

20TH ANNIVERSARY

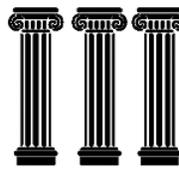


Asian Development Bank

Administrative
Tribunal

The Administrative Tribunal of ADB 20 Years of Operation

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Printed in the Philippines.

ISBN 978-92-9092-744-0 (Print), 978-92-9092-745-7 (PDF)
Publication Stock No. RPT124818

Cataloging-in-Publication Data

Asian Development Bank.

The Administrative Tribunal of the Asian Development Bank: 20 Years of Operation.
Mandaluyong City, Philippines: Asian Development Bank, 2012.

1. Administrative Tribunal. 2. 20 Years of Operation. I. Asian Development Bank.

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Note:

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Conference Reflections

President Arnold M. Zack

The 20th Anniversary Celebration of the Asian Development Bank Administrative Tribunal (ADBAT) is only the latest of many such milestones commemorated by various administrative tribunals, created by their host international organizations to provide independent review of the actions of management to assure that staff members were treated reasonably under the organizations' rule of law. Most of those commemorations focused on the need to assure independence of the tribunal itself so that it and the organization that created it remain respected as neutral and independent and thus beyond censure by national courts of member states claiming lack of adequate legal protection for their national citizens.

There is little question that the organizations have sought to assure independence of their tribunals by procedures for selection of judges, assurances of fixed tenure, and protection against organizational interference with their operations. To do so is naturally in their self-interest as well as essential to retaining the confidence of staff members that management actions are indeed subject to independent review. Such challenges have, so far, been rare, but in an era of increasing social networking, escalating demands for institutional transparency, and ever more frequent reports of grassroots protests, the risk of external challenge continues to be a matter of serious concern.

Although there is no guarantee of protection from member state protest, organizations need to continue to fine-tune their internal dispute resolution procedures to minimize the risk of external challenge.

For its 20th anniversary commemoration, the ADBAT undertook a different approach to the self-examination that has been at the heart of most such sessions. Given that most organizations have sought to create in their dispute resolution procedures a balance between rapid resolution of staff complaints and litigation before their administrative tribunals as the final adjudicator, we opted to focus on how the earlier steps in that dispute resolution procedure can be best structured to assure that most disputes are readily resolved as soon as possible after they emerge, while further encouraging such resolution as an alternative to tribunal determinations.

Our conference papers were placed in a sequence from Professor Dale Bagshaw's exposition of the universality and importance of mediation, particularly in multicultural environments; to Jack Kennedy's experienced recital of what occurs, what can go bad, and what could be done to make administrative review even more effective; and to Chris de Cooker's exploration of the steps below and how they could more effectively deter

cases from being appealed to administrative tribunals. The last paper, that delivered by Professor Ahmed El Kosheri, commented on many of the points raised in the earlier papers, but concentrated on the much broader scope of problems and worldwide operation of organizations like the United Nations and the need to develop a dispute resolution structure for global organizations, rather than single-city-based organizations such as the International Monetary Fund and ADB. He described his role in the review of the former procedures and the decision of the General Assembly to reformat its procedures by eliminating the peer review step and creating a two-tiered judicial process, with regional tribunals from which an applicant may appeal to the central UN Appeals Tribunal.

Professor El Kosheri focused the attention of the conference on the heart of the problem in designing an internal dispute resolution system that most effectively resolves disputes within the organization. The problem faces off those who support the view that the emphasis of the system should be on early resolution of any disputes between the staff and management through discussion, negotiation, and perhaps mediation, and those who support the view that the emphasis should be on judicial determination as to whether the management has violated its statutes or legal obligations. Although he asserts the former is a luxury that is suited to smaller single-city-based organizations and does not work for a worldwide organization of 30,000 employees such as the United Nations, I would suggest that relying solely on the judicial approach, particularly with its appeal potential, invites more litigation and greater longevity for more staff conflict than would a system that relies upon or even permits some form of internal peer examination and opportunity for claim settlement. Offering only litigation, with the delays for one's day in court, the confrontations that continue at the workplace while a case is being processed, the cost of counsel, and the difficulty of access to a far-distant forum, may reduce the number of claims, but it may also suppress legitimate claims, which left unaddressed can only engender more hostility and resentment against the management of the organization and expand rather than thwart conflict.

The experience at the World Bank, cited by David Rivero, shows that negotiation and mediation work to dispel a large number of disputes. Removing such an escape valve opens the potential that those disputes, when unresolved, will linger until adjudicated, with accompanying lingering staff frustration, or worse, may deter staff members from taking the litigation route, leaving their unresolved complaints to fester and spread among other staff members. Certainly even with the early efforts at resolution proposed by de Cooker and Kennedy, management retains the right to reject offers of settlement, leaving open the door to appeal to an organization's administrative tribunal, but at least after the applicant has been provided an exposure to the management's or human resources' position and hopefully offers a resolution so there is a better sense of the strength of an applicant's position than would prevail without those opportunities. Even in organizations as wide flung as the United Nations, with staff members in local operations without the full panoply of resources available in a single-site organization, there is some merit to providing such an opportunity for case assessment or compromise or even a face-saving way out of a complaint before requiring the staff member to enter the channel to judicial appeal.

The idea of having an appeal tribunal to handle appeals from their existing single-tier administrative tribunals is one that is often raised by organizations feeling too much beholden to a single level of tribunal. Such an appeal tribunal would provide protection against a wild off-the-wall decision of their present single tribunal, although it would presumably be equally accessible to a deep-pocket applicant unwilling to give up the virtues of their case even when ruled against by the organization's existing tribunal. The addition of such an appeal tribunal would presumably strengthen the concept of tribunal independence from the host organization, but probably only if that appeal tribunal was sited away from the organization with judges not selected, appointed, or paid by the organization providing that additional forum.

As to the shift to judicial proceedings in lieu of peer review procedures, Professor El Kosheri bases his case in part on the global nature of the United Nations, with personnel operating away from base stations with the myriad of settlement procedures that other organizations such as regional banks and other single-site organizations might provide. Adherence to the rule of law and a tilt in favor of reliance on litigation to determine whether the organization has acted improperly is particularly well suited for the far-flung staff of such a large global organization, but even there many disputes will arise over personal tensions and relationships, which indeed may be the driving force for the application and the appeal. Professor Bagshaw makes an appealing case for communication procedures that may diffuse such disputes, or at least remove the cultural and ethnic components from what then might be a strictly legal complaint. She endorses mediation as a proven technique for achieving such resolutions. Although the United Nations may indeed be such a unique structure that settlement efforts are of minimal value, the experience of other international organizations makes it clear that diffusing conflict, whether personal, ethnic, gender based, or indeed legal, is a top priority of their procedures. Certainly when working in any international organization staffed by employees from diverse cultures and ethnic groups, let alone countries, there is a stronger likelihood of tension and misunderstanding than one would expect in an institution of one cohesive ethnic group, though obviously disputes arise as well within such societies. Professor Bagshaw shows that mediation has been an effective means of reducing such intercultural conflicts.

De Cooker and Kennedy endorsed such dispute resolution procedures, particularly if they occur early enough to protect the organization from protracted red tape and to minimize the number, cost, and delays of appeals to tribunals.

They made a strong case for early discovery of the situation facts, early discussion with management and even the human resources office, and most pointedly, ready access to mediation and even ombuds services in the hope that such disputes could be peacefully settled without recourse to formal litigation before the organization's administrative tribunal.

The new United Nations procedure may well show that litigation alone is sufficient to assure fair resolution of workplace disputes within international organizations. The experience of other organizations shows that they have been effective using negotiation,

mediation, and peer review of various forms in an effort to resolve disputes and reduce the need for appeal to their tribunals. The World Bank shift in emphasis to mediation underscores its effectiveness. Both approaches have merit.

The choice between, on the one hand, efforts at early informal resolution through administrative review and peer review and on the other hand, reliance on the rule of law and exclusive resort to the formal litigation at one or more tribunal levels, will be answered by which is the most effective in resolving internal disputes expeditiously, economically, and acceptably while assuring challengers that the organization's procedures as well as its administrative tribunal are truly independent.

We hope that our session provided adequate food for thought for those engaged in the day-to-day problems of resolving disputes within international organizations. Whatever the machinery that is used, the goal remains to assure the staff that the procedures are fair and fairly administered, and that resorting to the organization's tribunal provides a full opportunity to present the position of staff member and employer for a resolution that is consistent with the laws of the organization and the standards of due process expected of all international tribunals.

The Conference Program

Time	Activity
8:15–8:55	REGISTRATION OF PARTICIPANTS ADB Auditorium lobby Coffee/tea service
9:00–9:30	OPENING SESSION <i>Introductions</i> Cesar L. Villanueva, Executive Secretary, ADB Administrative Tribunal <i>Welcoming Remarks</i> Arnold M. Zack, President, ADB Administrative Tribunal <i>Opening Remarks</i> Haruhiko Kuroda, President, Asian Development Bank David Sobel, Chair, ADB Staff Council Hamid Sharif, Chair, ADB Appeals Committee
9:30–10:30	PAPER PRESENTATION <i>Resolving Disputes in Asia: What Has Culture Got to Do with It?</i> Chair: Yuji Iwasawa, Vice President, ADB Administrative Tribunal Presenter: Dale Bagshaw, Adjunct Associate Professor, School of Psychology, Social Work and Social Policy, University of South Australia Discussant: Nimfa Cuesta-Vilches, Deputy Court Administrator, Supreme Court of the Philippines OPEN FORUM
10:30–10:45	Coffee/tea break
10:45–12:15	PAPER PRESENTATION <i>Improving the Steps Below: Administrative Review in International Organizations</i> Chair: Lakshmi Swaminathan, Judge, ADB Administrative Tribunal Presenter: Jack Kennedy, International Human Resources Consultant Discussants: Chris de Cooker, Chair, International Civil Service of the International Institute of Administrative Sciences David Rivero, Chief Counsel, The World Bank OPEN FORUM
12:15–1:30	LUNCH BREAK

continued on next page

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Time	Activity
1:45–3:15	<p>PAPER PRESENTATION <i>Improving the Step Below: Peer Review in the Internal Justice System of International Organizations</i> Chair: Claude Wantiez, Judge, ADB Administrative Tribunal Presenter: Chris de Cooker, Chair, International Civil Service of the International Institute of Administrative Sciences Discussants: Jack Kennedy, International Human Resources Consultant Jennifer Lester, Assistant General Counsel, International Monetary Fund</p> <p>OPEN FORUM</p>
3:15–3:30	Coffee/tea break
3:30–5:00	<p>PAPER PRESENTATION <i>How the Steps Below Impact on the Responsibilities and Independence of Administrative Tribunals</i> Chair: Florentino Feliciano, Judge, World Bank Administrative Tribunal Presenter: Ahmed El Kosheri, Vice President, International Chamber of Commerce's Court of Arbitration Discussants: Heidi Jimenez, Legal Counsel, Pan American Health Organization/World Health Organization Dale Bagshaw, Chris de Cooker, and Jack Kennedy</p> <p>OPEN FORUM</p>
5:00–5:30	<p>CLOSING CEREMONY <i>Closing Remarks</i> Arnold Zack, President, ADB Administrative Tribunal</p>
5:30–7:00	<p>COCKTAIL RECEPTION Host: Haruhiko Kuroda, ADB President Executive Dining Room</p>

The Presenters' Biographies



Dale Bagshaw

After 36 years as an academic, Dale is now an adjunct associate professor at the University of South Australia (UniSA), where she was previously head of school, director of postgraduate studies, and program director for the Master's/Graduate Diploma in Mediation and Conflict Resolution and the Doctor of Human Service Research in the School of Psychology, Social Work and Social Policy. From 1993 to 2009 she was also the director of the Centre for Peace, Conflict and Mediation. In 2010, Dale was also appointed as a visiting professor with the School of Law and Business at the National University of Ireland, Maynooth.

At the 10th National Mediation Conference, Dale was dubbed “the grandmother of mediation” in Australia. She has also been president of the World Mediation Forum and president of the Asia Pacific Mediation Forum since it was established in 2001; has led many research projects; chaired and participated on three national councils advisory to the Australian Government; is published internationally in many peer-reviewed books and journals; is on the International Editorial Board for the *Conflict Resolution Quarterly*; and is a reviewer for a number of other prominent journals. In her so-called “retirement,” she also supervises PhD students, conducts research and consultancies, and is a keynote speaker at many international conferences. Dale has co-edited a book that is relevant to her presentation: Bagshaw, Dale and Porter, Elisabeth (2009). *Mediation in the Asia-Pacific Region. Transforming Conflicts and Building Peace*. New York and London: Routledge.



Chris de Cooker

Chris de Cooker, a Dutch citizen, holds law degrees from the University of Amsterdam and Columbia University. He was from 1975 until 1984 associate professor at the University of Leyden in the Netherlands, lecturing on international law, the law of international organizations, and international administration. He was from 1979–1983 special advisor to the Head of the Legal Service of the Commission of the European Communities, particularly in treaty law matters, as well as lecturer in international organization at the Staff College of the Dutch Royal Air Force. Chris was from 1981–1983 chair of the Dutch Section of the International Commission

of Jurists. He worked for the International Labor Organization in 1983/84. He joined the European Space Agency in 1984, where he held a number of positions, mainly in charge of internal institutional matters. His last position was that of head of the International Relations Department. He retired from the agency in March 2011. Chris has authored several publications, mostly in the field of international administration. He is in particular editor of *International Administration, Law and Management Practices in International Organizations* and of *Accountability, Investigation and Due Process in International Organizations*. He is chair of the Standing Committee on Supranational Administration and the International Civil Service of the International Institute of Administrative Sciences, and a member of the Editorial Committee of the *International Review of Administrative Sciences*. He has been advising several regional and global international organizations, particularly in the field of internal dispute resolution, such as the International Monetary Fund, the World Health Organization, the UN Ombudsman, and the European Bank for Reconstruction and Development. He is an arbitrator in international civil service cases. He is a member of the International Academy of Astronautics.



Jack Kennedy

Jack Kennedy has had a long career in international financial institutions, including 10 years at the Asian Development Bank, where he was personnel manager for 5 years, and 22 years at the International Monetary Fund (IMF), where he held a number of senior positions in human resources management. Following his retirement from the IMF in 2008, he has been consulting on HR issues with the Asian Development Bank, the African Development Bank, the Inter-American Development Bank, and the Caribbean Development Bank.

For an extended period during his IMF career, Jack was in charge of the fund's dispute resolution system and handled directly and/or oversaw numerous cases during administrative review and before the IMF Grievance Committee; he was also responsible for the development and maintenance of the fund's staff rules and regulations. His other principal responsibilities were the design and oversight of the IMF's compensation systems and the principal benefits of IMF staff and management. For more than 10 years, he was the senior advisor on compensation to the Joint IMF and World Bank Boards of Governors Committee on the remuneration of the two organizations' executive boards.

Jack has been an active participant in conferences sponsored by the International Institute of Administrative Sciences on legal and HR issues in international organizations, and in the annual workshops of international financial institutions and international organizations on compensation and benefits policies and on pensions.



Ahmed El Kosheri

A senior partner of Koshari, Rashed and Riad Law Firm in Cairo, Egypt, Ahmed participated in around 100 arbitration cases over the last 4 decades, including the Aminoil case against Kuwait, the SPP Middle East/Egypt, Taba case against Israel, and the sovereignty over the islands and the delimitation of the maritime boundary between Eritrea and Yemen. He is a former judge ad hoc at the International Court of Justice (1992–1993); former professor of law and president of Senghor University at Alexandria (1997–2003); member of the UN Redesign Panel for the reform of the internal judicial system (2006); and vice chair of the ICC International Court of Arbitration (1998–2009). Ahmed holds membership in the International Law Institute (since 1987), the World Bank's Presidential List of ICSID Arbitrators (since 2002), and the Steering Committee of the Cairo Regional Centre for International Commercial Arbitration (since 2009). He also has been a judge of the World Bank Administrative Tribunal since 2009.

Resolving Disputes in Asia: What Has Culture Got to Do with It?

Dale Bagshaw, PhD

Abstract

This paper analyses the influence of culture and discourse on the way people view and handle conflict, provides examples of diverse religious and customary dispute resolution practices in Asia and a critique of their limitations, and suggests some implications for dispute resolution practitioners working in the region. Various forms of mediation, conciliation, and arbitration have existed for at least two millennia in various countries and cultural groups in Asia. However, globalisation and the colonial legacy have privileged Western ways of knowing and the increasingly dominant, Westernised approaches to dispute resolution have tended to ignore, marginalise, or subordinate local or customary knowledge and practices. The author argues that, for dispute resolution practices to be culturally appropriate, third parties should understand and value the way Asian peoples have historically conceived and responded to conflict and work towards co-constructing approaches to dispute resolution that privilege local ways of thinking and doing in relation to disputes. Potentially, a blend of Western and Eastern approaches can address the limitations of customary practices imposed by human rights conventions and legal frameworks and include the useful and positive aspects of each approach. However this will require third parties to be culturally fluent, self-reflexive, and mindfully aware of the influence of their own culture on their perceptions and practices.

Introduction

All societies have dominant mechanisms to manage conflicts, and to bring to account those whose disputes mar social cohesion and the structure of the group or society as a whole. In some generic form, for example, various forms of mediation, conciliation, and arbitration have existed for at least two millennia in Eastern nations, for example in the People's Republic of China, Japan, Republic of Korea, and Sri Lanka under the influence of Confucianism and in the teachings of the Holy Qur'an, which are influential in other Asian countries such as Malaysia, Indonesia, and the Southern Philippines.

This paper focuses on culture, religion and customary dispute resolution practices, their influence on the way people view and handle conflict and disputes in Asia, and implications for dispute resolution practitioners working in Asia. Effective dispute resolution processes are not only needed for business and cross-border disputes between trading partners and investors but also for land and family disputes, which also often underlie business disputes. Existing forms of recently introduced formal Western dispute resolution procedures used in Asia are ill-equipped to deal with some situations and a lack of knowledge of customary norms and processes can discourage investors and traders, obstruct law reform, and disempower traditional dispute resolution practitioners.

In this paper, I give examples of traditional and religious approaches to conflicts and disputes in various cultures and countries in Asia. However, it is important to recognise that the task of learning about the dispute resolution traditions of groups other than your own is never-ending and if done well would occupy legions of specialist scholars for many years. Even then, the diversity between individuals, families, organizations, groups, or communities within each culture or country, and the changes that occur over time with globalisation, will provide exceptions and contradictions to any generalizations that can be made.

As an Australian female “Westerner” with a keen interest in this topic I write as a humble learner. As a university academic for 36 years I taught and supervised numerous postgraduate scholars from Asia, and as a mediation consultant and trainer I have conducted mediation workshops in nine different countries,¹ including in Malaysia, the Philippines, and Fiji, which has made me mindful of the need for Western trainers and mediators working in the region to be culturally fluent. As a past president and vice president of the World Mediation Forum, the ongoing president of the Asia Pacific Mediation Forum, and a keen traveler, I have been fortunate to have had the opportunity to learn about different dispute resolution traditions and customs in the region.² However, the more I learn about the subtle and complex differences between the diverse dispute resolution practices of groups within Asia, the more humble I feel when approaching this topic.

Dominant Ways of Knowing About and Intervening in Conflicts

Epistemology is the philosophical study of the nature, foundation, sources, and limits of knowledge. Epistemology is concerned with who can be a knower, what constitutes truth, and how truth is verified. The French philosopher Michel Foucault examined who controls knowledge and what knowledge counts in various institutions. He argued

¹ I have conducted mediation training workshops for a range of professionals in all states of Australia, England, Sweden, Ireland, Germany, Denmark, Malaysia, the Philippines, and Fiji.

² See the Asia Pacific Mediation E-Centre—www.apmec.unisa.edu.au—for relevant papers from Asia Pacific Mediation Forum (APMF) conferences held in Adelaide (2001), Singapore (2003), Suva (2005), and Kuala Lumpur (2008). The APMF is also hosting a 3-day Asia Pacific Mediation Leadership Summit in Bangkok, December 2–4, 2011 and interested dispute resolution practitioners are invited to attend.

that all knowledge is socially constructed and is situated in a particular cultural and historical context. He also emphasised the close link between knowledge and power and argued that language constructs our understandings of the world and our place in it. Language has political implications and constructs our particular views of conflict and how it should be resolved. In this sense I am talking about the power of language as discourse—dominant ways of talking about and perceiving something (for example, conflict or mediation) in a particular cultural group or context at a particular period in time.

Dominant discourses in an organization, community, and/or society determine what counts as knowledge or “truth” and what does not. Foucault highlighted that, at any given time in history and in any given context, certain knowledge or “truths” are privileged and others are ignored, subordinated, or marginalised, and those who control the dominant discourses (“colonisers,” “professionals,” “experts,” politicians, religious leaders, and so forth) determine what is viewed as “normal” and “abnormal.”

The colonial legacy in many countries in the region has tended to ignore, marginalise, or subordinate indigenous or customary knowledge and has privileged Western ways of knowing. This has led to a process that is sometimes called “othering.” Linnekin points out that in Hawaii, New Zealand, and Australia, for example, indigenous people have been “transformed into subordinated minorities of the Fourth World. In each of these cases the colonial society’s categorisation and treatment has been founded on Western biological criteria and openly racist assumptions.” Many indigenous groups have struggled to assert their own cultural identities where there have been dominant colonial societies in the region.

Culture and Conflict

Contemporary writers define culture as:

the “whole way of life” of a social group as it is structured by representation and by power... a network of representations—texts, images, talk, codes of behaviour, and the narrative structures organising these—which shapes every aspect of social life.

LeBaron points out that conflict is always relational and social and argues that culture is integral to understanding conflict. She defines culture as:

[t]he sets of invisible rules that whisper prompts and frown at us in our mind’s eye when we contemplate deviating from norms. They are sets of messages that swirl around us in overlapping circles, often outside our conscious awareness.

All cultures are dynamic or in flux and each of us has multiple identities (based on age, nationality, geographic setting, gender, sexuality, race, ethnicity, socioeconomic class, profession, job role, ability, language, religion, and so forth) and may respond to conflict differently, drawing on one or a blend of these, depending on the context. LeBaron also states, however, that while culture is “multi-leveled and multilayered, there are ways to understand its patterns that can help us decode its symbols.” I agree with her premise that “practice and experience, together with learning, awareness, and reflection enhance cultural fluency.”

Okun et al. identified key elements of culture about which scholars agree:

- Culture includes all aspects of human life by which groups impose order and meaning on their life experiences.
- It involves communication between all the senses in patterns that are recognisable by members of a given culture.
- The way that language is used in a culture shapes meaning and experience which in turn shapes the language.
- The most effective method for understanding one’s own culture is to compare it to other cultures.

