and IMF prior to evacuation (May–June 1998)

18. The actions of Mr. "D"'s children while still overseas are a matter of dispute between the parties. According to Applicant, United HealthCare gave the family assurances that the evacuation would be covered by the MBP if "medically necessary," and the Fund did not give them a definitive answer to the contrary. By contrast, Respondent contends that Mr. "D"'s family understood before the evacuation that its cost would not be covered by the Plan, and that the family could have cancelled the arrangements but was prepared to pay the full cost (approximately $50,000) themselves or with the help of a family friend.

19. According to the Application, Mr. "D"'s children contacted both the Plan administrator United HealthCare and the Staff Benefits Division of the IMF's Department of Human Resources, initially on May 18, seeking authorization for coverage under the Medical Benefits Plan of their father's medical evacuation. On May 18, Mr. "D"'s son spoke by phone with a UHC representative who, Mr. "D"'s son maintains, told him that the evacuation would be covered if it were "medically necessary" and that a letter to that effect would need to be supplied by the attending physician. On May 28, when Mr. "D"'s condition had stabilized sufficiently to allow for his transport, Mr. "D"'s son again spoke with the same UHC representative who, Mr. "D"'s son claims, confirmed their earlier conversation. On May 29, he faxed a letter from the overseas attending physician asserting that "due to the extreme, life threatening nature of his condition," it was a "medical necessity" immediately to evacuate Mr. "D" to the United States, specifically to the hospital where he previously had been undergoing treatment. According to Applicant, Mr. "D"'s son spoke again that day with the UHC representative to make sure she had received the letter, and she told him that "everything looked fine."

20. On May 31, Mr. "D"'s son gave final authorization to the medical transport company to go ahead with the plan, faxing a credit card authorization for full payment, as was required. The next day, June 1, Mr. "D"'s son made an additional phone call to UHC. This time, however, the same representative reported that the claim had been denied, reading to him a letter that was later dispatched to the family home.

[15] The Application cites lack of sanitation, malfunctioning oxygen equipment, and lack of antibiotics which family members had to track down and have delivered from abroad.

21. The letter from UHC (dated June 2, 1998) responded to the family's "request for a predetermination of benefits for reimbursement of the proposed air ambulance transportation under International Monetary Fund's benefit plan," noting that the plan "authorizes United HealthCare to determine at its own discretion if a service or supply is medically necessary." The letter concluded:

> "After review of the medical documentation submitted, the medical staff has determined that the proposed course of treatment is not medically necessary and, therefore, not a covered expense. Air ambulance transportation services are medically necessary for critically ill and injured patients requiring transportation in the following situations:
>
> 1. No other form of transportation is appropriate for the condition of the patient, and
> 2. Transportation is to the closest facility capable of managing the patient's medical needs."

Additionally, the letter stated:

> "You have the right to appeal this determination as outlined in your Summary Plan Description. You may initiate an appeal with United HealthCare by following the procedure outlined below. United HealthCare offers two (2) levels of appeal. At each level, your appeal will be reviewed by a United HealthCare Medical Director or an independent medical consultant.
>
> To do so, please submit the following medical information within sixty (60) days of receipt of this notice. …"

22. Having learned of the denial of the benefit, and of their right to appeal, Mr. "D"'s children proceeded to go ahead with the plan to evacuate their father June 2. In Applicant's view, "[t]here was no question of stopping the evacuation because of Mr. ["D"]'s seriously compromised condition."

23. During the period of the family's contacts with UHC, they also appear to have attempted to contact the Fund. According to Applicant, calls made by the family to the Fund's Staff Benefits Division on May 18 and May 28 went unreturned. On June 1, however, following his conversation with the UHC representative, Mr. "D"'s son succeeded in speaking by telephone to Mr. "E", a Fund Human Resources Officer in the Staff Benefits Division of the Human Resources Department.

24. The contents of the conversation between Mr. "D"'s son and Mr. "E" are disputed. According to the affidavit of Mr. "D"'s son, Mr. "E" gave no definitive answer about coverage but promised to get back to the family on the question, and was "encouraging" when Mr. "D"'s son told him that they planned to appeal UHC's determination.

25. Mr. “E”, by contrast, has stated in his affidavit that he had taken the view in his conversation with Mr. “D”’s son that the evacuation was not covered, because transportation or travel, except by local ambulance service, was excluded under the MBP. In addition, he stated that no exception was possible on the basis of “emergency,” as the patient’s condition was improving. According to Mr. “E”’s affidavit, when Mr. “D”’s son indicated he intended to appeal with UHC the denial of coverage, Mr. “E” affirmed that he had the right to do so. Mr. “E” has termed “false” the assertion by Mr. “D”’s son that Mr. “E” told him the case was unusual and that he would have to get back to him on the question of coverage.

26. Respondent’s account of the events preceding June 1 also differs from Applicant’s. According to the Fund, on or about May 15, a high official in the World Bank, who was a family friend of the “D”’s, telephoned the Health Services Department (“HSD”) of the Bank (which serves as medical adviser to the Fund and Bank) on their behalf. The HSD Medical Duty Officer advised him that Mr. “D” would, of course, not be eligible for medical evacuation under an evacuation policy for active duty staff traveling on official business, and that the MBP would not be likely to cover the expense either. The Bank official allegedly told the Medical Duty Officer that, absent benefit coverage, he personally would be willing to pay all or part of the expense. After checking with the Fund’s benefits section, the Medical Duty Officer, according to her affidavit, sometime after May 18, confirmed to Mr. “D”’s son her understanding that the transportation expenses were excluded under the MBP.

27. Respondent also contends that the family first decided on or about May 15 to evacuate Mr. “D” without regard to benefit coverage, and that on May 17 the family friend authorized immediate transportation, not to the United States but to a closer destination. This plan was cancelled after the patient’s condition worsened and he could not be transported. Later, as Mr. “D” stabilized and was able to be transferred by air ambulance, his children decided to evacuate him to the United States.

Appeals with UHC (July - October 1998)

28. Consistent with their intention as expressed when first learning of the denial of coverage, Mr. “D”’s family proceeded to undertake an appeal with the Plan administrator United HealthCare. On July 25, 1998, Mr. “D”’s children wrote to UHC explaining in considerable detail the decision to transport their father back to the United States, attaching relevant documentation. The family’s submission was supplemented by an equally detailed letter from Mr. “D”’s Maryland oncologist aimed at describing the medical necessity of the evacuation. This letter was responsive to the June 2 letter from UHC, which had denied the claim on the basis of medical necessity.

29. On August 22, UHC responded to the appeal, again denying coverage. This time, the following was stated as the basis for the denial:

> “Under the International Monetary Fund plan, benefits are not available for transportation or travel, except for the use of local ambulance service in connection with hospital confinement, medical emergencies, or as specified under the hospice care benefit.

> This information is contained in the employee's summary plan description."

In addition, the letter gave notice of a right to a second level of appeal, within 60 days.

30. On October 7, following Mr. "D"'s death in September, Ms. "D" wrote again to UHC, pursuing the second appeal with the Plan administrator. Ms. "D"'s October 7 letter noted, among other things, the inconsistency between the June 2 denial on the basis of medical necessity and the August 22 denial on the basis of exclusion from the MBP's coverage of transportation other than local ambulance service. (Her letter indicates that a copy of it was sent to the Chief of the Fund's Staff Benefits Division.)

31. On October 20, UHC responded, once again denying the claim, on the following terms:

> "This is a coverage decision, governed by contract language in the benefit document, rather than a clinical decision to be decided by issues of medical need. Reimbursement for the air ambulance services used is simply not available in the benefit document. Ambulance services explicitly provided for in the benefit document refer to local ambulance services, as contrasted with ambulance services to transport a patient from one country to another."

Approaches to Fund for review (November – December 1998)

32. Having exhausted appeals with the Plan administrator UHC, Ms. "D" turned to the Fund's Staff Benefits Division for assistance. In November, a friend of Ms. "D" who is an attorney, telephoned Mr. "E" on her behalf. The purpose of this contact, according to the friend, was to inquire about what recourse there might be within the IMF for Ms. "D" to challenge the October 20 decision by UHC. According to the friend's affidavit:

> "The only option offered by Mr. ["E"] was to submit the matter to an independent medical expert for review. At no time did Mr. ["'E"] mention the grievance committee process set out in GAO No. 31."

33. On December 14, Ms. "D" wrote to Mr. "E" "… to avail myself of the option you kindly proposed to have this matter referred to an independent outside medical expert for final determination." The letter enclosed the relevant documentation and again put forth the argument that the claim should be determined on the basis of "medical necessity" as first proposed by UHC in the May phone conversations and confirmed by their letter of June 2.

Decision of January 26, 1999

34. On January 26, 1999, Ms. "D", who was planning to leave within a few days for a research/study trip abroad, phoned Mr. "E" seeking the results of the independent medical review of the contested benefit claim. Mr. "E", in his affidavit, describes the phone encounter as follows:

> "I received a telephone call from Ms. ["D"], Mr. ["D"]'s daughter, on January 26, 1999. I told her that the results of Intracorp's external review of the ["D"] family's claim for MBP coverage of Mr. ["D"]'s transportation costs were consistent with UHC's denial of coverage. Ms. ["D"] stated that she was due to leave the U.S. in a few days, and, at her request, I quickly prepared a letter confirming the results of the Intracorp review and the denial of MBP coverage based on the plan's exclusion of transportation expenses other than local ambulance service. I faxed her the letter, dated January 26, 1999. … In our telephone conversation, despite her earlier letter describing the Intracorp review as the 'final determination' of MBP coverage …, Ms. ["D"] advised me that she intended to appeal the Fund's denial of MBP coverage further when she returned to the United States. She stated that she would be in contact with me regarding the appeal, but she was very hurried and did not request any information on the appeal procedure. I expected to hear from her again, and would have advised her of the appeals procedure and time limits had she called me again as she said she would. I did not receive any telephone calls or correspondence from her again after that date."

35. The letter faxed by Mr. "E" on January 26, stated:

> "It is important that you understand that medical evacuation is not a covered benefit under the Medical Benefits Plan (MBP) of the International Monetary Fund. … In very rare circumstances where medical care is not available at the MBP participant's location, as an exception, the local ambulance benefit is extended to allow for transportation to the nearest location where medical care is available. …"
>
> We submitted your appeal to a physician consultant for an independent review to determine if your father's case met the medical necessity requirements for an exception to be made. The physician has concluded that your father's condition did not justify a medical evacuation. A copy of the physician's findings is attached."[16]

36. The letter concluded with the sentence: "I regret that this is not the outcome you had hoped for in this case." It provided no information as to any grievance or appeal procedures within the Fund. Ms. "D" asserts that a hard copy of the faxed letter was never received, and the Fund has not disputed this assertion.

Applicant's alleged conversation with Ombudsperson, January 28, 1999

37. According to Applicant, two days later, on January 28, 1999, she telephoned the Fund's Ombudsperson, seeking information on appeal procedures. Ms. "D" alleges that she told the Ombudsperson that she would be overseas for "three to five months" to complete her Ph.D.

