International Monetary Fund Administrative Tribunal

Reports

Volume II
2000–2002

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PREFACE

Volume II of *International Monetary Fund Administrative Tribunal Reports* contains the Judgments and Orders of the International Monetary Fund Administrative Tribunal rendered during the period 2000–2002. (As no decisions were issued by the Tribunal during the calendar year 2000, the volume begins with Judgment No. 2001-1.) An analysis of the Tribunal's jurisprudence for the period is provided in an introductory chapter "Developments in the Jurisprudence of the International Monetary Fund Administrative Tribunal: 2000–2002." A detailed topical Index of the Judgments and Orders is included near the end of the volume. Finally, the reader will find republished as an Appendix to this volume the Tribunal's Statute, Rules of Procedure, and the Report of the International Monetary Fund's Executive Board on the establishment of the Administrative Tribunal.

Celia Goldman
Registrar

Washington, D. C.
September 2008

Developments in the Jurisprudence of the International Monetary Fund Administrative Tribunal: 2000–2002

BY CELIA GOLDMAN*

Background

Established in 1994,[1] the International Monetary Fund Administrative Tribunal ("IMFAT" or "Tribunal") serves as an independent judicial forum for the resolution of employment disputes arising between the International Monetary Fund ("IMF" or "Fund") and its staff members.[2] An Applicant may challenge the legality of an "individual" or "regulatory" decision of the Fund by which he has been "adversely affect[ed]."[3] In the case of challenges to "individual" decisions, an Application may be filed only after the Applicant has exhausted all available channels of administrative review.[4] The Judgments of the Tribunal are final and without appeal.[5]

The Tribunal is composed of a President, two Associate Judges and two Alternate Judges, each appointed for two-year terms and eligible for reappointment.[6] The composition of the International Monetary Fund Administrative Tribunal remained unchanged during the period 2000–2002, with Judge Stephen M. Schwebel serving as the Tribunal's President, Judges

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[1]The Tribunal's Statute was adopted by the IMF Board of Governors by Resolution 48-1 and entered into force on October 15, 1992. The Tribunal was formally established on January 13, 1994 when, pursuant to the Statute, the Managing Director notified the staff of the Fund of the appointment of the Tribunal's members. (Statute, Article XX (2).)

[2]The Tribunal's jurisdiction also embraces enrollees in and beneficiaries under staff benefit plans challenging administrative acts arising under such plans. (Statute, Article II (1) (b).)

[3]Statute, Article II (1) and (2).

[4]Statute, Article V (1).

[5]Statute, Article XIII (2).

[6]Statute, Article VII (1)(a) and (b), and (2).

Nisuke Ando and Michel Gentot as Associate Judges, and Judges Georges Abi-Saab and Agustín Gordillo as Alternate Judges.[7] During the period, the Tribunal rendered five Judgments and one Order. This review highlights some of the most significant issues, both substantive and procedural, addressed by the IMFAT during the interval 2000–2002.[8]

Developments in the Substantive Law

During the period 2000–2002, the Tribunal considered a number of issues of substantive law upon which it had not previously been called upon to rule. These included interpretation of a provision of the Fund's Staff Retirement Plan that permits the IMF, pursuant to specified procedures, to give effect to orders for family support and division of marital property issued by domestic courts. The case raised a question of potential conflict of laws, which the Tribunal resolved by reference to what it termed the "public policy" of the forum, that is, the internal law of the Fund. (*Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001).) In two other Judgments, the Tribunal expressly invoked for the first time the principle of nondiscrimination as a constraint on management's discretionary authority. In each of these cases,

[7]The Tribunal's Judges must satisfy the statutory requirement that they possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence. (Statute, Article VII (1) (c).) The composition of the Tribunal (2000–2002) not only ably fulfills this requirement but also reflects major legal systems of the world:

Judge Stephen M. Schwebel (United States), President
Former President, International Court of Justice;
Associate Judge Nisuke Ando (Japan)
Professor of International Law, Doshisha University, Kyoto
Director, Kyoto Human Rights Research Institute
Member and Former Chairperson, Human Rights Committee under ICCPR;
Associate Judge Michel Gentot (France)
Former President of the Judicial Chamber, Conseil d'Etat, France
President, International Labour Organisation Administrative Tribunal;
Alternate Judge Georges Abi-Saab (Egypt)
Emeritus Professor of International Law,
Graduate Institute of International Studies, Geneva
Member of the Appellate Body, World Trade Organization;
Alternate Judge Agustín Gordillo (Argentina)
Professor of Administrative Law and Professor of Human Rights,
University of Buenos Aires School of Law
Judge, Organization of American States Administrative Tribunal.

