ABHANDLUNGEN

The Implications of the *de Merode* Case for International Administrative Law

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The World Bank Administrative Tribunal (hereinafter referred to as the WBAT) was established in July 1980. The first case it decided was that which has now come to be referred to as *de Merode et al.* v. *The World Bank*[1]. The decision in this case was handed down on June 5, 1981.

It was a historic case in many respects. First, in regard to subject matter, as will be seen from the account of the facts below, the Tribunal was presented with the question whether the implementation of decisions adopted in 1979 by the Executive Directors of the World Bank (hereinafter referred to as "the Bank" which includes the International Bank for Reconstruction and Development, the International Finance Corporation and the International Development Agency) regarding tax reimbursement and salary adjustment amounted to non-observance by the Bank of the contracts of employment or terms of appointment of the Applicants in the case.

Second, the actions contested were not simple acts of the management or administration of the Bank, such as termination of employment, taken in the course of administration of the Bank, but were decisions taken by an organ of the Bank which has policy-making and legislative functions in regard to relations between the Bank and its staff. The Executive Directors are a body in the Bank which is separate from the administration constituted by the President of the Bank and administrative managers and exer-

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[1] World Bank Administrative Tribunal Reports (hereinafter referred to as WBAT Reports) (1981), Decision No. 1.

cises powers delegated to it by the Board of Governors[2] in which are vested, according to the Articles of Agreement of the Bank, all the powers of the Bank[3]. It is the principal body which takes policy and legislative decisions in the Bank, since most powers have been delegated to it by the Board of Governors. It may be compared to the General Assembly of the United Nations Organization in regard to matters in the field of relations between the Bank and its staff. What was challenged was the power of the Executive Directors to enunciate policy and take decisions in the same way as the General Assembly of the United Nations might be expected to do in regard to relations between the staff and the administration of the United Nations.

Thirdly, the case was more in the nature of a class action. The six named Applicants in the case filed applications with the Tribunal but there were also 874 other applications filed by staff members who believed that their applications should be disposed of on the basis of the particular facts of their own individual cases and eight other applications for intervention which were joined with these 874[4]. The applications of the six named Applicants were identified by counsel for the Applicants as being representative of the broad spectrum of Bank employees who had been financially harmed by the two changes. The Bank agreed that, if and to the extent that the Tribunal rendered a decision in favor of an Applicant or Applicants in the representative cases on the basis of general principles rather than on the basis of particular facts relating to the application of a given individual, the Bank would treat all staff members similarly situated in accordance with the Tribunal's decision, whether or not such staff members had made application to or intervened in the proceedings before the Tribunal[5]. The Staff Association of the Bank took an active interest in all the applications and financed the retention of outside counsel for the proceedings relating to the applications. The case generated a great deal of interest throughout the Bank and apparently was the cause of much concern to most staff members.

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[2] See Article V, Sections 2(b) and 4(a) of the Articles of Agreement of the International Bank for Reconstruction and Development. See also Article IV, Sections 2(c) and 4(a) of the Articles of Agreement of the International Finance Corporation and Article VI, Sections 2(c) and 4(a) of the Articles of Agreement of the International Development Association.

[3] See Article V, Section 2(a) of the Articles of Agreement of the International Bank for Reconstruction and Development. See also Article IV, Section 2(a) of the Articles of Agreement of the International Finance Corporation and Article VI, Section 2(a) of the Articles of Agreement of the International Development Association.

[4] WBAT Reports (1981), Decision No.1, p.6.

[5] *Ibid.*

In view of the special nature of this case, the fact that it was the first case decided by the WBAT, the unusual content of the decision which made copious reference to the principles governing international administrative law and the impression it has left almost as a landmark decision, it would be useful to take a close look at the case and examine what it did say and do as well as what it did not. This article sets out to present the deeper implications of the case. It purports not only to consider the case in its own right as a decision of one of the many international administrative tribunals but also to place it in the context of the jurisprudence of international administrative tribunals and international administrative law in general. This means examining the decision for what it reflects of the many facets of the internal law of the Bank as an international organization, which governs the relations between the organization and its staff and may, for all intents and purposes, be regarded as a part of international law[6] (although this may not be regarded as of much practical importance), while also considering the relationship of the decision to international administrative law in general, particularly as reflected in the practice of international administrative tribunals of other organizations.

The Facts and Pleas

In 1977, the President of the Bank proposed to the Executive Directors that:

> "a Joint Bank and Fund Committee should be established to examine compensation issues and to agree on a set of principles which would provide a more stable framework for the process of determining compensation".

The Joint Committee on Staff Compensation Issues (the Kafka Committee, so called because it was chaired by Alexandre Kafka, an Executive Director of the International Monetary Fund), composed of Executive Directors of the World Bank and the International Monetary Fund and outside experts, issued its 516-page Report in January 1979 containing detailed findings as to salaries and benefits at the World Bank and the Fund and making recommendations for the future. After allowing a period for comment the Executive Directors of both the Bank and the Fund decided

[6] It is generally regarded as a separate branch of public international law: see S. Basdevant, Les Fonctionnaires Internationaux (1931), pp.68–69 and 283, A. Verdross, On the Concept of International Law (1949), p.435, S. Bastid, Have the United Nations Administrative Tribunals Contributed to the Development of International Law?, in: W. Friedmann (ed.), Transnational Law in a Changing Society (1972), p.307.

in May 1979 to adopt, subject to some changes, many of the Committee's recommendations.

By Administrative Circular, dated May 25, 1979, the staff of the Bank was informed that the Executive Directors had completed their consideration of the main policy issues stemming from the report of the Joint Committee on Staff Compensation Issues and among the more important matters, had agreed that:

> "... unless the Governments concerned agree to exempt their nationals from taxes on income derived from the Bank, the present system of tax reimbursement will be replaced, effective January 1, 1980, by a system based on average deductions with a five-year transition period and appropriate safeguards. The details of how this system is to be implemented are yet to be agreed.
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> The Executive Directors have also approved a 9.5% increase in net salaries effective March 1, 1979 ... This is in line with average real pay increases of the U.S. private sector comparators over the past year".

The methods of implementing the new system of tax reimbursement were set out in a Personnel Manual Circular, dated January 21, 1980.

These decisions were regarded by members of the staff as affecting them in two respects. The new tax reimbursement system would result, when fully phased in, in a reduction of 23% in tax reimbursements to existing staff of United States nationality. As regards the decision relating to salary increases, staff members considered that this involved the repudiation by the Bank of a decision taken in 1968 to adjust salaries automatically in proportion to the increase in the Consumer Price Index in the Washington Metropolitan Area (CPI). As a consequence of this decision the adjustment of 9.5% (effective March 1, 1979) and a subsequent adjustment of 8.3% (effective March 1, 1980) were lower than the increases in the CPI of 11.26% and 11.68% during the two preceding 12-month periods respectively.

From these decisions more than 1,300 World Bank staff members appealed to the Appeals Committee of the Bank alleging violation of their conditions of employment. On January 8, 1980 the Appeals Committee decided that it had no jurisdiction over the matter and expressed regret that there was "no forum in the world in which such decisions can be challenged, reviewed, and possibly overturned if found illegal". On April 30, 1980 the Board of Governors adopted the Statute of a Tribunal which entered into force on July 1, 1980. Article XVII of the Statute provides that:

> "... the Tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to January 1, 1979, provided, however,

that the application is filed within 90 days after the entry into force of the present Statute".

All of the six named Applicants complained of the decisions of the Bank relating to salary adjustments. They contended that, as a result of these decisions, their salaries for the years 1979 and 1980 were respectively 11% and 29% lower than they would have been if the Bank had not unilaterally abandoned its previous policy, established in 1968, of automatically adjusting salaries on the basis of the CPI. In addition, four of the six Applicants, complained of substantial reductions in their gross income resulting from changes made by the Bank, with effect from January 1, 1980, in the method of calculating tax reimbursement. The Applicants asked the Tribunal:

(i) To order the rescission of certain administrative circulars, namely, Administrative Circulars 23/79, dated May 25, 1979, and 13/80, dated March 14, 1980, as regards salary adjustment, and the Personnel Manual Circular 1/80, dated January 21, 1980, as regards tax reimbursement;

(ii) To order specific performance of their contract of employment;

(iii) To order the Bank to pay them the difference between their salaries and/or the tax reimbursements which they actually received on the basis of the above-mentioned circulars, and the payments to which they claimed they were entitled in law;

(iv) (a) To order the payment of interest at the prevailing rate on the difference;

(b) To order the Bank to reimburse all their fees, costs and disbursements incurred in the preparation of the case, including reasonable attorney's costs.

Jurisdiction

The jurisdiction of the Tribunal to pass judgment upon the applications was not contested by the Respondent. Nevertheless, the Tribunal stated, *proprio motu,* that, as the applications alleged non-observance of the contracts of employment or terms of appointment of the Applicants, it was competent under its statute to decide the issues contested.

Note must be taken of the fact that the Tribunal adverted to its competence in spite of the fact that the Respondent did not contest it. There were some critical issues which could have been raised on the question of competence particularly in view of what had been stated by the Executive Directors at the time the Statute of the WBAT was being considered by them. The fact that the Tribunal did not discuss those issues does not mean

that it was unaware of them. On the contrary, the explicit acceptance of jurisdiction does imply a well-defined attitude to the resolution of any such issues which might have been raised.

The Statute of the WBAT[7] deals in Article II with the jurisdiction of the Tribunal. Article II.1. states as follows:

> "The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. The words 'contract of employment' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement Plan".

This provision appears to give the tribunal wide power, *ratione materiae*, over matters connected with the "contract of employment" of staff members or their "terms of appointment". Such contract and terms are defined as including "all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement Plan". In this respect the Statute follows closely the language of the Statute of the UN Administrative Tribunal (hereinafter referred to as UNAT)[8]. In the case of the UN, the legislative history of Article 2.1. records that such language may have been intended to impose limitations in regard to the power of UNAT to question the authority of the General Assembly or of the Secretary-General acting on the instructions of the Assembly to make such changes in the staff rules and regulations as might be necessary. In this connection it may be useful to look at what happened in the UN at the time the UNAT Statute was being formulated, as it may be relevant to the interpretation of Article II of the WBAT Statute.

When the General Assembly was considering, in 1949, the establishment of UNAT, the United States proposed in the Fifth Committee an addition to Article 2 of the draft Statute providing that:

> "nothing in this Statute shall be construed in any way as a limitation on the authority of the General Assembly or of the Secretary-General acting on instructions of the General Assembly to alter at any time the rules and regulations of the Organization including, but not limited to, the authority to reduce

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[7] Published by the World Bank in World Bank Administrative Tribunal: Statute and Rules. See also 19 ILM (1980), p.958.

[8] See Article 2.1. The ICJ has made it clear that the jurisdiction of UNAT covers not only the contract of employment and terms of appointment of staff members, in a narrow sense, but also staff regulations and rules: *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, 1982 ICJ Reports, p.325 at p.365.

salaries, allowances and other benefits to which staff members may have been entitled"[9].

The amendment was withdrawn later because it was said that the debate in the Committee showed that Article 2 of the draft Statute was considered:

"broad enough to give sufficient scope to the General Assembly, and to the Secretary-General acting on its behalf, to carry out the necessary functions of the United Nations, in spite of the fact that such action might require changes and reductions in the existing benefits granted to the staff"[10].

In the Report of the Fifth Committee to the plenary of the General Assembly it was, as a consequence, stated:

"(b) That the Tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require. It was understood that the Tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary. It was understood also that the Secretary-General would retain freedom to adjust *per diem* rates as a result, for example of currency devaluations or for other valid reasons.