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[16] The attached findings of the physician concluded that transportation of Mr. "D" to another facility was not "absolutely necessary."

fieldwork, and that the Ombudsperson "… assured me there were internal channels for appeal and that the matter could be handled upon my return. Despite knowing that I would be gone for as long as five months, she never mentioned a time frame within which I had to pursue the matter." (Emphasis in original.) Applicant further asserts that had the Ombudsperson alerted her to a deadline she would have pursued the review process from abroad or petitioned the Grievance Committee for an extension before the expiration of the deadline.

Applicant's pursuit of review by the Director of Human Resources (January – February 2000)

38. Precisely how long Applicant was abroad is not evident from the record. Although she contends that she told the Ombudsperson in January 1999 that she would be gone for three to five months, it was not until nearly a year later that Ms. "D" claims to have taken any further action to pursue review of the contested benefit.

39. In late 1999, according to Applicant, she contacted the Fund's new Ombudsperson, as the former Ombudsperson's term had expired. The new Ombudsperson, asserts Applicant, was the first person to inform her of the administrative review procedures and to provide her with a copy of GAO No. 31.

40. On January 14, 2000, Ms. "D" wrote to the Fund's Director of Human Resources, expressly invoking GAO No. 31:

> "Having exhausted other channels of appeal, I am now formally requesting administrative review by the Director of Human Resources under GAO No. 31."

On the substance of the claim, she argued:

> "Obviously, there has been a great deal of confusion with the administrators of the health insurance as to what exactly is covered. If the language of the coverage was vague and ambiguous enough to confuse the administrators, naturally, our understanding could not have been any clearer; we proceeded only according to what UHC repeatedly told us [overseas], i.e., that evacuation was covered if 'medically necessary.'"

41. Ms. "D" recounted her earlier efforts to have the decision reversed, first through UHC's appeals process and then "…plead[ing] my case to an IMF Personnel Officer, [Mr. "E"], who also denied the claim. …" Finally, she expressly requested of the Director of Human Resources a waiver of time limits for administrative review on an exceptional basis:

> "The last fax comes from [Mr. "E"]; please note that he does not inform me of any time frame for responding further. Nor did he ever send me a hard copy of his denial as I had requested. He sent me this fax two days before I left the country to conduct my dissertation research … which had been repeatedly postponed due to my parents' illnesses. Having come back into the country, I have been making some

> inquiries as to my options in pursuing this matter. I have just learned that there may be time frames for appeal of which I should have been advised. However, please note that I was not made aware of them, nor the protocol for further appeal.
>
> I ask you to kindly review our case and, in the interest of fairness, to please waive any time frames for appeal that may exist so that I may have access, on behalf of my father's estate, to approach the grievance committee for final review. As stated earlier, I was never advised of any time frame in [Mr. "E"]'s last letter, and it is not reasonable to assume that I would know the proper procedures as I am not a staff member.
>
> … . I appeal to you now on moral grounds, in addition to those of fairness, to please address our claim and resolve this issue. I believe the IMF has a moral obligation to take responsibility for the errors of its agents; we should not be penalized for acting on misinformation we were given by UHC, the IMF's preferred administrator for health insurance at that time."

42. The Fund's Director of Human Resources responded on February 1, 2000, informing Ms. "D" that she was not able to review the case under GAO No. 31 because the period for initiation by Applicant of the administrative review process had expired:

> "I regret that I am not able to formally review your case under GAO No. 31. According to GAO 31, Section 6.03, ***Grievances Regarding Staff Benefits***, a written request must be submitted to the division chief in the Administration Department whose division is responsible for the administration of the benefit in question, clearly indicating that he or she is pursuing the administrative remedies under GAO No. 31, within three months after the staff member was informed of the intended application of the benefit. You were informed of the denial of the benefit in your father's case more than 11 months ago and no written request for review was received by the Staff Benefits Division within the three-month time limit or since that time."

43. In addition, the Director of Human Resources informed Ms. "D" that although the remedies under GAO No. 31 were unavailable, she had requested "… an internal review of the actions taken by my staff on your father's case." The conclusion of this review was that "… it cannot be claimed that you believed that the cost of your father's flight back to the United States would be covered under the MBP." The Director concluded her correspondence as follows:

> "I wish that I could respond more favorably to your request, but the provisions of the MBP, as well as the time limitations in GAO 31, preclude any other action on my part."

Approach to the Grievance Committee (March – May 2000)

44. Having failed to obtain redress through the Director of Human Resources, Ms. "D" on March 15, 2000 filed a formal grievance with the Fund's Grievance Committee, challenging the denial of MBP coverage for her father's evacuation. In her grievance, Ms. "D" herself raised the issue of timeliness, arguing, as she had to the Director of Human Resources, that as a non-staff member she had not been informed of the GAO No. 31 review process by Mr. "E" when denying her claim and that subsequently she had been given mistaken information by the Fund's then Ombudsperson. She termed the issue of timeliness a "legal technicality" and urged that her claim "… deserve[d] to be heard in the interest of justice."

45. The Fund's Assistant Director of Human Resources responded on April 26 in a letter to the Chairman of the Grievance Committee, contending that the grievance was time-barred under GAO No. 31, Section 6.03, which requires that a request for review of a decision regarding a staff benefit be filed with the Division Chief within three months of the denial of the benefit. As Ms. "D" had not done this, argued the Assistant Director, the grievance should be dismissed and no exception should be made:

> "Ms. ["D"]'s apparent lack of knowledge of the rules regarding the time limits for the submission of claims is not a valid basis for an exception to this mandatory requirement. Because her request is time-barred, the Grievance Committee has no jurisdiction over the matter, and the grievance should accordingly be dismissed."

Ms. "D" responded two days later, April 28, reiterating her earlier arguments for exception to the requirements of GAO No. 31.

46. On May 10, 2000, the Grievance Committee Chairman dismissed Ms. "D"'s grievance, by letter to Applicant, as follows:

> "After review of the record in your grievance, I regret to inform you that the Grievance Committee has no jurisdiction to consider your claim.
>
> As indicated by [the Assistant Director of Human Resources], the procedural time limits are mandatory, and must be met in order to allow the Grievance Committee to be vested with jurisdiction.
>
> You state that … the then Ombudsperson (she is no longer a consultant to the Fund) advised you that 'the matter could be handled upon [your] return' after you indicated to her that you would be away for three to five months. Even if this were the case, [the then Ombudsperson] had no authority to waive these mandatory time limits.
>
> Your circumstance is very unfortunate, but there is simply no way to empower the Grievance Committee with authority that it does not have under the enabling provisions of GAO No. 31."

Applicant's additional efforts at review (July – August 2000)

47. Ms. "D" efforts at pursuing her claim did not conclude with the dismissal of her grievance on jurisdictional grounds.[17] On July 15, 2000, Ms. "D" directed a letter to the Fund's Managing Director and Deputy Managing Directors, appealing to them "in the interest of justice" to remedy the Human Resources Department's "callous and unjust treatment of my family's claim." Again, Ms. "D" sought to excuse her failure to invoke the administrative review process in a timely manner:

> "First of all, invoking the time limit in my case was improper as, by its express terms, the time limit applies only to staff members (GAO No. 31, Section 6.03). Moreover, as I am not a staff member, I had absolutely no access to policy documents or the internal IMF web-site, which could have provided me with the rules and regulations. Despite Mr. ["E"]'s failure to disclose the rules and my avenues for appeal, on my own I had contacted the IMF's Ombudsperson before I left for [overseas]. When I mentioned I would be studying abroad for three to five months, she assured me the matter could be handled through internal procedures upon my return. She never mentioned any time frame. I spoke to the Ombudsperson because I knew she was the most impartial and knowledgeable source of such information. It is not reasonable to assume that I would, independently of the Ombudsperson, know my further rights to appeal."

Finally, stated Applicant:

> "I am hoping, however, that your principled intervention will finally bring this matter to a just resolution. In addition to those of fairness, I appeal to you on moral and compassionate grounds, to please reimburse us."

48. Applicant's correspondence resulted in a meeting on August 2 between herself and one of the Deputy Managing Directors. On August 4, Ms. "D" received a letter from the Deputy Managing Director denying her "request [ ] that the recent ruling of the Grievance Committee be overturned and that the Committee be instructed to consider your case."

49. In rejecting Applicant's request, the Deputy Managing Director emphasized the importance of compliance with the time limits for pursuing administrative review:

> "Your request for administrative review was not submitted until January 14, 2000, or almost one year after the final administrative decision was

[17] Sometime in late June or early July, 2000, Applicant received notification from the Fund that a charge of $392 for medical services incurred at a stopover point during the evacuation would be reimbursed, on the ground that it would have been a covered expense in the absence of the evacuation. Ms. "D" responded that the family would not accept this "token" offer and reaffirmed that coverage of the medical evacuation was, in their view, still an unresolved issue.

> taken. The statute of limitations that establishes time limits for submitting requests for administrative review and grievances is not a legal technicality as you suggest. It is present in virtually all legal systems to help ensure that cases are heard in a timely manner before the memories of witnesses fade or documentary evidence is displaced. As in any judicial system, lack of knowledge about the rules does not constitute a valid reason for making an exception to the rules. I also attach a good deal of importance to maintaining the integrity of our Grievance Committee and consistency in the application of our rules and regulations as they apply to approximately 3,000 current employees and 1,000 pensioners. In this regard, the Fund's management has never overturned a ruling of the Grievance Committee since the Committee's inception in 1980."

50. The letter concluded by informing Ms. "D" of the possibility of review by the Administrative Tribunal:

> "The Fund's dispute resolution procedures allow a decision of the Grievance Committee to be appealed to the Administrative Tribunal within three months of the decision taken by the Grievance Committee. *Without taking a position in your case with respect to the jurisdiction of the Administrative Tribunal*, our records indicate that the deadline for filing an appeal with the Tribunal would be August 10, 2000." (Emphasis supplied.)

51. On August 7, Ms. "D" telephoned the Registrar of the Administrative Tribunal seeking clarification of the filing deadline. The Registrar, who understood Ms. "D"'s inquiry as a good faith effort to comply with the applicable statutory provisions, concluded that, pursuant to Articles V and VI of the Statute, Ms. "D" would have three months from the Deputy Managing Director's letter of August 4, in which to file her claim.[18] The Application was filed with the Administrative Tribunal on October 31, 2000.

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[18] Ambiguity as to the construction of Article V arose from the fact the Grievance Committee Chairman, in dismissing the grievance on jurisdictional grounds, notified Ms. "D" directly of the dismissal rather than making a recommendation to the Managing Director as is contemplated by GAO No. 31.

Article V, para. 2 provides:

> "For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:
>
> a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;
>
> b. a decision denying the relief requested has been notified to the applicant; or

(continued)

Summary of Parties' Principal Contentions

Applicant's principal contentions

52. Applicant's principal arguments as presented in the Application and the Objection to the International Monetary Fund's Motion for Summary Dismissal, as well as in additional pleadings, are summarized below.

53. Applicant's contentions on the merits

1. Mr. "D"'s medical evacuation is covered under the Fund's Medical Benefits Plan as medically necessary. The medical necessity of the evacuation is supported by evidence supplied by Mr. "D"'s attending physicians in the United States and overseas.