[8]For a review of the Tribunal's jurisprudence for the years 1994–1999, see Goldman, "The International Monetary Fund Administrative Tribunal: Its First Six Years," in *International Monetary Fund Administrative Tribunal Reports,* Vol. I, 1994–1999, pp. 1–33 (2000).

the allegedly impermissible discrimination arose from the allocation of differing employment benefits to different categories of Fund staff. (*Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002) (overseas Office Directors v. Resident Representatives) and *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002) (Lawful Permanent Residents v. G-4 visa holders).) The Tribunal applied a "rational nexus" test to resolve these claims. These developments are elaborated below.

The Law Applied by the Administrative Tribunal

Article III of the Tribunal's Statute provides, in part, that "[i]n deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." In *Mr. "P" (No. 2)*, the IMFAT confronted for the first time the relationship between the internal law of the Fund and the domestic law of member states.

Mr. "P", a retiree of the Fund, challenged a decision taken by the Administration Committee of the Staff Retirement Plan ("SRP") to place in escrow a portion of his monthly pension payment, pursuant to a provision of the SRP that authorizes the Fund, under prescribed procedures, to give effect to orders for spousal and child support, and for division of marital property by deducting payments from a retiree's pension entitlements. Mr. "P"'s former spouse, Ms. "Q", had initiated proceedings in the SRP Administration Committee to give effect to a Judgment of Absolute Divorce rendered by a court of the state of Maryland in the United States, awarding her a continuing share of Mr. "P"'s ongoing pension entitlement from the IMF. In the proceedings before the Administration Committee, Mr. "P" had disputed the validity of the Maryland Judgment on the ground that he had obtained a divorce from Ms. "Q" in Egypt after the initiation of divorce proceedings in Maryland but before the Maryland court had rendered its Judgment.

The Egyptian divorce was obtained by Mr. "P" by declaration to a religious notary without the participation of Ms. "Q" and was later registered with civil authorities; it did not provide for division of marital property. By contrast, the Maryland Judgment that Ms. "Q" sought to have given effect under the Fund's pension plan had been rendered as a result of adversary proceedings in which Mr. "P" actively had participated before moving to Egypt; it specifically treated the question of division of the pension.

The Administration Committee of the SRP had concluded in the circumstances that there was a *bona fide* dispute as to the efficacy, finality or meaning of the Maryland Judgment upon which Ms. "Q" had based her request. Accordingly, pursuant to its Rules, the Committee decided to place in escrow the disputed portion of the pension payment pending resolution of the dispute between the parties. It was this decision that Mr. "P" challenged before the Administrative Tribunal, seeking restoration of the full amount of his pension payment. Ms. "Q", for her part, filed an application for intervention in the Tribunal proceedings. The IMFAT granted Ms. "Q"'s application for intervention, [9] and she participated thereafter as a party.

The Fund contended that the Tribunal should sustain the Administration Committee's conclusion that a *bona fide* dispute existed, justifying the continued escrowing of the disputed portion of Mr. "P"'s pension. Mr. "P" argued that he was entitled to have the full amount of the pension restored to him on the ground that the Maryland Judgment should not be given effect in light of the divorce obtained in Egypt. Ms. "Q" contended that the applicable provision of the Maryland Judgment should be given effect under the relevant SRP provision and the Administration Committee's Rules.

Having the benefit of the extensive pleadings of all three parties, the Tribunal rendered a decision resolving the merits of the dispute. The Tribunal found scope within its appellate authority[10] to adjudicate a dispute that otherwise might have gone unresolved:

> The significance of the Tribunal's appellate authority is illustrated by the present case. Absent it, the Applicant and the Intervenor could find themselves indefinitely without third party remedy. Even if there were merit to the Applicant's contention that the Administration Committee acted erroneously in withholding when there was no foreseeable resolution of the dispute—a contention which is necessarily conjectural—that objection can be overcome by recourse to this Tribunal.[11]

In the opinion of the Tribunal, the Committee's decision, although "understandable," was "in error and must be rescinded."[12] Accordingly, the

[9] *See infra* Admissibility of Parties and Claims before the Administrative Tribunal.

