

The World Bank Administrative Tribunal's External Sources of Law: A Retrospective of the Tribunal's First Quarter-Century (1981–2005)

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Abstract

The jurisprudence of the World Bank Administrative Tribunal has grown and evolved dramatically over its first quarter-century. Mr. Hansen's study comprehensively surveys the numerous doctrinal contributions provided by external sources during this time. Organized under rubrics suggested by Article 38 of the Statute of the International Court of Justice, which sets out that Court's sources of law, Mr. Hansen's study reviews: (i) the roles of the contract of employment, Bank rules, international treaties and national laws in the composition of the *pactum* established between a staff member and the Bank; (ii) the development of binding custom from the practices of the Bank, other institutions and national governments; (iii) the Tribunal's use of general legal principles drawn from other legal systems; and (iv) the Tribunal's use of international and domestic tribunal precedents. Extensively footnoted, Mr. Hansen's study is intended for both academics and practitioners specializing in international administrative law and dispute settlement.

Keywords

World Bank Administrative Tribunal; international administrative tribunals; international administrative law; public international law; International Court of Justice; World Bank; International Monetary Fund; international organizations; international employment contracts; national authorities and courts

The World Bank Administrative Tribunal is an independent judicial body established by the World Bank in 1980 to decide on applications brought by staff members with respect to alleged non-observance of their contracts of employment or terms of appointment.¹ Over the quarter-century spanning from the

*) (hereinafter "Tribunal"). Mr. Hansen received his J.D. from the American University Washington College of Law in 1996, and his LL.M. from Cambridge University in 2005. Prior to serving as Counsel at the World Bank, Mr. Hansen served as Editor of *International Legal Materials* from 1999 to 2001. Mr. Hansen has also served as a Legal Officer with the United Nations (U.N.) Office of Legal Affairs, Codification Division. The views and opinions expressed by Mr. Hansen are his own, and do not necessarily coincide with those of the World Bank Group ("Bank"), the Tribunal or the U.N. This article is dedicated to retired Tribunal President Robert A. Gorman, among whose many distinctions is his having been the only judge to serve on the Tribunal throughout the period under review.

¹) See Statute of the World Bank Administrative Tribunal (hereinafter "Tribunal Statute" and referring by default to the revised version effective for applications filed on or after 1 August 2001) at Article II(1);

Tribunal's first judgment in 1981 to the end of 2005, the Tribunal developed a unique jurisprudence in the course of reaching more than three-hundred and forty judgments.² External sources of law played prominent roles in this development, and this article shall review and evaluate their use by the Tribunal.

I. Introduction to the Tribunal and its Jurisprudence

The Tribunal's need for a coherent and effective jurisprudence is confirmed in its constitutive Statute ("Tribunal Statute"), which establishes that the Tribunal's judgments are final and binding upon both the staff member and the Bank, and must be both reasoned and published.³ Neither the Statute nor its supplementary Rules ("Tribunal Rules"),⁴ however, expressly limits the sources of law from which the Tribunal can draw.⁵

The Tribunal's use of external sources of law may be due to the internationalist character of the Tribunal's bench, which has included four judges (and two presidents) of the International Court of Justice (ICJ), and which has consistently repre-

Khan, Decision No. 307 [2003] at para. 9 (stating that under the terms of the Tribunal Statute, "the Tribunal cannot under any circumstances deal with matters that predate [1 January] 1979"). The Tribunal exists because of the immunity to domestic suits enjoyed by the Bank in its capacity as an international organization. In the absence of such immunity, a multitude of municipal laws could be applied against the Bank in a vast number of national fora. See generally C.F. Amerasinghe, *The Law of the International Civil Service* (vol. 1, 2d ed., 1994) at pp. 3–9 (discussing the rationale behind the establishment of international administrative tribunals). The Tribunal is one of many such international administrative tribunals, e.g. the Asian Development Bank Administrative Tribunal (ADBAT), the Council of Europe Administrative Tribunal (CEAT), the International Labour Organization Administrative Tribunal (ILOAT), the International Monetary Fund Administrative Tribunal (IMFAT), the now-defunct League of Nations Tribunal (LNT), and the United Nations Administrative Tribunal (UNAT).

² The present study follows the Tribunal's jurisprudence through *Hitch*, Decision No. 344 [2005]. It should also be noted at the outset that the Tribunal has stated that it is "not prepared to declare that its decisions have a *stare decisis* effect in all respects." *Fidel*, Decision No. 302 [2003] at para. 7.

³ Tribunal Statute at Articles XI, XIV. Rule 30 of the Rules of the Tribunal charges the Tribunal's Executive Secretary with arranging for publication of the Tribunal's decisions. The Tribunal's Secretariat has maintained since 2000 a website containing *inter alia* electronic versions of all Tribunal judgments and dispositive orders. This website is currently accessible at www.worldbank.org/tribunal.

⁴ The Tribunal's Statute and Rules are available at the Tribunal's website (www.worldbank.org/tribunal). The Statute was revised for applications filed on or after 1 August 2001, while the Rules were amended in 1998 and again later for applications filed on or after 1 January 2002.

⁵ Tribunal Statute at Article II(1) (noting that the Tribunal is empowered to hear any case alleging non-observance of a staff member's "contract of employment or terms of employment," and that these terms "include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement Plan"). In August 1983, as part of its codification of staff rules and rights, the Bank issued Principle of Staff Employment 9.1(b), which states that "the World Bank Administrative Tribunal shall, as prescribed in its Statute, hear and pass judgment upon applications from staff members alleging non-observance of their contracts of employment or terms of appointment, including these Principles and all pertinent Staff Rules of the Organizations." See C.F. Amerasinghe, *The Law of the International Civil Service* (vol. 1, 2d ed., 1994) at p. 109 (noting that no international administrative

sented diverse swaths of humanity through the lens of its membership.⁶ The common trait shared by most if not all Tribunal members is a deep respect for the norms and processes of public international law, as reflected throughout the Tribunal's case law, beginning with the Tribunal's debut judgment, *de Merode*, Decision No. 1 [1981].

The sources of law expressly identified or otherwise invoked by the Tribunal in *de Merode* and thereafter closely, albeit tacitly, parallel those recognized by Article 38(1) of the Statute of the ICJ, which lays out that Court's sources of law and in so doing provides an authoritative if not necessarily exhaustive list of legitimate sources of international law:⁷

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;

tribunal refers in its founding statute to the formal sources of law to be applied, and that it is thus left to the "initiative and innovative genius of the tribunals themselves" to determine such sources).

⁶ The past and present Tribunal judges who have served also on the International Court of Justice (ICJ) are Bola A. Ajibola (Nigerian), Taslim Olawale Elias (Nigerian and an ICJ President), Eduardo Jiménez de Aréchaga (Uruguayan and an ICJ President), and Charles D. Onyema (Nigerian). See Tribunal Statute at Article IV(1) (stating that Tribunal judges must be "persons of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence in relevant fields such as employment relations, international civil service and international organization administration"). Informal efforts are made to ensure that candidates for Tribunal membership reflect the Bank's diversity on the legal, national and ethnic planes. The Tribunal's bench thus tends to include at least one African judge, one American (U.S.) judge, one Asian judge, one European judge and one Latin American judge. As there are seven judges on the bench, doublings often occur, while other groups are also occasionally represented. At the end of 2005, the Tribunal's bench consisted of two African judges (Bola A. Ajibola of Nigeria and Sarah Christie of South Africa), an Asian judge (Florentino Feliciano of the Philippines), an Australian judge (Elizabeth Evatt), a European judge (Jan Paulsson of France, President of the Tribunal), a Latin American judge (Francisco Orrego Vicuña of Chile) and an American (U.S.) judge (Robert A. Gorman).

⁷ See C.F. Amerasinghe, *The Law of the International Civil Service* (vol. 1, 2d ed., 1994) at p. 107 (noting that the ICJ Statute "is generally believed accurately to reflect the sources of public international law"); Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997) at p. 36 (stating that, despite some writers' criticisms, Article 38(1) of the ICJ Statute "is usually accepted as constituting a list of the sources of international law"). But see also Amerasinghe at p. 107 (rejecting as "too naïve and simple" an attempt to draw an analogy between the respective sources of public international law and international administrative law, and stating that it is "really a futile exercise to try to draw close analogies" between the sources of international administrative law and the sources listed in Article 38(1) of the ICJ Statute). Despite such strong conclusions, Mr. Amerasinghe, a former Executive Secretary of the Tribunal and a respected scholar in the field of international administrative law, is considerably less certain about the proper sources of international administrative law. See Amerasinghe at pp. 103–109 (noting that neither tribunals nor text writers have tried to define exactly the sources of international administrative law "in the context of the discussion of the law applied by international administrative tribunals," and stating

- c. the general principles of law recognized by civilized nations;
- d. [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁸

The following review of the Tribunal's sources of law will be conducted under these four rubrics,⁹ partly as a matter of analytical convenience but also because, as will be shown, the sources will thereby clearly reveal the internationalist approach to jurisprudence which is so thoroughly expressed in the Tribunal's case law.

that the Tribunal in *de Merode*, Decision No. 1 [1981] "referred to and explained at some length the sources from which the relevant rights and duties of the employer and employee flow, without describing them as sources"). It is submitted in this article that while the Tribunal has neither explicitly founded its jurisprudence on public international law nor expressly adopted its sources, it has nevertheless been strongly, if often subtly, influenced by public international law's approach to identifying sources of law as well as by its principles and jurisprudential techniques.

⁸) Statute of the ICJ at Article 38(1).

⁹) It may be noted with respect to Article 38(1)(d) of the ICJ Statute that the Tribunal has made only a single reference in its judgments to a scholar's work as a source of law, and that this was done only very recently. *Yoon (No. 5)*, Decision No. 332 [2005] at para. 60 (finding it "well established in international law that the exhaustion rule requires that complainants, before going to the international forum, avail themselves of existing procedural mechanisms – such as calling witnesses – essential to the prosecution of their case"), citing D.P. O'Connell, *International Law* (2d ed., 1970), at p. 1059 (stating that "a litigant cannot have a second try if, because of ill-preparation, he fails in his action"). The Tribunal is not averse to scholarly input, however. See *Caryk*, Decision No. 214 [1999] at para. 19, and *Madhusudan*, Decision No. 215 [1999] at para. 25 (stating in each case that "of course the Tribunal will be influenced by persuasive analysis whatever its source"). The Tribunal has on a couple of occasions drawn evidentiary review standards from internal Bank experts. In *Medlin*, Decision No. 319 [2004], the Tribunal noted the testimony before the Bank's Appeals Committee of the Manager of the Bank's Human Resources Compensation Management Division, who stated that a staff member's request for a re-assessment of his or her job-grade level "could be as informal as a verbal request to a manager." *Medlin* at paras. 29–30 (characterizing this statement as "expert evidence"); *Richardson*, Decision No. 208 [1999] at para. 16 (stating that its conclusion that the Bank's tax-allowance formula would "rarely if ever" disadvantage a staff member was shared by the Appeals Committee and the Committee's "independent tax expert"). The Tribunal has also used scholarly studies as sources of facts. See generally, e.g., *Nunberg*, Decision No. 245 [2001] (discussing the findings of expert studies of gender-based salary differentials between Bank staff); *Lysy*, Decision No. 211 [1999] at para. 57 (stating that the Tribunal could refer to the views expressed by independent experts with respect to the technical quality of the applicant's contributions, and could further consider whether there had been any unfairness in the assessment amounting to an abuse of discretion). The Tribunal in 2002 engaged the services of a former ICJ president, Sir Robert Y. Jennings, Q.C., as the sole outside investigator in *Conthe*, a sensitive case brought by a former Bank vice president against the decision of the Bank's top management not to confirm his appointment. See *Conthe*, Decision No. 271 [2002] at paras. 42, 94 (describing Sir Robert as "a lifelong academic and jurist of worldwide reputation"), quoting the Tribunal's order of 26 April 2002 setting out the terms of reference given to Sir Robert, including the scope of the investigation to be conducted. Sir Robert's investigative efforts, methods and findings are discussed *passim* in the judgment. *Conthe* is the only case during the period under review in which the Tribunal has engaged the services of an outside person to conduct fact-finding operations on its behalf.

II. External Components of the Bank – Staff Member *Pactum*

In the international legal system, treaties, otherwise known as “conventions,”¹⁰ are express agreements freely entered into between states.¹¹ Such binding obligations derive ultimately from the Roman *pactum*,¹² as does a Bank staff member’s contract of employment.¹³ Under the rubric of Article 38(1)(a) of the ICJ Statute, the contract of employment would serve as the “particular” and almost indispensable convention to be applied in every Tribunal case,¹⁴ while “general” conventions

¹⁰ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th ed., 1997) at p. 36 (noting that the terms “treaty” and “convention” are synonymous).

¹¹ With respect to the freedom of states to consent to agreements, see the Vienna Convention on the Law of Treaties of 1969, at Articles 48–52 (establishing that a treaty shall be void or susceptible to invalidation in cases of mistake, fraud, corruption or coercion of a state’s representative, or coercion of the state itself through the threat or use of force).

¹² See Barry Nicholas, *An Introduction to Roman Law* (1962) at pp. 191–192 (stating that the concept of the *pactum* was widened during the Roman period from a mere compromise and agreement not to sue “to include any agreement”); Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th ed., 1997) at p. 18 (characterizing the principle of *pacta sunt servanda* (“treaties must be kept”) as a basic rule and principle of international law). Compare *Lavelle*, Decision No. 301 [2003] at para. 29 (stating that “[i]n the end, after all, freely accepted contracts are meant to be honored”).

¹³ The Tribunal found in *de Merode* that a contract of employment is entered into freely by both parties rather than through an act of “nomination” by the organization, as is the case with some domestic civil services. *de Merode*, Decision No. 1 [1981] at para. 17 (determining that “[e]mployment by the Bank . . . results from an offer followed by an acceptance, that is to say, a contract, and not, as is the case with employment in the civil service of certain individual countries, as a result of a unilateral act of nomination by the administration”). See also *Justin*, Decision No. 15 [1984] at para. 27 (stating that the formation of a staff member’s contract of employment depends on “certain general principles of contract law,” such as whether the parties have manifested their intention to contract). The Tribunal has further held that contracts of employment can endure beyond the term of the staff member’s service. *H*, Decision No. 342 [2005] at para. 27 (stating that a staff member’s temporary departure from Bank employment does “not mean that contracts lawfully entered into between the Bank and [the] staff member, and which purport to settle their relationship in the future, automatically become void and of no effect,” as “[s]uch an outcome would come as a most unwelcome surprise to staff members (the Applicant included) who anticipate that the Bank will honor its obligation to pay a variety of post-termination benefits, most obviously including pension payments”); *I*, Decision No. 343 [2005] at para. 15 (agreeing with the applicant that, *inter alia*, the “issues are the Applicant’s privacy and reputational rights, and involve violations of the terms and conditions of his employment, which the Applicant contends survive even after his separation and retirement from the Bank”). The Tribunal in *I* agreed that the question of whether “relevant rules extend to the benefit of retired staff members under the circumstances is a matter of substance, not jurisdiction.” *I* at paras. 18–19 (stating that the Tribunal “does not accept a narrow conception of its jurisdiction which leaves a former staff member incapable of bringing a case based on an alleged violation of his rights”), citing the reasoning of the *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO*, ICJ Reports 1956, p. 91, at p. 92, and noting its own similar invocation in *Carter*, Decision No. 175 [1997] at para. 14 (quoting pp. 92, 94 of the *Advisory Opinion* on this point and also with respect to the ICJ’s noting that “the complainant [in the ILOAT case], in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment”).

¹⁴ Tribunal Statute at Article II(1) (stating that 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

would be those rules, regulations and unilateral promises issued by the Bank with respect to its staff's conditions and terms of employment.¹⁵ Although the Tribunal has used contract and quasi-contract concepts to interpret an applicant's "particular" contract of employment,¹⁶ it is instead those "general" and particularly external sources of Bank legal obligations that fall to be examined here.

A. *Bank Rules and Policies*

The first such type of obligation is that imposed by the Bank's internal rules and policies. There is no clear rule for determining whether a certain public statement constitutes an *opinio juris*¹⁷ and, even more importantly, a codicil to the contract of employment. The Tribunal stated in *de Merode* that it would determine on a

'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"). By finding in *de Merode* that the contract of employment is the product of an offer and an acceptance, the Tribunal implicitly established a *de jure* legal equality between the Bank and its individual staff members which can be analogized to that of contracting states parties to a treaty. See *de Merode*, Decision No. 1 [1981] at para. 17. While the Tribunal did not also address the possibility of a *de facto* inequality of bargaining power between the Bank and its would-be employees, its approach accords with that of modern international law generally. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997) at pp. 139–140 (noting that Western states on the one hand and "communist states and the more militant Third World countries" on the other disagreed as to whether the use of "force" under the U.N. Charter could, for treaty-invalidating purposes, include "economic and political pressure as well as military force," and opining that the latter group's interpretation in favor of the expanded definition was "extremely strained").

¹⁵ Tribunal Statute at Article II(1) (stating that "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"); *de Merode*, Decision No. 1 [1981] at para. 4 (noting that the term "conditions of employment" describes "compendiously the various elements which together determine the content of the legal relationship between the Bank and a member of its staff"). The Tribunal recognized in *de Merode* that while "[t]he contract may be the *sine qua non* of the relationships... it remains no more than one of a number of elements which collectively establish the *ensemble* of conditions of employment operative between the Bank and its staff members." *de Merode* at para. 18 (emphasis in original). The Tribunal more specifically determined that "[f]urther elements of the legal relationship between the Bank and its personnel are also to be found in the Personnel Manual, the Field Office Manual, various administrative circulars and in certain notes and statements of the management." *Ibid.*, at para. 22. See also *Hitch*, Decision No. 344 [2005] at para. 66 (stating that "the Staff Rules are not written for the sake of formality alone, and procedures are set in order to ensure that fairness and impartiality are respected"), citing *K. Singh*, Decision No. 188 [1998] at para. 21 (stating that "[s]taff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered. Even if the [Bank] is in substance right about the decision that it took with respect to the Applicant, its departure from the relevant rules amounts to an abuse of its discretion"); *Lusakueno-Kisongele*, Decision No. 327 [2004] at paras. 41, 50 (noting that "the Staff Rules exist, and their formal requirements were invented by the Bank itself precisely in the interest of staff members"), likewise quoting *K. Singh* at para. 21.

¹⁶ See *infra* notes 233–249 and accompanying text.

¹⁷ See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997) at p. 44 (defining *opinio juris* as a "conviction felt by states that a certain form of conduct is required by international law"). Although *opinio juris* is a concept that normally applies to the evaluation of customary practice, in the Bank's case a policy may itself be enough to create a legal obligation even if no practice has

case-by-case basis whether given Bank statements were binding in “consequence of their objective existence as part of the legal system to which the staff member becomes subject by entering into a contract with the organization.”¹⁸

This approach is facially reasonable, but entails an undeniable risk of tautology, as a finding by the Tribunal that a given provision has an “objective existence” also confers such “objective” status. The power which this doctrine gives the Tribunal to expand the terms of the Bank’s *pactum* with a staff member, even in the absence of supporting Bank *opinio juris*, is tempered but not vitiated by the Tribunal’s self-imposed prohibition on replacing the Bank’s decisions with its own.¹⁹

B. *International Conventions and Legal Doctrines*

The Tribunal has only once identified an inter-state treaty as a source of law.²⁰ In *Agodo*, Decision No. 76 [1989], the Tribunal adopted from the Hague Convention on Pacific Settlement of Disputes of 1907 the “general principle” that the “Tribunal, as an international tribunal, has the inherent power to interpret its own decisions in case of dispute between the parties as to their meaning or scope, even if its Statute contains no provision to that effect.”²¹ Beyond this, however, the Tribunal’s consideration of claims based on international conventions has resulted in uniformly negative conclusions. In *Mendaro*, Decision No. 26 [1985], the Tribunal merely noted the parties’ disputes as to whether jurisdictional defects could be cured by the application of standards expressed in the United Nations

yet followed from it. See *infra* note 326 and accompanying text (discussing the Tribunal’s invocation of ICJ jurisprudence in adopting the concept of *opinio juris*).

¹⁸ *de Merode*, Decision No. 1 [1981] at paras. 22, 29 (stating that “it is important to observe that not all the provisions of these manuals, circulars, notes, and statements are included in the conditions of employment. Some of them have the character of simple statements of current policy or lay down certain practical or purely procedural methods of operation. It is, therefore, necessary to decide in each case whether the provision constitutes one of the conditions of employment”); *Ibid.*, at para. 24 (recognizing that the circumstances of an individual case, “particularly the actual conditions in which the appointment has been made”, may have “some bearing” on the legal relationship between the Bank and a staff member). The Tribunal introduced this case-by-case system of review due to a lack of formal, relevant staff rules at that time. *Ibid.*, at para. 18. This *lacuna* in the Bank’s internal law has since been remedied, but despite losing its original reason for such review, the Tribunal has continued to determine whether pertinent Bank policies are in fact binding. See, e.g., *Desthuis-Francis*, Decision No. 315 [2004] at para. 33 (holding that a reviewing director could not, as part of his search for a “more honest” process of performance evaluation, ignore what he believed to be overly positive multi-rater feedback “until and unless feedback evaluation is discarded by the [International Finance Corporation] as an irrelevant factor in performance evaluation of its staff members”).

¹⁹ See *de Raet*, Decision No. 85 [1989] at para. 56 (stating that the Tribunal’s duty is not to examine the Bank’s decision with a view to replacing it with the Tribunal’s own decision, but instead merely to assess the Bank’s decision for an abuse of discretion).

²⁰ See C.F. Amerasinghe, *The Law of the International Civil Service* (vol. 1, 2d ed., 1994) at p. 107 (stating that “international conventions are not as such a source of the law that governs employment relations in international organizations”).

²¹ *Agodo*, Decision No. 76 [1989] at para. 30, quoting the Hague Convention on Pacific Settlement of Disputes of 1907, Article 82 (establishing that “[a]ny dispute arising between the parties as to the

(U.N.) Convention on the Privileges and Immunities of the Specialized Agencies of 1947,²² and implicitly rejected the proposed international standards by applying its own jurisdictional rules.²³

Human rights conventions and precepts have inspired in some applicants more vigorous but equally unsuccessful arguments. In *Sharpston*, Decision No. 251 [2001], the Tribunal noted that the applicant, in referring to a “need for an international organization to adhere to international standards,” had “invoked a number of texts and precedents arising under the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights” to support his view that his case raised “issues of fundamental human rights with respect to which it is appropriate to address the merits ‘notwithstanding possible jurisdictional challenges.’”²⁴ The Tribunal found that this argument was intended to invoke the Tribunal’s right “within its statutory framework” to accept jurisdictionally defective applications when exceptional circumstances exist.²⁵ The Tribunal held that no such exceptional circumstances existed to justify the applicant’s untimely submission of his case.²⁶ The Tribunal further held that the invoked international conventions were generally inapplicable to the applicant’s case, even though the Tribunal expressed its agreement with certain of their underlying tenets.²⁷

In two other judgments, *Mahmoudi*, Decision No. 219 [2000], and *Yoon*, Decision No. 221 [2000], the Tribunal forcefully dismissed as hyperbolic the applicants’ claims of inhuman and degrading treatment.²⁸ Likewise, in *Mahmoudi*

interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the decision of the tribunal which pronounced it”).

²² *Mendaro*, Decision No. 26 [1985] at para. 18 (noting the applicant’s contention that since Article 31 of the U.N. Convention on the Privileges and Immunities of the Specialized Agencies of 1947 requires specialized agencies of the U.N. to make provision for “appropriate modes of settlement of disputes of a private character” to which the specialized agency is a party, it was necessary for the Tribunal to consider her case). The Bank for its part argued that Article 31(a) of the Convention did not apply because: (i) employment disputes are governed by public rather than private law; (ii) the Bank’s administrative-review procedures satisfied the Convention rule; and (iii) it is for the Bank’s President, Executive Directors and Board of Governors, rather than the Tribunal, to establish such “modes of settlement.” *Ibid.*, at para. 13.

²³ *Mendaro*, Decision No. 26 [1985] at paras. 20–33 (holding the applicant’s various claims to be within the subject-matter jurisdiction of the Tribunal but inadmissible for untimeliness pursuant to the terms of the Tribunal Statute and case law).

²⁴ *Sharpston*, Decision No. 251 [2001] at para. 56.

²⁵ *Ibid.*, at para. 57.

²⁶ *Ibid.*

²⁷ *Ibid.*, at para. 56 (stating that “[t]o the extent that these texts recognize the entitlement to be protected from inhuman or degrading treatment, they are entirely uncontroversial. To the extent that they refer to specific violations, such as the right of access to a court before confinement, they are not pertinent here. . . . A request for a review of the World Bank’s administration of its health services cannot remotely be equated with an action for inhuman or degrading treatment”).

²⁸ *Mahmoudi*, Decision No. 219 [2000] at para. 12; *Yoon*, Decision No. 221 [2000] at para. 12 (in each case rejecting as “trivial or frivolous” the applicants’ arguments that the “link between pension rights and

(No. 4), Decision No. 259 [2001], the Tribunal held that the applicant's claim of discrimination "against all the norms and standards of international labor laws and human rights" did not pertain to jurisdiction, for lack of which the application was deemed inadmissible.²⁹

C. National Laws and Local Customs

In *de Merode*, the Tribunal stated that the Bank's legal relationship with its staff "does not rest on any national legal system," and that the basis of the Bank's power must be found in its own internal law.³⁰ The Bank's "internal law" does, however, expressly adopt certain laws of the District of Columbia that relate to workers' compensation claims and benefits.³¹ It also recognizes national tax laws, although in the period under review the Tribunal had occasion to consider in detail only the laws of the United States and its District of Columbia.³² Apart

severance is illegal because it is in violation of human rights – i.e., denial of an economic right to a decent livelihood," that the applicants had been forced by the Bank to make the choice they did, and that "the choice which redundant staff must make between severance or an unreduced pension is akin to a choice imposed on slaves between early freedom or food"). See also *Mould*, Decision No. 210 [1999] at para. 25 (rejecting the applicant's claim that the Bank's pension provisions had the effect of reducing a would-be divorcé or divorcée to an untenable "state of bondage" out of fear of losing "his/her property right in the pension"). The Tribunal in *Yoon* (No. 5), Decision No. 332 [2005], noted that its earlier "admonition" to the applicant not to make such "trivial or frivolous arguments" had "fallen on deaf ears." *Yoon* (No. 5) at paras. 41–43 (finding none of the applicant's characterizations of events and persons to be "remotely borne out by the record," but noting that its observations in such respect did not affect the applicant's "unquestionable right to seek redress before the Tribunal. They are made simply to stress the need for care in discerning the precise complaints that fall to be dealt with by the Tribunal").

²⁹ *Mahmoudi* (No. 4), Decision No. 259 [2001] at para. 16. Cf. *Yasmin*, Order of 28 January 2000 at para. 2 (noting in its denial of the applicant's request for review of a previous judgment the applicant's intent to resort to U.S. courts and "various" human rights organizations if the Tribunal did not "properly" respond to her claim).

³⁰ *de Merode*, Decision No. 1 [1981] at para. 36.

³¹ See *Chhabra* (No. 2), Decision No. 193 [1998] at paras. 3, 6, 9, 12 (employing with respect to workers' compensation issues the relevant District of Columbia (D.C.) statute and the interpretative case law of the Court of Appeals for the District of Columbia); *Courtney* (No. 4), Decision No. 202 [1998] at paras. 9, 12, 14, 23 (discussing the relevant D.C. statutory provisions on the production of medical records); *Shenouda* (No. 2), Decision No. 218 [2000] at paras. 18–19, 21, 29 (discussing the Bank's rules on workers' compensation, and making reference to the relevant D.C. statute); *Hayati* (No. 2), Decision No. 311 [2004] at para. 25 (discussing the applicant's workers' compensation claims in the context of the relevant D.C. statute). In *Courtney* (No. 4), the Tribunal held in light of the applicable provisions of the Washington, D.C. municipal code that doctor-client privileges "relating to confidentiality" were "for the benefit of, and meant to be asserted by, the patient." *Courtney* (No. 4) at paras. 23–24. See also *infra* note 341 and accompanying text (discussing the Tribunal's use of D.C. judicial precedents in considering workers' compensation questions).

³² See generally, e.g., *Richardson*, Decision No. 208 [1999] (discussing the applicant's tax liabilities and his related tax "safety net" allowances, which were determined by the Bank according to the terms of U.S. and D.C. tax laws). For a non-U.S. case dealing with tax issues, see *Koudogbo*, Decision No. 246 [2001] at paras. 5–6, 11, 14, 37–40 (finding no improper use of a Nigerien tax-exoneration form by the applicant).

from the application of the aforementioned provisions, however, the Tribunal has been loath to apply national laws or local customs in its cases.³³

In *Cissé*, Decision No. 242 [2001], the Tribunal refused to apply national law when interpreting the Bank's staff rule prohibiting staff members from seeking public office.³⁴ In *Mould*, Decision No. 210 [1999], the Tribunal affirmed the Bank's independence from U.S. law with respect to pension matters.³⁵ In *Shenouda*, Decision No. 177 [1997], the Tribunal found that the applicant had seriously erred in invoking U.S. federal and state "disability standards," as "[t]hose laws are variable in content and are commonly less demanding than the requirements of the [Staff Retirement Plan] which, of course, govern in this proceeding."³⁶ In *Planthara*, Decision No. 143 [1995], the Tribunal rejected the applicant's claim that the Bank was obliged to follow the alleged practices of the "printing industry" in the Washington, D.C. area, "or generally in the host country."³⁷

³³ While local rules, customs, cultural views and practices could reasonably be analyzed under the rubric of informal "custom" or "practice" rather than as codicils to the formal contract of employment, the Tribunal's treatment of such potential sources of law has tended not to seek empirical proof of their validity and applicability, but rather to accept them at face value and either disregard them altogether or evaluate them against, or in coordination with, its own express legal standards or those of the Bank. For such reasons, the Tribunal's engagement with local rules and customs are reviewed here under the *pactum* heading. See in such respects *B (No. 2)*, Decision No. 336 [2005] at paras. 16, 24–27 (noting the applicant's argument that the time for filing her complaint "under common law [was] three years from the date on which the plaintiff [became] aware of his or her loss or claim," but dismissing the claim under the relevant Bank staff rule on the grounds that the applicant held no right on which to base her claim, and that "the three-year time limit [established by the staff rule] cannot be counted from a date unconnected to a specific right enjoyed by the Applicant"); *Arellano*, Decision No. 98 [1990] at para. 22 (noting but not addressing the otherwise successful applicant's claim that if a five-year medical clearance period were applied to her, it "would constitute illegal employment discrimination and [be] contrary to public policy under both the D.C. Human Rights Act and the Federal Rehabilitation Act of 1973").

³⁴ *Cissé*, Decision No. 242 [2001] at para. 23 (stating that the "object and purpose" of the relevant staff rule "does not depend on the definitions contained in the electoral laws of Niger or for that matter on other national legislation"). The Tribunal further affirmed that "questions of interpretation of rules governing the employment relationship" must be decided under the Bank's internal law. *Ibid.*, citing with approval *Schaffter*, ILOAT Judgment No. 477 (1982), para. 6 of considerations (establishing with regard to the International Labour Organization that "Staff Regulations should be interpreted in themselves, with due regard to their purpose and independently of national legislation"). The Tribunal pointed out, however, that its doctrine did not exclude "reference to national legislation to shed light upon some questions of fact that may arise." *Cissé* at para. 23. The Tribunal went on to consider the question of whether the applicant had pursued public office under the terms of Nigerian law. *Ibid.*, at paras. 27–32, 35.

³⁵ *Mould*, Decision No. 210 [1999] at paras. 23–24 (stating that as a "governmental plan," the Bank's Staff Retirement Plan is exempt from various U.S. laws which protect employee benefits, and holding to be inapposite the applicant's argument that the Bank's interpretation of the Plan was contrary to U.S. public policy, as the International Organizations Immunities Act, the Foreign Sovereign Immunities Act and other legislation provide the Bank with immunity from U.S. statutory provisions).

³⁶ *Shenouda*, Decision No. 177 [1997] at para. 21.

³⁷ *Planthara*, Decision No. 143 [1995] at para. 28 (stating that "the Bank Print Shop is not a part of [the printing] industry and its employees are members of the international civil service").

In the recent case of *Rodriguez-Sawyer*, Decision No. 330 [2005], which concerned the distribution of death benefits, the Tribunal rejected the applicability of U.S. federal and state law.³⁸ The Tribunal went on, however, to review the treatment of wills and other relevant “situations” under U.S. federal and state statutes and judgments before it concluded that the Bank’s determination to apply “only its own internal rule concerning beneficiary designations” had been “quite reasonable.”³⁹ The Tribunal noted that requiring the Bank’s Pension Benefits Administration Committee “to refer to the laws of one or another nation would potentially render its decision-making thoroughly impracticable, given the fact that staff members come from 184 nations, with no doubt widely differing approaches to the respective rights of divorced spouses.”⁴⁰

³⁸ *Rodriguez-Sawyer*, Decision No. 330 [2005] at paras. 13–14 (noting the Bank’s independence from any member state’s “statutory or judicial” laws, and finding that even if the Tribunal were to “look to judicial decisions for informal guidance,” the U.S. judgments proffered by the applicant were “particularly unhelpful”), citing *de Merode*, Decision No. 1 [1981] at para. 36, *Mould*, Decision No. 210 [1999] at paras. 23–24, and *Cissé*, Decision No. 242 [2001] at para. 23 (in each case noting the Tribunal’s independence from national laws). The Tribunal noted, however, that the Staff Retirement Plan does not “purport to resolve conclusively the respective claims of designated beneficiaries and third parties who assert superior rights under contracts, judicial decrees or other instruments to which the Bank is not a party,” and that the Bank’s Pension Benefits Administration Committee thus has a “continuing discretion” to determine whether a dispute is currently being settled “by arbitration, a court of competent jurisdiction, or agreement,” and whether disputed sums should be withheld until such a settlement is achieved. *Rodriguez-Sawyer* at para. 33.

³⁹ *Rodriguez-Sawyer*, Decision No. 330 [2005] at paras. 15–16 (basing the Tribunal’s determination on the “uncertain state of the law in the U.S.” as well as on “additional elements of uncertainty in the choice of law,” these being the Tribunal’s respective findings as to the pension fund’s “location” (the District of Columbia), the site of the court that had issued the relevant divorce decree and its incorporated property settlement agreement (Maryland), and the location of the relevant staff member’s death and estate (Florida)). See also *ibid.*, at paras. 18–20 (rejecting the applicant’s invocation of a presumption in favor of a beneficiary change upon divorce that is “apparently the case” under the Uniform Probate Code, which has been “widely adopted” by U.S. states “with respect to bequests by will”). The Tribunal upheld as “reasonable” and not an abuse of discretion the Staff Retirement Plan’s terms, underlying policies, justifications, assumptions and application to the effect that the “best indicator of the staff member’s intention upon death is the formally executed, and still unchanged, beneficiary designation.” *Ibid.*, at paras. 19–23, 25–27, quoting the “similar view[s]” expressed by *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990), and a dissenting opinion in *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78, 82–83 (4th Cir. 1996). In so doing, the Tribunal recognized that “several” federal and state court decisions had taken an approach that was different from the one that the Bank had validly chosen. *Rodriguez-Sawyer* at paras. 27, 31–32 (further noting, but declining to rule upon, the Bank’s invocation of “certain decisions of the U.S. courts, federal and state, that hold that any waiver of rights to death benefits under an explicit beneficiary designation must be detailed and explicit within the divorce agreement or decree”).

⁴⁰ *Rodriguez-Sawyer*, Decision No. 330 [2005] at para. 16. The Tribunal further acknowledged that such an approach would present evidentiary problems. *Ibid.*, at para. 24 (noting that a deceased staff member cannot shed light on his or her intentions during the dispute, and that “in an institution like the World Bank, key witnesses may be far-flung around the world, or may themselves be deceased. And even if the search for changed circumstances is limited to written instruments, the pertinent divorce decrees and property settlement agreements may come from around the world, and from varying legal environments (even when simply within the United States). These decrees and contracts may date back many years, and even recent ones may not readily come to the attention of the Bank, which of course is never a party thereto”).

The Tribunal has consistently rejected applicants' defenses and justifications based on national law, local practices or cultural mores. In a financial misconduct case, *Kwakwa*, Decision No. 300 [2003], the Tribunal found "irrelevant" the applicant's self-defense based on Ghanaian law.⁴¹ In another misconduct case of the same year, *Ismail*, Decision No. 305 [2003], the Tribunal dismissed the applicant's claim that procurement practices prohibited by the Bank had been justified by the practices of the Bank's local office in Dhaka, Bangladesh.⁴² The Tribunal in *Islam*, Decision No. 280 [2002], rejected the applicant's claim at the jurisdictional phase that Bangladeshi lawyers had been unable to help him due to a lack of access to legal information, on the ground that the Tribunal Statute does not require attorneys to file applications before the Tribunal.⁴³

The Tribunal did show itself slightly more receptive to an invocation of local mores in the peculiar case of *J. Singh*, Decision No. 105 [1991], in which an Indian applicant accused of misrepresenting his marital status to obtain benefits claimed that he had not known that he had been divorced in Virginia because of a prior reconciliation he had undertaken in response to cultural pressures.⁴⁴ More recently, however, the Tribunal in *G*, Decision No. 340 [2005], implicitly rejected the applicant's attempt to invoke Middle Eastern customs as "exculpatory or

⁴¹ *Kwakwa*, Decision No. 300 [2003] at paras. 19, 33–34, 37 (finding no need to consider the applicant's assertion that the financial transaction in question was legal under Ghanaian law, but conceding that if the applicant's "currency operations" had constituted his only misconduct, "it might have been necessary to assess the magnitude of the offense in light of all the circumstances, such as legality under local law and the Applicant's length and quality of service").

⁴² *Ismail*, Decision No. 305 [2003] at paras. 21, 23–27, 31, 34–36, 40, 70, 72 (concluding that while the applicant had not received formal training in procurement practices, he had had long experience in Bank procurement operations and thus should have been aware of the restrictions imposed by the Bank's rules).

⁴³ *Islam*, Decision No. 280 [2002] at para. 20 (noting in its rejection the applicant's rationale that the "Bank's Staff Rules and legal information are not commonly available to Bangladeshi lawyers"), citing *Yousufzi*, Decision No. 151 [1996], para. 29, which reiterated the Tribunal's earlier finding in *Kavoukas*, Decision No. 3 [1981] at paras. 12, 22, that an inability to retain counsel is not an exceptional circumstance. Compare *Mr. X*, Decision No. 16 [1984] at para. 33 (finding that a short delay caused by the applicant's change of attorneys did not render the consequently late application inadmissible for untimeliness under Article II(2) of the Tribunal Statute, given *inter alia* the Bank's lack of a jurisdictional objection).