2. The Plan administrator United HealthCare authorized the services subject to their medical necessity. Later UHC took the position that they were not covered under the policy. The Fund has admitted that in rare circumstances the local ambulance benefit is extended to allow transportation to the nearest location where medical care is available. The independent reviewer applied the wrong standard of "absolute necessity."

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c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken."

Arguably, exhaustion of channels of administrative review might have occurred under Article V, para. 2(b), when Ms. "D" was notified by the Grievance Committee Chairman of the dismissal of her grievance. (Article VI allows three months following exhaustion of administrative review for the filing of an Application.)

However, Article V, para. 2 appears to *assume* that a recommendation has been made by the Grievance Committee to the Managing Director. (See, e.g., Commentary on Article VI of the Statute, explaining that the three-month period for filing an application in the Tribunal would not begin to run until "…administrative review, including recourse to internal committees like the Grievance Committee (if applicable), is fully exhausted and the Managing Director has decided whether to implement the Committee's recommendation." (Report of the Executive Board, p. 24.)) (See also Ms. "Y", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 30 (summarizing provisions of Art. V, para. 2).) Therefore, it is not clear how para. 2 would operate in a case such as this one in which the applicant was notified directly by the Grievance Committee Chairman of the dismissal of the grievance. Moreover, after Ms. "D" brought her claim to the attention of Fund management, the Deputy Managing Director expressly ratified the decision of the Grievance Committee Chairman to dismiss the case, as well as the basis for that dismissal. Hence, although the Grievance Committee had made no recommendation to the Managing Director, the Deputy Managing Director reviewed the Chairman's ruling as if it had.

In the unusual circumstances of the case, the Registrar (after consulting with the Assistant Director of Human Resources, who agreed that the Fund would not dispute such determination in the case of the Estate of Mr. "D") decided to construe any possible ambiguity with respect to the construction of Article V in favor of the Applicant's having three months from the August 4 letter of the Deputy Managing Director in which to file the Application. The Registrar memorialized this decision in a Memorandum to Files that was copied to the parties.

3. Mr. "D"'s family and UHC entered into a special contract for reimbursement of costs conditioned on proof of medical necessity and reasonableness of the charges. UHC waived any other condition of disbursement. UHC and the IMF are estopped from imposing any other condition for reimbursement because the family relied on their representations. UHC acted as an agent of the Fund.

4. Applicant's seeks 100% of the submitted invoice for the air evacuation, plus interest. Applicant also seeks attorney's fees and incidental damages and costs of the litigation.

54. Applicant's contentions opposing summary dismissal

1. Applicant exhausted all administrative remedies by seeking to have the Grievance Committee adjudicate her claim, as well as taking her complaint to the highest levels of the IMF, including the Deputy Managing Director.

2. "It is obvious and not contested that Applicant did not seek Administrative Review in a timely manner."[19]

3. The time limits of GAO No. 31 do not contemplate and cannot reasonably be extended to the estate of a deceased beneficiary of the MBP who was not a staff member.

4. Fund officers deliberately left Ms. "D" in ignorance of the rights of the estate. At no point did the Fund's representatives provide Ms. "D" with the Fund's rules on bringing grievances or otherwise alert her to her rights of review. She did not have access to the IMF internal website. At a critical point when Applicant might have been informed of the appropriate procedures she was not given GAO No. 31. Mr. "E" treated the matter as closed in his letter of January 26, 1999.

5. The Fund's former Ombudsperson misled Applicant as to the deadlines for administrative review.

6. The facts indicate that Applicant believed, as in the law generally, that the minimum statute of limitations was one year.

7. Respondent abused its discretion by not availing itself of provisions for waiver and extension of time limits under GAO No. 31.

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[19] This argument is inconsistent with another argument: "… arguendo Applicant did not skip any intermediate stage of the review process, since she had previously requested the Division Chief concerned, Mr. ["E"] for review." Respondent, in its Additional Statement, points out that Mr. "E" was not the Division Chief but rather a Human Resources Officer three levels below the Division Chief. In response, Applicant has stated that she "regrets the mischaracterization" of Mr. "E"'s position. Nonetheless, she goes on to argue that as Mr. "E" had responsibility for the Medical Benefits Plan, he was thereby entitled to receive a request to review on behalf of the "actual" Division Chief.

8. Failure to meet the time limits for administrative review is not an automatic bar to the jurisdiction of the Administrative Tribunal.

9. Applicant promptly complied with rights of appeal of which the family was informed.

10. Applicant has not sought advantage through delay or willfully disregarded time limits.

11. Respondent has had ample opportunity to review the case and has demonstrably done so.

12. The Administrative Tribunal should hear the case on the merits and not return it to the Grievance Committee.

Respondent's principal contentions

55. Respondent's principal arguments as set forth in the Motion for Summary Dismissal and additional pleadings are summarized below.

56. Respondent's contentions on the merits

1. Mr. "D"'s medical evacuation is not covered under the Fund's Medical Benefits Plan because transportation or travel, except for local ambulance service, is excluded under the Plan.

2. Mr. "D"'s family understood that it would be fully responsible for the expense of the medical evacuation before deciding to go ahead with it. The Medical Duty Officer in the Health Services Department had told Mr. "D"'s son that the evacuation would not be covered, and this advice was confirmed to him by the Fund Human Resources Officer with responsibility for the MBP on June 1, 1998.

3. An external medical review concluded that there was no basis for an exception to the rule excluding transportation expenses under the MBP. Further internal review by the Director of Human Resources confirmed that the requested benefit was not payable under the MBP and that the family understood this when it undertook the evacuation.

57. Respondent's contentions in favor of summary dismissal

1. It is undisputed that Applicant failed to exhaust available channels of administrative review within the time limits prescribed by Fund rules. Therefore, the Application should be dismissed by the Administrative Tribunal for failure to meet the statutory requirement that all available channels of administrative review must be exhausted in order for the Tribunal to have jurisdiction.

2. Applicant did not request review by the Chief of the Staff Benefits Division, which is required within three months of the denial of the benefit (GAO No. 31, Section 6.03.)[20] Instead she submitted a request for review to the Director of Human Resources some nine months after the deadline for submission to the Division Chief had passed.

3. There is no basis to set aside the applicable time limits. Failure to exhaust administrative remedies was due solely to Applicant's own inaction. The onus was on her to make the necessary inquiries and to acquaint herself with relevant rules regarding the grievance process.

4. Lack of knowledge of the rules is not a valid basis for exception to mandatory time limits for submission of claims.

5. As Applicant is considered a "staff member" for purposes of submitting grievances to Grievance Committee, she must be held to the applicable time limits.

6. GAO No. 31, Section 6.07 does not permit tolling of any time limits in Applicant's case.

7. Failure of Applicant to exhaust administrative remedies was not due to any attempt by the Fund to mislead her.

8. The Tribunal should wholly disregard Applicant's assertions about what she allegedly was told by the Fund's former Ombudsperson, as the Ombudsperson may not be called as a witness or required to provide information in Tribunal proceedings. In addition, although Applicant says she told the Ombudsperson in January 1999 that she would be abroad for three to five months, she did not take up her appeal again until almost a year later.

9. GAO No. 31 is not applicable to the successor in interest to a non-staff member enrollee in a Fund benefit plan, and therefore the Grievance Committee properly dismissed Applicant's grievance.

10. If the Tribunal concludes that the Grievance Committee should have considered whether jurisdictional time limits might not be applicable, the parties should be directed to return to the Grievance Committee for examination of the relevant facts, including, if warranted, an examination of the merits of the case.

[20] Mr. "E" was not the Division Chief.

Consideration of the Issues of the Case

The Administrative Tribunal's jurisdiction under Article II

58. Respondent has contended, albeit in its final pleading relating to the Motion for Summary Dismissal, that there is question as to whether the Tribunal has jurisdiction under Article II of the Statute over an Application, such as the one in this case, brought by a successor in interest to a non-staff member enrollee in a Fund benefit plan. While Respondent "chose not to assert the jurisdictional defense" of Article II in this case, it did so "[w]ithout prejudice to the position it might take in some future case." The Tribunal, as a threshold matter, accordingly will now consider whether it has jurisdiction *ratione personæ* over the Estate of Mr. "D".

59. The pertinent provisions of Article II read as follows:

> "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:
>
> …
>
> 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. …"

The Commentary on the Statute makes clear that under Article II, para. 1, non-staff enrollees in the Medical Benefits Plan may bring Applications:

> "Section 1(b) sets forth the competence of the tribunal with respect to the retirement and other benefit plans maintained by the Fund, such as the Staff Retirement Plan (SRP), the Medical Benefits Plan (MBP), and the Group Life Insurance Plan. [Footnote omitted.] *This provision would allow individuals who are not members of the staff but*

> *who have rights under these plans to bring claims before the tribunal concerning decisions taken under or with respect to the plan.* Such individuals would *include* beneficiaries under the SRP and nonstaff enrollees in the MBP, *for example, a deceased staff member's widow who continues to participate in the MBP*. Such individuals would, however, be entitled to assert claims only with respect to decisions arising under or concerning the Fund's retirement or benefit plans; they would not have the right to challenge other types of administrative acts before the tribunal."

(Report of the Executive Board, p. 13.) (Emphasis supplied.)

60. At the same time, Article II, c. (iii), provides that successors in interest to staff members may bring Applications. The associated Commentary observes:

> "The definition also includes persons who would be entitled to assert the rights of the *staff member* in the event of his death; thus, if an issue as to the termination payments due to a *staff member* were unresolved at the time of his death, that claim could be pursued by the personal representative of the estate."

(Report of the Executive Board, p. 15.) (Emphasis supplied.)

61. The question for resolution by the Tribunal is whether Article II, para. 1.b. and para. 2.c. (iii) should be read together to permit the Estate of Mr. "D", a successor in interest to a non-staff member enrollee in a Fund benefit plan, to bring an Application in the Tribunal.

62. While the unusual category of interest represented by the Estate of Mr. "D" is omitted from the express terms of the Tribunal's jurisdiction, the question is whether that omission is an inadvertent vacuum in the ambit of jurisdictional terms or an intentional decision by the Statute's drafters that the interests of a staff member enrollee should survive that person's death but that the interests of a non-staff member enrollee should not. The issue does not appear to have been addressed in the Statute's legislative history. Nor is a review of statutes of other international administrative tribunals instructive. While a number of such statutes expressly grant jurisdiction over staff members, enrollees in benefit plans, and successors in interest to staff members, the precise category of successors in interest to non-staff enrollees does not appear to have been anticipated expressly, although the jurisdictional terms of some of the statutes admit of more flexibility than others. [21]

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[21] For example, the jurisdictional terms of the Statute of the Organization of American States Administrative Tribunal ("OASAT") provide as follows:

> "1. The Tribunal shall be competent to hear those cases in which members of the staff of the General Secretariat of the Organization of American States allege nonobservance of the conditions established in their respective appointments or contracts or violation of the General Standards for the operation of the General Secretariat or other applicable provisions, including those concerning the Retirement and Pension Plan of the General Secretariat.