Members of a specific culture experience their culture as “the way things are and the way things should be,” a phenomenon called ethnocentrism, our natural tendency to assume that everybody else views and understands the world in the same way that we do, which often leads to misunderstandings and conflict.

As previously explained, our cultural identity influences our approach to conflict and negotiation and this identity is based on a commonality of experience, perspectives, language, traditions, and environments. Language is central to the construction, negotiation, and communication of meaning and thought and enables us to categorise, label, and make sense of a situation in similar or different ways. Whilst recognising the dangers of categorisation, Table 1 illustrates how in communication Westerners tend to focus more on “things and objects, rather than on processes and relationships.” They tend to use categories as a shorthand way of understanding and communicating about events and experiences. On the other hand, people from non-Western cultures tend to use approaches to communication that may be either more abstract or more particular. For example, people from communitarian cultures will tend to pay more attention to the context and non-verbal communication and those from individualistic cultures will focus more on words and their meaning. These differences should be considered by third parties involved in cross-cultural communications.

Table 1 Factors Influencing Collaborative Dialogue between People from Individualistic (Western) and Collectivist (Eastern) Cultures

Elements of Collaborative Dialogue	Individualist Cultures	Collectivist Cultures
Reliance on context	Are less aware of context and nonverbal cues	Are more aware of context and nonverbal cues
Form and style of communication	Place more reliance on direct and verbal forms of communication	Place more reliance on indirect and nonverbal forms of communication
Level of assertiveness	Tend to be more assertive and self-affirming	Tend to be more submissive and self-effacing
Type of reasoning	Rely more on inductive reasoning	Rely more on deductive reasoning
Focus	Focus more on the needs, interests, goals, and rights of individuals	Focus more on the needs, interests, and goals of the collective and on individuals' responsibilities to the collective
Content of the communication	Rely more on gathering facts, establishing goals, and asking direct, specific questions	Rely more on general narratives, stories, metaphors, proverbs, analogies, and understatement to communicate meaning
Turn-taking and speed of communication	Engage in overlap talking and faster turn-taking verbal behaviour	Use longer turn-taking pauses and reflective silences
Process versus outcome orientation	Focus more on content, action plans, and outcomes than process	Focus more on process, identity, and relational meanings that underlie content messages and less on outcomes
Leadership	Tend to value horizontal power (low power-distance) and shared, egalitarian styles of leadership	Tend to value vertical power (high power-distance) and hierarchical, authoritarian styles of leadership

Source: Adapted from Ting-Toomey, 1999.

However, at this point I want to remind readers that culture is not static; it is fluid and changing and people can be influenced by many different cultures. Also, whilst categorising people according to their cultural background can be useful, putting people and cultures into binary categories (e.g., collectivist/individualistic) can detract from our ability to see shared values and behaviours across cultures and unique, individual aspects within a culture. Individuals belong to a number of categories, as previously explained, and perform in a number of roles (such as manager, colleague, employee, husband, father, or friend) and one category or role may be more relevant in some situations than in others.

Bauman has also cautioned against using analyses of culture that are based on binary concepts. She notes, for example, that there is a dialectical relationship between individual Aboriginal autonomy and group relatedness, such that whilst Aboriginal individuals may be heard to say, "I am boss for myself," autonomy can only be expressed through relatedness.

In their research, Tjosvold, Leung, and Johnson also found that, while some social scientists are skeptical that Western theory based on individualistic notions can be applied in collectivist cultures, their findings challenged the universalistic aspirations of Deutsch's theory of co-operation and competition. In cooperative contexts their Chinese participants were able to appreciate constructive controversy, were interested in learning more about opposing views, and tended to include them in decisions. To quote: "Our research challenges Western stereotypes and indicates that leaders in the the [People's Republic of] China must develop an open, mutual relationship with employees. Authority cannot be assumed; leaders must earn it by demonstrating commitment to employees and openness to them."

Whilst accepting that there are some universal values, however, in order to be culturally fluent, it is also important to acknowledge that people from different cultural backgrounds may view conflict situations differently, behave differently, communicate differently, and want different things. Diller has outlined various dimensions of culture which can be useful when exploring cultural similarities and differences. In relation to each dimension, Diller suggests that each culture evolves rituals and prescriptions, patterns, cultural myths, and symbols to support them. Some dimensions tend to cluster together and become mutually reinforcing. For example independence, individual rights, egalitarianism, control, and dominance are common in Western cultures and interdependence, honour and family protection, authoritarianism, and harmony and deference are common in Eastern or Asian cultures. However, a key question is: how do we know the position of a culture based on various dimensions?

There are a number of cross-cultural attitude surveys that have produced data which may be useful to consider, however they tend to offer binary ways of categorising which ignore the areas of similarity or overlap and individual and group differences. Hofstede, for example, conducted a global survey of IBM employees in 53 countries based on a questionnaire with 60 questions about the employee's basic values and beliefs. In relation to organizational disputes, Hofstede argued that "decisions have to be made in a way that responds to the values of the environment in which they have to be effective." In Hofstede's definition, culture is a group phenomenon:

Culture is the collective programming of the mind which distinguishes the members of one group or category of people from another.

After statistical analysis (factor analysis) Hofstede's survey showed that the 53 cultures differed mainly along four dimensions:

- *Power distance*: "the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally."
- *Individualism-collectivism*: "Individualism pertains to societies in which the ties between individuals are loose. Everyone is expected to look after himself or herself and his or her immediate family. Collectivism as its opposite pertains to societies in which people from birth onwards are integrated into strong,

cohesive in-groups, which throughout people's lifetime continue to protect them in exchange for unquestioning loyalty.”

- *Masculinity-femininity*: “Masculinity pertains to societies in which social gender roles are clearly distinct (i.e., men are supposed to be assertive, tough, and focused on material success, whereas women are supposed to be more modest, tender, and concerned with the quality of life); femininity pertains to societies in which social gender roles overlap (i.e., both men and women are supposed to be modest, tender, and concerned with the quality of life).”³
- *Uncertainty avoidance*: “the extent to which the members of a culture feels threatened by uncertain or unknown situations. This feeling is, among other things, expressed through nervous stress and in a need for predictability, a need for written and unwritten rules.”

Hofstede scored each country in his study from roughly 0 to 100 on each of the four dimensions.⁴ The results of the measurements for two of these countries (Australia and Malaysia) are shown in Table 2.

Table 2 Cultural Profiles of Australia and Malaysia

Country	Power Distance	Individualism	Masculinity	Uncertainty Avoidance
Australia	Low 36	High 90	High 61	Low 51
Malaysia	High 104	Low 26	Mid 50	Low 36
Median (53 units)	60	38	50	68

Source: Hofstede, 1991.

The dominant Australian culture was characterised by Hofstede as egalitarian individualism.⁵ From Hofstede's study, which gives the global picture, this pattern is quite common in the West, but there were interesting internal differences. The Anglo countries of Great Britain, the USA, and Australia were revealed as the most individualistic countries in the whole set of 53 countries. The pattern in Asian countries was the opposite of egalitarian individualism. On these dimensions the biggest gap was between Eastern and Western countries.

According to Hofstede's data, Malaysia was the most hierarchical culture in the whole set of countries, even though hierarchy is a characteristic of all Asian countries (and many others as well). However, in order to understand leadership in Malaysia we have to

³ It should be noted, however, that Hofstede's work had been criticised for failing to recognise that sex and gender are not the same thing. Whilst sex is biologically determined, gender is socially constructed. People are enculturated as feminine or masculine, regardless of their sex. He recognised that people have multiple and varied aspects of their identity but claimed that identification on the gender level of his hierarchy is determined “according to whether one was born as a girl or as a boy” (Hofstede, G., *Cultures and organizations: Software of the mind*. 1991, London: McGraw-Hill, p. 24). He reinforced the notion that individuals and nations have an essential gendered identity based on sex, which ignores other influences on the construction of masculinity and femininity.

⁴ The scores represent relative, not absolute positions of the countries. They measure how people in one country differ from people in other countries.

⁵ However, it is important to remember that Australia is the second most multicultural country in the world.

consider another dimension as well. The power of the leader is not perceived as coercive. Because of the collectivistic mentality, relationships between leaders and their followers are colored by the family metaphor. The leader is perceived as a benevolent father figure or patriarch, not as a harsh despot.

Traditional and Religious Dispute Resolution Practices in the Asia-Pacific Region

If we assume all knowledge is historically, socially, and culturally situated, then it follows that knowledge about conflict, its causes and approaches to its management, transformation, or resolution, are shaped by our cultural understandings and dominant world views. Thus retrieving and reclaiming local epistemologies, customary or “folk” knowledge with regard to conflict and dispute resolution processes in the region, is important if we want to design interventions that are culturally appropriate and relevant. This includes “knowledge that ordinary people have about causes and ways to deal with conflict in their particular cultural setting... not just empirical observation, theoretical research, and systematic testing of methodologies, but also personal experience, intuition, and imagination.” We need to value the way that Asian peoples have historically conceived conflict and work towards co-constructing models of practice that privilege local ways of thinking and doing in relation to disputes, and consider the limitations posed on these by human rights conventions and legal frameworks and the useful aspects of recent, formalised Western approaches to dispute resolution, such as mediation.

In the Asia-Pacific region arbitration, litigation, and traditional customary procedures are the three most commonly used forms of dispute resolution for cross-border, domestic, and local village disputes, respectively. However, customary approaches are not codified and are not well-understood outside of the local communities where they are practiced. The collectivist nature of Asian cultures means that more consensual means of dispute resolution tend to be favoured which are essentially restorative rather than retributive and involve all of the stakeholders affected. However, critics of traditional approaches have concerns about the lack of regulation leading to uncertain outcomes, gender inequality, lack of transparency and accountability, human rights abuses (particularly in relation to gender), and the qualities of people vested with decision-making capacities in disputes, who are often male village chiefs. The United Nations Human Rights Unit and the International Rescue Committee, for example, have raised concerns over customary approaches violating the rights of women and children. Various authors have therefore suggested that, for these and other reasons, there are benefits to be gained from blending Western approaches with traditional restorative practices.

In Asia, some traditional or indigenous practices are similar to what Westerners call mediation, while others are more like conciliation, where a third party (e.g., a mayor, chief, or elder) gets more involved in the outcomes of the dispute by enforcing customary norms or other parameters, or arbitration where the third party makes the decision after listening to many different points of view. However, there is no one set of socially transmitted values and beliefs in relation to conflict and the way it should be handled

in Asia, due to differences in the social, historical, religious, political, and economic situations of groups within and between countries in the region.

During the Second International Mediation Conference in 1996, in Adelaide, South Australia, representatives from a number of indigenous groups from colonised Asian and Pacific countries (including Hawaii, the Philippines, PNG, Australia, the Torres Strait Islands, and New Zealand) shared their personal experiences of traditional approaches to conflict in their communities and villages. Whilst there were some differences in their descriptions of the way conflicts were customarily handled, they shared similar traditions and values. The same themes were also evident in stories told by Pacific Islanders during the 3rd Asia Pacific Mediation Forum conference in Fiji in 2006, and included:

- a respect for elders in decision making;
- the central importance of harmony in relationships and the restoration of relationships;
- the relevance of metaphor and stories to explain events;
- a regard for the land as a spiritual phenomenon;
- the relativity of time;
- the indirect, circular, or holistic nature of communication;
- a central need to assert, protect, keep or save face;
- the importance of ceremonies and rituals and acknowledging their ancestors;
- the inclusion of the extended family and/or other stakeholders in decision making;
- a preference for the third party to be well known and respected by the participants; and
- a tendency for the third party to listen to others until there was some consensus and then make (or reflect) the decision.

In mainstream Western cultures individualised, direct, confrontational, linear, solution-oriented, third-party-neutral approaches to conflict are promoted in some, but not all, theoretical models of mediation. However, Australian Indigenous communities and many other Indigenous groups in the Asia-Pacific region are more likely to value indirect communication, harmony, face-saving or face-keeping, holistic approaches and the restoration of relationships. The “objectivity” and “impartiality” of the third party may be prized in some groups, or with some kinds of disputes; respected, well-known elders may be preferred in others.

In Australia the use of mediation for the resolution of native title disputes has provided an impetus for the examination of cross-cultural negotiation. With an increased understanding of cultural differences in the way Indigenous and non-Indigenous communities perceive and approach conflict it has been recognised that we need

to change our legal institutions to accommodate them. For example, a Queensland alternative dispute resolution body and the Australian Institute of Aboriginal and Torres Strait Islander Studies' (AIATSIS) Native Title Research Unit have recognised that it is crucial to tailor mediation processes to suit individual communities' needs and to acknowledge the issues of imbalances of power and equality in relationships when doing so. Comparable experiences can be found in New Zealand with the Waitangi Tribunal.

Similar to other Asian cultures, Malaysians generally see conflict as undesirable:

Conflicts are seen as the wilful creation of anti-social, immoral and selfish individuals... a sign of personal failure and weakness which brings shame (*malu*) and puts one's reputation at stake. A great deal of effort goes into denying that conflict exists. There is usually strong pressure to conform, not to "rock the boat" and not to be "different." Suppression of true and real feelings seems to be one of the most important goals of socialization.

The Malaysian majority require people to show courtesy to others in word, deed and action (*adab*) and encourage social harmony (*rukun*) in the family, community and society. In Malaysia, traditional approaches to mediation are practiced by village or *kampong* headmen and village elders, *imams* or mosque leaders, judges and others in the *Shariah* courts, and by clan leaders in the Chinese community. A *kampong* is similar to an extended family; it is strongly community-oriented, acts on the principle of collective responsibility, and makes decisions by consensus. *Mesyuarat* (discussion) and *muafakat* (consensus) are Arabic-derived words and reflect very deep values in the Indigenous culture. *Mesyuarat* is a gradual process of mutual adjustment that is made by participants between contrasting points of view, while avoiding expression of open disagreements, until consensus is reached.

In pre-colonial, traditional Malay societies, family elders, village elders, and appointed leaders were often called upon to resolve disputes, using their own personal styles, which included mediation, arbitration, and adjudication. In traditional societies, the village elders were held in high esteem, which is not necessarily the case today. As third parties they tended to pass judgment on who was "right" or "wrong" and how parties should or should not behave, according to *adat* (customary) law or divine law.

In Indonesia, traditional consensual procedures for decision making and dispute resolution (*musyawarah*) also aim to achieve a mutually acceptable decision with assistance from an authoritative decision maker. For example, in Maluku, a multicultural area of Indonesia, *Pela*, an alliance system which involves an enduring and unavoidable tie of brotherhood, has been developed over several centuries. In this system, disputing parties attend a reconciliation ceremony where apologies are given to each other in front of village elders and religious leaders.

Traditionally, mediation in the People's Republic of China (PRC) occupied the central place in courts, workplaces, schools, and communities. The People's Conciliation

Committees, established by the government, offer mediation at the community level and the mediators are often retired village leaders with high prestige. In 1995, when I visited the PRC as part of a delegation, my hosts, the Chinese Ministry for Justice, talked of the PRC having roughly 10 million mediators (one for every 10 families) and 800 lawyers. The mediators we met in the PRC, however, described and demonstrated their practices as being far more coercive than those of most Western mediators, in part because their concept of “neutrality” was based on collectivist rather than individualistic notions and therefore the interests of the state were higher than those of the individual. Many of the mediators we met were older people who were available to the community day and night most days of the week. They often talked about how many lives they had saved by preventing conflicts from escalating, and of the importance of assisting disputants to save or protect face.

In Republic of Korea, mediators also focus on keeping peace and saving face. Similar to the PRC, the Philippines has organized mediation programs permeating the village or province levels. The movement to restore traditional mediation practices in the Philippines is called *Katarungang Pambarangay* (KP), which involves compulsory conciliation by the KP conciliation committees in 42,000 barangays. Established in 1978 in the Philippines, the Barangay Justice System offers a nationwide elaborate system of mediation and arbitration panels to hear community disputes. Disputes are submitted to the *barangay* (village) captain and cannot be filed in the court until that process has been tried.

Various authors have described the long history of mediation being used at the informal level in Japan where it is embedded in the community, business culture, and the court-based system for family and civil cases. In the business culture, intermediaries are used as introducers (*shoikai-sha*) and as mediators (*chukai-sha*) to smooth business relationships. Japanese society expects tolerance and empathy for others and the Japanese have a duty to save and give face, so open confrontation may be viewed as an admission of personal failure and therefore proceeding to litigation may be seen as undesirable.

In India, mediation has been strongly influenced by Gandhian principles in the past and recently Western approaches have been provided by legal aid panels and courts in a number of states. As early as 1893, Gandhi, who was then a barrister, was sent to South Africa to settle a major commercial dispute. In settling the dispute out of court, Gandhi and the disputants drew on the *Lok Adalat* system in India and “also on the teachings of the disputants’ faith, the Holy Qur’an, which extols the virtues of forgiveness and negotiated settlement.”

The Influence of Islam

Traditional dispute resolution practices are often grounded in, or influenced by, religious principles. For example, arbitration (*tahkim*) and mediation or conciliation (*sulh*) are recognised in Islamic law and pre-existed Islam as the dominant dispute resolution mechanisms used in Arab societies.⁶ Mohamed Keshavjee, the leading mediation trainer

⁶ The 4th Asia Pacific Mediation Forum conference held at the National Islamic University of Malaysia in Kuala Lumpur in 2008 produced many papers relevant to this theme.

for the Ismaili National Conciliation and Arbitration Boards worldwide, argues that Islam promotes “reconciliation and settlement of disputes outside an adversarial, formalised context.” The Holy Qur’an specifically mentions conciliation (*sulh*) and “refers in several places to the principle of resolving disputes amicably, calling on protagonists to forgive: for to forgive is ennobling” (ibid, p. 5). There are many examples of actions of the Holy Prophet himself that bear testimony to the concept of compromise. However, the Qur’an also outlines “the principles of fairness and of right and wrong which clearly state what is *halal* (permissible) and what is *haram* (forbidden)” which are enforced by third parties, such as *imams*, when intervening in disputes.

Othman notes that some jurists are critical of *sulh*, as it can involve competing ethical and religious values. For example, if poorly conducted the outcomes can benefit an “undeserving,” “untruthful,” or more powerful party. She argues that there need to be guidelines and boundaries for its application because of the “need to balance the ideals of compromise with the fundamental Islamic principles of individual right to justice and truth.”

In Indonesia, Malaysia, Southern Philippines, and Thailand, conflicts involving Muslims are prevalent. Abu-Nimer suggests that Western conflict resolution strategies cannot easily be applied to disputes involving Muslims as the following underlying assumptions are contrary to dominant Western assumptions. He states that in Muslim cultures:

- conflict is viewed as negative and dangerous and should be avoided;
- group affiliation (family, clan, religion, sect etc.) is the most central and important identity and should be protected and sustained;
- spontaneous and emotional acts in the interaction between the parties are integral to Arabic society and therefore embedded in Arabic mediation and negotiation;
- social norms and values are more important than legal values—for example, written agreements are not as important as social and cultural norms;
- codes of honour, shame and dignity are centrally important;
- unity is often the ultimate goal for groups;
- hierarchical, authoritarian procedures and structures are preferred, thus “leaders” tend to be older males and high-power officials, and training and other credentials are not seen to be as important;
- conflict resolution processes are more relationship-oriented than task-oriented and parties are very concerned about their image and perceptions of their relationships; and
- arbitration and mediation are more commonly used than adversarial processes.

The influence of Confucianism

Confucianism has been influential in the PRC, Japan, Republic of Korea, Singapore, Taipei, China, and Viet Nam for thousands of years and traditional approaches to dispute resolution are grounded in Confucian ethical principles of harmony, peace, and conciliation. Wolski describes four interrelated tenets of Confucianism, which are as follows:

- “Social Harmony is the overall goal in human affairs”: order and harmony are valued and conflict and competition are unacceptable.
- “Society is composed of hierarchical relationships”: respect and obedience is required of five key hierarchical relationships (father and son, ruler and subject, husband and wife, elder and younger brother, and friend and friend) which are based on reciprocal and complementary duties. Overt expressions of anger and hostility are discouraged.
- “Relationships are the source of an individual’s humanity”: self-esteem is drawn from observing proper conduct, conforming to family and group norms, and suppressing one’s individuality.
- “Compromise, yielding and non-litigiousness are virtues”: conflict disrupts harmony so self-sacrifice is required for the good of the collective; litigation or a failure to compromise involves a loss of face.

The role of the mediator in ancient PRC, for example, was based on the Confucian values. Mediators were not trained or paid in a professional or formal way, as in the West, but were selected on the basis of moral and social standing and wisdom. Hilmer found in her study of mediation in the PRC that the third party historically had the authority to decide which rules apply and to interpret how they should be applied. Because of the emphasis on maintaining order, the traditional model was similar to Western notions of conciliation, where parties are brought together and encouraged to follow ethical or legal guidelines that rule the situation.

When developing conflict resolution programs in the PRC, Bretherton found that, because the PRC has a long history of patriarchy and an emphasis on hierarchical power relations (which sits uncomfortably with Western assumptions of equality), Western techniques for resolving conflict are still viewed with suspicion. In the PRC, the importance of power distance is implicit in relationships and the exploration of alternatives to using power and authority is novel and sensitive. Also, a rights discourse can be understood as a veiled Western attack on the government. They stress that in the PRC it is essential to take the time to build relationships and to ensure that the right introductions are made.

The value and practice of *guanxi* (translated as “relationship” but with “deeper and broader connotations”) is influential in the PRC and among the Chinese diaspora in other countries in Asia, in particular in business negotiations. *Guanxi* can refer to:

- a. the social interconnectedness of individuals and groups;
- b. ties, connections, and network of individuals and communities;
- c. a series of mutual and reciprocal activities;
- d. social rules and principles of human relations;
- e. *bao* (reciprocal exchange);
- f. *renqing* (human and emotional debt); and/or
- g. *mianzi* (face).

Guanxi is based on people's familiarity, similarity and friendship and emphasises the virtues of *yi* (uprightness), *ren* (benevolence), and *li* (propriety) as key Confucian principles for moral behaviour. Mediators can, for example, use *guanxi* to establish common ground and remind people of expectations of the people in their "*guanxi* network."