⁴⁴ *J. Singh*, Decision No. 105 [1991] at paras. 11, 41, 45 (noting the applicant's claim that "his culture [*i.e.* that of a "remote village in Northern India"] prohibited him to live with a woman, or to have children by her, if she was not his wife," and moreover that in "their home in Northern India divorce was virtually unknown and such a proceeding, if carried to a completion, may permanently ruin a wife"). The Tribunal further noted the applicant's claims that he had reconciled with his wife at her request and that of his mother, and that he had so notified the Circuit Court of Fairfax County, Virginia, which nevertheless finalized the divorce but never sent notice of such to the applicant because he had not provided a stamped, self-addressed envelope for this purpose. *Ibid.*, at paras. 3, 6, 45–49 (holding that insufficient evidence existed to show that the applicant had acted in bad faith or had made willful misrepresentations in holding himself and his wife out as a married couple).

explanatory evidence” that should have forestalled an investigation into an allegedly improper relationship.⁴⁵

In a sexual-harassment case, *Arefeen*, Decision No. 244 [2001], the Tribunal rejected the applicant’s self-defense, based on alleged local managerial practices and medical ethics, to a charge that he had wrongfully contacted his victim’s doctor about the victim’s medical condition.⁴⁶ The Tribunal further noted and applied without comment the Bank’s policy that sexual harassment will be identified with reference to the Bank’s own cultural standards.⁴⁷ The Tribunal has in subsequent

⁴⁵ *G*, Decision No. 340 [2005] at para. 49 (noting the applicant’s assertion that the Bank’s investigative body had “failed to consider the Applicant’s other correspondence with Afghans, and failed to consider that Middle Easterners like the Applicant greet and interact with trusted colleagues as though they are family, much like a brother or sister”). The other person in question (“Mr. I”) was a “70 year-old former staff member who lives in another country with his wife.” *Ibid.*, at para. 48 (noting further the applicant’s assertion that, based on a “short [e-mailed] note from the Applicant to Mr. I with salutations such as ‘My Dearest’ and ‘with all my love,’” the Bank’s investigative body had “concluded that the allegation of an intimate relationship was sufficiently corroborated”). The Tribunal found that while the applicant’s “expressions of ‘love’ and ‘dearest’ relations bespoke nothing more than wholly respectable affection,” the issue which justified the investigation was not “whether the Applicant’s relations with Mr. I were *improper*; it suffices that they were *personal* and *close*.” *Ibid.*, at para. 66 (emphasis in original). The Tribunal noted that while the applicant “appears to believe that it is important that her relationship with Mr. I was one of deep friendship rather than one involving any element of physical intimacy; [and that] she considers the latter a matter of defamation,” the possibility of clearing up such a matter was not important, as the “active promotion of a sole consultant who was a close friend was a sufficient concern” for the Bank to undertake an investigation. *Ibid.*, at para. 81. The Tribunal likewise declined to censure the investigative body for searching the applicant’s Bank e-mail account, as the “Applicant and Mr. I [had] listed the same home address in the Bank’s PeopleSoft database; the address given on Mr. I’s bill from the hotel in Dubai was not his own, but that of the Applicant in the U.S.; the Applicant had power of attorney over a bank account owned by Mr. I; and she [had] used variations of his name as the password for many of her personal accounts and other services.” *Ibid.*, at para. 82.

⁴⁶ *Arefeen*, Decision No. 244 [2001] at paras. 65–70, 74 (holding that the applicant’s conduct constituted “serious misconduct,” as it had not been justified by the Bank’s staff rules, and dismissing his assertions that he had managerial authorization and responsibility to make such checks, and that if his request for information had been wrongful, the victim’s doctor would not have provided such information).

⁴⁷ *Ibid.*, at paras. 15, 31 (noting the Bank’s policy that “[f]ormal judgment on whether conduct constitutes sexual harassment will be based on a determination of the impact of the behavior on a reasonable person of the same gender as the victim in the multicultural environment of the Bank Group,” and concluding that a “reasonable female in the multicultural environment of the Bank Group” would have viewed the events in question as “offensive and intimidating”). It may be observed that the Tribunal had in an earlier case looked at both international and national case law in evaluating the Bank’s definition. *Rendall-Speranza*, Decision No. 197 [1998] at paras. 43–44 (finding the Bank’s definition of sexual harassment, *i.e.* “any unwelcome sexual advance, request for sexual favor or other verbal, non-verbal or physical conduct of a sexual nature which unreasonably interferes with work, is made a condition of employment, or creates an intimidating, hostile or offensive environment,” to be consistent with “similar definitions” adopted in international and domestic jurisprudence). *Cf.* the intervening case of *Mustafa*, No. 207 [1999] at paras. 27, 29 (finding that the Bank had properly applied its definition of sexual harassment to the facts of the case, but not introducing the “multicultural environment” standard). Despite its substantive findings in *Arefeen*, the Tribunal set aside the Bank’s determination of sexual harassment on unrelated procedural grounds involving the conduct of the Bank’s investigation. The Tribunal did not do likewise in *Mustafa*, however, despite finding procedural irregularities in that case as well. Compare *Arefeen* at paras. 44–54, 73, with *Mustafa* at paras. 34–36.

cases established such “multicultural environment” or “multinational organization” norms in matters of general behavior⁴⁸ and hiring.⁴⁹

While not open to defenses based on domestic law, the Tribunal is bound by Bank Staff Rule 8.01 to consider national penal convictions (and, in an earlier version of the rule, merely “unlawful acts”)⁵⁰ when assessing certain charges of misconduct. The Bank now expressly recognizes as misconduct convictions received for *malum in se* crimes such as theft, fraud, forgery and assault, but also ones received for a potentially *malum prohibitum* crime (*i.e.* use or possession of “illegal drugs”) and for two practices, “corrupt practices” and “domestic abuse,” that while certainly odious in nature are not clearly defined in the Rule for penal classification purposes.⁵¹

⁴⁸ *Malekpour*, Decision No. 322 [2004] at para. 27 (considering “screaming and yelling [to] constitute an inappropriate response, particularly in a multicultural community like the Bank, to challenges presented by the character and work habits of a staff member,” and that “[s]uch treatment can be expected to generate humiliation and resentment on the part of subordinates”); *Ingco*, Decision No. 331 [2005] at para. 79 (observing that a “comment about [the applicant’s] coffin having been ordered . . . indicates a level of insensitivity that is particularly inappropriate in a multinational organization such as the World Bank”). See also *infra* note 52 (discussing the Tribunal’s requirement that Bank Country Office practices conform sufficiently to those at Bank Headquarters to avoid wrongfully unequal treatment of staff). The Tribunal has in a similar manner upheld Bank efforts to prevent the expression of nationalist views by staff to unreceptive clients. *Yoon (No. 5)*, Decision No. 332 [2005] at paras. 27, 52 (finding “not a hint of improper animus” against the applicant, a Korean national, with respect to the Bank’s advice to her not to “proselytize” through the “frequent promotion of the Korean model as an example for development,” and also for her “to resist over-personalization of the Korean approach to education and training when communicating with the Bank’s clients,” as the commenting manager had “received unsolicited feedback from African officials who had been unhappy with Korean examples in the past”).

⁴⁹ *Hitch*, Decision No. 344 [2005] at paras. 52–53 (finding “[e]specially undesirable, when comparing candidates during a selection process, are references made to age and race in a manner which results in singling out or setting apart one person; there, the impression is created that extraneous factors are being taken into account when making important employment recommendations or decisions”). The Tribunal considered the undesirability of such “unfortunate stereotyping” to be “the more so in a multinational organization like the World Bank which, under its Principles of Staff Employment, has as its mandate the hiring of high-caliber employees and the fostering of their equal treatment by disallowing unjustifiable differentiation on the basis of age, culture and gender while, at the same time, respecting the need for diversity.” *Ibid.*, at paras. 53–54 (determining nonetheless that despite the expression of such invalid preferences, there was no evidence of such factors having been taken into account in the challenged selection decision, which was found to have been based on the applicants’ respective qualifications and “legitimate diversity considerations”).

⁵⁰ *O’Humay*, Decision No. 140 [1994] at para. 25 (noting that the then-current version of Bank Staff Rule 8.01, para. 3.01(c), defined misconduct as including “unlawful acts (*e.g.* theft, fraud, felonious acts, use or possession of illegal drugs”). The Tribunal in *O’Humay* concluded, in the context of the applicant’s potential U.S. legal violations, that private conduct which reflects adversely upon the Bank’s “reputation or integrity” may form a basis for disciplinary proceedings within the Bank. *Ibid.*, at paras. 27–28.

⁵¹ The current (1 January 2004) version of Staff Rule 8.01, para. 2.01(e), defines misconduct as including a “[c]onviction for acts that are criminal in nature, including but not limited to theft, forgery, fraud, corrupt practices, use of or possession of illegal drugs, physical assault, and domestic abuse.” Termination is also now mandatory under Staff Rule 8.01, para. 3.01(b), when a staff member has been convicted of a “felonious criminal offense.”

It may be that the Tribunal will some day be asked under the terms of Staff Rule 8.01 to uphold a misconduct finding based on a local conviction obtained with less than satisfactory due process, or to assess for purposes of the Rule the nature of a crime for which a local conviction was obtained. It remains to be seen how the Tribunal will answer such challenges, particularly in the face of foreseeable political repercussions. The Tribunal has, however, already given a promising indication that it is willing to provide a remedy for staff members injured by punitive local practices.⁵²

III. External Practices and Authorities as Sources of Tribunal Law

In addition to recognizing the contract of employment and certain Bank policies as components of a Bank-staff *pactum*, the Tribunal in *de Merode* also found that “the practice of an international organization may under certain conditions be an independent source of rights and duties in the legal relationship between an organization and its staff.”⁵³ The Tribunal thereby implicitly adopted the same principle that underlies Article 38(1)(b) of the ICJ Statute, namely that custom may come to form a binding legal obligation.

The Tribunal stated in *de Merode* that it must determine whether the invoked practice in fact exists and, if it does, whether it has become a condition of employment by virtue of its following from a perceived legal obligation.⁵⁴ In the Bank’s milieu, most practices tested for customary legal status are internal to the Bank,⁵⁵

⁵² *Koudogbo*, Decision No. 246 [2001] at paras. 55–56, 59 (rejecting the Bank’s claim that its publication in the local press in Niger of an announcement “disclaiming any liability for any actions of the Applicant after the date of her termination” was consonant with local practice, on the grounds that such an action was not the practice at Bank Headquarters and possibly indicated unequal treatment among staff, and that its alleged local acceptance “does not justify the potential damage to the Applicant’s reputation and to her prospects of finding employment in the small community she lived in, particularly if the basis for her termination and this announcement were to be reversed in the future”).

⁵³ *de Merode*, Decision No. 1 [1981] at paras. 23, 98. See also *infra* notes 326–327 and accompanying text (discussing the Tribunal’s invocation of ICJ jurisprudence in evaluating whether a certain Bank practice had acquired a legally obligatory character).

⁵⁴ *Ibid.*, citing the ICJ’s recognition of this point in its *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO* (ICJ Reports 1956, p. 91). See also *ibid.*, at paras. 24, 29 (stating that “specific circumstances” in each case may also have some bearing on the legal relationship between the Bank and a staff member, but that such determinations do not depend on “subjective considerations of a highly individual character which would result, if one were to adopt them, in the application to staff members of different rules of law according to the expectations of each one at the moment he ‘accepted’ his appointment”); *ibid.*, at paras. 111–112 (holding that the Bank was obliged to carry out periodic salary reviews, as it had established a consistent practice of periodic salary adjustments out of the conviction that it was legally obliged to do so).

⁵⁵ See, e.g., *Degiacomi*, Decision No. 213 [1999] at paras. 27–30 (holding that a promise to renew or extend a fixed-term contract, or certain acts or pronouncements creating a reasonable expectation of such in the mind of the staff member, can give rise to a “legal expectation” of renewal or extension that

but outside bodies' practices have also at times been considered by the Tribunal,⁵⁶ including through the Bank's policy of "parallelism," and also when independent acts or requirements of national authorities have required the Tribunal's attention.

A. *Parallelism*

Beginning with *de Merode*, the Tribunal has at times been presented with the practice of parallelism, by which the Bank has tried to conform its management practices to those found in other organizations, particularly the International Monetary Fund (IMF).⁵⁷ The Tribunal has had to consider parallelism primarily with respect to compensation and classification,⁵⁸ but has also applied it to a lesser

becomes part of the contract of employment), citing *McKinney*, Decision No. 187 [1998] at paras. 14–16 (holding that satisfactory performance is assumed and cannot by itself "reasonably give rise to an expectation of greater employment rights than those expressly provided in the contract of employment"). See also *Taborga (No. 2)*, Decision No. 324 [2004] at paras. 8, 12, 29, 33 (setting aside as non-binding the rate at which the Bank had historically matched pension contributions, as this rate was not obligatory and was instead merely a "rule of thumb" reflected in "non-binding descriptions" of a "historical average"); *infra* notes 241–249 and accompanying text (discussing the Tribunal's development of reliance doctrines).

⁵⁶ *B (No. 2)*, Decision No. 336 [2005] at para. 33 (finding that "continuous service and other restrictions of such kind are normal requirements of pension plans"); *Elder*, Decision No. 306 [2003] at paras. 23–25 (noting that "continuous service is a normal requirement in all pension plans," and that certain restrictions on the restoration of pension service "are common in pension plans"); *Lavelle*, Decision No. 301 [2003] at para. 16 (finding that the conferral of benefits pursuant to certain criteria is "normally done in any pension system or for other employment benefits").

⁵⁷ See *de Merode*, Decision No. 1 [1981] at para. 28 (stating that the Tribunal does not overlook the fact that each international organization has its own constituent instrument, membership, institutional structure, functions, measure of legal personality, and personnel policy, or that the differences between organizations are "so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications," but opining that this does not exclude the possibility that "similar conditions may affect the solution of comparable problems"). See also, *e.g.*, *Teferra*, Decision No. 169 [1997] at para. 7 (noting that in 1993 the Bank initiated a benchmark study of cash-management practices and techniques "with twelve major [U.S.] financial and commercial organizations" as part of a reorganization plan designed to bring the Bank's practices on a par with best practices in the banking industry); *van Gent (No. 6)*, Decision No. 21 [1985] at para. 6 (noting that the Bank's outplacement assistance offer to the applicant of 15% of his salary was claimed to be, in the offer's own terms, "pretty standard in the United States, and is the fee charged by European branches of U.S. firms," although such assistance was "relatively new in Europe").

⁵⁸ See generally *de Merode*, Decision No. 1 [1981]; *von Stauffenberg*, Decision No. 38 [1987]; and *Vuyt*, Decision No. 39 [1987] (each of which deals extensively with issues of parallelism). See also *Gilani*, Decision No. 261 [2002] at paras. 4–5 (noting in passing, in a decision on jurisdiction, the efforts made by the applicant and his supervisor to obtain for the applicant a position classification consistent with U.N. standards); *Pinto*, Decision No. 56 [1988] at para. 4 (noting the Bank's adoption of the "Hay Associates" methodology for job grading, which was "widely used internationally in both the public and private sectors").

extent in matters of tax reimbursement,⁵⁹ post adjustment allowances,⁶⁰ and readmission to service in cases of medical leave.⁶¹

The Tribunal in *von Stauffenberg*, Decision No. 38 [1987], found that the Bank's policy of parallelism had been initiated in a Memorandum of the President of the Bank to the Executive Directors dated 2 December 1972.⁶² Parallelism was, however, a much older practice, as the Tribunal had noted in *de Merode* that the Bank had in the 1960s reviewed salary increases in the IMF, the Inter-American Development Bank, the U.N., the U.S. government, the public services of Canada and various European countries, and even U.S. academic institutions.⁶³

The Tribunal in *de Merode* noted that various post-1972 Bank documents had discussed the compensation practices of "analogous organizations" as well as those

⁵⁹ See *de Merode*, Decision No. 1 [1981] at para. 57 (referring to the Bank's establishment of a "Steering Committee on Tax Problems of International Organizations Respecting Methods of Tax Reimbursement by International Organizations," which produced its report in October 1946), and at paras. 68, 87 (noting the Kafka Committee's review and eventual rejection of the U.N.'s tax reimbursement system while it considered reforms to the Bank's own system); *Mould*, Decision No. 210 [1999] at para. 23 (noting the Bank's assertion that its Staff Retirement Plan is classified as a "governmental plan" and is "treated in the same manner as the pension plans of U.S. federal, state and local government employers"); *Lamson-Scribner*, Decision No. 32 [1987] at para. 17 (noting a Bank vice president's letter to the applicant agreeing that the Bank's tax-allowance system should be "reconsidered" in line with a planned Bank–International Monetary Fund (IMF) "comprehensive review" of the system).

⁶⁰ See *Kepper*, Decision No. 149 [1996] at paras. 3–6, 21–23, 25–27 (reviewing the Bank's switch from the U.N. Index to the U.S. State Department Index for determining job post location salary adjustments).

⁶¹ See *Arellano*, Decision No. 98 [1990] at paras. 10, 29, 39–40 (finding defective the Bank's reliance on the U.N.'s Guide to Medical Fitness Standards for Application by the International Organization in the United Nations when Awarding Regular Contracts, on the grounds that none of the Bank's applicable terms and conditions of service referred to the Guidelines, and that the Bank's "policy" based on the Guidelines was not published in any manner sufficient to vest it with the status of a rule governing an important aspect of the relationship between the Bank and the applicant). The Tribunal stated that "[w]hile, in principle, the adoption by the Bank medical staff of a policy contained in the UN Guidelines or any other internal guidelines, cannot be questioned, it is essential that the application of the policy should be fully consistent with the provisions of the Staff Regulations which require a complete medical examination." *Ibid.*, at para. 41.

⁶² *von Stauffenberg*, Decision No. 38 [1987] at paras. 54–56 (quoting the "statement of policy" on parallelism presented by the President of the Bank to the Bank's Board of Executive Directors, with the policy stating that "differences shall be avoided in the policies of the World Bank Group and the International Monetary Fund regarding salaries or staff benefits, except to the extent that such differences are clearly warranted by circumstances which are not comparable in the two institutions, be they external factors or internal factors such as differences in organization structure, size or the type of skills required"). For a general review of the history and nature of the Bank's policy of parallelism, particularly with respect to staff compensation, see *ibid.*, at paras. 54–69.

⁶³ *de Merode*, Decision No. 1 [1981] at paras. 93, 102 (noting the Bank's perception in the 1960s and 1970s that it needed to maintain "Bank salaries at a level comparable at least to those of its principal competitors: the United States Government, other international organizations such as the United Nations, O.E.C.D., the European Common Market, United States financial institutions and industrial corporations, and academic institutions").

of various national public and private sectors.⁶⁴ One such document, the Kafka Report of 1979, had stated that “the comparison of Bank jobs with certain outside jobs has always been part of the process of determining pay.”⁶⁵ The Tribunal in *de Merode* held in light of these documents that such an “established practice, and [Bank] statements confirming that practice” had created a legal obligation to make periodic salary adjustments “reflecting changes in the cost of living and other factors.”⁶⁶

Parallelism remained an important Bank practice and a Tribunal doctrine in the 1980s, although its status as a rigid legal obligation was questionable at best.⁶⁷ On the one hand, the President of the Bank on 4 March 1986 noted the close coordination between the Boards of the Bank and the IMF since 1973.⁶⁸ The

⁶⁴ *Ibid.*, at paras. 102–103, 105, 107, 110 (noting various Bank documents from the period 1969–1980 discussing the compensation practices of other organizations, particularly “analogous” ones).

⁶⁵ *Ibid.*, at para. 102. See also *Hammond*, Decision No. 86 [1989] at para. 3 (finding that the Bank’s system of salary reviews, based with only “slight modifications” on the Kafka Committee’s 1979 report, provided that “while in principle the [salary comparator] market should be international, for pragmatic reasons the U.S. market should be used, provided that its international competitiveness was kept under constant review; that the mix of public and private sector comparators should be 50/50; and that there should be a 10% quality premium in compensation”). The Kafka Committee, composed of Bank and IMF Executive Directors as well as outside experts, was so named because it was headed by Alexandre Kafka, an IMF Executive Director. *de Merode*, Decision No. 1 [1981] at para. 7.

⁶⁶ *de Merode*, Decision No. 1 [1981] at para. 112 (holding that “such an obligation is a fundamental element in the Applicants’ conditions of employment which the Bank does not have the right to change unilaterally”). The Tribunal’s language in this respect invokes the two elements of binding custom in international law, *i.e.* practice and *opinio juris*, and further links such custom to a “fundamental element” of a staff member’s “conditions of employment.” See Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th ed., 1997) at p. 39 (stating that custom in international law is composed of the “objective” element of practice and the “subjective” element of *opinio juris*), citing *Nicaragua v. United States (Merits)*, ICJ Reports 1986, p. 14 at 97. For a later consideration of the Bank’s salary reviews in this context, see *de Vuyst*, Decision No. 39 [1987] at paras. 26–28 (holding that the Bank had complied with “established practice” by completing an annual salary review by a date certain, and in so doing had followed the rules laid down by the Executive Directors in 1979 (*i.e.* the “Kafka system”), which had required that in “intervening years” pay should be adjusted “in the light of movements in the pay levels of comparator organizations in the chosen markets”).

⁶⁷ See generally *Hammond*, Decision No. 86 [1989] (reviewing the history of the Bank’s salary review system in the 1980s, in which parallelism with the IMF was an essential component and use was made of comparator analysis with the public and private sectors of France, Germany and the United States). The Tribunal in *Hammond* held that the Bank was legally obligated to follow this system of salary reviews (a point not disputed by the parties), but the Tribunal also held that the Bank’s two-year delay in completing the triennial comprehensive review required under the system did not in itself violate “an essential element” of the applicants’ conditions of employment. *Ibid.*, at paras. 30–37 (noting that the Kafka Committee report establishing the system foresaw the possibility of a five-year instead of three-year review cycle), quoting *von Stauffenberg*, Decision No. 38 [1987] at para. 84 (concluding that a one-year delay in the salary review process was a “minor change in periodicity” that related to a “non-essential element in the conditions of employment” and did not affect the “principle of periodic comprehensive review”).

⁶⁸ *von Stauffenberg*, Decision No. 38 [1987] at para. 57, quoting the President of the Bank’s Memorandum of 4 March 1986 (stating that under the policy of parallelism during the 1973–1986 period: (a) each Board would consider “comparable recommendations at about the same time”; (b) the decision of the Board which first considered the recommendations should not be implemented until the second Board had had an opportunity to consider them, with the first Board’s action made known to the second Board during the course of the latter’s deliberations; and (c) when the views of the second Board differed from

Tribunal also found in *von Stauffenberg* and in *de Vuyst*, Decision No. 39 [1987], that parallelism had become a “condition of employment.”⁶⁹ On the other hand, the Tribunal also found in *von Stauffenberg* and *de Vuyst* that it remained up to the Bank to determine when its practices or policies should parallel those of other organizations.⁷⁰ The Tribunal further found in *von Stauffenberg* that “[h]owever consistent the policy and practice of parallelism have been since 1972, in many cases they led only to broadly conceived harmonization which admitted of differences between the two institutions.”⁷¹

In the judgments following *von Stauffenberg* and *de Vuyst*, parallelism’s impact on the Tribunal has declined,⁷² often because the Tribunal has either recognized the growing divergence between the Bank and the IMF as organizations,⁷³ or

the first’s, the first should be given an opportunity to reconsider before any implementing action was taken). The Tribunal found in *von Stauffenberg* that for at least the first fifteen years of the policy, parallelism had been “applied consistently both in procedure and in substance,” the result being that “it appear[ed] that over all these years parallelism in most cases [had] led to identical policies and similar measures.” *Ibid.*, at paras. 56, 58.

⁶⁹ See *de Vuyst*, Decision No. 39 [1987] at para. 24 (holding that the Bank had “complied with the rule of parallelism” in deciding on salary adjustments the day after a decision on the matter had been approved by the IMF’s Board, and had not abused its discretion by adopting a similar decision), quoting *von Stauffenberg*, Decision No. 38 [1987] at para. 66 (concluding that “the established practice confirmed by consistent statements has created a rule of parallelism which has become part of the conditions of employment of the Bank’s employees”). See also *von Stauffenberg* at para. 126 (finding that parallelism had in 1984 and 1986 “actually operated” to the detriment of staff with respect to salary increases, albeit in a “legally unobjectionable way”).

⁷⁰ *de Vuyst*, Decision No. 39 [1987] at para. 24, quoting *von Stauffenberg*, Decision No. 38 [1987] at para. 69 (stating that “it is up to the Bank in each case to determine, in the light of all the factors, whether the circumstances call for identity of decisions or warrant a more or less different decision”). The Tribunal in *von Stauffenberg* further held that so long as it was satisfied that there had been no abuse of discretion, it lacked jurisdiction to determine whether the Bank had gone “far enough towards narrowing the discrepancy” between Bank and IMF compensation levels, and “still less does it fall within its jurisdiction to issue a ruling on any further steps that might appear appropriate.” *von Stauffenberg* at para. 126 (also concluding that it is “for the Bank to decide whether, in the light of the principle of parallelism and of other factors, it deems it appropriate to take any further step to bridge, or at least to narrow, the [compensation] gap which its Management and the Executive Directors themselves acknowledged as regrettable”).

⁷¹ *von Stauffenberg*, Decision No. 38 [1987] at paras. 59–60 (noting that “[t]he possibility of exceptions to parallelism ‘warranted by the circumstances’ had been foreseen from the outset by the President in his 1972 Statement of Policy . . . and confirmed ever since by both the Management and the Executive Directors”).

⁷² See *Kepper*, Decision No. 149 [1996] at paras. 23, 25–27 (holding that the Bank did not abuse its discretion by postponing its switch from the U.N. Index to the U.S. State Department Index for job post location salary adjustments, despite the IMF’s conclusion in 1987 that the U.N. Index was “substantively inadequate,” because it was not unreasonable for the Bank to “maintain the former standard until it [had] determined that an appropriate time had come to change it”). The Tribunal found its conclusion “reinforced by the fact” that the U.N. Index was at that time “still functioning reasonably to achieve the [Bank’s] objective of providing salary parity for staff members in high-cost posts.” *Ibid.*, at para. 26.

⁷³ See *Lavelle*, Decision No. 301 [2003] at paras. 13–14 (noting that the Bank did have the option to extend certain pension benefits “fully to all staff with [Non-Regular Staff] NRS service, as the IMF did,” but “particularly in view of the numbers of NRS involved and the concomitant cost[, the Bank’s] situation in this respect is quite different from that of the IMF”). The Tribunal in *Lavelle* further noted that “the Tribunal has ruled in the past that the policy of parallelism cannot be followed blindly when circumstances do not justify it.” *Ibid.*, at para. 14, citing *Crevier*, Decision No. 205 [1999] at paras. 35–36. See also *Lavelle* at para. 13 (noting that the “Bank had in fact various options to handle the issue of past pension credit”).

avoided the issue on technical grounds.⁷⁴ Moreover, in *Crevier*, Decision No. 205 [1999], the Tribunal found under the heading “The principle of parallelism revisited” that parallelism required merely that an external policy be considered a “reference point” for consultations between the Bank and the IMF, given that the “size and mission of the Bank is entirely different today from that of the IMF.”⁷⁵ By this point, the break with the old policy of close organizational coordination was obvious.

While parallelism has not since *Crevier* been rejected outright by the Tribunal, and thus still holds out some potential for jurisprudential influence, it can at this point be considered more of a historical relic than a living doctrine.⁷⁶

B. *Involvement by National Authorities*

As the Bank’s staff members enjoy immunity only with respect to their official functions,⁷⁷ the Tribunal’s contact with national authorities and legal systems often occurs with respect to a staff member’s outside activities or failure to

⁷⁴ See *Prescott*, Decision No. 253 [2001] at para. 29 (stating that the Tribunal’s finding of an abuse of discretion rendered unnecessary a discussion of “questions of practice in the Bank and the International Monetary Fund”), citing *Yang*, Decision No. 252 [2001] at para. 38 (rejecting comparisons between Bank and IMF practices on the ground that the “practices referred to [*i.e.* presumably those of the IMF] have been either discontinued or responded to different situations and conditions that are not extant in the present case”).

⁷⁵ *Crevier*, Decision No. 205 [1999] at para. 35 (finding that parallelism “entails a process of consultations with the International Monetary Fund (IMF), a business rationale for any differentiation in benefits and, if it is the case, to consider whether the IMF’s decisions should be followed by the Bank”), citing generally *von Stauffenberg*, Decision No. 38 [1987]; *Crevier* at para. 36 (stating that “parallelism does not mean that the Bank is tied to IMF policies. . . . The Bank has asserted a need to provide for mobility of its staff and this is justified, not by comparison with the IMF, but in consideration of its own reality”).

⁷⁶ An example of parallelism’s decline is provided in *Nunberg*, Decision No. 245 [2001] at para. 30, wherein the Tribunal noted but did not address the applicant’s contention that while there were “no cases in international organizations where a jurisdiction” had recognized regression analysis to prove gender discrimination in compensation, statistical evidence was “frequently” permitted in the U.S. courts in such matters. The Tribunal could have taken this opportunity to bring its own practices on this evidentiary point into parallel with one or the other set of U.S. courts, or at least required further pleadings from the parties as to the anti-discrimination practices of comparable organizations, given the fact that compensation issues went historically to the heart of the parallelism doctrine. Instead, the Tribunal reached its conclusions based solely on its own logic as applied to the Bank’s relevant staff rules and the studies produced for the Bank and the Bank’s Staff Association. *Ibid.*, at paras. 4, 51, 53–58 (finding in light of these studies that a regression analysis would be “no more than a step in a complex process” given the variation of “expert opinion” on this point). The Tribunal further stated that it perceived any possible gender discrimination as “resulting not from actual intent but in all likelihood from historical patterns.” *Ibid.*, at para. 58. Here again the Tribunal did not take an opportunity to conduct or require an exploration of such “historical patterns” in other organizations’ experiences. The Tribunal’s overall approach in this case, and the lack of any mention of parallelism in the Tribunal’s analysis, lend support to the conclusion that the Tribunal’s adoption of parallelism has been predicated and contingent on the Bank’s own commitment to the doctrine.

⁷⁷ See *O’Humay*, Decision No. 140 [1994] at paras. 26–27 (stating that a staff member’s private obligations, unlike his or her official conduct on behalf of the Bank, are not immune from civil jurisdiction), quoting Principle of Staff Employment 3.3, which grants to staff members, “in the interests of their Organizations, privileges, immunities and facilities” pursuant to the relevant Articles of Agreement “or

duly observe national law,⁷⁸ or with respect to a staff member's tax obligations,⁷⁹ particularly in the U.S.⁸⁰ The Tribunal has also been called upon to deal with questions dealing with national or municipal law and involving spousal support questions,⁸¹ estate issues,⁸² visa and citizenship issues,⁸³ and demands for

other applicable treaties or international agreements or other laws." Principle 3.3 establishes, however, that these rights do not excuse staff members from performing their "private obligations or from the due observance of the law." A staff member's employing organization may also decide under Principle 3.3 whether it shall waive or invoke his or her immunity, given its interests and "[h]aving regard to the particular circumstances." The Bank is for its part immune to civil jurisdiction in respect of staff members' personal obligations. *E*, Decision No. 325 [2004] at para. 20, noting *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1988) (upholding that Bank's immunity from garnishment orders).

⁷⁸ See *O'Humay*, Decision No. 140 [1994] at paras. 31–33, 39 (finding that a staff member's misrepresentations to a U.S. Consul for the purpose of obtaining a U.S. G-5 visa for a domestic employee was not a "purely private matter" and was thus subject to Bank discipline). The Tribunal further determined that it could not adjudicate the applicant's failure to pay the statutory minimum wage to this employee as a matter of contract, but that the Bank had a right to involve itself in this matter as the applicant had failed to obey U.S. law and had thus impugned the Bank's reputation and integrity. *Ibid.*, at paras. 34–35, 39. The Tribunal found similar misconduct in the applicant's failure to enter timely reports with the relevant U.S. authorities with respect to the employee's social security tax requirements. *Ibid.*, at paras. 36, 39.

⁷⁹ See *Koudogbo*, Decision No. 246 [2001] at paras. 5–6, 11, 14, 37–40 (finding no improper use of a tax-exoneration form by the applicant, particularly as the claimed amount of exempted concrete corresponded exactly to the amount delivered).

⁸⁰ See *de Merode*, Decision No. 1 [1981] at para. 51 (noting that the U.S. had not acceded to the Convention on the Privileges and Immunities of the Specialized Agencies with respect to the Bank, and thus its nationals in the Bank's staff, like certain other staff from other countries, remained fully liable for domestic taxes and were consequently reimbursed by the Bank); *Lamson-Scribner*, Decision No. 32 [1987] at para. 3 (finding that the Bank's tax-reimbursement policy had been articulated in a recommendation adopted by the Bank's Executive Directors on 10 December 1946); *Smith*, Decision No. 158 [1997] at paras. 8, 33 (noting that the Bank had invoked its immunity in response to a U.S. Internal Revenue Service "Notice of Levy on Wages, Salary and Other Income" with respect to the applicant, and later dismissed him for tax-related misconduct). The Tribunal in *Smith* rescinded the applicant's dismissal on the grounds *inter alia* that the applicant had previously entered into a payment agreement with the U.S. tax authorities, and that the circumstances of his dismissal had deprived him of a separation package that could have defrayed his tax debt. *Smith* at para. 42. By this holding, the Tribunal harmonized the applicant's contention that his dismissal had violated U.S. public policy by depriving him of the ability to pay his tax debt, with the Bank's contention that a staff member's failure to pay taxes could have a "seriously negative impact" on the relations between the Bank and the state in question. *Ibid.*, at paras. 21, 32. See *infra* note 196 for further discussion of *Smith*. See also generally *Robinson*, Decision No. 78 [1989] (concerning tax reimbursement with respect to pension payments); *Richardson*, Decision No. 208 [1999] (concerning an applicant's claim that his tax allowance was insufficient to meet his tax liability in the U.S.). *Cf. C (No. 2)*, Decision No. 312 [2004] at paras. 16–20 (referring to the Bank's informal dispute-resolution procedures the claim of the applicant, a non-U.S. national, for a U.S. tax allowance to cover the amount awarded in a previous Tribunal judgment in his case); *Khatabakhsh*, Decision No. 163 [1997] (holding untimely and thus inadmissible the applicant's claim for retroactive "grossed-up" daily pay to meet U.S. tax liabilities arising from her naturalization as a U.S. citizen during the course of successive appointments).

⁸¹ See generally *E*, Decision No. 325 [2004]; and *infra* notes 119–122 and accompanying text (discussing *E*).

⁸² See generally *Rodriguez-Sawyer*, Decision No. 330 [2005]; *supra* notes 38–40, *infra* note 342 and accompanying text (in all places discussing *Rodriguez-Sawyer*).

⁸³ *Samuel-Thambiah*, Decision No. 133 [1993] at para. 40 (stating that "entitlement to a given visa follows the contract of employment and not the other way round; that is, the contract of employment does

expatriate benefits upon the renunciation of U.S. citizenship or otherwise on visa-status grounds.⁸⁴

In *von Stauffenberg*, the Tribunal rejected the applicant's allegation that the Bank's policy of parallelism with the IMF had been improperly coerced in 1984 through pressure placed by the U.S. Secretary of the Treasury on the President and Executive Directors of the Bank, and held instead that "[a]n international organization is composed of States and each member state is entitled to seek the adoption of its views within the governing bodies of the organization, on condition, of course, of respecting its constituent instrument."⁸⁵ The Tribunal has fur-

not follow the need for a visa, a situation which would be utterly disruptive of any employment policy"); *Saberi*, Decision No. 5 [1981] at para. 28 (holding that G-IV visa status is a consequence of employment with the Bank and that there is no entitlement to it once such employment has ended, and further stating that insofar as the applicant's presence was required in the U.S. to enable him to pursue his case, special arrangements could "no doubt be made" as necessary); *Suntharalingam*, Decision No. 6 [1981] at para. 11 (rejecting the applicant's request that the Bank be ordered to maintain his G-IV visa status, as the applicant could continue from abroad to employ local (presumably U.S.) counsel, and also as the Tribunal could for the purpose of conducting a fair trial either request a temporary visa for the applicant or devise other procedures to satisfy due process). See also *Dambita*, Decision No. 243 [2001] at paras. 3–12, 14–15, 19–26, 28 (holding that the Bank had wrongly sanctioned the applicant, mistakenly informed the U.S. government that the applicant was no longer an employee, and wrongly informed the U.S. government of its conclusion that the applicant had participated in a visa-application forgery). The Bank's first investigation of the visa matter in *Dambita* was launched on the basis of a letter sent to the Bank by the U.S. embassy in Lagos, Nigeria, requesting that the Bank confirm the veracity of an employment-confirmation letter allegedly sent by a Bank manager. *Ibid.*, at para. 4. The Bank determined that the letter was a forgery based on its erroneous personnel information. *Ibid.*, at paras. 4–6. The Tribunal held that the Bank had failed to prove the applicant's participation in the alleged fraud. *Ibid.*, at paras. 21–22 (basing the Tribunal's ruling partly on the applicant's claim that she had lodged a police report with the Lagos authorities, complaining that her agent had used her particulars in producing an application for a third party).

⁸⁴ *Wahie*, Decision No. 93 [1990] at paras. 39–41 (holding that the Bank's refusal to renew expatriate benefits upon the applicant's renunciation of U.S. citizenship was not an abuse of discretion, as finding otherwise might encourage a "casual approach to the responsibilities and implications of citizenship"). The Tribunal in *Wahie* dismissed the applicant's contention that such a refusal would interfere with her right "freely to acquire and reassume" her Indian citizenship. *Ibid.*, at para. 40 (stating that the applicant could not use such freedom as the basis for requiring the Bank to grant her "certain benefits"). *Cf. Farvacque*, Decision No. 121 [1992] at paras. 28–30 (dismissing the applicant's challenge to a Bank rule denying expatriate benefits to those holding or seeking U.S. permanent resident status, on the ground that the applicant was challenging a general rule rather than its specific application to her), following *Briscoe*, Decision No. 118 [1992] at paras. 29–31 (rejecting the application on the ground that it was "in effect directed against a general rule regarding employment benefits, rather than an individualized application of that rule to the Applicant himself. His application has not been directed at any specific decision by the Respondent denying him expatriate benefits"). *Accord with Briscoe* the cases of *Canada, Eyassu, Hafeez, Ketema, Roche, Roncal and Tuluy*, Decisions Nos. 119–120, 122–126 [1992]. The Tribunal has, moreover, held that non-U.S. citizenship does not in itself provide "exceptional circumstances" that justify a failure to comply with the Tribunal's requirements for filing applications. *Malekpour*, Decision No. 320 [2004] at para. 22 (finding that the applicant had not explained how the "circumstance" of his non-U.S. citizenship had posed such "real and serious impediments to exhausting internal remedies" as to constitute "exceptional circumstances," and stating that "mere inconvenience" does not constitute exceptional circumstances). See *infra* notes 180–184 and accompanying text (discussing the Tribunal's doctrines with respect to "exceptional circumstances").

⁸⁵ *von Stauffenberg*, Decision No. 38 [1987] at paras. 103, 108. See also *supra* notes 57–76 and accompanying text (discussing the rise and decline of the Bank's parallelism policy).

ther suggested that for the Bank to owe a duty of protection to a staff member as against a state, a connection must exist between the person's status as a staff member and the national government's actions.⁸⁶ In practice, however, the Tribunal has shown a consistent willingness to uphold an applicant's rights as against the Bank, regardless of the role played by national authorities.

At the weakest end of the national-involvement spectrum, there are two cases in which the Tribunal has sanctioned the Bank for taking decisions detrimental to applicants on the basis of complaints allegedly but not actually made by governments or their representatives. In *Skandera*, Decision No. 2 [1981], the Bank falsely stated that the applicant's termination had been requested by the government of Lesotho, which had in reality merely endorsed the termination.⁸⁷ In *Barnes*, Decision No. 176 [1997], the Tribunal found that the applicant's managerial responsibilities had been curtailed partly on the basis of an alleged

⁸⁶ In *Abadian*, the applicant challenged the Bank's decision not to assist him in responding to his black-listing by the Iranian revolutionary authorities. *Abadian*, Decision No. 141 [1995] at para. 12 (noting the applicant's view that the Bank was in a position to use its "good offices" to press Iran to compensate him when it resumed project-lending there, given "such a breach" of international law, and finding that the Bank had disclaimed responsibility in unequivocal terms, *i.e.* that "the Bank is not in a position to pursue claims involving personal assets with a member country, nor is there any basis for the Bank to, as you assert, share responsibility for resolving the difficulties you are having with the Iranian Government"). The Tribunal noted that a further request by the applicant had been turned down on the grounds of "both the Applicant's failure to raise any issue arising from his terms of appointment or conditions of employment and the fact that his request for review was untimely." *Ibid.*, at para. 23. The Bank asserted before the Tribunal that the Bank's good offices are exercised entirely at the Bank's discretion. *Ibid.*, at para. 18. The Tribunal dismissed the application as untimely, but stated that if the applicant had at the relevant time been in Iran discharging duties "on behalf of and in his capacity as a staff member of the Bank," and had also timely filed his application with the Tribunal, the Tribunal would have been required to define the precise scope of assistance and protection that the Bank might have been obliged to afford him. *Ibid.*, at para. 25.