(continued)

63. The Administrative Tribunal concludes that it does have jurisdiction *ratione personæ* over Applicant's claim under Article II of the Statute, for two reasons. First, the Commentary on the Statute provides examples of those covered that are not exhaustive: "Such individuals would a include … non-staff enrollees in the MBP, for example …" Other individuals in the situation, "for example" of the Applicant, could be "included". Second, given the intent of the Statute and the structure of the Fund's benefit program to afford staff members and their families benefits, it would not make sense to exclude from the reach of the provisions in question a person who is a successor in interest to a non-staff enrollee.

The exhaustion of remedies requirement of Article V

64. Respondent seeks summary dismissal of the Application on the ground that Applicant has failed to satisfy the exhaustion of remedies requirement of Article V of the Tribunal's Statute. Article V provides in its entirety:

> "***ARTICLE V***
>
> 1.When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.
>
> 2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

> 2. The Tribunal shall be open to:
>
> a) Any staff member of the General Secretariat of the Organization, even after his employment or duties have ceased, and to any person who has succeeded to the staff member's rights upon his death.
>
> b) Any other person who can show that he is entitled to rights derived from a contract of employment or an appointment or from a provision of the General Standards or of other administrative regulations upon which the staff member could have relied.
>
> 3. For the purposes of this Statute, anyone who is connected with the Secretariat by an appointment, a contract of employment, or some other employer-employee relationship, in accordance with provisions of the General Standards or other administrative regulations shall be considered to be a staff member of the General Secretariat.

(OASAT Statute, Article II.) Arguably, under the OASAT Statute, a successor in interest to a non-staff enrollee in a benefit plan might fall within the terms of Article II, 2.b. as a person entitled to rights "derived from" a contract of employment.

a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

3. For purposes of this Statute, where the available channels of review do not include the procedure described in Section 2, a channel of administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since the request for review was made and no decision stating that the relief requested would be granted has been notified to the applicant;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

4. 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."

65. Article VI provides a three-month period following the exhaustion of administrative remedies for the filing of an application with the Administrative Tribunal:

"***ARTICLE VI***

1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.

2. An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible

> application challenging the legality of an individual decision taken pursuant to such regulatory decision.
>
> 3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.
>
> 4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.
>
> 5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application."

66. The requirement for exhaustion of remedies serves the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication. These goals are reflected in the Commentary on the Statute found in the Report of the Executive Board, and in the jurisprudence of the Tribunal. The Commentary emphasizes that the Administrative Tribunal is intended as a last resort after the administration has had a full opportunity to determine whether corrective measures should be taken:

> "Article V prescribes an exhaustion of remedies requirement with respect to the admissibility of applications before the tribunal. Cases otherwise falling within the tribunal's competence would be admissible only if applicable administrative remedies have been exhausted. The exhaustion requirement is imposed by the statutes of all major administrative tribunals, presumably for the reason that the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate."

(Report of the Executive Board, p. 23.)

67. In Ms. "Y", Applicant, v. International Monetary Fund, Respondent, IMFAT Judgment No. 1998-1 (December 18, 1998), the Tribunal recognized that "… recourse to the Grievance Committee [has] the advantage of producing a detailed factual and legal record which is of great assistance to the consideration of a case by the Administrative Tribunal." (para. 42.) Other international administrative tribunals likewise have recognized this fundamental advantage of administrative review. In Donneve S. Rae (No. 2) v. International Bank for Reconstruction and Development, World Bank Administrative Tribunal ("WBAT") Decision No. 132 (1993), the WBAT recognized the difficulty for a tribunal of having to "… assess *ab initio* [a case] without the benefit of the kind of full evidentiary record, and prior informed review, that would have been assured had the case been presented in good time to [the internal appeals board]." (Quoted in Ms. "Y", para. 32.)

68. The following passage from Eilert J. de Jong v. International Finance Corporation, WBAT Decision No. 89 (1990) aptly describes the interplay between both reasons for the exhaustion of administrative review:

> "(The) statutory exhaustion requirement is of utmost importance. It ensures that the management of the Bank shall be afforded an opportunity to redress any alleged violation by its own action, short of possibly protracted and expensive litigation before this Tribunal. In addition, the pursuit of internal remedies, in particular the findings and recommendations of the Appeals Committee, greatly assists the Tribunal in promptly and fairly disposing of the cases before it. The Appeals Committee permits a full and expeditious development of the parties' positions, including the testimony of witnesses, and often results in the announcement of recommendations that are satisfactory to both the Bank and to the aggrieved staff members (Berg, Decision No. 51 [1987], para. 30; Dhillon, Decision No. 75 [1989], para. 22)."

(de Jong, p. 9.)

The process of administrative review pursuant to GAO No. 31

69. As contemplated by Article V, para. 2 of the Statute, GAO No. 31, Rev. 3 (1995) provides a comprehensive scheme for the administrative review of employment-related disputes within the Fund, leading up to Grievance Committee review and culminating finally in a recommendation from the Grievance Committee to the Fund's Managing Director. Among the purposes of GAO No. 31 is to "…make recommendations to the Managing Director in order to facilitate the fair and expeditious resolution of disputes. …" (GAO No. 31, Section 1.) While adopted initially in 1980 to establish the Fund's Grievance Committee, GAO No. 31 was amended in 1995, in part to bring it into conformity with the newly enacted Statute of the Administrative Tribunal.[22]

70. Grievance Committee review is open to the following categories of persons:

> "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; (ii) any successor in interest to a

[22] *See, e.g.,* Staff Bulletin No. 94/14 (Nov. 17, 1994):

> "…it had always been intended, once the Tribunal was established, that the jurisdiction of the Grievance Committee would be broadened to include all types of cases involving individual decisions (other than those arising under the Staff Retirement Plan), as the final stage of administrative review before a staff member sought redress from the Tribunal. This intention was expressed in Executive Board papers as early as 1989 and was reiterated in subsequent papers."

> deceased member of the staff, to the extent that he or she is entitled to assert a right of such staff member against the Fund; and (iii) any enrollee in a benefit plan maintained by the Fund as employer, with respect to decisions arising under any such plan."

The two latter categories were inserted with the 1995 revision of GAO No. 31.

71. The jurisdiction of the Grievance Committee is predicated upon a potential grievant's exhaustion of underlying administrative review procedures, unless, by consent, the dispute is submitted directly to the Committee:

> "4.02 *Exhaustion of Administrative Review*. The Committee shall have jurisdiction to hear a case only after the grievant has exhausted the applicable channels of administrative review set forth in Section 6 of this Order, unless the Managing Director, or the Managing Director's designee, agrees that the grievance may be submitted directly to the Committee."
>
> …
>
> "7.01.2 *The Fund.* The Managing Director or the Director of Administration[23] may, with the prior consent of the grievant, refer to the Committee any case brought directly to their attention, and the Committee shall have jurisdiction to hear the case."

72. In the case, as in this one, of a dispute regarding a staff benefit, the following procedures and time limits apply:

> "6.03 *Grievances Regarding Staff Benefits*. For decisions regarding the application of a staff benefit, the staff member shall first submit a request for review in writing to the division chief in the Administration Department whose division is responsible for the administration of the benefit in question, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. The request must be submitted within three months after the staff member was informed of the intended application of the benefit. The division chief shall have 15 days to respond in writing.
>
> 6.04 *Appeal to the Director of Administration.* If dissatisfied with the response to a request under either Section 6.02 or 6.03, or if no response is received within 15 days after submission of such a request, then the staff member may request in writing a review by the Director of Administration.

[23] Effective July 1, 1999, in recognition of reorganization within the Fund, all references in the GAOs to the Administration Department were changed to the Human Resources Department. (Memorandum to Staff, September 9, 1999, "Revised References in General Administrative Orders".)

> The written request must be submitted within 30 days after the response from the division chief or Department Head, as applicable, has been received or the deadline for a response has passed, whichever is earlier.
>
> 6.05 *Exhaustion of Administrative Review.* The channels of administrative review shall be considered exhausted, for purposes of filing a grievance with the Committee, when the staff member has received a response to his or her written request or no response has been received within 15 days of its submission to the Director of Administration.
>
> 6.06 *Decisions Taken by Managing Director or Director of Administration.* With respect to any decision that was taken directly by the Director of Administration or by the Managing Director, or by the Managing Director=s designee, the staff member may file a grievance with the Committee within six months after the challenged decision was made or communicated to the staff member, whichever is later."
>
> …
>
> "7.03 *Time Limit for Submission to Grievance Committee.* Other than with respect to decisions taken directly by the Director of Administration or the Managing Director, as provided in Section 6.06 above, a grievant shall have 60 days after the administrative remedies have been exhausted to submit a grievance to the Committee."

73. In this case, it is not contested that Applicant complied with all of the above procedures and time limits, except for the initial requirement of Section 6.03 to request administrative review by the Chief of the Staff Benefits Division within three months of the denial of the benefit.

74. With respect to compliance with the time limits for administrative review, GAO No. 31 provides some limited exceptions:

> "6.07 *Time Limits.* A staff member shall be required to exhaust the applicable channels of administrative review within the required time limits before submitting a grievance to the Grievance Committee. The time limits prescribed in Sections 6.02, 6.03, 6.04 and 6.06 shall be extended, day for day, for each day that the grievant is working on Fund business outside Washington D.C. or is in recognized leave status, except for administrative leave and separation leave.
>
> 6.07.1 Any of the time limits prescribed in this Section, except for those prescribed for the initiation of administrative review of a decision or for the filing of a grievance under Section 6.06, may be extended: (i) for the staff member, with the consent of the official to whom the request for review is addressed; and (ii) for the official responsible for responding to the request for review, with the consent of the staff member."

75. Finally, GAO No. 31 provides that the Grievance Committee "… for the purpose of proceeding with a grievance, shall decide whether it has jurisdiction over the matter." (GAO No. 31, Section 4.04.)

76. The history of the Fund's experience with GAO No. 31, especially the provisions for extension or waiver of time limits thereunder, was the subject of a Request for Information issued to the Respondent by the President of the Administrative Tribunal. That Request asked inter alia:

> "4. In how many of the grievances over which the Grievance Committee has exercised jurisdiction, has the Fund consented to: a) direct Grievance Committee review under GAO No. 31, Section 7.01.2, or b) the extension of time limits for completion of the administrative review process under GAO No. 31, Section 6.07.1, or c) any other extension or waiver of time limits for the exhaustion of administrative review under any applicable provision of GAO No. 31?"

77. In response, the Fund has stated that in all cases that have proceeded to a decision on the merits by the Grievance Committee, the grievants had complied with the necessary steps of administrative review. Thus, in no case, has the Managing Director or Director of Administration (now Human Resources) consented to review pursuant to Section 7.01.2 of GAO No. 31. The Fund's response to Request 4 (b) and (c) is less clear:

> "With respect to parts (b) and (c), the Fund was unable to consent to any extension of time limits under GAO No. 31 from 1980 until the 1995 Revision of the GAO, under which the applicable time limit for the initial submission of a benefit-related grievance to the Chief of the Staff Benefits Division was not extendable or waivable.[*] Where it has been, no case has challenged the failure to consent to an extension where it would have been permissible.
>
> [*] See Section 6.07.1 of GAO No. 31, Rev. 3 (1995)"

The Fund's response also states:

> "… the current text continued the longstanding policy under GAO No. 31 against extending the initial submission of the benefit complaint to the Chief of the Staff Benefits Division."