No objection was voiced in the Committee to those interpretations, subject to the representative of Belgium expressing the view that the text of the statute would be authoritative and that it would be for the Tribunal to make its own interpretations"[11].

There are four important points in this text. First, it purports to lay down an interpretation which could bind the future Tribunal. On the other hand, it refers to a view which purports to express the opinion that the interpretation was not authoritative. A consequence of this might be that the interpretation given in the quotation above was not intended to be final and binding upon the Tribunal. Thirdly, the qualifying view to which so much importance was attached stated that the text of the Statute (probably as distinguished from any *travaux préparatoires*) was authoritative and that it would be for the Tribunal to make its own interpretation. Fourthly, the interpretation merely referred to the Tribunal's having to "respect" the authority of the General Assembly to act. It did not categorically state that the General Assembly's actions were immune from the control of the Tribunal.

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[9] A/C.5/L.4/Rev.2 reproduced in GAOR, 4th Session, 5th Committee, Annexes agenda item 44, at p.165.

[10] A/C.5/SR.214, para.40.

[11] A/1127, para.9, reproduced in GAOR, 4th Sess. Plenary, Annexes, agenda item 44, p.167 at p.168.

In actual practice, UNAT has examined the applicability of Staff Regulations and Rules which appear to be in conflict with the governing principles of law of the organization[12]. From this it may be deduced that UNAT has assumed jurisdiction to examine resolutions of the General Assembly which affect staff benefits, etc.

It may be of interest that the ILO Administrative Tribunal (hereinafter referred to as ILOAT) which has a similar, though not identically formulated, article as UNAT in its Statute also follows the same practice. Thus, in the case of *In re Callewaert-Haezebrouck (No.2)*, the Tribunal held that an interpretation given to a text of a legislative provision involved discrimination and that:

> "Such discrimination offends against the general principles of law, and particularly of the international civil service, and the Tribunal cannot allow the application of a text which so discriminates"[13].

Further the opinion has been expressed by commentators in connection with cases such as these that administrations of international organizations should promptly seek amendment of rules which are held to be in conflict with texts or principles of higher authority, thus acknowledging the practice of tribunals such as UNAT and ILOAT referred to above[14].

In the case of the WBAT, the Executive Directors, after referring to the legislative history of the UNAT Statute, pointed out in their report to the Board of Governors on the administrative tribunal that the intent of the language used in Article II of the Statute:

> "is that the Tribunal has to respect the authority of the Board of Governors or the Executive Directors to make such alterations and adjustments in the staff rules and regulations as circumstances might require"[15].

This statement seems categorical but when read in conjunction with the reference to the legislative history of the UNAT Statute, which has been discussed earlier in this article and shows, at least, some ambiguity, and the practice of UNAT which conflicts with any categorical prohibition against finding the action of the legislative organs unlawful, it seems that its import may be subject to some flexibility.

In the *de Merode* Case decisions taken by the Executive Directors of the Bank affecting the rights of staff members were being questioned. As has

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[12] See the *Mullan* Case, UNAT Judgment No. 162.

[13] ILOAT Judgment No. 344, at p. 6.

[14] See Wattles, Administrative Tribunal: Procedures and Unification, UN Doc. CCAQ/PER/R 107, Annex II, at pp. 14–15.

[15] See Memorandum to the Executive Directors dated January 4, 1980 from the President of the World Bank, Annex II, p. 1.

already been seen, these decisions changed the entitlement of U.S. staff members to tax reimbursement and determined increases in the salaries of staff members annually. These were decisions determining policy and were of a legislative nature. Thus, although the Bank has no staff regulations and rules as such, these decisions set norms governing the relations between the staff and the administration.

In deciding, though *proprio motu*, that it had jurisdiction in the case, the Tribunal took the view that it could examine whether the power of the Executive Directors (and, implicitly, of the Board of Governors) "to make such alterations and adjustments in the staff rules and regulations as circumstances might require" had been properly exercised. If it had been of the view that respect for such power and authority on its part meant that acts of the Executive Directors (and the Board of Governors) could not be subjected to its review, it would, *in limine* have dismissed the case as being outside its jurisdiction. This is not what it did. The fact that the outcome of the case upheld the validity of the actions of the Executive Directors does not affect the conclusion that the case demonstrates the willingness of the Tribunal to assume jurisdiction in cases in which the authority of the Executive Directors (or the Board of Governors) to take decisions of a general nature determining the rules governing the staff is being questioned.

The Internal Law of the Organization

Jurisdiction aside, the decision in the *de Merode* Case had much to say about the legal system which governs the Bank's relations with the members of its staff or, in a broad sense, conditions of employment. In this regard, there are basically two questions which may be addressed on the basis of what the Tribunal said at various stages in the decision. The first relates to the scope and breadth of such legal system. The second concerns the control such legal system has on the powers of the supreme bodies of the organization, namely the Executive Directors and, impliedly, the Board of Governors.

On the scope and breadth of the legal system, the Tribunal raised the question, in view of the arguments of the parties, in the following way:

> "The parties have discussed the questions whether the conditions of employment incorporate in addition the rights and duties defined in relation to other international organizations by administrative tribunals comparable to this one. Or, to put it another way, do there exist rules common to all international organizations, and which must, therefore, *ipso facto* apply in the legal relations

between the Bank and its employees, in such a way as to determine the rights and duties of the two parties in the present case? Is there a common *corpus juris* shared by all international officials"[16]?

The Applicants had argued that the opinions of international administrative tribunals together constituted a body of jurisprudence applicable to the interpretation of international employment agreements[17] and that, *inter alia*, because such opinions had "illuminated the expectations and actions of the Bank and its employees"[18] they provided, at least, "persuasive precedents" upon which the Tribunal should rely[19]. The Respondent contested this argument on various grounds but principally because the assumptions on which the Applicant's position was based, namely that the decisions of international administrative tribunals constituted a coherent body of law with developed legal principles freely applied from one organization to another and that all international organizations had similar personnel rules and policies and arranged their employment practices in identical fashion to accomplish their institutional functions, were faulty[20].

The Tribunal chose not to give a categorical answer in a negative or positive form to the question raised and which it had formulated clearly in terms of a general *corpus juris* for all international officials. Perhaps, this was because a categorical answer was not possible nor was desirable. As it pointed out, whether similar features in the jurisprudence of international administrative tribunals amounted "to a true *corpus juris*" was not a matter on which it was necessary for it to express a view[21]. It did state that there was an internal law of the Bank which governed conditions of employment[22] and that it must apply that law in deciding, as an international tribunal, internal disputes between the Bank and its staff which were disputes within the organized legal system of the Bank[23], but at the same time

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[16] WBAT Reports (1981), Decision No.1, at p.12.

[17] Consolidated Memorandum in Support of the Applications (hereinafter referred to as Consolidated Memorandum), at p.25.

[18] *Ibid.*, at p.26.

[19] *Ibid.*, at p.25.

[20] Joint Memorandum in Support of Respondent's Answers (hereinafter referred to as Joint Memorandum), at pp.42ff.

[21] WBAT Reports (1981), Decision No.1, at p.13.

[22] Authors agree with the view that it is the internal law of the organization which is applicable: see, e.g., M. Akehurst, The Law Governing Employment in International Organizations (1967), p.25, G. Langrod, The International Civil Service (1963), pp.84–87, A. Plantey, The International Civil Service (1981), pp.46–48.

[23] WBAT Reports (1981), Decision No.1, at p.12.

it was quite explicit about the relevance of an international administrative jurisprudence. It said:

> "The Tribunal does not overlook the fact that each international organization has its own constituent instrument; its own membership; its own institutional structure; its own functions; its own measure of legal personality; its own personnel policy; and that the difference between one organization and another are so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various international administrative tribunals do not consider themselves bound by each other's decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service ... The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals, particularly those of the United Nations family. In this way the Tribunal may take account both of the diversity of international organizations and the special character of the Bank without neglecting the tendency towards a certain rapprochement"[24].

Two points of significance clearly emerge. In sufficiently comparable situations the law applied by other tribunals could be taken note of and applied by the Tribunal. Thus, it was of the view that there were some common principles. Secondly, where conditions were dissimilar the Tribunal could take note of the diversity of international organizations and the special character of the Bank, and apply different and special rules.

In connection with the above point, the Bank had made some other rather extensive points about the applicability of national labor laws. It argued:

> "In the context of an organization like the Bank ... a very complex issue is raised as to what rights and obligations in the employment relationship may exist outside of the appointment letter and the recorded personnel policies. If the Bank were a national organization, the issue could be fairly easily resolved by invoking the employment laws of the surrounding jurisdiction, including not only applicable employment legislation but principles of law and interpretations of jurists within that jurisdiction. The Bank is not a creature of any one jurisdic-

[24] *Ibid.*, at p.13.

> tion, however, but operates and functions on an international plane as a public intergovernmental organization. If it were to be subjected to the employment laws and principles in the multitude of jurisdictions where it has an office or from which its staff are recruited, the Bank's ability to function would be severely hampered by application of the conflicting employment principles and policies which prevail around the world. Thus the Bank's Articles invoke the special international character of the staff's duties and command all members to respect such character (Article V, 5(c)). Further, the application of employment principles of just one of the Bank's members, such as those prevailing where most staff are based, while avoiding to a great extent the problem of conflicting rules, would also be inconsistent with the international character of the Bank and its staff and unacceptable to other sovereign members. The Bank is not a legal entity of any one jurisdiction, but is instead an international organization established by treaty and subject ultimately to the collective authority of its sovereign member governments. Accordingly, employment principles which are accepted in some or even most of the Bank's members cannot and should not be assumed to have direct, automatic application to the relationship between the Bank and its staff"[25].

Implicitly, the Tribunal accepted this view that national labor law principles and rules were not *per se* part of the legal system applicable to the Bank, in so far as it held that the internal law of the Bank governed the conditions of employment in the Bank. However, the Tribunal did not go so far as to say that principles of municipal law were totally irrelevant in deciding cases concerning those conditions of employment. Particularly, the Tribunal did not purport to address the questions whether municipal law could be used in the deduction of general principles of law, to reason by analogy[26] or to supplement existing international law[27].

On the question whether the internal law of the organization reached up to the supreme bodies of the organization, the Bank had originally, in an opinion given by outside counsel, espoused the view that there was "no brooding omnipresence that constrains the freedom of the Bank to structure its employee relationships to accomplish its goals" and that "the internal law of the Bank would include the concept of 'acquired rights' or a comparable doctrine only if the Bank's Articles so provide or the Bank has so elected"[28]. This was refined in the later pleadings of the Bank in the *de*

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[25] Joint Memorandum, at pp.39–40.

[26] See *Desgranges* (1953), ILOAT Judgment No.11.

[27] See *Sharma* (1957), ILOAT Judgment No.30.

[28] Memorandum on Staff Compensation Policy dated May 1, 1979 by Wilmer, Cutler and Pickering, pp.4–5. (See Bank Administrative Circular AC/18/79, of May 2, 1979).

Merode Case to mean that the only limitation on the Bank's ability to unilaterally alter all terms and conditions of employment was that against retroactive changes[29].

The trend of the Respondent's argument was clear. It was concerned with the legislative and policy-making powers of the Bank in regard to conditions of employment which are exercised primarily by the Executive Directors. The case itself concerned decisions taken by the Executive Directors which affected the conditions of employment of the staff. The Respondent's claim was in effect that the actions of the Executive Directors were subject to no legal control except in so far as the Articles of Agreement of the Bank directly or indirectly imposed limitations on the powers of the Executive Directors and in so far as the rule against retroactivity set limits.