⁸⁷ *Skandera*, Decision No. 2 [1981] at paras. 11–12, 16, 21–22, 25 (noting the Bank's admission that the applicant's termination letter had falsely claimed that his termination had been at the request of the government of Lesotho, which had merely endorsed the termination). The Bank for its part argued that while "there may have been some Lesotho Government officials who were unaware of [the applicant's] termination or who even were satisfied with his work[, this] is not relevant," as the relevant Bank representative held the power to evaluate and terminate the applicant. *Ibid.*, at para. 21. While the applicant alleged that the Lesotho official endorsing the termination had been so induced through improper promises or threats, and that his termination was adverse to Lesotho's "best interests," the Tribunal held his termination to have been declared by the Bank on reasonable grounds and without improper motive. *Ibid.*, at paras. 15, 25–26. The Tribunal found that the "true reasons" for the applicant's termination had been expressed in four documents, one of which *inter alia* "challenged Mr. Skandera's claim that the Government of Lesotho was pleased with and anxious to extend his services." *Ibid.*, at para. 25. The Tribunal also rejected the applicant's claim that "the Bank's assertion that his appointment was terminated at the request of the Government of Lesotho was humiliating to him and will interfere with future employment opportunities," as "the vague reference in his termination notice to the request of the Lesotho Government would surely be far less harmful to the reputation of Mr. Skandera than would have been the full disclosure of the true reasons for the termination of his appointment." *Ibid.*, at paras. 27–30. The Tribunal nevertheless held that while the Bank's false reference to Lesotho's non-existent "request" had perhaps been a well-intentioned way to avoid "hurtful criticism" that would have more severely harmed the applicant's reputation, it was nonetheless misleading and prejudicial to him and his ability to deal with the Bank's action in an informed and timely manner, thus warranting compensation. *Ibid.*, at paras. 27, 29–30.

complaint by a Kazakh delegation that was neither verified nor investigated, and which was later admitted to have been the product of a miscommunication between Bank officials.⁸⁸

The remainder of the spectrum covers a range of complex and sometimes obscure Bank-state interactions that affect staff members, mostly for ill. In several cases, the Tribunal has considered the role played by a member state in a termination decision made by the Bank.⁸⁹ In *Martin del Campo*, Decision No. 292 [2003], the Tribunal held that negative government feedback could be considered in a redundancy decision where satisfactory performance was not in question.⁹⁰ In *McNeill*, Decision No. 157 [1997], the Tribunal stated that it could not judge the Bank's assessment of the danger posed to Brazilian-Bank relations by the applicant's further work with the Bank,⁹¹ but held that the Bank had breached the applicant's rights "as a probationer" by refusing on confidentiality grounds to

⁸⁸ *Barnes*, Decision No. 176 [1997] at paras. 13–16 (observing that the reallocation of the applicant's duties had been undertaken despite the applicant's outstanding performance evaluation). The Tribunal held that the inconsistency between the alleged complaint by the Kazakh government and the applicant's performance record meant that the allegation "should have been carefully investigated prior to being used as a basis, however minimally, for altering her work program." *Ibid.*, at para. 17.

⁸⁹ The Tribunal has not had a similar opportunity to address the question of whether a government has improperly assisted staff members in retaining their employment. See *de Raet*, Decision No. 85 [1989] at paras. 29, 36, 48 (noting the parties' contentions with respect to the applicant's claim that government intervention had saved the jobs of four staff members declared redundant, while the service of the remaining staff members had been terminated). The Tribunal pointed out that the Bank is not obliged to demonstrate the absence of discrimination (and thus of an abuse of discretion) unless "an Applicant has made out a *prima facie* case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner." *Ibid.*, at paras. 56–57, citing generally *Bertrand*, Decision No. 81 [1989]. The Tribunal concluded that the applicant's allegation of "bias" rested on "at best coincidence," with no "direct or circumstantial evidence to support it." *Ibid.*, at para. 74. It may be separately noted that national representatives and authorities have helped to exonerate a staff member under internal investigation by the Bank. *Cissé*, Decision No. 242 [2001] at paras. 5–6, 30 (noting that the European Union representative and the U.S. embassy in Niger had respectively disavowed and claimed no knowledge of allegations purportedly leveled against the applicant by an employee of the U.S. Agency for International Development, and that the Nigerien National Observatory of Communications had appeared to disavow any connection with a video allegedly showing the applicant at a political convention).

⁹⁰ *Martin del Campo*, Decision No. 292 [2003] at para. 78 (finding that the "negative feedback" received from the Argentine government was not given emphasis or prominence by the relevant Bank Country Director, and holding that while the Country Director's reference to such could have required an opportunity for rebuttal if made in the context of a performance evaluation, it was irrelevant to a redundancy decision that "may have to be made on the basis of perceptions of relative strengths or weaknesses," such as those gathered with respect to the applicant's criticized communications skills).

⁹¹ *McNeill*, Decision No. 157 [1997] at paras. 33, 36. The applicant's Division Chief had been made aware of the applicant's responsibility for deteriorating Brazilian-Bank relations through, *inter alia*, a letter from a Brazilian official. *Ibid.*, at paras. 52, 54. The Division Chief requested the non-confirmation of the applicant's appointment on the ground *inter alia* that "a strong concern [had been] raised by the Brazilian Government concerning disruption within the pilot program being caused by Mr. McNeill's repeated, unauthorized and premature transmission of information to members of the government about ostensible Bank positions which, in fact, were thoughts in progress rather than fully developed positions."

provide the applicant with two letters by Brazilian officials which had factored into the Bank's termination and administrative leave decisions.⁹² Likewise, in *Garcia-Mujica*, Decision No. 192 [1998], the Tribunal rejected the applicant's claim that his redundancy was due to tensions between the Bank and Uruguay over a report mistakenly attributed to the applicant,⁹³ but held that the Bank had failed to provide the applicant with an adequate opportunity to defend himself in this respect.⁹⁴ In *Barnes*, the Tribunal awarded compensation to the applicant for the Bank's failure to properly investigate complaints made by a national official about her.⁹⁵ In *Conthe*, Decision No. 271 [2002], however, the Tribunal

Ibid., at paras. 9, 11 (noting further the Division Chief's claims that the applicant's conveyance of "twisted" information to the Brazilian authorities had "harmed the relationship between the Bank and the Brazilian Government," and that the applicant's behavior had created a "serious country relations problem vis-à-vis Brazil"). The applicant's non-confirmation was later pressed by another Bank official as being urgent "due to the extremely serious nature of the country relations issue." Ibid., at para. 15. The applicant's service was subsequently terminated, and in the interim before his departure he was placed on administrative leave expressly on this ground. Ibid., at paras. 17, 52 (finding that the country-relations issue had been the "decisive factor" in the applicant's placement on administrative leave, and noting the firing Vice President's termination letter to the applicant, which stated that the latter's "representations relating to the Bank policies and operations... have resulted in a serious erosion of the Bank's relations with one of its largest client countries, Brazil," and that the situation had "clearly... led to a serious deterioration in the relationship of trust that needs to exist between the Bank and its staff"). The Tribunal ultimately held that it was not necessary to consider the deterioration of the Bank's relationship with Brazil since the applicant could have been lawfully denied confirmation on the basis of his poor performance in other respects. Ibid., at paras. 33–43, 63. The Tribunal also held, however, that the Division Chief's failure to raise the applicant's effect on Brazilian-Bank relations at an interim evaluation stage constituted unfair and unjust treatment. Ibid., at paras. 52, 54–55.

⁹² Ibid., at paras. 40, 42, 53 (noting that the applicant had questioned the authenticity of the two letters presented by the Bank in its defense, and noting also the Bank's subsequent acknowledgment that one of the letters had been dictated by a Brazilian official to a member of the relevant Bank Division Chief's unit, in the Bank's offices in Washington). See also *C*, Decision No. 272 [2002] at para. 25 (stating, with respect to the Bank's disclosure of documents to national prosecutorial authorities and concomitant refusal to reveal such documents to the applicant under investigation, that "[c]onfidentiality is one thing, violation of due process quite another").

⁹³ *Garcia-Mujica*, Decision No. 192 [1998] at paras. 8, 11, 15 (noting the applicant's contention that he had been made a scapegoat for Bank mistakes which had led to a deterioration in relations between the Bank and Uruguay, and holding that the applicant's redundancy was neither an abuse of discretion nor the result of retaliation for his having criticized the Bank's approach to Uruguay). The Tribunal found no evidence to support the applicant's contention that a similar incident in the early 1980s in which he had been involved had influenced the 1996 decision to declare him redundant. Ibid., at para. 22 (noting the applicant's assertion that his performance had been criticized in the early 1980s after he had forewarned the Bank about a financial crisis in Mexico, and that he had later been vindicated).

⁹⁴ Ibid., at paras. 18–20 (holding that the Bank should have provided the applicant with an opportunity to defend himself against managerial criticisms of his performance in relation to "the events in Uruguay and to differences of opinion between the Applicant and his managers about the reports on the evaluation of that country").

⁹⁵ *Barnes*, Decision No. 176 [1997] at paras. 25–30 (finding there to have been inconsistencies between the respective results of two Bank investigations of a complaint made against the applicant by the Bank's Executive Director for Russia). The Tribunal noted that after the first investigation had resulted in a finding that the criticisms of the applicant were valid, a letter in support of the applicant was received from

concluded that the Bank President's conversations about the applicant with "two Spanish political figures" did not constitute a "secret investigation of the Applicant," and that the fruits of such conversations had not been used to justify the applicant's non-confirmation.⁹⁶

The Tribunal has shown itself willing to identify Bank violations where the fundamental decision affecting the applicant was actually made by a national government.⁹⁷ The Tribunal has, however, declined to hold the Bank responsible for comments made by a national government to a third party about a staff member's work on Bank projects.⁹⁸ The Tribunal has likewise upheld the Bank's decision not to respond to national press reports erroneously naming an applicant as the author of a report which had caused tensions between the state and the Bank.⁹⁹

the First Deputy Minister of Economics of the Russian Federation, who was also the Chairman of the Governmental Oil Transport Task Force. *Ibid.*, at paras. 25–26. A second investigation involved the questioning of five consultants, who were recorded as not making complimentary remarks about the applicant. *Ibid.*, at para. 27. Four of these consultants, however, later submitted statements strongly defending the applicant. *Ibid.* The Tribunal determined that these later statements were inconsistent with evidence obtained during the first investigation, and further noted that they were not considered during either investigation. *Ibid.* The Tribunal found that the revealed inconsistencies cast doubt on the objectivity of the Bank's investigations, and held that while the expiration of the applicant's contract could not be challenged, the applicant was due compensation for the intangible injury caused by the "elements of mismanagement that could have influenced the Bank's eventual decision not to extend or convert her contract." *Ibid.*, at paras. 28–31; see also *infra* notes 255–265 and accompanying text (discussing the Tribunal's doctrine of intangible injury). Compare *G*, Decision No. 340 [2005] at paras. 73, 78 (stating, in the context of a misconduct investigation into the applicant's recommendation to the Afghan government that her friend be hired as a consultant, that the duty of the Bank's investigative body is not that "every inquiry be a perfect model of efficiency, but that it operate[] in good faith without infringing individual rights" or crossing the line into harassment).

⁹⁶ *Conthe*, Decision No. 271 [2002] at paras. 33–34, 134–135, 137 (noting these findings of the investigation conducted by Sir Robert Y. Jennings, Q.C., on behalf of the Tribunal). For further information on the Jennings investigation, see *supra* note 9.

⁹⁷ *Justin*, Decision No. 15 [1984] at paras. 40–42 (awarding compensation to the applicant for expenses and lost income resulting from the Bank's delay in denying him medical approval and consequently ending his contract, as the Bank should reasonably have been aware of his age "several months" before it informed him that he was too old for a project). Although the applicant's consultancy offer was withdrawn after Pakistani officials decided that he was too old to be assigned to a potentially seven-year post and requested the Bank to come up with a short-list of younger candidates, the Tribunal observed that the Bank had informed the Pakistani authorities of its concerns about the applicant's health prospects if he were to undertake the consultancy. *Ibid.*, at paras. 8–12, 37. The Tribunal held, however, that the Bank's conclusion that the applicant did not meet the requisite medical standards was neither unreasonable nor reached in bad faith, so that the parties were relieved of their mutual duties when the contract between them validly ended upon the applicant being informed of his ineligibility. *Ibid.*, at para. 39.

⁹⁸ *van Vugt*, Decision No. 179 [1997] at para. 13 (finding that since complaints by Philippine officials to a private company about the applicant's work for the Bank did not originate from the Bank, the Bank could not be held to have thereby made misrepresentations about the applicant, adversely affected his reputation, or violated its obligations concerning the release of information to outside parties).

⁹⁹ *Garcia-Mujica*, Decision No. 192 [1998] at para. 24 (finding the Bank's decision not to respond to be justified by a "long-standing practice which treats with disfavor responses to negative press comments and [by] the need to avoid a heated public debate about the Bank's policies in Uruguay").

The Tribunal has rejected claims where the applicant's personal approach toward a national government is at issue. In *Visser*, Decision No. 217 [2000], the Tribunal rejected for lack of evidence the applicant's claim that he had become "expendable" when it became clear that he could not assist the Bank in securing funds from the Dutch government.¹⁰⁰ In *van Vugt*, Decision No. 179 [1997], the Tribunal held that a vice-presidential memorandum endorsing a lack of managerial support for the applicant's rehiring did not constitute a ban, but was rather an "expression of dissatisfaction" with the applicant's tendency to "communicate on his own with government authorities."¹⁰¹ In *G*, the Tribunal held that the Bank was justified in investigating, *inter alia*, the applicant's recommendation to the Afghan government that her friend serve as a consultant to evaluate commercial bank proposals.¹⁰² The Tribunal found that the applicant had put herself in this position by mixing personal and professional relations in a manner reflecting a clear lapse of judgment.¹⁰³

The Tribunal in *Cissé*, meanwhile, demonstrated a forgiving attitude toward an applicant alleged to have participated illicitly in national political affairs. The Tribunal held that the relevant activities did not constitute misconduct since, *inter alia*, staff members had in the Bank's "prior practice . . . on a number of occasions" been seconded to "ministerial positions in their government[s], these being

¹⁰⁰ *Visser*, Decision No. 217 [2000] at paras. 72–75. While the Tribunal found certain aspects of the matter not to have been explained, it concluded that it was "far from clear that the Applicant was asked, rather than offered, to approach the Dutch government," and further that the applicant's dealings with the Dutch appeared to have been merely "peripheral." *Ibid.*, at para. 75 (noting that no record had been presented of any Bank instructions to the applicant to approach the Dutch government).

¹⁰¹ *van Vugt*, Decision No. 179 [1997] at paras. 8–10, 12.

¹⁰² *G*, Decision No. 340 [2005] at paras. 5, 66. The applicant in *G* stated that she had "performed remarkably well" in "post-conflict Afghanistan" when working with "inexperienced government officials," and that her managers lacked "any direct knowledge of the facts relating to the allegations, because they were not in Afghanistan and were merely retelling hearsay and gossip." *Ibid.*, at paras. 38, 45–47, 51–52 (noting also the applicant's assertion that the charges brought against her were founded on "unsubstantiated rumor," "double or triple hearsay," "gossip" and her managers' "unreliable information"). The Tribunal upheld the decisions of the Bank's investigative body to conduct a preliminary investigation and then a full investigation. *Ibid.*, at para. 78 (finding the facts upon which the preliminary investigation was launched to have been objective and "of the Applicant's own doing," and stating that while such facts might have been "susceptible of innocent explanation," they required exploration, "even at the cost at some inconvenience and anxiety").

¹⁰³ *Ibid.*, at para. 66 (stating that a seasoned staff member should be more than familiar with the Bank's longstanding and firm policy to avoid promoting "individual suppliers" to its clients). The Tribunal found that the circumstances of the applicant's actions were troubling and required investigation, as it could not be known at the outset whether such acts were "the tip of an iceberg." *Ibid.*, at paras. 66, 74 (noting also that the Bank's investigative body had ultimately concluded that the applicant's "overall performance in Afghanistan had been positive – some adjectives used were 'excellent,' 'respected,' and 'extremely committed')." The Tribunal further noted the Bank's conclusion that while the applicant had exceeded her instructions by making a recommendation to the Afghan government with respect to its choice of a bank, "her recommendation had been correct and in any event was immaterial to the government's decision." *Ibid.*, at para. 74.

by their very nature national political offices.”¹⁰⁴ The Tribunal further suggested the existence of a certain hypocrisy toward such issues in the Bank when it observed that “[c]ampaigning to become the head of an international organization is not necessarily less political than campaigning for national public office. Yet this too has precedent in the Bank.”¹⁰⁵

In the recent case of *Prasad*, Decision No. 338 [2005],¹⁰⁶ the Tribunal issued a dictum in favor of due process and transparency that could serve as a lasting foundation for future doctrine pertaining to the role of national governments in Bank staffing decisions. In addition to holding that the implementation of larger political concerns under the cover of a standard staff assessment was improper,¹⁰⁷ the

¹⁰⁴ *Cissé*, Decision No. 242 [2001] at paras. 31–32 (rejecting the notion that third-party funding of such positions could affect the legal question of whether the Bank was in compliance with its staff rule on the pursuit and assumption of public office by staff members).

¹⁰⁵ *Ibid.*, at para. 32 (observing that the relevant staff rule equated governments and international organizations for the purpose of a staff member’s “employment or performing of services”).

¹⁰⁶ See *Prasad*, Decision No. 338 [2005] at para. 42 (noting the Bank’s assertion that “several Lebanese government officials [had] expressed their concerns about the Applicant’s performance”), citing generally *Skandera*, Decision No. 2 [1981], as a case “discussing the role of national officials in Country Office personnel decisions.” The Tribunal in *Prasad* observed that “government officials” had testified before the Appeals Committee in the applicant’s case, and noted the Bank’s argument that the applicant’s performance had had a “negative impact” on the Bank’s relations with the Lebanese government, “as evidenced by several witnesses’ statements during the Appeals Committee proceedings.” *Prasad* at paras. 23, 42. It is unclear from the judgment, however, whether it was Bank officials or Lebanese officials who originally raised the allegation of a “negative impact.” As in *Skandera* and *McNeill*, Decision No. 157 [1997], the Tribunal in *Prasad* focused on the Bank’s internal rationale for its treatment of the applicant rather than on the member state’s input. *Prasad* at paras. 43–50. See also *supra* notes 87, 91–92 and accompanying text (discussing *Skandera* and *McNeill* on these points).

¹⁰⁷ *Prasad*, Decision No. 338 [2005] at para. 47 (stating that “the fact that existing assessments [of the applicant’s performance] were ignored raises questions about the impartiality and objective nature of the decision made to recall the Applicant”). The Tribunal noted testimony indicating a lack of “positive chemistry” between the applicant and the Bank’s President and incoming Vice President for the Middle East and North Africa (MNA) Region during the visit of the latter officials to the applicant’s Beirut office. *Ibid.*, at para. 48. The Tribunal looked past the formal non-involvement of this Vice President in the applicant’s evaluation since the official performing the evaluation “was very much aware of the Vice President’s views on the Applicant,” *ibid.*, at para. 31, and as both officials were “also quite aware of the Bank President’s views on the need to reorganize the MNA Region.” *Ibid.*, at para. 49. The Tribunal held that the evaluation of the applicant had violated both the staff rules and the applicant’s due process rights, *ibid.*, at para. 31, and further held that the “decision to recall the Applicant responded more to [the need to reorganize the MNA Region] than to any specific performance problem.” *Ibid.*, at paras. 49–50 (concluding that while the decision to reassign the applicant fell within the Bank’s discretion, “the transparency and openness that should always characterize such a step were lacking in this case, thus leading inevitably” to a finding of an abuse of such discretion). The Tribunal found that the “natural order” of having a performance evaluation and then its consequences had been reversed, and that the isolation of a reassignment decision “from a proper performance evaluation fundamentally alters the logic of the process and may result, as in this case, in an abuse of discretion when the Bank adopts decisions that could otherwise be entirely justified.” *Ibid.*, at paras. 57–60 (stating further that “[p]rocedures or investigations that may end up being surreptitious cannot be upheld as proper and rightful”). See also *Marrou*, Decision No. 184 [1997] at paras. 16–21 (finding that a reduction in the applicant’s hardship allowance was “the result of a political decision to regroup and adjust (mostly downward) the allowance rates,”

Tribunal stated that “[t]here may be cases in which a reassignment has to be effected promptly in the best interests of the institution, but even then the matter has to be handled with respect for due process rights, and in the open and transparent manner that has to govern professional relations, including most certainly a discussion of the performance issues concerned.”¹⁰⁸

Besides distinguishing Bank obligations from national government actions, the Tribunal has consistently asserted its particular jurisdiction as against those of national authorities and courts.¹⁰⁹ In *Rittner*, Decision No. 339 [2005], the Tribunal stated that it is not its duty to “furnish copies of any pleading of the Applicant to criminal investigation agencies of Member States of the Bank.”¹¹⁰ This

rather than of “a re-assessment of the living conditions at the Applicant’s duty station as required” by the staff rules).

¹⁰⁸ *Prasad*, Decision No. 338 [2005] at para. 60.

¹⁰⁹ See *Mendaro*, Decision No. 26 [1985] at paras. 32–33 (dismissing the applicant’s untimely application on the ground that no “exceptional circumstances” were presented by the applicant’s resort to the U.S. courts due to her doubts as to her standing before the Tribunal and the Tribunal’s jurisdiction *ratione materiae* with respect to sexual discrimination and harassment); *Means*, Decision No. 298 [2003] at paras. 11–12 (finding no exceptional circumstances to be presented by the applicant’s claim that she had been discouraged from bringing her misclassification claim before the Tribunal “because the labor-protection laws of the United States and other member nations provide no relief” for such). See also *Novak*, Decision No. 8 [1982] at para. 19 (finding that the Bank’s explicit reference to the Tribunal’s forthcoming creation in a pleading filed before a U.S. court in the applicant’s suit there against the Bank constituted sufficient notice to overcome the applicant’s claim of ignorance as to the Tribunal’s existence). The Tribunal in *Mendaro* established that the judgment of a U.S. court (this being in *Mendaro* the U.S. Court of Appeals for the District of Columbia Circuit) does not constitute for the jurisdictional purposes of Article II of the Tribunal Statute either the “occurrence of the event giving rise to the application” from which the time for filing runs, or a proper exhaustion of internal remedies. *Mendaro* at para. 27. Cf. *Taborga (No. 2)*, Decision No. 324 [2004] at para. 18 (noting but not ruling upon the unsuccessful applicant’s jurisdictional argument that the Tribunal was his only available forum except for a “United States federal court”), and at para. 30 (declining to draw any inference from a U.S. Internal Revenue Service legal determination concerning the Bank’s Staff Retirement Plan, which the applicant had invoked in support of his jurisdictional argument). In adjudicating the merits of claims against the Bank that have arisen wholly or partly out of domestic legal actions, the Tribunal has passed neither judgment nor comment upon the local court’s actions or decisions. See generally *J. Singh*, Decision No. 105 [1991] (involving the applicant’s divorce action before the Circuit Court of Fairfax County, Virginia); *Mould*, Decision No. 210 [1999] (concerning the proper implementation by the Bank of a divorce consent order filed with the Circuit Court for the City of Alexandria, Virginia). See also *Cissé*, Decision No. 242 [2001] at paras. 14–15, 19, 23 (noting the role of the Supreme Court of Niger in that country’s presidential candidate selection process, and finding that while Nigerien law could not affect the Tribunal’s interpretation of the object and purpose of the relevant Bank staff rule, it could “shed some light” on certain factual questions).

¹¹⁰ *Rittner*, Decision No. 339 [2005] at para. 42 (noting that the applicant had requested the Tribunal to “forward his requests for investigation to the Ombudsman of the Bank and the Office of the President of the Bank, as well as to certain agencies of certain Member States of the Bank”). The Tribunal found no evidence to have been presented in support of the applicant’s claim of having been the “target of a long-standing, wide-ranging and ‘very corrupt’ conspiracy on the part of superiors inside the Bank and other persons outside the Bank, including several sovereign Member States of the Bank, to inflict harm and prejudice upon him and his professional career.” *Ibid.*, at para. 41. The Tribunal stated that the applicant “may communicate with those Member States on his own, if he so wishes,” and that the “task of producing evidence to sustain his claims before the Tribunal belongs to the Applicant.” *Ibid.*, at para. 42.

declaration followed from the Tribunal's robust assertion of its jurisdiction in its first misconduct case simultaneously involving national prosecutorial authorities, C, Decisions Nos. 268 and 272 [2002], in which the Tribunal rejected the notion that its work could interfere with the ongoing national investigations or with the national legal systems involved.¹¹¹ The Tribunal ordered the Bank to provide both it and the applicant with a "list and a comprehensive description of the documents provided to any public authorities," and also to submit for its *in camera* review those documents turned over to the national authorities so that the Tribunal could assess the Bank's compliance with due process as established by the Bank's staff rules.¹¹²

After conducting its review, the Tribunal concluded that since the U.S. Department of Justice could have subpoenaed the applicant's personal financial records "in the ordinary process of discovery available in the United States legal system," no "implied condition against disclosure" in the Bank's Policy on Disclosure of Information could have prevented such discovery "in the context of this kind of investigation."¹¹³ The Tribunal further held that while the Bank's interviews of the applicant and others were "manifestly confidential within the Bank,"¹¹⁴ the Bank could disclose interview summaries and related documents in a "presumably confidential" manner to "national authorities . . . in the specific context of an investigation

¹¹¹) C, Decision No. 268 [2002] at paras. 9, 11 (holding that the Tribunal's jurisdiction derives from its "statutory authority to interpret the staff member's terms of appointment and conditions of employment," and that the Tribunal had in no way interfered with the "purely criminal aspects of the investigation" by assuming jurisdiction). See also C, Decision No. 272 [2002] at para. 26 (stating that the Bank's observance of due process does not necessarily prejudice national criminal investigations, that the accused may be better able to address questions put by national authorities if he or she has all relevant information, and that strict enforcement of due process will also likely avoid accusations of a general nature, unsupported by specific evidence, that could mislead the national authorities involved). The Tribunal found this to be true in the applicant's case, as his "exposure to national authority [had grown] along with the [U.S. Department of Justice's] investigation," and as he could have been aware of his "true position" only by the date on which the relevant document transfers were completed, and then only if the Bank had provided him with the evidence given against him. *Ibid.*, at paras. 19–21. Under the Bank's current (1 January 2004) version of Staff Rule 8.01, para. 5.01, the Bank's investigative team must reveal the names of otherwise confidential informants if the Bank is so ordered by a "competent judicial authority within a member government."

¹¹²) C, Decision No. 268 [2002] at paras. 21–22 (stating that if the applicant indeed had a right to review the documents turned over, this would not "raise an obstacle to the use of such information already in the hands of the Department of Justice"). The Tribunal further stated that its forthcoming review of the merits of the case would examine "whether there are rights of the staff member, or former staff member, safeguarded by the Bank's own Staff Rules and whether, if entitled, the staff member can also make use of the information concerned. These determinations will lead to a finding as to whether that Rule has been complied with." *Ibid.*, at para. 21.

¹¹³) C, Decision No. 272 [2002] at paras. 14–15.

¹¹⁴) *Ibid.*, at paras. 16–17 (stating that while the 1994 version of the Bank's Policy on Disclosure of Information had not expressly excluded such information from public disclosure, as did the current, 2002 version, "non-disclosure derives from a well-established rule of privilege, particularly in the legal system of the United States").

relating to potential criminal offenses and their prosecution.”¹¹⁵ The Tribunal established, however, that the applicant was entitled to examine the documents so referred,¹¹⁶ noting that “in criminal investigations, the standards [of due process] applied must be construed more strictly than would be the case in matters that do not so seriously affect a staff member’s reputation and employment prospects.”¹¹⁷

The Tribunal has on the other hand been similarly solicitous in respecting and upholding the exclusive jurisdiction of national courts.¹¹⁸ In *E*, Decision No. 325 [2004], a case arising from the application of the Bank’s Policy on Spousal and Child Support,¹¹⁹ the Tribunal found that the dispute raised “significant questions with respect to the authority of the Bank to give effect to the decrees of

¹¹⁵ The Tribunal in *C* observed at the merits phase that the documents in question had derived from the “relationship between the Applicant and internal and external investigators,” rather than from one “between the Applicant and his private attorney” that would have “certainly” led to the documents being “excluded from disclosure.” *Ibid.*, at para. 17 (further stating that the disclosure of investigative findings to a “third party investigating the matter . . . essentially is governed by principles of due process and fair treatment”). See also *ibid.*, at para. 18 (holding that the Bank’s disclosure was permitted in the absence of an authorizing rule because the documents in question related “specifically to the investigation,” and because the Bank’s policy constraining disclosure was focused “more on public disclosure than on presumably confidential disclosure to national authorities”). The Tribunal in *C* determined, moreover, that the staff rules’ provisions for the disclosure of personnel information upon the “advice of the Legal Department for legal proceedings or law enforcement efforts” should apply even where the items in question do not relate to “‘personnel’ matters,” save in respect of certain listed items such as a staff member’s compensation or visa status. *Ibid.*

¹¹⁶ *Ibid.*, at paras. 23–25, citing *King*, Decision No. 131 [1993] at para. 36 (stating that the “entitlement of the staff member to respond presupposes an exact knowledge of the charge made against him and extends to the right to give a properly considered answer to, or comment upon, every aspect of the case made against him”).

¹¹⁷ *C*, Decision No. 272 [2002] at paras. 25, 32–33. See also *infra* notes 135–152 and accompanying text (discussing the Tribunal’s development of due process doctrines with respect to investigations and disciplinary cases).

¹¹⁸ See *Verdier*, Order of 15 May 1998 at para. 6 (summarily dismissing the applicant’s claim on the grounds that it necessarily involved a request to review and declare invalid both the procedures followed and decisions made by the French judicial authorities in accordance with French law, and that the Tribunal “manifestly has no jurisdiction to pass judgment upon the application of the provisions of the French ‘Code Civil’ by the French judiciary”); *E*, Decision No. 325 [2004] at para. 26 (applying to the Tribunal the principle, agreed upon by the parties, that “the Bank must avoid interpreting or construing the ambiguous or unclear provisions of a decree of a national court. This is to be done by the judicial authorities so charged by national law, and not by an official within an international organization such as the World Bank”), citing *O’Humay*, Decision No. 140 [1994] at para. 27 (establishing that the settlement of personal debts falls under the jurisdiction of “ordinary courts of law”), *Verdier* at para. 6, and *Mr. “P” (No. 2)*, IMFAT Judgment No. 2001–2 (20 November 2001), para. 146 (stating that only the Maryland courts are competent to determine whether a Maryland court correctly applied Maryland law).

¹¹⁹ The Bank’s Policy on Spousal and Child Support was enacted in 1998. *E*, Decision No. 325 [2004] at paras. 10, 20–24, 49–51 (describing the history and features of the policy, and noting that the policy was designed to ensure that staff did not seek to hide behind the Bank’s immunity from garnishment orders), noting *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1988) (upholding the IDB’s immunity from such orders). The policy established that the Bank would hear accusations of a failure to provide support and, if such were found to be true, deduct sums from the salary of a

national courts.”¹²⁰ The Tribunal held that the Bank had exceeded its powers in adopting one interpretation of the divorce decree at issue, as “conflicting interpretations” of the decree had created a “genuine and reasonable doubt” about the meaning of the word “mortgage” as it was used in the decree.¹²¹ The Tribunal held that the Bank must refrain from attempting its own “definitive interpretation” where two reasonable meanings are possible, and leave the matter for the local court to resolve, so that the burden lies upon a claimant to turn there for vindication.¹²²

IV. General Legal Principles as a Source of Tribunal Law

The Tribunal in *de Merode* recognized, in terms clearly evoking Article 38(1)(c) of the ICJ Statute, that “[a]nother source of the rights and duties of the staff of the Bank consists of certain general principles of law, the applicability of which has in fact been acknowledged by the Bank in its written and oral pleadings.”¹²³ The Tribunal further noted that the parties had discussed the more specific question of whether the Bank’s “conditions of employment” incorporate those conditions defined by other tribunals to be “common to all international organi-

delinquent staff member having a “clear legal obligation” to make support payments of a “readily ascertainable amount.” *E* at para. 10. The Tribunal noted in *E* that the Bank had appeared to classify a failure to make support payments as a “species of misconduct” even before it codified this view in Staff Rule 8.01, para. 2.01(g), on 1 January 2004, after the facts of *E* had taken place. *Ibid.*, at para. 52.

¹²⁰ *E*, Decision No. 325 [2004] at para. 2. The Tribunal found that certain of the Bank’s relevant actions, and also the language of the Bank’s Policy on Spousal and Child Support, were “no doubt intended to reflect the principle . . . that it is beyond the powers of the Bank to interpret and implement unclear language in the decrees of national courts or to establish amounts that are not readily ascertainable.” *Ibid.*, at paras. 32–33. The Tribunal upheld the Bank’s right to establish less elaborate procedures in cases of alleged non-support than in other disciplinary cases, so long as fundamental due process was still accorded. *Ibid.*, at paras. 53–56. The Tribunal also stated, however, that no “reasonable staff member” could in the absence of documented Bank distinctions be expected to appreciate that an involuntary salary deduction for support payments was not a “disciplinary measure,” and instead the “enforcement of a pre-existing legal obligation.” *Ibid.*, at paras. 62–66 (finding that the Bank had provided confusing and misleading information on the nature of the support-enforcement process, and requiring the Bank to provide clear, consistent and transparent authorization when allowing an internal body to undertake such a process).

¹²¹ *Ibid.*, at paras. 34–35. The Tribunal observed that “[w]hile the Bank’s practices and the common understanding of the term ‘mortgage’ are relevant to [the Bank’s] inquiry” with respect to the applicant, “they are not dispositive.” *Ibid.*, at paras. 38–39 (finding that the Bank had “lost sight of this basic fact”). The Tribunal concluded that the Bank was “seriously mistaken” in asserting that housing loans provided by the Bank are not mortgages, as “it is not for the Bank to instruct the courts of the state of Virginia as to the correct meaning of terms in the decrees of those courts.” *Ibid.*, at para. 39 (concluding that whether the Virginia court had intended to allow the applicant to reduce his support obligations was a “judgment for that court to make, whether its terminology was artful or not, and [that] it is altogether beyond the power of the Bank to declare that the national court would be ‘quite simply’ wrong in the interpretation of its own language”).

¹²² *Ibid.*, at para. 41.

¹²³ *de Merode*, Decision No. 1 [1981] at para. 25.

zations” and which thus apply as part of a “common *corpus juris* shared by all international officials.”¹²⁴

Had the Tribunal expressly adopted such a *corpus* of international administrative law, there would have arisen the interesting if troublesome issue of identifying its contents, as well as the limits of the Tribunal’s doctrinal independence from it. In the event, however, the Tribunal refrained from taking such a step, instead concluding that it was obliged to decide its cases “within the organized legal system of the World Bank and . . . [that] it must apply the internal law of the Bank as the law governing the conditions of employment.”¹²⁵ The Tribunal did not reconcile this profession with its express recognition in the same case of “certain general principles of law,” or specify what these principles and their sources were.

Nevertheless, given the Bank’s acknowledgment of such principles, and the Tribunal’s reference to the Bank’s “internal law” as its ultimate source of law, it follows that principles of external origin have been incorporated into the Bank’s *pacta* with its staff. It remains open to question, however, exactly what these principles are. They may not be susceptible of exhaustive listing, but they can be examined inasmuch as they have already figured into Tribunal judgments. In addition to the principles expressly adopted by the Bank, there are those which the Tribunal has independently imported into numerous judgments since *de Merode*, particularly with respect to due process, jurisdiction, the Tribunal’s procedures and the adjudication of certain substantive matters. Absent an express “closing of the door” by the Tribunal, or perhaps even by the Bank, the Tribunal will remain free to expand its rich stock of fertile legal concepts, and perhaps thereby move toward not only a common *corpus juris* of international administrative law, but also to one for international law or even simply law as a whole.

A. *Principles of Due Process*

Due process is a concept that by its nature pertains to procedure, but that can also affect a wide range of substantive legal rights. The Tribunal has incorporated due process notions into many areas of its jurisprudence on both sides of this porous divide. On the most clearly procedural level, no single doctrine has ever been laid down to encompass due process in all of its various procedural forms,¹²⁶ and the Tribunal has instead adopted a case-by-case approach to developing such norms. These have been embodied in rules concerning, for example, the proper exhaustion

¹²⁴ *Ibid.*, at para. 26.

¹²⁵ *Ibid.*, at para. 27.

¹²⁶ The Tribunal has, however, recognized procedural due process as a discrete and valid subject of inquiry. See *Medlin*, Decision No. 319 [2004] at para. 34 (stating that “due process is an inherent requirement in the employment relationship, and therefore it may be appropriate to penalize procedural irregularities even if they did not ultimately lead to a different substantive outcome”).

and management of prior internal remedies,¹²⁷ the provision of notice and information about available channels of appeal,¹²⁸ and the proper handling of confidential information and records in the course of investigations.¹²⁹ The Tribunal has also in this vein clarified that while Pension Benefits Administration Committee procedures are in reality Bank procedures, they are not discretionary in nature.¹³⁰

The Tribunal's independent elaboration of substantive due process rights has often dovetailed with the principles established by the Bank's staff rules and Principles of Staff Employment.¹³¹ The Tribunal has also often conflated its due process

¹²⁷ *B. Thomas*, Decision No. 232 [2000] at para. 23 (stating that the requirement that available internal remedies be pursued "is a fundamental one in the context of grievance procedures and due process"); *Lopez*, Decision No. 147 [1996] at para. 54 (holding that an administrative review taking 73 rather than the mandated 30 days was a due process failure that "infringed upon [the applicant's] procedural rights and his legitimate expectation to have a speedy disposition of his complaints"); *Courtney (No. 2)*, Decision No. 153 [1996] at para. 38 (rejecting the applicant's request for medical arbitration as a remedy for alleged due process violations, as such a proposal was "not in accordance with the institutional rules governing the Bank's Pension Benefits Administration Committee"); *Courtney (No. 4)*, Decision No. 202 [1998] at para. 15 (stating that the conditioning of a workers' compensation investigation or award upon the claimant's production of obviously irrelevant documents would be an abuse of discretion and denial of due process); *Spier*, Decision No. 77 [1989] at para. 19 (holding that a reopening of the applicant's case before the Job Grading Appeals Board did not violate the applicant's due process rights, as an oversight of the Board's Secretary had obviously disadvantaged the Bank).

¹²⁸ *Matta*, Decision No. 12 [1982] at para. 52 (holding that the Bank does not have a due process obligation "to remind each and every employee who may possibly be affected by a decision of the Respondent that he has a right of appeal to the Tribunal"); *Tucker*, Decision No. 238 [2001] at para. 23 (encouraging the Bank's Pension Benefits Administration Committee to inform rejected applicants of their rights of consultation and appeal within the Bank, but holding that the Bank's failure to do so in the applicant's case could not be viewed as a due process violation or arbitrary act in breach of her terms of employment).

¹²⁹ *C*, Decision No. 272 [2002] at para. 17 (noting that the disclosure of documents by Bank investigators to outside parties in misconduct cases is "essentially . . . governed by principles of due process and fair treatment" pursuant to Principle of Staff Employment 2.1); *Lopez*, Decision No. 147 [1996] at paras. 55–56 (identifying as due process failures the Bank's violations of a staff rule on the handling of confidential information and records which resulted from the Bank's mishandling of a confidential document and the turning over of the applicant's confidential medical records to an investigator looking into harassment charges brought by the applicant). See also *supra* notes 111–117 and accompanying text (discussing the Tribunal's handling of privilege issues in *C*).

¹³⁰ *Courtney (No. 2)*, Decision No. 153 [1996] at para. 30 (stating that the Pension Benefits Administration Committee's denial of a disability pension request "cannot be regarded purely as a matter of executive discretion" since no other internal remedies are available within the Bank and appeal can only be made directly to the Tribunal); *Shenouda*, Decision No. 177 [1997] at para. 37 (identifying a number of flaws in the Committee's procedures "that can readily interfere with due process and with the transparency of decision-making by the Bank").

¹³¹ *K. Singh*, Decision No. 188 [1998] at para. 21 (stating that "[s]taff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered"); *Garcia-Mujica*, Decision No. 192 [1998] at para. 19 (concluding that while Staff Rule 7.01 does not require advance warning of redundancy, "a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work"); *K. Singh* at para. 26 (noting that the Bank's "mismanagement of the [applicant's redundancy] case goes wider than the fact that the Applicant was not dealt with under Staff Rule 7.01,

analysis in substantive matters with an application of the abuse of discretion standard.¹³² The Tribunal has, however, affirmed the Bank's specific obligation to respect due process in the management of staff members' careers,¹³³ and in many cases has expressly dealt with termination and probation questions from the perspective of due process.¹³⁴ The Tribunal has also made clear that the "requirements

Section 11"); *A. Berg*, Decision No. 73 [1988] at para. 38 (stating that the Bank's obligation to communicate the reasons for a demotion is "demanded by elementary considerations of due process [and] independent of the adoption of the Principles of Staff Employment").