The Influence of Hinduism

The *panchayat raj* is a customary South Asian dispute resolution system used mainly in India, Pakistan, Fiji, and Nepal. "*Panchayat*" literally means assembly (*ayat*) of five (*panch*) wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settled disputes between individuals and villages. Modern Indian government has decentralised several administrative functions to the village level, empowering elected *gram panchayats*. *Gram panchayats* are not to be confused with the unelected *khap panchayats* (or caste panchayats) found in some parts of India. Prasad notes that the widespread acceptance of *panjayats*, both in India and within the Indian Diaspora, can be attributed to its overarching and well-entrenched positioning in Hinduism and its associated religious-cultural values and beliefs. In this context "panch" (five) is significant. The *Panchayati* panel is deemed to have the cumulative power of the five principal elements: *Akaash* (Sky), *Vayu* (Air), *Agni* (Fire), *Jal* (Water), *Prithvi* (Earth), which comprise the Indian understanding of the universe. In Indian thought, the human body is made up of five elements—*air, water, earth, fire, and ether*. There are five vices—*lust, anger, greed, attachment, and pride* and also five virtues—*truth, contentment, compassion, duty, and patience*. In the Sikh community, *Panchayat* is perhaps as binding as "Five Ks," that is, unshorn hair (*kes*), sword (*kirpan*), comb (*kanga*), iron bangle (*kara*), and short breeches (*kachh*).

The Influence of Buddhism

The influence of Buddhism can be seen in many countries in Asia; however, there is an overwhelming diversity of forms of Buddhism.⁷ Buddhism has interacted with several

⁷ According to analyses found in Wikipedia (http://en.wikipedia.org/wiki/Buddhism#The_Four_Noble_Truths), Buddhism was the first world religion and is currently the fourth-largest religion in the world behind Christianity, Islam, and Hinduism. The monks' order (*Sangha*), which began during the lifetime of the Buddha, is among the oldest organizations on earth. There are many forms of Buddhism which can be found in Bhutan, Cambodia, the PRC, India, Japan, Republic of Korea, the Lao People's Democratic Republic, Mongolia, Nepal, Singapore, Sri Lanka, Taipei, China, Thailand, and Tibet.

East Asian religious traditions since it spread from India during the 2nd century AD. The Buddhist concept of “mindfulness” is mentioned elsewhere in the paper. Some of the other tenets of Buddhism are reflected in the following quote:

If we awaken to the reality of Interbeing and non-self, we awaken to the wisdom of nondiscrimination, it is the wisdom that can break the barrier of individualism, with this wisdom we see that we are the other person and the other person is our self. The happiness of the other person is our own happiness, and our own happiness is the happiness of the other people, of plants, animals, and even minerals.

The Buddhist influence can be seen in Cambodia, for example, where the traditional, informal approach to conflict resolution in Cambodian villages is known as *somrob-somrueal*, which means to help people to live together happily (*srob* means to get together for a purpose and *srueal* means easy, comfortable). The courts are perceived as remote and alien while the Buddhist temple (*wat*) is local and familiar. People of high status are held in high regard and traditionally the village headman was “advisor, conciliator, mediator and judge for a range of problems.”

Buddhism is also influential in Thailand where traditionally mediation has been also used at the village level. Village elders, monks, and other leading figures mediated disputes.

Blended Approaches

In Singapore, efforts have been made to build on the dispute resolution traditions of its Chinese, Malay, and Indian populations and to build a blended mediation approach: by incorporating Western models of mediation with traditional Indigenous philosophies and procedures that engender a “*kampong* spirit” (a sense of community and being together), informal use of intermediaries (the *kong chin* among Chinese, *kampong kutu* or *penghulu* among Malays), and village meetings such as the *panchayat* (Indian, gift giving and tea).

In Singapore, commercial and family mediation are also relatively well developed and in these contexts efforts have also been made to blend Asian and Western approaches.

In summary, I have only had the time and space to touch on a few traditional or customary approaches to dispute resolution in Asia and the influence of some, but not all, religions. There is an increasing number of books and articles that outline the various conflict management and peace-building processes that have been traditionally, and are currently, used in the Asia-Pacific region. Needless to say, there are vast differences between local, religious, customary or traditional conflict management practices and the modern forms of mediation that are currently being transported from the West to Asia, often in an imperialistic way and without reference to culture.

Implications for Dispute Resolution Practitioners in Asia

Given the potential impact of cultural differences on dispute resolution processes in cross-border or cross-cultural negotiations, third parties should be culturally fluent and competent to assist each disputant to be flexible and to adapt the key elements of negotiation to meet the interests, needs and goals of the other. This will involve assisting disputants to engage in an open “culture sensitive, respectful inquiry process” in which the disputants “suspend their own assumptions and invite the other to share their stories, expectations, need and goals.”

Ting-Toomey suggests that when attending to people’s cultural identities in cross-cultural mediation it is essential for the mediator, and the participants, to listen “mindfully” to each other and to notice the verbal, nonverbal and meta-verbal contexts which are being conveyed. This can be difficult for a Western mediator who has been raised in a low-context culture. Ting-Toomey’s concept of “mindful reframing” is important as it involves understanding the others’ verbal and nonverbal communication from their cultural standpoint and then translating and reframing our perceptions and understandings accordingly. LeBaron also advocates the need for mediators to engage in “cultural fluency” through a process of “mindful awareness” by reflecting “on our own cultural ways of knowing and being.”

In other papers I have suggested that mediators working cross-culturally should engage in *self-reflexivity*. Constructivist ideas suggest that it is impossible for a mediator to be neutral, which requires the mediator to take a *reflexive* approach to practice. The concept of self-reflexivity recognises that our practices are culturally specific, not neutral, and involve the mediator “being explicit about the operation of power” and mindful of their power position in the mediation process. The reflexive mediator assumes a non-hierarchical position (“bottom up” rather than “top down”) and works collaboratively with clients in a more collegial, partnership role, sometimes described as engaging in *conversation* rather than as intervention. It is the participants’ knowledge that is privileged, and the participants who supply the interpretive context for determining the meanings of events. The mediator is primarily interested in their different world views, as expressed through their stories about the conflict, and assists them to hear alternative views or stories that might be more useful to their situation and to the transformation of the conflict, an approach advocated in models of narrative mediation.

Bretherton suggests that deep listening is the ground from which effective negotiation and mediation grows and stress the importance of empathy, which involves entering the world of another in a non-judgmental way and putting aside one’s own agenda. Empathic listening provides the recognition and respect that Bush and Folger see as the pivot of conflict transformation. However, listening deeply is difficult enough within our own culture and can be even more challenging when in another culture. Marsick and Sauquet point out that adults shape their understanding by looking through a lens of belief that is often unconscious. Much of our cultural learning is implicit and tacit, so listening deeply to someone from another culture challenges cherished viewpoints and closely held assumptions. Learning about another culture hence involves also learning about one’s own.

John Paul Lederach stresses that Western mediation trainers should also explore both the content and the approach to conflict resolution training and its relationship to culture. He compares and contrasts prescriptive and elicitive approaches to cross-cultural mediation training and concludes that a combination of the two approaches should be used in diverse cultural settings.

An increasing number of dispute resolution educators and trainers from the West are working outside their own countries as so-called “experts” in dispute resolution, including university academics such as myself, private consultants, judges, experts working for government organizations, and organizations such as the Asian Development Bank’s Administrative Tribunal. This is partly due to globalisation, which has altered the boundaries of our practices, and partly due to the increasing domination of Western ways of knowing. As Honeyman and Chedlin point out, no matter how well-meaning these “experts” are they “may inadvertently cause harm to persons and parties for whose culture, language, or circumstances... has left them inadequately prepared.” Brubaker and Verdonk stress that:

considerable time and care must be invested in assessing cultural differences, political realities, bureaucratic hurdles, and logistical challenges prior to plunging forward with a training workshop or other activity. In addition, thoughtful and thorough follow-up after training is as important as attentive preparation before the training.

Conclusions

In this paper I have argued that when resolving disputes in Asia, Western models and approaches to dispute resolution may need to be adapted to embrace aspects of the religious and cultural traditions and norms of the people involved. Westerners have a lot to learn from customary dispute resolution practices, but critics have also highlighted some of the limitations of customary approaches, including their lack of transparency and regulation and the potential for third parties to undermine the human rights of less powerful groups, such as women and children. The strengths of Western and Eastern approaches to dispute resolution have been blended successfully in some parts of Asia. Forms of mediation in Singapore, for example, have been promoted by various authors as being consonant with Asian traditions and much can be learned from their approach.

In summary, it is suggested that dispute resolution practitioners working cross-culturally in the Asia Pacific region should

- ensure that the third party is acceptable to and respected by the disputants and, if possible, can operate as part of a multicultural team so an appropriate mediator can be selected for each dispute, or co-mediation can be used when required;
- take time to prepare prior to intervening and become familiar with relevant cultural norms and traditional approaches to conflict and its management, transformation, or resolution;

- privilege the participants' knowledge and allow the participants to supply the interpretive context for determining the meanings of events;
- be good empathic listeners, fluent in the appropriate languages, flexible, and able to use indirect, high-context styles of communication;
- be culturally fluent, mindfully aware, and self-reflexive;
- incorporate relevant traditional values and practices into the mediation process, for example by using a consensus-building approach;
- focus on preserving and building relationships and on assisting the participants to assert, restore, preserve, and/or keep face as required; and
- include all people in the process who are relevant to the dispute and the disputants.

Finally, after attending four stimulating conferences as president of the Asia Pacific Mediation Forum, in 2009 I co-edited a book which addresses some of the concerns I have outlined in this paper in more depth. Writing chapters in the book involved a collaborative partnership between Westerners and Easterners from different Asian and Pacific Island countries. In collaboration with key people in the communities involved, our goals were to

1. understand and compare the different local and customary cultural norms and values with regard to conflict management and dispute resolution practices in the Asia-Pacific region, and
2. critically analyse the effects of dominant Western discourses, education, and training on mediation practices, in order to
3. develop concepts, processes, and models of mediation that build on the strengths of the customary practices, and
4. suggest culturally relevant approaches to mediation education, training, and practice.

We hope that this book will be a useful resource for third parties intervening in conflicts and disputes in Asia.

Appendix

Diller outlines various dimensions of culture which are useful when exploring cultural similarities and differences.

- *Psychobehavioural modality* refers to the preferred mode of activity—actively “doing,” or more passively “being”—either experiencing the process or with the intention of evolving (becoming).

- *Axiology* refers to the interpersonal values a culture teaches such as: compete vs. cooperate, emotional restraint vs. emotional expressiveness, direct or indirect verbal expression, help-seeking versus face-saving.
- *Ethos* refers to the beliefs that are widely held as a guide to social interactions— independence vs. interdependence, individual rights vs. family honour, egalitarianism vs. authoritarianism, control and dominance vs. harmony and deference.
- *Epistemology* refers to the preferred ways of gaining knowledge. Do people rely on cognitive (intellectual abilities) or affect (intuitive, emotions) or both?
- *Logic* refers to the reasoning process that people adopt—“either/or” (dualistic), “both/and” or circular?
- *Ontology* refers to how truth or reality is viewed and understood. Is reality viewed objectively/materially, subjectively/spiritually or both?
- *Concept of time* or how time is experienced also varies between cultures. Is time linear or clock-based or event-based or repetitive (cyclical)?
- *Concept of self* refers to whether individual group members experience themselves as separate, autonomous beings with in internal locus of control (extended self locus of control (individual self) or as part of a greater collective with an external locus of control (extended self).

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Summary of Discussion

In his opening remarks, ADB Administrative Tribunal President Arnold Zack welcomed guests on the occasion of the 20th anniversary of the ADB Administrative Tribunal (ADBAT) and noted that the ADBAT shared concerns of other international organizations of assuring workplace fairness whilst striving to protect tribunal independence. He expressed the hope that the session discussions would assess, evaluate, and explore better ways to more efficiently, effectively, and equitably resolve inevitable workplace disputes. Zack also noted that prior conferences on this topic had not focused on “the steps below” as a means of avoiding appeals to the tribunal. The four papers to be discussed examine traditional ways of resolving disputes in Asia before the imposition of our Western judicial legal processes, how to resolve disputes whilst they are still in the administrative process and then at the peer review stage where the parties continue to retain control of the outcome, and finally how the steps below impact on the functions of the administrative tribunal. He noted that the conference has focused on the need to strengthen the steps below as preferable to surrendering the decision-making authority to outside judges and the need to discuss how the entire dispute resolution structure can best buttress the independence of tribunals and help enhance the ultimate effectiveness of their efforts.

Presented by Dale Bagshaw, adjunct associate professor at the University of South Australia; chaired by Yuji Iwasawa, vice president of the ADB Administrative Tribunal; and discussed by Nimfa Cuesta-Vilches, deputy court administrator of the Supreme Court of the Philippines.

Professor Bagshaw briefly summarized her paper, which focuses on aspects of culture that dispute resolution experts need to consider. Before opening the floor to the discussants, she noted that it was essential that third parties design models or approaches to dispute resolution that fit the individual collective or culturally based conflict resolution needs of their clients, rather than force clients to follow a particular model that they impose.

Discussion

Professor Cuesta-Vilches pointed out that disputes should be culturally appropriate and should encourage disputants to have a sense of ownership. She spoke of the “Justice on wheels” program that has been in operation in the Philippines for 2 years and is supported by organizations such as ADB and the World Bank. The program, which involves around four to five trained mediators who speak in the same dialect as disputants, has had a 96% success rate in resolving disputes (6,800 cases successfully settled) because

culture is recognized in every step of the process. Cuesta-Vilches added that in some cases gender settlements remained unfair because the majority of “arbitrators” were male elders. She offered a solution by providing the training that Bagshaw recommended in her paper, and stipulating ethical standards and guidelines and a standard threshold of what can and cannot be compromised and settled. A blended approach, particularly in Asia, was recommended.

Professor Bagshaw responded in agreement to the articulation of ethical standards and guidelines and said that Australia had drawn up a national code of ethics, but improvements were still required.

When the discussion was open to the floor, Arnold Zack noted that international organizations provide a structure for mediation but they are part of the establishment and will not reflect the diversity of people involved in the dispute. They therefore lack what Bagshaw describes as providing the diversity and culture required. He posed two questions: Are international organizations able to utilize more resources from outside? How are Western legal institutions to incorporate what is required to successfully resolve disputes in Asia?

Professor Bagshaw responded with several suggestions: (i) find out about the culture from the locals, (ii) train locals to develop cultural awareness, (iii) appoint mediators from the culture, and (iv) use mediators as advisors/consultants and have the locals educate them so that those mediators can then become part of the dispute resolution process.

Raul Pangalangan, former executive secretary of the ADB Administrative Tribunal, suggested that at times you may need to insulate decision makers from culture, such as in cases of violence against women or sexual harassment where the community may ignore the issue. He questioned, “Where do you draw the line? At what point do you need to give justice independent from what the local culture expects?”

Professor Bagshaw thought Pangalangan’s point central to the fact that with culture issues there are limitations to taking culture into account. International standards are required that cut across cultures. UN conventions have commenced articulating these standards but they are not applied stringently enough.

Jennifer Lester, assistant general counsel, International Monetary Fund (IMF) asked, “Where cultural influence is not the norm, how effective can it be if it is at odds with the dominant organization?”

Jack Kennedy, international human resources consultant, noted that there is a variation amongst international organizations on how mediation is structured. Some rely more heavily on mediation outside rather than inside the organization. Most international organizations have a strong internal culture, including ADB, and efforts to mediate from outside without understanding the internal culture presents difficulties, as to be successful you need to suggest solutions that work and can be implemented in the working office.

Professor Bagshaw responded that family law disputes and those within international organizations are often similar in terms of the relationships formed and that mediators need to be skilled at understanding that. Beyond culture, mediators need to understand organizational culture and how to effectively intervene. If the dispute is based in culture, such as racism, sexual harassment, minority groups, etc., then it would be especially important for a mediator to have a combination of those skills.

Professor Bagshaw concluded the discussion by addressing Lester's question—cultural fluency is not always possible but an organization could try by listening to relevant advisors (e.g., an Islamic university on the interpretation of the Qur'an).

Improving the Steps Below: Administrative Review in International Organizations

John P. “Jack” Kennedy

Introduction

International financial institutions and organizations are granted certain privileges and immunities under international law; these are intended to ensure the proper functioning of the organizations and to maintain their independence from the legal systems of their member states. These immunities include broad exemptions from the employment laws of member countries, exemptions which serve several purposes: they enable an international organization to adopt employment policies and practices that best serve its own needs and multinational character; they protect the organization from inappropriate governmental interference in the selection and management of staff; and they allow staff to perform their duties exclusively in the interest of the organization.

International organizations have long recognized that their freedom from external employment laws requires them to establish an internal equivalent—a comprehensive set of internal rules and regulations that governs terms and conditions of employment and sets out the duties and obligations of both staff members and the organization itself. Given the multinational character of international organizations, it would be inappropriate for these internal rules to mirror the national laws of any single member country, but the organizations generally acknowledge that their internal legal framework should serve the same broad purposes and provide reasonably a comparable balance between the authority of the organization and the safeguards for the rights and interests of staff as the external employment laws provide in member countries.

It is inevitable in international organizations, as with any employers, that disputes will arise over employment terms and conditions, the organization’s treatment of staff, and the conduct of staff members. Because the staff of these organizations usually cannot have recourse to national employment laws and protections, the internal legal frameworks of the organizations have for many years incorporated internal processes for adjudicating employment disputes. The availability of such processes has generally come

to be regarded as an essential corollary to the continuing immunity of international organizations from external legal interventions in employment disputes.⁸

In most international organizations, the internal justice system is set in motion when a staff member files a formal complaint or grievance contending that his or her terms and conditions of employment have been breached. In many—but as is discussed below, not all—international organizations, the internal justice system comprises a three-tier process:

- a. A process of administrative review, through which the management of the organization reconsiders and affirms or modifies its decision.
- b. An internal review stage by a committee composed of management and staff representatives or designees (variously designated as a grievance committee, appeals committee, or peer review committee), which hears from both parties to the dispute and makes recommendations to the top-level management of the organization to affirm, modify, or overturn the initial decision. Typically, the jurisdiction of such committees is limited to the application of the organizations' rules and regulations and not to the legality of the rules and regulations themselves.
- c. A judicial review by an administrative tribunal, which is independent of the organization's management and, in most cases, has jurisdiction over both the application of the organization's rules and regulations and the legality of the rules and regulations under the organization's internal laws and commonly accepted principles of international administrative law.

The focus of this paper is on the first of these three tiers, administrative or management review. It is written primarily from the perspective of human resources management and not, strictly speaking, the legal requirements of internal justice systems, which come more strongly into play in the latter two tiers of the systems. Its general theme, which, in the main, reflects the writer's experience in overseeing reforms of the justice system and managing the grievance process over many years in the International Monetary Fund (IMF), is that a rigorous and thorough administrative review process can resolve a substantial portion of employment disputes, thereby avoiding costly, time-consuming recourse to later appeals processes, including proceedings in the organization's administrative tribunal.

⁸ The International Court of Justice, the European Court of Human Rights, and various national courts have repeatedly upheld the privileges and immunities, including exemptions from national employment laws, afforded to international organizations. However, these courts have also concluded that these immunities are not absolute and that international organizations have an obligation to provide effective means for the settlement of employment disputes. Some courts have reserved the right to intervene in employment disputes if the international organization does not have an internal justice system and procedures that incorporate fair and appropriate standards and provide for the independent judicial review of the organization's decisions.

Overview: The conduct of administrative review⁹

International organizations that have adopted this three-tier process for dispute resolution include, among others, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Central Bank, the International Monetary Fund, the International Labour Organization, and the World Trade Organization.¹⁰ The United Nations and a number of its affiliated agencies has a comparable “Management Evaluation” stage, but its judicial review procedures differ from this model following the 2009 establishment of the UN Dispute Tribunal and UN Appeals Tribunal. The World Bank, as discussed below, has eliminated administrative review and has a very different approach.

The specific arrangements for administrative review (and also the terminology) vary among these organizations, and it will be useful to provide a brief overview of some of their salient features and differences among them.

- **International Monetary Fund (IMF).** The IMF has a highly structured and formal administrative review process, in which there are normally two stages. An initial review of the original decision is carried out by (i) the line manager and/or higher-level supervisor in the staff member’s department in cases involving a staff member’s work or career, or (ii) the responsible manager within the HR department in cases involving decisions on benefits and other centrally administered personnel matters. If the matter is not resolved in this initial stage, a subsequent review is carried out by the HR department. The two stages of the grievance process allow the manager closest to the original decision to have the first opportunity to reconsider it and then provide for a centrally managed institutional review.¹¹ The central review by the HR department is the more important stage in that it provides the first independent review outside the original decision makers’ chain of command. The HR department is also in a better position to carry out a more in-depth review, and it has broader authority and latitude to seek solutions to the dispute. While the IMF procedures do not incorporate formal recourse to independent mediation, the HR department’s reviewing officer usually tries to resolve the dispute through negotiations; these efforts have occasionally involved mediation by the ombudsman. Finally,

⁹ Many international organizations have established extensive informal mechanisms for resolving disputes before they rise to the level of formal grievances. Staff are typically encouraged to try to resolve concerns through dialogue with their supervisors, senior departmental managers, and staff of the HR department. Most of the organizations considered here also make available the services of ombudsmen, mediators, and in some organizations, specialized advisors on harassment and/or discrimination who can, to varying degrees, intervene and assist in resolving disputes.

¹⁰ The Organization for Economic Co-operation and Development (OECD) requires a formal administrative review to be conducted by mandating that no decision may be appealed to its administrative tribunal if the staff member has not previously requested the secretary-general to withdraw or modify the original decision. Informal reviews are typically undertaken at an early stage of any disputes, with the involvement of staff from the HR and legal departments and, as appropriate, OECD’s mediator.

¹¹ In both stages the staff member requests the reviewing official to explain, vary, or confirm the contested decision. The staff member must set out the decision that is being challenged, the provisions of the rule or regulation that the staff member contends has been violated, the relevant facts known to the staff member, the reasons that the staff member believes the decision to have been wrong, and the relief that the staff member seeks.

administrative review in the IMF is intended to give institutional finality to the decision and is therefore a prerequisite for subsequent appeals to the fund's internal Grievance Committee or its administrative tribunal.