The Tribunal did not deal, as such, with the question of the reach of the internal law of the Bank as described above. However, it did decide that a major distinction had to be drawn among the numerous and varied elements of the conditions of employment and that certain elements were fundamental and essential in the balance of rights and duties of the staff members and were not open to any change without the consent of the staff member affected, while, on the other hand, there were other elements which were less fundamental and less essential in the balance of rights and duties of staff members and could be unilaterally changed by the Bank, subject to certain limits and conditions[30]. The Tribunal's view on the above points is significant. In the context of the case, it was clear that the view taken covered the powers of the Executive Directors, or even the Board of Governors for that matter, to make changes in and take decisions in regard to the conditions of employment of staff members. To this extent, the Tribunal was of the opinion that the internal law of the organization extended to the powers of these bodies. They were not merely subject to the Articles of Agreement and the doctrine of retroactivity but to the whole internal legal system applicable to the Bank.

Contract or Status

Since the *de Merode* Case concerned the power of the Executive Directors of the Bank to change the conditions of employment of staff members, a preliminary issue of some significance was whether staff members were in

[29] Joint Memorandum, at p.51.
[30] WBAT Reports (1981), Decision No.1, at p.19.

a status in respect of the organization or whether their relations with the organization were governed by a contract of employment, irrespective of where the terms and conditions of such contract were to be found. In some legal systems (e.g. the French) the civil service is governed by rights and duties set out in a *règlement* which is drawn up by the administration and is a legislative act. Appointment or nomination is a unilateral act of authority. By this act the individual nominee is placed in a status where the *règlement* becomes applicable to him. In this situation the official cannot be subjected to rules other than those contained in the *règlement*. At the same time, generally the *règlement* can be unilaterally altered by the administration. Although even in this situation the nominee's consent is ascertained before he is appointed, the element of consent does not convert the appointment into a contractual one. The nomination takes the form of an administrative decision which does not constitute an offer requiring acceptance.

An alternative situation exists in other legal systems where civil servants are employed on the basis of a contract[31]. Appointment takes the form of an offer which is required to be accepted by the prospective officer. The offer and the acceptance form the contract. In this situation the legal relations between the officer and the administration are governed by the terms and conditions of the contract wherever these may be found.

In the case of international organizations, both situations obtain. The difference in the two situations is of some significance in the area of international organization, particularly for the reason that the limitations on the alterability of the *règlement* may be less severe than in the case of the rules and regulations governing a contractual appointment. But there may be other consequences of the difference such as that the sources of the law governing the conditions of employment may in the two situations not be identical.

In the case of the European Communities it has been held that permanent officials are appointed by a unilateral act of authority and are subject to a status[32]. In most international organizations, however, it is generally agreed that employment is on the basis of a contract of service. In the case of the United Nations[33] and most of the specialized agencies employment

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[31] See, for example, apparently the U.S.A. and the U.K.

[32] See *Campolongo*, decided by the Court of Justice of the European Communities, 1960 Recueil VI, p.795 at p.819. See also S. Bastid, Le statut juridique des fonctionnaires de l'O.N.U., in: The United Nations: Ten Years' Legal Progress (1956), p.145 at p. 151.

[33] See *Effect of Awards of Compensation made by the U.N. Administrative Tribunal*, 1954 ICJ Reports, p.47 at pp.47, 53.

is by a contract of service. Indeed, UNAT has generally adopted this analysis where the question has been raised[34]. ILOAT has also accepted this approach in cases before it[35]. Further, the Staff Regulations or Staff Rules of many specialized agencies refer specifically to the contract of employment which is constituted by the letter of appointment and the letter of acceptance[36].

In the *de Merode* Case, the situation in the World Bank was not seriously contested. Both parties apparently agreed implicitly that employment was on the basis of contract. In fact, the Statute of the WBAT refers specifically in Article II to "the contract of employment" of staff members. Yet, there is no reason why this statement which emanated from the Executive Directors should have finally disposed of the question, since it appears in that part of a legislative instrument governing jurisdiction. Also, the presence or absence of the express use of the word "contract" may probably not be the sole criterion which determines the nature of the appointment of an employee of an international organization, such as the Bank. What is of relevance and constitutes the real test is whether the appointment is regarded as a purely unilateral act, at any rate formally, or whether it requires a genuine offer and acceptance for its validity. In order perhaps to dispel any possible doubts that may arise also from other references in Article II of the Statute itself to "terms of appointment" or from other characteristics of the employer-employee relationship in the Bank, the Tribunal did advert to the question and made an analysis of the situation as it prevailed in the Bank.

The Tribunal in its analysis stated that[37] a number of the staff entered the service of the Bank as a result of an exchange of a letter of appointment and a letter of acceptance, the letter of appointment conveying to the prospective staff member a formal offer of an appointment to the staff of the Bank; this letter contained specific details of the appointment, such as initial assignment, salary, dependency allowances, entry date and information about benefits, etc.; it further explicitly set forth that salary and dependency allowances were net of income taxes as at that time or thereafter provided in the By-Laws and Regulations of the Bank and that the appointment was subject to the conditions of employment of the Bank as at

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[34] See *Bulsara* (1957), UNAT Judgment No.68.

[35] See e.g., *Rothbarth* (1947), ILOAT Judgment No.6, and *Pelletier* (1964), ILOAT Judgment No.68.

[36] See e.g., those of ICAO, ILO, UNESCO, WHO and WMO.

[37] WBAT Reports (1981), Decision No.1, at pp.8–9.

that time in effect and as such conditions might be amended from time to time; in the letter of acceptance the prospective employee stated that he accepted appointment to the staff of the Bank under the terms and conditions set forth in his letter of appointment and the policies and procedures of the Bank as they might be in effect from time to time. The Tribunal concluded that:

> "employment by the Bank resulted from an offer followed by an acceptance, that is to say, a contract, and not, as in the case with employment in the civil service of certain individual countries, as a result of a unilateral act of nomination by the administration"[38].

Sources of Law

The Tribunal dealt at length with the sources of law governing the conditions of employment of Bank staff members. To this extent the Tribunal made a significant contribution to international administrative law.

Initially, the Tribunal made it quite clear that the fact that staff members of the Bank entered its service on the basis of an exchange of letters did not mean that those contractual instruments were the sole repository of all the rights and duties of the parties to the contract; the contract was the *sine qua non* of the relationship between the staff member and the Bank but it remained no more than one of a number of elements which collectively established the ensemble of conditions of employment operative between the Bank and its staff members[39]. The Tribunal also elaborated further[40] that it was important to emphasize that the legal basis for the application to each employee of rules outside his own "contract" *stricto sensu* did not rest on those terms of the letter of appointment and the letter of acceptance which provided for the appointment to be subject to the conditions of employment of the Bank and which referred specifically to the Bank's policy in respect of dependency allowances, benefits, retirement, insurance, etc., but that in fact in accepting the appointment offered by the Bank, the staff member at the same time accepted as a whole the relevant rules and policies. It was the Tribunal's view that the applicability of these rules and policies to the employee was really the consequence of their objective existence as part of the legal system to which the staff member became subject by entering into a contract with the organization. There

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[38] WBAT Reports (1981), Decision No.1, at p.9.
[39] WBAT Reports (1981), Decision No.1, at p.9.
[40] *Ibid.*, at p.14.

was here a clear assertion that the internal legal system of the Bank as a whole determined the sources of the law governing the conditions of employment, as opposed to the immediate contractual documents themselves.

(a) The contractual documents

While asserting this, the Tribunal did not deny that these contractual documents themselves did contain rules governing the rights and duties of the parties and undoubtedly were a source of law for the employer-employee relationship. Particularly, where there were explicit statements of rights and duties the contractual documents would be relevant. Yet, clearly there were limitations on how far even explicit statements in the contractual documents could overrule higher norms of the governing legal system, as will be seen from what the Tribunal had to say later in regard to the Bank's power of amendment. As a consequence, for example, the statement in the contractual documents that the appointment was subject to the policies and procedures of the Bank as they might be in effect from time to time did not mean that the Bank had *carte blanche* unilaterally to change the policies and procedures in existence at the time the particular contract of employment became effective. Similarly, questions could arise as to whether an explicit statement in the contractual documents which was at variance with a higher norm such as a requirement of the Articles of Agreement of the Bank, the By-Laws of the Bank or a superior general principle of law would override such requirement. The Tribunal did not advert to this question specifically but it is implied in its examination of the sources of law governing conditions of employment of staff members of the Bank that the answer which it would have given was that such higher norm would, in the circumstances described above, have prevailed.

(b) The circumstances of appointment

As a corollary to the relevance of the contractual documents, while no specific example emerged from the facts of the case, reference was made to the specific circumstances of each contract as a source of law. The Tribunal said:

> "The specific circumstances of each case may also have some bearing on the legal relationship between the Bank and an individual member of the staff, particularly the actual conditions in which the appointment has been made"[41].

[41] WBAT Reports (1981), Decision No.1, at p.12.

On the other hand, the Tribunal made it quite clear that the determination of the applicable law could not depend on subjective considerations of a highly individual character, which would result, if they were accepted, in the application to staff members of different rules of law according to the expectations of each one at the moment his or her contract of employment came into force[42]. In conformity with this view the Tribunal later held that the argument advanced by the Applicants that they had agreed to enter the service of the Bank in the expectation of a guaranteed maintenance of the real value of their renumeration and that the Bank did not have the power to disappoint this expectation could not be accepted, because no particular importance could be attached to subjective considerations[43].

On the other hand, the Tribunal held that the circumstances within which certain Applicants had been recruited and, in particular, certain information provided to them at the time of their appointment confirmed the existence of an obligation on the part of the Respondent to make periodic adjustments in the salaries of staff, taking into account various relevant factors, which obligation had been established by a consistent practice[44]. Thus, the circumstances of appointment became relevant in the case, as, at least, confirming a practice of the Respondent which had become law and, thus, part of the conditions of employment of staff members.

(c) The Articles of Agreement

The Tribunal stated that the Articles of Agreement were relevant as a source of law for the conditions of employment of staff members, particularly in the absence of Staff Regulations and Rules[45]. Undoubtedly, the Articles of Agreement were regarded as a primary source of law for this purpose to the extent that they had anything to say about the relationship between the staff and the organization.

For the case in hand, the Tribunal regarded Articles V and VII of the Articles of Agreement as being particularly relevant. Article V(1) gave the

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[42] WBAT Reports (1981), Decision No.1, at p.14. The Respondent had argued that "reliance" upon certain expectations in regard to tax reimbursement could not be law-creating, since these were only subjective thoughts during pre-employment which could not replace the express provisions of the appointment letter: Joint Memorandum, at pp.55ff. The Tribunal's view supports this argument.

[43] WBAT Reports (1981), Decision No.1, at p.54.

[44] *Ibid.*, at p.56.

[45] WBAT Reports (1981), Decision No.1, at p.9.

Bank authority to have in addition to a Board of Governors, the Executive Directors and a President, such other officers and staff to perform such duties as the Bank might determine. Article V(2)(f) further gave the Board of Governors and the Executive Directors, to the extent authorized, power to adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank. Article V(5) provided that:

> "(b) The President shall be chief of the operating staff of the Bank and shall conduct, under the direction of the Executive Directors, the ordinary business of the Bank. Subject to the general control of the Executive Directors, he shall be responsible for the organization, appointment and dismissal of the officers and staff.
>
> (c) The President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.
>
> (d) In appointing the officers and staff the President shall, subject to the paramount importance of securing the highest standards of efficiency and technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible".