¹³² *K. Singh*, Decision No. 188 [1998] at para. 21 (stating that "[e]ven if the Respondent is in substance right about the decision that it took with respect to the Applicant, its departure from the relevant rules amounts to an abuse of its discretion"); *Conthe*, Decision No. 271 [2002] at para. 180 (stating that "[m]atters of due process are not discretionary"); *Buyten*, Decision No. 72 [1988] at para. 43 (stating in a performance evaluation case that the "principal issue... is whether the Applicant has been treated unfairly, arbitrarily, in a manner falling short of due process or involving an abuse of managerial discretion"); *McKinney*, Decision No. 183 [1997] at para. 15 (stating that the Tribunal had in the past found that employment contracts contain a protection against non-renewal based on discrimination or a lack of due process), quoting *Carter*, Decision No. 175 [1997] at para. 15 (stating that non-renewal cannot be decided upon arbitrarily or in an abuse of discretion); *infra* notes 278, 348 and accompanying text (providing two Tribunal formulations of the abuse of discretion standard). See also *Courtney (No. 2)*, Decision No. 153 [1996] at para. 38 (rejecting the applicant's claim of a due process violation, on the ground that the selection of a medical expert to review the applicant's disability request was within the discretion of the Bank's Pension Benefits Administration Committee); *Sengamalay*, Decision No. 254 [2001] at para. 29 (stating that "[a]s the Tribunal has stated on many occasions, decisions such as those relating to redundancy, or to reassignment and transfer, are discretionary decisions for the management of the Bank, and are subject only to limited review by the Tribunal. Such decisions will not be set aside unless they constitute an abuse of discretion, being arbitrary or capricious, discriminatory, or influenced by a lack of due process"), citing *Yoon (No. 2)*, Decision No. 248 [2001] at para. 28 (with respect to redundancy), and *Sweeney*, Decision No. 239 [2001] at para. 49 (with respect to reassignment).

¹³³ *Conthe*, Decision No. 271 [2002] at para. 179 (finding the Staff Association's insistence on this point in its *amicus curiae* brief to be "proper and well-founded").

¹³⁴ See *Skandera*, Decision No. 2 [1981] at para. 28 (finding it impossible to "develop in detail at this time all of the requirements of what might be called 'procedural due process' in termination cases," but concluding that a "notice of termination should communicate to the affected staff member the true reasons for the Bank's decision"); *Suntharalingam*, Decision No. 6 [1981] at paras. 31–35 (finding that a Bank statement on termination procedures reflected "basic requirements of due process in termination cases," and establishing as a test whether the applicant was made aware of unsatisfactory performance and rendered capable of defending himself or herself in the event of termination); *Buranavanichkit*, Decision No. 7 [1982] at para. 28 (finding the Bank's reliance on information on alleged past problems in terminating the applicant to have been "irregular and contrary to the principle of due process, since [such information] could not be answered by her" due to its not having been communicated or made available to her); *Salle*, Decision No. 10 [1982] at paras. 50, 59 (emphasizing the "importance of the requirements sometimes subsumed under the phrase 'due process of law,'" including compliance with procedural guarantees of fair treatment and "appropriate standards of justice," such as through the giving of an opportunity to defend oneself against criticism by superiors); *Samuel-Thambiah*, Decision No. 133 [1993] at para. 32 (recognizing with respect to probation "[t]wo basic guarantees... defined by the Tribunal in connection with due process," these being the giving of adequate warning of performance criticisms or deficiencies, and the giving of adequate opportunities for defending oneself); *Yoon (No. 2)*, Decision No. 248 [2001] at para. 37 (stating that the "basic elements of due process and the rule of law mandate that a staff member be clearly notified of the exact and correct Staff Rule under which his or her employment is being terminated").

of due process are . . . not as stringent in probationary matters as they are regarding disciplinary measures.”¹³⁵

With respect to the latter, the Tribunal first declared a substantive disciplinary decision null and void for want of due process in *Gyamfi*, Decision No. 28 [1986].¹³⁶ The Tribunal in *Gyamfi* found the following procedural flaws to have been violations of due process: (i) the harshness of the applicant’s suspension and his exclusion from the Bank’s premises;¹³⁷ (ii) the Bank’s repeated failure to inform the applicant properly as to the accusations laid against him, and to allow him an opportunity to present his side of the case;¹³⁸ (iii) the Bank’s failure to reveal the names of the applicant’s accusers;¹³⁹ (iv) the Bank’s denial of the applicant’s right to confront or cross-examine his accusers, or to call supportive witnesses;¹⁴⁰

¹³⁵ *McNeill*, Decision No. 157 [1997] at paras. 35, 53.

¹³⁶ *Gyamfi*, Decision No. 28 [1986] at paras. 31, 40, 47 (finding that Principle of Staff Employment 8.1 classified demotion as a disciplinary measure and thus required an examination as to whether “the basic requirements of procedural due process [had been fulfilled] in applying this sanction to the Applicant”).

¹³⁷ *Ibid.*, at para. 41. See also *D*, Decision No. 304 [2003] at paras. 66–70 (finding there to have been no good reason for the “intimidating and public” manner of the applicant’s escort from the building upon being placed on administrative leave).

¹³⁸ *Ibid.*, at paras. 42–43 (noting that the applicant had learned the exact content of the allegations against him only when he appeared as a witness before the investigating committee, and finding that the Bank’s failure to inform him of the allegations had “seriously impaired” his ability to defend himself). See also *Planthara*, Decision No. 143 [1995] at para. 31 (holding that the Bank had met the “essential requirements of due process as defined by the Tribunal” by informing the applicant of the specific accusations and charges brought against him, providing ample opportunity for him to answer the allegations in writing, and presenting him with the relevant evidence); *Cissé*, Decision No. 242 [2001] at para. 37 (holding that reading a memorandum of misconduct allegations over the phone to the applicant did not satisfy due process); *E*, Decision No. 325 [2004] at para. 57 (stating that while notice of claims and an opportunity to respond in writing are “central elements” of due process, they are not necessarily the only such elements). The Tribunal in *E* listed several failures by the Bank to inform the applicant about the relevant process and its lack of procedural protections, and also the Bank’s failure to permit the applicant to provide comments or corrections. *E* at paras. 58–67 (finding a lack of transparency in the procedures applied, and that such due process failures might in the aggregate “unfairly disadvantage” an applicant). The Tribunal further required the Bank in family support cases to provide clear, consistent and transparent authorization when allowing internal bodies to enforce such obligations. *Ibid.*, at para. 66.

¹³⁹ *Gyamfi*, Decision No. 28 [1986] at para. 43. See also *C*, Decision No. 272 [2002] at para. 26 (expressing “reservations with respect to unnecessarily secretive procedures, which tend to result in unfair accusations and investigations”). *Cf. Sengamalay*, Decision No. 254 [2001] at para. 45 (in a reassignment case, finding that the Bank’s managerial performance appraisal technique was troubling due to the appraisals’ “anonymity, their lack of specificity and the failure to afford the Applicant an opportunity to respond,” and that such features fell short of the Bank’s own guidelines for the provision of constructive feedback); *F*, Decision No. 313 [2004] at paras. 63–66 (holding that the use of anonymous feedback in a performance evaluation did not harm the applicant or entail a due process violation, but stating that “transparency is the desirable rule, and that it should be observed by all involved in the [evaluation] process”).

¹⁴⁰ *Gyamfi*, Decision No. 28 [1986] at para. 44 (holding these violations “to be a serious impairment of the Applicant’s rights under due process of law,” and rejecting the Bank’s contention that confrontation was avoided to preclude intimidation of the witnesses by the applicant, as “[a]ccepting such an argument would logically lead to the abolition of the right to cross-examine hostile witnesses in all such cases”). The Tribunal stated that “sensitivity to the need of witnesses to be free from any possible intimidation should be weighed against the basic right of the accused to a fair trial and an unhampered opportunity properly

(v) the inclusion in the *ad hoc* reviewing committee of persons previously involved in the investigation of the applicant;¹⁴¹ and (vi) the Bank's assembling of witnesses prior to a later Appeals Committee's hearing.¹⁴² The Tribunal stated that while it had in the past "expressed its grave concern over certain procedural irregularities and other practices that did not conform with the requirements of due process of law," it would in this case rescind the decision taken against the applicant and award him compensation for the "unnecessary and considerable damage" he had suffered "as a result of the improper treatment."¹⁴³

The Tribunal has in later disciplinary cases interpreted aspects of Staff Rule 8.01, which the Tribunal found to be "intended to give expression to the basic principles of due process of law with respect to disciplinary measures."¹⁴⁴ The

to be heard." *Ibid.* The Tribunal's express identification of a "basic right" evidences its willingness to independently incorporate fundamental notions of due process rights into its jurisprudence. Compare *Rendall-Speranza*, Decision No. 197 [1998] at para. 62 (holding that no "basic right" of the applicant was violated by "the fact that the independent investigator did not allow either party to be present when the witnesses were interviewed, and to examine and cross-examine them").

¹⁴¹ *Gyamfi*, Decision No. 28 [1986] at para. 45 (stating that "it is a fundamental rule of both judicial and quasi-judicial procedures that whoever is invited to pass judgment on another must assume his responsibility free from any possible prejudice developed through previous involvement with the case," and, without impugning the "integrity and fairness" of the committee members, holding that the "participation in the committee of two members who were involved in other areas of inquiry puts in question the perception of fairness and impartiality"); *Cissé*, Decision No. 242 [2001] at para. 38 (finding that the relevant Vice President's "unsolicited recommendation [to the Bank's Ethics Office]... interfered with the impartiality of the investigation"); *Ismail*, Decision No. 305 [2003] at para. 61 (holding that the use of a witness as an interpreter was a due process violation as it "was not consistent with the independent and impartial role expected of an interpreter"). Compare *Courtney (No. 2)*, Decision No. 153 [1996] at para. 39 (holding that the involvement of the chairman of the Bank's Pension Benefits Administration Committee in the applicant's past career did not disqualify him from participating in the decision on the applicant's request for a disability pension). The Tribunal in *Courtney (No. 2)* further interpreted *Gyamfi* as requiring for a due process violation "evidence that the integrity or fairness of any member of the committee might have been in any way compromised," and further stated that even if one Committee member were assumed *arguendo* to have been prejudiced, there was "no evidence that his presence influenced the decision adverse to the Applicant, since this decision was taken by the full committee with the advice of the Medical Advisor." *Ibid.*, citing *Gyamfi* at para. 45.

¹⁴² *Gyamfi*, Decision No. 28 [1986] at paras. 14, 17, 25, 46 (noting the Appeals Committee's strong protest against this procedure and the Bank's explanation that "it [had done] so only in order to familiarize them with procedures and liberate them from any possible inhibition," and finding instead that "[s]uch a practice is bound to cast doubt upon the credibility of the testimony of the witnesses and is inconsistent with fundamental principles of due process of law").

¹⁴³ *Ibid.*, at paras. 47–48. See also *King*, Decision No. 131 [1993] at para. 67 (finding the disciplinary process to have been so "fundamentally flawed" that it "cannot be allowed to lead to... an implication [of culpability] or to [relevant] measures or sanctions").

¹⁴⁴ *King*, Decision No. 131 [1993] at paras. 29–38, 61 (stating that Staff Rule 8.01 "contains a number of essential components – none of which can be neglected if it is to be properly applied"); *E*, Decision No. 325 [2004] at paras. 56, 60–67 (stating that procedures formulated under a certain Bank policy "must accord with the fundamentals of due process of law, and the distinctions between them and the procedures under Staff Rule 8.01 must be transparent," and that such distinctions must be made clear to the affected staff member). See also *C*, Decision No. 272 [2002] at para. 26 (stating that "[o]bservance of due process within the Bank does not necessarily prejudice national criminal investigations," and that

Tribunal stated in this regard that the “essential ingredients” of due process are “the precise formulation of an accusation, the communication of the precise accusation to the Applicant, the giving to the Applicant of an opportunity to rebut in detail the specifics of the charge and the opportunity to invoke all pertinent factors.”¹⁴⁵ The Tribunal has noted, however, that “[n]ot every aspect of the due process required in the administration of disciplinary measures is written down in Staff Rule 8.01.”¹⁴⁶

The Tribunal has, for example: (i) extended due process rights to staff members who act as accusers;¹⁴⁷ (ii) required that the placement of flags in personnel records follow the “basic elements of due process”;¹⁴⁸ (iii) recognized the attorney-client privilege;¹⁴⁹ (iv) declared that the initiation of investigations on the basis of

“[s]trict enforcement of due process will also likely avoid accusations of a general nature unsupported by specific evidence that could mislead the national authorities”). Compare *Kwakwa*, Decision No. 300 [2003] at para. 29 (establishing that the Bank is not to “be held to the full panoply of due process requirements that are applicable in the administration of criminal law”); *G*, Decision No. 340 [2005] at para. 80 (stating that “since a preliminary inquiry is not an adjudicatory process, it is not open to challenge on as broad a range of grounds as those which may invalidate judicial proceedings, and in particular lack of notice”), citing *Rendall-Speranza*, Decision No. 197 [1998] at para. 57 (further stating that due process concerns in investigations “relate to the development of a fair and full record of facts, and to the conduct of the investigation in a fair and impartial manner”).

¹⁴⁵ *King*, Decision No. 131 [1993] at paras. 53–56 (stating that the “cardinal consideration [with respect to investigations] is that if disciplinary action is to be taken against a staff member he must know what he is being charged with and must have an opportunity properly to respond specifically to that charge and to deal with the evidence adduced against him”).

¹⁴⁶ *Sjamsubabri*, Decision No. 145 [1995] at para. 15. See also *Rendall-Speranza*, Decision No. 197 [1998] at para. 63 (holding that oaths need not be administered while obtaining testimony during internal Bank investigations, as the process is administrative rather than judicial in nature, and “[i]t is only in some judicial proceedings that witnesses must give their testimonies under oath”).

¹⁴⁷ *McCall*, Decision No. 201 [1998] at para. 20, citing *McKinney (No. 2)*, Decision No. 194 [1998] at paras. 11–13 (stating that “[i]t would make a mockery of the requirements set forth in Staff Rule 8.01 if the Bank were allowed to discharge [an investigation] without affording due process to both the accuser and the accused”).

¹⁴⁸ *Dambita*, Decision No. 243 [2001] at paras. 26, 28 (stating that such elements specifically include written notification and the right to reply, and apply to both present and former Bank staff). Compare *Mwake*, Decision No. 318 [2004] at para. 34 (concluding that the placement of flags in the applicant’s personnel file was at most a *de minimis* due process violation, as the flags “simply disallowed him from obtaining a building pass or photo ID,” and as no evidence was presented to show that the flags had hindered the applicant’s performance of his duties).

¹⁴⁹ *C*, Decision No. 272 [2002] at paras. 16–17 (stating that while the “express terms” of a certain Bank policy did not “expressly exclud[e]” the Bank’s investigative findings “from public disclosure...[,] non-disclosure derives from a well-established rule of privilege, particularly in the legal system of the United States”). The Tribunal further stated in *C* that while “documents... deriv[ing] from a relationship between the Applicant and his private attorney... would certainly be excluded from disclosure,” the Bank’s disclosure to “a third party investigating the matter” of documents produced by the applicant’s interaction with “internal and external investigators” was not precluded and was “essentially... governed by principles of due process and fair treatment” pursuant to the Bank’s Principle of Staff Employment 2.1. *Ibid.*, at para. 17. See also *supra* notes 111–117 and accompanying text (discussing the Tribunal’s handling of privilege questions in *C*).

“rumors and allegations by questionable sources” does not comport with “the basic elements of due process”;¹⁵⁰ and (v) held that “even absent . . . a provision in the Staff Rules, . . . it is a prerequisite of due process” that an accused staff member be notified of an investigation outcome that clears him or her.¹⁵¹ The Tribunal has further established in disciplinary cases that it will go beyond an abuse of discretion standard and determine whether, *inter alia*, the requirements of due process have been observed.¹⁵²

B. Principles Concerning Jurisdiction

The Tribunal has employed a number of common adjudicatory principles and concepts in considering its jurisdiction and related matters. Some of these principles have been introduced or developed independently, or at least without direct reference to the Tribunal Statute. Such has been the case with collateral and other jurisdictional versions of estoppel,¹⁵³ and also with the notion of staleness and the

¹⁵⁰ *Koudogbo*, Decision No. 246 [2001] at paras. 43–44 (stating that even preliminary investigations should not be commenced on such a basis); *D*, Decision No. 304 [2003] at paras. 59–61 (concluding that while “legal technicalities” need not be applied in such matters, “at least a slight measure of corroboration of the accusation” should have been sought before the applicant’s e-mail was reviewed by investigating officials); *G*, Decision No. 340 [2005] at para. 78 (stating that a preliminary inquiry into alleged misconduct “should not be triggered merely because there have been isolated, anonymous, indirect, word-of-mouth tips,” which “must be considered critically”), citing *Koudogbo* at para. 43. The Tribunal in *G* observed that it had been troubled in *D* because in that case the Bank’s investigators “had questioned at least three IFC clients during the preliminary inquiry without taking into account whether the questioning of such outside individuals would spread rumors or gossip concerning the allegations,” and had, “after concluding the preliminary inquiry phase and determining that a formal investigation was necessary, sent a mission to Tanzania to interview IFC clients there, and only after those interviews were conducted was the subject given notice of the allegations of misconduct.” *G* at para. 80, citing generally *D*, which deals with these points at, e.g., paras. 63–64. Compare *Kwakwa*, Decision No. 300 [2003] at para. 28 (stating that “[w]hatever may be the law enforcement system, tips are unlikely to come from pillars of the community who have benevolent feelings toward the accused. Indeed, tipsters may be wholly disreputable. The issue was whether the ensuing investigation was fair, and whether the burden of proof was met”).

¹⁵¹ *McCall*, Decision No. 201 [1998] at paras. 29–31.

¹⁵² *Cissé*, Decision No. 242 [2001] at para. 26, citing *Carew*, Decision No. 142 [1995] at para. 32; *Mustafa*, Decision No. 207 [1999] at para. 17; *Planthara*, Decision No. 143 [1995] at para. 24. See also *infra* notes 278, 348 and accompanying text (providing two Tribunal formulations of the abuse of discretion standard).

¹⁵³ *Baartz (No. 2)*, Decision No. 258 [2001] at paras. 19, 31–32 (rejecting the Bank’s contention that the applicant’s claims were barred by the principles of *res judicata* and “collateral estoppel,” as the applicant had only casually referred in his previous application to the matter in question, and the Tribunal had not addressed the issue in its judgment); *Peprah*, Decision No. 275 [2002] at para. 37 (rejecting on the basis of the Tribunal’s “statutory obligations” the applicant’s claim that jurisdiction was provided by “estoppel” and the “Rules of Natural Justice and Fairness” given the allegedly poor reflection of his case on the Bank); *Robinson*, Decision No. 78 [1989] at paras. 18, 37–38, 40 (finding jurisdiction but not addressing the applicant’s assertion that the Bank should be barred by “the equitable doctrine of estoppel” from raising jurisdictional objections due to its alleged failure to provide the applicant with timely responses to her inquiries as to available remedies).

“continued wrong” theory of jurisdiction.¹⁵⁴ The Tribunal has in some cases used the Latin names of jurisdictional concepts that it addresses quite commonly, for example *dies a quo*¹⁵⁵ and jurisdiction *ratione materiae*, *ratione temporis* and *ratione personae*.¹⁵⁶ This choice of nomenclature does not, however, appear to have substantively altered the Tribunal’s doctrines in respect of such matters. (Likewise, the Tribunal has used certain Latin terms only when describing the pleadings of

¹⁵⁴ *Yoon (No. 5)*, Decision No. 329 [2004] at paras. 21–22 (rejecting the applicant’s re-introduction of “stale claims to support a ‘pattern of abuse’ or ‘continued wrong’ theory”), quoting *Malekpour*, Decision No. 320 [2004] at para. 21 (rejecting the applicant’s “effort to tack numerous alleged Bank acts and ‘decisions’ since the mid-1990s onto his complaint . . . by alleging that those old acts and ‘decisions’ constituted evidence of a ‘pattern’ of ‘abusive treatment and retaliation’ on the part of the Bank ultimately leading to the allegedly unfair evaluation”), which in turn quoted *Jalali*, Decision No. 148 [1996] at para. 35 (holding that the applicant “cannot now incorporate these earlier decisions by the Bank as part of a ‘pattern’ that can be indefinitely subjected to review by the Tribunal,” as the applicant had “[n]ot . . . raised them before and [had] not . . . taken them through administrative review”). See also *Mahmoudi (No. 4)*, Decision No. 259 [2001] at para. 9 (rejecting the “Applicant’s attempt to resuscitate a stale grievance”); *Mwake*, Decision No. 318 [2004] at para. 25 (finding that since the “relevant events giving rise to this funding dispute all occurred in the 1990s, . . . any resulting claims are now stale”). But see *O*, Decision No. 323 [2004] at paras. 23, 34–36 (establishing that a claim may be brought after a succession of attempts at mediation, and rejecting the Bank’s contention that “repeated efforts at mediation cannot resuscitate a stale claim and thereby establish jurisdiction”).

¹⁵⁵ The term *dies a quo* was first used to describe the date from which a filing deadline runs in *de Jong*, Decision No. 89 [1990] at paras. 32, 42, 44–45. It was briefly referenced in *Ramorasovina*, Decision No. 95 [1990] at para. 27 (quoting *de Jong* at para. 32), and after being used in *Setia*, Decision No. 134 [1993] at para. 29, disappeared from the Tribunal’s jurisprudence for eight years. It was resurrected in *Mahmoudi (No. 4)*, Decision No. 259 [2001] at para. 9 (holding that “[t]he Applicant’s attempt to use May 15, 2001, as a *dies a quo* must fail”), and has since been used in several judgments. Compare with this the anglicized wording used in *Scott*, Decision No. 4 [1981] at para. 12 (stating that in applying the Tribunal Statute’s jurisdictional provisions, “the Tribunal’s point of departure is to identify the event or decision that constitutes a cause of complaint in this case”); *van Gent*, Decision No. 11 [1982] at Decision (deciding to “fix the date of the present judgment as the starting day for the period of 90 days . . . within which the Applicant may exercise the option for the alternatives offered”).

¹⁵⁶ *Carter*, Decision No. 175 [1997] at paras. 9–17 (rejecting the Bank’s contention that the Tribunal lacked jurisdiction *ratione materiae* because non-renewal of the applicant’s contract did not constitute a “non-observance of the contract of employment or terms of appointment” under the terms of the Tribunal Statute), and at paras. 18–20 (upholding the Bank’s argument that the Tribunal lacked jurisdiction *ratione temporis* over claims relating to a certain decision, as the applicant had filed his application months after the time limit applicable to the decision); *Mwake*, Decision No. 318 [2004] at paras. 24, 32–33 (asserting pursuant to the Tribunal Statute that “[i]t is sufficient to provide jurisdiction *ratione personae* that the Applicant was a former staff member,” but stating that “for the Tribunal to have jurisdiction *ratione materiae*, the former staff member must be alleging non-observance of his contract of employment”), and at para. 29 (holding that “insofar as the target of the Applicant’s charges was a body outside the Bank, for example the University of Pennsylvania, the Tribunal has no jurisdiction *ratione personae* to hear the Applicant’s claim”); *McKinney (No. 2)*, Decision No. 194 [1998] at paras. 6–9 (rejecting the Bank’s challenge to the Tribunal’s jurisdiction *ratione temporis*, and holding that an application is deemed “filed” upon its dispatch by registered mail rather than upon its receipt by the Tribunal Secretariat), and at paras. 10–14 (rejecting the Bank’s challenge to the Bank’s jurisdiction *ratione materiae*, and holding that the Tribunal can review a challenge brought by an accusing staff member against the conduct of an investigation); *McKinney*, Decision No. 183 [1997] at paras. 13, 15–17 (noting the Tribunal’s earlier discussion in *Carter* as to its jurisdiction *ratione materiae* over non-renewal cases, and rejecting the Bank’s request that the application be held inadmissible for lack of such jurisdiction), quoting *Carter* at para. 15

parties, and again without any perceptible effect on its doctrines or habits of reasoning. These terms include *ab initio*,¹⁵⁷ *ultra vires*,¹⁵⁸ and *res* as used to refer collectively to the matters in dispute.)¹⁵⁹

The Tribunal has since 1987 described and addressed parties' contentions respecting a case's "ripeness,"¹⁶⁰ but began to use the term "ripe" in its own reasoning only in 2004.¹⁶¹ Likewise, the Tribunal in 1984 first noted a Bank assertion that the Tribunal reviews "*de novo*" those applications brought originally before

(establishing the applicability of the abuse of discretion standard to cases of non-renewal, without use of the term *ratione materiae*). *Accord Beacham*, Decision No. 229 [2000] at para. 25 (holding that a "mere allegation by the Applicant that her terms of appointment were violated by the Bank renders the Application admissible" under the Tribunal Statute), quoting *McKinney* at paras. 13, 17.

¹⁵⁷ *H*, Decision No. 342 [2005] at para. 21 (noting the applicant's contention that his mutually agreed separation "was void *ab initio* because he was coerced to agree to it"); *Rae (No. 2)*, Decision No. 132 [1993] at para. 42 (finding support for the Tribunal's requirement that prior remedies be exhausted from the applicant's seeking "to have the Tribunal assess *ab initio* the fairness of the... grade of [her] position... without the benefit of the kind of full evidentiary record, and prior informed review, that would have been assured had the case been presented in good time to the Job Grading Appeals Board").

¹⁵⁸ *Montasser*, Decision No. 156 [1997] at para. 16 (noting the applicant's contention that the use of a panel process to consider him for a new appointment was *ultra vires*); *Oraro*, Decision No. 341 [2005] at paras. 57, 82 (noting the applicant's claim that the extension of his performance-improvement plan was *ultra vires*); *Jalali*, Decision No. 148 [1996] at para. 25 (noting the Bank's contention that its career-management plans vis-à-vis the applicant were not unreasonable, contrary to earlier proposals or *ultra vires*).

¹⁵⁹ *O*, Decision No. 323 [2004] at para. 30, quoting *Chhabra*, Decision No. 139 [1994] at para. 46 (noting that the applicant "contends that the issue of past merit increases forms part of the *res* and that all these matters are 'one ball of the same wax'").

¹⁶⁰ *Agodo*, Decision No. 76 [1989] at para. 20 (noting but not otherwise addressing the Bank's contention that in twelve prior cases the applicants either lacked standing or "the Tribunal did not rule on the merits of their cases because the issues were not yet ripe for review"); *Lewin*, Decision No. 152 [1996] at para. 39 (quoting the Staff Association's *amicus curiae* brief's assertion that the question of the Bank's authority to reject a recommendation of the Appeals Committee was "ripe for exploration" by the Tribunal). In a number of related cases brought in 1987 by members of the Executive Committee of the Staff Association and other staff members, the Tribunal noted and upheld the Bank's contention that a complaint concerning the denial of a tax allowance was not "ripe for consideration" since no staff member had yet requested such a payment. See *Agodo*, Decision No. 41 [1987] at paras. 17, 30 (noting that "[a]nother way to state the defect in the Applicant's case is that it is premature. The Applicant does not claim that any adverse consequences have been actually suffered by him. Nor does he claim that he has selected any compensation package attendant upon termination of employment which would oblige him to waive any preexisting claims that he might otherwise have for review by the Tribunal. He is indeed asking for an advisory opinion on the validity of Rule 5.09 in the abstract, by virtue of the injury that it might possibly in the future cause to the Applicant or to other members of the staff").

¹⁶¹ *Malekpour*, Decision No. 320 [2004] at para. 24 (holding that one of the applicant's claims "is not yet ripe for review, the internal remedies not having been fully exhausted"); *Moss*, Decision No. 328 [2004] at para. 36 (holding one of the applicant's claims "not ripe for adjudication" as "this claim is currently before the Appeals Committee in a separate appeal"); *C (No. 2)*, Decision No. 312 [2004] at paras. 18–19 (noting the Bank's contention that a claim by the applicant was "not ripe for consideration and should be dismissed," and holding the claim inadmissible as "not [having been] properly brought" and having been presented "as a merely potential" claim). Compare *Agodo*, Decision No. 41 [1987] at para. 28 (stating that the Bank's non-adoption of a Staff Association proposal "manifest[ed] a refusal to countenance the assertion before the Tribunal of claims of a premature and generalized nature").

the Bank's Appeals Committee.¹⁶² In 1989, the Tribunal explicitly stated that it is not a “court of appeal from the Appeals Committee.”¹⁶³ Yet it was only in 2004 that the Tribunal expressly characterized its review as “*de novo*.”¹⁶⁴

The Tribunal's development of a doctrine of “mootness” has been strictly independent, and began in 1982 with the Tribunal's dismissal of an issue on this ground.¹⁶⁵ The Tribunal has since rejected the notion that a case is moot if it challenges an omission rather than an affirmative decision.¹⁶⁶ The Tribunal has likewise considered itself empowered to identify a violation committed by the Bank even though the underlying claim has become moot or the parties have agreed that the claims arising from the violation are moot.¹⁶⁷ The Tribunal has even been

¹⁶² *Mr. X*, Decision No. 16 [1984] at para. 31 (noting the Bank's contention that “[t]he request for rejection of the recommendations of the Appeals Committee is not in order since the case before the Tribunal is a *de novo* proceeding and not an appeal from the Appeals Committee”).

¹⁶³ *de Raet*, Decision No. 85 [1989] at para. 54 (stating further that the Tribunal does “not review the manner in which the Appeals Committee has dealt with a case before it,” as “proceedings before the Tribunal are entirely separate and independent despite the fact that recourse to the Appeals Committee is a condition precedent to the commencement of proceedings before the Tribunal”). The Tribunal in *de Raet* noted that the “report of the Committee is never regarded as ‘the basis’ upon which this Tribunal deals with cases and is in no way binding upon it. The Tribunal is the only body within the Bank that deals with complaints judicially and it does so only on the basis of the evidence before it.” *Ibid.*, at para. 54. See also *McKinney (No. 2)*, Decision No. 206 [1999] at para. 25 (stating that “[t]he interposing of the Appeals Committee's recommendations cannot deprive complaining staff members of the right to take to the Tribunal claims of breach of their contract of employment and to enjoy the benefits of judicial review provided for in the Bank's laws”); *Carter*, Decision No. 175 [1997] at para. 22 (stating that the Tribunal's task is “to pass judgment upon the Bank's decision and not to review the Report of the Appeals Committee,” and also that since “the Appeals Committee's task is purely advisory . . . , there is no such thing as an Appeals Committee's [*sic*] ‘decision’ which could be challenged before the Tribunal”), citing *Lewin*, Decision No. 152 [1996] at paras. 37, 43–45, and *Guya*, Decision No. 174 [1997] at para. 3.

¹⁶⁴ *Yoon (No. 4)*, Decision No. 317 [2004] at para. 22 (establishing that “[t]he Tribunal reviews applications *de novo*. Its function is not to assess the regularity of the process that leads to an Appeals Committee recommendation, because that recommendation is of no moment in the Tribunal's assessment of the legal merits of any application”).

¹⁶⁵ *Salle*, Decision No. 10 [1982] at para. 31 (finding that a disclosure by the Bank had rendered moot the applicant's request for access to his personnel file, with the result being that the Tribunal had no need to address the question of the Bank's duty to disclose personnel records to applicants before the Tribunal). The Tribunal has also applied mootness in the context of a third-party attempt at intervention. *Jassal*, Decision No. 100 [1991] at para. 66 (noting the Tribunal's successful efforts to satisfy “to the degree it deems proper and possible” the concerns of the would-be intervenor, and “without ruling on the issue of admissibility, decid[ing] that the application for intervention is in any event without object”).

¹⁶⁶ *Robinson*, Decision No. 78 [1989] at paras. 14, 39 (rejecting the Bank's assertion that the case was moot, on the grounds that the Tribunal Statute “does not limit [the Tribunal's] jurisdiction to the review of only affirmative decisions by the Bank,” and that it appeared “clear that claims of nonfeasance are as much within the Tribunal's jurisdiction as claims of improper affirmative decisions” since the Tribunal has the power to redress any injury caused by the Bank's improper failure to fulfill an obligation imposed by the applicant's contract of employment or terms of appointment).

¹⁶⁷ *Sengamalay*, Decision No. 254 [2001] at para. 43 (stating that “even though the challenge to the redundancy is moot, that does not mean that the facts surrounding the declaration and the withdrawal must be ignored by the Tribunal”); *Isaac*, Decision No. 274 [2002] at paras. 15–18 (holding that certain Bank failures had not been extinguished by the parties' agreement on the relevant claims' mootness, and

willing to rule on a claim despite the applicant's unilateral assertion that it is now moot.¹⁶⁸ The Tribunal has, however, also stated its expectation that moot claims or applications will be withdrawn,¹⁶⁹ and shown a willingness to stay proceedings where a case may be rendered moot by a Bank action.¹⁷⁰

The Tribunal has at times linked its independent elaboration of common jurisdictional principles with the terms of the Tribunal Statute. This has certainly been the case with standing, with respect to which the Tribunal in *Agodo*, Decision No. 41 [1987], simultaneously upheld the “established principle of adjudication” that only an injured party may bring a claim for redress,¹⁷¹ and invoked specific statutory requirements for personal standing.¹⁷² The Tribunal has in the same vein interpreted the concept of standing in light of the rejection of a draft Tribunal Statute put forward by the Staff Association.¹⁷³

finding that the Bank had abused its discretion through such failures); *Cissé*, Decision No. 242 [2001] at para. 33 (stating that while a certain question had become “to a large extent” moot in light of the Tribunal’s conclusion about the relevant facts, “the issue still merits consideration in view of its legal implications for the proper application of the Staff Rules”).

¹⁶⁸ *H*, Decision No. 342 [2005] at paras. 18–19, 33–40 (finding the applicant’s claims to be “less than clear,” and identifying and addressing as a “principal contention” a claim which the applicant had declared moot in his pleadings).

¹⁶⁹ *de Vuyst*, Decision No. 39 [1987] at para. 34 (stating that the applicant’s “request to declare null and void a non-existent decision has become moot and she should have discontinued her application”); *Isaac*, Decision No. 274 [2002] at paras. 12–13 (stating that as the applicant “in her recent statement regarding mootness continues vaguely to challenge ‘procedural irregularities,’ [it] is altogether inappropriate to the extent this might be meant to refer to the circumstances surrounding her redundancy”).

¹⁷⁰ *von Stauffenberg*, Decision No. 38 [1987] at paras. 2, 25–28, 49 (noting the Tribunal’s earlier grant of a stay of proceedings pending a decision of the Bank that could have rendered the case moot).

¹⁷¹ *Agodo*, Decision No. 41 [1987] at para. 22 (stating that “[i]t is, indeed, an established principle of adjudication that claims for redress are properly to be asserted only by the injured party, lest there be gratuitous and vexatious litigation of claims of dubious and speculative merit”). See also *K. Berg*, Decision No. 51 [1987] at para. 36 (holding that the applicant lacked standing to challenge the validity of a claims-release form he did not sign); *Lavelle*, Decision No. 301 [2003] at para. 8 (accepting the Bank’s objection to jurisdiction on the basis, *inter alia*, that “the Applicant was not a party to either [of two previous Tribunal judgments] and hence has no standing to request a revision of these judgments”); *The World Bank Staff Association*, Decision No. 40 [1987] at para. 81 (noting in passing that a “personal representative” of a staff member . . . rather clearly from its context invites limitation to representatives – such as conservators, guardians, and the like – who are acting of necessity on behalf of an incompetent or deceased individual”); *Mendaro*, Decision No. 26 [1985] at para. 34 (stating that letters from “non-parties . . . seeking to influence the outcome of a case pending before the Tribunal” constituted an “improper and unacceptable attempt to interfere with the mission of the Tribunal”).

¹⁷² *Alcantara*, Order 2002–1 [2002] at para. 8 (noting the Tribunal’s emphasis on the need for applicants to have “personal standing before the Tribunal”), quoting *Agodo*, Decision No. 41 [1987] at para. 22 (stating that under the Tribunal Statute, a “staff member must allege non-observance of the employment contract or terms of appointment ‘of such staff member,’ that is, of the staff member filing the application[, and that a]n application asserting a violation of some other staff member’s contract of employment is clearly inadmissible”).

¹⁷³ *Levin*, Decision No. 152 [1996] at para. 41 (holding that the “Staff Association has no standing to file an application with the Tribunal, whether on its own behalf as an institution or on behalf of staff members or as an intervening party”), citing *The World Bank Staff Association*, Decision No. 40 [1987] at paras. 83, 85, 87 (noting that the Staff Association’s proposed draft for the Tribunal Statute in November 1979,

A similarly blended approach can be discerned with respect to the doctrine of *res judicata*, concerning which the Tribunal has mixed an independent development¹⁷⁴ with invocations of the Tribunal Statute's Article XI (concerning the final and binding nature of Tribunal judgments) and Article XIII (concerning revision of Tribunal judgments).¹⁷⁵ Interestingly, *res judicata* provided the basis upon which the Tribunal first began to summarily dismiss applications for being "clearly irreceivable or devoid of all merit," even though the latter power had existed under the Tribunal Rules from the beginning.¹⁷⁶ Between 1981 and 1997, the

which would have granted such standing, was not ultimately adopted). See also *Agodo*, Decision No. 41 [1987] at para. 28 (stating that the non-adoption of the Staff Association proposal "manifest[ed] a refusal to countenance the assertion before the Tribunal of claims of a premature and generalized nature, and an intention to have the Tribunal rule only upon past administrative action affecting the rights of specific members of the staff"). In *The World Bank Staff Association* at para. 81, the Tribunal stated that under its Statute "the only person who may properly file an application is a member of the staff as defined in Article II, para. 3. That definition refers only to an individual currently or formerly employed, or a personal representative of such an individual, or a person claiming a pension payment. The Staff Association is not within any of these categories."

¹⁷⁴ See *B (No. 2)*, Decision No. 336 [2005] at para. 39 (stating that "two conditions must be met for the application of *res judicata*, these being that the parties are the same in both cases and that the substance of the claim is essentially the same in both applications"), interpreting *C (No. 2)*, Decision No. 312 [2004] at para. 10 (noting the Tribunal's "long line of judgments dealing with the question of *res judicata* and the need to avoid subsequent applications arising from the same grievance"). See also *Yoon (No. 5)*, Decision No. 329 [2004] at paras. 16–17, 20 (barring certain of the applicant's claims on the basis of *res judicata*), and at para. 24 (stating that "the broad language employed by the Applicant does not give her license to bring in claims that are dismissed by the present judgment, or were dismissed in *Yoon (No. 2)*, *Yoon (No. 3)* and *Yoon (No. 4)*," and emphasizing "in the strongest terms that it will not tolerate any attempt to re-litigate claims which it has already dismissed"); *Madabushi*, Order No. 2002–10 [2002] at para. 4 (holding that the applicant's "plea clearly restates [his] original plea entered in his application of July 11, 2001 regarding his non-conversion and, as this plea was dismissed, it is now irreceivable under the principle of *res judicata*"); *Baartz (No. 2)*, Decision No. 258 [2001] at paras. 31–32 (rejecting the Bank's *res judicata* objection to jurisdiction, on the ground that the Tribunal did not address the issue raised in a previous judgment on the merits, and that the "claims made and decided" in *Baartz*, Decision No. 198 [1998], "are different from the ones before the Tribunal in the present case").

¹⁷⁵ *A. Berg (No. 2)*, Decision No. 87 [1990] at para. 15 (stating that the principle of *res judicata* is confirmed by Article XI(1) of the Tribunal Statute, which declares that the Tribunal's judgments shall be "final and without appeal"), quoting *Van Gent (No. 2)*, Decision No. 13 [1983] at para. 21 (stating that a dissatisfied party may not return to the Tribunal for a "second round of litigation"); *Moses (No. 2)*, Decision No. 138 [1994] at paras. 9, 13 (noting the applicant's agreement with the Bank that a prior judgment could not be relitigated partly due to the application of *res judicata* and partly due to Article XI of the Tribunal Statute); *Agodo*, Decision No. 76 [1989] at paras. 17–18 (noting but not specifically ruling upon the parties' opposing contentions with respect to *res judicata*, as stated in the terms of Article XI); *Nkojo (No. 2)*, Decision No. 170 [1997] at para. 13 (noting the Bank's jurisdictional objections based on Article XI and *res judicata*). The Tribunal in *Nkojo (No. 2)* determined that the applicant could not meet the test laid out by Article XIII of the Tribunal Statute to justify a revision of an earlier judgment. *Nkojo (No. 2)* at paras. 22–23.