- **European Bank for Reconstruction and Development (EBRD).** The EBRD's procedures are broadly similar to those of the IMF. The initial stage of administrative review involves recourse to "normal administrative channels." If the dispute involves work- or career-related issues, the review is performed by the staff member's immediate line manager and then—if necessary—the staff member's department head. If the dispute involves benefits or other centrally decided personnel matters, the review is performed by mid-level and then—if necessary—senior HR management. However, the EBRD departs from the IMF process by requiring the staff member and the bank itself to consider and, if appropriate, to exhaust mediation as a preliminary step before the dispute can be appealed to the bank's Grievance Committee.¹²
- **Asian Development Bank (ADB).** ADB incorporates compulsory conciliation in its procedures for administrative review, and requires it to be undertaken **before** the employment dispute can be submitted to the HR department for review (administrative review in ADB has only a single stage). The completion of both of these steps is required before a staff member can submit the dispute to ADB's internal Appeals Committee.
- **World Bank Group (WBG).** By way of contrast, the World Bank's conflict resolution system includes no provision for administrative review. The bank eliminated administrative review as an initial stage in its formal system in 1999. (A new mediation service was introduced in conjunction with this decision and, partly, as an alternative.) As noted below, the reasons for this are understood to be that such reviews were generally regarded as unproductive and lacking in credibility. A more recent review of the conflict resolution system in 2008–2009 reaffirmed this decision (as well as the earlier emphasis on the resolution of disputes through mediation).

Under the current conflict resolution system, introduced in mid-2009, staff members appeal contested decisions on employment matters directly to a peer review committee (PRC), without a prior review (except in the course of attempted mediation) by management. The chair and members of the PRC are volunteer staff members appointed by management on the joint recommendation of the HR department and the staff association. Disputes are heard by three-person panels. The committee is assisted and advised by a secretariat, and legal assistance can be provided to both the grievant and the manager whose decision is in dispute.¹³ The panels may secure documentation

¹² The EBRD's Grievance Committee is a peer review committee, chaired by an experienced lawyer from outside the bank. The committee investigates disputes and makes recommendations to the bank's president. This process is considered part of the administrative review by the bank, but in most respects it is comparable to the second tier of the three-tier structure outlined above.

¹³ Lawyers do not participate in PRC hearings and are not allowed to draft submissions. The PRC proceedings are intended to be conducted on an informal, non-legalistic basis. In hearings, the case for the bank is presented by the original decision maker, a procedure that is considered to increase managerial accountability.

and testimony that it considers relevant to the dispute. Recommendations affirming or modifying the original decision, together with any recommended corrective measures, are submitted to management for decision.

Bank staff on the committee's secretariat have indicated that they believe that the operations of the peer review committee serve some of the same purposes as administrative review. The PRC plays a somewhat comparable fact-finding role, and it may facilitate settlements by referring the dispute to the bank's mediation services or ombuds.¹⁴ (Either the parties or the PRC itself refer the matter to mediation; in either case, the referral suspends the committee's proceedings.)

Basic Purposes of Administrative Review

Administrative review is normally a formal process that is intended (i) to allow an organization's management to make sure that the relevant facts concerning an employment dispute are discovered and understood; (ii) to provide an opportunity for management to reconsider, clarify, modify, or reverse a decision involving a staff member's terms and conditions of employment, or a finding and penalty resulting from charges of misconduct; and (iii) if necessary, to help prepare the organization for subsequent consideration by appeals committees and/or administrative tribunals. In organizations employing the three-tier process for dispute resolution, administrative review also provides final institutional confirmation of the original (or modified) decision, and for this reason, it is a prerequisite for further appeals in most organizations.¹⁵

In support of these purposes, organizations typically consider the following basic questions during administrative review:

- **What are the facts?** Are the facts and considerations that entered into the original decision, as presented by the staff member, correct or in error? More broadly, was the original decision based on an accurate understanding of the

¹⁴ It is too early to determine whether the World Bank's Peer Review Services provide an effective alternative to a prior management-directed administrative review, but the Bank's current arrangements raise a number of questions: (i) Does the Bank's approach move the first stage of reviews of disputes too far from the point where the original decision was made?; (ii) Does reference to peer review in the first instance prematurely transfer from management the responsibility for investigating a dispute and, when appropriate, taking remedial action? and (iii) Can an inquiry by a committee, particularly one whose membership does not include either HR specialists or lawyers knowledgeable about administrative law, be as effective as management-directed administrative review in carrying out an inquiry and in identifying appropriate solutions? Responses in support of the bank's approach might include the following: (i) the decision maker is directly involved in the deliberations of the peer review committee and is more firmly held accountable for the decision; (ii) the committee's findings and recommendations are submitted to senior management, who remain responsible for the final decision; and (iii) the committee's secretariat can provide any necessary legal advice and can call on others for expert advice on HR matters.

¹⁵ In the IMF, the purposes of administrative review are described as follows: "The purposes of Administrative Review are (1) to determine whether the original decision is valid—that is, whether the relevant policies and procedures were correctly interpreted and applied; (2) to allow the original decision to be amended if it is found not to have been correctly decided; and (3) to give finality to the administrative decision."

facts, and were the essential or relevant facts—possibly including extenuating circumstances—taken into account in the decision?

- **What are the applicable policies and rules?** Was the original decision based on the correct rules, regulations, and relevant precedents, and were these correctly applied? Were there other rules and regulations that, if taken into account, could have affected the original decision or resulted in a different outcome?
- **What are the applicable processes and procedures?** Did the process followed in arriving at the original decision conform to the prescribed procedures, and, to the extent that there were departures from these procedures, were they such that they could have or did affect the outcome?

In many cases, the answers to these questions are straightforward and relatively easy to determine. Disputes over the eligibility for and the amount of benefits and allowances or the timing of certain personnel actions, for example, frequently involve narrow and specific questions of fact, on which differences can be easily identified and possibly reconciled. Other cases may present more difficulties: there may be irreconcilable differences between the staff member and the decision maker on the facts of the matter or on the process followed in arriving at the decision, and the applicable provisions of the relevant rules may be inconsistent and unclear or open to differing interpretations.

Such difficulties are more likely to arise when administrative review addresses decisions involving the exercise of discretionary authority or managerial judgment. Such disputes typically involve assessments of a staff member's performance, the amount of performance-based salary increases or bonuses, continuing employment (e.g., upon the conclusion of a probationary period), or the outcome of misconduct/disciplinary proceedings. In such disputes, administrative review needs to consider an additional set of questions, anticipating issues that can be expected to arise if the dispute proceeds to judicial review; these questions include:

- **Was the substance of the decision properly grounded and motivated?** Was it a proper exercise of authority, based on an objective consideration of relevant facts and a reasonable interpretation/application of the applicable policies and rules? Was the original decision taken in good faith and free from improper motives, including bias and discrimination? In misconduct cases, was the disciplinary measure proportionate to the nature of the misconduct and consistent with the discipline imposed in similar cases?
- **Was the decision reached in a manner that respected due process and the rights of the staff member?** Did the staff member receive appropriate notice of the grounds for the decision (e.g., notice of shortcomings in performance with an opportunity to remedy them, or notice of the grounds for misconduct charges)? Did the staff member have a reasonable opportunity to remedy them, or notice of the grounds for misconduct charges? Did the staff member have a reasonable opportunity to respond, and was the response appropriately taken into account?

Broader purposes of administrative review

When the administrative review process asks and produces, to the extent possible, answers to the foregoing questions, it can help to provide both management and the staff member who initiated the grievance with a full, or at least better, understanding of the grounds for the original decision. Such improved understanding is essential for management to consider amending or rescinding the decision. Equally or more importantly,

- It gives the organization an opportunity to consider the “rightness” or quality of the decision: setting aside the letter of the applicable rules, is the outcome one with which the organization is comfortable?
- It may open the door for an early compromise resolution between the organization and staff member.

The quality of decisions. Administrative review, particularly when it is being performed by the central HR function, normally provides the first occasion for the organization to directly consider the *quality* of the original decision from an institution-wide perspective. Front-line supervisors and managers, who are an organization’s principal decision makers, are usually primarily concerned with the correct application of the organization’s policies and procedures, and they normally do not have the authority to reinterpret the rules or to depart from established practices. There will consequently be some decisions that conform to the letter of the applicable rules and prescribed procedures but are nevertheless not in the broader interest of the organization or staff.

The smooth functioning of international organizations depends on a certain level of confidence and trust between the organization’s management and its staff. This requires, in turn, the maintenance of a reasonable balance between enforcement of the rules and regulations that are needed for orderly and sound administration and the belief of staff in the reasonableness and fairness of the rules and their application. It is therefore important for administrative review to consider the *qualitative* aspects of the contested decision by addressing such questions as:

- **Does the substance of the decision seem “right,”** in the sense that the outcome can be regarded as reasonable, and consistent with the values of the organization and with its desired approach to its relationship with staff?
- **Do the rules and regulations on which the decision was based remain appropriate?** Are they still consistent with the organization’s current HR strategies and objectives? Do they appropriately reflect developments in outside legal or employment practices that the organization considers relevant to itself? Have changes in other rules created inconsistencies or conflicts with the rule or regulation in question?

Administrative review provides the best setting in the dispute resolution process for these questions. Administrative review is the last stage in this process that falls entirely

within the purview of management. In considering the merits of a decision, management has considerable latitude (including the ability to “second guess”) in reexamining the desirability of the outcome and its effects on the staff member, as well as its impact on staff relations. It also has considerable flexibility—more than administrative tribunals—in crafting creative solutions of the type noted above, which may lie outside the specific parameters of the grievance in question.

In this connection, it is important to bear in mind that subsequent judicial review may not be able to reach some important qualitative aspects of disputes. Administrative tribunals have consistently and repeatedly affirmed that it is not within their capacity either to substitute their judgment for decisions involving the exercise of managerial discretion (particularly including questions regarding staff members’ qualifications and performance) by properly authorized officers or to question the advisability of policy decisions.¹⁶ There are accordingly a range of decisions on which the final determination regarding their wisdom rests with the organization’s management.

It should also be borne in mind that it may be in the staff member’s interest (and not just that of the organization) to take advantage of the flexibility that management has during administrative review to second-guess itself and to modify not only the original decision but also the rules or regulations on which it was based.

Seeking solutions. It is a widely accepted principle that it is preferable from both a human resources and legal perspective to resolve employee disputes as soon as possible and as close to the point of decision as possible. There is substantial value in finding solutions to disputes before the formal judicial process begins. The longer the grievance/appeals process runs, the more likely it becomes that the two sides will become entrenched in their positions and that the persisting differences will embitter the employment relationship with the directly involved staff member, and possibly the organization’s staff association and other interested onlookers. The possibly lengthy continuation of cases through the appeals and tribunal stages additionally results in significantly greater costs (both expenditures and time) for the organization and the staff member.

Within a three-tier review process, administrative review provides the principal early opportunity to avoid such outcomes. It is accordingly in the interest of the organization, as well as of the staff member, to build on the improved understanding of the issues by seeking a mutually agreeable solution during administrative review.¹⁷

¹⁶ Administrative tribunals have also consistently ruled that they do have the authority to determine whether discretionary and policy decisions are lawful; they can overturn such decisions if they are found to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures. (See the Commentary of the Statute of the IMF Administrative Tribunal at www.imf.org/external/imfat/report.htm.)

¹⁷ Not all disputes can or should be settled on the basis of compromise solutions. The desire to reach mutually agreeable solutions should not give rise to moral hazard by establishing precedents that would excuse staff from complying with clear and reasonable requirements. Nor would it be in the longer-term interest of the organization to compromise fundamental principles and employment policies.

The search for solutions during administrative review should not be limited to potential compromise positions between the original action and the remedy sought by the staff member. Effective solutions may also be found in remedial actions that may not directly reverse or modify the original decision but may rather identify other paths for addressing the staff member's concerns.¹⁸

This writer has dealt with grievances involving, for example, the denial of promotions and non-selection for positions, which administrative review would sustain on the facts, but were resolved by providing new work assignments and training opportunities that would strengthen the staff member's ability to compete for future promotions or vacancies. In other cases involving allegations of discrimination, the grievances were resolved by arranging the placement of the staff in a different unit under managers with a strong reputation for the fair treatment of staff. And a case involving a decision not to offer a staff member a regular (open-ended) appointment on (somewhat questionable) grounds of poor performance was resolved through the transfer of the staff member and restarting the clock over on the "probationary" period. In all of these cases, the staff members' specific complaints and requested reversal of the original decision were simply set aside upon the identification of alternative remedies.

The Role of Conciliation/Mediation in Administrative Review

Most of the organizations considered in this paper support the services of ombudsmen or mediators to facilitate the resolution of disputes during either the preliminary, informal stages or in the formal review/appeal stages. As previously noted, ADB requires compulsory conciliation as a preliminary step in administrative review, and the EBRD requires that mediation be considered between the first stage of administrative review and recourse to the Grievance Committee. In the World Bank, parties to a dispute or the peer review committee may also refer disputes to the bank's mediation services or ombudsperson prior to or during the PRC's proceedings. Most organizations have concluded that their mediators and ombudsmen make important contributions to the resolution of staff disputes, and staff members often have greater confidence in their services than in the formal review/appeals mechanisms.

The proven effectiveness of the various forms of mediation services provides reasons to consider its closer integration with administrative review. To the extent that organizations look to administrative review as a key point at which employment disputes may be resolved, it would seem logical to deploy all the available tools to this end. The external panel that reviewed the IMF's dispute resolution system in 2001 endorsed such an approach:

¹⁸ It is important to recognize that in cases involving employment and careers the specific decision challenged by a staff member may represent a broader and possibly longer-standing set of underlying concerns.

In the course of administrative review, [the HR department] should utilize the full range of the tools [e.g., the services of the IMF Ombudsman and outside mediators] available to it in order to determine if a resolution acceptable to both sides is possible and to attempt to reach agreement on a solution. These efforts must, of course, be reciprocal, and we would urge staff members who request administrative review to enter the process with a view to finding a solution.¹⁹

It is suggested that *consideration* of a referral to mediation be established as a regular, mandatory element of administrative review. Engagement in mediation—as opposed to consideration of it—would not be compulsory, because mediation is unlikely to be successful unless both parties agree to the effort.²⁰ When appropriate, referral to mediation would occur in the course of administrative review. This timing seems preferable to that of ADB (i.e., before administrative review) because the delay would allow a more complete discovery of the facts, circumstances, and applicable rules before mediation is undertaken. It also seems preferable to that of the EBRD (i.e., after the first stage of administrative review) because the earlier timing would position mediation before the review process reaches a conclusion on the case.

Concluding Thoughts: Can Administrative Review Be Effective?

The most common criticism of administrative review is that it is ineffective and unproductive. The reviews can be perceived as no more than a rubber stamp of the original decision. Reviewing officers typically rely on information from the original decision maker(s), whom they may be reluctant to question or to challenge. Appeals to the management level above the original decision maker may lack credibility as the more senior managers may be inclined—or presumed to be so inclined—simply to support their subordinates; and the original decision (e.g., performance assessments) may have previously been “cleared” by the higher-level managers.²¹ In addition, reviewing managers in line departments may not possess the in-depth understanding of the rules and regulations in question needed to determine whether substantive or procedural violations have occurred. When administrative review is carried out centrally by the HR department, the officers who actually conduct the review may lack the clear authority or standing within the organization to sustain a conclusion that the decision in question was flawed and requires modification. As noted previously, such considerations contributed to the World Bank’s decision to eliminate administrative review in 1999.

¹⁹ Arnold Zack (chair), Chris de Cooker, and Sarah Christie. 2001. *Review of the International Monetary Fund’s Dispute Resolution System*. November 27. p. 54. The report is available at www.imf.org/external/hrd/dr/112701.pdf.

²⁰ See footnote 10 above. As indicated there, not all disputes can or should be settled on the basis of compromise solutions. In addition, as the report on the IMF dispute resolution system noted, cases involving clear-cut issues of fact and nondiscretionary application of rules may provide little scope for negotiated solutions.

²¹ In the IMF, departmental review may be waived and the grievance immediately transferred to the HR department when the disputes involve matters arising within line departments and the senior managers who would normally carry out a review were, or may be perceived to have been, involved in the original decision.

Within a three-tier grievance structure under which administrative review remains the exclusive responsibility of management, the review process will inevitably have some degree of one-sidedness. The operative question is whether this can be reduced or controlled to the extent needed for reviews to be perceived and accepted as credible, objective, and independent.

For the past 10 years or so, the IMF has attempted to achieve this objective by designating a senior official—either an HR officer or a lawyer deputed from the legal department—who is knowledgeable about and experienced in interpreting and applying the fund's rules and procedures to carry out administrative review on behalf of the HR department. These officers have been granted substantial independence, latitude in determining the scope of the reviews, and authority to secure information and to question decision makers and others who may have relevant information. They report their findings and recommendations directly to the HR director or deputy director who makes the final decision on the reviews.

This arrangement has generally worked well in the fund, where it has significantly strengthened the objectivity and credibility of the review process. The HR department's thorough inquiry into the facts of the dispute has also proven to be effective in opening the door to settlement discussions; in some years, up to 50% of grievances have been resolved during administrative review. However, this arrangement has not been solidly institutionalized, and it may not prove durable in ensuring that administrative reviews remain sufficiently independent; it could prove vulnerable to changes in personnel, budgetary constraints, and shifting work priorities and pressures. It is also uncertain whether other organizations would be able to successfully replicate this approach.

The suggested closer integration of mediation services with administrative review could provide a way to increase confidence in the objectivity and independence of the review process and place it on a more solid institutionalized footing. Although referral to mediation would (and should) be primarily focused on encouraging and facilitating the solutions to disputes, the regular involvement of such outside and independent officials could also provide a means of monitoring the conduct of administrative review. Independent mediators would be in a position, and could be given the authority, to confirm or to question whether the analysis and conclusions reached in administrative review have taken the relevant considerations into account in a balanced manner and whether all reasonable paths to a compromise settlement have been explored.

Summary of Discussion

Presented by Jack Kennedy, international human resources consultant. Chaired by Lakshmi Swaminathan, ADBAT judge, and discussed by Chris de Cooker, chair, International Civil Service of the International Institute of Administrative Sciences and David Rivero, chief counsel, the World Bank.

After briefly summarizing his paper, Kennedy invited reactions from the audience to address three main topics:

1. Is administrative review a necessary step? If it does not exist, how might management ensure that disputes are resolved as early as possible? And if it is available, how could its pitfalls, such as the perception of being unobjective, be avoided, and how can it arrive at an authoritative decision that has the respect of both staff and the original decision maker?
2. How can mediation and conciliation fit into the administrative review step? Or how can it be a better fit?
3. Can our approaches to administrative review be improved? Kennedy shared an example, the IMF experience of inviting staff to submit complaints about actions that were discriminatory at any time in their career and then having those complaints heard by a three-person panel comprised of an outside expert on employment discrimination and two staff members, who then carried out in effect an administrative review of the past employment history of staff. The panels gave credibility to the process and, with very few exceptions, staff accepted the outcomes and remedial action was taken.

Discussion

Chris de Cooker agreed that disputes should be solved as early as possible with a low-threshold approach. But he noted three points:

1. Administrative review only works if it is tackled with the right mind-set of both parties. In other words, management needs to take the matter seriously before an official complaint is lodged. For this, de Cooker recommends managers be trained in conflict management.
2. A lot of cases are not legal issues but simply people not getting along. In these cases, it is better for the human resources department to find a solution rather than implementing a process of determining what is right and wrong.

3. Every effort should be made not to elevate disputes to the next level of the procedure.

De Cooker then postulated as to how much human resources staff should work alone before being assisted by a “proactive ombudsman” or a third-party mediator and, noting the early commencement of the conciliation process within ADB, questioned whether it should come in later.

Rivero from the World Bank explained the background of the bank’s decision to remove the administrative review process. With 12,000 staff, including 130 officers worldwide, the World Bank realized in 1998 that the administrative review stage didn’t fit all employees in terms of conflict resolution with regard to the organizational and cultural dimension of the bank. Wishing to “go beyond administrative review,” the World Bank decided to abolish the administrative review process. They had two objectives: (i) to achieve conflict resolution rather than adjudication (noting that adjudication often didn’t leave staff satisfied); and (ii) management accountability (to have managers defend their decisions without initial help from the human resources and legal departments). Initial attempts to start a community of practice whereby HR or legal would come to the table at the initial stage were not successful as staff felt that HR and legal were taking management’s side. So the World Bank then decided to take a softer approach to conflict resolution by empowering staff in the dispute resolution process.

Three new approaches supplanted the initial stages: (i) the introduction of three ombudsmen (the third based regionally out of Bangkok); (ii) workplace advisors who were local in-country and trained staff within the organization; and (iii) a mediation office through which outside mediators (i.e., not within the organization) were identified. Regional mediation hubs reflecting different cultures and approaches are growing. These three measures were then followed, if necessary, by the existing peer review and tribunal processes at the World Bank. Finally, the World Bank reviewed how many staff were bringing matters forward and discovered that many staff are finding it more comfortable to come forward under the new softer approach as compared with the previous adversarial system. He supported this observation with the following statistics: In 2004, 330 disputes went to the ombudsperson, 100 used workplace advisors, and 74 went to peer review. This can be compared with 2010, when 458 staff went to the ombudsperson, 400 went to workplace advisors, and 114 went forward for peer review. In support of the tribunal’s function, Rivero noted that the tribunal can provide a stable, predictable legal framework from which conflict resolution can operate and helps manage expectations on the sides of both staff and management.

Kennedy fundamentally agreed with Rivero and de Cooker in terms of endorsing “informal” dispute resolution. But he noted that managers are not necessarily going to be good at management and that was why the IMF focused on training. He also noted that many disputes don’t lend themselves to mediation as sometimes a clear answer is required. So he questioned, what happens when staff still feel aggrieved by management practice? Should the organization have the first opportunity to address that? He noted that once you move to peer review as the first review, you lose that element. He also

noted that an important factor in the peer review stage at the World Bank was that it still went back to management for a recommendation.

Rivero responded that the cases did lend themselves well to mediation and quoted 41 of 54 cases being resolved amicably, whilst 10 were withdrawn. He accepted that discipline cases don't lend themselves to mediation at all.

Heidi Jimenez, legal counsel, World Health Organization (WHO) agreed with both approaches as she felt administrative review has its purpose and that the two processes could complement each other depending on the type of issue at hand. She wants a process that is not formal and burdensome and has the appropriate checks and balances in place.

Kennedy noted that at the IMF they tried to implement such a system by providing the staff with considerable independence and latitude in saying no to their bosses during the administrative review process, but the process is not institutionalized. Kennedy is more comfortable with the peer review process in the World Bank over peer management review. But he is not yet satisfied that peer review has the ability to handle the thorough fact-finding and itself come up with as creative solutions as can a proficient administrative review.

Rivero admitted that the World Bank had considered administrative review but questioned who could act as the truly independent honest broker. They felt legal, human resources, and management couldn't fulfill that role, so that left them with nowhere else to go but staff—which was the peer review process.