Finally Article VII(9)(b) was mentioned as providing that no tax should be levied on or in respect of salaries and emoluments paid by the Bank to Executive Directors, Alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals.

These provisions were regarded as the constitutional foundation of the Bank's power to act as an employer and gave such organs as the Board of Governors, the Executive Directors and the President power to regulate the conditions of employment of staff members. These were largely empowering provisions. In addition there were certain limitations presented in them on the powers of the Bank's organs, and the Bank's members, particularly by Article VII(9)(b) which related to taxes. Further, Article V(5)(c) imposed certain specified obligations on staff members.

Clearly, the Tribunal did not agree, in the case of the Bank, with the view that has been expressed that the constituent treaty could not be assumed *a priori* to be applicable, because it could be argued that it only created rights and duties between the member States and had no effect on the staff, particularly as it was not mentioned as a source of law in the letters of appointment or in the Statute of the Administrative Tribunal[46].

[46] See Akehurst, *op. cit.* note 22, at p.61.

The Tribunal assumed without discussion that the Articles of Agreement were an important source of law.

The WBAT does not stand alone in its view. UNAT has stated that the Charter of the UN is one of the sources of law which it must apply[47]. The International Court of Justice has held that the establishment of UNAT was *intra vires* the General Assembly and in so doing it referred to the Charter as giving the General Assembly such a power[48]. ILOAT has also referred to constituent treaties of international organizations as applicable in the area of conditions of employment. In *Duberg* ILOAT cited the constitution of UNESCO as prohibiting the Director General of UNESCO from associating himself with the execution of the policy of any State member in regard to his treatment of a staff member[49]. The OECD Appeals Board in *Aicher* directly applied the constituent treaty of the OECD to find that new Staff Regulations drawn up by the Council of OECD had replaced the Staff Regulations of OEEC[50]. In the case of the European Communities, the applicability of the constituent treaties is well established. Their Court of Justice has held, for instance, that Article 246(3) of the EEC Treaty prevented a contract of employment, concluded before the establishment of the Staff Regulations, from creating a lasting legal relationship between the parties[51].

Considering that the Tribunal gave primary importance to the Articles of Agreement as a source of law for the conditions of employment, one may conclude that the Articles were regarded as controlling the resolutions, decisions and other actions of the Bank as employer. This means that, to the extent that By-Laws, resolutions, decisions, regulations, rules, circulars, manuals, policies, etc. of the Board of Governors, the Executive Directors and management of the Bank as represented by the President, in the area of employment are in conflict with any provision of the Articles of Agreement, they would be regarded by the Tribunal as null and void. For example, any regulation or rule or policy requiring that a staff member compromise his independence as an employee owing his or her duty entirely to the Bank and to no other authority would inevitably be struck down as incompatible with Article V(5)(c). Similarly, an attempt through

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[47] See *Howrani* (1951), UNAT Judgment No.4, at p.21, and *Aglion* (1954), UNAT Judgment No.56, at pp.293–294.

[48] *Effect of Awards of Compensation made by the U.N. Administrative Tribunal,* 1954 ICJ Reports, p.47 at p.57.

[49] (1955), ILOAT Judgment No.17, at pp.255ff.

[50] (1964), Decision No.37 of the OECD Appeals Board.

[51] *von Lachmüller,* 1960 Recueil VI, p.933 at pp.954–955.

regulation or otherwise to make staff members pay taxes, even indirectly, except within the limits of Article VII(9)(b), would be regarded as a violation of that Article.

(d) By-Laws and decisions of the Board of Governors and of the Executive Directors

Next in line as a source of law after the constitutional foundation controlling the Bank's power to act as an employer are the decisions taken in the exercise of the power accorded to the Board of Governors and Executive Directors, by Article V(2)(f) principally, to adopt rules and regulations necessary for or appropriate to the conduct of the Bank's business[52]. The Tribunal pointed out that this power could be exercised in a variety of ways of which the most formal in character was the By-Laws[53]. The main provision in these By-Laws referring to staff members was that in Section 14(b) which related to tax reimbursement. In the same way, the decision of the Board of Governors to establish the World Bank Administrative Tribunal introduced into the conditions of employment of Bank staff members the right of recourse to the Tribunal, in accordance with the conditions laid down in the Statute of the Tribunal which was also part of the decision of the Board of Governors, and this right formed an integral part of the legal relationship between the Bank and its staff members[54]. Decisions of the Executive Directors affecting staff rights and obligations which are taken regularly were, no doubt, in the view of the Tribunal, law-creating as far as the relationship between the Bank, as employer, and the staff was concerned. Thus, the decisions taken from time to time by the Executive Directors in regard to salary increases, allowances and staff benefits belonged to this category of source.

In the case of the UN the Charter gives the General Assembly the power to establish the regulations governing the staff[55]. Thus, the plenary organ has the primary power to take decisions relating to the rights and obligations of staff members. In most other organizations too, the basic staff regulations are established by the plenary organ, composed of representa-

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[52] WBAT Reports (1981), Decision No.1, at p.11.

[53] *Ibid.*

[54] *Ibid.*

[55] Article 101(1) of the Charter. The power of the General Assembly to establish and amend staff regulations was implicitly acknowledged in *Application for Review of Judgment No.273 of the United Nations Administrative Tribunal,* 1982 ICJ Reports, p.325 at p.362.

tives of all the member States[56]. There are, however, a few instances where another organ of an international organization has been empowered to draw up regulations governing the staff[57]. In the case of the UN and most other organizations in addition to the power to make staff regulations, it is generally recognized that the plenary organ or the organ empowered to draw up the staff regulations has the power also to adopt resolutions which are a source of law for the legal relationship between the organization and the staff. UNAT has applied such resolutions as sources of law in a number of cases[58].

A significant difference between the World Bank and other organizations is, perhaps, that there are two deliberative organs in the World Bank which have power in the field of employer-staff relations. Both the Board of Governors and the Executive Directors exercise this power, although it is clear that the Executive Directors exercise their power as a delegated function so that their decisions are always subject to decisions taken by the Board of Governors whose power is superior to that of the Executive Directors. In the case of most other organizations there is generally only one deliberative organ exercising decision-making functions in regard to staff under the constitutional instrument.

(e) Management manuals and circulars

The Tribunal stated that further elements of the legal relationship between the Bank and its staff were also to be found in manuals, such as the Personnel Manual and the Field Office Manual, in various administrative circulars and in certain notes and statements of the management of the Bank[59]. Clearly, this power of the management, which is a power of the President, derived from the Articles of Agreement which give him, in Article V(5)(6), the responsibility, under the general control of the Executive Directors, for the organization, appointment and dismissal of officers and staff. The powers of the management or administration are, thus,

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[56] See e.g., FAO Constitution, Article VIII(1), UNESCO Constitution, Article 6(4), OECD Convention, Article 11(1), Council of Europe Statute, Article 16.

[57] See e.g., IMCO Convention, Article 23 (Council).

[58] *Howrani* (1951), UNAT Judgment No.4, *Harris* (1956), UNAT Judgment No.67. See also for the OEEC, *Lanner* (1960), OEEC Appeals Board, Decision No.31. See also the advisory opinion on the *Application for Review of Judgement No.273 of the United Nations Administrative Tribunal*, 1982 ICJ Reports, p.325 at p.362, where the competence of UNAT to apply the resolutions of the General Assembly of the UN in addition to the Staff Regulations was affirmed.

[59] WBAT Reports (1981), Decision No.1, at p.11.

subordinate to the power of the Executive Directors and, *a fortiori*, to that of the Board of Governors to make general regulations and rules governing the relationship between the Bank and its staff.

This power of management is comparable to that of the UN administration and the administrations of other international organizations to make staff rules and issue circulars and manuals of an administrative nature implementing and interpreting the staff regulations of such institutions. Both the UNAT and ILOAT have held that staff rules must conform to and not conflict with staff regulations[60], thus confirming that the powers of the administration in the field of staff relations are subordinate to those of the deliberative organ entrusted with legislative responsibility in this area. UNAT has also applied manuals and administrative circulars, generally on the basis that they interpret the regulations and rules[61]. ILOAT has in like manner recognized the law-creating effect of manuals and administrative circulars, generally as interpreting and applying the regulations and rules[62] but also sometimes as independent sources of law where claims have been founded solely on manuals or administrative circulars[63]. The Court of Justice of the European Communities has taken a similar view as regards the powers of the administration to promulgate rules designed to facilitate the application of the staff regulations, even when the regulations themselves did not provide for this[64].

The Tribunal, moreover, pointed out that it was important that not all the provisions of manuals, circulars, notes and statements were included in the conditions of employment, that some of them had the character of simple statements of policy and laid down certain practical or purely procedural methods of operation, and that, therefore, it was necessary to decide in each case whether the particular provisions constituted one of the conditions of employment[65]. UNAT has in similar manner adopted the attitude of assessing the effects of circulars by reference to their own terms[66], recognizing that some circulars or notes or communications may

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[60] See *Wallach* (1954),UNAT Judgment No.53; *Poulain d'Andecy* (1960), ILOAT Judgment No.51. See also Decisions No.24–26 (1957), OEEC Appeals Board.

[61] See *Robinson* (1952), UNAT Judgment No.15, *Aglion* (1954), UNAT Judgment No.56, *Harris* (1956), UNAT Judgment No.67.

[62] *Duberg* (1955), ILOAT Judgment No.17, *Reynolds* (1958), ILOAT Judgment No.38.

[63] *McIntire* (1954), ILOAT Judgment No.13, *Fisher* (1960), ILOAT Judgment No.48.

[64] See *Huber*, 1964 Recueil X, p.721, *Pistoj*, 1964 Recueil X, p.673.

[65] WBAT Reports (1981), Decision No.1, at p.11.

[66] See *Robinson* (1952), UNAT Judgment No.15, and *Russell-Cobb* (1954), UNAT Judgment No.55.

not have any legal effect at all or not have the same effect as a regulation or rule.

(f) Possible limitations in sources arising from the Statute

The question may be raised whether the language of the Statute of the WBAT in any way limits the sources of law to which resort may be had by the Tribunal. The provision of the Statute in question is Article II dealing with jurisdiction which states:

> "The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member".

The same provision goes on to define the words "contract of employment" and "terms of appointment" as including all pertinent regulations and rules in force at the time of the alleged non-observance. The issue to be addressed is whether these provisions limit the sources of law which the Tribunal may apply to the sources already discussed above because they are the only sources directly arising from a staff member's "contract of employment" and "terms of appointment".

The Tribunal did not discuss this point which has been raised in connection with other administrative tribunals including UNAT whose Statute has provisions prescribing jurisdictional limitations which are exactly the same as those in the WBAT Statute[67]. The point was not raised by either of the parties in the *de Merode* Case. On the other hand, the Tribunal did state positively that there were other sources of law which it could apply than those discussed above[68], thus clearly denying any possibility of limitations on applicable sources of law arising from Article II of the Statute which really deals only with WBAT's jurisdiction. These sources are discussed below. Further, the Tribunal did examine the practice of the Bank in regard to salary increases as a source of law in order to determine whether such practice had given rise to rights which could be relied on by the applicants, although such rights had not been included in writing in their contracts of employment, and did find that the practice had established certain rights for staff members, although not the rights claimed to have been established by the Applicants. The Tribunal, hence, explicitly accepted practice as a possible source of law. Thus, the attitude of the Tribunal to limitations on sources of law was clearly established in the *de*

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[67] See discussion in Akehurst, *op. cit.* note 22, at pp. 47 ff.