¹⁷⁶ Tribunal Rules at Rule 7(11) (permitting a stay of proceedings until the next Tribunal session if "it appears that an application is clearly irreceivable or devoid of all merit," so that it can then be determined whether summary dismissal is warranted on such a basis).

Tribunal either rejected summary dismissal requests by the Bank,¹⁷⁷ or held the applications so contested inadmissible for common jurisdictional deficiencies.¹⁷⁸ The Tribunal began its modern practice of summary dismissal in 1997 when it issued an Order summarily dismissing an application on the ground that it raised claims indistinguishable from those earlier decided on the merits.¹⁷⁹ The Tribunal did not, however, employ the term “*res judicata*” in this noteworthy instance.

The Tribunal’s engagement with the common juridical notion of “exceptional circumstances” illustrates the interplay between the terms of the Tribunal Statute and the Tribunal’s independent development of the concept. Article II(2) of the Tribunal Statute¹⁸⁰ has always permitted the Tribunal to hear an application where jurisdictional requirements have not been properly met but in which “exceptional circumstances” exist.¹⁸¹ The Tribunal has added to this provision a requirement of good faith (itself a common adjudicatory standard),¹⁸² and in 1983 applied the notion of “exceptional circumstances” so as to permit a reasonable accommodation in place of a strict application of quasi-substantive Bank rules.¹⁸³ The Tribunal

¹⁷⁷ *de Merode*, Decision No. 1 [1981] at para. 3 (stating that the “legal issues involved in this question [of alleged non-observance by the Bank of the applicants’ contracts of employment and terms of appointment] are basic and important. They do not lend themselves to summary treatment”). See also *Agodo*, Decision No. 76 [1989] at paras. 1, 17–19 (rejecting the Bank’s request for a stay pending summary dismissal review, and noting but not ruling upon the parties’ relevant contentions, which primarily pertained to the applicability of *res judicata*).

¹⁷⁸ *Azhar*, Decision No. 104 [1991] at para. 15 (holding the application inadmissible because the applicant was not a staff member at the time the challenged decision was taken, and had not alleged any illegality or violation of a contract of employment). The Tribunal in *Azhar* noted that its preliminary consideration of jurisdiction had been preceded by the Bank’s request for summary dismissal, and summarized the Bank’s argument as being that the Tribunal “should summarily dismiss the application as clearly irreceivable and devoid of all merit,” but did not address whether its finding of inadmissibility equated to a summary dismissal. *Ibid.*, at paras. 1, 12.

¹⁷⁹ *Witter*, Order of 11 April 1997 (finding the application to be “devoid of all merit as it is essentially repetitive of, and indistinguishable from, the [applicant’s] earlier application,” which had resulted in a judgment on the merits), citing *Addy*, Decision No. 146 [1995] (this being the applicant’s original case, with the applicant’s name having changed in the interim).

¹⁸⁰ See Tribunal Statute at Article II(2) (establishing that “[n]o . . . application shall be admissible, except under exceptional circumstances as decided by the Tribunal,” unless internal remedies have been exhausted and the application has been filed within 120 days of the date of the challenged decision).

¹⁸¹ This jurisdictional discretion was first exercised in 1984, when the Tribunal permitted a late application to be heard on the merits. *Mr. X*, Decision No. 16 [1984] at para. 33 (holding that a late application was not inadmissible under Article II(2) of the Tribunal Statute in light of the short delay caused by the applicant’s change of attorneys and the Bank’s lack of objection). See also *supra* note 84 (noting the Tribunal’s rejection of an applicant’s contention that his non-U.S. citizenship constituted exceptional circumstances for jurisdictional purposes).

¹⁸² *Mustafa*, Decision No. 195 [1998] at para. 8 (establishing that in the absence of any suggestion of bad faith on the applicant’s part, “the occurrence of exceptional circumstances at any point during the [filing] period will serve to extend that period by the duration of the exceptional circumstances”). See also *infra* notes 220–224 and accompanying text for a discussion of “good faith” doctrines.

¹⁸³ *Gregorio*, Decision No. 14 [1983] at para. 58 (finding that the relevant staff rule envisioned the sort of exceptional circumstances present in the case, and granting the applicant additional time in which to

did, however, notably decline to establish an exceptional-circumstances doctrine with respect to applications brought under the Tribunal Statute's Article XVII, which pertains to applications dealing with causes arising between 1 January 1979 and 1 July 1980, and which does not contain an express "exceptional circumstances" provision.¹⁸⁴

C. Principles Concerning the Tribunal's Procedures

The Tribunal's incorporation of two common judicial practices into its procedures provides a further illustration of the Tribunal's bifurcated approach to developing outside principles. While the Tribunal's handling of *amicus curiae* filings is founded partly on the Tribunal Rules, its use of *in camera* proceedings has followed an entirely independent path of development.

With respect to *amicus* filings, the Tribunal Rules have always allowed "any person or entity with a substantial interest in the outcome of a case to participate as a friend-of-the-court."¹⁸⁵ The Tribunal has, however, taken a broadly accepting view of straightforward advocacy filings by the Staff Association, and has used the Latin term in referring to such documents.¹⁸⁶ The Tribunal has also in some cases

comply with a requirement that she provide to the Bank evidence of her intent to exercise a right of resettlement).

¹⁸⁴ See current (1 August 2001) version of Tribunal Statute, Article XVII (stating that "[n]orwithstanding Article II, paragraph 2 of the present Statute, 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"); *Scott*, Decision No. 4 [1981] at para. 11 (noting that admissibility requirements "under Article II and under Article XVII are not identical," and that "the two provisions deal with different situations. The distinguishing factor is the time when the cause of complaint giving rise to the application has taken place. If the cause of complaint is one that arose before July 1, 1980, it is Article XVII of the Statute that should be applied. Article II applies only to applications concerning causes of complaint that arise after the entry into force of the Statute on July 1, 1980"); *Kavoukas*, Decision No. 3 [1981] at paras. 28–32 (rejecting on the facts the applicants' claim that "exceptional circumstances" existed in the case, "[w]ithout pronouncing on the question whether this Tribunal has a discretionary power to consider applications filed beyond the date fixed by" the Tribunal Statute). *Accord Mendaro*, Decision No. 26 [1985] at para. 31; *Novak*, Decision No. 8 [1982] at paras. 15, 18 (holding further that while the Tribunal is permitted under the Tribunal Rules to modify "time limits for the pleadings and other proceedings which occur after an application has already been filed in time," the requirements for an application's timely filing had been "set forth in the Statute of the Tribunal [at Article XVII] and cannot be modified at the will of the Tribunal").

¹⁸⁵ See Tribunal Rule 25(2) in the current, 2002 version of the Rules, and Rule 23(2) of the 1980 and 1998 versions; *Rodriguez-Sawyer*, Decision No. 330 [2005] at para. 9 (noting that the Tribunal had contacted and received comments from a former wife of a deceased staff member in a case involving the distribution of a death benefit). The third-party in *Rodriguez-Sawyer* was directly affected by the outcome of the case, as she was the designated beneficiary of the benefit. *Ibid.*, at para. 6.

¹⁸⁶ The Staff Association is the only third-party to have filed such briefs during the period under review, although other third-parties are presumably free to present similar filings. See *The World Bank Staff Association*, Decision No. 40 [1987] at paras. 88–89 (treating the Staff Association's "pleas and supporting memoranda" as "requests for permission to participate as friend of the court and as *amicus curiae* briefs," and stating that "[i]n those cases properly brought before the Tribunal by staff members alleging

allowed the incorporation of *amicus* and quasi-*amicus* filings into an individual's pleadings,¹⁸⁷ but has not yet addressed the issue of cost claims by *amicus* filers.¹⁸⁸

The Tribunal has since 1997 noted its use of *in camera* proceedings to guard confidentiality, and has employed the Latin term in referring to such.¹⁸⁹ Unlike *amicus* filings, such proceedings have no basis in the Tribunal Statute or Rules. The Bank has nevertheless complied with orders to produce documents for the Tribunal's *in camera* review with respect to issues of performance evaluation,¹⁹⁰ sexual harassment¹⁹¹ and misconduct.¹⁹² While in *Conthe* the terms of reference

non-observance of their contracts of employment or terms of appointment, the Staff Association could, for example, usefully file briefs in support of the staff member's contentions regarding such matters as the Respondent's alleged failure to consult properly with the Staff Association or the allegedly arbitrary and unreasonable methods chosen by the Respondent to implement the reorganization plan"). See also *Lewin*, Decision No. 152 [1996] at para. 42 (stating that "[b]y reason of the Staff Association's general concern for the well being of the staff, there is no doubt that the Staff Association has 'a substantial interest in the outcome of the case' on this particular issue [*i.e.* the Bank's authority to reject a recommendation of the Appeals Committee]). In drawing the attention of the Tribunal to the importance of the issue and in informing the Tribunal of its views on the matter, the Staff Association has not exceeded the role of an *amicus curiae*").

¹⁸⁷ *Agodo*, Decision No. 41 [1987] at para. 2 (noting that the Tribunal President had permitted "cross-referencing for legal arguments and annexes" between the Staff Association memorandum and the applications brought by ten Staff Association Executive Committee members and four other staff members), and *Agodo*, Decision No. 76 [1989] at para. 1 (noting that the Tribunal President had allowed that "the memorandum filed by the Staff Association be incorporated in the application" of Mr. Agodo). The cases judged under the lead case of *Agodo* were brought in connection with the Staff Association action decided under *The World Bank Staff Association*, Decision No. 40 [1987] (see *supra* note 186). See also *Elder*, Decision No. 306 [2003] at paras. 27–29 (noting and rejecting on the facts a Staff Association Alternate Delegate's allegation that a Bank Vice President had admitted in a Staff Association meeting to the Bank's having "applied its discretion in making exceptions to the past pension credit rules in twenty to thirty cases, [so] that the Bank had taken individual circumstances into consideration in some cases instead of mechanically applying the relevant rules"). The allegation had been made in an affidavit produced by the Associate Delegate and submitted via the applicant. *Elder* at para. 27. The Tribunal thereafter solicited and obtained from the Bank's Vice President of Human Resources an affidavit which responded to the Alternate Delegate's allegation. *Ibid.*, at paras. 27–28.

¹⁸⁸ *Agodo*, Decision No. 76 [1989] at para. 22 (noting but not ruling upon the Bank's contention that "[e]xtensive participation in litigation does not transform an *amicus curiae* into a party, and the Staff Association cannot become entitled to the rights of a party and assert a claim for costs which is a plea for relief. . . . The Tribunal has broad discretion in the award of costs and attorneys' fees to parties, but there exists no authority under the Tribunal Statute for an award of costs and fees to a non-party").

¹⁸⁹ The first Tribunal judgment to refer to *in camera* proceedings was *van Vugt*, Decision No. 179 [1997] at para. 17 (noting the Tribunal's examination of certain Bank documents *in camera* for reasons of confidentiality, and refusing the applicant's request for access to such items on the ground that "no new elements of the case [are] to be found in them").

¹⁹⁰ *Yoon (No. 5)*, Decision No. 332 [2005] at paras. 52, 59 (considering performance feedback produced by the Bank after it requested such from individual "peer reviewers" for the purposes of the Tribunal's subsequent *in camera* review).

¹⁹¹ *Rendall-Speranza*, Decision No. 197 [1998] at paras. 41, 60–61 (noting that the Tribunal had ordered the Bank to produce for its *in camera* review 2,300 pages of interviews in a sexual harassment investigation, and its denial of the applicant's request for transcripts of interviews of non-parties).

¹⁹² *C*, Decision No. 268 [2002] at para. 22 (requiring for the Tribunal's *in camera* review the production

given to the Tribunal's independent investigator limited the Tribunal's ability to review *in camera* the interview transcripts that resulted from his work,¹⁹³ the Tribunal has not been so bound with respect to the work of the Bank's Appeals Committee (an internal Bank organ). In *Lopez*, Decision No. 147 [1996], the Tribunal ruled that it could review testimony heard before the Appeals Committee, even though the Committee's hearings are required by the staff rules to be held by that body *in camera*.¹⁹⁴ The Tribunal now routinely receives Appeals Committee hearing transcripts from the parties, most usually the Bank.

D. Principles Concerning the Adjudication of Substantive Matters

The Tribunal's use of "general principles" in establishing substantive rights and doctrines has been broad and significant. At the most basic level, the Tribunal has in two cases invoked "the rule of law" in support of its substantive holdings.¹⁹⁵ While the Tribunal has rejected or set aside arguments based on the public policy or alleged public policy of a member state,¹⁹⁶ it has expressly recognized an intra-Bank

of documents earlier provided to national public authorities as part of a misconduct investigation); *C*, Decision No. 272 [2002] at para. 9 (noting the Bank's compliance with the Tribunal's order in Decision No. 268); *Kwakwa*, Decision No. 300 [2003] at paras. 1, 9, 39 (considering documents obtained by the Bank in a misconduct investigation, and which the Tribunal had called upon the Bank to produce for its *in camera* review). See also *McKinney (No. 2)*, Decision No. 206 [1999] at para. 31 (finding after the Tribunal's *in camera* review of an Ethics Office investigation report that the investigation had been properly conducted and that the report contained no inconsistencies with other evidence that had been produced).

¹⁹³ *Conthe*, Decision No. 271 [2002] at para. 42 (noting that the terms of reference given to the Tribunal's independent investigator, Sir Robert Y. Jennings, Q.C., stipulated that the "interviews will be transcribed for the sole purpose of assisting the investigator in preparing his report. The Tribunal may examine the transcripts *in camera* if the President of the Tribunal determines that such examination is absolutely necessary").

¹⁹⁴ *Lopez*, Decision No. 147 [1996] at para. 58 (stating that the staff rules' requirement of *in camera* Appeals Committee proceedings "refers to the privacy of the meetings of the Appeals Committee and to the general confidentiality of the proceedings before it but does not forbid the invocation of such testimony before this Tribunal, if relevant, particularly having in mind that proceedings before the Tribunal are also not made public").

¹⁹⁵ *Degiacomi*, Decision No. 213 [1999] at para. 33 (stating that it had been "on several occasions declared by the Tribunal [that] the discretionary power of management is not, and cannot under the rule of law be, a limitless arbitrary power"); *Yoon (No. 2)*, Decision No. 248 [2001] at para. 37 (stating that "[t]he basic elements of due process and the rule of law mandate that a staff member be clearly notified of the exact and correct Staff Rule under which his or her employment is being terminated").

¹⁹⁶ *Mould*, Decision No. 210 [1999] at paras. 12, 23–24 (finding inapposite the applicant's contention that "as the Bank's pension plan claims the benefit of U.S. law, it should follow the dominant public policy expressed in U.S. law," as the Tribunal found that the plan "is exempt from various U.S. laws which protect employee benefits... [and that] the International Organizations Immunities Act, the Foreign Sovereign Immunities Act and other legislation provide the Bank immunity from U.S. statutory provisions"); *Arellano*, Decision No. 98 [1990] at para. 22 (noting but not otherwise addressing the applicant's contention that a rule on rehiring staff with certain medical conditions "would constitute illegal employment discrimination and is contrary to public policy under both the D.C. Human Rights Act and the [U.S.] Federal Rehabilitation Act of 1973"); *Smith*, Decision No. 158 [1997] at para. 21 (noting the

“public policy” in a few cases.¹⁹⁷ More recently, in *Bernstein*, Decision No. 309 [2004], the Tribunal expanded the notion of public policy in gender-discrimination matters by holding that “under recognized international standards, absence from work due to pregnancy and childbirth should not result in loss of continuity of employment, seniority or status.”¹⁹⁸

The Tribunal has applied more concrete principles to a miscellany of substantive matters. The Tribunal has expressly adopted the *de minimis* standard,¹⁹⁹ identified certain of its statements as *obiter dicta*,²⁰⁰ and expanded its application of the

applicant’s contention that the Bank violated public policy by firing him and making it impossible for him to pay back taxes owed to the U.S., but holding that the applicant’s failure to use a tax allowance exclusively for the payment of taxes was serious misconduct, as “staff members entitled to tax reimbursement should honestly fulfil their duties to the tax authorities in the United States. This is a matter in which the Bank has a legitimate interest and is not a matter exclusively between the staff member and the tax authorities”). See also *supra* note 80 (providing an alternative interpretation of *Smith* as a harmonization of the parties’ respective public and Bank policy arguments).

¹⁹⁷ *Kirk*, Decision No. 29 [1986] at paras. 14, 23, 36 (noting the disagreement of the parties over the “public policy” aspect of claims-release provisions in a settlement, and holding that “[r]ather than conflicting with public policy, the Tribunal’s enforcement of voluntary settlement or release provisions . . . advances public policy”); *Mr. Y*, Decision No. 32 [1985] at para. 26 (stating that “[i]t would unduly interfere with the constructive and efficient resolution of . . . claims if the Bank could not negotiate – in exchange for concessions on its part – for a return promise from the staff member not to press his or her claim further. If such an agreed settlement were not binding upon the affected staff member, there would be little incentive for the Bank to enter into compromise arrangements, and there might instead be an inducement to be unyielding and to defend each claim through the process of administrative and judicial review. It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements”); *Yousufzi*, Decision No. 151 [1996] at para. 26 (stating that time limits have a “wide purpose,” including the reasonable organization of judicial proceedings and the prevention of unnecessary delays in dispute settlement, and so “are of a mandatory nature and are enforced by courts in the public interest”). Compare *Kepper*, Decision No. 149 [1996] at para. 13 (noting but not otherwise addressing the unsuccessful applicant’s contention that his contract of employment “would have had to be interpreted in favor of the Applicant and in the light of public policy”).

¹⁹⁸ *Bernstein*, Decision No. 309 [2004] at para. 30.

¹⁹⁹ *Mwake*, Decision No. 318 [2004] at para. 34 (rejecting a due process complaint due to the alleged violation being “at most *de minimis*”); *Hayati*, Decision No. 228 [2000] at para. 18 (finding that “[i]t could not have been the intention of the Workers’ Compensation Program to cover *de minimis* injuries particularly where the injury is cumulative in nature and intermingled with other injuries”). See also *Suntharalingam*, Decision No. 6 [1981] at paras. 25, 35–39 (noting the Bank’s contention that the absence of written explanations for below-norm merit salary increases was a “*de minimis* omission,” and holding both that “no fundamental procedural right” had been violated, and that the “deficiencies complained of do not suffice to justify the rescission or the remanding of the decision contested”).

²⁰⁰ *I*, Decision No. 343 [2005] at paras. 13–14 (stating that the Bank had cited *Walden*, Decision No. 167 [1997] at para. 22 concerning the Tribunal’s lack of jurisdiction over the findings of an Ethics Officer, “without mentioning that the passage it quotes is *obiter dictum*”); *Conthe*, Decision No. 271 [2002] at para. 181 (characterizing as “obviously *obiter dictum*” the Tribunal’s comments in the preceding paragraph, in which the Tribunal “urge[d] the Bank to study the issue [of a certain type of performance evaluation] as a matter of some priority . . .,” as this “is an area which calls for clarification to ensure that the Bank’s practices do not give rise to justified grievances”). Cf. *Buyten*, Decision No. 72 [1988] at paras. 32, 65 (noting the applicant’s characterization of the Tribunal’s finding in *Harrison* concerning costs as a “dictum,” but holding that due to the dismissal of the instant application, the issue of costs did not arise), citing generally *Harrison*, Decision No. 53 [1987].

common principle that “ignorance of the law is no excuse” beyond jurisdictional questions²⁰¹ to substantive ones,²⁰² and more specifically in rejecting defenses to misconduct charges.²⁰³ The Tribunal has also employed canons of construction,²⁰⁴ distinguished between *de jure* and *de facto* conditions,²⁰⁵ and discounted the legal weight of hearsay in misconduct investigations.²⁰⁶

The Tribunal’s extensive development of the notion of equity reflects its practice of elaborating complex principles on a case-by-case basis rather than through purely abstract or academic reasoning.²⁰⁷ The Bank’s Principles of Staff Employ-

²⁰¹ See *Novak*, Decision No. 8 [1982] at paras. 16–17 (rejecting the applicant’s contention that “ignorance of the Statute and of the Tribunal should justify extending the time limit” for filing his application).

²⁰² See *Courtney (No. 3)*, Decision No. 154 [1996] at para. 32 (noting the Tribunal’s repeated restatements of the principle that ignorance of the law is no excuse, and stating that the Bank “is not under an obligation to inform each staff member of his rights and duties under the Staff Rules which are published and disseminated precisely with the object of ensuring that all staff are kept informed”), citing *inter alia Novak*, Decision No. 8 [1982] at para. 19 (finding that the applicant was put on notice as to the Tribunal’s “likely creation” when the Bank “explicitly referred to that fact in a pleading filed in October 1979 in a lawsuit brought against it by the Applicant in a United States court”).

²⁰³ *Planthara*, Decision No. 143 [1995] at para. 35 (stating that “[i]n any event ignorance of the law is not an acceptable excuse for misconduct”); *Kwakwa*, Decision No. 300 [2003] at para. 21 (stating that “ignorance of the Staff Rules provides no excuse” in misconduct matters); *Koudogbo*, Decision No. 246 [2001] at para. 31 (finding in a misconduct case that even if the applicant “had no knowledge of such [procurement] provisions, her failure to observe them would not be justified, as ignorance of the law is no excuse”).

²⁰⁴ *Mould*, Decision No. 210 [1999] at para. 21 (rejecting an interpretation by the applicant that would have “surviving spouse” be read to mean “spouse or former spouse,” as such would be “against accepted canons of construction”); *Crevier*, Decision No. 205 [1999] at para. 27 (finding that the Bank may, “[c]onsistent with recognized canons of construction,” lawfully qualify an entitlement to severance pay on restrictions reasonably tested against the entitlement’s objectives and “not otherwise inconsistent with the terms of the Staff Rules”); *Wahie*, Decision No. 93 [1990] at para. 37 (finding “recognized principle[s] of interpretation” to be that the different parts of a legal text should be read together, and that any reading of a text that results in making one part thereof superfluous or merely repetitive should not be adopted); *Novak*, Decision No. 8 [1982] at para. 17 (rejecting a construction of the Tribunal Statute that would render its established time limits “almost ineffective”); *accord Setia*, Decision No. 134 [1993] at paras. 25–26; *Sharpston*, Decision No. 251 [2001] at para. 53 (holding that even the construction of a letter’s terms most favorable to the applicant would not be sufficient to establish the Tribunal’s jurisdiction); *The World Bank Staff Association*, Decision No. 40 [1987] at para. 82 (finding that the terms of the Tribunal Statute as to the kind of claim permitted to be heard, as well as the kind of person entitled to file a claim, “reinforces further a construction” of the Tribunal Statute that would disallow the Bank’s Staff Association from having standing before the Tribunal).

²⁰⁵ *Moses (No. 2)*, Decision No. 138 [1994] at para. 28 (holding that while the applicant had been *de jure* on special leave, he was entitled to compensation because *de facto* he had at that time been working “like any other staff member”).

²⁰⁶ *D*, Decision No. 304 [2003] at paras. 59–60 (finding the Bank’s investigation of the applicant’s Bank e-mail to have been precipitate and lacking corroboration, as the accusations were “by that time... triple-hearsay, which [the accusing staff member] had heard in a setting in which the accusations hardly appeared to be pertinent or imparted in a serious and focused manner”). See also *G*, Decision No. 340 [2005] at para. 74 (rejecting the applicant’s contention that the Bank’s investigations unit had proceeded “on the basis of hearsay or speculation; [as] the documentary evidence alone made it inconceivable that the case would simply have been dropped”).

²⁰⁷ See *de Merode*, Decision No. 1 [1981] at para. 43 (stating that the line between “equitable and inequitable” is impossible to “describe in abstract terms”).

ment and early policy statements introduced certain requirements for equitable treatment which the Tribunal has over the years molded to deal with specific issues of job grading,²⁰⁸ compensation²⁰⁹ and tax allowances.²¹⁰ The Tribunal

²⁰⁸ Principle of Staff Employment 6.2(b) requires the Bank to establish and maintain a systematic job evaluation and grading system “to provide a sound and equitable basis for the remuneration of staff members.” *Sebastian* (No. 2), Decision No. 57 [1988] at paras. 21, 23 (holding that Principle 6.2(b) does not require a certain system or mechanical rules and evaluation criteria, but rather allows “a degree of discretion on the part of the individuals in charge of the evaluation”). Principle 5.1(f) further requires reasonable alleviation of the adverse effects caused by a low grading or regrading of a given position. See *Gabriel*, Decision No. 106 [1992] at para. 37 (rejecting the applicant’s claim to “permanent salary grandfathering,” as such a “complete elimination of hardships as distinct from their alleviation” would be “inequitable” to other staff at the applicant’s grade as well as to those at the higher-paid grade doing higher-level work). In 1988, a number of cases before the Tribunal dealt with questions about job-grading. In several similar cases, the Tribunal noted the applicants’ contention that their treatment had been contrary to established Bank grandfathering practices so as to raise “issues of equity vis-à-vis other staff,” and concluded that a downgrading of the applicants for organizational rather than misconduct reasons “reasonably entitled [them] to more equitable treatment, as appears to be contemplated by Staff Principle 5(1)f.” *Pinto*, Decision No. 56 [1988] at paras. 21, 40; *Gavidia*, Decision No. 66 [1988] at para. 26; *Chakra*, Decision No. 70 [1988] at paras. 12–13, 21, 29–30; *Cardenas*, Decision No. 71 [1988] at paras. 13–14, 22, 30–31; *A. Berg*, Decision No. 73 [1988] at para. 43. The Tribunal in *Pinto* and in another set of similar 1988 cases applied the abuse of discretion standard where inequity was alleged in the description of positions for job-grading purposes. *Pinto* at para. 36. With respect to the latter set, see *Apkarian*, Decision No. 58 [1988] at paras. 9, 11, 17, 44, 47–51 (finding no abuse of discretion or violation of a contractual entitlement, but awarding damages for the intangible, “interim, economic or other injury” sustained by the applicant prior to the Bank’s correction of its mistakes).

²⁰⁹ Principle of Staff Employment 6.1 requires the Bank to “provide levels of compensation that are equitable internally,” and the Bank’s launch of the policy of parallelism in 1972 had as a purpose the “perceived equity from the point of view of staff” of compensation levels at the Bank and the IMF. *von Stauffenberg*, Decision No. 38 [1987] at para. 54 (quoting the memorandum of the Bank President to the Executive Directors dated 2 December 1972, which initiated the policy); *Kepper*, Decision No. 149 [1996] at paras. 9, 21, 27 (rejecting the applicant’s contention that the Bank’s chosen system of post allowances treated mission staff inequitably in comparison to Headquarters staff under “Principle 6”). See also *supra* notes 57–76 and accompanying text (discussing the Bank’s policy of parallelism). The Tribunal in its first case noted the concepts of “internal equity” and “external equity” discussed in the Kafka Report on Bank staff compensation. *de Merode*, Decision No. 1 [1981] at para. 67 (defining “internal equity” as being that “between United States nationals and expatriate staff,” and “external equity” as that between “United States nationals employed by the organizations and those employed outside”). In *Nunberg*, the Tribunal found that the factually supported “inference” that gender inequity had affected the applicant’s salary shifted the burden of proof onto the Bank to prove that the raise given to the applicant was fair and reasonable. *Nunberg*, Decision No. 245 [2001] at paras. 44–46 (stating that a failure by the Bank to fulfill its obligation under Principle of Staff Employment 6.1 does not require a “specific intent” to do so, but that a “submission that studies show that equitable starting salaries are connected with inequitable salary progression” does not constitute evidence specific to the applicant’s situation). The Tribunal nevertheless ultimately held that the Bank had not violated “fairness and equity” with respect to the raise, or in refusing to provide material for a regression analysis of salaries. *Ibid.*, at paras. 55–57 (noting also that the adjustment of an “individual salary on the basis of an individual regression analysis without looking carefully at other relevant factors, as indicated by expert opinions, might disturb the overall salary pattern in a particular area of the Bank or disrupt the Bank’s program of making corrections to “reposition” salaries in different areas or teams and thus compound the problem of salary inequity”).

²¹⁰ *de Merode*, Decision No. 1 [1981] at para. 50 (noting the 16 March 1946 resolution of the Bank’s Board of Governors that “[a]ppropriate measures for the elimination or equalization of the burden of

has also independently applied notions of equity in its assessment of damages,²¹¹ implicitly estopped the Bank “on equitable grounds” from making certain arguments,²¹² and speculated about the legal consequences of potentially inequitable applications of the Bank’s staff rules.²¹³ Like the ICJ, however, the Tribunal has never asserted jurisdiction *ex aequo et bono*,²¹⁴ nor has it expressly accepted other

national taxes upon salaries and allowances paid by (the Bank) are indispensable to the achievement of equity among its members and equality among its personnel”). The Tribunal has held in such respect that “the fact that some staff members do not pay medicare/social security taxes and that those who do are not fully compensated does not constitute inequitable treatment.” *Richardson*, Decision No. 208 [1999] at paras. 11, 14, 18, 26, 28 (rejecting the applicant’s claims for his desired method of tax-assessment calculations and for an increased tax allowance to cover the amount due on his pension due to the size of his severance package); *de Merode* at para. 55 (quoting a 5 December 1946 memorandum by the Bank’s General Counsel and the Bank’s Treasurer, stating that “in many cases it would be highly inequitable to allocate all [possible] deductions to the employee’s salary,” and that such an allocation determination by the Bank would be a considerable task that would involve a level of scrutiny annoying to staff members), and at para. 85 (upholding a change in the Bank’s calculation of tax allowances that aimed to promote salary equity by disallowing U.S. staff members from increasing their pay by taking advantage of relevant U.S. tax code provisions). The Tribunal in *de Merode* also noted the Kafka Report’s identification of another type of equity, this being that established “among United States nationals at different income levels and with or without outside income.” *de Merode* at para. 67. The Tribunal stated that for tax reimbursement a balance is required between sometimes contradictory factors such as equity, simplicity, cost, ease of administration, comprehensibility and confidentiality. *Ibid.*, at paras. 76, 87.

²¹¹ The Tribunal has in a number of cases since 1982 awarded “equitably assessed” damages to applicants who have suffered an injury for which rescission or specific performance is not an appropriate remedy. *Skandera*, Decision No. 2 [1981] at para. 29; *Buranavanichkit*, Decision No. 7 [1982] at para. 30; *Broemser*, Decision No. 27 [1985] at para. 40; *A. Berg*, Decision No. 73 [1988] at para. 41; *Arellano*, Decision No. 98 [1990] at para. 44; *K. Berg*, Decision No. 99 [1990] at para. 39; *Sjamsubabri*, Decision No. 145 [1995] at para. 21 and Decision (awarding “equitably” assessed compensation for “distress” caused by “significantly flawed” Bank disciplinary proceedings); *Addy*, Decision No. 146 [1995] at paras. 20, 29, 45 and Decision (noting also the applicant’s contention that she should be treated “in law and in equity” in accordance with the original version of the applicable staff rule, and the Bank’s contention that the exemption of the applicant could not be justified “on equity grounds or otherwise”); *McNeill*, Decision No. 157 [1997] at para. 63; *Barnes*, Decision No. 176 [1997] at para. 31. The Tribunal in *Addy* defined such damages as “reasonable compensation.” *Addy* at para. 51. The Tribunal’s award in *Addy* resembled those made for “intangible” or “moral” injuries, while in *Skandera*, *Broemser*, *A. Berg*, *McNeill* and *Barnes* this connection was made explicit. See *Skandera* at para. 29; *Broemser* at para. 40; *A. Berg* at para. 41; *McNeill* at para. 63; *Barnes* at para. 31; *infra* notes 255–265 and accompanying text (discussing the Tribunal’s development of doctrines concerning intangible and moral injuries).

²¹² *Moses*, Decision No. 115 [1992] at paras. 20, 37, 41–44 (implicitly upholding the applicant’s contention that the Bank should be “estopped on equitable grounds” from arguing that the applicant was not entitled to certain benefits, as the Bank had itself benefited from the applicant’s service in a benefits-eligible role). See also *supra* note 153, *infra* note 246 and accompanying text (in both places discussing the Tribunal’s doctrines concerning estoppel).

²¹³ *Rodriguez-Sawyer*, Decision No. 330 [2005] at para. 28 (noting that the Bank can conceivably abuse its discretion by disregarding events that “might bear upon the equity of a strict application” of the Bank’s pension plan rule concerning beneficiary designations for death benefits).

²¹⁴ *Yousufzi*, Decision No. 151 [1996] at paras. 15, 24–31 (noting the applicant’s assertion that “[s]ince the Tribunal applies international law then by analogy the Tribunal also applies equity in its jurisprudence because equity is part of international law,” and dismissing the applicant’s claim as untimely under the Tribunal Statute and the Tribunal’s case law). See also the ICJ Statute at Article 38(2) (establishing that the Court’s sources of law listed in Article 38(1) “shall not prejudice the power of the Court to decide a

demands for the “equitable” exercise of jurisdiction.²¹⁵ The Tribunal has, moreover, upheld the application of general rules despite inequities allegedly imposed thereby on individuals.²¹⁶ The Tribunal has tempered the bright-line harshness of this approach by, *inter alia*, adopting “legitimate expectation” and “fairness” doctrines that derive directly from the English concept of equity.²¹⁷

The installation of “reasonability” in the Tribunal’s doctrinal canon was achieved in a somewhat less formal manner than was the notion of equity. Instead of drawing the concept from express Bank rules, the Tribunal adopted it in its first case, *de Merode*,²¹⁸ after noting that the Bank had in its oral arguments acknowledged as binding not only this concept but also the principles of non-retroactivity and

case *ex aequo et bono*, if the parties agree thereto”). The ICJ has never decided a case in such a manner. Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th ed., 1997) at p. 55. Were it to do so, it would be liberated from the requirement that it apply existing rules of international law, and could then proceed to decide the case per the dictates of justice as it perceived them to be. See *ibid.*, at pp. 55, 57 (stating that “when a tribunal is authorized to decide *ex aequo et bono*, the tribunal is allowed to substitute its own ideas of equity for any and every rule of international law”).

²¹⁵ The Tribunal in *Yousufzi* found the “equitable” doctrine of laches to be irrelevant when a time limit has been established by the Tribunal Statute. *Yousufzi*, Decision No. 151 [1996] at paras. 14–16, 19–21, 24, 27 (noting the applicant’s contention that the Tribunal applies equity as part of its application of international law, and also the Bank’s contention that “[n]either the Statute of the Tribunal nor its jurisprudence distinguish between legal and equitable remedies”). See also *Kavoukas*, Decision No. 3 [1981] at para. 7 (noting but not otherwise addressing the observation of the Chairman of the Bank’s Staff Association that the applicants “had decided to file an application with the Administrative Tribunal appealing to its equity jurisdiction, because pursuant to Article III of the Statute: ‘In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the Tribunal’”); *Wahie*, Decision No. 93 [1990] at para. 20 (noting but not otherwise expressly addressing the applicant’s contention that “[w]here a rule of law is lacking in clarity the Tribunal can decide the issue on equitable grounds, inasmuch as an interpretation in favor of the Applicant would not impose a burden on the Bank or damage its interest in any significant manner”). Compare *Robinson*, Decision No. 78 [1989] at paras. 18, 36–38 (noting the applicant’s contention that the “equitable doctrine of estoppel” barred the Bank from raising jurisdictional objections, and holding, in light of the uncertainty caused by the Bank’s statements to the applicant, that “administrative review procedures . . . should be applied flexibly in accordance with their terms and their spirit”). See also *supra* notes 25–26, 180–184, *infra* note 223 and accompanying text (in all places discussing the Tribunal’s jurisdictional doctrine of exceptional circumstances, which involves the discretionary acceptance of applications where statutory admissibility requirements have not been met).

²¹⁶ *Elder*, Decision No. 306 [2003] at paras. 14–19 (holding that “the Bank is quite evidently not under an obligation to develop individualized exceptions for each staff member . . . [as doing so could] be administratively unmanageable and might end up being unfair in itself”), citing *Lavelle*, Decision No. 301 [2003] at para. 14.

²¹⁷ See *infra* notes 343–349 and accompanying text (discussing the Tribunal’s adoption of the “legitimate expectation” standard originated in the English courts).

²¹⁸ *de Merode*, Decision No. 1 [1981] at para. 47 (stating that Bank amendments to the conditions of employment “must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff”). The Tribunal in *de Merode* also noted that it is impossible “in abstract terms . . . to discern the line between what is reasonable and unreasonable,” and that such distinctions turn upon the “circumstances of the particular case, and ultimately upon the possibility of recourse to impartial determination.” *Ibid.*, at para. 43. For a later application of the reasonability standard, see, e.g., *Arefeen*, Decision No. 244 [2001] at paras. 15, 31 (noting the Bank’s policy that “[f]ormal judgment on whether conduct constitutes sexual harassment will be based on a determination of the impact of the behavior on a reasonable person of the same gender as the victim in the multicultural environment of the Bank Group,” and

non-discrimination.²¹⁹ The Tribunal’s simultaneous establishment of the Bank’s obligation of “good faith” was, by contrast, wholly independent.²²⁰ The Tribunal has since *de Merode* equated “bad faith” to improper motivation falling under the abuse of discretion standard,²²¹ but has refused to ascribe bad faith to Bank management on an *a priori* basis.²²² The Tribunal likewise presumes an applicant’s good faith when it extends filing deadlines in exceptional circumstances,²²³ and has stated that an applicant’s good-faith reliance on a Bank official’s apparently authorized act will bind the institution.²²⁴

concluding that a “reasonable female in the multicultural environment of the Bank Group” would have viewed the events in question as “offensive and intimidating”).

²¹⁹ *de Merode*, Decision No. 1 [1981] at para. 34 (noting that the Bank’s “power of unilateral amendment [of the conditions of employment], in Respondent’s own view as elaborated during the oral pleadings, is 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”). See also *Mendaro*, Decision No. 26 [1985] at para. 20, quoting *de Merode* at paras. 25, 34, 47 (stating that the Tribunal had included among those “certain general principles of law” forming part of the conditions of employment the “principle of non-discrimination,” pursuant to which the Bank “must not discriminate in an unjustifiable manner between individuals or groups within the staff”).

²²⁰ *de Merode*, Decision No. 1 [1981] at para. 47 (stating that changes to non-essential conditions of employment “must be made in good faith and must not be prompted by improper motives”).

²²¹ *Skandera*, Decision No. 2 [1981] at paras. 15, 26 (noting the applicant’s allegation that he had been terminated “upon such motives as hatred, malice, prejudice and bad faith,” and holding that the termination was not “improperly motivated”); *Peprah (No. 2)*, Decision No. 310 [2004] at para. 31 (finding that the applicant had failed to show clear evidence of a “lack of good faith on the part of his Manager”), quoting *Lysy*, Decision No. 211 [1999] at para. 7 (stating that a “finding of improper motivation cannot be made without clear evidence”); *Desthuis-Francis*, Decision No. 315 [2004] at para. 26 (noting that the Tribunal might agree with a contention that certain comments were “given in good faith, that is to say, were not improperly motivated”); *Lopez*, Decision No. 147 [1996] at paras. 17, 28–29, 36 (noting both parties’ respective contentions of good and bad faith on the part of the Bank, and applying the abuse of discretion standard, which as restated included a test for improper motivation but not one for bad faith); *Taborga*, Decision No. 297 [2003] at para. 25 (enumerating improper motivation as a species of “abuse of discretion”). See also *Lavelle*, Decision No. 301 [2003] at paras. 24–26, quoting and adopting the reasoning of *Kruse v. Johnson*, [1898] 2 QB 91, [1895–1899] All ER Rep 105 (Lord Russell’s opinion, which stated that a court would not defer to a regulation that “disclosed bad faith”); *G*, Decision No. 340 [2005] at para. 73 (stating that “[w]hat is required of [the Bank’s investigative body] is not that every inquiry be a perfect model of efficiency, but that it operates in good faith without infringing individual rights”); *infra* notes 278, 348 and accompanying text (providing two Tribunal formulations of the abuse of discretion standard).