[10] Section 7.2 (b) of the Staff Retirement Plan provides that decisions by the SRP Administration Committee to determine *inter alia* whether any person has a right to any benefit under the Plan, and the amount thereof, are subject to review by the Administrative Tribunal. Likewise, the Tribunal's Statute places review of such decisions within its jurisdiction *ratione materiæ*. (Statute, Article II (1) (b).)

[11] *Mr. "P" (No. 2),* para. 141.

[12] *Id.,* para. 145.

Tribunal directed the Fund to pay to Ms. "Q" the amount held in escrow, including interest, and, in future, to pay to her the requested proportion of the pension payments consistent with the Maryland Judgment.

The Tribunal explained its relationship to the law of the IMF's member states in the following terms:

> Under its Statute, the Administrative Tribunal has no competence to pass upon the validity of municipal law as interpreted and applied by the legal authorities of either Maryland or Egypt. . . . The Tribunal accordingly must take as its starting point, supported by the record in this case, that the Maryland Judgment of Absolute Divorce is valid under Maryland law and that the Egyptian divorce as recorded by a religious notary and registered with Egyptian civil authorities is valid under Egyptian law.[13]

Applying the internal law of the Fund, as required by its Statute, the Tribunal looked to the "public policy"[14] of its forum as embodied in the relevant provision of the Staff Retirement Plan:

> The underlying purpose of the policy is to encourage enforcement of orders for family support and division of marital property, and hence the policy favors legal systems in which such measures are recognized. . . .
>
> Moreover, the Fund's internal law favors legal decisions that are the result of adversary proceedings, in which reasonable notice and the opportunity to be heard are the essential elements. . . .
>
> . . . As an element of its employment policy, the Fund may condition receipt of retirement benefits on compliance with valid orders for family support or division of marital property.[15]

The Tribunal, in deciding the case before it, additionally weighed a number of other relevant factors, including that Mr. "P" had submitted himself to the jurisdiction of the Maryland court to adjudicate the termination of his marriage to Ms. "Q". Having told the Maryland court that he would not leave its jurisdiction, he summarily departed for Egypt and declared a divorce from Ms. "Q", thereafter repudiating the Maryland court's jurisdiction. The Tribunal observed that the pension plan provision and the Administration Committee Rules thereunder were expressly designed to apply to retired participants who have moved outside the jurisdiction of the court issuing the applicable order. Moreover, observed the Tribunal, it was of "cardinal importance" that the Maryland Judgment conformed to the cri-

[13] *Id.*, paras. 146–147.
[14] *Id.*, paras. 150, 156.
[15] *Id.*, paras. 151–153.

teria of enforceability set out in the internal law of the Fund, notably in the Administration Committee's Rules under SRP Section 11.3.[16]

The Tribunal accordingly concluded that Ms. "Q"'s request under the Staff Retirement Plan should be given effect. The Tribunal emphasized:

> In so concluding, the Administrative Tribunal does not enforce the law of Maryland and decline to enforce the law of Egypt. Its decision rather responds to what may be termed the public policy of its forum, namely, the internal law of the Fund.[17]

Nondiscrimination as a Constraint on the Fund's Discretionary Authority

In its Judgments in *Mr. "R"* and *Ms. "G"*, the Tribunal ruled expressly for the first time that the principle of nondiscrimination serves as a constraint on management's discretionary authority.[18] In each case, Applicants challenged Fund policies (and decisions refusing to make exceptions to those

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[16]*Id.*, paras. 153, 155.

[17]*Id.*, para. 156. The same principle was later underscored in *Mr. "N", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application),* IMFAT Judgment No. 2007-7 (November 16, 2007), para. 21, quoting *Mr. "P" (No. 2),* para. 130:

> '. . . [The Fund], by SRP Section 11.3 and the Rules thereunder, does not subject itself to the jurisdiction of any court, nor does the Fund comply automatically with court orders. Instead, the Fund has incorporated into its internal law a policy of giving effect, on a case by case basis, to a particular type of court order. The order is given effect only after procedures are followed, within the Fund, allowing for consideration of the views of the affected parties. A decision is then rendered by the Administration Committee, subject to appeal to the Administrative Tribunal.'

[18]In its earlier Judgment in *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 29, the Tribunal may be said to have recognized implicitly such a principle when it held, as to the discretionary act of setting compensation, that ". . . when the Fund applied the so-called non-economist matrix to the determination of the salary of Mr. D'Aoust, cutting off the credit given to his prior experience at ten years, that of itself did not give rise to a cause of action against the Fund on the ground of inequality of treatment."