[68] WBAT Reports (1981), Decision No. 1, at pp. 11 ff. See also below.

Merode Case. The approach is justified, since the Statute in Article II does say that the terms defined only include "all pertinent regulations and rules in force ...". This language leaves room for reference to other sources than such regulations and rules, because it is only inclusive and not exclusive.

In the case of UNAT, where, as already pointed out, the Statute has similar language to that in the WBAT Statute, it would seem that a similar conclusion has now been reached. Initially, in some early cases, UNAT showed a tendency implicitly to reject sources other than those such as the Charter, resolutions of the General Assembly, staff regulations, staff rules and other written sources of law[69]. However, in more recent cases UNAT has adopted a more liberal attitude. UNAT has in fact applied unwritten sources of law such as general principles of law and administrative practice[70]. This approach has been taken in regard to matters both of substance and procedure.

Although the language of the jurisdictional provision of the ILOAT Statute appears to be more restrictive than that of the UNAT Statute or the WBAT Statute, ILOAT has also indicated that it has power to apply general principles of law[71], for instance. It has also applied other sources of law than general principles of law and the written sources referred to in the jurisdictional provisions of its Statute.

(g) General principles of law

The Tribunal stated clearly that: "Another source of the rights and duties of the staff of the Bank consists of certain general principles of law ..."[72]. The Applicants had implicitly argued that general principles of law were a source of law for the conditions of employment of Bank staff[73]. In the case in hand the Applicants contended that such general principles of law imported the doctrine of the protection of acquired rights into the contracts of employment of Bank staff members[74]. The Respondent did

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[69] See *Howrani* (1951), UNAT Judgment No.4, *Aglion* (1954), UNAT Judgment No.56, *Robinson* (1952), UNAT Judgment No.15.

[70] See *Crawford* (1953), UNAT Judgment No.18, *Crawford* (1955), UNAT Judgment No.61, *Davidian* (1958), UNAT Judgment No.75, *Mr. A.* (1962), UNAT Judgment No.86, *Mr. A.* (1966), UNAT Judgment No.99.

[71] See *Waghorn* (1957), ILOAT Judgment No.28, *Sharma* (1957), ILOAT Judgment No.30, *Wakley* (1961), ILOAT Judgment No.53, *Rebeck* (1964), ILOAT Judgment No.77.

[72] WBAT Reports (1981), Decision No.1, at p.12.

[73] Consolidated Memorandum, at pp.25ff.

[74] *Ibid.*, at pp.28ff.

not deny that general principles of law were relevant to the conditions of employment of Bank staff members but in fact conceded the applicability of such general principles of law both in its written and oral pleadings, differing, however, as to the content of such principles in regard to the case in hand and not conceding that the doctrine of acquired rights as described by the Applicants was applicable as a general principle of law to the conditions of employment of staff members. The Respondent argued:

> "... the Bank does not deny that limitations exist under such general principles of law on the Bank's ability to amend employment terms. Notwithstanding the Applicant's attempt to dismiss restriction against retroactive changes to salary or benefits as not significant, we maintain that such a limitation is an important protection for the staff and may be precisely what the theory of acquired rights really means"[75].

In taking the view that general principles of law were applicable, the Tribunal was of the opinion that such general principles would in appropriate circumstances control the powers of the Board of Governors, the Executive Directors and the Bank's management to take decisions relating to the contracts and conditions of employment of staff members, in so far as it stated that the Bank's power of amending the terms and conditions of employment of staff members was limited by certain governing principles which will be discussed later. Thus general principles of law were hierarchically regarded as being virtually at the top in the order of sources.

General principles of law have been recognized as a source of law by other international administrative tribunals. The League of Nations Tribunal did not hesitate to apply general principles of law in its decisions, as early as 1929, beginning with the very first case it decided[76]. UNAT has also not been slow to hold that general principles of law are applicable to cases which come before it[77]. ILOAT has applied general principles of law in its decisions on more than one occasion[78], expressly mentioning that general principles of law were one of the sources of law which it should

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[75] See Oral Proceedings, *de Merode et al.* v. *The World Bank* (hereinafter referred to as Oral Proceedings), May 28, 1981, at p.38.

[76] *di Palma Castiglione* (1929), Judgment No.1 of the League of Nations Administrative Tribunal. See also *Bouvaist Hayes* (1930), Judgment No.4, *Lhoest* (1932), Judgment No.5, *Schumann* (1934), Judgment No.13.

[77] See *Howrani* (1951), UNAT Judgment No.4, *Crawford* (1955), UNAT Judgment No.61.

[78] See *Desgranges* (1953), ILOAT Judgment No.11, *Rothbarth* (1947), ILOAT Judgment No.6, *Niestle* (1955), ILOAT Judgment No.16, *Wakley* (1961), ILOAT Judgment No.53.

apply[79]. Other international administrative tribunals have also applied general principles of law as a source of law to cases between staff and the administrations of international organizations[80].

As already pointed out, the WBAT was of the view in the *de Merode* Case that general principles of law could control the powers of the organs of the Bank to alter the conditions of employment of staff members. Amendment of the terms and conditions of employment could occur broadly in two situations: firstly, where the organization has not specifically reserved the power to make changes in such terms and conditions and secondly, where there is an express agreement that such terms and conditions may be amended without the consent of the staff member, as is the case where the contract of employment refers to the fact that the conditions of employment of staff may be amended from time to time. The view taken by the Tribunal clearly covered the first situation where there was no reservation of the power to amend. As for the second possibility, since the case concerned a situation in which the contracts of employment of staff members stated that conditions of employment could be amended from time to time, and the Tribunal did take the view that, even so, general principles of law limited the organization's power to amend the conditions of employment, it is clear that the Tribunal regarded general principles of law as taking precedence over written sources of law even in this circumstance. In short, the express reservation of the power to amend conditions of employment did not preclude the application of general principles of law to such power of amendment.

The Tribunal did not specifically discuss the possibility that a term of a contract, whether included by legislative fiat or by a decision of the management, could offend against a general principle of law. This was unnecessary for the decision of the case in hand. The situation may arise, for instance, if such a term were discriminatory or manifestly unjust. While the Tribunal did not pronounce on the question, its approach in the case would seem to warrant the conclusion that it would have regarded general principles of law as being superior hierarchically to the written sources of law in such circumstances.

As for the practice of other administrative tribunals, the question has been widely discussed whether the power of amendment of terms and

[79] *Waghorn* (1957), ILOAT Judgment No.28, at p.6, *Sharma* (1957), ILOAT Judgment No.30, at p.3.

[80] See OEEC Appeals Board: Decision No.33 (1961) and Decision No.34 (1961); the Court of Justice of the European Communities: *Algera*, 1957 Recueil III, p.115, *von Lachmüller*, 1960 Recueil VI, p.958, *Huber*, 1964 Recueil X, p.721.

conditions of employment by the organization-employer is controlled by general principles of law and the position generally seems to be that in appropriate circumstances general principles of law would limit the amending power of the organization-employer, whether the power of amendment had been reserved or not[81]. This is so, even though there may not be clear agreement in the jurisprudence of these tribunals as to what the governing general principles of law are. As to whether a general principle of law can modify an express written term of the contract of employment, wherever set forth, other tribunals have been less positive. Few situations have arisen in which these tribunals have been called upon to apply such principles to change written terms and conditions of contracts of employment but there have been some cases in which tribunals have stated that general principles of law may govern conditions of service in a subsidiary way but could not alter the written terms of contracts of employment[82]. However, there are also a few statements which support the opposite view. Thus, the Court of Justice of the European Communities said in *De Bruyn* that a specific period of notice for dismissal laid down by a clause of a contract accepted by the staff member should be upheld "unless the Court holds that it is manifestly unjust or vexatious ..."[83].

The WBAT did not in the *de Merode* Case address the question how it would proceed to derive or find a general principle of law, although it did establish certain general principles of law pertinent to the decision of the case, such as that there was a distinction between essential or fundamental terms of the contract of employment which could not be amended unilaterally by the organization-employer without the consent of the staff member and non-essential terms of the contract of employment which could be unilaterally amended by the organization-employer without the consent of the employee[84]. Needless to say, the Tribunal will proceed to establish and apply general principles of law as and when necessary, in spite of the copious and diverse nature of the discussion centering on the techniques of deriving general principles of law and on whether such general principles are principles of municipal law or international law.

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[81] See discussion in Akehurst, *op. cit.* note 22, at pp.199ff.

[82] See *di Palma Castiglione* (1929), League of Nations Administrative Tribunal, Judgment No.1, *Puvrez* (1961), UNAT Judgment No.82, Decision No.6 (1950) of OEEC Appeals Board, *Sharma* (1957), ILOAT Judgment No.30.

[83] (1962), Recueil VIII, at p.61. See also *Prakash*, 1965 Recueil XI, p.677, and *Varlocosta Patrono* (1966), ILOAT Judgment No.92.

[84] WBAT Reports (1981), Decision No.1, at p.19.

In this connection, it may be of interest that the Tribunal was not adverse to finding support for its view of a general principle of law in the decisions of other international administrative tribunals. In establishing the distinction between essential or fundamental elements in the conditions of employment of staff members and non essential terms of employment the Tribunal stated:

> "In various forms and with differing terminology this distinction is found in the jurisprudence of other international administrative tribunals"[85].

International administrative tribunals have often cited their own judgments or the decisions of other tribunals to support their view of the general principles of law[86].

(h) Practice of the organization

Another source of law of considerable importance discussed by the Tribunal was the practice of the organization. The Tribunal stated:

> "The practice of the organization may also, in certain circumstances, become part of the conditions of employment. Obviously, the organization would be discouraged from taking measures favorable to its employees on an *ad hoc* basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation, as was recognized by the International Court of Justice in its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO* (ICJ Reports 1956, p.91)"[87].

Practice was clearly a source of law governing the conditions of employment of Bank staff but there was a strict requirement that it needed to be established that a practice was followed by the organization in the conviction that it reflected a legal obligation. Apart from a consistent repeated pattern of behaviour on the part of the organization (or, perhaps, usually a succession of identical administrative decisions in previous analogous cases[88]), there had to be an *opinio juris*. The view of the International Court of Justice on practice in this connection is worth repeating:

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[85] WBAT Reports (1981), Decision No.1, at p.19.

[86] See *Crawford* (1953), UNAT Judgment No.18, *Perasse* (1947), ILOAT Judgment No.3, *Niestle* (1955), ILOAT Judgment No.16, *McIntire* (1954), ILOAT Judgment No.13, *Waghorn* (1957), ILOAT Judgment No.28.

[87] WBAT Reports (1981), Decision No.1, at pp.11–12.

[88] See Akehurst, *op. cit.* note 22, at p.95.

> "The fact is that there has developed in this matter a body of practice to the effect that holders of fixed-term contracts ... have often been treated as entitled to be considered for continued employment ... in a manner transcending the strict wording of the contract ... The practice as here surveyed is a relevant factor in the interpretation of the contracts in question. It lends force to the view that there may be circumstances in which the non-renewal of a fixed-term contract provides a legitimate ground for complaint"[89].

On the material aspect of practice which created obligations and rights the Tribunal cited the judgment of the International Court of Justice in the *Asylum* Case which it applied by way of analogy. That judgment reasserted the requirement of constant and uniform usage as an element of law-creating custom. Thus, where the facts "disclosed so much uncertainty and contradiction, so much fluctuation and discrepancy", the International Court of Justice was of the view that it was not possible to discern any constant and uniform usage, accepted as law[90].