Jennifer Lester agreed that the process at the IMF was working very well but that a lot depended on the respect and credibility of those involved and, as Kennedy noted, this meant it was a process not institutionalized. She was also not sure if it would work in larger organizations such as the UN and the World Bank. Contrary to Rivero, she felt the administrative review stage at the IMF was not adversarial as the person carrying out the review was seen as objective.

Rivero noted that the World Bank experience was informed by staff resorting to local lawyers and seeking to bring an adversarial process from the outset. The World Bank is seeking resolution before the peer review in an informal stage through ombudsmen and respected external mediators.

An ADB staff member noted that there is some benefit in giving people the opportunity to correct their actions and explained that the ADB experience was that if you want to use administrative review it should occur in the early stages of the conflict. He believed having conciliation come in at an early stage was working, as it had improved a system that was not working previously.

Rivero noted that the method behind his review was that people should be given the opportunity to correct their mistakes after having received the advice of the peer review.

He noted that the World Bank peer review as originally envisioned was supposed to give management an indication of how peers saw the decision and if it was within the “bounds of play” for the organization.

Arnold Zack asked if having conciliation at earlier steps had had an adverse impact on managers and their authority.

Rivero didn't think that it had, as the decisions are not taken at lower-level management but taken by a line manager with a community of practice—collaborative decisions. He sees administrative review as in a sense duplicating that process.

Kennedy noted that at the IMF, human resources will take over an administrative review if it was a collective management decision. But the first round of administrative review generally takes place in human resources and people are generally reluctant to go beyond this. As an example, Kennedy noted that in performance assessment disputes sometimes it was a matter of changing the language without changing the substance of what was said. He saw the process at the World Bank as potentially risky to the effectiveness of management when staff members could threaten to go to the ombudsman if a manager didn't go along with them.

Hamid Sharif, chair, ADB Appeals Committee, had three questions:

1. How do international organizations implement the value to be just and fair at all levels before it gets to the administrative tribunal?
2. What is the right balance in international organizations between management autonomy and the human resources function?
3. The World Bank has the resources to carry the costs of a multilayered dispute resolution system, but how would smaller organizations such as ADB weigh up the costs and benefits?

Kennedy said international organizations spend time and resources on the questions of managerial effectiveness. The IMF values economic and financial advice over the ability to supervise, but they have tools such as training courses, advisory assistance, coaching, and accountability through subordinate appraisals.

Rivero noted that the World Bank tried to inculcate values in two ways: 1) online code of conduct training and 2) performance reviews going to vice presidents of management who would make the decision rather than going to human resources. In terms of costs, he did not have a sense of how much the multilayered approach was costing.

De Cooker noted that the UN approach was to keep lawyers out for as long as possible and to have human resources there to advise. If staff seeks outside counsel then the big risk is that it will become adversarial from the beginning. He noted that in Europe the trend was for staff to go to the national course and that a lot of lawyers were recycling themselves as mediators.

Improving the Steps Below: Peer Review in the Internal Justice System of International Organizations

Chris de Cooker

Introduction

International organizations are under their constituent treaties and in accordance with general principles of international law independent from the legal systems of their member states. This entails a responsibility for the organizations to have their own labor code providing not only fair employment conditions for their staff but also an adequate dispute resolution system.

All international organizations have a scheme of informal and formal steps for the resolution of grievances before resort is had to adjudication by their own administrative tribunal (or by a tribunal of which they have recognised the jurisdiction²²). These steps include internal administrative review as well as the involvement of third parties, such as ombudsmen and in-house or external mediators, a practice that is also known in national labor dispute resolution systems. One of the more interesting aspects of dispute resolution systems in international organizations, however, is that almost all of them have peer review as part of their system. There is one important exception to this general approach: the United Nations (UN) has 3 years ago abolished peer review. The reasons behind this will be explained and analysed below. It should, however, also be underlined that a number of other organizations have recently reviewed their systems as well, but have arrived at a different conclusion: peer review was maintained and measures were even introduced to enhance its role.

The purpose of this contribution is not to give an overview of all existing forms of peer review of each and every organization. It is rather the intention to explain the

²² The best example is the Administrative Tribunal of the International Labour Organization, which is not only the administrative tribunal for its own organization but also for almost 60 other organizations.

evolving role of peer review, its advantages and disadvantages, and the requirements for a proper functioning within the overall frame of the informal and formal dispute resolution mechanism, taking into account the changing environment organizations find themselves in. The examples that will be given serve as illustrations and will concentrate on the financial institutions (and the UN). They do not pretend to be conclusive.

Peer review stands, just like administrative review, at the crossroads of informal and formal procedures. It should be kept in mind that, in practice, a strict borderline between informal and formal procedures often does not, and cannot, exist, and rightly so. Administrative review serves, in fact, a double purpose: on the one hand, it allows the administration to look again at all aspects of an issue and to see whether an early solution can be found; on the other hand, it also allows the administration to better prepare its “final” position (i.e., the one which is subject to judicial review). It is, in a way, a process.

The same can be said of peer review. It is definitely part, and an obligatory part, of the formal complaints process. A peer review committee advises the head of the organization on the legality of the contested decision before he or she takes a “final” decision. At the same time, however, peer review committees generally have the power to give a recommendation on the advisability of a decision under review and to make suggestions for an agreed solution. When the peer committee meets as an advisory body under a disciplinary procedure it advises on the proportionality of the envisaged sanction. One can also observe that increasingly these committees, or their chairpersons and secretaries, are expected to explore possibilities and to guide the parties towards a mediated solution. Peer review committees will, or should, give their advice to the head of the organization only if mediation or conciliation has proven to be impossible. The head of the organization is then, and only then, expected to take the final decision—which may be different from the initial position—and which may be challenged before the tribunal.

Main Characteristics of Peer Review Bodies in International Organizations

Details in set-up and procedure differ per organization, but they also have a lot in common.²³

With the exception of the UN mentioned above, all international organizations have a body composed of peers as part of the pre-litigation process. These boards have different names in the various organizations. For example, the Asian Development Bank (ADB), the Food and Agriculture Organization (FAO), and the European Patent Office,

²³ For more details, see Chris de Cooker. 2009. Pre-litigation Procedures in International Organizations. In Chris de Cooker (ed.). 2009. *International Administration, Law and Management Practices*. V.6.

have an Appeals Committee; the World Bank used to have an Appeals Committee, but now has a Peer Review Service; the International Monetary Fund (IMF) and the European Bank for Reconstruction and Development (EBRD) have a Grievance Committee; the Inter-American Development Bank (IADB) has a Conciliation Committee; Interpol and the Organization for Economic Co-operation and Development (OECD) have a Joint Advisory Board; the United Nations Educational, Scientific and Cultural Organization (UNESCO) has an Appeals Board; the Council of Europe an Advisory Committee on Disputes; the North Atlantic Treaty Organization (NATO) a Complaints Committee; the European Space Agency (ESA) an Advisory Board; etc.

In most organizations the boards are, for each case, composed of an uneven number of members, for example three in ADB, IADB, and the IMF, but five in FAO, UNESCO, the International Labour Organization (ILO), and the World Health Organization. Even numbers can be found in the Council of Europe (four) and ESA (six).

In some organizations, such as ESA, ILO, and OECD, the members of the peer committee are appointed on an ad hoc basis when the committee is seized of a dispute. In most organizations, however, the members of a panel are for a particular case chosen from the larger roster of its members. They are generally appointed to the roster for a fixed period by the head of the organization and staff representatives in equal numbers. The chair then composes the panel for each case.

In some organizations, such as ESA, the chair is chosen by and from the members of the committee concerned. In other organizations the head of the organization appoints the chairperson, usually after consultation with the staff association.

A number of organizations have chosen for an external chair appointed by the head of the organization after consultation with the staff association. For example, the chair of IMF's Grievance Committee has always been an experienced labor arbitrator. The current chair of the OECD's Joint Advisory Board is a judge from the French *Conseil d'Etat*. The chair of the EBRD's Grievance Committee is at present a barrister, professor, and president of an administrative tribunal of another international financial institution. In the IADB the president chooses the chair for its Conciliation Committee from among the retirees of the IADB.

Secretariat facilities are provided by a staff member designated by the head of the organization and all costs are borne by the organization.

Recent Developments

Over the last decade most organizations have, in addition to the classic peer committees in the appeals process, introduced peer review committees for specific issues, generally in a reaction to an ad hoc requirement. They have been tasked to deal with issues such as discrimination, harassment, discipline, pensions, etc. The parallel existence of such bodies is confusing. It can lead to misunderstandings on who is doing what (and in

which order). It is therefore not contributory to an expeditious solution of issues. Only an overall review of the whole dispute resolution system can bring some order into this.

Regarding disciplinary procedures, for example, ADB has been “experimenting with various disciplinary procedures,”²⁴ thereby guided by the jurisprudence of its Administrative Tribunal as from its first case. One approach was the introduction, in 1998, of a peer Review Committee. This committee was to be seized in cases where the charges, if proven, could entail the staff member’s dismissal for misconduct. For all other disciplinary cases such a committee could be appointed, but there was no obligation. The experience had mixed results and in 2006 ADB decided to abolish the Review Committee. Rather than having two peer review processes (Review Committee and Appeals Committee), ADB opted for a single but improved process before the Appeals Committee.

The United Nations (UN) has gone through almost 20 years of reviewing the administration of justice in the Secretariat. The UN used to have a peer review system, called the Joint Appeals Board (JAB) for appeals and Joint Disciplinary Board (JDC) for disciplinary cases. During the review exercise in the mid-1990s the UN secretary-general proposed²⁵ that the JAB would render binding decisions. Since staff members could, in his view, not impose a decision on him as the chief administrative officer of the organization, he proposed that the JAB be a body composed of professional arbitrators, who would be “officials” and not “staff members.” This proposal, like almost any other proposal he was making at the time concerning the reform of the internal justice system and which was costing money, was not retained by the General Assembly.

It should be noted that the UN had since the mid-1970s, in parallel to the JAB, a peer review mechanism for discrimination cases. In fact, the General Assembly had in 1976 requested the secretary-general to appoint a panel to investigate allegations of discriminatory treatment.²⁶ The secretary-general established the first such panel at UN headquarters in 1977: the Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat. The following year, similar panels were set up in other major duty stations. The panel members were selected from among the UN staff and were appointed by the secretary-general on the recommendation of the Joint Advisory Committee for a renewable term of 2 years. The panels were designed to investigate allegations of discriminatory treatment and were expected to resolve cases through conciliation or by recommending appropriate action. The secretary-general reformed the panels in 1983 in terms of composition, procedure, and scope, and broadened their terms of reference to cover all types of staff grievances. The panels were renamed to become the Panels on Discrimination and Other Grievances (PDG).²⁷ Although the

²⁴ Gerd Droege. Accountability, Investigation and Due Process: the Example of the Asian Development Bank. In Chris de Cooker (ed.). 2009. *International Administration*. II.14. pp. 419 ff.

²⁵ Cf UN docs A/C.5/49/13, A/C.5/49/60 and A/C.5/50/2.

²⁶ Resolution 31/26 of 29 November 1976.

²⁷ ST/AI/308/Rev. 1 of 25 November 1983.

procedure was rather an informal one, the panels could only act when a staff member made a formal complaint.

Discussions on reform in the UN continued and in 2002 the General Assembly agreed to the creation of the function of the ombudsman.²⁸ The Office of the Ombudsman was promulgated on 15 October 2002. The secretary-general had already in 2000 indicated that, in his opinion, the establishment of the full-time function of the ombudsman would strengthen the informal mediation process and, as a result, would replace the PDGs. He repeated this in 2002.²⁹

The General Assembly requested the secretary-general to submit, in consultation with the ombudsman and staff representatives, a detailed proposal on the role and work of the PDGs.³⁰

The ombudsman asked an expert team to review the function of the PDG in March 2004. The expert team submitted its report in July 2004. It was of the opinion that the handling of PDG issues by the Office of the Ombudsman was according to established international standards fundamentally incompatible with the role of the ombudsman. It proposed to reconstitute the PDG as a Joint Grievance Committee and to relocate it under the JAB administrative structure with an enhanced jurisdiction to hear any grievances that do not stem from an administrative act. Last but not least, it drew attention to the fact that the UN was lacking structured mediation to complement or assist the informal resolution channels.

The secretary-general submitted his report on the matter, together with a number of other reports on the administration of justice, to the General Assembly in October 2004.³¹ He basically endorsed the analysis made by the expert team, but it is interesting to note that where the expert team called the PDG procedure a formal one with informal aspects, the secretary-general insisted in calling the PDG system an informal one. He then presented two options to the General Assembly: either to abolish the PDGs or to redesign them. The General Assembly decided that the secretary-general should form a panel of external and independent experts to consider redesigning the whole administration of justice system.³² It was amongst other things tasked to consider the peer review.

The report of this Redesign Panel was transmitted to the General Assembly in the summer of 2006.³³ The Redesign Panel found that the United Nations internal justice system was outmoded, dysfunctional and ineffective, and lacking independence. The panel recommended a “decentralized, streamlined and ultimately cost-efficient system of internal justice.” It recalled that the UN’s current employment practice was to award

²⁸ Resolutions A/RES/55/258 and A/RES/56/253.

²⁹ Cf document A/55/253, Annex V, paragraph 3. See also document A/56/800, paragraph 29, of 13 February 2002.

³⁰ Resolution A/RES/57/307 of 15 April 2003.

³¹ Document A/59/414 of 5 October 2004.

³² Resolution A/59/283, section IV.

³³ Document A/61/205 of 28 July 2006.

fixed-term appointments. It concluded from this that there was less willingness for staff to serve on peer review committees and that there should be concern about the independence of the staff members that do serve on such committees. It observed that the peer review committees were “composed of staff members acting in an advisory capacity to the secretary-general and, thus, do not meet the basic standards required to guarantee their independence. That the administration of justice in the United Nations lags so far behind international human rights standards is a matter of urgent concern requiring immediate, adequate and effective remedial action.” It therefore proposed to abolish the JABs, the JDRs and the PDGs, also because they were in many places not functioning well, and to replace them with a decentralised UN Dispute Tribunal (UNDT) with the power to render binding decisions. The UN Administrative Tribunal was then to become an appellate court. The panel also insisted on the creation of efficient mediation services.

These recommendations were generally approved and the new system of administration of justice began functioning on 1 July 2009.³⁴ The JAB and JDC cases pending at the time were transferred to the three registries of the UNDT.

As mentioned above, a number of other international organizations have in the last decade reviewed their internal justice system and others are in the process of doing so. The IMF, for example, which had created its peer review committee, the Grievance Committee, in 1980,³⁵ reviewed the latter’s role in 1994–1995 when it established its Administrative Tribunal.³⁶ The IMF reviewed its overall internal justice system in 2001 and 2002 with the assistance of an external panel.³⁷ When analysing the practice and experience of the Grievance Committee, the external panel was impressed with the fact that the committee had in all cases before it issued unanimous recommendations and that the managing director had accepted and implemented all of them. The panel could therefore limit itself when making suggestions for improvement. One recommendation was to inaugurate a joint training programme for new committee members. The other suggestions concerned mainly improvements of procedure. The panel, for example, recommended that the chairperson take initiatives for a better focus of the hearings. In order to do so he should, before the formal commencement of the proceedings, meet with the grievant, or both parties, to better ascertain the nature of the dispute and try to identify those areas that are not in dispute, such as (some of) the facts, testimonies, and issues to be resolved. The panel urged that such an informal meeting become a routine opportunity where parties could be encouraged to find resolution through the facilities of the ombudsman or (interpersonal) mediation. A second suggestion called for a greater reliance on pre-hearing briefs or written arguments. Lastly, the panel recommended that the chair of the Grievance Committee should be allowed, with the consent of the parties, to recommend the parties to suspend the proceedings and attempt to resolve

³⁴ Resolution 63/253.

³⁵ For details, see David Cutler. The Grievance Committee of the International Monetary Fund. In Chris de Cooker (ed.), *International Administration*. V.9.

³⁶ For details, see Joan Powers. Reinventing the Wheel—The Establishment of the IMF Administrative Tribunal. In Chris de Cooker. (ed.). *International Administration*. V.10.

³⁷ Its report can be found at www.imf.org/external/hrd/dr/112701.pdf

some or all of the issues by recourse to mediation (or the ombudsman). The proceedings may, in fact, bring to light facts and arguments, or a new assessment thereof, which may reopen interest in an agreed solution.

The EBRD reviewed its system for the first time in 2001 and 2002. Until then the EBRD only had an Appeals Committee, with an external chair. The organization decided to introduce an administrative tribunal as the third element of a three-tier system, the first tier being normal administrative channels, and the second a formal administrative review. The tribunal was composed of an outside chair and two assessors, who were EBRD staff members. This system was again reviewed in 2005 and 2006. The EBRD then decided to leave the first tier of “normal” administrative review unchanged, but to change the second tier (i.e., the formal administrative review process) and to replace this with a Grievance Committee with an outside chairperson. Secondly, it restructured its Administrative Tribunal, which is now composed of outside independent judges. It should be added that the EBRD also has an ombudsman.

The most recent, and very interesting, change comes, however, from the World Bank Group. The World Bank has regularly, almost continuously, reviewed its conflict resolution system and it has consistently been seeking to introduce mechanisms that facilitate early resolution of disputes and to “delegalize” the system. It has, for example, over the years introduced Ombuds Services, Mediation Services, Respectful Workplace Advisors (who are also peers), etc. Peer review has been offered since 1977 when the Appeals Committee was created. The Appeals Committee became over time, as in almost every other international organization, part of the legalized system (i.e., the procedures before it were more and more legalistic) and the committee became a first stage in the litigation process proper.

In its most recent reform, which took effect on 1 July, 2009, the World Bank Group decided to change the Appeals Committee into Peer Review Services (PRS), thereby restoring its genuine nonjudicial peer review character, and moving it away from the adversarial process and the committee’s quasi-judicial functions. The objectives of the peer review process, which carries as its motto “peers ensuring fairness,” are to provide staff with a means to obtain review of disputed employment matters by their peers; to reach just, fair and efficient resolution of such matters; and to ensure managers’ accountability for their actions affecting staff.

PRS functions in panels of three. They are designated from a list of around 60 volunteers appointed by the managing director, based on joint recommendations of the vice president, human resources, and the staff association. PRS members hold a 3-year term, renewable once for a second 3-year term. The chairperson of Peer Review Services is appointed in accordance with the same procedure and for the same duration. (S)he is responsible for advising the Peer Review Secretariat on matters relating to the operation of Peer Review Services and for representing Peer Review Services in various bank forums. In addition, the chairperson may decide certain matters relating to cases, as will be explained below. (S)he is also a Peer Review Services member and may therefore participate in the review of cases as a panel member. All peer review members must

complete the training course offered by the Peer Review Secretariat prior to serving on a panel.

A staff member seeking a review of what is referred to as the “disputed employment matter” is, in fact, required to submit the matter first to the Peer Review Services prior to appealing to the World Bank Administrative Tribunal. When submitting the matter to PRS, the staff member must also indicate whether (s)he has tried to resolve the disputed employment matter(s) with his/her supervisor or manager, and also whether (s)he would be agreeable to resolve the claims through mediation. The same questions are put to the respondent supervisor or manager, who has 45 days to send in his/her input.

PRS may in principle review any request for review in which a staff member alleges that a managerial action, inaction, or decision was not consistent with his or her contract of employment or terms of appointment. The scope goes therefore further than the classic “administrative decision” concept. There are, however, a number of exceptions. Panels may, for example, not review decisions from the Outside Interests Committee, the benefits administrator, the finance administrator, or the Pension Benefits Administration Committee. The same is true for actions taken in connection with misconduct investigations. The latter are to be submitted to the administrative tribunal directly. This also applies to cases where a staff member seeks review of a decision to terminate his or her employment. In that case (s)he may elect to bypass the peer review process and file an application concerning the matter directly with the World Bank Administrative Tribunal.

The Peer Review Secretariat designates a panel of three members to review each request for review. Each panel includes members at both the managerial and nonmanagerial level. Each panel in principle includes at least one member who is either at the same grade level as, or shares similar work experience with, the staff member who requested the review, and at least one member from the same Bank Group institution.

The panel, or the PRS chair, may at any stage in a proceeding refer a matter to the Office of Mediation Services, the Ombuds Services Office, the Office of Ethics and Business Conduct, or any other office or individual within the bank for review or to encourage informal resolution of a disputed employment matter. They can also dismiss a request for review, or one or more of the claims made therein, when circumstances so warrant, including when (i) the request for review was not timely submitted, (ii) the disputed employment matter falls outside the scope of PRS, (iii) the disputed employment matter has already been challenged in the peer review process or before the World Bank Administrative Tribunal, (iv) the secretariat is unable to contact the staff member concerned after reasonable efforts to do so, or (v) the request for review represents an abuse of the peer review process. They may also consolidate for review one or more requests filed by the same staff member.

The panel, or the PRS chairperson, may also at any stage in the proceedings make an interim recommendation regarding the resolution of a case or suspend the review for a reasonable period of time as warranted under the circumstances.

In addition, the panel may at any stage decide upon the parties' document and witness requests. It may also request any official, including those involved in the matter under review, to produce documents or information relevant to the disputed employment matter within a specified period of time. A panel may not, however, obtain (i) medical records without the express consent of the individual concerned, (ii) documents covered by the attorney-client privilege, or (iii) records of an ongoing investigation until the completion of all formal proceedings. It may request any individual to appear as a witness at a hearing. It is to be noted that the staff rules protect certain offices, such as the Ombuds Services Office, from being required to disclose information or from being a witness.

As far as individuals are concerned who are not bank staff members, the panel may request them to produce documents or information but cannot compel them to do so. The panel may also request such individuals to appear as a witness but, again, cannot compel them to do so.

A panel may at any stage make findings of fact and reach conclusions with respect to disputed employment matters, and recommend to management that the bank award relief to the staff member concerned and/or take other corrective measures as appropriate.

The panel reviews all the elements brought before it and considers whether the manager's actions were consistent with the staff member's contract of employment and terms of appointment, including the pertinent bank rules and policies. It generally holds a hearing, but the staff member may also request that the review is done in a written procedure. The hearing is conducted in the presence of both the staff member and the responding manager. Witnesses called by the panel are questioned in the presence of both parties. The panel may recommend that the bank award relief to the staff member and/or take other corrective measures. The recommendations are submitted to the requesting staff member's and responding manager's vice president, who then decides, after appropriate consultations with HR, to propose all or part of these recommendations to the staff member. In case of agreement, the decision is implemented.

A copy of the final decision and of the PRS report goes to the ombudsman unless the staff member objects to this.