²²² *Conthe*, Decision No. 271 [2002] at para. 127 (finding the applicant’s contentions unpersuasive because they were found to be “based on a series of speculative hypotheses” requiring an *a priori* determination of management’s bad faith). See also *Malekpour*, Decision No. 322 [2004] at para. 20 (stating that a presumption of competence and good faith properly attaches to a “responsible” manager’s payment of “due consideration to a judgment expressed by a predecessor” concerning a staff member’s performance).

²²³ *Mustafa*, Decision No. 195 [1998] at para. 8 (stating that “[a]bsent any suggestion by the Bank of bad faith on the part of an Applicant, the occurrence of exceptional circumstances . . . will serve to extend [the filing] period by the duration of the exceptional circumstances”).

²²⁴ *Bigman*, Decision No. 209 [1999] at para. 10 (establishing that “the act of a Bank official who is acting within his or her apparent authority will be attributable to the institution, particularly if this act was relied upon in good faith”). See also *infra* notes 241–249 and accompanying text (discussing the Tribunal’s development of reliance doctrines).

Unlike the Tribunal's straightforward adoption of equity and reasonability standards, the Tribunal's acceptance of the "burden of proof" concept has been much more gradual. In its second case, *Skandera*, the Tribunal noted the lack of *prima facie* evidence to support a claim,²²⁵ but that same year dismissed the "so-called problem of burden of proof" in adopting an "all available evidence" approach.²²⁶ Issues dealing with the placement of the burden of proof did not arise again in the judgments for eight years, until the Tribunal in *de Raet*, Decision No. 85 [1989], explicitly recognized that the burden of proof shifts from an applicant to the Bank only after the applicant has made out a *prima facie* case.²²⁷ The Tribunal has since *de Raet* established burdens of proof in more specialized contexts relating to substantive rights²²⁸ and, quite recently, jurisdiction.²²⁹ The

²²⁵ *Skandera*, Decision No. 2 [1981] at para. 32 (rejecting a claim by the applicant for its being "vague in nature and . . . unsupported even by prima facie evidence of a relationship between the Bank's alleged failure and the alleged impairment of the Applicant's quality of life").

²²⁶ *Salle*, Decision No. 10 [1982] at paras. 34–35, 59 (explaining that "[i]t is incumbent upon both the Applicant and the Respondent to provide the Tribunal with all the available evidence in order to allow it to pass judgment upon the Applicant's allegations of non-observance of his conditions of employment; and it is for the Tribunal to determine, in the light of the evidence made available to it, whether the Applicant's conditions of employment have, or have not, been observed"). *Accord von Stauffenberg*, Decision No. 38 [1987] at para. 97, recalling *Salle* at para. 35.

²²⁷ *de Raet*, Decision No. 85 [1989] at para. 57 (stating that "it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power – not, that is, until an Applicant has made out a *prima facie* case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner"); *Bertrand*, Decision No. 81 [1989] at para. 20 (stating that in light of the "detailed allegations and factual support presented by the Applicant in his pleas," his "case should properly be treated as one in which the burden of proof moved to the Respondent to show that Bank management acted fairly to the Applicant, rather than resting upon the Applicant the burden to show that the Bank acted unfairly"). The Tribunal in *Bertrand* further noted that "[i]n the typical case in which the Applicant points to specific reasons for casting serious doubt upon the fairness of the Bank's selection process, it is for the Bank to dissipate this doubt by providing the facts that are readily available to it in order to show no more than that its discretion has been fairly exercised." *Ibid.* See also *Harrison (No. 2)*, Decision No. 91 [1990] at para. 30 (finding it appropriate to place on the Bank a burden to demonstrate that the applicant would not have been given serious consideration for assignment to a comparable position, as "every probability" existed that she would have been given such consideration had the Bank not wrongfully failed to consider her properly at an earlier round).

²²⁸ *Rodriguez-Sawyer*, Decision No. 330 [2005] at para. 28 (stating that the burden of proving an inequitably strict application of death-benefit rules "would lie with the person attacking the written beneficiary designation, both because of that person's knowledge of and access to such unusual facts and because of the strong presumption of regularity accorded such a designation"); *Nunberg*, Decision No. 245 [2001] at paras. 45–46 (finding in light of the evidentiarily supported inference that the Bank did not meet its obligation to provide equitable compensation to the applicant, that "a burden falls on the Bank to show that its decision to grant an increase of 5% was a fair and reasonable response to the salary inequity . . . , and that it was in accordance with the principles of fairness and impartiality"). See also *Prescott*, Decision No. 253 [2001] at para. 27 (stating that a directive by the President of the Bank "in effect" placed a burden on the Bank to show "particular reasons" why a qualifying staff member's appointment had not been regularized pursuant to the staff rules).

²²⁹ *Malekpour*, Decision No. 320 [2004] at para. 22 (stating that a burden lies on the applicant to show that exceptional circumstances justify relief from, or suspension of, the duty to exhaust internal remedies

Tribunal has come to burden the Bank with proving misconduct in disciplinary cases,²³⁰ but has rejected a call by the Staff Association to burden the Bank with proving an absence of abuse of discretion when it rejects recommendations made by the Appeals Committee.²³¹ This latter ruling is akin to the Tribunal's refusal in *Conthe* to ascribe bad faith to the Bank's management on an *a priori* basis.²³²

The Tribunal's handling of contract and quasi-contract issues has been so greatly facilitated by its importation of domestic legal principles that its approach should be instantly recognizable to a municipal lawyer, or at least to one working in an Anglo-Saxon legal system. The Tribunal has applied the concepts of consideration,²³³ a "meeting of the minds" involving an offer and acceptance,²³⁴ "appar-

before applying to the Tribunal); *B (No. 2)*, Decision No. 336 [2005] at para. 25 (stating that a determination of a jurisdictional staff rule's applicability to alleged substantive rights is "relevant . . . because an applicant must at the very least show *prima facie* that he is entitled to a certain right," and stating that the relevant period began to run from the date on which the "identifiable right" arose), citing *Taborga (No. 2)*, Decision No. 324 [2004] at paras. 21–24 (stating that the applicant's claimed pension rights "are not abstract or theoretical rights, even less so speculative. This means, in the instant case, that the Applicant must show, at least *prima facie*, that he is entitled to a certain right that has not been paid or credited, and claim it within the three-year time period").

²³⁰ In *Carew*, Decision No. 142 [1995] at paras. 18, 26, 31–32, the Tribunal noted the parties' disagreement as to whether the applicant bore the burden of proof in a disciplinary investigation, and stated that in disciplinary cases it will determine *inter alia* the existence of facts and whether they amount to misconduct. The Tribunal did not directly address the issue of whether a burden lies upon the applicant in such cases, but its analysis focused on each of the applicant's claims and factual assertions. More recently, however, the Tribunal in *Dambita*, Decision No. 243 [2001] at para. 21, established that "a conclusion of misconduct has to be proven" and that "the burden of proof of misconduct is on the Respondent." The Tribunal held that the Bank had failed to "establish the existence of facts substantiating misconduct by the Applicant." *Ibid.* See also *Kwakwa*, Decision No. 300 [2003] at para. 28 (rejecting the applicant's complaint that the investigation against him had been based on tips, as the "issue was whether the ensuing investigation was fair, and whether the burden of proof was met").

²³¹ *Lewin*, Decision No. 152 [1996] at paras. 39, 43, 45 (concluding that there is "nothing wrong *per se* in the Bank's decision not to accept the recommendations of the Appeals Committee," and stating that the Staff Association's position "is clearly at variance with the role and mission of both the Appeals Committee and the Tribunal" since "the Appeals Committee is a body whose mission is to assist management – and, in the last resort, the Tribunal – in reaching proper solutions"), citing *K. Berg*, Decision No. 51 [1987] at para. 30, and *Samuel-Thambiab*, Decision No. 133 [1993] at para. 37.

²³² See *supra* note 222 and accompanying text.

²³³ *Kirk*, Decision No. 29 [1986] at paras. 38–39 (rejecting the applicant's claim that his agreement to a release of claims in return for certain benefits was involuntary and not supported by consideration or a "mutual agreement," as the benefits conferred were not obligatory but rather within the Bank's discretion, and as these had been granted in exchange for the applicant's promise with respect to the claims' release).

²³⁴ *Justin*, Decision No. 15 [1984] at paras. 13, 22, 24–26, 32–35 (interpreting the applicant's claim of a "meeting of the minds" as an allegation that a contract of employment existed under the terms of the Tribunal Statute's jurisdictional provisions, and holding that no such meeting of the minds occurred with respect to one alleged offer deemed "too contingent in nature" by the Tribunal, but that such a meeting of the minds did occur with respect to another Bank communication to the applicant). The Tribunal in *Justin* further stated that "[o]ne such principle [of contract law] is that there is a binding contract if both parties manifest an intention to contract and if all the essential terms have been settled, and if any additional steps to be taken are merely formalities that require no further agreement." *Ibid.*, at para. 27. The

ent authority” to contract,²³⁵ unjust enrichment,²³⁶ and the reducibility of an award where the applicant has aggravated the injury he or she has suffered due to the breach of a contract.²³⁷ Since 1985, the Tribunal has recognized duress as a factor that can render a settlement of claims ineffective,²³⁸ and in *Harrison*, Decision No. 53 [1987], it distinguished between valid, “fair value” releases of Bank liability achieved through “personalized negotiation,” and invalid releases produced in an “absence of freedom,” with the settlement value determined “by an inflexible and general rule covering potentially all staff members . . . , regardless

Tribunal stated that when the applicant “completed [the relevant] forms and timely returned them to that Department, the Applicant sufficiently manifested his assent to the terms of the Respondent’s offer, such that there was a meeting of the minds and the formation of a contract.” *Ibid.*, at para. 35. See also *ibid.*, at paras. 25, 34 (stating that one of the applicant’s communications to the Bank “should . . . properly be regarded as an ‘invitation to deal’”).

²³⁵ *Ibid.*, at para. 30 (finding that a personnel manual statement “clearly suggests that even before a letter of appointment is issued by the Personnel Department, the operational department has at least apparent authority to make a ‘commitment for employment’”). The Tribunal in *Justin* held that the applicant was reasonable in believing from the circumstances that the relevant official had the authority to commit the Bank to an employment contract. *Ibid.*, at para. 31. See also *Bigman*, Decision No. 209 [1999] at para. 10 (stating that “[i]t is a well-established principle of many legal systems, as well as of international law, that the act of an official who is acting within the scope of his or her actual or apparent authority will be attributable to the relevant entity”). The Tribunal in *Bigman* further stated that “the act of a Bank official who is acting within his or her apparent authority will be attributable to the institution, particularly if this act was relied upon in good faith.” *Ibid.*, at paras. 10, 20 (attributing an employment offer to the Bank on the ground that it “constituted a legally valid promise as it was made by an official with at least the apparent authority to do so”).

²³⁶ *Chhabra* (No. 3), Decision No. 200 [1998] at para. 18 (holding the applicant’s allegation of “unjust enrichment” by the Bank to be untenable since she was being compensated at a level falling within the job-grade range she considered appropriate, albeit “in the peculiar condition of ‘personal basis’”). See also *Moses*, Decision No. 115 [1992] at paras. 37–44 (holding that the applicant’s work “for the benefit of the Bank with its authorization” had to be paid for by the Bank since the applicant had worked “for all intents and purposes” as a regular staff member while on “special leave,” without this condition’s “rights and obligations” having been applied to him by the Bank).

²³⁷ *Teitel*, Decision No. 180 [1997] at para. 34 (finding that the applicant’s “unreasonable failure to consult with the Bank contributed to a considerable extent to the increased damages he claims,” and stating that “[i]t is a well-known principle of law that a person who has been the victim of a breach of contract may not thereafter take steps that aggravate his injury and thereby unreasonably enhance the quantum of his damages”).

²³⁸ *Mr. Y*, Decision No. 32 [1985] at paras. 32–33 (agreeing with the applicant’s conclusion that “no release or settlement of claims should be given effect if concluded under duress,” but disagreeing that the circumstances “constituted duress in any relevant sense” as “the kind of balancing of priorities that inheres in every settlement . . . cannot properly be regarded as duress”). *Accord Pruthi*, Decision No. 55 [1988] at paras. 26–27 (finding that “there is no evidence of duress that might affect the validity of Applicant’s acceptance of the *ex gratia* payment as a full and final settlement of his claim”). See also *Chhabra*, Decision No. 139 [1994] at para. 56 (concluding that the Bank had made the applicant choose between separation on mutually agreed terms and “demotion to an unreasonably low level,” so that the applicant had “no real choice at all”). Larger due process and fairness concerns were linked to duress in *Chhabra*, where the Tribunal found that despite there being “no evidence or even allegation of duress,” the Bank had mismanaged the Applicant’s career because its probationary offer of a certain position had been “unrealistic” and did not allow for a “fair trial.” *Ibid.*, at paras. 56–57.

of the special circumstances of their Bank position or service, or their personal situation.”²³⁹

Like the Tribunal’s approach to burdens of proof,²⁴⁰ the Tribunal’s adoption of the quasi-contract notion of reliance was halting but ultimately wholehearted. In *de Merode*, the Tribunal stated flatly that “no particular importance can be attached to . . . subjective considerations,”²⁴¹ and that the permissibility of a unilateral Bank change to the conditions of employment could not depend on an affected staff member’s “state of mind,” “intentions,” “expectations,” “reliance” or “motivating factors” in accepting or continuing in the Bank’s employment.²⁴² The Tribunal reasoned that there are “two subjective intentions in any contract,” the staff member’s and the Bank’s, and that both are to be given equal weight.²⁴³ The Tribunal further noted that subjective considerations are increasingly difficult to identify over time, and that individualized conditions of employment could lead to a “diversity of governing rules where uniformity is necessary.”²⁴⁴

This lack of sympathy for claims based on purely subjective perceptions has not changed since *de Merode*.²⁴⁵ The Tribunal has, however, made clear that where

²³⁹ *Harrison*, Decision No. 53 [1987] at paras. 24–29. The Tribunal proceeded to strike down the relevant authorizing staff rule, invalidate releases signed under this rule, and allow those who had signed such releases to pursue their cases “through the usual channels.” *Ibid.*, at paras. 28–29.

²⁴⁰ See *supra* notes 225–232 and accompanying text.

²⁴¹ *de Merode*, Decision No. 1 [1981] at para. 109.

²⁴² *Ibid.*, at para. 41 (holding that “staff members are entitled to the observance of their conditions of employment as they may exist from time to time,” and that staff members “should expect” that their terms of employment “may be altered in the future to take account of changing circumstances”); *ibid.*, at para. 29 (holding that Bank rules and policies apply to a staff member due to their “objective existence as part of the legal system to which the staff member becomes subject by entering into a contract with the organization,” and that the determination of applicable law “cannot depend on subjective considerations of a highly individual character which would result, if one were to adopt them, in the application to staff members of different rules of law according to the expectations of each one at the moment he ‘accepted’ his appointment”).

²⁴³ *Ibid.*, at para. 41.

²⁴⁴ *Ibid. Accord Baartz (No. 2)*, Decision No. 265 [2002] at para. 25 (holding that the Bank’s Pension Benefits Administration Committee could not depart from the existing terms of the Staff Retirement Plan “in order to satisfy the mere subjective expectations of the Applicant”); *Novak*, Decision No. 8 [1982] at para. 17 (refusing to construe the time limits imposed by the Tribunal Statute so as to “render the time limits of the Statute almost ineffective, particularly when the extension urged by the Applicant would turn upon as elusive a matter as his subjective state of mind”).

²⁴⁵ *Yoon (No. 4)*, Decision No. 317 [2004] at para. 38 (stating that “[t]he Applicant apparently so *perceives* [that she has been treated with indignity]. But the Bank cannot be held to a duty to ensure that staff members *feel* satisfied and respected. The Tribunal’s inquiry is whether objective standards have been violated”) (emphasis in original); *Moret*, Decision No. 113 [1992] at para. 40 (holding that the Bank was not obliged to meet the applicant’s “purely subjective expectation,” as it lacked evidentiary support); *Naab*, Decision No. 173 [1997] at para. 20 (holding that the applicant’s “subjective understanding based on a misreading of the Staff Rules and a false assumption of the existence of a ‘right to return to the Bank’” did not oblige the Bank to refrain from amending its staff rules).

actual reliance has occurred, promissory estoppel may apply²⁴⁶ and “surrounding circumstances” may be interpreted as an implied yet binding promise of contract renewal.²⁴⁷ The Tribunal has also recently, in *Lavelle*, Decision No. 301 [2003], embraced a concept of “fairness” that is based on the English doctrine of “legitimate expectation” and holds the Bank to a changed policy’s original terms where there has been justifiable reliance on those terms.²⁴⁸ The degree of the Tribunal’s doctrinal evolution from *de Merode* to *Lavelle* is indicated by the Tribunal’s statement in *Bernstein* that “[w]hile general policies might be changed by the Bank, a prior expectation must be respected when created by the acts of management itself.”²⁴⁹

²⁴⁶ *Conthe*, Decision No. 271 [2002] at para. 150 (rejecting the applicant’s invocation of the “principle of estoppel” and “vested rights,” as “[t]here can be no estoppel absent an attempt to demonstrate actual detrimental reliance”); *Bigman*, Decision No. 209 [1999] at para. 10 (establishing that “the act of a Bank official who is acting within his or her apparent authority will be attributable to the institution, particularly if this act was relied upon in good faith”); *Harrison (No. 2)*, Decision No. 91 [1990] at paras. 27–28 (rejecting the Bank’s contention that a staff rule was unclear, as “the Bank’s legal department construed it in the Applicant’s favor at the time, and she and her supervisors within the Bank acted in reliance upon this construction at the time of her separation from the Bank”); *Justin*, Decision No. 15 [1984] at paras. 14–15, 19 (noting but not expressly applying the parties’ arguments concerning “promissory estoppel” with respect to an alleged promise of employment by the Bank upon which the applicant had relied).

²⁴⁷ See *Rittner*, Decision No. 339 [2005] at para. 33 (interpreting the Tribunal’s statement in *Carter* that “there may be something in the surrounding circumstances which creates a right to the renewal of a [fixed-term] appointment” as including “in principle” an implied promise “to extend or renew on the part of the Bank and, on the other hand, reliance thereon or acceptance of such promise on the part of the staff member”), quoting *Carter*, Decision No. 175 [1997] at para. 13, and citing *Degiacomi*, Decision No. 213 [1999] at para. 28 (finding that nothing in the circumstances of the case “may be reasonably understood as a promise of renewal, and no conduct of the Bank can be validly invoked as creating any kind of expectation in the mind of the Applicant that his contract would be renewed upon its date of expiry”), and *Visser*, Decision No. 217 [2000] at para. 35 (finding no “inference of a promise or assurance giving rise to any entitlement on [the applicant’s] part”). See also *McKinney*, Decision No. 187 [1998] at paras. 14–15 (finding no circumstances to support the applicant’s claim of a “legal expectation” of reappointment based on “several decisions by other administrative tribunals” in which conduct by the organization had given rise to a “reasonable [and actionable] expectation of continued employment”). See also *infra* note 313 and accompanying text (noting the Tribunal’s observation of its sister tribunals’ uniform jurisprudence recognizing the possibility of such circumstances).

²⁴⁸ *Lavelle*, Decision No. 301 [2003] at para. 26 (establishing that “legitimate expectation,” which is the standard for “fairness” beyond contractual rights, “assumes that those who invoke its operation oppose a change in policy and had at the very least ‘relied, and have been justified in relying, on a current policy or an extant promise.’ . . . This latter circumstance would be why the policy could not later be changed”), quoting *R v. North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850, 871–872 at para. 65. See also *infra* notes 343–349 and accompanying text (discussing the Tribunal’s adoption of the “legitimate expectation” standard).

²⁴⁹ *Bernstein*, Decision No. 309 [2004] at para. 32 (finding that both the applicant and relevant Bank officials were unaware of the relevant rule and had thus expected, perceived and believed that the applicant’s return to Bank service would not be subject to time limitations). The Tribunal noted, however, that the case was factually “extraordinary.” *Ibid.*, at paras. 23, 32.

The Tribunal's formulation of awards, while broadly governed by the Tribunal Statute²⁵⁰ and facilitated by the Tribunal Rules,²⁵¹ has always applied common

²⁵⁰ For applications filed prior to 1 August 2001, Article XII(1) of the Tribunal Statute provided for the remedies of rescission and specific performance, with compensation presented as something of an alternative to be selected by the respondent institution's president. See Article XII(1) (version in force prior to 1 August 2001) (stating that for "well-founded" applications, the Tribunal "shall order the rescission of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the respondent institution, within thirty days of the notification of the judgment, decide, in the interest of such respondent, that the applicant shall be compensated without further action being taken in the case"). The amount to be paid by the Bank was to be determined by the Tribunal in its judgment, up to a maximum of three years' net salary or, in exceptional and justified cases, any level of "higher compensation." *Ibid.* In such exceptional cases, a "statement of the specific reason for such an order" was required of the Tribunal. *Ibid.* Article XII(3), meanwhile, bound (and still binds) the respondent institution to pay the compensation fixed by the Tribunal "[i]n all applicable cases." The amended Article XII(1), which came into force for applications filed on or after 1 August 2001, removes from the respondent institution's president the choice of restitution to be accorded. In its place, the Article gives the Tribunal the power to decide whether the respondent institution has "reasonably determined that such rescission or specific performance would not be practicable or in the institution's interest. In that event, the Tribunal shall, instead, order such institution to pay restitution in the amount that is reasonably necessary to compensate the applicant for the actual damages suffered." Besides lifting the ceiling on damages, the new wording on compensation in Article XII(1) largely parallels that of the Tribunal's prior judgments. See *Zwaga*, Decision No. 225 [2000] at para. 59, following *McNeill*, Decision No. 157 [1997] at para. 62 (stating that "[d]amages are designed to provide the Applicant with adequate reparation of injury actually suffered"). The mutual exclusivity which the new Statute text seems to force between rescission or specific performance on the one hand and compensatory awards on the other has not led in practice to a strict division between these two types of remedies. The Tribunal has instead continued to proceed on the basis that rescission or specific performance may be incapable of remedying (and thus precluding compensation for) each and every injury resulting from a violation, so that both forms of relief may be provided to remedy different facets of a wrong. See *Prasad*, Decision No. 338 [2005] at para. 69 and Decision (awarding, in addition to rescission and specific performance, compensation "due for the aggregate of irregularities and infringements of due process rights... [that] inevitably resulted in upsetting the Applicant's career in the Bank and [which] constitute an abuse of discretion that the Tribunal cannot condone"). Compare the similar wording used in the much earlier case of *Gyamfi*, Decision No. 28 [1986] at para. 48 and Decision (ordering rescission, specific performance (with an alternative of compensation) and, "in any event," an additional award of compensation for "unnecessary and considerable damage as a result of [the applicant's] improper treatment").

²⁵¹ Although Tribunal Rule 7(3) has always required that the pleas section of an application "indicate [and specify] all the measures and decisions which the applicant is requesting the Tribunal to order or take," the Tribunal has never been bound by its Statute or Rules to formulate or limit its award according to an applicant's stated requests. The Statute's remedy provisions also cannot be considered exclusive since Tribunal Rules 7(3)(f) and 29 have always regulated requests for costs despite the lack of provision for such awards in the Tribunal Statute. The Tribunal has made awards for costs since *Buranavanichkit*, Decision No. 7 [1982] at Decision (awarding the successful applicant \$1,250 for legal fees), and while it did not explain its award in that case, it has at times since then stated its reasons when making such an award. See, e.g., *Herman*, Decision No. 223 [2000] at para. 22 (holding that the Tribunal would award costs to the applicant "[i]n view of the importance of the legal issues raised by the Applicant in his pleadings, and the usefulness of those pleadings for the determination and interpretation of rules of general application"); *Zwaga*, Decision No. 225 [2000] at para. 59 (awarding compensation and costs for "procedural irregularities" other than those for which the applicant had already received compensation from the Bank). In three similar cases in 2002, the Tribunal awarded partial attorneys' fees to the unsuccessful applicants because the failure of the Bank's Pension Benefits Administration Committee to properly

concepts of injury and restitution.²⁵² These include unjust enrichment²⁵³ and equity,²⁵⁴ but far more widely applied than these has been the concept of “intangible” injury. Since its very first award, in *Skandera*, the Tribunal has used this term to identify compensable wrongs in many (albeit not all)²⁵⁵ cases in which the applicant’s due process or procedural rights have been infringed,²⁵⁶ the Bank has failed to fulfill a promise,²⁵⁷ or rescission and specific performance are unwarranted or inappropriate remedies.²⁵⁸ The Tribunal has also awarded damages for

provide them with its reasons for denying their claims “put [them] in the position of having to speculate about the issues and arguments to present,” and may well have “inconvenienced and subjected [the applicants and their attorneys] to unusual uncertainty and expense.” *Biswas*, Decision No. 262 [2002] at paras. 28–29 (noting that the typical rule is to deny costs where an application has been dismissed on jurisdictional grounds, but that the applicant’s case was not typical and “in fact extremely troubling”). *Accord Uyanik*, Decision No. 263 [2002] at para. 14; *Gokce*, Decision No. 264 [2002] at para. 14.

²⁵² See also *infra* notes 314, 332, 353 and accompanying text (discussing the role of external jurisprudence in the Tribunal’s adoption of principles concerning the computation of damages).

²⁵³ See *supra* note 236 (discussing unjust enrichment in the context of the Tribunal’s adoption of contract and quasi-contract principles).

²⁵⁴ See *supra* note 211 (discussing the influence of equity on the assessment of damages as part of a larger discussion of the Tribunal’s adoption of equity principles).

²⁵⁵ See *Prasad*, Decision No. 338 [2005] at para. 69 (awarding compensation of an unspecified type for the “aggregate of irregularities and infringements of due process rights... [that] inevitably resulted in upsetting the Applicant’s career in the Bank and [which] constitute an abuse of discretion that the Tribunal cannot condone”). It would appear that this set of wrongs would collectively constitute an “intangible” injury arising from the misapplication of Bank procedures. See *infra* note 256 (noting instances in which the Tribunal has applied this term to such injuries).

²⁵⁶ See *Skandera*, Decision No. 2 [1981] at para. 29 (awarding compensation because the Bank’s failure to provide a “prompt and candid disclosure of reasons” for the applicant’s termination “delayed [him] by four months in dealing in an informed manner with the Bank’s action” and thereby caused him an “intangible injury”); *E*, Decision No. 325 [2004] at para. 43 (finding that “defective” investigative and enforcement procedures “may have impaired [the applicant’s] abilities to present his case and may thus have caused at least intangible injury for which compensation may be appropriate”); *Samuel-Thambiah*, Decision No. 133 [1993] at para. 43 (finding that the applicant had suffered an intangible injury because “appropriate standards of justice were not fully observed in [an] administrative review”); *Lopez*, Decision No. 147 [1996] at para. 56 and Decision (awarding damages for an intangible injury caused by a “violation of [the applicant’s] right to confidentiality” resulting from the turning over of his medical records to an investigator in violation of the staff rules); *Lamson-Scribner*, Decision No. 32 [1987] at para. 57 (awarding compensation for an intangible injury caused by the Bank’s wrongful retention and use in litigation of the applicant’s tax returns, which were also ordered purged from the Bank’s records); *Durrant-Bell*, Decision No. 24 [1985] at para. 36 (awarding compensation of an unspecified type for “discrepancies and inconsistencies [that] must have left the Applicant without the indispensable clarity as to the exact position of the Respondent concerning her worthiness, entitlement to promotion on the basis of merit and performance, and her right accurately to assess the prospects of her career with the Respondent”); *Rae*, Decision No. 74 [1988] at paras. 31, 52 and Decision (awarding the applicant *inter alia* “compensation... for the tangible and intangible injury suffered... as a result of the irregular procedure followed in determining the grade of her position”).

²⁵⁷ *Rae (No. 2)*, Decision No. 132 [1993] at para. 48 (awarding compensation for “at least some intangible injury [sustained] on account of the Respondent’s failure to provide promised training”).

²⁵⁸ See *Lindsay*, Decision No. 92 [1990] at paras. 34–36, quoting *Broemser*, Decision No. 27 [1985] at para. 40 (noting that in a “number” of prior cases the Tribunal did not find a procedural irregularity warranting rescission of a decision or specific performance of an obligation, but “has ordered the payment of

“moral” injuries since *Lopez*,²⁵⁹ but has not clearly differentiated between such injuries and “intangible” ones. If there is indeed a distinction to be made, it could be argued on the basis of *Lopez* and *Isaac*, Decision No. 274 [2002], that a “moral” injury is a type of “intangible” injury that occurs when there has been a wrongful deviation from standard managerial behavior or treatment of staff, including when this happens as a result of a due process or procedural wrong forming a separate, “intangible” injury.²⁶⁰

the staff member of compensation for the intangible injury thus suffered”). *Accord Barnes*, Decision No. 176 [1997] at para. 31 (also relying on *Broemser* in stating that there had been “a number of cases in which the Tribunal, though finding that there ha[d] been an irregularity or defect in the Bank’s treatment of a staff member,” had concluded that rescission and specific performance were inappropriate remedies). See also *Buranavanichkit*, Decision No. 7 [1982] at para. 30 (finding it difficult to place a value on the intangible injury caused when the Bank’s treatment of the applicant fell short of “appropriate standards of justice,” and awarding a year’s net base salary “[s]ince in the circumstances rescission of the decisions contested or specific performance of the obligation invoked is not a remedy appropriate to the injury done”); *Chhabra*, Decision No. 139 [1994] at paras. 26(v), 57–58 (in a redundancy case, noting the applicant’s claim of an intangible injury and awarding compensation of an unspecified type even though “no particular decision of the Respondent is to be quashed,” because “the Respondent’s behavior towards the Applicant from the Reorganization onwards, taken as a whole, constitutes mismanagement of the Applicant’s career[,] reveals errors of judgment which taken together amount to unreasonableness and arbitrariness[, and] falls short of the standards of treatment required of the Bank under the Principles of Staff Employment”); *K. Singh*, Decision No. 188 [1998] at para. 26 (awarding compensation for “intangible damage” arising from due process violations and the Bank’s mismanagement of the applicant’s case, as rescission of the termination decision and reinstatement were not realistic remedies). In *McNeill*, Decision No. 157 [1997] at para. 63, the Tribunal “equitably assess[ed]” intangible damages where “in the circumstances neither rescission of the contested decision nor specific performance has been requested and both are anyway out of the question.” See also *supra* note 211 (concerning the role of equity in the Tribunal’s assessment of damages).

²⁵⁹ *Lopez*, Decision No. 147 [1996] at paras. 56–57 and Decision (awarding damages for an “intangible” injury and for a separate “moral injury” caused by “excessive” security measures undertaken to deal with the applicant’s presence at the Bank, despite there being “no evidence of him being violent or threatening any form of physical disruption”). In six cases prior to or contemporaneous with *Lopez*, the Tribunal noted that the applicants had made claims for moral damages. These applicants, however, either lost their cases or were not addressed on this point. *Salle*, Decision No. 10 [1982] at para. 25 (noting the unsuccessful applicant’s request for an “unspecified amount of compensation for moral damages and injury to reputation”); *Gregorio*, Decision No. 14 [1983] at para. 24 (noting but not otherwise addressing the partly successful applicant’s request for “compensation for moral injury, damage to reputation and loss of career”); *Sukkar*, Decision No. 84 [1989] at para. 24 (noting the unsuccessful applicant’s request for four months’ salary as compensation for “moral and intangible injuries”); *Mathew*, Decision No. 103 [1991] at para. 18(C) (noting the unsuccessful applicant’s claim for “moral damages”); *Moses*, Decision No. 115 [1992] at para. 21 and Decision (awarding a portion of the applicant’s claim for costs, and noting but not otherwise addressing the applicant’s request for “moral damages”); *Jalali*, Decision No. 148 [1996] at paras. 20, 29 (noting the unsuccessful applicant’s request for “compensation for lost salary and for other moral and professional damage” allegedly resulting from his having been deprived of a “more normal career path, promotion and merit awards”).

²⁶⁰ *Lopez*, Decision No. 147 [1996] at paras. 56–57 and Decision (awarding damages for an “intangible” injury arising from a breach of the applicant’s due process right to confidentiality during an investigation, and for a separate “moral” injury caused by “excessive” security measures taken against the applicant despite a lack of evidence of violent or threatening behavior on his part). See also *O*, Decision No. 337 [2005] at paras. 26, 59 and Decision (noting the applicant’s claim for “moral” damages and awarding

It would be difficult, however, to confirm “moral injury” as a distinct species of “intangible injury” if review were limited to the Tribunal’s practices between *Lopez* and *Isaac*. During this period, the Tribunal was not only inconsistent in its own usage,²⁶¹ but in several cases appeared tacitly to accept the “wrong” term put forward by the successful applicant. This latter practice could be ignored when occurring prior to *Lopez*,²⁶² but not afterwards.²⁶³ The Tribunal’s own use of terms, meanwhile, strongly suggests that the terms were essentially synonymous at that time. Since *Isaac*, however, the Tribunal’s slight practice in this area accords with its approach in *Lopez*,²⁶⁴ and so the door may yet be open to a Tribunal definition

compensation of an unspecified type for “an unusual degree of monitoring and . . . continuing stigma and embarrassment” resulting from her retention on a performance-improvement plan in violation of the relevant staff rule). The Tribunal in *Isaac* appeared to reject the term “moral” in favor of “intangible” where the injuries were directly caused by faults in due process or Bank procedure. *Isaac*, Decision No. 274 [2002] at paras. 16–17 and Decision (noting the applicant’s request for “compensation for what she terms ‘moral damages,’” and awarding compensation for an “intangible” injury arising from the Bank’s abuse of its discretion “in minor respects,” these being its delay in sending to the applicant a copy of the Appeals Committee report in her case, its provision to the applicant of a Memorandum of Agreement containing “much more elaborate and restrictive language” than that found in the related communications of the Appeals Committee and Vice President of Human Resources, and its self-contradictory insistence that a 36-month appointment was “regular,” this latter type of appointment being open-ended in duration).

²⁶¹ Compare *Rendall-Speranza*, Decision No. 197 [1998] at para. 80 (finding that the applicant’s “stress, confusion and other intangible injury” resulting from her Director’s “cross[ing of] the line separating friendly congenial relationships from improper behavior” entitled her to compensation), with *Lopez*, Decision No. 147 [1996] at paras. 56–57 and Decision (awarding damages for a “moral injury” caused by “excessive” security measures taken against the applicant despite there being no evidence of his being violent or physically threatening). See also *Yoon* (*No. 2*), Decision No. 248 [2001] at paras. 3, 45, 50–51 and Decision (noting the applicant’s claim for “professional and moral damage” and awarding compensation for “both material and moral damage resulting from the termination decision,” which was taken and carried out in violation of the Bank’s staff rules and express policies).

²⁶² *Robinson*, Decision No. 78 [1989] at paras. 46–47 (holding that the Bank’s failure to inform the applicant about the adverse tax consequences of certain pension payments during a change in the U.S. tax laws violated its “duty to act reasonably in all the circumstances,” but rejecting as being “too remote and speculative” the applicant’s claim of “intangible losses resulting from the unexpectedly higher taxation, including anxiety, diminished standard of living, and insecurity”).

²⁶³ *Romain* (*No. 2*), Decision No. 164 [1997] at paras. 12, 22 (noting the applicant’s claim for moral damages and awarding compensation of an unspecified type because a quashed performance review could not be redone due to the applicant’s retirement); *Ezatkhab*, Decision No. 185 [1998] at paras. 10, 22–26 and Decision (noting the applicant’s claim for “moral and economic damages” and awarding compensation of an unspecified type for the Bank’s failure to comply with staff rules concerning redundancy that required the Bank to offer the applicant a certain position and alert her to other open positions for which she was qualified); *Mahmoudi* (*No. 2*), Decision No. 227 [2000] at paras. 3, 53–56 and Decision (noting the applicant’s claim for moral damages and ordering compensation of an unspecified type for a redundancy decision that “lacked a normative basis” under the relevant rules and was therefore to be rescinded as a “serious” abuse of discretion that “must [also] be sanctioned in proportion with its gravity” since the applicant had “undoubtedly faced difficulties in the wake of his redundancy”).

²⁶⁴ *O*, Decision No. 337 [2005] at paras. 26, 59 and Decision (noting the applicant’s claim for “compensatory economic damages and moral damages for the economic loss and the professional and emotional stress,” and awarding “relief” of an unspecified type in compensation for “an unusual degree of monitoring

of “moral injury” along such lines, whether by consistent practice or express statement.²⁶⁵

While a charge of facial inconsistency could also be leveled against the Tribunal’s handling of prior, *ex gratia* Bank compensation payments when it formulates awards,²⁶⁶ such an accusation would mistakenly suggest a failure by the Tribunal to incorporate the common concept of *ex gratia* into its jurisprudence. Such is not the case, as the Tribunal has firmly distinguished between the Bank’s legal obligations and its *ex gratia* grants of benefits,²⁶⁷ and has also upheld the validity

and... continuing stigma and embarrassment” resulting from her retention on a performance-improvement plan in violation of the relevant staff rule). This case is similar to *Lopez*, Decision No. 147 [1996], in its focus on wrongful working conditions resulting from a misapplication of Bank rules and procedures. See *supra* notes 259–260 (discussing the award of damages made in *Lopez*). While the Tribunal did not seize opportunities presented in three post-*Isaac* cases to recast claims of “moral” injury as being seemingly based on alleged due process or procedural violations and therefore indicative of standard “intangible” injuries, this cannot reasonably be seen as a tacit adoption of the applicants’ chosen term since the issue of damages was not reached in any of the cases. *G*, Decision No. 340 [2005] at paras. 64–65 (noting the unsuccessful applicant’s claim that her placement on administrative leave had embarrassed her, damaged her reputation and caused a moral injury, and further noting the Bank’s denial of such an injury on the grounds that the investigation of the applicant had been properly conducted and that her placement on administrative leave had not been arbitrary); *Martin del Campo*, Decision No. 292 [2003] at para. 2 (noting the unsuccessful applicant’s request for “moral damages for acute mental suffering” allegedly caused by an improper determination of redundancy under the staff rules); *H*, Decision No. 342 [2005] at para. 3 (noting the unsuccessful applicant’s request for “moral damages” in recompense for the Bank’s allegedly improper imposition and interpretation of a separation agreement).

²⁶⁵ It should be noted that while the Tribunal may one day face this specific issue in the course of a case, it can hardly be compelled by the Bank to answer it. The Tribunal is now permitted under the Tribunal Statute’s amended Article XII(1) to award whatever “amount... is reasonably necessary to compensate the applicant for the actual damages suffered.” While the Bank could press the Tribunal to define “actual damages” under Article XI(2), which has always required the Tribunal to “state the reasons on which [its judgment] is based,” this would be a slim reed for any demand to have this question addressed in a comprehensive, theoretical or advisory manner. This is particularly so since the amended Statute no longer obliges the Tribunal even to produce a “statement of the specific reason for... an order” awarding compensation in excess of three years’ net salary. See Tribunal Statute (version in force for applications filed prior to 1 August 2001) at Article XII(1) (providing this rule).

²⁶⁶ See *infra* note 271 for contrasting examples of the Tribunal’s handling of prior, *ex gratia* payments made by the Bank to applicants.

²⁶⁷ *Elder*, Decision No. 306 [2003] at paras. 28–29 (finding that “the Bank did not bend, and could not have bent, its rules in [the] particular circumstances” in which “*ex gratia*” payments were made to certain staff members, as the relevant rules did not apply to these staff members and therefore “no exceptions were made to the application of the Bank’s rules”); *Lavelle*, Decision No. 301 [2003] at para. 29 (holding that a new rule could not be invoked by the applicant “as it regulates a benefit not existing at the time of his employment contract and, moreover, was expressly ruled out” in his type of contract, and further finding that “the benefit, not being a contractual right or a duty causing the Bank to be under any legal obligation to grant it, can only be in the nature of an *ex gratia* benefit”); *Means*, Decision No. 298 [2003] at para. 15 (holding that the Bank did not lose a jurisdictional defense “by virtue of beneficent action taken *ex gratia* by the Bank more than three years” after the point at which the applicant’s claim had lapsed for untimeliness).

of the Bank's *ex gratia* settlement payments²⁶⁸ and offers.²⁶⁹ In the context of award-making, however, the *ex gratia* payments in question are those made by the Bank in response to dispute-settlement recommendations,²⁷⁰ particularly those of the Appeals Committee.²⁷¹ Since the Tribunal has made clear that it reviews applications *de novo* and thus independently of the Bank's internal advisory processes and organs,²⁷² it is this doctrine rather than one of *ex gratia* that governs. Consequently, prior, *ex gratia* compensation payments have the status of mere facts, and may or may not be factored into an independent Tribunal award.²⁷³

²⁶⁸ *Pruthi*, Decision No. 55 [1988] at paras. 26–27 (finding “no evidence of duress that might affect the validity of Applicant’s acceptance of the *ex gratia* payment as a full and final settlement of his claim”), quoting *Mr. Y*, Decision No. 25 [1985] at para. 26 (stating that “[i]t would unduly interfere with the constructive and efficient resolution of these claims if the Bank could not negotiate – in exchange for concessions on its part – for a return promise from the staff member not to press his or her claim further. If such an agreed settlement were not binding upon the affected staff member, there would be little incentive for the Bank to enter into compromise arrangements, and there might instead be an inducement to be unyielding and to defend each claim through the process of administrative and judicial review. It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements”). See also *supra* notes 238–239 and accompanying text (discussing the Tribunal’s adoption of the concept of duress).