The Tribunal applied the law relating to practice to the issues raised in the *de Merode* Case as to whether the staff members of the Bank had a right to the protection of the real value of their salaries against erosion by inflation and as to whether by granting salary increases markedly lower than the increases in the Washington Consumer Price Index the Bank had infringed this right. Both aspects of practice – *opinio juris* and consistent usage – were examined in the course of the decision.

The Applicants had contended that a policy of automatic adjustment of salaries to meet increases in the Consumer Price Index was recommended by the President of the Bank to the Executive Directors in Report R.68–140 of 1968 and was adopted by the Executive Directors in August 1968[91]. Report R.68–140 had stated that the President proposed to modify the existing system and adopt a policy of periodic across-the-board salary increases for professional staff to match rises in the cost-of-living in the Washington area, while the basic objective would continue to be to attract and retain a highly competent international staff and to motivate and stimulate the highest level of performance by staff members. The Executive Directors approved the President's recommendation in the Report for a general salary increase, with the modification adopted at a meeting in August 1968. At the meeting of the Executive Directors in point there were some questions raised about the President's proposal to adopt a policy of

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89 1954 ICJ Reports, p.47 at p.91.
90 1950 ICJ Reports, p.266 at p.277.
91 Consolidated Memorandum, at p.59.

periodic across-the-board salary increases for professional staff and the President had explained that he proposed to follow such a policy and planned to have periodic reviews and make recommendations to the Executive Directors where it was necessary to have their approval of across-the-board increases.

The Tribunal held, as regards the President's decision, that:

> "The Report (as clarified by the explanations of the President during the meeting of the Executive Directors) thus amounted only to a statement of the President's intentions and of the policy that he recommended the Executive Directors to follow in the future. The Tribunal cannot attribute the effect of a decision creating rights and obligations as between the Bank and its staff to a statement of policy by which the President informed the Executive Directors of his intentions. The President's recommendation of June 30, 1968 cannot, therefore, be considered as having modified, and become part of, the conditions of employment of the Applicants"[92].

As regards the Executive Directors' decision of August 1968 the Tribunal held that this decision:

> "neither repeated the President's recommendation nor stated a general policy that the Executive Directors intended to follow in the future. The Executive Directors merely decided to give the staff an increase of a fixed amount on September 1, 1968. Should the President subsequently recommend further increases, as he said he would, the Executive Directors would decide on such recommendations within the framework of their powers: 'a decision would be brought to them for approval'. The Executive Directors thus retained their full freedom to approve or not in each future case any salary increase which the President might propose to them"[93].

Further the Tribunal stated that the administrative circular announcing the increase to the staff did not contain any commitment to compensate automatically for future increases in the cost-of-living. Hence, in view of all this, there was no underlying belief that there was a legal obligation to increase salaries to meet the full increase in the cost-of-living.

However, at a later point in the judgment the Tribunal held that the Bank made periodic adjustments of salaries out of the conviction that it was legally obliged to do so and that this had become one of the conditions of employment[94]. The content of this practice and obligation will be discussed further below.

The Applicants had also contended that the implementation by the Bank

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92 WBAT Reports (1981), Decision No.1, at p.47.

93 *Ibid.*

94 *Ibid.*, at p.56.

of a policy of adjusting the salaries of its staff to match cost-of-living increases had given rise to a consistent and established practice which had become an integral part of their conditions of employment[95]. The Tribunal decided to examine whether or not such a practice existed and whether, if it did, it had become a condition of employment.

The Tribunal made a detailed examination of the practice of the Bank from 1968 to 1978[96]. Several important findings of fact were made. First, in some instances (in 1973 and 1978) the rise in the cost-of-living was mentioned as the decisive reason for the increase. Second, several factors other than cost-of-living were taken into account in formulating one or another salary increase. These factors included competitiveness, provision of reasonable differentials between grades, reward of performance, real income growth, and staff morale. Third, the President and the Executive Directors made a balanced choice among these factors according to the conditions prevailing each year. Further, the exercise of this judgment did not lead in the years 1968 to 1978 to systematic increases equal to those of the Washington Consumer Price Index. In fact, all in all, it could not even be maintained that the salary increase was in all cases at least the equivalent of that in the cost-of-living and that the maintenance of the real value of compensation was the minimum essential, particularly because on four occasions the increases for the staff at higher levels were tapered so that they received increases below the Consumer Price Index. This latter feature was found to be a sufficient basis for rejecting the thesis of the "minimum essential". Further, on occasion the President and the Executive Directors even expressly opposed a salary adjustment corresponding exactly to the increase in the cost-of-living. On one of these occasions the President had clearly stated that there could be no substitute for the exercise of judgment in determining a compensation package at any given time in relation to all the factors involved.

The Tribunal concluded, in the light of its findings described above, that between 1968 and 1979 there did not exist any established and consistent practice of increasing salaries across the board to a degree at least equal to the increase in the Consumer Price Index. Each increase was decided upon in the light of the circumstances of the time and having regard to various factors among which the increase in the cost-of-living played an important, but in no way a decisive and certainly not an exclusive, role[97].

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[95] Consolidated Memorandum, at p.59.
[96] WBAT Reports (1981), Decision No.1, at pp.48–55.
[97] WBAT Reports (1981), Decision No.1, at pp.53–54.

The Tribunal did, however, hold that the conditions of employment contained rules regarding salary adjustment resulting from an established practice. The Tribunal made it quite clear that:

"In holding that the conditions of employment of staff members did not in 1979 contain any rule of law relating to the method of adjustment of salaries or to the taking into consideration of certain factors in preference to others, the Tribunal is not asserting that the conditions of employment contain no rules whatsoever regarding salary adjustment. True, neither the letters of appointment and acceptance nor the Articles of Agreement, nor any written rule or regulation, include any provision requiring the Bank as a matter of law to make periodic adjustments of salaries. However, the Tribunal considers that a consistent practice of periodic adjustment has been established, and that the Bank makes these adjustments out of the conviction that it is legally obliged to do so. In his Memorandum to the Executive Directors dated April 19, 1972, the President wrote:

'It is by now our established practice to review the staff compensation programme annually in early spring with a view to introducing whatever changes may be appropriate effective May 1'.

Since then, this practice has been affirmed year by year, and the increases adopted in 1979 and 1980, as well as those decided upon since the filing of proceedings in the present case, have confirmed it.

The Tribunal considers in consequence that the Bank is obliged to carry out periodic reviews of salaries, taking into account various relevant factors. The Bank is under no duty to adjust salaries automatically to increases in the cost-of-living and it retains a measure of discretion in this regard. This does not mean that the rises in the cost-of-living in a period of inflation constitute a factor that can be ignored or disregarded in the exercise of that discretion. On the contrary, the established practice, and statements confirming that practice, have created a legal obligation to make periodic adjustments reflecting changes in the cost-of-living and other factors. In the opinion of the Tribunal such an obligation is a fundamental element in the Applicants' conditions of employment which the Bank does not have the right to change unilaterally. In this respect, the Tribunal takes particular note of the statement made in the Respondent's Joint Memorandum to the effect that:

'It is still the intention of the Bank to adjust salaries periodically to reflect changes in various factors, including cost-of-living'"[98].

While the Tribunal held that the decision contested by the Applicants was not a violation of their rights, it is significant that it did conclude that a practice had been established of making periodic adjustments in the salary

[98] WBAT Reports (1981), Decision No. 1, at pp. 55–57.

of staff members reflecting changes in the cost-of-living and other factors. The exact content of this obligation as established by this practice was not elaborated upon by the Tribunal so that it is not possible at this time to specify at what point in the progression of percentages, so to speak, the Tribunal would consider that there had been a breach of that obligation nor how consideration of the relevant factors should be balanced for a breach of such obligation not to occur. Suffice it to say that the Tribunal would probably require a reasonable decision relating to the measure of the salary increase given annually to reflect changes in cost-of-living and other factors. Each decision would have to be looked at on a case-by-case basis by the Tribunal to determine whether it did not violate the Bank's obligation.

Practice has been relied on by other international administrative tribunals as law-creating. Thus, in some cases limitations regarding procedure according to which a power may be exercised have been implied from administrative practice[99]. Also practice has in some cases been regarded as spelling out in greater detail rules which had already been laid down by the provision conferring the power[100]. Practice has also been successfully invoked in cases involving the submission to local rules of law of the contracts of employment of officials in ILO branch offices[101]. In several cases ILOAT remarked, in the case of fixed-term contracts, that it was a general practice to renew them as a matter of course[102], thus referring to practice as a source of law, though it did not actually base its decisions on practice in those cases. In the *Bang-Jensen*[103] UNAT virtually regarded it as an established normal practice of the UN Secretariat that when an assignment was ended, the papers relating to such assignment were handed over to the United Nations. Practice has been invoked for a number of purposes which are not restricted to resolving patent ambiguities in written provisions. In fact UNAT has stated that refunding of travelling expenses incurred in order to appear before the Joint Appeals Board had not been provided for in the Staff Regulations or Rules nor had it become an administrative practice[104]. Thus practice was regarded as an independent source of law in so far as it was on a par with written sources of law.

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[99] See *Vanhove* (1952), UNAT Judgment No.14, *Garcin* (1958), ILOAT Judgment No.32.

[100] See *Aglion* (1954), UNAT Judgment No.56, *Carson* (1962), UNAT Judgment No.85.

[101] *Desgranges* (1953), ILOAT Judgment No.11.

[102] See *Duberg* (1958), ILOAT Judgment No.17, *Bernstein* (1955), ILOAT Judgment No.21.

[103] (1958), UNAT Judgment No.74.

[104] *Davidian* (1958), UNAT Judgment No.75.

The Power of Amendment

One of the key issues in the *de Merode* Case concerned the power of the Bank to amend or change the general and impersonal rules establishing the rights and duties of the staff. In so far as the Applicants contested the power of the Bank to alter, for instance, the tax reimbursement system as applicable to U.S. nationals, they were questioning the power of the Bank unilaterally to amend terms and conditions of employment.

It was agreed by the parties that the power of the Bank to change the general rules defining the rights and obligations of the staff could not be denied. However, there was disagreement, among other things, on whether changes introduced by the Bank could be applied to staff members employed before their adoption. In the view of the Tribunal it was an important consequence of the dominantly objective nature of the legal position of the Bank staff that the Bank possessed, in common with other international organizations, an inherent power to change, subject to certain conditions, the general and impersonal rules governing the conditions of employment of the staff, because it was a well-established legal principle that the power to make rules implied in principle the right to amend them, which power flowed from the responsibilities of the competent authorities of the Bank. The dispute, it said, really related to what the extent of the limitations on this power of amendment was.

(a) The arguments of the parties

In broad terms the Applicants relied principally on what was called the doctrine of acquired rights, under which "the employer organization may not unilaterally make substantial adverse changes in the essential terms of an employee's appointment". They maintained that, even if the staff member had accepted in advance in his contract of employment, without any reservation or limitation, the organization's power to amend the contract – which was the case in the letters of appointment and acceptance of the Bank – this power could not go so far as to authorize the organization unilaterally to prejudice the acquired rights of staff members. The Bank rejected this contention in regard to acquired rights as unreasonable and unrealistic: acceptance of such a theory, it was argued, would have prevented the Bank from adjusting its personnel policies to changing circumstances and would have placed it in an administrative straitjacket. Moreover, it was added, the doctrine of acquired rights could not be applied in this case without disregarding the clear language of the letters of appointment of the staff members concerned.