The Tribunal would later distinguish between the form of discrimination alleged in *Mr. "R"* and *Ms. "G"*, i.e., allocation of employment benefits according to work responsibilities or visa status, with alleged discrimination implicating universally accepted principles of human rights. *See Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81–84 (religious discrimination); *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006), paras. 112–133 (child born out of wedlock).

It may be noted that in *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal was called upon to review a gender discrimination claim only indirectly in passing upon the decision of the Director of Admin-

policies in their individual cases) that allocated differing employment benefits to different categories of Fund staff.[19]

Mr. "R", a staff member who served as Director of one of the Fund's overseas Offices, contested as discriminatory the assignment of less favorable benefits to overseas Office Directors as compared with Resident Representatives who also serve the Fund in overseas locations. Mr. "R" contended that as an overseas Office Director posted in a particularly challenging locale he should have been entitled to an overseas assignment allowance and a housing allowance commensurate with that accorded the Resident Representative in the same foreign city. The location of the Applicant's assignment was unique in that it was the site both of a Fund overseas Office and a Resident Representative posting.

Citing the Commentary[20] on the Tribunal's Statute and the jurisprudence of other international administrative tribunals, the IMFAT in *Mr. "R"* took as its starting point that "[i]t is a well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization."[21] At the same time, the Tribunal cautioned that ". . . the Tribunal's duty to assure that the Fund's discretionary authority has been exercised consistently with the principle of nondiscrimination must be understood within the context of the deference that the law requires that international administrative tribunals accord to the exercise of managerial discretion. . . ."[22] The IMFAT accordingly concluded that it was required to resolve the "tension between deference to

istration to ratify the conclusions of ad hoc discrimination review procedure. *See infra* The IMFAT's Relationship to the Channels of Administrative Review.

[19]While Mr. "R", in the course of the exchange of pleadings, withdrew his express challenge to the policy itself, seeking only an exception in his individual case, the Tribunal observed that "individual" and "regulatory" decisions may be analytically indistinguishable where the contested decision is to deny exception to a general policy, and analyzed the issues accordingly. *Mr. "R"*, paras. 25, 61.

[20]The Tribunal referred to the often cited principle that "'. . . with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown 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.'" *Mr. "R"*, para. 32, quoting Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund ("Report of the Executive Board"), p. 19 (emphasis supplied).

[21]*Mr. "R"*, para. 30.

[22]*Id.*, para. 33.

administrative discretion and the need to assure that this discretion is exercised in a manner compatible with the principle of nondiscrimination."[23]

After reviewing the various approaches of other international administrative tribunals to the question of nondiscrimination, the IMFAT concluded that for it to sustain the differentiation in benefits contested by Mr. "R" the Fund's reasons for the distinction needed to be supported by evidence establishing a ". . . 'rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.'"[24]

The Tribunal considered the evidence offered by the Fund in support of the differential in benefits between the two categories of staff and concluded that the distinction was rationally related to the purposes of the employment benefits at issue. This was so, observed the Tribunal, even though the policy was ". . . dependent on generalizations, i.e. generalizations about the living conditions in the locations in which 'many' Resident Representatives, as compared with the conditions in the countries in which 'most' overseas Office staff serves."[25]

In the view of the IMFAT, the fact that the Fund had studied and then rejected the proposition that there should be complete parity of benefits between the two categories of staff supported the conclusion that the contested policy decision had not been taken arbitrarily.[26] The manner of arriving at it had been "deliberate" and taken "after extended consideration."[27] The Tribunal held that the distinction in benefits was "rational, related to objective factors, and untainted by any animus against the Applicant." The allocation of differing benefits to different categories of staff was "reasonably related to the purposes of these benefits," in particular the "incentive to recruitment" for particular posts.[28] Accordingly, the Tribunal concluded that the decision did not represent an abuse of the Fund's managerial authority.

Turning to Mr. "R"'s challenge to the Fund's decision not to make an exception in his individual case, the Tribunal indicated that managerial discretion includes the discretion to make choices between valid alternatives:

> While, in the view of the Tribunal, the granting of such an exception in this case would have been reasonable, the Fund's decision not to make an

[23]*Id.,* para. 35.

[24]*Id.,* para. 47, quoting *Mould v. International Bank for Reconstruction and Development,* WBAT Decision No. 210 (1999), para. 26.