The procedure before the PRS panel is rather expeditious: the staff member has 120 working days to submit his/her request for review and the manager 45 days to reply. The panel's report is to be submitted within 21 calendar days after the conclusion of the deliberations. The line vice president is expected to issue his/her decision within 30 days.

PRS may also submit general observations to HR recommending improvements to policies, processes, and procedures, even when it does not recommend relief in a given case. It has so far done so in some 10 cases.

As mentioned above, PRS is a completely delegatized procedure. Although both the staff member and management, of course, do have access to legal advisors who can advise on

the PRS procedure, they have to write their submissions in their own words. Attorneys may not draft submissions and they are not permitted in the hearings. This carries the risk, however, that any subsequent procedure before the Administrative Tribunal may become a *de novo* procedure, not only in terms of procedure proper but also in terms of fact-finding. In order to avoid this, peer committees in some other organizations, which also have less formal procedures, occasionally ask advice from the Legal Service on points of procedure and due process. It is recalled that some organizations have, particularly for this reason, an external chairperson with a legal background.

In 2009, the first (half) year of its existence, 10 requests for review were submitted and 26 new cases were submitted under the “old” Appeals Committee mechanism. At the end of the year, 4 out of the 10 PRS cases had been resolved; the other 6 remained pending. The Appeals Committee processed in the same year a total of 52 cases in 2009, of which 47 were resolved. Most of the cases concerned benefits and remuneration issues.

In 2010, PRS had a caseload of 42 cases, 31 filed in 2010 and 11 carried forward from 2009. Thirty cases were resolved: 2 were dismissed for lack of jurisdiction and 9 withdrawn following a settlement. PRS made recommendations in 19 cases, 16 following the holding of hearings and 3 following a written procedure. Only 17 of the recommendations were accepted, 5 of them being in favour of the staff member. Again, benefits and remuneration issues led the list of topics that were dealt with, followed by performance management matters and reassignment or selection questions. It was after the first year and a half of experience with the PRS system that it was felt that the process was, in certain cases, still too formal and adversarial, which was not conducive to resolving the issue. PRS has therefore recently introduced a pilot program, under which the panel will interview the staff member and the responding manager separately and outside the presence of each other. The same is the case for hearing witnesses. After a first analysis, the panel may then meet for a second time with either of the parties, but the panel may also meet with both parties in the presence of each other if this would contribute to finding a solution. Upon this the panel follows the usual procedure of issuing its report and recommendations.

This pilot program applies to requests submitted between 1 April and 31 December 2011 and only if both parties agree to follow this special procedure. This approach is not unique. It has been applied in other organizations as well, for example in the North Atlantic Treaty Organization (NATO).

Outlook

A blueprint of an ideal administration of justice system for all international organizations will probably never exist. Any system will have a three-tier scheme: administrative review, informal and formal pre-litigation, and adjudication. The details of each element depend on historical and cultural differences between the organizations, and policy decisions. A dispute resolution system must also take into account whether all or almost all staff are working in one duty station, whether the organization is “decentralised” or not, etc.

Some of the employment conditions, such as whether staff have generally fixed-term or indefinite duration contracts, are also relevant.

Recent experience shows that alternative dispute resolution schemes are increasingly introduced in international organizations. Organizations realise that an early solution of an issue through a low-threshold mechanism is to be preferred to a protracted legal and legalized process.

It is to be added that, although every issue can be presented as a legal issue, most of the cases don't have a legal question at its origin. Many cases do not concern administrative acts. They rather concern actions (or non-actions), attitudes, behaviour, interpersonal relationships, non-assistance, etc.

Peer review committees do play an important role in the justice systems of international organizations and will continue to do so. As we have seen above, almost all organizations that recently had an overall review of their internal justice systems have reinforced peer review. The only real exception to this trend is the UN, which abolished peer review and has opted for a very legalized system. It is to be regretted that the UN did not seek to improve the existing peer review mechanisms as other organizations have recently done, which was possible and would have been worth the effort. It is also to be regretted that the UN applied a legalistic "independence" test to the JAB as if the staff concerned were judges. It is anyway too early to assess the new system for the administration of justice in the UN. Statistics so far show that the judges of the UNDT have an important workload. There is not enough jurisprudence from the UN Administrative Tribunal (UNAT) to draw any conclusions on the number of appeals to the UNAT and on the success rate. And it is certainly too early to make an assessment of the new mediation services.

The approach followed by most organizations is that the role of peer review should not be, or become, one of adjudication. Peer review there remains a low-threshold part, and generally the beginning, and only the beginning, of a formal process. It is to be underlined that peer review committees are essential for the organizations, since international organizations are generally, or have become over time, very complex organizations and it is therefore useful that somewhere in the dispute resolution system people with knowledge, experience, insight, wisdom, common-sense understanding of the organization and its rules, etc., have a look at the case.

In their more formal role, peer review committees are instrumental in establishing facts and identifying the real issues of dispute. International administrative tribunals have always been very positive about the assistance and input (fact-finding, assessment, etc.) they have received from this early stage in the procedure. It should not be forgotten that peer review is part and parcel of the overall justice system and that the procedure and the results of the procedure may ultimately find their way to the administrative tribunal. In fact, international administrative tribunals very rarely have *de novo* procedures and some of the well-known tribunals almost never hold hearings. Attention must therefore be given to basic principles of procedure and due process in the peer review proceedings.

A number of organizations, such as the EBRD and IMF, have opted for a very formal peer review process and there may be good arguments to do so. In order to prevent dispute resolution from becoming too legalised, special care must be given, in particular in those organizations, to the availability of efficient informal mediation or ombudsman services.

It should be underlined, however, that peer review committees also have a more informal role. The committees are allowed to make proposals for a solution. Organizations could, and should, explore more the possibilities for such committees, or their chairs or secretaries, to guide parties to a mediated solution, if this is still possible. And sometimes, when a formal complaint is lodged and a procedure starts, parties do see possibilities. This is already the practice in an increasing number of organizations and the recent changes in the World Bank Group are an excellent example.

Another interesting example can, again, be found in ADB. Administrative Order No. 2.06 introduced in 1998 a conciliation procedure within the appeals process: after the formal submission of the appeal, the chair, or alternate chair, of the Appeals Committee had 1 month to seek a settlement of the matter. This approach was abandoned in 2002 in favour of mediation at an earlier stage. A staff member who seeks administrative review of a decision must submit a request for compulsory conciliation within 45 days from receipt of the decision. The director of human resources forwards this request to one of the two conciliators—the staff member has the choice. The conciliator conducts interviews with all concerned parties within a further 15 days. If conciliation is successful, the conciliator submits a statement on the details of the settlement. If it is not, the conciliator submits a statement to that effect. The rules provide that statements made in the course of the conciliation can never be presented as evidence during any subsequent administrative review, appeal, or proceedings before the Administrative Tribunal.³⁸ It is to be added, moreover, that ADB in 2011 created the ombudsman function.

The involvement of an outside chair of the peer review committee adds an undeniable level of expertise in procedural and substantive matters, which can be of crucial importance for the whole administration of justice process and will add weight to the authority of the opinions delivered. If the approach of having an outside chair is retained, it is advisable to select a chairperson who is not only familiar with this type of procedures and rules, but who is also largely available so as not to slow down the process. The other members of the committee should then be selected from a roster of available staff members. It is not advisable to compose the whole committee of experts that are not staff members. This means, obviously, the end of peer review and it entails the risk that the pre-litigation becomes too legalised. On the other hand, organizations may sometimes be confronted with very complex cases and they could call on a small group of experts, such as arbitrators, to have an early and neutral look at the case.

The ultimate purpose of any administration of justice system should be an expeditious and fair solution of a case. The adversarial process should come in as late as possible and every effort must therefore be made to make mediation and peer review work.

³⁸ Cf Drosses, *op. cit.* note. pp. 426–427.

Summary of Discussion

Presented by Chris de Cooker, chair, International Civil Service of the International Institute of Administrative Sciences. Chaired by Claude Wantiez, judge, Asian Development Bank (ADB) Administrative Tribunal. Discussed by Jack Kennedy, international human resources consultant, and Jennifer Lester, assistant general counsel, International Monetary Fund (IMF).

De Cooker briefly summarized his paper and, before opening the floor to the discussants, concluded that peer review was here to stay, as it could not replace mediation and without it the system would become too heavily legalized.

Discussion

Jennifer Lester couldn't say that she disagreed but explained that the IMF had wanted to look at the objective of the peer review and how they could improve it. She saw its purpose as being (i) fact-finding, (ii) a means to create a useful record for the tribunal, (iii) a forum for staff members to be heard and have their "day in court," and (iv) a means for the organization to have another opportunity to correct a mistake if one had occurred. She thought that the composition of the peer review helps, ideally with an external chair, one representative nominated by staff, and another nominated by management. She noted that its detractors felt it costly, too legalistic, and intimidating to staff, and that some disputes were not suited to an adversarial hearing (for example, when the two parties concerned might need to still work together). She noted that 10 years ago, implementation of conciliation/mediation services at the IMF had been recommended and, whilst it had never really eventuated at the time, the IMF was now considering doing so. She concluded that there was no right or wrong solution as it depended on the culture of the organization.

Jack Kennedy asked if we were asking too much of these organizations to have peer reviews and noted that peer review tended to be an all-encompassing bundle of a fact-finding, advisory, and conciliation roles. He noted that in hierarchical organizations such as the IMF, a legalistic approach is probably better. But he cautioned the need to have clear expectations of the peer review role. Do they represent management and staff at the same time or not?

Chris de Cooker noted that the IMF was an extreme example as the grievance procedures were very adversarial. He said that his experience with the committees was that the members were independent in the political context (not in the legal context).

Arnold Zack reflected that discussants had spoken about resolving disputes expeditiously and that now we were hearing about a wide variety of steps below. He posed the question, To what extent does peer review impact on the decisions of the tribunal? He noted that he was troubled by the cavalier attitude of peer review, asking people questions without cross-examination, reporting its conclusions as fact to the tribunal, and the tribunal accepting such reports as factually accurate. As a judge, he felt uncomfortable making a decision of law on evidence not cross-examined. He noted that at the IntraDevelopment Bank, peer review used to be a conciliation step and therefore those reports went to the tribunal. He noted that when the tribunal hears a case, they want to be independent and do not want to step back from what is that responsibility. He concluded that the informal structure was good but not if it becomes part of the formal structure of the tribunal.

Chris de Cooker responded that his point was that there is a report from the peer review, which uncovers facts as they find them, and this report goes to the tribunal. Then it depends if the tribunal is satisfied with what it wants to take on board. If it is not satisfied it should go *de novo*. But in many cases this is not happening. He said that the peer review step does not dictate to the tribunal what it should decide, but it is part of the process.

Arnold Zack responded that it makes it harder for the tribunal as the employer might be offering a compromise to settle a case, which should not be known to the tribunal charged with deciding a case on the basis of paper submitted.

Jennifer Lester said it depended on the nature of the review below. In the IMF case, the entire case findings go to the tribunal, but the tribunal uses the record below as evidence. If it wants to hold a hearing for its own fact-finding, it can. She noted that she would also be concerned if confidential settlements found their way before judges.

Arnold Zack noted that in “messy” cases, such as continuing harassment over time with lots of witnesses, he was not convinced that non-experts on the Appeals Committee could capture the facts in one report that the tribunal could rely on. He said it “may or may not be persuasive.” To what extent was the testimonial tested? The IMF gives reports with an explanation of the transcripts of the hearings.

Chris de Cooker said that the International Labour Organization Administrative Tribunal (ILOAT) has about 60 peer reviews and they all go to the ILOAT, which holds no hearings, and that this was working. He admitted it was probably not the best but that was what was happening.

Jennifer Lester noted that whilst the formal mechanics are costly, difficult, and intimidating, they had staff who wanted lawyers involved from day one, so it was difficult to persuade them that the organization will try and act in good faith with its preference to mediate (the informal situation).

David Sobel, chairperson, ADB Staff Council, noted that often staff would go to the Staff Council in the absence of an ombudsman (which is to be resolved shortly with the appointment of an ombudsman position at ADB), but staff who choose administrative

review and the appeals process often see it as a necessary evil to get to the tribunal. He said there was a perception that the case wouldn't get resolved until it reached the tribunal. He also noted that staff do not hear about the cases that are resolved, and that they have a somewhat cynical view considering that from 2003 to 2007 staff lost all cases that went to the tribunal.

Chris de Cooker pointed out that it is different looking at what was statistically measured compared with what was actually happening. He noted that the ADBAT was well established for doing justice from its first case giving guidance to management on how to improve internal law. His impression was that the Appeals Committee is working well at ADB. He noted ADB has an administrative process in its steps but felt that the conciliation process came in very quickly as a compulsory step. He noted that what was missing, but had now been addressed, was the ombudsman role.

An IMF Administrative Tribunal staff member asked if there was any information about informal systems after parties had gone to the administrative tribunal. He said it was normal in commercial arbitration that after the parties had seen the position of the other parties, a settlement is reached. He asked if there are any settlements after cases have been to the tribunal?

Arnold Zack noted that in the 7 years that he had served as a judge on the tribunal, the first one had happened last week. He said he didn't have the data regarding the number of complaints filed, mediated, proceeded to peer review, and proceeded to the tribunal, but he noted that management can always manage a case more readily than can staff. He noted the "chilling" effect of adding to the statute the potential award of costs to the employee for frivolous cases but added that to his knowledge there had been no case to date held to be frivolous. But he thought the potential of the new clause was that it might be a deterrent to staff in filing claims. He noted that ADB and the IMF now had that clause and that it could deter legitimate cases.

Jack Kennedy noted that you could keep staff informed of cases proceeding through the dispute mechanism in the way that the IMF did through its ombudsman and ethics officer, who produced annual reports to track who was making claims and which cases had been resolved. He noted that they had recently experimented with a broader report on misconduct after a 3–5 year lag for confidentiality reasons. The IMF Staff Association had wanted the information to support the transparency of the system.

Jennifer Lester noted that at the IMF, facts and positions became so entrenched that it was difficult at the tribunal stage to settle and that it rarely happened.

Chris de Cooker said that in his opinion it was never too late to settle—even if the case were in front of the tribunal. But what he questioned is whether there were deals and compromises being made that were not known to staff. He also noted that once a case got to the level of the tribunal, it was rare that anyone would say a case was vexatious or frivolous. He noted that in a particularly rare case of a recurrent litigant they might have to pay a token penalty.

How the Steps Below Impact on the Responsibilities and Independence of Administrative Tribunals

Ahmed El Kosheri

The emergence of intergovernmental organizations as legal entities forming recognized subjects of international public law has been one of the fundamental changes that occurred during the 20th century. Within the major characteristics of these multifaceted international organizations, which mushroomed particularly during the second half of the last century, figures the legal aspects of the relationships between the organizations' executive organs composed of representatives of the member-states as well as the elected bodies in charge of their administration, on the one hand, and on the other, the international civil servants recruited as employees to undertake the various functions and tasks needed to achieve the objectives entrusted to them.

A special branch of international law developed consequently, in view of elaborating the rules governing such supranational type of working relationship which requires that the employees' allegiance should be entirely devoted to the organization that recruited them, regardless of their nationalities. Hence, a coherent body of rules commonly known as international administrative law, or the law of the *fonction publique internationale*, becomes a necessity focusing on two main aspects: (i) on the one hand, the working guarantees and standards of performance aiming to ensure both the highest standards of efficiency and the utmost loyalty to the institution and its interests; and (ii) on the other hand, creating the organizational independent environment that permits the elimination of any possible recourse to the rules and regulations familiar in the domestic legal systems for protection of the rights and interests of the national employees, and substituting such legal social protection measures by a supranational system providing an adequate regulation in conforming with most relevant rules and standards safeguarding the international human rights as recognized worldwide.

The modern community of all civilized nations, through Resolution 59/283 adopted by the General Assembly of the United Nations, emphasized that basic reality by explicitly stressing "that the system of justice as a whole should be *independent, transparent, effective, efficient and fair*" (second paragraph of the preamble; italics added), and requiring in the subsequent paragraphs that such a system should secure compliance with the following characteristics:

- (i) “accountability of managers for the system”;
- (ii) “respect the principle of due process and provide for appropriate peer review”;
- (iii) “early and swift resolution of disputes, in particular through a direct dialogue between managers and staff”; and
- (iv) “ensuring fair and just treatment” within the context of fullest respect of human rights and elimination of all sorts of discrimination.

The above-stated factors could be safely considered as constituting a common core that should guide the system applicable to all international organizations, whatever may be their category or specificity. Nevertheless, there are certain particularities that should be observed, since some organizations are universal and covering various types of activities, such as the United Nations (UN) and its specialized agencies or funds. Such organizations, having worldwide reach and undertaking a vast scope of multipurpose activities, encounter different types of difficulties that the UN Resolution 59/283 was keen to emphasize, by referring to the “continuing backlog of appeals in various parts of the system” that existed by then, the need to “focus on training for all participants,” being “slow, cumbersome and costly,” and the need to avoid “duplication and overlap within the formal process.”

The shortcomings in question represent the particularity of a huge institution like the UN Secretariat, which had in 2005 more than 30,000 staff members located on all continents of the world, with fewer than 11,000 in New York and the others dispersed in many offices mainly in Africa, Asia, and Latin America, including the humanitarian peacekeeping missions managing tens of thousands of military forces under UN command, as well as numerous other persons undertaking technical cooperation purposes. Equally, the Redesign Panel, which was established by virtue of Resolution 59/283, was in charge of providing for reform applicable also to the separately administered United Nations funds and programs—such as UNDP, the United Nations Population Fund (UNFPA), UNICEF, and the office of the United Nations High Commissioner for Refugees (UNHCR)—whose staff totaled more than 25,000 persons.

Providing for adequate reform that copes with the great number of staff members and those locally recruited persons is not an easy task, particularly when taking into consideration that the thousands of people in question represent a great variety of individuals and groups having different cultures and backgrounds. The relevance of these factors are extremely important as masterly emphasized by Professor Dale Bagshaw in her report to the present meeting, and I can add nothing more to the wealth of knowledge contained therein. I may only stress that according to my own experience, the fact of working under supervisions mostly of managers belonging to different origins had been one of the most striking visible factors which I noticed in my capacity as a member of the UN Redesign Panel during the study we undertook during the first half of the year 2006, and that reflected necessarily on the panel’s findings. This was reflected particularly within the scope of the repeated accusations of discrimination and the lack of sensitivity within the conduct of the appeals committees operating under the United Nations, which could hardly qualify as being “appropriate peer review” due to

the imbalance of its composition and the fear by females to pursue accusations against male white men occupying in most cases commanding positions.

Obviously, such situation that prevailed during the study undertaken by the UN Redesign Panel and necessarily reflected in a number of its findings that are subject to criticism by my eminent colleagues and *co-rapporteurs* in the present gathering, has to be considered as having been conceived within a given different context, and thus said consideration could possibly be nonexistent or of minor relevance with regard to situations prevailing in other organizations, particularly these of a regional nature and specialized in specific limited types of activities, such as the Asian or African Development Banks, the International Monetary Fund (IMF), or the World Bank.

Having said so, as a preliminary remark calling for a note of moderation in order to avoid any unjustified generalizations, the following paragraphs deal with two subjects:

- First: The common core forming the unanimously agreed-upon background for each adequate system of internal administrative justice in an international organization, whether universal or regional, covering a variety of purposes or limited to a given sector, such as monetary cooperation or developed banking.
- Second: The other particular aspects of internal justice specially tailored to fit within a given context, such as universal multidimensional organizations like the United Nations, provide some illustrations to explain the reasons for which the United Nations Redesign Panel opted for creating a first-tier judicial organ called the United Nations Dispute Board (UNDB) to render binding decisions, replacing the joint appeals boards (JABs) and the joint disciplinary committees (JDCs) composed of staff members for peer review of administrative decisions and disciplinary cases that issued simple recommendations subject only to a possible appeal to the UN Administrative Tribunal (UNAT).

The Undisputed General Patterns of the Adequate System of Administrative Justice

In order to possess a well-functioning system for the administration of justice in any international organization, whatever may be its size, nature, and extent of geographic coverage, there should be a balance between various components belonging to both the informal and the formal aspects of the said system.

Within the informal structure, the office of the ombudsman holds a central position as a viable and integrated alternative for prompt resolution of disputes within an environment of strict confidentiality and operating in a coherent manner easily accessible to the staff wherever their location may be.

Equally important, mediation has to play an increasingly important role, not only voluntarily at an early stage of any dispute, upon the initiative of the staff member

or with his consent, but also the recourse to mediation may take place after engaging proceedings in the formal justice system, once suggested either by the ombudsman's office or by the judge in charge of the case already within the formal justice system. The advantages of mediation are enormous, in terms of rapidity, efficiency, and the possibility of converting the result of the successful mediator into a binding decision upon endorsement by the judge of the said mutually accepted recommendation.

Regardless of whether the coming into effect of the formal system of justice has to be preceded by a prior phase of administrative complaint and another step of peer review, two essential issues on which my two eminent *co-rapporteurs* Chris de Cooker and Jack Kennedy have essentially focused, and to be commented upon later, the essence of the formal system is the passage to a judicial review by one or more judges in the proper sense who are third parties recruited for their recognized professional experience and neutrality to properly adjudicate the cases submitted to them by rendering a binding decision at the end of proceedings conducted in conformity with the due process requirements, and securing the equality of treatment between the staff member involved and the administration.

Without going into details that could hardly fit within the present context, it has to be noted primarily that, until recently, the equality of arms was not realized in many aspects, particularly since as a general rule, administrative tribunals were not entitled to pronounce certain remedies, such as a specific performance amounting to annulment of an administrative decision, issuing injunction, or declaratory decree, including an order that an appointment be set aside. At the same time, administrative tribunals were subject to certain maximum limitations on the sums of financial indemnities that can be allocated to successful plaintiffs. Over and above, the administration is by far better defended by in-house counsel of high caliber, contrary to the plaintiff staff members who until recently were deprived of the right to be assisted by counsel at least partially provided by and paid through funding from the organization.

Due to the change in mentality and prevailing concepts which surfaced in the last few years as a result of new trends in favor of combating all forms of discrimination among all persons, including the staff member of the international organization, and providing higher standards for protecting their dignity and human rights, including the right to have a fair trial and adequate remedies, a number of recent developments took place, particularly within the UN's new system of formal justice, which came into force as a result of the adoption by the UN General Assembly of a large number of the reformed rules proposed by the UN Redesign Panel.

To the extent that this reformed rule could be considered falling within the common core of the general patterns of an adequate universal system of administrative justice, all other institutions, such as the Asian Development Bank (ADB), can benefit from the newly adopted model.