This suggests that the extension provision of Section 6.07.1 would not be applicable in the case of Applicant, in which she failed to initiate administrative review on a timely basis with the Division Chief.

78. According to the Fund's response to the Tribunal's Request for Information, approximately sixty-two grievances have been filed from the initial issuance of GAO No. 31 in 1980 through the end of 2000. Of these, only three have been dismissed for failure to meet the requirements for exhaustion of administrative review under GAO No. 31. Sixteen grievances have related to benefit

questions of any kind, and five of these have related to the Medical Benefits Plan. The Fund asserts that it has no record of any non-staff member grievances related to benefits. Neither has a successor in interest to a deceased staff member filed a grievance since GAO No. 31 was revised in 1995 to permit such persons to file grievances.

Was Applicant required to exhaust the administrative review procedures of GAO No. 31?

79. In assessing whether Applicant has met the exhaustion of remedies requirement of Article V and filed a timely application pursuant to Article VI, the Administrative Tribunal first must determine what channels of administrative review, if any, were available to the Estate of Mr. "D" under the internal law of the Fund. The question of whether or not Applicant, as a successor in interest to a non-staff member enrollee in a Fund benefit plan, was required to exhaust the channel of administrative review provided by GAO No. 31 has been the subject of inconsistent pleadings on the part of Respondent.

80. In its Motion for Summary Dismissal, the Fund contends:

> "As the representative of the Estate of Mr. ["D"] and the successor in interest to the late Mr. and Mrs. ["D"], Applicant has recourse to the Grievance Committee concerning the denial of a benefit claim that Mr. ["D"] would have been able to pursue had he survived. Thus, the Applicant is considered as a 'staff member' for purposes of submitting grievances to the Grievance Committee, and she must be held to the requirements to which all 'staff members' (including beneficiaries or persons with derivative claims) are subject, including the time limits prescribed in the rules and the consequences of failing to meet those time limits."

Hence, the central argument made in the Fund's Motion is that Ms. "D" failed to satisfy Article V of the Statute because she did not initiate the administrative review procedures of GAO No. 31, to which she was subject, on a timely basis.

81. Likewise, in its correspondence with Ms. "D" prior to the litigation in the Administrative Tribunal, the Fund repeatedly informed her that further review of the claim was precluded because she had failed to comply with the time limits of GAO No. 31. This position was asserted in the following communications from Respondent: the February 1, 2000 letter from the Director of Human Resources; the Memorandum of April 26, 2000 from the Assistant Director of Human Resources to the Grievance Committee Chairman (copied to Ms. "D"); the May 10, 2000 dismissal by the Chairman of the Grievance Committee of Applicant's grievance; and finally, the Deputy Managing Director's letter of August 4, 2000, ratifying that ruling.

82. Nonetheless, in its submission of March 9, 2001, responding to the Tribunal's Request for Information, Respondent for the first time takes the position that GAO No. 31 is not applicable to Applicant's claim. The basis for this position is a strict reading of Section 7.01.1 of the GAO, which provides:

> "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; (ii) any successor in interest to a deceased member of the staff, to the extent that he or she is entitled to assert a right of such staff member against the Fund; and (iii) any enrollee in a benefit plan maintained by the Fund as employer, with respect to decisions arising under any such plan."

The Fund thus contends in its March 9 submission that Ms. "D"'s grievance was "unreceivable" in the Grievance Committee not only because it was time-barred but also because there is no provision in GAO No. 31, Rev. 3 (1995) for the bringing of a grievance by the successor in interest to a non-staff enrollee in a Fund benefit plan.

83. Most recently, in its last pleading to the Tribunal, Respondent takes the position, parallel to its assertion with respect to the issue of the Tribunal's jurisdiction under Article II, that it will not assert the "defense" that GAO No. 31 was not applicable in this case.

84. Having held above that Article II of the Tribunal's Statute encompasses claims by a successor in interest to a non-staff member enrollee in a Fund benefit plan, the Tribunal holds that the similar though not identical language of Section 7.01.1 of GAO No. 31 also should be interpreted to allow such claims. To conclude otherwise would be to create the anomalous result that Ms. "D" would have been able to come to the Tribunal without having proceeded through the administrative review process required of staff members, their successors in interest, and enrollees in Fund benefit plans. GAO No. 31, while initially and essentially drafted to govern only staff members, was extended to embrace successors in interest to staff members and "any enrollee in a benefit plan maintained by the Fund. …" Accordingly, the Tribunal concludes that the Applicant does fall within the reach of GAO No. 31, the position predominantly and repeatedly taken in this case by the Fund itself. (The question of whether or not Applicant's unusual status in respect of the terms of GAO No. 31's jurisdictional provision should excuse her untimely initiation of the administrative review process is taken up in a succeeding section of this Judgment.)

Effect of Grievance Committee Chairman's dismissal of Applicant's grievance for failure to pursue timely administrative review under GAO No. 31

85. A preliminary question raised by the filing of the Motion for Summary Dismissal in this case is what effect the decision of the Grievance Committee Chairman that the Committee was without jurisdiction to consider Applicant's grievance should have upon the Administrative Tribunal's consideration of whether Applicant has met the requirements of Article V of the Tribunal's Statute. In its Explanatory Memorandum accompanying Order No. 1999-1, Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent (February 26, 1999) the Tribunal had occasion to consider this very question and concluded:

> "… while the Grievance Committee judges its own jurisdiction for purposes of hearing a grievance (GAO No. 31, Section 4.04), the Administrative Tribunal necessarily decides for itself whether channels of administrative review have been exhausted, and in so doing it may consider the Grievance Committee's determination."

(Explanatory Memorandum, p. 10.)

86. This conclusion has its basis in Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), in which the Tribunal held that it does not serve as an appellate court with jurisdiction to review directly the Grievance Committee's decisions, as "… the Grievance Committee's recommendations do not constitute 'administrative acts' in the sense of Article II, Sections 1.a. and 2.a., because the Committee is not qualified to take 'decisions.'" (D'Aoust, para. 17.) This principle was reaffirmed in Mr. "V", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-2 (August 13, 1999), in which the IMFAT observed that "[a]s the Tribunal makes its own independent findings of fact and holdings of law, it is not bound by the reasoning or recommendation of the Grievance Committee." (Mr. "V", para. 129.)[24]

87. The question considered in the Explanatory Memorandum arose as a result of the Fund's request for interpretation of the Tribunal's Judgment in Ms. "Y", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1998-1 (December 18, 1998). In Ms. "Y", the issue presented was whether the applicant was required by Article V of the Tribunal's Statute to have brought her complaint to the Grievance Committee when she had availed herself of an ad hoc discrimination review process that had been specially instituted by the Fund for a limited period of time. The Tribunal's Judgment in Ms. "Y" , which referenced the "singular circumstances" of the

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[24] Likewise, the WBAT has recognized:

> "The Tribunal is not an appellate body reviewing the proceedings, findings and recommendations of the Appeals Committee. Its task is to review the decisions of the Bank; it is not to review the Report of the Appeals Committee. In a previous judgment the Tribunal has stated as follows:
>
> > '… the relationship of the Appeals Committee to the Tribunal is not that of an inferior to a superior court. The Tribunal is not a court of appeal from the Appeals Committee and does not review the manner in which the Appeals Committee has dealt with a case before it. The proceedings before the Tribunal are entirely separate and independent despite the fact that recourse to the Appeals Committee is a condition precedent to the commencement of proceedings before the Tribunal. The function of the Appeals Committee is to assist the management of the Bank to determine for itself whether there has been a failure on the part of the Bank. The function of the Appeals Committee ends with its recommendation, which the Bank may or may not accept. … The Tribunal is the only body within the Bank that deals with complaints judicially and it does so only on the basis of the evidence before it. (de Raet, Decision No. 85 [1989], para. 54).'"

Helen Lewin v. International Bank for Reconstruction and Development, World Bank Administrative Tribunal Decision No. 152 (1996), para. 44.

case, held that "…in the event that the Grievance Committee, if seized, should decide that it does not have jurisdiction over Applicant's claim, the Administrative Tribunal will reconsider the admissibility of that claim on the basis of the Application now before it." (Ms. "Y", para. 43).

88. In its request for interpretation of judgment, the Fund asked the Administrative Tribunal to limit the use of the term "jurisdiction" in its holding in Ms. "Y" to mean only "jurisdiction *ratione materiae*." The Fund thereby sought to preclude the possibility of Tribunal review should the Grievance Committee dismiss the grievance as time-barred.

89. The Tribunal decided not to admit the Fund's request for interpretation on the grounds that the term "jurisdiction" as used in the operative provisions of the Judgment was neither "obscure nor incomplete" as required for interpretation under Article XVII of the Statute and Rule XX of the Rules of Procedure, and that adoption of the requested interpretation would constitute an amendment of the judgment. (Order No.1999-1, Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent) (February 26, 1999)). Hence, the Order itself does not address the substantive issue raised by the Fund's request. Nonetheless, in an explanatory memorandum accompanying Order No. 1999-1, the Tribunal confronted directly the following question:

> "If the Applicant's grievance is dismissed by the Grievance Committee as time-barred, should that dismissal necessarily determine that Ms. "Y"'s Application with the Tribunal is not admissible?"

(IMFAT's explanatory memorandum accompanying Order No. 1999-1, p. 7.)

90. In answering this question in the negative, the Tribunal clarified the relationship between the Grievance Committee's decision-making with respect to its own jurisdiction and the parallel task of the Administrative Tribunal to decide whether an Applicant has exhausted available channels of administrative review under Article V of the IMFAT Statute:

> "Hence, while the Grievance Committee judges its own jurisdiction for purposes of hearing a grievance (GAO No. 31, Section 4.04), the Administrative Tribunal necessarily decides for itself whether channels of administrative review have been exhausted, and in so doing it may consider the Grievance Committee's determination. Therefore, should the Grievance Committee dismiss Applicant's complaint as time-barred, and should she then choose to return to the Tribunal to pursue the admissibility and merits of her Application, the Tribunal would have the benefit of the Grievance Committee's views on the matter of that Committee's jurisdiction. As the Tribunal held in Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), '…the Tribunal may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee. The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it.'…."

(IMFAT's explanatory memorandum accompanying Order No. 1999-1, p. 10.)

91. Taken together with the IMFAT's jurisprudence establishing that the Tribunal makes its own findings of fact and holdings of law, the explanatory memorandum suggests that the decision of the Grievance Committee Chairman denying jurisdiction in Applicant's case is relevant to but not necessarily dispositive of the Tribunal's consideration of whether she has exhausted channels of administrative review as required by Article V.