²⁶⁹ *Peprah (No. 2)*, Decision No. 310 [2004] at para. 37 (rejecting the applicant’s contention that a Bank settlement offer of forty days’ annual leave amounted to an admission of liability, as “such a rule, absent clear and convincing evidence of such admission, would restrain parties from entering into such settlement negotiations in the future. The Tribunal is disinclined to impose any such impediment on free and fair settlement negotiations”).

²⁷⁰ See *Samuel-Thambiah*, Decision No. 133 [1993] at paras. 7, 39 (finding that the applicant had been fairly treated “because an *ex-gratia* payment covering the balance of his fixed-term appointment [had been] offered” pursuant to a recommendation made by the Vice President and Controller upon administrative review, and because such a payment was later made along with a grant of special leave).

²⁷¹ See *Garcia-Mujica*, Decision No. 192 [1998] at paras. 7, 25 (awarding compensation “in addition to any *ex gratia* payments already made” by the Bank pursuant to the recommendation of the Appeals Committee in light of the Committee’s finding of “procedural errors” committed by the Bank); *K. Singh*, Decision No. 188 [1998] at para. 26 (rejecting the Bank’s contention that its having made an “additional severance payment [as] recommended by the Appeals Committee” constituted adequate compensation, and awarding further recompense for the applicant’s “intangible damage”); *Isaac*, Decision No. 274 [2002] at paras. 7–8, 16 and Decision (awarding damages “in addition to the amounts already promised by” the Vice President of Human Resources in her acceptance of the recommendations of the Appeals Committee). *Contra Moses*, Decision No. 115 [1992] at Decision (awarding the applicant compensation “less the *ex-gratia* payment he received upon the advice of the Appeals Committee”); *McNeill*, Decision No. 157 [1997] at paras. 19–23, 63 (taking into account in its damages assessment “an *ex gratia* payment in the amount of \$15,000” made by the Bank after the Appeals Committee had provisionally recommended the suspension of the applicant’s termination during the pendency of the case to avoid hardships to him with respect to, *inter alia*, his wife’s continuing need for medical care).

²⁷² See *supra* notes 162–164 and accompanying text (discussing the nature of the Tribunal’s *de novo* review and the Tribunal’s relationship to the Appeals Committee).

²⁷³ See *supra* note 271 for examples of awards either surpassing or deducting compensation paid *ex gratia* by the Bank on the recommendation of the Appeals Committee. The Tribunal has in some cases made such decisions on an injury-by-injury basis. See *Zwaga*, Decision No. 225 [2000] at para. 59 (finding that compensation previously paid by the Bank on the recommendation of the Appeals Committee was adequate for one injury, and awarding compensation and costs for “other procedural irregularities” identified by the Tribunal); *Jakub*, Decision No. 321 [2004] at paras. 73, 76 (deeming “appropriate” a

E. *The Détournement Standards and the Rise of the Tribunal's Abuse of Discretion Standard*

Of the many “general principles” invoked by the Tribunal over the years, those of *détournement de pouvoir*, and its variant *détournement de procédure*,²⁷⁴ have had the most complex history of use by the Tribunal, as they have at times competed with, and have now arguably been woven into, the Tribunal’s core standard of review, abuse of discretion.²⁷⁵ The Tribunal first sketched out its standards of review in *de Merode*, in which the Tribunal identified a “well-established principle . . . applied in many judgments of other international administrative tribunals,” that “the Bank’s power to amend non-essential terms may be exercised subject only to certain limitations. Discretionary power is not absolute power.”²⁷⁶

The Tribunal followed this succinct statement of precepts with a wide-ranging list of principles, among them a basic formulation of the “abuse of discretion” standard, that were collectively to form the basis of the Tribunal’s jurisprudence.²⁷⁷

sum recommended by the Appeals Committee and paid by the Bank in compensation for a procedural violation relating to the applicant’s redundancy, and awarding further compensation for the Bank’s concomitant failure to give the applicant an “opportunity to compete for a position in his department for which he was entitled to be considered”).

²⁷⁴ See C.F. Amerasinghe, *The Law of the International Civil Service* (vol. 1, 2d ed., 1994) at pp. 277, 282 (defining *détournement de pouvoir* as “[b]asically . . . when discretionary powers are exercised for purposes or objects other than those for which such powers have been explicitly or implicitly granted or are not exercised for the objects underlying the grant of such powers,” and defining *détournement de procédure* as a “special case” of *détournement de pouvoir* in which “the organization has recourse to one procedure for taking a decision in a situation where another procedure is in law applicable, with the result that the applicant is deprived of safeguards afforded by the other procedure”). The doctrinal relationship of the abuse of discretion standard to the *détournement* standards is not especially clear in international administrative law, or in the jurisprudence of the Tribunal. They may at times appear to be substantively the same, and at other times the abuse of discretion standard may seem to be a subset of the *détournement* standards. This article considers the issue only within the limited scope of the Tribunal’s case law, and does not seek to draw broader conclusions about the relationship. It may be noted that Mr. Amerasinghe, a former Executive Secretary of the Tribunal, has equated the two standards in his analysis of the Tribunal’s jurisprudence. See *ibid.*, at pp. 281–282 (finding that the Tribunal in *de Merode* “did not hesitate” to state that the Bank’s power of amendment of conditions of employment was a “legislative power . . . subject to the principle of *détournement de pouvoir*”), quoting *de Merode*, Decision No. 1 [1981] at para. 47 (stating that 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’”).

²⁷⁵ It may be noted that the Tribunal is not constrained from applying a different level or standard of review when such is felt to be necessary or appropriate. See, e.g., *Carew*, Decision No. 142 [1995] at para. 32 (stating that in disciplinary cases the Tribunal examines: (i) the existence of the facts; (ii) whether they legally amount to misconduct; (iii) whether the sanction imposed is provided for in the law of the Bank; (iv) whether the sanction is not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed); *Gyamfi*, Decision No. 28 [1986] at para. 39 (stating that the “scope of the Tribunal’s power of review in respect of decisions of a purely managerial or organizational nature is more limited than that which it may exercise with respect to disciplinary actions”).

²⁷⁶ *de Merode*, Decision No. 1 [1981] at paras. 45–46.

²⁷⁷ *Ibid.*, at paras. 47–48 (stating that the “principle of non-retroactivity is not the only limitation upon the power to amend the non-fundamental elements of the conditions of employment. The Bank would

Over time, this protean set of standards was condensed into a broadly inclusive, widely applied test for “abuse of discretion.” The wording of the standard used in such a review has varied slightly from case to case, but is elegantly stated in one as being whether a challenged Bank decision is “arbitrary, discriminatory or improperly motivated, or otherwise in violation of the Staff Rules, the Principles of Staff Employment or due process.”²⁷⁸

In 1989, applicants began to invoke the concepts of *détournement de pouvoir* and *détournement de procédure*. The Tribunal in these cases applied either a basic “abuse of power” standard or an abuse of discretion standard that covered the essence of the *détournement* claims.²⁷⁹ The Tribunal first expressly included a *détournement* standard in its own reasoning in *Jassal*, Decision No. 100 [1991], in which the Tribunal found that having unsatisfactory performance serve as the sole basis for a redundancy improperly avoids the protections “otherwise afforded” by the Bank’s rules on termination of employment, and thus constitutes a “*détournement*

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 based on a proper consideration of relevant facts. They 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. The Tribunal must satisfy itself in each case that the Bank’s power to change the non-fundamental elements in the conditions of employment of its employees has not been exercised either retroactively or in an arbitrary or otherwise improper manner”).

²⁷⁸) *Taborga*, Decision No. 297 [2003] at para. 25. See also *infra* note 348 (providing a similar Tribunal formulation of the abuse of discretion standard).

²⁷⁹) *Sukkar*, Decision No. 84 [1989] at paras. 20, 24, 33 (noting the unsuccessful applicant’s allegation of an “abuse of power” and her claim for damages for an alleged *détournement de pouvoir*, and upholding the Bank’s denial that a Bank official had “abused his power” in sending to the applicant a certain letter, with respect to which the Tribunal found that a contested proviso “does not signify that the Applicant must work without pay, if she accepts a new position and, consequently, it does not constitute a penalty, nor a misuse or abuse of power”). The issues of abuse of discretion and of discretion more generally were not raised in *Sukkar*. In *de Raet*, Decision No. 85 [1989], the Tribunal noted the applicant’s allegations of “abuse of power” and of *détournements de pouvoir* and *de procédure* with respect to the Bank’s evaluation of his performance, and further noted the Bank’s denial of an “abuse of power” in such respect. *de Raet* at paras. 28, 30, 42, 48. The Tribunal stated that the Bank is not obliged to demonstrate a lack of “discrimination or abuse of power” until a *prima facie* case has been made by the applicant, and further clarified that the Tribunal’s duty is to “assess the Bank’s decision – as to both its content and the manner in which it has been made – to determine whether it constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.” *Ibid.*, at paras. 56–57. The Tribunal separately stated with respect to one challenged performance review that “[a]t most the Tribunal can find that this conclusion was reached in an arbitrary manner, involving, for example, unfairness, failure to allow the Applicant to state his case, or other departures from established procedures, bias, prejudice, the taking into consideration of irrelevant factors or manifest unreasonableness. If the Tribunal so finds, it may declare the [performance review] invalid and require its removal from the Applicant’s record.” *Ibid.*, at para. 67.

de pouvoir, subject to reversal by the Tribunal.”²⁸⁰ Over the following eight years, the Tribunal accepted claims based on the *détournement* standards, but in its analysis did not clearly distinguish between such standards and that of abuse of discretion.²⁸¹

The *détournement* standards assumed a major role in the Tribunal’s jurisprudence as part of the Tribunal’s reasoning in four cases decided in 1999. In *Caryk*, Decision No. 214 [1999], and *Madhusudan*, Decision No. 215 [1999], the applicants proposed the use of the *détournement* standards through their invocation of the *Amora* case, which had been decided by the Asian Development Bank Administrative Tribunal (ADBAT).²⁸² The Tribunal recognized both standards and specifically applied the *détournement de procédure* standard.²⁸³ In noting that the

²⁸⁰ *Jassal*, Decision No. 100 [1991] at para. 31. This portion of *Jassal* was quoted and followed in another, similar case decided at the same session, *Fabara-Núñez*, Decision No. 101 [1991] at para. 32.

²⁸¹ *Atwood*, Decision No. 128 [1993] at paras. 15, 34–35 (noting and rejecting on the facts the applicant’s contention that the Bank’s failure to renew his contract was “arbitrary and constituted a *détournement de pouvoir*”). While the Tribunal noted but did not otherwise address the Bank’s assertion that its decision had not been an abuse of discretion, it determined with respect to the Bank’s assessment of the applicant’s performance that no evidence existed of an abuse of discretion. *Ibid.*, at paras. 27, 36. See also *Lewin*, Decision No. 152 [1996] at para. 25 (concluding that the record did not substantiate any accusation of misconduct, abuse of power or *détournement de pouvoir* with respect to the progress report produced by the applicant’s manager concerning the applicant’s performance), and at paras. 31–32 (rejecting the applicant’s claim of age discrimination on the basis that there was no *détournement de pouvoir* or *de procédure*, or any abuse of power or discretion, in the applicant’s termination for unsatisfactory performance, which was the “outcome of a long and consistent assessment” that could not be overturned absent abuse of discretion); *McNeill*, Decision No. 157 [1997] at paras. 30–32, 35–37, 43, 63 (applying and finding no violation under the abuse of discretion standard, which the Tribunal in one instance formulated as being a test of whether the challenged decisions, “even if resting on proper motives, . . . nevertheless were based on facts which did not exist, or were based on a manifestly erroneous appreciation of the facts, or were tainted by *détournement de pouvoir*”).

²⁸² *Caryk*, Decision No. 214 [1999] at paras. 13, 24–25; *Madhusudan*, Decision No. 215 [1999] at paras. 20, 30 (stating in each case that the applicant “relies on the *Amora* decision for its invocation of the doctrine of *détournement de procédure*”), citing *Amora*, ADBAT Decision No. 24 (1997). See *infra* notes 315–325 and accompanying text (discussing the *Amora* decision and its influence on the Tribunal’s jurisprudence). The Tribunal noted that the applicants had introduced the standard of *détournement de procédure* in their pleadings before the Bank’s Pension Benefits Administration Committee at an earlier stage of the case. *Caryk* at paras. 5, 13; *Madhusudan* at paras. 20, 30. The Tribunal appeared to adopt the applicants’ view that for jurisdictional purposes the *détournement de procédure* standard would not require identification of the first challengeable decision as the point from which would run the time for filing an application, as the applicants’ claims entailed retrospective evaluation of “ostensibly innocent” acts that “ultimately matured into an impermissible” one. *Caryk* at paras. 16–17; *Madhusudan* at paras. 23–24 (in each case finding “difficulties” in, but not ruling upon, the Bank’s jurisdictional objection that the applicant was required to challenge the first alleged misclassification, a position which the Tribunal found to imply that there was a “particular moment” of misclassification).

²⁸³ *Caryk*, Decision No. 214 [1999] at paras. 24–25; *Madhusudan*, Decision No. 215 [1999] at paras. 30–31 (stating in each case that “[t]he Applicant relies on the *Amora* decision [ADBAT Decision No. 24 (1997)] for its invocation of the doctrine of *détournement de procédure*. . . . The [Asian Development Bank Administrative Tribunal] held in its *Amora* decision that if a label given to a relationship was merely a device to deny the employee regular staff benefits, it should be disregarded. The instant case does not, however, present such a pattern”). See also *Caryk* at para. 43; *Madhusudan* at para. 52 (in each case

détournement standards permitted a review for arbitrariness,²⁸⁴ and in affirming that its review under these standards was limited in scope to the specific application of policies,²⁸⁵ the Tribunal did not also mention that the abuse of discretion standard permitted the same manner of review.

Meanwhile, in *Brebion (No. 2)*, Decision No. 212 [1999], the applicant contended that the “introduction and implementation” of the new “Rule of 50” pension scheme was a “*détournement de pouvoir* and *de procédure*” as well as an “abuse of discretion, violation of essential terms and conditions of employment and [a policy having] adverse financial implications . . . on the Staff Retirement Fund.”²⁸⁶ In rejecting this claim,²⁸⁷ the Tribunal relied on a case decided the same year, *Crevier*, which had found untenable that applicant’s contention that the Bank’s establishment of the “Rule of 50” scheme had been a misuse of pension assets constituting “an abuse of discretion and a *détournement de pouvoir* and *de procédure*.”²⁸⁸ While the Tribunal had in *Crevier* specifically addressed and rejected

finding no “pattern of abuse amounting to a *détournement de procédure* in dealing with the Applicant,” and that such a conclusion was “entirely consistent with the fact that in 1998 the Respondent decided to phase out NRS [Non-Regular Staff], and to allow continuing NRS to join the [Bank’s] pension scheme”).

²⁸⁴ *Caryk*, Decision No. 214 [1999] at para. 24; *Madhusudan*, Decision No. 215 [1999] at para. 30 (stating in both cases that “[d]étournement de procédure (broadly, abuse of procedure) is a subcategory of *détournement de pouvoir* (abuse of power). *Détournement de pouvoir* is extant whenever the authority in question exercises its power for a purpose different from that for which its power was attributed to it, or whenever there appears to be no valid reason for the exercise of the power (which therefore is challengeable for arbitrariness”).

²⁸⁵ *Caryk*, Decision No. 214 [1999] at para. 41; *Madhusudan*, Decision No. 215 [1999] at para. 50 (stating in each case that “[t]o determine whether individual applicants have a legitimate grievance, then, the circumstances of their particular cases must be examined. They may prevail not because the rules which governed their activity had generally deleterious effects, but only if they have suffered a *détournement de procédure* and *détournement de pouvoir* in the particular instance of application. This has not been demonstrated”) (emphasis in original). See also *Caryk* at para. 40; *Madhusudan* at para. 49 (finding in each case that certain cited “examples of policy initiatives or studies from the later periods of the Applicant’s association with the Respondent are not exhaustive. They show that the Respondent, far from being involved in a *détournement de pouvoir* and *détournement de procédure*, was sensitive to a wide range of different, and occasionally conflicting, factors. The task of the Tribunal cannot possibly be to judge whether the Respondent could have been wiser”).

²⁸⁶ *Brebion (No. 2)*, Decision No. 212 [1999] at para. 2 (noting the applicant’s argument that the “Rule of 50 [pension scheme] violates the Principles of Staff Employment and amounts to a *détournement de pouvoir* and *de procédure*, particularly because Staff Retirement Plan assets would be used for purposes other than the payment of retirement benefits and the end result would be a discriminatory and arbitrary policy towards different groups of staff members”). The Tribunal further noted that the applicant’s case posed questions not decided in *Crevier*, Decision No. 205 [1999], with these “new aspects” being raised “in connection with policy questions, with the legal powers of the Executive Directors, or with respect to the specific situation of the Applicant. Similarly, . . . [the applicant requested] that the Rule of 50 be rescinded.” *Brebion (No. 2)* at para. 4.

²⁸⁷ See *Brebion (No. 2)*, Decision No. 212 [1999] at para. 14 (rejecting the applicant’s request for rescission of the “Rule of 50” pension scheme, which had been made “[b]ased on her objections to the policy underlying the Rule of 50,” as the Tribunal had concluded *inter alia* that “the policy pursued by the Bank is legitimate”), following generally *Crevier*, Decision No. 205 [1999].

²⁸⁸ *Brebion (No. 2)*, Decision No. 212 [1999] at paras. 7–9 (stating that the applicant had “raised certain

only the applicant's abuse of discretion claim,²⁸⁹ in *Brebion (No. 2)* it examined only the issue of whether the applicant had suffered "direct or indirect harm from the implementation of the Rule of 50."²⁹⁰

Two years later, in *Prescott*, Decision No. 253 [2001], and its related case *Yang*, Decision No. 252 [2001], the Tribunal seemed to continue the development of the *détournement* standards as specific-use tools for the review of policies. The Tribunal noted that the "policy questions involved in the Human Resources Policy Reform were discussed and decided" in *Caryk* and *Madhusudan*, and found that "[c]onsistent with this jurisprudence, the Tribunal concludes that to the extent the issue before it involves a question of general policy pertaining to the ambit of managerial discretion, there is no basis for a finding of *détournement de procé-*

objections to the policy underlying the Rule of 50 and related amendments," and noting that the relationship "between this Rule and the general pension and staff policy of the Bank was discussed by the Tribunal at length in *Crevier*", citing generally *Crevier*, Decision No. 205 [1999]. The Tribunal in *Brebion (No. 2)* at para. 7 interpreted *Crevier* as "conclud[ing] that the adoption of the Rule of 50 did not violate the Principles of Staff Employment, as the severance and pension policies of the Bank are complementary aspects of the overall compensation and employment policy of the institution. It followed that the linkage between these aspects could not be considered to violate the essential terms and conditions of employment of staff members. It was also concluded that Staff Retirement Plan assets are not being used under the Rule of 50 for purposes different from the payment of pensions and retirement benefits, and that any reduction in the Bank's administrative expenses is purely incidental. Neither was it found that the integrity of the management of the Fund is compromised in any way by the new benefits introduced. On the basis of these and other arguments, the allegation of *détournement de pouvoir* and *de procédure* could not then and cannot now be sustained in the context of the introduction and implementation of the Rule of 50." See also *Crevier* at paras. 28–29 (presenting the conclusions in question and rejecting the applicant's claim that the use of pension-fund "assets [is] for a purpose other than for the payment of retirement benefits, and that this, consequently, is an abuse of discretion and a *détournement de pouvoir* and *de procédure*").

²⁸⁹⁾ *Crevier*, Decision No. 205 [1999] at para. 2 (noting the applicant's claim that the denial to her of newly devised pension benefits violated her "conditions of employment and other essential rights established in the Principles of Staff Employment by being arbitrary, discriminatory and unfair and involving an abuse of power and discretion"). The Tribunal found that the first question to be addressed was "whether it was an abuse of discretion for the Bank to link the pension entitlement of a staff member with his or her severance entitlement or whether such matters are entirely unrelated." *Ibid.*, at para. 13 (stating that the "pertinent purposes of each such mechanism must therefore be examined"). In substantively rejecting the abuse of discretion claim, the Tribunal stated *inter alia* that "[i]t is not within the competence of the Tribunal to consider which alternative would have been best or more effective to attain the desired objectives of the reform. This is a matter that is solely within the discretion of the Board of Directors. The Tribunal is empowered only to decide whether the solution retained [in the new pension plan] can be applied lawfully to the Applicant in the light of his rights as a staff member." *Ibid.*, at paras. 14–27. The Tribunal further rejected the applicant's allegation that the Bank's use of pension funds constituted an "abuse of discretion and a *détournement de pouvoir* and *de procédure*." *Ibid.*, at paras. 28–29.

²⁹⁰⁾ *Brebion (No. 2)*, Decision No. 212 [1999] at para. 2 (noting the applicant's claim of an "abuse of discretion, violation of essential terms and conditions of employment and... adverse financial implications that the policy relating to the Rule of 50 would have on the Staff Retirement Fund"). The Tribunal "examine[d] the specific circumstances of the Applicant in relation to her pension entitlement," and held "that the Applicant derives no direct or indirect harm from the implementation of the Rule of 50." *Ibid.*, at paras. 5–6.

deure or *de pouvoir* on the facts of this case.²⁹¹ The Tribunal made clear, however, that this holding did not “obviate an examination of whether the implementation of the Bank’s policies in fact resulted in a violation of the Applicant’s conditions of employment.”²⁹² The Tribunal applied its abuse of discretion standard in this more particular review,²⁹³ and found in *Prescott* abuse that “was not the result of a general policy of the Bank, which was leading in the opposite direction, nor of a deceitful purpose aiming at the denial of benefits, but rather of the failure to apply the policy.”²⁹⁴

Despite the Tribunal’s apparent if rather subtle differentiation between the two standards, with the *détournement* standards invoked in tests of a policy’s validity, and the abuse of discretion standard being used to test its implementation in a specific case, this distinction is at most a semantic one. The fundamental unity of the standards is evidenced by the Tribunal’s identification in *Prescott* and *Yang* of a “question of general policy pertaining to the ambit of managerial discretion.”²⁹⁵ The Tribunal’s insistence that review be limited to individual cases is, moreover, supported by precedent not expressly related to *détournement* questions.²⁹⁶ In recent years, the Tribunal’s reviews of policies under *détournement* standards have

²⁹¹ *Prescott*, Decision No. 253 [2001] at paras. 12–13; *Yang*, Decision No. 252 [2001] at paras. 12–13, quoting in each case *Caryk*, Decision No. 214 [1999] at para. 40, and *Madhusudan*, Decision No. 215 [1999] at para. 49 (finding in each case that certain Bank policy initiatives and studies, “far from being involved in a *détournement de pouvoir* and *détournement de procédure*,” were instead “sensitive to a wide range of different, and occasionally conflicting, factors”). The link between policy and implementation appears to have been first suggested by the applicants in *Prescott* and *Yang*. See *Prescott* at para. 10; *Yang* at para. 10 (summarizing in each case the applicant’s argument that “while lower-level management did not intentionally engage in *détournement de procédure* and unjustifiable differentiation, such abuses nevertheless resulted from the policy framework in which management had to operate”).

²⁹² *Prescott*, Decision No. 253 [2001] at para. 13; *Yang*, Decision No. 252 [2001] at para. 13.

²⁹³ *Prescott*, Decision No. 253 [2001] at paras. 25, 27 (holding that the Bank was not obliged “[a]s a general principle” to regularize the applicant, but abused its discretion in failing to consider him for regularization in a timely fashion as required by both a relevant staff rule and a directive from the President of the Bank); *Yang*, Decision No. 252 [2001] at paras. 23, 36 (finding no abuse of discretion with respect to the applicant’s classification).

²⁹⁴ *Prescott*, Decision No. 253 [2001] at para. 28 (stating that “[i]f all the legal and policy elements point in one direction and the managers choose to go the opposite way, probably relying on how things had been done in the past, there is an element of arbitrariness amounting to an abuse of discretion”).

²⁹⁵ *Prescott*, Decision No. 253 [2001] at para. 13; *Yang*, Decision No. 252 [2001] at para. 13.

²⁹⁶ *Taborga* (No. 2), Decision No. 324 [2004] at paras. 26–28 (holding that a challenge brought against an “overarching policy decision” rather than the “enforcement or interpretation of a specific right” did not even *prima facie* invoke the Tribunal’s jurisdiction), citing *Briscoe*, Decision No. 118 [1992] at para. 31 (finding no jurisdiction over an application that the Tribunal considered to be “in effect directed against a general rule regarding employment benefits, rather than an individualized application of that rule to the Applicant himself”). See also *Briscoe* at para. 30 (holding, “along with other international administrative tribunals,” that a claim of non-observance of a staff member’s contract or terms of appointment cannot be directed merely “against the organization’s promulgation of some general rule or policy”); *Agodo*, Decision No. 41 [1987] at paras. 28–31 (denying that the Tribunal had decided “other cases involving a generalized challenge” to the validity of Bank policies, and concluding that the Bank’s failure to adopt the Bank Staff Association’s November 1979 draft Tribunal Statute expressly allowing for the issuance of

been conducted exclusively with respect to individual cases,²⁹⁷ even if in one instance the Tribunal allowed itself to advise the Bank about policy changes that would be required with respect to a certain possible administrative reform.²⁹⁸

Otherwise, given the Tribunal's continued substantive (if not at this time nominal) blending of the *détournement* and abuse of discretion standards,²⁹⁹ and to a

advisory opinions on the “validity of administrative action which the [Bank] proposes to take” manifested a refusal by the Bank to “countenance . . . claims of a premature and generalized nature, and an intention to have the Tribunal rule only upon past administrative action affecting the rights of specific members of the staff”), quoting *in re Sikka No. 3*, ILOAT Judgment No. 622, p. 4 (1984) (stating that that tribunal hears complaints challenging individual decisions, not those directed against “abstract rules of general purport,” and that while that tribunal is not precluded from ruling on the “validity of any general and abstract rule,” it will do so only “by way of exception, viz. when hearing a complaint which challenges an actual decision”).

²⁹⁷ *Bernstein*, Decision No. 309 [2004] at paras. 15, 18 (rejecting the applicant's contention that an unfair, arbitrary and discriminatory *détournement de pouvoir* was at work in the past pension credit policy, as “no ground” existed on which to alter the Tribunal's previous conclusions upholding the Bank's “general rules” on past pension credit, and as “it is not for the Tribunal to consider which alternative would have been best or more effective, but only to decide whether the outcome violates an applicant's rights”), citing *Lavelle*, Decision No. 301 [2003] at paras. 14, 16 (finding nothing wrong with “a decision that grants benefits to the staff pursuant to certain criteria . . . [as] this is what is normally done in any pension system or for other employment benefits,” and stating that an “endeavor to examine each staff member's career history would result in an administrative nightmare, not to mention the practical difficulties and a much greater risk of arbitrary differentiation between like staff members”), and *Elder*, Decision No. 306 [2003] at paras. 10, 12 (rejecting the applicant's allegation of a *détournement de pouvoir*, on the ground that it is not arbitrary for the Bank “to establish reasonable limits and conditions on the benefits allowed under the rules which it enacts from time to time”). The Tribunal held in *Bernstein* that since the applicant's rights had not been affected by the past pension credit policy, under a “strict application of the rules in force, she had no entitlement to the benefit,” although the Tribunal did find that “[o]ther considerations must be taken into account.” *Bernstein* at para. 18. The Tribunal held that “[a]lthough it would be improper for the Tribunal to require that the Bank adopt policies on a case-by-case basis without setting general rules, it would be equally wrong for the Tribunal to decide specific cases without considering extraordinary circumstances” such as those present in the applicant's “unique” case. *Ibid.*, at paras. 21, 23, 32.

²⁹⁸ *E*, Decision No. 325 [2004] at para. 29 (stating that the Bank “would be well advised to clarify and revise the wording of the 1998 Bank Policy” should it wish in the future to grant an internal body jurisdiction to hold proceedings and make salary deductions with respect to certain support payments owed but allegedly unpaid by staff members). This advice did not, however, signal any change in the Tribunal's approach to its review of applied rather than abstract policies. See *ibid.*, at para. 25 (noting the Tribunal's “power to review Bank policies in the context of their application to applicants' individual cases,” and endorsing the “view that the 1998 Bank Policy is lawful to the extent that it manifests a concern for the enforcement of spousal and child support orders directed against staff members, and seeks to establish a procedure for implementing that goal”).

²⁹⁹ See, with respect to *détournement de procédure*, *Chavakula*, Decision No. 277 [2002] at para. 9 (finding no evidence of “any form of abuse or harassment” tainting the challenged decision, nor “any unfair treatment or procedural irregularity in the handling of the matter by the Bank”), citing *Salle*, Decision No. 10 [1982] at para. 30 (establishing that the merits of a Bank decision may be reviewed only for abuse of discretion and to ensure that “appropriate standards of justice have been met”), *Buranavanichkit*, Decision No. 7 [1982] at para. 28 (finding the Bank's failure to provide information to the applicant on her past performance problems to be “irregular and contrary to the principle of due process”), and *Samuel-Thambiab*, Decision No. 133 [1993] at paras. 31–32, 38 (reviewing the Bank's assessment of the applicant's performance for abuse of discretion and violation of due process). See also, with respect to *détournement de pouvoir*, *Moss*, Decision No. 328 [2004] at para. 49 (rejecting the applicant's claim that

lesser extent its adoption of the reliance standard in cases dealing with “general policy” changes,³⁰⁰ there is no real potential for the *détournement* standards to develop a role substantively distinct from that of abuse of discretion. Unless major changes occur in the Tribunal’s overall approach to its adjudication of Bank actions and policies, it is highly unlikely that future nominal reappearances of the *détournement* standards will signal a shift in the Tribunal’s analytical methods or scope of review.

V. External Case Law as a Source of Tribunal Law

The Tribunal stated in *de Merode* that it is “free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals, particularly those of the United Nations family,” so that it can thereby “take account both of the diversity of international organizations and the special character of the Bank without neglecting the tendency towards a certain *rapprochement*.”³⁰¹ The Tribunal’s approach to case law is similar to that established in Article 38(1)(d) of the ICJ Statute, in that each court considers judicial decisions to be subsidiary means of determining rules of law, and is free to review whatever judgments it wishes. While the Tribunal in *de Merode* specifically acknowledged only its sister administrative tribunals’ case law, it has since then also applied precedents from other international tribunals and even national courts.

the downgrading of her position was a pretext so that she need not be offered a promised position, as “[a]bsent . . . evidence of a clear promise to offer the Applicant the vacated position, . . . the Respondent had the discretion to downgrade such position to meet legitimate business needs”, following *Medlin*, Decision No. 319 [2004] at paras. 26, 28 (stating that “managers have a discretion to organize [a department] and to define the scope of the requirements for all of its jobs. . . . The determination that [the Bank] had no business need for a [certain grade] position was not an abuse of managerial discretion,” as “[i]t is a Bank prerogative within its discretion to evaluate jobs and functions”).

³⁰⁰ *Bernstein*, Decision No. 309 [2004] at para. 32 (stating that while “general policies might be changed by the Bank, a prior expectation must be respected when created by the acts of management itself”). See also *supra* notes 241–249 and accompanying text (discussing the evolution of the Tribunal’s reliance doctrines). The Tribunal’s formulation of the reliance standard in *Bernstein* removes much of the need for the Tribunal to undertake a *détournement de pouvoir* or “abuse of power” review when evaluating the alleged wrongfulness of a policy change that is claimed to have had negative effects on an applicant simply by virtue of its terms rather than by its discretionary application.

³⁰¹ *de Merode*, Decision No. 1 [1981] at para. 28 (stating that “[w]hile 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 found it unnecessary, however, to express a view as to whether these “similar features amount to a true *corpus juris*.” *Ibid.* Cf. *G*, Decision No. 340 [2005] at para. 25 (noting but not otherwise addressing with respect to other tribunals’ jurisprudence the applicant’s argument that “the Staff Rules do not exist in a vacuum; to apply them blindly, without regard to principles of managerial fair play as articulated by this Tribunal and other international administrative tribunals, is unacceptable”).

A. *Judgments of Other International Administrative Tribunals*

The Tribunal has invoked specific judgments of its sister tribunals in support of its conclusions that: (i) the Tribunal is not empowered to issue advisory opinions as to a rule's general validity, and must instead be concerned with the review of individual Bank decisions;³⁰² (ii) the Bank's definition of sexual harassment is consistent with those adopted by the U.N. and the International Labour Organization, and applied by their respective administrative tribunals;³⁰³ (iii) the Bank's internal law is independent of national legislation;³⁰⁴ and (iv) the Tribunal lacks competence to pass upon the validity of municipal law as interpreted and applied by national authorities.³⁰⁵ The Tribunal has in other cases noted but not adopted an applicant's invocation of other international administrative tribunals' judgments³⁰⁶ or practices.³⁰⁷

³⁰² *Agodo*, Decision No. 41 [1987] at paras. 30–31 (holding that the Tribunal is not empowered by its Statute or Rules to issue advisory opinions, and finding that “[o]ther international administrative tribunals” had reached “similar conclusions”), quoting *in re Sikka No. 3*, ILOAT Judgment No. 622, p. 4 (1984) (stating that that tribunal does not hear complaints directed against “abstract rules of general purport,” and while it is not precluded from ruling on the “validity of any general and abstract rule,” it will do so only “by way of exception, viz. when hearing a complaint which challenges an actual decision”). See also *Briscoe*, Decision No. 118 [1992] at para. 30 (holding, “along with other international administrative tribunals,” that a claim of non-observance of a staff member's contract or terms of appointment cannot be directed merely “against the organization's promulgation of some general rule or policy”); supra note 296 and accompanying text (discussing the Tribunal's insistence that applicants challenge the wrongful, individual application of a policy rather than the policy itself).

³⁰³ *Rendall-Speranza*, Decision No. 197 [1998] at paras. 43–44 (finding the Bank's definition of sexual harassment to be consistent with “similar definitions” adopted in international and domestic jurisprudence), citing *Belas-Gianou v. Secretary-General of the United Nations*, UNAT Judgment No. 707, at 33–34, U.N. Doc. AT/DEC/707 (28 July 1995) (referring to *Procedures for Dealing with Sexual Harassment*, U.N. Doc. ST/AI/379 (29 October 1992)), and *In re Abreu de Oliveira Souza*, ILOAT Judgment No. 1609 (30 January 1997), at pp. 6, 13 (referring to *Sexual Harassment Policy and Procedures*, ILO Circular No. 543, 2 November 1995). The Tribunal did not, incidentally, cite any specific domestic judgments to support this finding.

³⁰⁴ *Cissé*, Decision No. 242 [2001] at para. 23 (noting that “[a]nother administrative tribunal has established that ‘Staff Regulations should be interpreted in themselves, with due regard to their purpose and independently of national legislation,’” but also stating that such a principle does not preclude reference to national legislation in order to shed light on certain questions of fact), quoting *Schaffier*, ILOAT Judgment No. 477 (1982), para. 6 of Considerations.

³⁰⁵ *E*, Decision No. 325 [2004] at para. 26, quoting *Mr. “P” (No. 2)*, IMFAT Judgment No. 2001–2 (20 November 2001), para. 146 (stating that the IMFAT “has no competence to pass upon the validity of municipal law as interpreted and applied by the legal authorities of either Maryland or Egypt. Hence, whether the Maryland Court correctly applied Maryland law may be regarded as a question that only the Maryland courts are competent to answer”).

³⁰⁶ *Perea*, Decision No. 326 [2004] at paras. 64, 68, noting the applicant's invocation of *Pinto*, ILOAT Judgment No. 1646 (1997), para. 11 (establishing the “cardinal rule” that a chosen candidate must have at least the qualifications stipulated in the hiring notice), and *Moreno de Gómez*, ILOAT Judgment No. 1602 (1997), para. 4 (relied on by the applicant as establishing a preference for an internal candidate in a situation where the external and internal candidates have similar qualifications). The Tribunal in *Perea* instead reaffirmed its abuse of discretion standard in reviewing selection decisions. *Ibid.*, at para. 73, quoting *Montasser*, Decision No. 156 [1997] at para. 15 (stating that the “Bank was not obliged by its

The Tribunal has likewise noted the general jurisprudence of its sister tribunals when establishing that the Bank's discretionary power is not absolute,³⁰⁸ and also when recognizing: (i) the concept of proportionality in the taking of disciplinary measures;³⁰⁹ (ii) the principle that the Tribunal will not substitute its judgment for that of management;³¹⁰ (iii) the distinction between fundamental and non-fundamental conditions of employment;³¹¹ (iv) the principle of non-retroactivity where accrued rights might otherwise be affected;³¹² and (v) the principle that

rules and regulations, or by basic principles of fairness and due process, to place the Applicant in ... a position, in preference to the earlier incumbent or to some other candidate who might be properly found to be more highly qualified than the Applicant". See also the similar reliance on internal precedent by the Tribunal in the contemporary case of *Moss*, Decision No. 328 [2004] at para. 42 (finding that "even if an applicant were to be considered to fill a certain position, a selection process would have to be followed and the applicant would still be expected to compete with other candidates in order to be selected to that position"), citing *Riddell*, Decision No. 255 [2001] at para. 23.

³⁰⁷ *Agodo*, Decision No. 76 [1989] at paras. 6, 9, 18 (noting the parties' respective pleadings with respect to the awarding of costs and fees, including attorneys' fees, in light of the practices of other "international administrative tribunals and courts of most member countries of the World Bank/I.F.C.," and further noting the applicant's assertion that the UNAT had "been awarding incremental legal expenses in appropriate cases" even though its policy was to award costs "only in 'most exceptional circumstances'" because of the U.N.'s policy of providing free legal assistance to U.N. staff). The Tribunal in *Agodo* did not address its sister tribunals' jurisprudence on this point, instead holding simply that "silence means rejection" with regard to claims for costs or attorneys' fees. *Ibid.*, at para. 32, following a "dictum" of the ICJ in its *Application for Review of Judgment No. 158 of the UNAT*, ICJ Reports 1973 at p. 212, para. 98. See also *infra* notes 314, 332, 353 and accompanying text (discussing the Tribunal's invocation of other tribunals' jurisprudence in establishing doctrines relating to damages).

³⁰⁸ *de Merode*, Decision No. 1 [1981] at paras. 45–46 (noting the "well-established principle... applied in many judgments of other international administrative tribunals," that "the Bank's power to amend non-essential terms may be exercised subject only to certain limitations. Discretionary power is not absolute power").

³⁰⁹ *Smith*, Decision No. 158 [1997] at para. 37 (finding that the Bank's staff rule requiring a case-by-case determination of appropriate disciplinary measures reflected the concept of proportionality, "which is well established in the case-law of this and other administrative tribunals").

³¹⁰ See *Lewin*, Decision No. 152 [1996] at para. 10; *Thompson*, Decision No. 30 [1986] at para. 24, each quoting *Polak*, Decision No. 17 [1984] at para. 43 (finding there to be an "established rule of judicial review by this and other similar tribunals" that a "reviewing tribunal" may not substitute its own judgment of "satisfactory performance" for that of management).

³¹¹ *de Merode*, Decision No. 1 [1981] at paras. 42–45 (establishing that fundamental conditions of employment can be changed by the Bank only with the consent of the staff member, while non-fundamental conditions can be changed unilaterally by the Bank subject to "limits and conditions," and further stating that in "various forms and with differing terminology this distinction is found in the Jurisprudence of other international administrative tribunals").