However, these opposing views were not proposed in absolute terms. Both the Applicants and the Bank admitted some limitations and nuances, though they were not in complete agreement. The Applicants conceded that the doctrine of acquired rights precluded only substantial adverse unilateral changes in the essential terms of the employee's appointment which implied that the Bank could make (i) favorable changes, (ii) insubstantial changes and (iii) changes in non-essential terms; and further they admitted that there could be instances of "exigent circumstances" or "overwhelming contingencies" under which the doctrine of acquired rights would give way to the Bank's need to act[105].

The Bank denied the doctrine of acquired rights as invoked by the Applicants but, on the other hand, acknowledged that the Bank could not act in an unfettered manner. The power of unilateral amendment was subject to general principles of law such as the principle of non-retroactivity, the principle of non-discrimination and the principle of reasonable relationship between aims and means[106].

(b) The Tribunal's view

The Tribunal gave a reasoned and detailed exposition of its approach to the problem. First, it held that the Bank had the inherent power unilaterally to amend conditions of employment of the staff but that, at the same time, there were significant limitations upon the exercise of such power. The Tribunal purported to be dealing with the amendment of general and impersonal rules and, therefore, it is uncertain how much of what it said applied also to other kinds of rules. It would seem that the Tribunal did not give detailed consideration to the issue of the amendment of the latter kind of rules.

(i) Personnel already in employment

The Tribunal stated clearly that it was not a limitation on this power that amendments to conditions of employment should not be applied to personnel already in employment. The basis of this was explained as follows:

> "The existence of the Bank's power unilaterally to change conditions of employment rests on its implied power to pursue fully and efficiently the purposes and objectives for which it was created. As the legal relationship between the Bank

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[105] Consolidated Memorandum, at pp.27ff.

[106] Joint Memorandum, at pp.46ff., and Oral Proceedings, at pp.38, 40.

and its staff does not rest on any national legal system, it is in the Bank's own internal law that the basis for the Bank's power must be found. To deny the existence of any power unilaterally to amend the conditions of employment of existing staff would lead to a situation in which there are as many rules as there are employees who entered the service of the Bank at different dates. This would create unjustifiable inequalities between the various staff members and would be contrary to the elementary requirements of good administration. The existence of objective rules of a general and impersonal character implies not only the power of the organization to change these rules, but also a power to decide that the new rules should apply immediately to personnel already employed"[107].

The power unilaterally to amend conditions of employment could not, therefore, be limited to favorable amendments, as far as staff members already in employment were concerned. It was not a viable argument that the staff member placed his "reliance" and his "expectations" on those conditions of employment at the time of his employment as an inducement to become an employee. Further, among other things, the Statute of the Tribunal in Article II provided that the terms and conditions of appointment and employment included all pertinent regulations and rules in force at the time of the alleged non-observance of such terms and conditions of employment. This provision established that the conditions of employment for which the Tribunal must assure respect were not those which existed at the date of the appointment of a staff member but those which existed at the date of the alleged non-observance, which implied possible changes in the conditions of employment.

(ii) Existence and basis of limitations

While conceding the inherent power of the Bank to amend unilaterally and unfavorably conditions of employment applicable to staff members already in employment, the Tribunal was equally emphatic that this inherent power implied certain limitations:

"The same considerations which underlie the existence of a power of unilateral amendment, namely, the internal law of the Bank and its implied powers, lead the Tribunal to reject the idea that this power should be totally unlimited. Such an idea would run counter to 'the paramount importance of securing the highest standards of efficiency and of technical competence' (Article V, Section 5(d) of the Articles of Agreement). No one would wish to be employed in an organization in which there were no limits at all to the power of the employer"[108].

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[107] WBAT Reports (1981), Decision No.1, at pp.16–17.
[108] WBAT Reports (1981), Decision No.1, at p.18.

The Tribunal, first, made a distinction between those unilateral amendments which were permissible and those which were not. In making this distinction the Tribunal made two negative points of considerable importance. First, it said that such a distinction did not rest on the extent to which a staff member accepted such power of unilateral amendment in his letter of appointment. The absence of express reservation of the power of amendment in the letter of appointment did not mean that such a power could not be implied from the internal law of the Bank. Conversely, even where the power of unilateral amendment was reserved in terms which imposed no limitations upon its exercise, this could not be construed to accord to the organization an unrestricted power of unilateral amendment. Such words reserving a power of amendment in the letters of appointment were to be read against the background of the internal law of the Bank which would determine, irrespective of such words, what the limitations on the power of amendment were.

The second negative point related to the subjective state of mind of staff members. The distinction between what was permissible and what was not did not rest on the intentions or state of mind of staff members at the time they accepted employment, or their expectations or reliance or on the motivating factors which might have induced them to accept or remain in employment with the Bank. If subjective considerations were to be the determining factor there would be a diversity of governing rules where uniformity was necessary. In any case, at least two subjective intentions formed the basis for the contract of employment. There was also the intention of the Bank to be considered. There was no reason, therefore, to attach greater weight to the intention of the staff member than to that of the Bank. In entering the service of the Bank, staff members could not expect that the terms of appointment which might have induced them to accept service with the Bank would not be altered in the future to take account of changing circumstances.

(iii) The distinction between fundamental or essential elements and non-fundamental or non-essential elements

Positively, the Tribunal drew a major distinction between certain elements in the contract of employment which were fundamental and essential in the balance of rights and duties of the staff member and those which were less fundamental and less essential in this balance. The former could not be changed without the consent of the staff member affected. The latter

could be unilaterally changed by the Bank in the exercise of its inherent power, subject to certain limits and conditions[109].

In describing the distinction further, the Tribunal made two important points. First, it made clear that the distinction between essential or fundamental and less essential or less fundamental conditions of employment did not necessarily correspond to the distinction between contractual rights and statutory rights. It specifically stated that some contractual conditions contained in the letters of appointment and acceptance could be non-fundamental and non-essential while some of the conditions lying outside the contract which might be called statutory could be fundamental and essential. Thus, some "contractual" conditions would be unilaterally changeable, subject to certain conditions, while some "statutory" conditions would be unilaterally unalterable.

The second point was that the distinction did not depend on a doctrine of acquired rights which was difficult to define. The absence of a power of unilateral amendment did not rest on whether a right had been acquired; the doctrine of acquired rights did not constitute the cause or justification of the unchangeable character of certain conditions of employment. Rather, it was because certain conditions of employment were so essential and fundamental that they became unchangeable unilaterally and thus gave rise to, so to speak, acquired rights.

As for drawing a firm line between fundamental or essential and non-fundamental or non-essential elements, the Tribunal did not purport to describe this line in abstract terms because, in its view, it was difficult to discern the line in such terms in the same way as it was difficult to draw a firm line between what was fair and unfair, reasonable and unreasonable, equitable and inequitable. In short, the distinction turned upon the circumstances of the particular case.

The Tribunal, however, did demonstrate how the distinction would be applied when it said:

> "Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely – both principle and implementation – to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and

[109] WBAT Reports (1981), Decision No. 1, at p. 19.

well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential"[110].

In the case in hand, it will be seen below how the distinction was applied to the issue of tax reimbursement. In regard to the issue of salary increases, the Tribunal held that the Bank had, as a result of a practice that had been followed over time, an obligation to carry out periodic reviews of salaries, taking into account various relevant factors, and that this obligation was a fundamental or essential element in the conditions of employment of staff members which could not be changed by the Bank unilaterally.

(iv) Non-fundamental or non-essential elements

Non-fundamental and non-essential elements of the conditions of employment were, in the view of the Tribunal, subject to unilateral amendment by the Bank. Since this was a discretionary power, there were two significant consequences. On the one hand, the Tribunal would not, in any case brought before it, substitute its judgment for that of the competent organs of the Bank in exercising that power. On the other hand, the power, being discretionary, was not absolute and was, therefore, subject to certain limitations in its exercise.

Broadly speaking, amendment of non-fundamental elements of the conditions of employment of employees could not be exercised retroactively or in an arbitrary or otherwise improper manner. The well-established principle of non-retroactivity meant that staff members could not be deprived of accrued rights for services already rendered. In regard to arbitrariness and improper modality leading to abuse of discretion, the Tribunal said:

"The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and of technical competence'. Changes must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal"[111].

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[110] WBAT Reports (1981), Decision No.1, at p.20.
[111] WBAT Reports (1981), Decision No.1, at p.22.

The explanation does not necessarily purport to be exhaustive of the manner in which a discretion may be abused by being exercised in an arbitrary or otherwise improper manner. It covers a wide range of defects which may be characterized as improper or arbitrary exercise of discretion but it would seem to be the case that, in so far as the Tribunal summed the position up by saying that in each case the Tribunal must satisfy itself that the power of changing non-fundamental elements in the conditions of employment had not been exercised in an arbitrary or otherwise improper manner, room was left for a broader definition of arbitrariness or improper exercise of discretion which could cover more than has been outlined above.

(c) Practice of other tribunals

The practice of other tribunals is, to say the least, confusing[112]. Not only are the decisions of different tribunals conflicting but sometimes the decisions of the same tribunal are not consistent and clear. In short, it is difficult to find a clear exposition in the jurisprudence of other tribunals which corresponds to the exposition of general principles given in the *de Merode* Case.

It seems to be generally accepted that, even where there is no prohibition against retroactivity in the clause enabling the organization to make amendments, retroactive amendments are not permitted[113]. This is so in the case of statutory terms and conditions of employment[114] as well as in the case of contractual terms. This does not mean, however, that favorable changes to terms and conditions of employment cannot be made retroactively[115].

In most cases administrative tribunals have had to deal with situations in which staff regulations or rules have provided for unilateral amendment by the organization. Nevertheless, the general approach seems to have been not to permit unilateral amendment of terms in contracts conferring rights directly upon officials[116]. Beyond this, it seems to be generally assumed that there is a distinction between contractual and statutory elements in the

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[112] See the discussion in Akehurst, *op. cit.* note 22, at pp.199–245.

[113] See *Poulain d'Andecy* (1960), ILOAT Judgment No.51.

[114] See *Algera* (1957), Court of Justice of the European Communities, Recueil III, p.81, *Elz* (1960), *idem,* Recueil VI, p.215, *Lindsey* (1962), ILOAT Judgment No.61.

[115] *Puvrez* (1961), UNAT Judgment No.82, *Fisher* (1960), ILOAT Judgment No.48, *Decision No.19* (1955), OEEC Appeals Board. *Contra Elz* (1960), Court of Justice of the European Communities, Recueil VI, p.215.

[116] See *Kaplan* (1953), UNAT Judgment No.19, *Julhiard* (1955),UNAT Judgment No.

rules governing the rights and obligations of the staff and that, even where provision is made for unilateral amendment in instruments such as staff regulations or rules or even the contract, it is only the statutory elements that can be changed at any time because they are not deemed to be incorporated in the contract, while the contractual elements cannot be changed without the agreement of the parties[117]. This distinction has in some way sometimes been linked to the doctrine of acquired rights[118]. But in general neither has the doctrine of acquired rights been clearly explained or consistently applied nor has the distinction between contractual and statutory elements been adequately defined. It will be noted that the WBAT rejected both the above doctrine and the above distinction in favor of a distinction between fundamental or essential and non-fundamental or non-essential terms and conditions of employment. In *Lindsey*[119], however, ILOAT did refer to "the balance of contractual obligations" and "the essential terms of appointment" as being relevant to the question whether unilateral amendment was permissible. This approach comes very close to that taken by the WBAT.

As for "abuse of discretion" in regard to non-fundamental or non-essential terms of contracts of employment, there is little precedent for this doctrine in the case-law of other tribunals. However, the OEEC Appeals Board has referred to the possibility of an abuse of legislative power in connection with amendments to rules governing employment made by the organization[120].