92. This conclusion is consistent with the decisions of other international administrative tribunals holding that an appeals body's decision as to the timeliness of administrative review may be re-examined when assessing whether an applicant to the tribunal has met the exhaustion of remedies requirement of the tribunal's statute. In Roman A. Alcartado v. Asian Development Bank, Asian Development Bank Administrative Tribunal ("AsDBAT") Decision No. 41 (1998), the Appeals Committee had concluded that applicant's appeal was not time-barred in that Committee because he had not had adequate notice of the contested decision. Nonetheless, the AsDBAT

> "… firmly reject[ed] the contention of the Applicant that the decision of the Appeals Committee is in any way binding upon the Tribunal. The Appeals Committee is not meant to be a formal adjudicatory body but rather a recommendatory body…, albeit a most important one, that assists the Bank in the adjustment of grievances. …" (Para. 18.)

On the basis of an examination of the facts, the AsDBAT went on to conclude that "[s]urely, under the circumstances already recounted, the Applicant knew – or clearly should have known – of the Bank's decision, even prior to June 1994, so that the six-month period for filing his grievance had already begun to run." (Alcartado, para. 18.) The AsDBAT accordingly held that the application in the tribunal was inadmissible for failure to exhaust internal remedies as required by its Statute. (Para. 21.)

93. A similar course of events transpired in In re Schulz, International Labour Organisation Administrative Tribunal ("ILOAT") Judgment No. 575 (1983). In that case also, an administrative tribunal disregarded an appeals committee's assessment of its own jurisdiction *ratione temporis* in reaching a determination as to whether an applicant had exhausted administrative remedies prerequisite to tribunal review. As in Alcartado, in Schulz the appeals body had decided the case on the basis that the claim was not time-barred, but the tribunal found to the contrary, holding consequently that the applicant had not exhausted internal remedies and that the application therefore was inadmissible.

94. In the World Bank, the rules governing the Appeals Committee are explicit in providing that the Committee's decision on an objection to its competence is subject to review by the Administrative Tribunal. (SR 9.03, para. 4.01.) Moreover, the WBAT has recognized that its Appeals Committee "… is part and parcel of the administrative review process." Helen Lewin v. International Bank for Reconstruction and Development, WBAT Decision No. 152 (1996).

Importance of timely pursuit of administrative review

95. International administrative tribunals have emphasized the importance not only of the exhaustion of administrative remedies but also that the process be pursued in a timely manner. The timeliness of the review process is directly linked to the purposes of that review:

> "Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors – when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies, as is the case here."

(Alcartado, AsDBAT Decision No. 41, para. 12.)

96. Hence, administrative tribunals frequently have dismissed applications for failure to meet the exhaustion requirements of their statutes when the underlying administrative review has not been timely pursued. For example, in Schultz, the ILOAT concluded:

> "According to Article VII (1) of the Statute of the Tribunal a complaint will not be receivable unless the means of redress provided by the staff regulations have been exhausted. To fulfil this condition it is not sufficient to address an appeal to the internal appeal bodies; the internal appeal must be submitted in time. In this case it was not, since it was not until 12 May 1982 that the complainant submitted to the President of the Office her appeal against the decision taken on 17 July 1981 determining her grade, step and seniority. She therefore failed to respect the three-month time limit set in Article 108 (2) of the Service Regulations. Accordingly the internal appeals procedure was not correctly followed, and the present complaint is irreceivable." (P. 4.)

97. Similarly, in Surinder N. Setia v. International Bank for Reconstruction and Development, WBAT Decision No. 134 (1993), the WBAT reaffirmed that:

> "'[W]here an Applicant has failed to observe the time limits for the submission of an internal complaint or appeal, with the result that his complaint or appeal had to be rejected as untimely, he must be regarded as not having complied with the statutory requirement of exhaustion of internal remedies (Dhillon, Decision No. 75 [1989], paras. 23-25; Steinke, Decision No. 79 [1989], paras. 16-17; de Jong, Decision No. 89 [1990], paragraph 33).'"

(Setia, para. 23.)

Exceptional circumstances

98. In assessing compliance with statutory requirements for the exhaustion of administrative review, international administrative tribunals sometimes consider claims of exceptional circumstances to excuse a failure to comply on a timely basis with the underlying review

procedures. Tribunals may similarly consider whether exception may be made in a given case to the time limits for filing an application with the administrative tribunal once administrative review has been exhausted.

99. Several administrative tribunals operate under statutory provisions that expressly authorize them to consider exceptional circumstances with respect to both exhaustion of administrative review and the timeliness of an application. The WBAT Statute, for example, provides:

> "2. No such application shall be admissible, *except under exceptional circumstances* as decided by the Tribunal, unless:
>
> (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and
>
> (ii) the application is filed within ninety days after the latest of the following:
>
> (a) the occurrence of the event giving rise to the application;
>
> (b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or
>
> (c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice."

(WBAT Statute, Art. II, para. 2.) (Emphasis supplied.) The AsDBAT Statute, Article II, para. 3 mirrors almost exactly the WBAT provision quoted above.[25]

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[25] Another variation is given by the Statute of the African Development Bank Administrative Tribunal ("AfDBAT") which provides:

> "2. No application shall be admissible unless:
>
> (i) the applicant has exhausted all other administrative review remedies available within the Bank, except in cases where the applicant and the Bank have agreed to submit the application directly to the Tribunal; and
>
> (ii) the application is filed within ninety days after the latest of the following:
>
> (a) occurrence of the event giving rise to the application,
>
> (b) receipt of notice (after the applicant has exhausted all other remedies available within the Bank) that the relief asked for or recommended will not be granted, or

(continued)

100. The ILOAT Statute, it should be noted, does not appear to provide any statutory basis for an examination of exceptional circumstances either with respect to the exhaustion of remedies requirement (Article VII, para. 1) or the time limits for the filing of an application (Article VII, paras. 2 and 3). Nevertheless, the ILOAT, in deciding whether the exhaustion requirement is met, will examine exceptional circumstances when, as in the case of In re Al Joundi, Judgment No. 259 (1975), the appeals body of the organization involved was empowered by the organization's staff rules to make a waiver of time limits in the complainant's favor in exceptional circumstances. There, the ILOAT held that the appeals body, applying the rules of the International Telecommunication Union, was correct in deciding that no such exceptional circumstances existed. (Al Joundi, p. 5.)

101. By contrast, the IMFAT Statute expressly recognizes exceptional circumstances under Article VI (relating to time limits for the filing of an application) but makes no mention of exceptional circumstances in relation to Article V (requiring the exhaustion of administrative remedies).[26] Article VI, para. 3 states:

> "In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible."

The Commentary explains this provision as follows:

> (c) receipt of notice that the relief asked for or recommended will be granted, and the expiry of thirty days after receipt of such notice, without such relief being granted.
>
> …
>
> 4. Notwithstanding the provisions of paragraph 2 of this Article, the Tribunal may decide in exceptional circumstances, where it considers the delay justified, to waive the time limits prescribed under this Article in order to receive an application that would otherwise be inadmissible."

(AfDBAT Statute, Article III). Arguably, para. 4 may apply to both (i) and (ii) of para. 2.

[26] The Organization of American States Administrative Tribunal ("OASAT") Statute, Article VI, reflects the same scheme.

> "The tribunal would have discretion, in exceptional circumstances, to waive the time limits for filing imposed under the Article; this might be appropriate, for example, in situations where, due to extensive mission travel, prolonged illness, or other exigent personal circumstances, a staff member was unable to file his application within the prescribed period. The staff member could request a waiver either before the deadline if he anticipated that he would be unable to file on time, or after the deadline had passed. However, such a waiver would have to be predicated on a finding that the delay was justified under the circumstances."

(Report of the Executive Board, p. 26.)

102. The question is whether, given the statutory basis for the waiver of its own time limit for the filing of an application, the IMFAT may consider exceptional circumstances that may excuse a failure to comply fully with time limits in the underlying, anterior administrative review procedure, or whether Article V's silence as to exceptional circumstances precludes the consideration of such circumstances. The Tribunal concludes that it does have authority to consider the presence and impact of exceptional circumstances at such anterior stages, for these reasons. First, the recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to debar them. If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse. Second, there is support in the regimes of other administrative tribunals for authority to find exceptional circumstances, for example, in that most senior Tribunal, that of the International Labour Organisation. No reason appears for denying this Tribunal that authority. Indeed, since under Article V, paragraph 1 of the Statute, an application may be filed with the Tribunal only after the exhaustion of available channels of administrative review, there is the requisite basis in the Statute for the Tribunal to assess the performance of such channels.

103. Accordingly, the Administrative Tribunal holds that it may consider exceptional circumstances in assessing whether Applicant has exhausted all channels of administrative review as required for the Application to be admissible under Article V of the Statute.

104. At the same time, the Tribunal recognizes that in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal processes, such requirements should not be lightly dispensed with and "exceptional circumstances" should not easily be found. Applicants having knowledge of internal review requirements may not simply choose to ignore them, for example, on the view that pursuit of such review would be "futile and illusory". (Mesch and Siy (No. 3) v. Asian Development Bank, AsDBAT Decision No. 18 (1996) paras. 34-35.) Nor may time limits be regarded as "no more than guidelines that may in particular cases be disregarded." (Mariam Yousufzi v. International Bank for Reconstruction and Development, WBAT Decision No. 151 (1996), para. 25.) An applicant's "own casual treatment of the relevant legal requirements" does not excuse delay. (Hans Agerschou v. International Bank for Reconstruction and Development, WBAT Decision No. 114 (1992), para. 45.) Hence, the Tribunal does not agree with the contention of the Applicant that time limits are a "legal technicality."

105. In addition, in light of the public interest in enforcement of time limits, the fact that the respondent organization may not have been prejudiced by the delay does not excuse the applicant's failure to meet the requisite filing deadlines:

> "Under the terms of Article II the specified time limits may be disregarded only when the Tribunal finds that exceptional circumstances exist.
>
> 26. The Tribunal also does not accept the Applicant's contention that enforcement of the time bar prescribed by Article II is contingent on the Respondent's showing that it suffered injury or damage resulting from the Applicant's failure to observe the prescribed time limits. Time limits are not prescribed in the interest of the Respondent alone. Rather, they have a wide purpose. They are prescribed as a means of organizing judicial proceedings in a reasonable manner. Their object is to prevent unnecessary delays in the settlement of disputes. As such they are of a mandatory nature and are enforced by courts in the public interest."

(Yousufzi, paras. 25-26.)

106. The WBAT has cited the "extent of the delay and the nature of the excuse" in evaluating pleas of "exceptional circumstances." (Ghulam Mustafa v. International Bank for Reconstruction and Development, WBAT Decision No. 195 (1998) para. 7 (excusing due to serious illness a one-month delay in filing application with the tribunal). See also "A" v. International Bank for Reconstruction and Development, WBAT Decision No. 182 (1997) (applicant's mental illness, which was the subject of a disputed claim for disability pension, was "exceptional circumstance" excusing delay in filing with the tribunal).

107. Finally, arguments for exception must be considered in light of the underlying purposes of the requirements:

> "The Applicants seek exemption from the need to exhaust internal remedies on the ground of exceptional circumstances. This plea must be considered in the light of the purpose of internal remedies. Internal remedies enable each party to better appreciate the position of the other; they provide the administration with an opportunity to ascertain the causes of an alleged grievance and to arrive at a settlement; and internal appeal bodies which are generally more familiar with organizational factors may also elicit material evidence which might not otherwise be available to the Tribunal. There must be cogent reasons for dispensing with internal remedies."