[25]*Id.,* para. 58.

[26]*Id.,* para. 59.

[27]*Id.,* para. 63.

[28]*Id.,* para. 64.

> exception in favor of the Applicant on the ground of the undesirability of awarding one Office Director perquisites not accorded to other Office Directors is also reasonable and one within the ambit of the Fund's managerial discretion.[29]

Applying similar reasoning in the case of *Ms. "G"*, the Tribunal denied a staff member's challenge to a decision of the IMF Executive Board that set eligibility for expatriate benefits on the basis of visa status. Significantly, the IMFAT in *Ms. "G"* concluded that the "substance of the Fund's choice is rational and defensible," even in light of the Tribunal's own observation that "perhaps even more so, was [the Fund's] earlier selection of the nationality criterion."[30]

Ms. "G", a national foreign to the United States and holding U.S. lawful permanent resident ("LPR") status, had contested the Fund's eligibility criterion for expatriate benefits. That policy, as amended by the Executive Board effective in 2002, extended expatriate benefits to current and newly appointed Fund staff who are U.S. LPRs on the condition that they relinquish their LPR status in favor of obtaining a G-4 visa. Ms. "G" had sought, and was denied, an exception to the policy to allow her to receive expatriate benefits while retaining her LPR status. Mr. "H", a staff member who shared Ms. "G"'s visa status, applied for and was granted the opportunity to participate in the Tribunal's proceedings as an Intervenor.[31]

Relying upon the principles established in *Mr. "R"*, in particular the "rational nexus" test, the Tribunal considered whether the Fund's method for determining eligibility for expatriate benefits discriminated impermissibly among categories of Fund staff.[32] The Tribunal posed the question presented as follows:

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[29]*Id.*, para. 65. Managerial discretion to make choices between valid alternatives is a theme that the Tribunal was later to return to in *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-1 (January 24, 2007). In upholding revisions to the Fund's system of staff compensation, the IMFAT noted that ". . . this Tribunal on more than one occasion has recognized that the Fund's policy-making discretion extends to making choices between more than one reasonable alternative." *Daseking-Frank,* para. 101, citing *Mr. "R",* para. 65 and *Ms. "G",* para. 80.

[30]*Ms. "G",* para. 80.

[31]*See infra* Admissibility of Parties and Claims before the Administrative Tribunal.

[32]The Tribunal observed that, as in the case of *Mr. "R",* while Ms. "G" and Mr. "H" sought exception to a general policy, it was not possible to examine the challenge to the denial of a request for exception without subjecting to scrutiny the legality of the policy itself. *Ms. "G",* para. 73. Accordingly, the Tribunal considered the question of whether that policy was discriminatory.

> The Tribunal in the case before it must assess whether there is a rational nexus between the goals of the expatriate benefits policy—i.e. to compensate staff for costs associated with maintaining and renewing ties with their home countries (through home leave and education allowances), to facilitate their repatriation following service with the Fund, and to recruit and retain a diverse staff sustaining the international mission of the Fund—and its method for allocating these benefits.[33]

Citing *Mr. "R"*, the Tribunal emphasized that ". . . a 'rational nexus' does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and indeed that the categories employed may rest upon generalizations."[34]

The Tribunal concluded that the Fund's choice of a visa criterion for allocation of expatriate benefits was reasonable:

> The procedure for selecting it was not arbitrary but deliberate. The substance of the Fund's choice is rational and defensible. . . . [T]hese decisions in the exercise of its managerial authority cannot be overridden by this Tribunal when they are rationally related to the mission and objectives of the Fund, in particular as regards expatriate benefits.[35]

The Tribunal went on to observe that "[i]t is reasonable to accord benefits to G-4 visa holders that are withheld from those in LPR status because the advantages of LPR status run counter to a fixed intention of the staff member concerned to return to his home country upon the completion of his Fund service. . . . In contrast, the options of the holder of a G-4 visa are more limited and directed towards eventual repatriation."[36] Finally, having determined that the policy adopted for the allocation of expatriate benefits was not discriminatory, the Tribunal concluded that the Fund did not err in declining to make exceptions to that policy. The Application of Ms. "G", and that of Mr. "H" as Intervenor, accordingly were denied.