What remains questionable concerns those other particularities that reflect the special circumstances still prevailing in the United Nations family, with its universal dimension and complexity of structures, as well as multifaceted objectives.

The Controversial Aspects of the New United Nations System of Justice of Questionable Applicability to Regional Organizations, Particularly of an Economic and Financial Nature

The environmental culture that prevails in institutions like ADB, the African Development Bank (AfDB), the IMF, the World Bank, etc., is not limited to the diversity in nationalities and backgrounds of both the managers and the staff members, but relates essentially to the administrative structure and the decision-making process that characterizes the operations therefore (weighted voting instead of equal voting as in the UN political structure).

This basic difference has to be taken fully into account in understanding appropriately the analysis contained in the reports of my eminent two colleagues, Professor de Cooker and Professor Kennedy.

Both professors de Cooker and Kennedy provided valuable information about the internal justice system prevailing in a great number of international organizations, and their comparative study reveals the specificity of the United Nations' new system introduced since 1 July 2009, on two particular aspects, which are the administrative review, on one hand, and peer review, on the other hand.

The report of Professor Kennedy emphasizes the importance of the administrative review, through which the management of the organization reconsiders and affirms or modifies its decision. He invokes in this respect the living experience of many organizations, among which he particularly referred to ADB, AfDB, the European Bank, the International Labor Organization (ILO), the IMF, the World Bank, and the World Trade Organization (WTO). It has to be noted that all of them are economic and financial institutions specialized in their branch of activities and mainly centralized in the sense of operating in the city where the respective headquarters is located.

The report's elaboration on the salient features of the said administrative review within the grievance process in those centrally managed institutions is extremely convincing about the merits of such process, especially in ascertaining whether the substance of the decision was properly grounded and motivated in the light of the proven facts and the applicable rules, policies, and procedures. The author's analysis and conclusions with regard to the merits of the process in question is both well established and convincing.

However, the only question which remains pending relates to whether the same analysis and conclusions can be true within the context of a huge universal organization having

multiple diversified tasks to achieve throughout the world with managers and staff members spreading all over the globe and having different cultures and backgrounds.

The experience gained during the 6 months spent in 2006 with the four other members of the UN Redesign Panel permits me to express a negative answer. The careful observation of what took place in so many cases demonstrated clearly how poorly and unprofessionally the system existing by then functioned through a centralized secretariat handling hundreds of files, dispatched from places far away around the globe and remaining pending for months for a decision by the secretary-general, who under Article 97 of the charter is assumed to exercise absolute power to say yes or no upon a couple of words pronounced by one of his collaborators, and hardly having any time to seriously study the file. In more concrete words, the administrative review as practiced at the top of the UN Secretariat at that time could have been considered a total waste of time without tangible practical results in most cases.

Turning to the other issue related to the peer review, Professor de Cooker's report constitutes a brilliant contribution demonstrating the essential role and main characteristics of the peer review bodies in a great number of international organizations. It meets a deeply rooted legal tradition prevailing particularly in common-law domestic systems especially with regard to criminal justice. Professor de Cooker rightly insisted on its evolving role and its manifestations within the overall system of the dispute resolution mechanism in many institutions, a useful tool that exists at the crossroads between the informal and the formal components, thus facilitating the passage from the one to the other.

This is perfectly conceivable and proven in a number of situations, to the extent that the UN General Assembly did not hesitate to indicate in the Preamble of its Resolution No. 59/283 the need to "provide for appropriate peer review."

The question is, how can all of that be reconciled with the fact that the Redesign Panel arrived at the conclusion that the JABs and the JDRs, which were the concrete products that embodied the peer review, have to be abolished, and the General Assembly later adopted that conclusion?

Clearly, the reasons for such radical change could not be construed as a refusal of the "peer review" concept *per se*, but in reality it has been motivated by the study of how such a nice idea was badly implemented in a manner that led the Redesign Panel, after deep consideration of what was taking place on the ground, to attest that "the United Nations internal justice system was outmoded, dysfunctional, ineffective and lacking independence," and to declare, consequently, that "the administration of justice in the United Nations lags so far behind international human rights standards." Such harsh words were the outcome of the 6-month survey undertaken by the five members of the UN Redesign Panel, who had in the final analysis no other solution but to abolish the JABs and the JDRs, which were evidently not rendering justice.

In essence, it was discovered that, generally speaking, the staff members who served on a volunteer basis in such a huge institution were not devoting the necessary time

and effort to study the disputes submitted to them, that they were coming from circles not familiar with the subject matter, that they lacked in most cases the legal basis for investigating and researching properly for the true facts, and that many among them tended to take the matter lightly if not to avoid displeasing the administration. All this with considerable delays amounting sometimes to periods of over a year, particularly with files collected from all four corners of the globe, and thereafter during several months in the Office of the Secretary-General waiting to get hold of him for few minutes, among his worldwide political burdens, to decide whether to sanction the recommendations of the JABs and the JDCs, or to decide otherwise as he may see fit as sole decision maker.

Therefore, it should not be taken as a surprise that the UN Redesign Panel found no other alternative but to suggest to replace that malfunctioning system of JABs and JDCs by a professionalized decision-making mechanism that delivers transparent and timely justice with full respect for the due process rights of both parties, through a binding decision rendered by a qualified and experienced outside judge recruited for a limited one-time period and who could not become later a member of the secretariat or occupy any task within the UN system. Consequently, the secretary-general, like any staff member, if dissatisfied with the binding decision rendered by the judge, could go to the second-tier judicial system of justice to file an appeal against the said decision in front of the UNAT, which becomes a true court of appeal composed exclusively of professional judges.

Lastly, it has to be noted that due to the immense number of staff members, exceeding 30,000 persons, whether internationally appointed or locally recruited in the various posts and locations covering the entire globe, the judges within the new system of justice in the UN are located around the world, and New York became only one trial place among others (i.e., justice became closer to all staff members in Asia, Africa, Latin America, and Europe). Such decentralization can lead to better taking into account of the relevant cultures and legal traditions which are of prime importance, as explained by Professor Dale Bagshaw.

Summary of Discussion

Presented by Ahmed El Kosheri, vice president, International Chamber of Commerce's Court of Arbitration. Discussed by Heidi Jimenez, legal counsel, Pan American Health Organization/WHO; Dale Bagshaw; Chris de Cooker; and Jack Kennedy.

El Kosheri explained the background of the UN Review Panel's findings, which was that they weren't looking for a model practice but one that worked in an environment of poor human resources with their own employees.

In 2006, the UN Review Panel thought it impossible to have a peer review of disciplinary matters when such a panel knew nothing about the law. By 2011, they had opted to reform the system and introduce something that was workable. The reforms had resulted in the recruitment of a judge, a female Canadian of Arab origin, with 136 cases pending. In the last 6 months since she was appointed, she has finished 40 cases.

Discussion

Heidi Jimenez pointed out that the United Nations (UN) was the only international organization to do away with peer review. In her view, there could have been other solutions that might have addressed the decentralized size and multiculturalism of the UN without doing away with the peer review system. She also pointed out that the UN was a parent organization so it was difficult to say that it was a bad model and that it was hard for smaller international organizations to not follow the UN model, and in the end that had a real and practical impact on the independence of tribunals and their decisions. She found it difficult to accept that the model put in place doesn't have a huge impact. It caused all organizations to review the judicial systems within their respective international organizations. In terms of safeguarding independence, a well-functioning system gives rise to good law and jurisprudence, but risks to the system were not necessarily truly reflecting the decentralization. She noted that regional tribunals were meant to bring law to the people but could be creating inconsistencies with jurisprudence because they are not necessarily in tune with peer notions. She also questioned the cost-effectiveness of such a system, where every case is required to go through two tiers.

El Kosheri responded that the model of an ambassador as the ombudsman does not work; diplomats make concessions whereas the law needs to be consistently applied.

Jack Kennedy remarked that the scalability of administrative review probably was beyond the resources for the size of the UN, but he thought the difficulties of a decentralized approach may have been overestimated. He noted that not every case has to go to the secretary-general (a huge bottleneck with administrative review).

A conference delegate asked about the progress on ombudsmen and litigation.

Dale Bagshaw responded that El Kosheri has highlighted how disputes can quickly arise when parties are not aware of the cultural differences. A human resources code of ethics and standards are needed. Bagshaw pointed out the National Alternative Dispute Resolution Advisory Council website, which had made an attempt to define the dispute resolution process and a code of ethics. She also noted that organizations require strong leadership and she thought there was a place for mediation in all international organizations, but that the mediators need to be well trained.

Chris de Cooker said that the fallout from the report caused international organizations to question whether they should follow suit or not. Staff associations for a long time have wanted to go to court and staff reps don't like statistics of how many cases are won and lost, but if the ratio was 50:50 then he questioned whether management should be changed. What about changing judges (which he noted was a trend in Europe) or introducing a two-tier system? De Cooker said he was not against a two-tier system but was in favor of good steps below. He felt that the UN missed a golden opportunity to improve its peer review function and its removal puts pressure on the tribunal—but, he conceded, not in terms of independence.

El Kosheri noted that reforms were made and that the UNDP should be the defendant and not the secretary-general of the UN.

Chris de Cooker noted that the General Assembly has taken a Board recommendation that the panel make lawyers available. But at the moment there is a problem: when staff go to a lawyer they could be told that they don't have a case.

El Kosheri said the tribunal's role is to correctly interpret internal laws. If the issue raised by one employee could affect many, it is logical to accept *animus curae*—the organization will present procedures for consultation between management and personnel. This was refused by the General Assembly.

David Sobel said he hadn't grasped the key message for staff from the address. He noted that the staff association's preference is to settle matters informally in a culturally sensitive way. This is why we welcome the introduction of an ombudsman. But in the absence of that, staff want a system to be fair, transparent, and culturally sensitive. He believes there is a disconnect between the administrative review system and decisions that come out of it. He said that staff have concerns and asked, "so what are your main messages in relation to this?"

El Kosheri said that the best solution is to have a dialogue and be consensus driven.

Dale Bagshaw felt it important for staff to be clear about the range of dispute resolution options available to them so that the opportunity to resolve disputes early was heightened. And there should be opportunities for staff to be consulted and provide feedback—for example, procedures for staff to provide feedback online.

Heidi Jimenez acknowledged that she had little knowledge of ADB but the message is that there is a conscious effort to bring the system up to speed. We highlighted all the different international organizations where there is a political will but that also may have a leadership issue. She concluded that discussions such as this enrich the community as a whole and ADB. We focused on the UN model, but the message is that there is a lot of care and thinking taking place to improve the situation to benefit staff.

History of the ADB Administrative Tribunal's 20 Years of Operation

Christine Griffiths

History of Establishment and Mandate

The Asian Development Bank (ADB or “the bank”), being a multilateral organization established by treaty in 1966 and having its headquarters in Manila, Philippines, is immune from the jurisdiction of the courts and government agencies of its member states. As a corollary of this immunity, ADB recognized that it needed to create an adequate dispute resolution system for the mutual benefit of staff members and the organization.

Prior to 1991, ADB had an internal appeal process against administrative decisions, but this was later considered inadequate. As a result, the Board of Directors of the bank decided to establish an appeal mechanism to which aggrieved staff members might have recourse after exhausting all internal means of redress of their grievance. The Board initially considered a single external arbiter, but after a review of the framework, it was concluded that an administrative tribunal would be able to undertake a “more thorough and balanced examination of a case and would, through a certain distribution of nationalities, be perceived to render a more impartial judgment than a single arbiter.”³⁹

And so, in April 1991 the Administrative Tribunal of ADB (“the Tribunal”) was established. Its creation, through the Board of Directors’ adoption of its statute,⁴⁰ strengthened the rule of law in the bank’s internal operations by providing a mechanism to review the actions of management to assure treatment of staff members in compliance with the rules and regulations of the bank. It also enhanced the morale of staff and made the bank a more desirable and efficient place to work. The Tribunal was purposefully created in the image of the World Bank Administrative Tribunal (WBAT), the latter having been established 10 years earlier in 1981 (at the same time as the Inter-American Development Bank Administrative Tribunal). Other notable administrative tribunals already in existence at the time were the International Labour Organization Administrative Tribunal (ILOAT), established in 1946, and the United Nations Administrative Tribunal, established in 1949.

³⁹ ADB Board of Directors Paper 11 April, 1991.

⁴⁰ Statutes of the Administrative Tribunal of the Asian Development Bank (ADB Administrative Tribunal Statute).

With the creation of the Tribunal, decisions by management were to be subject to judicial review by a panel of external judges. The Tribunal hears and passes judgment upon any application in which an individual member of the staff of the bank alleges nonobservance of the contract of employment or terms of appointment, which include all pertinent regulations and rules in force at the time of alleged nonobservance as well as the provisions of the staff retirement plan and the benefits plans provided by the bank to the staff.⁴¹ In terms of composition, scope of judgments, and rules of procedure, the structure of the tribunal system proposed and endorsed was in line with the practice of comparable organizations, such as the World Bank and the Inter-American Development Bank.

Function and Procedure

The Tribunal began functioning at the beginning of 1992 according to its 1991 statute. The statute has since been amended twice. The first amendment was effective January 1995 and increased the number of judges at the Tribunal from three to five (the additional members not actually being elected until July 1995). This change made it possible to convene panels of three or five members, the latter being a “full panel.” It also became possible for a judge to issue as an attachment an opinion dissenting from the Tribunal’s decision. The second amendment was made effective 30 January 2006, creating the Committee on Administrative Tribunal Matters to advise on candidates for appointment to the Tribunal, and introducing the potential of the applicant having to pay the bank’s costs for defending a case if the Tribunal finds the application was “without foundation either in fact or under existing law” or “intended to delay the resolution of the case or to harass the bank or any of its officers or employees.”⁴²

The Tribunal has conducted 30 sessions since its creation. It meets usually at least once a year, and sometimes twice a year, in order to decide disputes without any undue delay. It holds sessions usually in Manila at the bank’s facilities, but it is not precluded, when necessary, from arranging a session in other locations and has done so in Colombo, New York, and also conducted an evidentiary hearing in Tokyo.

The actual conduct of the proceedings is regulated mainly by the Tribunal’s Rules of Procedure, established and adopted by the Tribunal in 1992 (and amended several times since).⁴³ Administrative Order No. 2.07 has been issued to further explain the role and procedures of the Tribunal. The procedure during the written phase generally follows the normal legal procedure of international tribunals: the application is filed with the Tribunal office and is sent to the bank which then, as the respondent, provides its written answer to the application within a time limit, which then leads to the opening of the second round of written comments consisting of the applicant’s reply and the respondent’s rejoinder. This round is optional for the parties to the case, but the Tribunal

⁴¹ ADB Administrative Tribunal Statute, Articles I and II.

⁴² ADB Administrative Tribunal Statute, Article X para 6.

⁴³ The Rules of Procedure were amended in September 1994 and August 1995, and five new practice directions added since 2000.

does have the power to make it obligatory for both parties, should it decide that such extra pleadings are necessary for the decision of the case. In any case, the second round of proceedings has been used in every case to date submitted to the Tribunal. If both parties and the Tribunal consider that the case is sufficiently pleaded and sufficient evidence of the issues has been gathered, then the Tribunal's rules allow that the case be decided without oral proceedings. The two rounds of pleadings for each party, supplemented by the typically dozens of annexed documents, usually provide an adequate basis for decision making.

In most cases, the disputed issues—factual as well as legal—have been resolved without seeing live witnesses, and on the pleadings alone. There have been four occasions when requests for oral hearings were denied. But during the Tribunal's more recent history, oral hearings have been more common—four having been held since 2006. When the Tribunal has held hearings, which are in the Tribunal's discretion to grant, they have been considered as helpful in addressing very significant issues—by helping the Tribunal to elicit more evidence from witnesses and to hear arguments of counsel at greater length and for the parties to have their “day in court.” This was particularly the case at the first oral hearing conducted by the Tribunal to hear witnesses being examined and cross-examined when alleged sexual harassment was at issue.⁴⁴

Sources of Law

Traditionally within the internal legal systems of international intergovernmental organizations, the hierarchy of legal norms govern the legal relations between the staff member and the organization and arrange the administrative and judicial appeals system.⁴⁵ At the bank, the hierarchy of legal norms has at its highest level the agreement establishing ADB, supplemented by the agreement between ADB and the Government of the Philippines regarding the headquarters of ADB, both agreements being treaties under international law. These are further regulated by lower-level norms; at ADB, these are contained in the staff rules and regulations issued by the Board of Directors, which are further specified and developed by lower-level administrative norms—administrative orders and circulars issued by management. However, some terms of employment may be specifically agreed upon in the employment contract. Furthermore, all administrative tribunals cite the rules developed in their own practice through earlier decisions, which has been the case with the Tribunal. Principles of “natural justice,” such as due process of law, are often considered as well.

There is no general code of international civil service law, but the common law of the international civil service has come into existence and the analogies which can be drawn from the decisions of other administrative tribunals have a great deal of guiding value.

⁴⁴ *Ms. X*, Decision No. 74 [2006] 7 ADBAT p. 91.

⁴⁵ *In re de Merode*, Decision No. 1 [1981] WBAT reports “it must apply the internal law of the bank as the law governing the conditions of employment.”

For example, the Tribunal has cited, in a few cases, the practice of the WBAT and the ILOAT as having guiding value.

On rare occasions, there may be a conflict between the express directives of the bank, clearly stated to be a part of the staff member's "contract of employment" and more general commonly accepted principles of law. When that conflict cannot readily be resolved, the latter principles will commonly prevail. An example is a case decided by the Tribunal in 1997, known as the *Amora* case.⁴⁶ Mr. Amora, a Filipino, worked over the course of 15 consecutive years as a member of the supporting staff in the ADB printing office. His initial appointment was for 1 year, and it described Mr. Amora as an "independent contractor" and as such "not be entitled to any compensation, allowances, benefits or rights from or against the bank other than expressly provided therein." He was not included in the ADB pension plan. The bank kept Mr. Amora on a series of 1-year and other very short-term renewals and extensions for 15 years and he was "regularized" only 2 years before his mandatory retirement age. This meant he was forced to retire with a very small pension. Mr. Amora's request to be accorded pension rights for the full 15 years of his service as a so-called "independent contractor" was denied by the bank, and his case ultimately reached the Tribunal. The Tribunal concluded that the legal relationship the bank sought to create simply by using the term "independent contractor" fundamentally disregarded reality. Mr. Amora was an employee of ADB with regular, essentially unchanging full-time job responsibilities and working subject to the directives of ADB supervisors. The Tribunal held that the use of short-term contracts which denied him benefits was a *detournement de pouvoir* or abuse of power, and set aside the 1-year contracts as not reflecting the true relationship between the bank and the staff member.

The Appeals System: How the Steps Below and the Tribunal Operate

Similar to many other international organizations, the appeals system of the bank has two phases, the first administrative, and the second judicial.

One condition for the jurisdiction of the Tribunal to be triggered, except by agreement or by the Tribunal's discretion in exceptional cases, is that the applicant must have first completed compulsory conciliation and then sought administrative review from which a decision must be issued. The bank has also established an Appeals Committee to hear and deal with the allegations on administrative decisions which allegedly have been influenced by administrative irregularities or abnormalities. The Appeals Committee is composed of fellow staff members, not necessarily lawyers, some appointed by management and some appointed by the ADB Staff Council. They conduct a full evidentiary and adversary proceeding and make recommendations to the President of ADB as to how to resolve the dispute. The proceedings before the Appeals Committee

⁴⁶ *Amora*, Decision No. 24 [1997] 3 ADBAT p. 1.

are not binding on either the staff member or the bank. If the staff member remains dissatisfied after action upon an Appeals Committee recommendation, he or she may file an application with the Tribunal. But the non-use of the procedures at the Appeal Committee creates, under ordinary circumstances, a situation of non-exhaustion of internal remedies, which according to Article II, paragraph 3 (a) of the Tribunal's statute would preclude the application from the Tribunal's jurisdiction.⁴⁷

These “steps below” are designed to encourage disputes to be resolved before they come to the Tribunal. To this end, the structural design appears to be working, as one can see from examining the number of disputes at the start of the process (compulsory conciliation) to the smaller number that remain contested after the appeals process and thereafter proceeding to the Tribunal. For example, in 2006, of twelve cases that went to conciliation, only six proceeded to the Tribunal. Similarly in 2007, of eleven cases at the conciliation stage only five went to the Tribunal; in 2008, of three cases disputed at the administrative stage only two proceeded to the Tribunal; and in 2009 of three cases that commenced at the conciliation stage, none proceeded to the Tribunal.

The judicial phase of the appeals system in ADB consists only of one-level legal proceedings. The statute of the Tribunal establishes the Tribunal as the final independent appeal mechanism for the resolution of employment disputes between the bank's management and the members of its staff.⁴⁸ There is no higher legal (appellate) level to which an ADBAT decision may be appealed, although such appellate systems do exist in some of the other international organizations. The Tribunal's judgments are final and binding⁴⁹ and only limited revision and reopening of the case before the Tribunal itself are allowed.

Composition

Since January 1, 1995, the Tribunal has been composed of five members who are required to be nationals of the member countries of the bank, but no two of whom shall be nationals of the same member country. Each must possess the qualifications required for appointment to high judicial office or be juris consults of recognized competence.⁵⁰

The members of the Tribunal are appointed by the bank's Board of Directors from a list of candidates, or in the case of a single vacancy, the one candidate, recommended by the President after consideration by the bank's Committee on Administrative Tribunal Matters (an organ that includes at least the general counsel, the secretary, and the chair of the Staff Council).⁵¹ The members are appointed for a term of 3 years, which, if

⁴⁷ Article II of the Tribunal's statute and refer to *Zimonyi*, Decision No. 13 [1996], 2 ADBAT Reports, p. 43 and *Jianming Xu*, Decision No. 25 [2005], 7 ADBAT Reports, p. 27.

⁴⁸ ADB Administrative Tribunal Statute, Articles I and II.

⁴⁹ ADB Administrative Tribunal Statute, Article IX.

⁵⁰ ADB Administrative Tribunal Statute, Article IV, para 1.

⁵¹ ADB Administrative Tribunal Statute, Article IV, para 2, as amended in 2006. The Staff Council is the only employees' organization.

not otherwise specifically decided by the Board of Directors, begins on the first day of October of the year of appointment. The number of the member's terms of appointment is limited to three terms.⁵² Reappointment is upon the President's recommendation and in practice three terms has been the norm to ensure a high degree of continuity.