(Ferdinand P. Mesch and Robert Y. Siy (No. 3) v. Asian Development Bank, AsDBAT Decision No. 18 (1986), para. 31.)

Admissibility of the Application under Article V

108. Applicant has cited several factors in an effort to excuse her failure to initiate administrative review on a timely basis. Consistent with the jurisprudence of international administrative

tribunals, these factors must be evaluated in light of the extent and nature of the delay, as well as the purposes intended to be served by the requirement for exhaustion of administrative remedies.

109. First, Applicant contends that the Fund abused its discretion in not invoking extension and waiver provisions of GAO No. 31. The Fund's response to the Tribunal's Request for Information indicates that the waiver provision of Section 7.01.2 has never been used. Moreover, the extension provision of § 6.07.1 would appear not to have applied in Applicant's case as it is not applicable to the period for initiation of review procedures.

110. More importantly, any authority of the Fund to consent to the waiver or extension of time periods for administrative review under GAO No. 31 is a discretionary authority. Its exercise (or lack thereof) in a particular case therefore would be reviewable by the Administrative Tribunal only upon an allegation that the Fund's action was arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures. Applicant has alleged abuse of discretion, but has not made out any specific argument as to its nature, apart from asserting that hers was a "special and unusual case" calling for direct submission to the Grievance Committee, and that "[g]iven the unusual nature of this case, failure of management to avail itself of that discretion may actually be an abuse of the discretion".

111. To sustain the Applicant's claim that there are exceptional grounds to justify her failure to apply for administrative remedies in time, it is not necessary to find an abuse of discretion on the part of the Fund. Nor has the Tribunal's Request for Information elicited any support for the view that Respondent treated Applicant's grievance any more stringently than that of others in similar circumstances with regard to the enforcement of time limits, as there have been no others in similar circumstances.

112. Second, Ms. "D" has alleged that, when she contacted the Fund's Ombudsperson by telephone on January 28, 1999, the Ombudsperson misled her (however inadvertently) as to the time frame for initiating administrative review. Ms. "D" asserts that she told the Ombudsperson that she would be out of the country for three to five months and that the Ombudsperson said she could wait until her return to initiate review of the contested benefit decision within the Fund.

113. Respondent asks the Tribunal to "wholly disregard" Applicant's allegations regarding her discussions with the Ombudsperson because the Terms of Reference of the Ombudsperson prevent her from being called as a witness or required to provide information in tribunal proceedings.[27] That same provision also prohibits the Ombudsperson from "furthering an application to the

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[27] "10. If a person who has raised a matter with the Ombudsperson decides to initiate a formal grievance under GAO No. 31, or to make an application to the Administrative Tribunal, the Ombudsperson may provide advice on the procedures prior to the filing of the grievance or the making of the application. However, the Ombudsperson shall thereafter refrain from assisting the grievant in the grievance process or in furthering an application to the Tribunal, except to the extent that, in the Ombudsperson's judgment, he or she may be able to assist in mediating the settlement of a case. The Ombudsperson may not be called as a witness or otherwise be required to provide information in such proceedings, or in any other administrative or judicial proceedings inside or outside the Fund."(Ombudsperson's Terms of Reference, para. 10.)

Tribunal." Hence, contends the Fund, these are hearsay assertions which the Fund would not be able to rebut. Applicant, on the other hand, suggests that the confidentiality provision of the Terms of Reference of the Ombudsperson is subject to waiver with the consent of the individual.[28]

114. Without passing upon whether or not the former Ombudsperson could voluntarily provide information to the Tribunal with the consent of the individual, the Tribunal observes that Applicant apparently has not sought, or has not succeeded in obtaining, any statement from the former Ombudsperson that might corroborate her allegations.

115. Therefore, Applicant's assertion as to the purport of her exchange with the Ombudsperson must be decided on the basis of credibility. Applicant vigorously pursued all appeals with UHC. Beginning in January 2000, she attempted other channels of review within the Fund, each time meeting the requisite deadlines. The question is whether mistaken advice may have contributed to her delay in initiating the administrative review process under GAO No. 31 or whether, for other reasons, Applicant chose to ignore the issue of the contested benefit for close to a year. It is also significant that while Applicant alleges that she told the Ombudsperson that she would be away for at most five months, she delayed pursuit of the matter for an additional six months.[29] In view of

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[28] The pertinent provision of the Ombudsperson's Terms of Reference provides:

> "**Confidentiality**
>
> 11.The Ombudsperson will keep all dealings with persons who seek his or her services strictly confidential, except to the extent that the person seeking assistance consents to disclosure for the purpose of the performance of the duties specified in paragraph 5. However, the Ombudsperson may, at his or her sole discretion, break confidentiality if the physical safety of any person is threatened.
>
> 12. All information and records compiled by the Ombudsperson shall be for the use of the Ombudsperson and for no other purpose than the functions of the office of the Ombudsperson. Any reports of the Ombudsperson shall be prepared in a manner that will preserve the right to confidentiality of the persons who have brought matters to the attention of, or provided information to, the Ombudsperson. Details of specific cases may be disclosed only with the concurrence of such persons."

Paragraph 5 provides:

> "The Ombudsperson shall review those problems of an employment-related nature that are brought to his or her attention by any persons who have access to his or her services as provided in paragraph 8 below. The Ombudsperson's review of a problem and contacts with persons who are involved may take place at any stage in the process through which that problem is being addressed. With the primary objective of resolving these problems, the Ombudsperson will exercise judgment in seeking to facilitate the resolution of conflicts, using mediation and conciliation or other appropriate means. For a problem that cannot be resolved by mutual agreement, the Ombudsperson may present recommendations for the resolution of the problem to those with authority to implement those recommendations. The Ombudsperson may decline to investigate allegations of misconduct."

[29] Applicant also contends in her Objection to the Fund's Motion for Summary Dismissal that "The facts indicate that [Applicant] believed that as in the law generally the minimum statute of limitations is one year." This assertion would seem to be in the nature of a post hoc rationalization of Applicant's delay.

this latter consideration, the Tribunal, while accepting the Applicant's rendering of her exchange, is not disposed to accord it weight.

116. Applicant's final (and strongest) argument for "exceptional circumstances" is that she was not provided timely and sufficient notice of the Fund's administrative review procedures. Specifically, Applicant alleges that Mr. "E"'s letter of January 26, 1999 treated the matter of her recourse as closed and did not inform her of additional review procedures within the Fund. Hence, at a critical point she was not informed of the review procedures or given GAO No. 31.

117. Mr. "E"'s letter of January 26, 1999 concluded with the sentence: "I regret that this is not the outcome you had hoped for in this case." Although Mr. "E", in his affidavit, notes that Ms. "D" advised him that she intended to pursue further avenues of appeal, his letter provided no information as to the requisite procedures. According to Mr. "E", he expected to hear again from Ms. "D" but did not.

118. The affidavit of Ms. "D"'s friend, who had contacted Mr. "E" on her behalf in October 1998, also states:

> "The only option offered by Mr. ["E"] was to submit the matter to an independent medical expert for review. At no time did Mr. ["E"] mention the grievance committee process set out in GAO No. 31."

119. Furthermore, Applicant contends that not being a staff member she did not have access to the usual channels of information within the Fund regarding dispute resolution procedures. Respondent counters that Applicant is a highly educated and adept claimant who did not make a reasonable effort to inform herself of the Fund's administrative procedures. The question now to be addressed is whether the Fund's lack of notice to Applicant of its review procedures is an "exceptional circumstance" excusing her failure to initiate administrative review on a timely basis.

120. As a general rule, it has been held that lack of individual notification of review procedures does not excuse failure to comply with such procedures. For example, in Deborah Guya v. International Bank for Reconstruction and Development, WBAT Decision No. 174 (1997), the WBAT held as follows:

> "8. The Applicant also maintains that when the Respondent decided on October 5, 1995 to accept the Appeals Committee's recommendation it did not give her the Statute and Rules of the Tribunal and did not advise her of her right to take her case to the Tribunal and of the 90-day statutory requirement. There is no rule of law requiring the Bank to advise the staff members at each and every stage of the decisional process of their right to request administrative or judicial review and to recite to them the conditions and limits of such review as laid down in the relevant texts, the applicable general principles of law and the jurisprudence of the Tribunal. The fact that the Respondent did not advise the Applicant of her right to bring her case to the Tribunal and did not inform her of the time limit or other statutory requirements can in no way be regarded as an exceptional circumstance under Article II, paragraph 2(ii), of the Statute of the Tribunal."

121. Nonetheless, the matter of notice is one that may be examined by international administrative tribunals in evaluating a plea of exceptional circumstances. See, e.g. Setia, WBAT Decision No. 134 (1993) (para. 25) (four-year delay is inexcusable when information relating to pending reorganization cases was "widely publicized among the staff even before the Applicant separated from the Bank").

122. In the case of Ms. "D", a number of factors seem pertinent in assessing the adequacy of such notice of the Fund's procedures as Ms. "D" was afforded. First, Ms. "D" was not and had never been a staff member of the Fund. She was the daughter and executrix of the estate of a deceased non-staff member enrollee in the Fund's Medical Benefits Plan. She therefore cannot be assumed to have had access to the information on dispute resolution disseminated to staff members. She cannot be assumed to have had access to the Fund's internal website, which today carries the following message:

> **"Disputed Claims and Claims Appeal Procedures**
>
> Through its contract with the claims administrator, the Fund has delegated to the claims administrator Willse & Associates, Inc. complete discretionary authority to construe the MBP's provisions as to eligibility for participation and benefits. These procedures do not limit staff members' rights under GAO No. 31, concerning grievances. Pursuant to section 6.03 of GAO No. 31, before filing a grievance, a staff member must first seek a review of the disputed claim through the Chief, Staff Benefits Division. The appeal procedures outlined below must be followed before you can seek such a review of the denial of a claim."

123. Interestingly, the statutes of the United Nations Administrative Tribunal ("UNAT") and the Inter-American Development Bank Administrative Tribunal ("IDBAT") include an automatic extension for the filing of an application in cases brought by heirs of a deceased staff member. Thus, the UNAT Statute, Article 7, para. 4 provides:

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

(Emphasis supplied.) The IDBAT Statute, Article II, para. 3 provides, in very similar terms, the same extension from ninety days to one year.[30]

124. It may also be observed that the nature of the benefit being contested and the internal appeals procedures of the then Plan administrator, UHC, might perhaps give rise to uncertainty as to what recourse, if any, might be available through the Fund.[31] When, after concluding timely appeals with UHC, Ms. "D"'s representative contacted a Human Resources Officer with responsibility for the MBP, Mr. "E" offered, on an extraordinary basis, to send the claim for an external review. That Ms. "D" understood this, at the time, as a "final determination" of the matter is evidenced by her letter to Mr. "E" of December 14, 1998. There is no evidence that the Fund sought to change her understanding.