³¹² See *Lavelle*, Decision No. 301 [2003] at para. 19, quoting *de Merode*, Decision No. 1 [1981] at para. 46 (stating that "no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals"); *de Merode* at para. 34 (noting that the Bank had recognized the principle of non-retroactivity as binding); *Addy*, Decision No. 146 [1995] at paras. 42–45 (interpreting *de Merode* as meaning that "the Bank may not apply an amended rule to existing staff, if this rule changes conditions of employment which are fundamental and essential," and finding that the Bank "in effect" applied a rule retroactively to the applicant in breach of its legal obligations). The Tribunal confirmed the non-retroactivity, or *ex post facto*, principle for

“surrounding circumstances” may confer on a staff member the right to have a fixed-term appointment extended or converted into a permanent one.³¹³ With respect to awards, the Tribunal in *Moses (No. 2)*, Decision No. 138 [1994], stated that it had found it “convenient, following the practice of a number of other administrative tribunals,” to express the quantum of damages to be awarded in terms of a number of months’ salary.³¹⁴

The most important precedent drawn by the Tribunal from another international administrative tribunal has been the 1997 *Amora* judgment of the ADBAT,³¹⁵ in which that tribunal held that the Asian Development Bank had wrongfully denied a staff member pension credit by, among other things, wrongfully maintaining him in “independent contractor” status.³¹⁶ In *Caryk and Madhusudan*, decided by the Tribunal in 1999, two World Bank staff members invoked *Amora* before the World Bank’s Pension Benefits Administration Committee in an unsuccessful attempt to obtain pension credit for their prior service as Non-

disciplinary purposes in *D*, Decision No. 304 [2003], by stating that “[c]onduct on the part of a staff member which was blameless at the time cannot be made punishable by a subsequently amended staff rule.” *D* at para. 49 (establishing further that a contract of employment allowing prospective changes to the conditions of employment “cannot reasonably be construed to give the Bank the authority to apply rules relating to discipline – whether of substance or of sanction – retroactively so as to embrace conduct that had occurred before”). The Tribunal has incidentally used the term “*ex post facto*” only once, and then simply to quote an applicant’s contention with respect to a performance assessment. See *Visser*, Decision No. 217 [2000] at para. 59 (noting the applicant’s contention that the “assessment which the Task Manager sent to the Division Chief was written on the same day that she decided to end [the applicant’s] relationship with EDIHR. The Applicant submits that the opinion is ‘*ex post facto*’ and that it is bogus”).

³¹³ *Barnes*, Decision No. 176 [1997] at para. 4 (finding it “well recognized” by the Tribunal and “other international administrative tribunals” that “surrounding circumstances” may confer a right to conversion or extension of a staff member’s fixed-term contract); *McKinney*, Decision No. 187 [1998] at paras. 14–15 (applying the test, drawn from “decisions by other administrative tribunals” cited by the applicant, of whether the “Bank had made express representations that continued satisfactory performance would result in a contract extension,” and finding that no circumstances in the case gave rise to a “reasonable expectation of continued employment, such that non-renewal [would be] deemed to be a violation of the contract of employment”); *Carter*, Decision No. 175 [1997] at para. 13 (stating that the Tribunal’s identification of such a right to conversion in *Mr. X*, Decision No. 16 [1984] at para. 38, was “consistent with the prevailing decisions of all international tribunals”). *Mr. X*, however, does not itself refer to other tribunals in establishing this principle. See also *supra* note 247 and accompanying text (discussing the Tribunal’s adoption of implied promise and reliance doctrines in questions of contract renewal).

³¹⁴ *Moses (No. 2)*, Decision No. 138 [1994] at para. 27. See also *infra* notes 332, 353 and accompanying text (discussing the Tribunal’s invocation of the jurisprudence of other tribunals when establishing doctrines relating to damages). *Cf. The World Bank Staff Association*, Decision No. 40 [1987] at para. 68 (noting but not otherwise addressing the Bank’s argument that international administrative tribunals, except for the Court of Justice for the European Communities, “do not give relief of a general declaratory nature”).

³¹⁵ *Amora*, ADBAT Decision No. 24 (1997).

³¹⁶ *Caryk*, Decision No. 214 [1999] at paras. 21–24; *Madhusudan*, Decision No. 215 [2001] at paras. 27–30 (observing in each case that the ADBAT had held in *Amora*, ADBAT Decision No. 24 (1997), that “if a label given to a relationship was merely a device to deny the employee regular staff benefits, it should be disregarded”).

Regular Staff (NRS).³¹⁷ The Committee denied that *Amora* was applicable,³¹⁸ but on appeal the Tribunal held that while *Amora* was not binding, it did have value as a “persuasive” precedent given the Tribunal’s interest in a doctrinal “harmony” between international administrative tribunals.³¹⁹ The Tribunal went on to factually distinguish *Amora* in both cases.³²⁰

Several applicants in 2000 and shortly thereafter invoked *Amora*, albeit mostly without success.³²¹ In the 2001 case of *Prescott*, however, the Tribunal implicitly followed the ADBAT’s approach in finding the circumstances of the applicant’s NRS employment to have merited past pension credit.³²² Although the Tribunal

³¹⁷ *Caryk*, Decision No. 214 [1999] at para. 13; *Madhusudan*, Decision No. 215 [1999] at para. 20. See also supra notes 282–285, 291 and accompanying text (discussing the invocation of *Amora*, ADBAT Decision No. 24 (1997), by the parties in these cases as part of the Tribunal’s application of the *détournement de pouvoir* and *de procédure* standards).

³¹⁸ *Caryk*, Decision No. 214 [1999] at para. 18; *Madhusudan*, Decision No. 215 [1999] at para. 24.

³¹⁹ *Caryk*, Decision No. 214 [1999] at para. 19; *Madhusudan*, Decision No. 215 [1999] at para. 25 (stating in each case that “the Tribunal considers that a harmony of views of similar international jurisdictions is to be welcomed, if possible, and of course the Tribunal will be influenced by persuasive analysis whatever its source”).

³²⁰ *Caryk*, Decision No. 214 [1999] at paras. 20–26; *Madhusudan*, Decision No. 215 [1999] at paras. 26–31, 34 (distinguishing the applicant in each case from Mr. Amora of *Amora*, ADBAT Decision No. 24 (1997), on the bases of, *inter alia*, their respective job responsibilities and required skill sets, and the durations of their respective institutions’ needs for the tasks which they performed).

³²¹ See *Mitra*, Decision No. 230 [2000] at paras. 6, 10–11 (holding that no *prima facie* evidence existed to demonstrate that the applicant’s situation was similar to that presented in *Amora*, ADBAT Decision No. 24 (1997)); *M. Singh*, Decision No. 240 [2001] at paras. 14, 21 (stating that *Amora* did not establish that the “proper time” to file a pension or severance benefit claim was upon leaving the service of the Bank, and also finding that the applicant’s retrospective realization of his alleged misclassification was “not comparable” to the circumstances in *Amora*, in which a “clear abuse of discretion” was inherent in Mr. Amora’s “initial categorization as an independent contractor”). *Accord Gress*, Decision No. 269 [2002] at paras. 7–8 (holding the applicant’s reliance on *Amora* to be misplaced since in Mr. Amora’s case the abuse of discretion had been “clear. . . [from] the initial categorization, and did not require a retrospective evaluation of the Respondent’s conduct over the years”). In *B. Thomas*, Decision No. 232 [2000], the Tribunal rejected the World Bank Staff Association’s invocation of *Amora* to support its alternative *amicus curiae* arguments that either no 90-day time limit applied to pension-review claims, or that the “appropriate appeal period applicable to claims of entitlement to pension credits for misclassified past service does not expire until 90 days after staff members depart the Bank.” *B. Thomas* at paras. 17, 26–27 (distinguishing *Amora* on the same basis as in *M. Singh*, and finding the unsuccessful applicant’s situation to be closer to that in *Caryk* and *Madhusudan*, where the “substantive issue was whether ‘an initial ostensibly innocent appointment ultimately matured into an impermissible retention of the Applicant in an inappropriate classification’”), quoting *Caryk*, Decision No. 214 [1999] at para. 16, and *Madhusudan*, Decision No. 215 [1999] at para. 23. The World Bank Staff Association invoked *Amora* in the same manner in three contemporaneous cases which succeeded at the jurisdictional phase on other grounds. *Yang*, Decision No. 233 [2000] at paras. 16, 27–30; *Prescott*, Decision No. 234 [2000] at paras. 16, 27–30; *Oben*, Decision No. 235 [2000] at paras. 16, 27–30 (in each case noting the Staff Association’s invocation of *Amora*, finding the applicant’s situation to be similar to that in *Caryk* and *Madhusudan*, holding the applicant’s misclassification claim to be timely, and rejecting the applicant’s claim that no time limits exist for pension-review requests).

³²² *Prescott*, Decision No. 253 [2001] at paras. 19–23 (finding, as the ADBAT had with respect to Mr. Amora in *Amora*, ADBAT Decision No. 24 (1997), that the applicant’s work for the Bank consisted

never mentioned *Amora* in its judgment, it had become familiar with that decision and its influence cannot be doubted given the parallel paths of reasoning in the two cases.³²³ While the Tribunal strictly curtailed the jurisdictional impact of *Prescott* on like claims,³²⁴ *Prescott* has had a profound substantive effect on the Bank's treatment of NRS pension demands.³²⁵ The increase in staff pension rights and benefits that resulted provides a powerful illustration of the potential impact of cross-pollination between international administrative tribunals and its consequent additions to the common *corpus juris* of international civil service law.

B. *Judgments of the International Court of Justice, Permanent Court of International Justice and International Arbitral Tribunals*

The Tribunal's use of ICJ precedents began in *de Merode*, in which the Tribunal both invoked an ICJ advisory opinion in support of its recognition of *opinio juris*,³²⁶ and applied "by way of analogy" the ICJ's "approach" when deciding that

of providing administrative support that the Bank consistently viewed as being susceptible to replacement by ever-improving, labor-saving technology). See also *ibid.*, at para. 26 (holding that the Bank abused its discretion in "not considering and determining the Applicant's regularization" as required by express Bank rules and policy, and also given the Tribunal's finding that while the applicant had "satisfied the [requisite] criteria, no special effort was made to regularize him and no particular reasons were offered at any material time to justify this failure"). The Tribunal held that the applicant was entitled to past pension credit for the time during which he had wrongly been denied regularization. *Ibid.*, at paras. 32–33.

³²³) Such a conclusion is bolstered by the Tribunal's simultaneous judgment in *Prescott's* related case, *Yang*, Decision No. 252 [2001] at paras. 26–27 (rejecting for lack of supporting evidence the applicant's claim that the Bank had, like the Asian Development Bank in *Amora*, ADBAT Decision No. 24 (1997), "artificially defined her appointment types so as to suggest functions of a specific, limited duration, or for specific tasks"). The Tribunal in *Yang* stated that in *Amora* "it [had been] decided that benefits may not be neutralized by contracts which do not reflect the true relationship between the individual and the organization," and that "the problem [in *Amora* had been] precisely one of intentional deprivation of the Applicant's benefits." *Yang* at paras. 26–27.

³²⁴) Numerous claims filed in light of *Prescott*, Decision No. 253 [2001], have been dismissed on jurisdictional grounds by judgment or order as a result of the applicant's failure to personally exhaust all available internal remedies in a timely manner. See *M. Singh*, Decision No. 240 [2001] at paras. 25–28; *Gress*, Decision No. 269 [2002] at paras. 5–6; *Huber*, Decision No. 270 [2002] at para. 13 (stating in each case that under the terms of *Prescott*, there can be no later *dies a quo* for the running of time than that of the applicant's regularization). See also the Tribunal's orders of 24 May 2002 in *Alcantara, Dossa, Goldman, Harun, Mack, Peña, Reddy, Richardson, Tadesse, Waiser and Walker Gary* (finding in each case that the applicant had erred in relying for jurisdictional purposes on the timely actions of Mr. Prescott, and summarily dismissing the applicant's claims on the ground that the applicant's own actions had rendered the application untimely).

³²⁵) See generally, *e.g.*, *Lavelle*, Decision No. 301 [2003] (providing a history of the Bank's post-*Prescott* granting of limited past pension credit to certain former Non-Regular Staff (NRS), and dismissing a claim for past pension credit brought by an applicant ineligible for such credit under the new system). See also *supra* note 324, *infra* notes 343–349 and accompanying text (discussing in both locations the Tribunal's post-*Prescott* doctrinal development in respect of past pension credit eligibility).

³²⁶) *de Merode*, Decision No. 1 [1981] at para. 23 (establishing that a Bank practice becomes binding on the Bank as part of the "conditions of employment" only when there is evidence that the Bank has the "conviction that it reflects a legal obligation, as was recognized" by the ICJ), citing the *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO*, ICJ Reports 1956, p. 91.

the Bank's history of salary increases between 1968 and 1979 revealed, in the words of the ICJ, "so much uncertainty and contradiction, so much fluctuation and discrepancy... that it is not possible to discern in all this any constant and uniform usage, accepted as law."³²⁷

The Tribunal has since made use of ICJ precedents to support its holdings that: (i) a Bank action appeared "to have been kept within the bounds of what is moderate and reasonable";³²⁸ (ii) a former staff member is capable of bringing a case before the Tribunal to challenge an alleged violation of his or her rights;³²⁹ (iii) the Tribunal may independently identify both the object of a claim and the legal issues really in question;³³⁰ (iv) an "adequately reasoned" judgment need not discuss every "particular plea" or give reasons for each plea's approval or rejection;³³¹

³²⁷ *Ibid.*, at paras. 9, 108 (concluding on this basis 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 in the Washington Metropolitan Area"), quoting *The Asylum Case*, ICJ Reports 1950, p. 277.

³²⁸ *von Stauffenberg*, Decision No. 38 [1987] at para. 111 (observing that the ICJ's language was stated "in another context"), quoting the *Norwegian Fisheries Case*, ICJ Reports 1951, p. 142.

³²⁹ *I*, Decision No. 343 [2005] at para. 18 (noting that the "International Court of Justice counseled against an interpretation of the relevant contract of employment which, 'by considering exclusively the literal meaning of its provision relating to duration,' would disentitle the [former] employee from relying on it when challenging its non-renewal"), quoting the *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO*, ICJ Reports 1956, p. 91, at p. 92, and noting the Tribunal's similar invocation in *Carter*, Decision No. 175 [1997] at para. 14 (quoting pp. 92, 94 of the *Advisory Opinion* on this point and also with respect to the ICJ's noting that "the complainant [in the ILOAT case], in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment"). The Tribunal in *I* stated that "[b]y a parity of reasoning, the Tribunal does not accept a narrow conception of its jurisdiction which leaves a former staff member incapable of bringing a case based on an alleged violation of his rights." *I* at paras. 18–19 (stating further that "[w]hether in fact the relevant rules extend to the benefit of retired staff members under the circumstances is a matter of substance, not jurisdiction").

³³⁰ *von Stauffenberg*, Decision No. 38 [1987] at para. 43, quoting *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, p. 88, para. 35 (stating that "if [the Tribunal] is to remain faithful to the requirements of its judicial character... it must ascertain what are the legal questions really in issue in questions formulated in a request") (bracketed text and ellipsis taken directly from the *von Stauffenberg* quote), and also citing *Application for Review of Judgment No. 273 of the UNAT*, ICJ Reports 1982, p. 349, para. 48. See also *McNeill*, Decision No. 157 [1997] at para. 26 (stating that "it is [the Tribunal's] duty, as it is the duty of every international tribunal, 'to isolate the real issue in the case and to identify the object of the claim...; this is one of the attributes of its judicial functions'"), quoting the *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 262. The *Nuclear Tests Case* has likewise been cited on this point in the post-*McNeill* cases of *McCall*, Decision No. 201 [1998] at para. 19; *Yang, Prescott and Oben*, Decisions Nos. 233–235 [2000], all at para. 22; *Gilani*, Decision No. 261 [2002] at para. 16; *Hitch*, Decision No. 344 [2005] at para. 32.

³³¹ *van Gent (No. 2)*, Decision No. 13 [1983] at para. 28, following *Application for Review of Judgment No. 158 of the UNAT*, ICJ Reports 1973, pp. 210–211 (stating that "a judgment shall be supported by a stated process of reasoning. This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted").

(v) the Tribunal's rejection of a request for costs and attorneys' fees may be implied and need not be reasoned in detail;³³² and (vi) the Bank's decision not to renew a fixed-term appointment upon its expiry may not be made in an arbitrary manner,³³³ and is to be reviewed on the merits rather than at the jurisdictional stage.³³⁴

The Tribunal has in certain instances cited one of its own judgments as a precedent rather than repeat that judgment's citation of an ICJ case.³³⁵ This practice

³³² *Agado*, Decision No. 76 [1989] at para. 32 (stating that the Tribunal's "silence means rejection" with respect to a request for costs and attorneys' fees), following a "dictum" of the ICJ in *Application for Review of Judgment No. 158 of the UNAT*, ICJ Reports 1973, p. 212, para. 98 (taking account of the "basic principle" that in contentious cases before international tribunals each party shall bear its own costs absent a specific decision by the tribunal to award costs, and stating that the "decision merely to allow the general principle to apply does not necessarily require detailed reasoning, and may even be adopted by implication"). See also *supra* note 314, *infra* note 353 and accompanying text (in both places further discussing the role of external jurisprudence in the Tribunal's adoption of principles concerning the computation of damages).

³³³ *Carter*, Decision No. 175 [1997] at paras. 14–16 (rejecting the Bank's contention that the "absence of the renewal or extension of the Applicant's contract cannot constitute 'non-observance of the contract of employment or terms of appointment' within the meaning of" the Tribunal Statute, and stating that the Bank's discretionary power not to renew a contract is "not absolute and may not be exercised in an arbitrary manner"), quoting as support the *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO*, ICJ Reports 1956, p. 91, at pp. 92, 94 (rejecting "an interpretation of the contract of employment which, by considering exclusively the literal meaning of its provision relating to duration, would mean that on the expiry of the fixed period a fixed-term contract cannot be relied upon for the purpose of impugning a refusal to renew it," and finding that "the complainant, in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment").

³³⁴ *Carter*, Decision No. 175 [1997] at para. 17, recalling the *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO*, ICJ Reports 1956, p. 91, at p. 94 (holding that the question of whether the relationship between a renewal and the original appointment creates a "definite right to renewal" is one that "pertains to the merits").

³³⁵ See *Rittner*, Decision No. 335 [2005] at para. 27 (recalling that "it is the duty of every international tribunal 'to isolate the real issue in the case and to identify the object of the claim,' and that 'this is one of the attributes of its judicial function'"), quoting *McNeill*, Decision No. 157 [1997] at para. 26, but not also citing the ICJ precedent quoted by *McNeill*, *i.e.* the *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 262. Compare the Tribunal's direct invocations of the *Nuclear Tests Case* during the period 1997 to 2005, *supra* note 330. During this time, the Tribunal in *Madabushi*, Decision No. 257 [2001] at para. 45, cited to both *McNeill* and *Oben*, Decision No. 235 [2000] at para. 22. While an examination of *Oben* would reveal its reproduction of *McNeill's* quotation and citation of the *Nuclear Tests Case*, the Tribunal in *Madabushi* presented, at least facially, a fully internal set of supports. See also in this vein *Gavidia*, Decision No. 66 [1988] at para. 24 (noting the Tribunal's decision in *von Stauffenberg* that "it is within its judicial mission to address the legal questions really in issue in the submissions formulated in an application"), citing exclusively to *von Stauffenberg*, Decision No. 38 [1987] at para. 43, which had in this regard both quoted the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, p. 88, para. 35, and cited the *Application for Review of Judgment No. 273 of the UNAT*, ICJ Reports 1982, p. 349, para. 48. See also *von Stauffenberg* itself, at para. 89 (finding that the Bank's varying practices and freedom to choose certain measures made it impossible "to speak of a [specific] practice capable of generating rights and duties between the Bank and the staff"), citing only to *de Merode*, Decision No. 1 [1981] at para. 108, which had in this respect applied "by way of analogy" the approach taken by the ICJ in *The Asylum Case*, ICJ Reports 1950, p. 277, in analyzing the legal implications of practice.

completes the absorption of the ICJ contribution into the genetic structure of the Tribunal's jurisprudence. If future cases were to reference only such internal precedents, the ICJ graft might in time come to be discovered only through a determined genealogical search back through a chain of older cases.³³⁶

In the two instances where the Tribunal has used judgments of the Permanent Court of International Justice (PCIJ) as precedents, it has done so to support its holdings that: (i) a dispute “as to whether a particular point has or has not been decided with binding force” falls under the category of disputes concerning a judgment's meaning or scope;³³⁷ and (ii) an international judicial body “is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.”³³⁸

The Tribunal has very recently cited two international arbitral awards in support of its finding that it is “well established in international law that the exhaustion rule requires that complainants, before going to the international forum, avail themselves of existing procedural mechanisms – such as calling witnesses – essential to the prosecution of their case.”³³⁹ It remains to be seen, however, whether the Tribunal will continue to welcome doctrinal contributions from the vigorous tradition of international arbitration, and what impact such doctrines will have on the Tribunal's jurisprudence.

³³⁶ In the context of identifying the real issue to be decided in a case (see *supra* note 330), *McNeill*, Decision No. 157 [1997], serves as a “first-step” precedent that introduces the ICJ's doctrinal contribution, while *Rittner*, Decision No. 335 [2005], and *Madabushi*, Decision No. 257 [2001], serve as “second-step” precedents that refer back to *McNeill* (and, in the case of *Madabushi*, also to *Oben*, Decision No. 235 [2000]) without acknowledging the original ICJ source. (Cases like *Oben*, which reveal the ICJ source even as they refer to the introductory, first-step precedent, are for this reason themselves merely a variation on the first-step precedent.) If a “third-step” case were to refer to a second-step precedent, discovery of the original ICJ source would grow even less likely. For example, if a case were to cite to *Rittner*, the ICJ contribution would be found along this line only after a review of *Rittner* and then *Rittner's* own source, *McNeill*. As ever higher-step precedents multiply and the chain lengthens, the ICJ case's place in the doctrine's ancestry may in time be forgotten, at least among average practitioners. It may be observed, however, that no third-step precedent has yet occurred in the Tribunal's jurisprudence.

³³⁷ *Agodo*, Decision No. 76 [1989] at para. 31, quoting the *Chorzów Factory Case (Request for Interpretation)*, PCIJ Series A, No. 13, pp. 11–12.

³³⁸ *von Stauffenberg*, Decision No. 38 [1987] at para. 51 (concluding on the basis of the PCIJ's reasoning that the Tribunal “would not fulfill its judicial mission if it were, for procedural and purely formalistic reasons, to limit itself to the review of only one aspect of the case”), quoting *Mavrommatis Palestine Concessions*, PCIJ Series A, No. 2, p. 34, and further citing *Northern Cameroons*, ICJ Reports 1963, p. 28 (following *Mavrommatis* on this point).

³³⁹ *Yoon (No. 5)*, Decision No. 332 [2005] at para. 60, citing *Finnish Ships*, Finland v. Great Britain, 9 May 1934, III Reports of International Arbitral Awards 1479, at p. 1502, and *Ambatielos*, Greece v. U.K., 6 March 1956, XII Reports of International Arbitral Awards 83, at p. 120.

C. *Judgments of National Courts*

The Tribunal in only a few cases between 1981 and 2005 looked to national court judgments in its reasoning.³⁴⁰ In *Chhabra (No. 2)*, Decision No. 193 [1998], the Tribunal relied on specific judgments of the District of Columbia Court of Appeals interpreting that jurisdiction's workers' compensation law, which the Bank has bound itself to follow.³⁴¹ In *Rodriguez-Sawyer*, the Tribunal quoted two U.S. federal appeals court opinions that supported the Tribunal's view that "strict and clear rules" are desirable for beneficiary designations under the Bank's retirement plan.³⁴²

³⁴⁰ The national cases considered by the Tribunal during the period under review came from either the United Kingdom or the United States, with the latter's courts being either those for federal appeals or those for municipal appeals arising in the District of Columbia. The U.K. judgments cited in the Tribunal's reasoning are the opinion of Lord Russell in *Kruse v. Johnson*, [1898] 2 QB 91, [1895–1899] All ER 105; *R v. IRC, ex parte MFK Underwriting Agencies Ltd.*, [1990] 1 WLR 1545, at pp. 1569–1570; *R v. North and East Devon Health Authority, ex parte Coughlan*, [2000] 3 All ER 850, at pp. 871–872, para. 57. The U.S. cases cited are *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990); *Spartin v. Dist. of Columbia Dept. of Employment Services*, 584 A.2d 564 (D.C. 1990), at p. 568; *Sturgis v. Dist. of Columbia Dept. of Employment Services*, 629 A.2d 547 (D.C. 1993), at pp. 551–552; and a dissenting opinion in *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78 (4th Cir. 1996), at pp. 82–83.

³⁴¹ *Chhabra (No. 2)*, Decision No. 193 [1998] at paras. 6, 8–9, 12 (applying as a "governing principle" the "objective test" employed by the District of Columbia Court of Appeals and consequently adopted by the Bank's Workers' Compensation Administrative Review Panel when considering the relevant D.C. statute which the Bank had bound itself to apply), quoting *Sturgis v. Dist. of Columbia Dept. of Employment Services*, 629 A.2d 547 (D.C. 1993), at pp. 551–552 (stating that in cases of work-related stress an inquiry shall focus on whether the job's stresses were so great as to cause harm to the average worker, and that "a claimant must establish that a particular incident or situation at work was a significant stressor that could reasonably be expected to affect a person of ordinary sensibilities in the same way that it affected the claimant"), and *Spartin v. Dist. of Columbia Dept. of Employment Services*, 584 A.2d 564 (D.C. 1990), at p. 568 (stating that a "claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant's subjective perception of his working conditions, were the cause of his emotional injury. The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar emotional injury in a person who was not significantly predisposed to such injury"). Compare *Shenouda*, Decision No. 177 [1997] at paras. 20–21 (finding, in a disability pension case heard originally by the Bank's Pension Benefits Administration Committee, that the applicant "seriously err[ed] in invoking disability standards under the laws applied in state and federal courts of the United States," as "[t]hose laws are variable in content and are commonly less demanding than the requirements of the [Staff Retirement Plan] which, of course, govern in this proceeding"). The Tribunal further observed that standards applied under the Staff Retirement Plan in respect of a requested disability pension are more stringent than those applied to a claim for workers' compensation, as the latter may be only temporary or partial in scope. *Ibid.*, at para. 20. See also *supra* note 31 and accompanying text (discussing the Tribunal's application of District of Columbia statutes in reviewing workers' compensation questions).

³⁴² *Rodriguez-Sawyer*, Decision No. 330 [2005] at para. 26 (noting the "similar view [that] has been expressed in the United States federal appeals courts, sometimes in majority opinions and sometimes in dissent"), quoting *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990) (stating that "[i]f the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation"), and a dissenting opinion in *Estate of Altobelli v.*

In the recent pension policy case of *Lavelle*, the Tribunal expressly adopted the English doctrine of “legitimate expectation,” which arose in that country’s courts from the “notion of fairness.”³⁴³ The Tribunal cautioned that while it “does not necessarily follow the standards of national law, the formulation of legitimate expectation [provided by certain cited English judgments] does summarize the essence of the doctrine invoked. This was the very reasoning underlying the judgment of the Tribunal in *Prescott*.”³⁴⁴ This equation of the English doctrine with the *ratio decidendi* of *Prescott* not only served to connect the Tribunal’s jurisprudence with English law, but also linked the “legitimate expectation” doctrine to the ADBAT’s *Amora* judgment, which *Prescott* paralleled in its reasoning.³⁴⁵ In doing this, the Tribunal provided noteworthy support to the concept of a “common *corpus juris*” of international administrative law.

This being said, however, the Tribunal did not institute in *Lavelle* a wholly new or separate standard of review. In applying the “legitimate expectation” doctrine,

International Business Machines Corp., 77 F.3d 78 (4th Cir. 1996), at pp. 82–83 (stating that “[s]trict adherence to [written beneficiary designations] ensures that all interested parties, including participants, beneficiaries, and plan administrators, can identify their rights and duties with certainty”). The Tribunal further observed that “there are in the United States several federal court decisions, as well as state court decisions, that invite plan administrators to consider facts and circumstances surrounding divorces and settlement agreements, with a view toward possibly overriding the expression of intent found in an earlier beneficiary designation.” *Rodriguez-Sawyer* at para. 27. The Tribunal found it sufficient, however, to conclude that the terms of the Bank’s Staff Retirement Plan and “its underlying policies and justifications” were “reasonable,” and that their application was not an abuse of discretion. *Ibid*.

³⁴³ *Lavelle*, Decision No. 301 [2003] at paras. 24, 26 (applying the English “legitimate expectation” doctrine and noting that “[f]airness is not loosely defined [in English law]. On the contrary, it is measured by strict standards. While in its origins the doctrine was applied only to procedural shortcomings, it has evolved into an examination of the reasonableness of decisions and policies”), citing *R v. IRC, ex parte MFK Underwriting Agencies Ltd*, [1990] 1 WLR 1545, at pp. 1569–1570. See also *de Merode*, Decision No. 1 [1981] at para. 43 (recognizing that it is impossible “in abstract terms . . . to discern the line between what is . . . fair and unfair, equitable and inequitable”); and also *supra* notes 248–249 and accompanying text (discussing *Lavelle* and the “legitimate expectation” doctrine in the context of the Tribunal’s development of reliance doctrines).

³⁴⁴ *Lavelle*, Decision No. 301 [2003] at paras. 24–25, citing *R v. IRC, ex parte MFK Underwriting Agencies Ltd*, [1990] 1 WLR 1545, at pp. 1569–1570, and quoting both the opinion of Lord Russell in *Kruse v. Johnson*, [1898] 2 QB 91, [1895–1899] All ER 105 (stating that an English court’s solicitude would not extend to regulations “if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men”), and *R v. North and East Devon Health Authority, ex parte Coughlan*, [2000] 3 All ER 850, at pp. 871–872, para. 57 (stating that where an English court considers that a lawful promise or practice has induced a “legitimate expectation” of a substantive and not simply procedural benefit, “authority now establishes” that the court will “in a proper case” decide whether frustrating the expectation is so unfair that the taking of such a new and different course amounts to an abuse of power, the legal result being that once the expectation’s legitimacy is established, the court has the task of “weighing the requirements of fairness against any overriding interest relied upon for the change of policy”).

³⁴⁵ See *supra* notes 322–323 and accompanying text (discussing *Amora*, ADBAT Decision No. 24 (1997), in the context of the Tribunal’s judgment in *Prescott*, Decision No. 253 [2001]).

the Tribunal found no “procedural flaws” to have been alleged with respect to the Bank’s new past pension credit policy,³⁴⁶ and required that the applicant have “at the very least” relied, and been justified in relying, on a current policy or extant promise.³⁴⁷ Such tests at least partly resemble those of the Tribunal’s abuse of discretion standard,³⁴⁸ and also those of the *détournement de pouvoir* and *de procédure* standards to the extent that they exist independently for the purpose of reviewing the validity of a general policy’s application to specific applicants.³⁴⁹

It remains to be seen whether the Tribunal will develop its anglicized doctrine of “legitimate expectation” into a distinctly new jurisprudential tool. It also may

³⁴⁶ *Lavelle*, Decision No. 301 [2003] at paras. 24, 26 (noting that the English doctrine of “fairness” was originally applied only to alleged “procedural shortcomings,” but later “evolved into an examination of the reasonableness of decisions and policies,” from which developed the “legitimate expectation” doctrine), citing *R v. IRC, ex parte MFK Underwriting Agencies Ltd.*, [1990] 1 WLR 1545, at pp. 1569–1570.

³⁴⁷ *Lavelle*, Decision No. 301 [2003] at paras. 26–27, 29 (finding that the applicant’s contractual rights were not affected by the Bank’s new pension policy, and holding that he could not “have relied on the substantive benefits of a policy that did not exist and that had not been promised”). See also *supra* notes 248–249 and accompanying text (discussing the Tribunal’s adoption of the “legitimate expectation” doctrine in the context of the Tribunal’s development of reliance doctrines).

³⁴⁸ For a description of the abuse of discretion standard, see *McKinney (No. 2)*, Decision No. 206 [1999] at para. 35 (stating that the Tribunal had held “on several occasions that a decision of the Bank in the exercise of its managerial discretion ‘is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure’”), quoting *Saberi*, Decision No. 5 [1981] at para. 24. See also *supra* note 278 and accompanying text (providing a similar formulation of the abuse of discretion standard). Prior to *Lavelle*, Decision No. 301 [2003], the Tribunal dealt with cases of alleged expectation under this standard. *Mr. X*, Decision No. 16 [1984] at paras. 20, 27, 38–39, 44 (noting the parties’ contentions as to whether the applicant had had a “legitimate expectation” of continued employment with the Bank, and holding for lack of an abuse of discretion that the “Bank ha[d] not failed to observe the contract of employment or terms of appointment of the Applicant”); *Mathew*, Decision No. 103 [1991] at paras. 14, 21, 25–29, 32, 39 (reviewing for abuse of discretion the performance evaluation upon which was conditioned the applicant’s allegedly promised and expected conversion from a fixed-term appointment to a permanent one); *McKinney*, Decision No. 187 [1998] at paras. 14–16 (rejecting on the facts the applicant’s claim that, as in “several decisions by other administrative tribunals,” “special circumstances” resulting from the Bank’s conduct had given rise to his “reasonable expectation” and “legal expectation” of continued employment, and stating that good performance is assumed and thus cannot “reasonably give rise to an expectation of greater employment rights than those expressly provided in the contract of employment”). Compare *Visser*, Decision No. 217 [2000] at paras. 30–31, 36, 83 (holding, without specific reference to an abuse of discretion, that the Bank denied “fair treatment” to the applicant by confounding his claimed “legitimate expectation” of benefits that would normally flow from a six-month contract). *Cf. Vollmer*, Decision No. 112 [1992] at para. 17 (noting but not specifically addressing the unsuccessful applicant’s claim of a “legitimate expectation” with respect to a salary increase).

³⁴⁹ *Lavelle*, Decision No. 301 [2003] at para. 28 (stating that the Tribunal had “no doubt in concluding that the policy defined did not entail an abuse of power or frustrate a legitimate expectation”); *ibid.*, at paras. 27–28 (stating that the Tribunal could not judge the wisdom of the Bank’s policy, and finding that neither the Bank’s management and Executive Directors, nor the “thousands of staff members” who had benefited from the policy, appeared to believe the policy “manifestly unjust, made in bad faith or so gratuitous and oppressive that no reasonable person could think it justified”). For a discussion of the scope of the Tribunal’s *détournement* standards for reviewing applied policies, see *supra* notes 274–300 and accompanying text.

be wondered whether the Tribunal will expand its reception of English and U.S. law, or incorporate the jurisprudence of other countries' national courts. The Tribunal's recent practice suggests that such rich veins of doctrine may yet be opened up for mining, even if only for the purpose of obtaining external support for the Tribunal's independent reasoning.

D. *Reference to Unnamed Tribunals*

The Tribunal has in several instances invoked the jurisprudence of unnamed tribunals to support its doctrinal conclusions. With respect to jurisdiction, the Tribunal found in *Justin*, Decision No. 15 [1984], that it had the power "initially to consider the merits of the Applicant's claim of contract formation for the limited purpose of determining its own jurisdiction," as was "commonly exercised by domestic and international tribunals."³⁵⁰ In *Yousufzi*, Decision No. 151 [1996], the Tribunal stated that time limits on the filing of applications "are of a mandatory nature and are enforced by courts in the public interest."³⁵¹ As regards substantive matters, the Tribunal has cited unnamed tribunals in upholding the Bank's definition of sexual harassment,³⁵² and in refusing to award interest in the absence of an injury.³⁵³

³⁵⁰ *Justin*, Decision No. 15 [1984] at para. 22. Cf. *The World Bank Staff Association*, Decision No. 40 [1987] at para. 65 (noting but not otherwise addressing the Bank's argument that the "jurisprudence of other tribunals and courts" did not support an "enlargement" of the Tribunal Statute's terms so as to allow the World Bank Staff Association to stand as an applicant or intervenor on behalf of an individual staff member).

³⁵¹ *Yousufzi*, Decision No. 151 [1996] at para. 26 (stating that time limits are not established for the Bank's benefit as the respondent, but instead have a "wide purpose" as a means of organizing judicial proceedings in a "reasonable manner," and also have as their object the prevention of "unnecessary delays in the settlement of disputes"). See also supra notes 195–198 and accompanying text (discussing the Tribunal's engagement with "public policy" concerns). The Tribunal further held in *Yousufzi* that the "doctrine of 'laches'" is irrelevant where the time limit is prescribed by the Tribunal Statute, and in any event is "directed against non-vigilant parties and is not meant... to be used as a justification for untimely action." *Ibid.*, at paras. 15, 19, 21, 24, 27 (noting also the parties' contentions regarding the applicant's claimed "equitable defense of laches" allegedly arising from international law's jurisprudential "equity" and pursuant to which, the applicant contended, the Bank must show that the applicant's delay in filing was "unreasonable" and that the Bank thereby "suffered harm or undue prejudice"). See also supra notes 207–217 and accompanying text (discussing the Tribunal's engagement with notions of "equity").

³⁵² *Rendall-Speranza*, Decision No. 197 [1998] at para. 44 (finding the Bank's definition of sexual harassment to be consistent with "both international... and domestic jurisprudence"). See also supra note 47 and accompanying text (discussing the Tribunal's application of the Bank's "multicultural environment" approach to identifying instances of sexual harassment).

³⁵³ *de Vuyst*, Decision No. 39 [1987] at paras. 9, 29 (noting the applicants' submission that "[i]nternational and domestic tribunals have recognized that [the payment of] interest is an important part of restoring injured parties to the *status quo ante* and making them whole," and rejecting the applicants' claim for such on the grounds that, unlike in the jurisprudence invoked, there had been no "violation of a rule of

VI. General Conclusions

While the scale and significance of individual adoptions have varied greatly, the overall impact of external sources of law on the Tribunal's jurisprudence has been profound. This study has, in the spirit of the Tribunal's first judgment, *de Merode*, divided its review of this hugely diverse body of external inputs under the four rubrics provided by the ICJ Statute when listing that Court's sources of law. The modifications required to fulfill this organizational conceit reveal that while the Tribunal broadly shares the ICJ's approach to sources of law, and can indeed be seen as a vigorously growing branch on the tree of international jurisprudence, it covers a distinct type of jurisdiction to which its importation practices have had to be specially adapted.

Thus, the "conventions" applied by the ICJ are in this study analogized to a staff member's "*pactum*" with the Bank. This *pactum* is described in terms of a contract of employment and terms of appointment, but also includes the Bank's rules and, to a lesser extent, the terms of treaties enunciating general legal norms, certain pieces of national legislation, and even local mores. The Tribunal's handling of "custom" reveals a similar openness to outside sources, for while the Tribunal reviews only the Bank's acts for signs of *opinio juris*, it has also had to consider the practices of other organizations as well as those of national and local governments, including prosecutorial authorities and courts.

The Tribunal's adoption of numerous general principles of law provides perhaps the fullest demonstration that the Tribunal's jurisprudence is not *sui generis*, but rather an edifice founded in large part on a host of domestic and international legal concepts. This process of importation, partly explicit, partly subconscious in character, has allowed the Tribunal to erect a sophisticated legal system within a relatively brief period of time. Meanwhile, the Tribunal's use of outside precedents and jurisprudence has sometimes sparked important new stages in the Tribunal's doctrinal evolution, and has also regularly provided opportunities for the Tribunal to harmonize its doctrines with those of other international administrative tribunals.

As the Tribunal's long jurisprudential flowering continues into its next quarter-century, it is for all of the above reasons unlikely to turn away from the external sources of law it has employed so effectively in developing its own doctrines. Not only is the Tribunal's bench by its very constitution a body of internationalist disposition and habits, but it is also profoundly and openly dedicated to the pur-

law," no deliberately or neglectfully wrongful and unjustified act or omission, nor an unduly long and unreasonable delay in payment of compensation by the Bank). See also *supra* notes 314, 332 and accompanying text (discussing the Tribunal's invocation of other tribunals' precedents and jurisprudence in establishing doctrines relating to damages).

suit of doctrinal *rapprochements* with its sisters. It may therefore indeed be that the first quarter-century of Tribunal judgments are but the Tribunal's first steps toward a larger process of harmonization that will lead ultimately to a unified *corpus juris* having deep and lasting effects on international administrative law and its subjects.