Admissibility of Parties and Claims before the Administrative Tribunal

During 2000–2002, the IMFAT also addressed challenges to the admissibility of parties and claims before the Tribunal. In *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*,

[33]*Ms. "G"*, para. 79.
[34]*Id.*
[35]*Id.*, para. 80.
[36]*Id.*

IMFAT Judgment No. 2001-1 (March 30, 2001), the Tribunal held that its jurisdiction *ratione personæ* extends to a successor in interest to a non-staff member enrollee in the Fund's Medical Benefits Plan. In *Mr. "P" (No. 2)* and *Ms. "G"*, the Tribunal addressed the related question of intervention in Tribunal proceedings, which is permitted by persons within the Tribunal's jurisdiction *ratione personæ* whose rights may be affected by the Judgment.

In *Ms. "G"*, the Tribunal also interpreted for the first time the limitation of the Tribunal's jurisdiction *ratione materiæ* to claims that are brought by persons who have been "adversely affect[ed]" by the contested administrative act. In that Judgment, the IMFAT additionally revisited its interpretation of the statutory time bar against challenges to administrative acts pre-dating the period of the Tribunal's competence, further delineating the reach of its jurisdiction *ratione temporis.*

Jurisdiction Ratione Personæ

In *Estate of Mr. "D",* the Tribunal interpreted Article II of its Statute so as to close a potential gap in its jurisdiction *ratione personæ*.[37] The Estate of Mr. "D" challenged a decision under the Fund's Medical Benefits Plan to deny reimbursement of medical evacuation expenses that had been incurred by Mr. "D" shortly before his death.

While successors in interest to staff members are expressly included in the jurisdictional provisions of the Tribunal's Statute, as are non-staff member enrollees in Fund benefit plans,[38] the Statute is silent as to the narrow category represented by the Estate of Mr. "D". The Tribunal considered whether the omission from the express terms of the Tribunal's jurisdictional grant of successors in interest to non-staff enrollees in Fund benefit plans represented an inadvertent vacuum in the Tribunal's jurisdiction or an intentional decision by the Statute's drafters that the interests of a staff member enrollee should survive that person's death but that the interests of a non-staff member enrollee should not. The Tribunal concluded, on the basis of the published Commentary on the Statute and the structure of the Fund's benefits program, that Article II does confer jurisdiction over the unusual category of Applicant presented in the case.[39]

[37]Respondent had questioned whether the Tribunal had jurisdiction *ratione personæ* over the Applicant. While electing "'not to assert the jurisdictional defense,'" the Fund reserved the possibility of doing so in a future case. *Estate of Mr. "D",* para. 58.

[38]Statute, Article II (1) (b) and (2) (c) (iii).

[39]*Estate of Mr. "D",* paras. 58–63.

Intervention

Closely related to the question of the Tribunal's jurisdiction *ratione personæ* is the issue of access to the Tribunal by Intervenors. The Statute and Rules of Procedure of the Administrative Tribunal provide for intervention by ". . . persons to whom the Tribunal is open under Section 1 of Article II [i.e., persons within the Tribunal's jurisdiction *ratione personæ*], whose rights may be affected by the judgment."[40] In *Mr. "P" (No. 2)* and in *Ms. "G"*, the Tribunal granted applications for intervention over the objections of the Applicant, the Fund, or both.

In *Mr. "P" (No. 2)*, the Tribunal drew directly upon its reasoning in *Estate of Mr. "D"*[41] to resolve the question of whether to admit Mr. "P"'s former spouse, Ms. "Q", as an Intervenor in the Tribunal's proceedings.[42] The Tribunal observed that the question of Ms. "Q"'s right to be heard as an Intervenor was identical to the question of whether she herself could have filed an Application with the Tribunal contesting the decision of the Administration Committee of the Staff Retirement Plan to escrow a portion of Mr. "P"'s pension payments, which had left unresolved her claim to the disputed benefits. Accordingly, Ms. "Q"'s application to intervene ". . . raise[d] the important issue of whether the amendment of Section 11.3 of the SRP, granting rights to spouses and former spouses of SRP participants to request the Fund to give effect to domestic relations orders, provide[d] a parallel right of review of such decisions of the Administration Committee in the Administrative Tribunal, in the case in which the decision of the Committee is adverse to

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[40]Statute, Article X (2); *see also* Rule XIV, para. 1.