So far there have been 16 persons who have served as members of the Tribunal. Their expertise reflects both knowledge from the practical legal field, either at the international level or at the national level, and expertise from the academic world. The majority of the members (at least eight) have had, or still have, high academic posts and several members also possess experience from other administrative tribunals (seven), mainly having been members of the WBAT or the ILOAT. Four members have been members of supreme courts in their own countries. Four of the sixteen members of the Tribunal have been women, of which one, Justice Flerida Romero, served one term as president. Ten judges have been from regional member countries and six have been from non-regional countries, those being the Philippines (2), Japan (3), India (2), Pakistan (1), Sri Lanka (1), Singapore (1), the United States (2), France (1), the United Kingdom (1), Belgium (1), and Finland (1).

The first set of judges sat on the Tribunal from 1991 to 1995. Professor Elihu Lauterpacht, CBE, QC, then director of the Research Centre of the University of Cambridge (later also president of the WBAT and judge ad hoc before the International Court of Justice) was elected chair of the Tribunal. The other judges were Philippine Supreme Court Justice Florentino Feliciano (later judge of the appellate body of the World Trade Organization in Geneva, judge of the WBAT, and during a later term, president of the Tribunal) and Sri Lankan Supreme Court Justice Mark D.H. Fernando (later also judge at the ILOAT and president of the Tribunal). With the resignation of judges Lauterpacht and Feliciano, four new members (membership having been increased from three to five in 1995) were appointed: Professor Brigitte Stern of the University of Paris I (later judge at the United Nations Administrative Tribunal); Dr. Laxmi Singhvi, who was India's high commissioner to London; Professor Toshio Sawada of Sophia University; and Professor Robert Gorman of the University of Pennsylvania Law School and one of the founding judges of the WBAT (and later president of the WBAT and the Tribunal).

Two new judges were appointed to the Tribunal in 1996, and another in 1997. Professor Stern was replaced by Professor Martti Koskenniemi of the University of Helsinki; Dr. Singhvi by Dr. Thio Su Mien, former law dean and private practitioner in Singapore and later judge of the WBAT; and Professor Sawada by Professor Shinya Murase, likewise of Sophia University.

In October 2001, Philippine Supreme Court Justice and ILOAT Judge Flerida Romero (later president of the Tribunal) replaced Dr. Thio Su Mien; and in August 2003, former Punjab High Court Judge Supreme Court Justice Khaja Samdani replaced Mark Fernando. In October 2003, Martti Koskenniemi was replaced by private practitioner

⁵² ADB Administrative Tribunal Statute, Article IV, para. 3.

in Belgium Claude Wantiez; and in August 2004, two judges, Professor Gorman and Professor Shinya Murase, were replaced by Arnold Zack of Harvard University and former president of the National Academy of Arbitrators (current president of the Tribunal) and Professor Yuji Iwasawa of the University of Tokyo and later chairperson of the UN Human Rights Committee. In October 2006, Justice Romero was replaced by a former Tribunal judge and retired justice of the Supreme Court of the Philippines, Justice Florentino Feliciano, who in turn ended his third and final term on 30 September, 2009, to be replaced in February 2010 by former vice chair (judicial) of the Central Administrative Tribunal, India and former joint secretary of the Indian Ministry of Law and Justice, Lakshmi Swaminathan.

Dissenting Opinions

Article IX of the Tribunal's statute expressly grants to judges the right to issue a separate opinion, to be attached to the decision itself. There have been two lengthy dissenting opinions filed at the Tribunal. In one case, the Tribunal (4 to 1) upheld the bank's decision to make 60 the mandatory retirement age, but the dissenting judge strongly believed that this was a violation of staff rules and ADB practices which, to her, indicated that members were entitled to work until the age of 65.⁵³ In the second case, the Tribunal (3 to 2) sustained the bank's announcement of a policy not to pay tax-reimbursement benefits to staff from the United States and the Philippines, in the face of an earlier Tribunal judgment that some construed as making such payments mandatory and unalterable. The dissenting judges contended that the Board of Directors may not decide to expressly prohibit tax reimbursement payments unless it likewise disavowed or expressly abandoned the principle of equal pay for equal work internally and externally.⁵⁴

Types of Disputes

In its 20-year history, the Tribunal has issued 96 decisions. Eight-five percent (85%) of applications filed concerned staff members contesting administrative decisions that affect them. The remaining 15% related to applications for the interpretation or revision of earlier decisions. These cases are published both on the ADB website and in the Tribunal's own reports, published by the Office of the Executive Secretary. There are now eight volumes of the reports.

The appeals in these cases have focused on certain substantive issues, but at the same time, several important procedural questions have also been decided. The types of disputes brought to the Tribunal in order of frequency include:

1. Conflict resulting from job classification and career development

These decisions challenged by staff members concern disputed selection and promotion procedures, job classifications, transfers, promotions, and career

⁵³ *Samuel (No. 2)*, Decision No. 15 [1996], 2 ADBAT Reports, p. 51, Stern dissenting at 69.

⁵⁴ *Mesch and Siy (No. 4)*, Decision No. 35 [1997], 3 ADBAT Reports, p. 71, Stern and Sawada dissenting at 93.

development and account for 29% of applications. The first decision rendered by the Tribunal involved the non-conversion of the applicant's contract into a regular appointment. The Tribunal found that the bank's decision was invalidated by its failure to apply due process. It also laid down the guiding principle by which it will review management decisions that are discretionary in nature, the applicable test being whether such a decision has been "arbitrary, discriminatory, or improperly motivated, or has been carried out in violation of a fair and reasonable procedure."⁵⁵ Another notable case examined the evolution of the performance evaluation system in relation to the applicant contesting a new performance management system that imposed a system requiring a distribution of ratings. In that case the Tribunal decided it was not persuaded that there were "fixed" quotas or that if there were such, that they were applied to the applicant.⁵⁶

2. Disputes related to performance evaluation

The challenge of these decisions range from termination of appointment, non-confirmation of appointment at the end of the probationary period, and irregularities in performance evaluation by supervisors. Of these, five involved harassment and discrimination issues.⁵⁷ They represent 26% of applications. The Tribunal resolved its first performance evaluation case at its second session in 1994, and found that the staff member's performance evaluation report scores did not reflect his true rating due to an informal quota of "distinguished ratings."⁵⁸

3. Violation of bank rules and regulations, and conditions of employment

These cases account for 18% of applications and concern disputes relating to the mandatory retirement age (which elicited several claims), equal pay for equal work, the duty of reasonable care, the staff retirement plan, and changes to the group medical insurance plan to ensure its long-term viability.⁵⁹ Two of the more significant cases brought to the Tribunal, the *Mesch and Siy* and *Samuel* cases, are discussed in detail below. Two other cases required the Tribunal to examine the responsibility of an international organization for the safety of its officials and decide whether the bank had met its duty to exercise reasonable care. The *Bares*⁶⁰ case arose from the murder of a lawyer of the bank in its basement parking area at the hands of a member of its security contingent. The Tribunal, finding that the claim was based on contract and not on vicarious liability arising from tort, held that any supposed defects in the bank's security system could not have prevented the tragic event, and that the bank had met its duty to exercise reasonable care in its selection and

⁵⁵ *Lindsey*, Decision No. 1 [1992], 1 ADBAT Reports p. 1.

⁵⁶ *Zeki Kiy*, Decision No. 89 [2009], 8 ADBAT Reports p. 189.

⁵⁷ *Alexander*, Decision No. 40 [1998], 4 ADBAT Reports p. 41; *Yamagishi*, Decision No. 65 [2004], 6 ADBAT Reports p. 107; *Ms. X*, Decision No. 74 [2006], 7 ADBAT Reports p. 91; *Ms. A*, Decision No. 87 [2009], 8 ADBAT Reports p. 155, and *Mr. Y*, Decision No. 94 [2011].

⁵⁸ *Tay Sin Yan*, Decision No. 3 [1994], 1 ADBAT Reports p. 35.

⁵⁹ *Suzuki et al*, Decision No. 82 [2007], 8 ADBAT Reports p. 59.

⁶⁰ *Bares et al*, Decision No. 5 [1995], 1 ADBAT Reports, p. 53.

supervision of the security company employed. The second case, *Chang et al.*,⁶¹ contested the bank's selection and supervision of its in-house medical facility operated by Associated Medical and Clinical Services Inc. (AMCSI) when the initial applicant was diagnosed late with lung cancer and later died. In that case the Tribunal was also not persuaded that there had been a breach of duty of care in the selection and supervision of AMCSI.

4. Disputes related to disciplinary action

These cases represent 15% of applications, the majority of which involved dismissal of the applicant. The misconduct involved ranged from fraudulent telephone calls⁶² and medical insurance claims,⁶³ bid manipulation,⁶⁴ theft,⁶⁵ forgery of documents,⁶⁶ misappropriation of property,⁶⁷ and rental subsidy fraud.⁶⁸

5. Disputes related to payment of entitlements

These disputes related to payment of entitlements such as rental subsidy, the special separation program, and expatriate benefits. They represent 12% of applications. Five cases involved each applicant contesting their denial of early retirement under the bank's voluntary early retirement program known as the Special Separation Program. The Tribunal concluded that the applicants were ineligible but awarded compensation in each case as they agreed that the formulating criteria and its implementation were flawed and that this had meant their wrongful deprivation of a qualifying opportunity.⁶⁹ Another case involved 29 professional Filipino staff alleging discrimination with respect to certain employment benefits and remuneration extended to expatriate staff but not to themselves. The applicants alleged they were similarly situated and so the decision involved the Tribunal interpreting the principle of equal treatment. Their claim was upheld as regards two benefits, *force majeure* protection and education grants, but rejected as regards two other benefits, home leave and separation pay.⁷⁰

In the 96 cases decided so far, applications were dismissed or denied in 65 cases (this included eight denials of revision and three denials of clarification), but in nine of those cases, intangible or moral injury was found and compensation granted even though the actual claims did not succeed. Of the 96 applications, seven were considered inadmissible, and three cases were withdrawn due to an agreed upon settlement.

⁶¹ *Chang et al.*, Decision No. 84 [2008], 8 ADBAT Reports, p. 87.

⁶² *Zaidi*, Decision No. 17 [1996], 2 ADBAT Reports, p. 89 and *Chaudhry*, Decision No. 23, [1996], 2 ADBAT Reports, p. 171.

⁶³ *Abat*, Decision No. 78 [2007], 8 ADBAT Reports, p. 1.

⁶⁴ *Domdom Jr.*, Decision No. 47 [2000], 5 ADBAT Reports, p. 37.

⁶⁵ *Galang*, Decision No. 55 [2002], 6 ADBAT Reports, p. 25.

⁶⁶ *Ms. C.*, Decision No. 58 [2003], 6 ADBAT Reports, p. 71.

⁶⁷ *Lim*, Decision No. 76 [2006], 7 ADBAT Reports, p. 127.

⁶⁸ *Bristol*, Decision No. 75 [2006], 7 ADBAT Reports, p. 113 and *De Alwis 4* Decision No. 85 [2008], 8 ADBAT Reports, p. 108.

⁶⁹ *Breckner*, Decision No. 25 [1997], 3 ADBAT Reports, p. 17.

⁷⁰ *De Armas et al.*, Decision No. 39 [1998], 4 ADBAT Reports, p. 9.

A significant decision of the Tribunal was *Samuel*,⁷¹ which challenged the policy decision of the Board of Governors to reduce the prevailing mandatory retirement age of staff members from 65 to 60. The applicant asserted that such a change was an abuse of discretion, while the bank argued that it was beyond the power of the Tribunal to review a decision of the Board of Directors, the bank's highest decision-making authority. The Tribunal rejected the latter position. It held that even the Board is subject to the rule of law and to limits upon its discretion. Nonetheless, the Tribunal upheld the change in the mandatory retirement age; it was viewed as within the Board's discretion, as not unreasonable or arbitrary, and as consistent with prevailing bank procedures and other more general principles of procedural law. This case also saw the Tribunal's first dissenting opinion.

Other significant decisions were rendered in the four *Mesch and Siy* cases, which involved discussion of essential and nonessential conditions of employment; essential conditions of employment being so "fundamental and essential" that the bank is forbidden from changing them to the detriment of the staff members whereas nonessential conditions of employment can be unilaterally changed by management subject to certain limitations related to expectations. The *Mesch and Siy* cases were about the reimbursement of taxes paid by Mr. Mesch (American) and Mr. Siy (Filipino) on their bank income. Most nations that have their citizens working at international organizations do not impose a tax upon their income there, as a matter of informal comity. However, the United States and the Philippines are among the very few nations that do collect income taxes from their nationals working at ADB. This results in a net income for a US citizen or a Filipino citizen that is less than another nation's citizen doing precisely the same sort of work. In its initial decision, the Tribunal held that the bank's own articulated principle of equal pay for comparable work was an unchangeable essential condition of employment. The Tribunal applied that principle and concluded, even in the absence of any previous program of tax reimbursement and in the absence of any ADB statements confirming such a program in any way, that tax reimbursement was a condition of employment. The Tribunal therefore ordered appropriate compensation to the United States and Filipino staff for the 2 past years that were in dispute. But there was no precise holding that tax reimbursement was fundamental and unchangeable.⁷² As a result, the ADB Board of Directors adopted a resolution to the effect that "the Bank shall not reimburse the taxes paid by any...staff member of the Bank for the taxes paid by them on their salaried and emoluments paid by the Bank, effective upon the date of this Resolution." When Messrs. Mesch and Siy returned to the Tribunal, they not surprisingly argued that tax reimbursement—designed to achieve equal pay for equal work—was a fundamental and essential term, that the bank was legally obligated not only to pay it for the past but to continue it in the future, and that the Board of Directors' resolution was therefore invalid. The three Tribunal judges who constituted the majority distinguished the *de Merode* WBAT decision⁷³ and held, particularly because of the absence of any past practice or confirming statements by ADB with respect to tax reimbursement, that such reimbursement was a non-fundamental and nonessential condition of employment

⁷¹ *Samuel No. 2*, Decision 15 [1996], 2 ADBAT Reports, p. 51.

⁷² *Mesch and Siy*, Decision No. 2 [1994], 1 ADBAT Reports, p. 21.

⁷³ *de Merode*, Decision No. 1 [1981], WBAT Reports.

subject to complete withdrawal by the ADB Board of Directors. The majority concluded that although there was indeed a fundamental principle of equal pay for equal work, the equality requirement could be satisfied by equal compensation before the imposition of national income taxes, which was a circumstance over which the bank had no control.⁷⁴

Relief and Compensation

The statute provides that the following remedies are available: rescission of the decision contested, specific performance of the obligation invoked, or, in lieu of specific performance and at the option of the bank (if the President of ADB decides it is in the interests of the bank to compensate the applicant without further action), payment of compensation.⁷⁵

In its first judgment rendered in December 1992, the Tribunal, citing precedent from the World Bank Tribunal, read its remedial powers to include a choice among rescission of the contested decision, specific performance or, in its place, compensation—the power to grant compensation for injury caused.⁷⁶ But in a following decision,⁷⁷ it stressed that the Tribunal cannot affirmatively exercise a discretionary power belonging to the bank and therefore substitute the Tribunal's judgment for that of the bank: for example, a direction to grant a performance rating, merit pay increase, or promotion. Instead the Tribunal is limited to setting aside the defective decision and, where applicable, remanding the issue to the bank for proper consideration. *Ibrahim* was a recent decision which saw the Tribunal exercise its power to rescind the applicant's "unsatisfactory" rating and order either the applicant's reinstatement to her former position being made whole for all losses, or her payment of compensation without further action being taken.⁷⁸

Cases where specific performance has been an option have included *Mesch and Siy*,⁷⁹ where the Tribunal ordered the bank to reimburse the applicants the amount of the income tax levied against and paid on their salaries beginning from the year 1990, together with interest of 5% per annum, beginning from February 10, 1992, for the years of 1990 and 1991. The interpretation of the decision, together with certain related issues, was also later submitted for the Tribunal's consideration in *Ferdinand P. Mesch & Siy No. 2*, in which the Tribunal ordered the bank to pay the applicant immediately plus interest on any remaining balance of their tax reimbursement still outstanding concerning those years at issue.

Despite having the actual claim dismissed, in several instances the Tribunal has ordered compensation where the Tribunal has found a violation of due process. An example is

⁷⁴ *Mesch and Siy No. 4*, Decision No. 35 [1997], 3 ADBAT Reports, p. 71.

⁷⁵ Article X para. 1 of the Tribunal's statute.

⁷⁶ *Lindsey*, Decision No. 1 [1992], 1 ADBAT Reports, p. 1.

⁷⁷ *Tay Sin Yan*, Decision No. 3 [1994], 1 ADBAT Reports, p. 35.

⁷⁸ *Ibrahim*, Decision No. 86 [2008], 8 ADBAT Reports, p. 115.

⁷⁹ *Mesch and Siy*, Decision No. 2 [1994], 1 ADBAT Reports, p. 21.

the case of breach of confidentiality in the disciplinary cases of *Zaidi* and *Chaudhry*.⁸⁰ In one exceptional case, *Bares*, even where the bank was not found liable, the Tribunal recommended in a “rider” to its decision that due to the exceptional circumstances of the case, an *ex gratia* payment be paid to the members of the deceased’s family by the bank.

Conclusion

As of March 2011, ADB had 2,849 staff of whom 1,037 are professional staff of various nationalities. The remainders are primarily Filipino support staff. Given this large number of staff from different cultures, it is inevitable that disputes will arise between them and their superiors or other representatives of management. The Tribunal has and will continue to play an important role in supporting the rule of law in the bank’s internal operations and providing a mechanism to solve internal disputes such that the observation of staff’s basic legal rights and the proper administration of justice can be guaranteed. It has also had an impact on the internal functioning of ADB—one notable example being its acting as a catalyst for review of the bank’s performance management system.

The Tribunal strives to act as an impartial arbiter whose decisions will hopefully be generally accepted by the bank and its staff as fair and just. Its decisions also appear to have provided a positive addition to the repertoire of jurisprudence of international administrative law in line with those of the World Bank, International Labor Organization, United Nations, International Monetary Fund, Inter-American Development Bank, and others. The Tribunal is proud of its work and gratified to be able to celebrate its 20 years of operation.

⁸⁰ *Zaidi*, Decision No. 17 [1996], 2 ADBAT Reports, p. 89; *Chaudhry*, Decision No. 23 [1996], 2 ADBAT Reports, p. 171.

ADB Tribunal Members' Biographies

Arnold M. Zack, President

President Arnold Zack, who is a national of the USA, has served as a judge of the Asian Development Bank Administrative Tribunal since 2004 and has been president of the Tribunal since 2010. He has been an arbitrator and mediator of labor management disputes since 1957. He is a graduate of Tufts College (BA 1953), Yale Law School (LLB 1956), and the Harvard University Graduate School of Public Administration (MPA 1961). He was a Fulbright Scholar, a Wertheim Fellow, former president of the National Academy of Arbitrators, and is a member of the College of Labor and Employment Lawyers. He has also served as senior research associate at the Labor and Worklife Program at Harvard Law School since 1985.

Yuji Iwasawa, Vice President

Mr. Iwasawa, who is a national of Japan, is a professor of international law and director of the Department of International Relations, University of Tokyo; and chairperson, Human Rights Committee, International Covenant on Civil and Political Rights.

Khaja Muhammad Ahmad Samdani, Member

Mr. Samdani is a former judge of the Punjab High Court and currently advocate of the Supreme Court of Pakistan. He is a graduate of Yale Law School (LLB.M.) and Peshawar University (M. Sc.). He has appeared in a large number of cases arising from the service disputes between the federal and provincial governments on one side and their respective employees on the other since 1986.

Claude Wantiez, Member

Mr. Wantiez is a professor at the University of Namur (Belgium) and a senior partner of Van Eeckhoutte, Taquet & Clesse. He is a practicing lawyer with 35 years of experience specializing in individual and collective labor law, including matters of European and transnational labor law.

Lakshmi Swaminathan, Member

Judge Swaminathan is a former vice chairperson (judicial) of the Central Administrative Tribunal, Principal Bench, New Delhi; and former joint secretary and legal advisor in the Ministry of Law and Justice, Government of India.

Cesar L. Villanueva, Executive Secretary

Mr. Villanueva has been in the practice of law since 1981. He is currently the dean of the Ateneo de Manila Law School and a professorial lecturer in corporation law; agencies, trusts, partnerships, and joint ventures; and law on sales. He is a senior partner in the law firm of Villanueva, Gabionza & De Santos and is a member of the Board of Directors of Makati Medical Center, the Clark Electric Distribution Corporation, and the Clark International Airport Corporation.

Attorney Villanueva obtained his accounting degree (BSC) from Holy Angel University (magna cum laude) in 1977, his Bachelor of Laws (LL.B.) from Ateneo de Manila Law School (valedictorian, cum laude), his Master of Laws (LL.M.) at Harvard, and a Diplome in Juridical Science (D.J.S.) from San Beda College.

Christine Griffiths, Legal Assistant to the Administrative Tribunal

Ms. Griffiths, who is a national of Australia, obtained her LLB from the University of Queensland, Australia. She has also completed a master's degree in business administration and a bachelor's degree in commerce. She has worked with the ADBAT Secretariat since 2003.

Prior to joining ADB, Ms. Griffiths worked in the International Organizations and Legal Division of the Australian Department of Foreign Affairs and Trade and as an insurance litigation lawyer at Gadens Ridgeway Solicitors.

Mr. Rino Paez, Operations Assistant

Mr. Paez joined the Tribunal with 9 years of planning, research, and policy development experience in the public sector. He holds a bachelor's degree in consular and diplomatic affairs from De La Salle-College of St. Benilde and a master's degree in development studies specializing in public policy and management from the International Institute of Social Studies of Erasmus University Rotterdam, The Hague, The Netherlands.



2011 Composition of the Tribunal and Its Secretariat. From left upper row clockwise: Khaja Muhammad Ahmad Samdani, member judge; Cesar Villanueva, executive secretary; Christine Griffiths, legal assistant to the executive secretary; Claude Wantiez, member judge; Lakshmi Swaminathan, member judge; Arnold Zack, president; and Yuji Iwasawa, vice president.

The Administrative Tribunal of ADB 20 Years of Operation

This publication is a compilation of the conference proceedings from the Asian Development Bank Administrative Tribunal (ADBAT) 20th anniversary program of the Asian Development Bank Administrative Tribunal held on 5 September 2011 at the ADB Headquarters, Manila. It is authored by esteemed international experts in mediation and labor arbitration. It also covers the Tribunal's establishment and accomplishments since its inception in 1991.

About the Asian Development Bank

ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to two-thirds of the world's poor: 1.8 billion people who live on less than \$2 a day, with 903 million struggling on less than \$1.25 a day. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

Based in Manila, ADB is owned by 67 members, including 48 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.

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