The Issue of Tax Reimbursement

The contention of four of the Applicants was that the Bank had acted illegally in unilaterally amending the method of tax reimbursement for U.S. nationals.

62, *Puvrez* (1961), UNAT Judgment No.82, *Mirossevich* (1956), Court of Justice of the European Communities, Recueil II, p.365, *Kergall* (1955), *idem*, Recueil II, p.9.

[117] See *Kaplan* (1953), UNAT Judgment No.19, *Lindsey* (1962), ILOAT Judgment No.61, and discussion in Akehurst, *op. cit.* note 22, at pp.208–227.

[118] See *Poulain d'Andecy* (1960), ILOAT Judgment No.51. *In Application for Review of Judgment No.273 of the United Nations Administrative Tribunal*, 1982 ICJ Reports, p.325 at p.365, the ICJ pointed out that the UN Staff Regulations themselves approved the fundamental principle of respect for acquired rights and, therefore, the doctrine of acquired rights had to be applied by UNAT. It must be noted that in the case of the UN, Staff Regulation 12.1 refers to the acquired rights of staff members and protects them.

[119] (1962), ILOAT Judgment No.61. See also the *Aicher* Case (1964), OECD Appeals Board Decision No.37.

[120] See OEEC Appeals Board Decisions Nos.24–25 (1957).

The starting point for a consideration of the problem was the Articles of Agreement of the Bank which in Article VII (9) prohibited the levying of taxes on salaries and emoluments of employees of the Bank who were not local citizens, local subjects, or other local nationals. Since the U.S. in particular had not in 1946 yet agreed to exempt the salaries and emoluments of its nationals from taxation, the Board of Governors adopted By-Law 14 (b) which stated:

> "Pending the necessary action being taken by members to exempt from national taxation salaries and allowances paid out of the budget of the Bank, the Governors and the Executive Directors, and their Alternates, the President, and the staff members shall be reimbursed by the Bank for the taxes which they are required to pay on such salaries and allowances.
>
> In computing the amount of tax adjustment to be made with respect to any individual, it shall be presumed for the purposes of the computation that the income received from the Bank is his total income. All salaries and allowances prescribed by or pursuant to this section are stated as net on the above basis".

The principle of reimbursement of taxes required to be paid by U.S. nationals was stated clearly but the method of calculating the amount of reimbursement gave rise to problems. The method used to calculate the reimbursement in 1946 and thereafter was as follows: firstly, Bank income was regarded as the total income of the employee concerned; secondly, because of the complexity of the tax system created by the possibility of taking either the standard deduction or itemized deductions (for interest, real estate taxes, etc.), whichever was greater, the reimbursement was to be calculated on the basis of the standard deduction from the salary of the Bank staff member concerned. A result of this system was that a staff member could take itemized deductions which were larger than the standard deduction and consequently pay a lesser amount in tax than he would have been reimbursed by the Bank. The Bank was aware of this consequence but was of the view that the saving which would accrue to the Bank from a more accurate method of computation would not offset the disadvantage to the Bank in having to make a special computation in each case.

This system underwent many changes. However, one was of importance for the issue raised. In 1963, in recognition of changed circumstances as a result of the taxpayer being permitted to take either the standard deduction or the actual amount of his state and local taxes as a deduction, a modification was made. It was recognized that those who did not itemize their deductions could be reimbursed in excess of their actual taxes. Hence, reimbursement was henceforth to be calculated using the standard deduction or the amount of state and local taxes, whichever was greater. This

change produced an adverse impact on some employees who were already working for the Bank, since they would have received a lower reimbursement than under the former policy and thus would have had a lower gross salary but it was applied across the board and without protest from the staff. The change was codified in a Personnel Manual Statement issued in December 1973.

In 1977, because of doubts in regard to the existing system and new economic conditions, the Bank decided to have the tax reimbursement system studied. It was found, *inter alia*, that nearly 50% of those entitled to reimbursement received reimbursement in excess of the actual tax paid on their total family income and that the overall average excess reimbursement was over $2,300 per staff member. This excess ranged from $150 at low income levels to a maximum of more than $4,000 at the highest income levels. The whole problem of tax reimbursement was then submitted to the Joint Committee on Staff Compensation Issues (the Kafka Committee).

The Kafka Report found that the practice of itemizing deductions had increased and that the cost to the Bank of tax reimbursement had risen from $300,000 in 1946 to almost $19 million in 1978, representing an increase from 2.4% of the total administrative budget to 7.2%. Hence, the Report recommended a change in the reimbursement system. It recommended that the principal objective of the system should be the achievement of equity, which, however, was a difficult notion to define. Various kinds of equity could be identified – as between U.S. nationals and expatriate staff ("internal equity"); as between U.S. nationals employed by the organizations and those employed outside ("external equity"); and among U.S. nationals at different income levels and with or without outside income. Other objectives had, according to the Report, also to be borne in mind: ease of administration; cost; comprehensibility; and, as a subsidiary consideration, confidentiality. The Report, after considering various alternatives, including the UN system, expressed a preference for an average deductions system under which the tax reimbursed would not exceed the average tax paid by persons throughout the U.S. at the same income level as the staff members.

The Executive Directors accepted this recommendation and decided to introduce the average deductions system with effect from January 1, 1980, subject to two conditions, namely a five-year transition period and other appropriate safeguards. Subsequently, the Board of Governors adopted an amendment to By-Law 14(b) effective January 1, 1980 so that it read:

> "Pending the necessary action being taken by members to exempt from national taxation salaries and allowances paid out of the budget of the Bank, the Gover-

nors and the Executive Directors, their Alternates, the President, and staff members and other employees of the Bank, except those whose employment contracts state otherwise, shall receive from the Bank a tax allowance that the Executive Directors determine to be reasonably related to the taxes paid by them on such salaries and allowances.

In computing the amount of tax adjustment to be made with respect to any individual, it shall be presumed for the purposes of the computation that the income received from the Bank is his total income. All salaries and allowances prescribed by or pursuant to this section are stated as net on the above basis". (Emphasis added).

(This section is now 13(b) of the By-Laws).

The Executive Directors decided that the new system was to apply fully only to those staff members accepting offers of appointment on or after January 1, 1980 but as regards existing staff or those who had accepted offers prior to that date two special provisions were laid down. The first was that the new system would be introduced progressively over a five-year period. The second was that for the duration of their service with the Bank, such staff members would be reimbursed, as a minimum, for the taxes they were required to pay on their income from the Bank. Thus, a staff member whose tax allowance was less than the taxes due on Bank income could choose to apply for a supplementary payment (the "safety-net").

The first issue before the Tribunal was whether the standard deduction system was part of the conditions of employment of the four Applicants. The Bank had contended that it was no more than a mere procedure not forming part of the legal relationship between the Bank and the Applicants. The Tribunal rejected this contention, holding that the system was part of the conditions of employment of the Applicants on the date on which they were changed.

The next issue was whether the introduction of the new tax reimbursement provisions changed the fundamental and essential elements of the conditions of employment of the four Applicants. The Tribunal held that there were two basic principles underlying the tax reimbursement system at the time it was established designed to ensure equality among staff members of the Bank, regardless of their nationality. The first was that all employees of the Bank should receive a salary free of national taxes. Hence, letters of appointment fixed salaries in net terms. The second was a logical corollary of the first, namely that those staff members of the Bank who were subject to tax by their state would have the right to be reimbursed by the Bank for the taxes which they were required to pay. The

Tribunal further pointed out that the "safety-net" mechanism instituted by the Bank in the amendments made in 1979 was an implicit recognition of the fundamental character of these elements.

The second principle could, in the view of the Tribunal, be implemented in a variety of ways. The method based on the presumption of a standard deduction was one of them. The method based on average deductions was another alternative. What was important was that there was a distinction between the principles of tax reimbursement and the method of implementation of that principle. The method of implementation or computation was not a fundamental element in the terms of appointment of the four Applicants. Hence, the standard deduction method of computation was a non-essential element of the Applicant's conditions of employment. Further, the explicit provisions referring to net salary in the letters of appointment laid down the essential conditions of employment in regard to this matter.

Accordingly, in regard to the tax reimbursement system itself the Tribunal concluded that

> "the Bank does not have the power unilaterally to abolish the tax reimbursement system or to repay a lesser amount than the taxes which each of the Applicants is required to pay (on the assumption that Bank income is his or her only income)"[121].

On the facts of the case the Tribunal held that the Bank had not done so:

> "The Applicants continue after the decisions of 1979/80 as before to receive a net salary in the same way as non-United States staff members. The principle of reimbursement 'for the taxes they are required to pay' is fully respected by virtue of the safety net. In no case does any United States staff member receive a net salary lower than that which he would have received if he had not been subject to United States taxes. All taxes which he is 'required to pay' are reimbursed by the Bank"[122].

The fact that the gross income of certain staff members had been reduced as a result or that the reimbursement in excess of taxes was diminished or had disappeared was not relevant, since these were non-essential elements in the conditions of employment which were subject to unilateral amendment by the Bank.

In accordance with what had been said earlier in regard to the power of amendment, the Tribunal considered the next issue raised in the case which was whether the exercise of the discretion to change the method of

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121 WBAT Reports (1981), Decision No.1, at p.40.

122 *Ibid.*, at p. 41.

implementation of the tax reimbursement principles which was a non-essential element in the contract of employment had been proper or had not been abused. The Tribunal clearly pointed out that it was not its function to substitute its judgment for that of the Bank in choosing the average deductions system. In examining the question whether there had been an abuse of discretion the Tribunal noted that the changes had not been made retroactive and that they had been chosen to ensure a better functioning of the institution with a more equitable personnel policy. Further, it was stated that the choice of a particular method of tax reimbursement could properly be determined by several factors: equity, ease of administration, cost, comprehensibility and confidentiality, and that, therefore, the Tribunal saw no abuse of discretion

> "in the fact that the Executive Directors took into account the cost of the various systems and, after having assessed the advantages and disadvantages of each, decided to adopt the average deductions system"[123].

It also considered the manner in which the change had been prepared and applied in assessing whether the amendment had an arbitrary or unreasonable character and held that:

> "The long and detailed studies which preceded the 1977 decisions show that this was not a hastily adopted reform, but a change studied at length and most carefully prepared. The establishment of the new system included measures showing moderation and concern for staff. The Executive Directors did not follow the Kafka recommendations blindly, but introduced into them two important changes: the safety net and a transitional period of five years 'in order to alleviate the impact of the change'"[124].

For all these reasons, the Tribunal held that the introduction of the average deductions system did not involve an abuse of discretion.

Conclusion

There were several issues of major importance which were raised and decided in the *de Merode* Case. In regard to the sources of international administrative law and the power of unilateral amendment by the Bank of conditions of employment, particularly, the decision made a very significant contribution. The Tribunal indicated quite clearly what the sources of law it would apply were and gave a clear and useful exposition of their relevance and importance. As to the power of amendment by an interna-

[123] WBAT Reports (1981), Decision No.1, at p.43.
[124] *Ibid.*, at p.44.

tional organization of conditions of employment, the decision in the *de Merode* Case contributed much to clarify this rather confused area of the law. Especially, the categorical distinction made between fundamental or essential terms of employment and non-fundamental or non-essential terms of employment has considerably enriched the jurisprudence of international administrative tribunals. Similarly, the application of the distinction in the case and the holding that non-fundamental or non-essential terms of employment could only be unilaterally amended provided that there was no abuse of discretion, and the application of this principle was of prime significance. The case can truly be regarded as a landmark decision in the history of international administrative law.