125. It is significant that, at each stage in which Applicant was informed of the requisite procedures, she conformed to the deadlines. Hence, her conduct cannot be said to represent "casual treatment of the relevant legal requirements." (Agerschou.) Moreover, Ms. "D" expressly attempted to invoke administrative review procedures. Applicant's conduct in this regard contrasts with that reviewed in Thomas Bredero v. International Bank for Reconstruction and Development, WBAT Decision No. 129 (1993), in which the applicant had addressed a number of letters to the Bank but "none of these in terms, or intent, sought administrative review." (Para. 22.) Furthermore, Applicant's plea for exceptional circumstances must be evaluated in light of the purposes of administrative review. In the case of the Estate of Mr. "D", the Fund has on several occasions reviewed the claim, creating opportunities for resolution of the dispute and building an evidentiary record.

126. The vacillation on the part of Respondent as to whether or not Ms. "D" was or was not required to follow the administrative review procedures of GAO No. 31 may also suggest flexibility in the application of those review requirements. The decision of the World Bank Administrative Tribunal in Charlotte Robinson v. International Bank for Reconstruction and Development, WBAT Decision No. 78 (1989) is instructive in this regard. In Robinson, the Bank challenged the jurisdiction of the Tribunal on the ground that applicant had failed to invoke internal

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[30] The UNAT and IDBAT provisions are noted in passing in the Commentary on Article VI of the IMFAT Statute:

> "The comparable period in other international administrative tribunals is generally 60 days or 90 days; except in cases of death, the statute of limitations in other tribunals does not exceed 90 days.[*]
>
> [*] Compare the WBAT Statute (90 days); UNAT Statute (90 days); IDBAT Statute (60 days)."

(Report of the Executive Board, p. 24.)

[31] The Fund's response to the Request for Information reveals that there has been less than one grievance per 100,000 medical claims "… which clearly reflects the definitive nature of coverage and the claims procedure under the Fund's Medical Benefits Plan."

review procedures on a timely basis. The Appeals Committee had rejected the same challenge and had exercised jurisdiction.

127. In concluding that the applicant had fulfilled the exhaustion of administrative remedies requirement of the tribunal's statute, the WBAT considered that the respondent organization had offered conflicting arguments with respect to the requirements for administrative review in that case. The WBAT reasoned that the organization's own ambivalence supported the view that uncertainty on the part of the applicant as to whether particular administrative review procedures applied and to whom she should turn for recourse was understandable. Therefore, the tribunal held that the administrative review requirements should be applied flexibly:

> "It is first necessary to consider the Respondent's challenge to the Tribunal's jurisdiction. *The position of the Respondent in this regard has been ambivalent*. *On the one hand, it has contended that the Applicant*, when she consulted the Pension Information Assistant in February 1987, *neither sought nor received an 'administrative decision' from which an appeal could ultimately be taken to the Tribunal*; she merely claims that the Pension Information Assistant failed to give accurate advice and there is no claim that she asked, and was denied, any income tax reimbursement or any form of relief or any other decision. *On the other hand, the Respondent claims that the Applicant failed to invoke in a timely manner her internal administrative review, but such review applies only (under Staff Rule 9.01, para. 3.01) to 'review of an administrative decision.*'
>
> 36. Although, as the Tribunal will note shortly, its own jurisdiction is not limited to review of affirmative administrative decisions but can encompass as well certain omissions or failures to act, *the reference in Staff Rule 9.01 to review of an 'administrative decision' can obviously give rise to uncertainties on the part of staff members.* In the circumstances of this case in particular, it is difficult to say what kind of specific relief or decision the Applicant could have expected from the Pension Information Assistant, in view of the fact that the revised U.S. tax law was indisputably applicable to her late-1986 commuted pension payments; she was indeed informed by him that there was nothing that the Bank could do for her. *If, as the Respondent sometimes argues in this case, this did not amount to an 'administrative decision' that this Tribunal can review, it is understandable that there could be uncertainty on the part of the Applicant as to whether the Bank's administrative review provisions in Staff Rule 9.01 were applicable and as to whom the Applicant should turn to for recourse.* She was therefore not unreasonable when she moved promptly to seek the advice of the Staff Association and then of the Ombudsman. The Applicant might well have moved equally promptly to file an appeal with the Appeals Committee had she not been accurately advised by the Ombudsman that she need not do so because of a pending appeal that the Bank had agreed to apply to her should the outcome favor the staff member. It is noteworthy, in any event, that when the Applicant did take her case to the Appeals Committee, the Bank challenged the Committee's jurisdiction for lack of an 'administrative decision' from which administrative review and ultimately appeal could be taken.

> *37. The Tribunal is of the view that Staff Rule 9.01 and its provisions for administrative review should not be construed in an overly technical manner. Those provisions are designed to rectify misunderstandings and to resolve a wide range of claims by staff members in an expeditious but essentially informal manner. Between the Bank and its staff members, there are often ongoing communications and exchanged letters and memoranda that sometimes render it unclear whether firm decisions have been made and time periods crystallized. As this case shows, there may be ambiguities about whether the administrative review procedures are intended to apply at all. Given the fact that these procedures were designed to be utilized by all categories of staff members, most of them lacking legal expertise and most of them presumably acting without the aid of counsel at this relatively early dispute stage, the Tribunal concludes that they should be applied flexibly in accordance with their terms and their spirit.*
>
> 38. It is perhaps for these reasons that the Appeals Committee, despite the Respondent's challenge to its jurisdiction for reasons similar to those raised here, decided to rule upon the Applicant's appeal on the merits. The Tribunal also concludes that Staff Rule 9.01 should not provide a bar to the application in the circumstances of this case." (Emphasis supplied.)

128. The Tribunal concludes that, in this case, it was incumbent on the Fund to inform Ms. "D"--who could not be assumed to know--of the specifics of the further recourse open to her. The Fund should have met that obligation by the time that Mr. "E" verbally informed and then faxed Ms. "D" of the denial of coverage as a result of the Fund's receipt of the opinion of an external medical examiner. That Mr. "E" understood that he would have another occasion to do so when Ms. "D" reverted to him is insufficient to excuse the Fund's reticence. The Fund, in this case of exchanges with a non-staff member, could easily and should routinely have informed Ms. "D" of her options, as by attaching to its denial of coverage the text of GAO No. 31 and information on recourse to the Administrative Tribunal. The Fund had no reason to presume that Ms. "D" had knowledge of, or should be charged with knowledge of, recourse procedures to which it made not the slightest allusion; on the contrary, the Fund gave the impression to Ms. "D" that, with the report of the external medical examiner, she had reached the end of the road.

The question of returning the case to the Grievance Committee

129. In its Motion for Summary Dismissal, Respondent contends:

> "Even if the Tribunal were to conclude that the Grievance Committee should have considered whether the jurisdictional time limits might not be applicable (e.g., based on what the Applicant was told by the Ombudsperson and how long she waited after returning to the U.S. to submit her claim), the appropriate solution would be to direct the parties to return to the Grievance Committee for an examination of the relevant facts, including, if warranted, an examination of the merits."

Applicant counters that returning the matter to the Grievance Committee would unduly prolong the case and seeks resolution on the merits by the Tribunal.

130. The Fund's argument that the Tribunal could return the case to the Grievance Committee is a departure from the view it urged upon the Tribunal in the D'Aoust case.[32] In D'Aoust, the Tribunal rejected the suggestion of the applicant in that case that the Tribunal functions as an appellate body with respect to the Grievance Committee. (D'Aoust, para. 17.)

131. Moreover, Respondent's suggestion would contravene GAO No. 31, Section 4.04 which (as the Tribunal recognized in Ms. "Y", paras. 42-43 and Mr. "V", para. 130) vests in the Grievance Committee itself the authority to decide upon its own jurisdiction for purposes of proceeding with a grievance.

132. Respondent cites the Tribunal's conclusion in Ms. "Y" that "… recourse to the Grievance Committee would have the advantage of producing a detailed factual and legal record which is of great assistance to consideration of a case by the Administrative Tribunal." (Para. 42.) Ms. "Y", however, is inapposite. In Ms. "Y", the applicant had failed to seek Grievance Committee review before coming to the Tribunal, in light of ambiguous indications from the Fund as to whether resort to the Grievance Committee was available to her following the review of her complaint by an ad hoc discrimination review procedure. By contrast, in this case, Ms. "D" already has sought review by the Grievance Committee; the Grievance Committee Chairman dismissed her grievance for failure to exhaust the prerequisite review procedure on a timely basis.

133. It should also be noted that the Tribunal in Ms. "Y" did not direct the parties to return to the Grievance Committee. It simply stated that if the Grievance Committee were seized of Applicant's grievance and the Committee decided that it was without jurisdiction, the Administrative Tribunal would be open to reconsidering the admissibility of the Application in the Tribunal. (Ms. "Y",

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[32] 16. The Tribunal summarized the Fund's argument in D'Aoust as follows:

> "The Respondent contests that the Tribunal functions as an appellate body, advancing as reasons for that view that:
>
> > '... if the proceedings before the Tribunal were intended as a review of the action of the Grievance Committee, this would involve two significant departures from the authority conferred on the Tribunal under its Statute: first, the Tribunal would be limited to reviewing questions of law and could not take evidence directly (which is not the case under the Statute); and second, the appropriate remedy would not be to order the relief the Applicant is seeking but rather to remand the case to the Grievance Committee for new proceedings, as an appellate court may reverse and remand in order for a new trial to be held, but it would not normally be empowered to make findings and award damages.'
>
> In addition, the Respondent suggests that if the Tribunal were an appellate body over the Grievance Committee, 'the Tribunal would be reviewing the recommendations of the Grievance Committee and would be limited in its scope of review as to the matters considered by the Committee; this is clearly not the case.'"

(D'Aoust, para. 16.)

para. 43 and Decision.) It is in that very posture, following dismissal by the Grievance Committee Chairman on jurisdictional grounds, that Ms. "D"'s case arrives at the Tribunal.

134. Respondent has not cited authority in support of its view that the Tribunal is empowered to remand the case to the Grievance Committee. It is possible that the Applicant could be directed to file a request for review with the Division Chief of the Staff Benefits Division, but, in the circumstances that obtain, the Tribunal is not of the view that she should be so directed.

135. Finally, it is observed that Respondent's concern that, without a decision on the merits in this case by the Grievance Committee, the Tribunal will lack a full evidentiary record, is misplaced. The Tribunal in this case has the benefit of an extensive documentary record, including affidavits from several key individuals. In addition, the parties will have further opportunity to supply argumentation and documentation relating to the merits of the case. Should the factual record prove inadequate, the Tribunal could exercise its authority, under Article X of the Statute and Rule XVII of the Rules of Procedure, to examine witnesses and request information.

136. Accordingly, the Administrative Tribunal denies the Fund's Motion for Summary Dismissal. The exchange of pleadings pursuant to Rules VIII – X of the Tribunal's Rules of Procedure will resume. The filing of the Motion suspended the time for answering the Application until the Motion was acted on by the Tribunal. (Rule XII, para. 2.) Thus, in view of the denial of the Motion, the Fund's Answer on the merits, Applicant's Reply and the Fund's Rejoinder will follow, according to the schedule prescribed by the Rules.

Decision

FOR THESE REASONS

The Fund's Motion for Summary Dismissal is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

_____

Stephen M. Schwebel, President

_____

Celia Goldman, Registrar

Washington, D.C.
March 30, 2001