[41]*See Mr. "P" (No. 2),* para. 61:

> . . . The Tribunal in *Estate of Mr. "D"* emphasized that Article II, Section 1(b) of the Statute is designed to allow individuals who are not members of the staff, but who "have rights under these [benefit] plans," to have their claims under these plans adjudicated by the Administrative Tribunal. [Footnote omitted] It cannot be disputed that Section 11.3 grants rights under the Plan to persons such as the Applicant for Intervention to request the Administration Committee to give effect to applicable domestic relations orders, and that the SRP's Administration Committee has created an administrative review procedure which is open to "any person claiming any rights or benefits under the Plan,"[footnote omitted] a procedure which Ms. "Q" initiated with her Request to the Administration Committee to give effect to the Maryland Judgment.

The Tribunal also took note of the importance of coordination between the jurisdiction of the Administrative Tribunal and of the Fund's underlying administrative review procedures. *Id.*, note 30, citing *Estate of Mr. "D"*, para. 84.

[42]Both Mr. "P" and the Fund objected to Ms. "Q"'s application for intervention. In the Fund's view, while Ms. "Q" had rights that might be affected by the Judgment, she was not a person to whom the Tribunal was open under Article II, Section 1 of the Statute. The Fund suggested that she be invited to offer her views as an *Amicus Curiæ*. *Mr. "P" (No. 2),* para. 48.

the former spouse but not to the SRP participant [footnote omitted]."[43] The Tribunal, rejecting the objections of Mr. "P" and the Fund, concluded that it did, holding that Ms. "Q" was a ". . . beneficiary under a Fund benefit plan, for purposes of challenging the legality of the Administration Committee's Decision on her Request to give effect to the [support] order." [44] Her application for intervention accordingly was granted.

The issue of intervention also arose in the case of *Ms. "G"*, in which the Applicant challenged the Fund's eligibility criterion for expatriate benefits. Upon notification to the staff of the filing of Ms. "G"'s Application, Mr. "H", who shared the same visa status as Ms. "G", sought to be admitted as an Intervenor in the Tribunal's proceedings.

Applying its Rule on intervention in the context of a challenge to a "regulatory" decision of the Fund, the Tribunal in *Ms. "G"* rejected the Fund's contention[45] that the application for intervention might be denied on the ground that Mr. "H", even without his intervention, would be in the class of persons who would benefit if Ms. "G" succeeded in her claim. "Indeed," observed the Tribunal, "that the prospective intervenor would be affected by such an outcome supported the conclusion that he should be admitted as an intervenor and thereby granted the opportunity to attempt to persuade the Tribunal of his views on the matter."[46]

The Tribunal emphasized that the statutory language "*may be affected* by the judgment" provided a broad standard for the admission of an application for intervention.[47] It likewise rejected the Fund's contention that such an application might be denied on the basis that it is "merely duplicative" of the claims of the Applicant. Rather, concluded the Tribunal, such a view ". . . runs counter to the purposes of intervention. An identity between the claims of an applicant and of an intervenor is ordinarily the touchstone for

[43]*Id.*, para. 51.

[44]*Id.*, para. 65. In a subsequent Judgment, the Tribunal applied the same rationale in exercising jurisdiction over an application brought by non-staff members asserting rights under the same section of the Staff Retirement Plan. *See Ms. "M" and Dr. "M", Applicants, v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006), note 1.

[45]The Fund had taken the position that it would not, in the circumstances of the case, oppose the intervention of Mr. "H", but it nonetheless urged the Tribunal to rule that there was discretion to deny an application for intervention by a person in the position of Mr. "H", who, in the Fund's view, would be only "indirectly" affected by the Tribunal's Judgment. *Ms. "G"*, paras. 28–30.

[46]*Id.*, paras. 32–33.

[47]*Id.*, para. 33. (Emphasis supplied.)

a decision to admit an intervention."[48] Finally, the Tribunal also rejected Ms. "G"'s argument that Mr. "H"'s application for intervention should be denied on the basis that the intervention would create additional burdens for her as a litigant.[49]

The "Adversely Affecting" Requirement of Article II

The Tribunal in *Ms. "G"* also was presented for the first time with the opportunity to elucidate the meaning of the requirement of Article II of the Statute that in order to challenge an "administrative act" of the Fund an Applicant must be "adversely affect[ed]" by it.[50] The "adversely affecting" requirement of Article II prevents the Tribunal from exercising jurisdiction to decide a claim if the Applicant lacks standing to raise it. The Commentary on the Statute elaborates: ". . . a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions."[51] Citing this Commentary, the Tribunal in *Ms. "G"* held that the "intendment of [the "adversely affecting"] requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy."[52]

The Fund contended that Ms. "G" had not been adversely affected because, as an LPR employed after 1985, she had been and continued to be ineligible for expatriate benefits; the 2002 amendment expanded her options by permitting her to become eligible for such benefits if she chose to convert to G-4 visa status. In the view of the Tribunal, however, Ms. "G" had been "adversely affect[ed]" within the meaning of the Statute because as a staff member employed after 1985 and continuing to hold LPR visa status, she remained ineligible for expatriate benefits. The Tribunal emphasized that the statutory requirement is intended to assure that an Applicant does not merely seek an advisory opinion but has an actual stake in the controversy. Ms. "G" had met that test.[53]

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[48]*Id.,* para. 34.

[49]*Id.,* paras. 27, 35.

[50]Article II (1) provides in pertinent part: "The Tribunal shall be competent to pass judgment upon any application: a. by a member of the staff challenging the legality of an administrative act adversely affecting him. . . ."

[51]Report of the Executive Board, p. 13.

[52]*Ms. "G",* paras. 61–62.

[53]In subsequent Judgments, the Tribunal has applied the formulation of the "adversely affecting" requirement as first developed in *Ms. "G",* in each instance denying challenges to its jurisdiction on the ground that the Applicant had not met the requirement. *See Baker et al.,*

The Time Bar of Article XX

The Tribunal in *Ms. "G"* also rejected the Fund's assertion that the Applicant's claim lay beyond the reach of the Tribunal's jurisdiction *ratione temporis*. The Fund contended that Ms. "G"'s Application presented a challenge to a policy that pre-dated the Tribunal's 1992 Statute and therefore was barred by Article XX[54] of the Statute, which excludes from the IMFAT's jurisdiction challenges to administrative acts pre-dating the period of the Tribunal's competence. In the view of the Fund, Ms. "G"'s complaint was in essence a challenge to a policy of the Fund—the "visa test" for expatriate benefits—that had been in effect since 1985, i.e., before the effective date of the Tribunal's Statute.

The Tribunal in *Ms. "G"* examined closely the actions taken by the Fund's Executive Board subsequent to the entry into force of the Tribunal's Statute and concluded that the expatriate benefits policy first adopted in 1985 had been thoroughly reconsidered and reaffirmed by the Executive Board in 1994 and then materially refashioned as of 2002. These decisions "represented the re-consideration of the contested policy and its adaptation at the highest levels of the Fund's decision-making."[55] The Tribunal concluded that "[a]s such, they represent an 'administrative act' falling within the Tribunal's jurisdiction *ratione temporis*."[56]

Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications), IMFAT Judgment No. 2005-3 (December 6, 2005), paras. 17–21; *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-3 (May 22, 2007), paras. 64–69; and *Mr. M. D'Aoust (No. 3), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2008-1 (2008), paras. 27–32. At the same time, the Tribunal has cautioned that the question of whether an Applicant has been "adversely affect[ed]" by an administrative act of the Fund for purposes of determining the admissibility of his claim is to be distinguished from the inquiry as to whether the Applicant shall prevail on the merits. *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-1 (January 24, 2007), para. 87; *D'Aoust (No. 2),* para. 69; *D'Aoust (No. 3),* para. 32.

[54]Article XX (1) provides: "The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date."

[55]*Ms. "G"*, para. 72.

[56]*Id.* The Tribunal distinguished the facts presented by Ms. "G"'s case from those considered in its earlier Judgment in *Ms. "S", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1995-1 (May 5, 2005), in which there was no evidence that the contested rule had been re-considered and reaffirmed in the period of the Tribunal's jurisdiction, apart from the "individual decision" resulting from Ms. "S"'s request for an exception to the generally applicable policy.

The IMFAT's Relationship to the Channels of Administrative Review

Article V of the Tribunal's Statute provides that "[w]hen the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review." With respect to "individual decisions"[57] of the IMF that are challenged before the Administrative Tribunal, administrative review typically is exhausted through the Fund's Grievance Committee, in which the Applicant's claims and the Fund's defenses are first presented in a forum that is advisory to the Fund's management.[58] During the period 2000–2002, however, none of the Judgments rendered by the Administrative Tribunal followed precisely this typical pattern. As noted, *Mr. "P" (No. 2)* presented a claim that was first considered through the channel of review provided by the Administration Committee of the Staff Retirement Plan.[59] In the cases of *Mr. "R"* and *Ms. "G"*, it was undisputed that the Applicants presented issues beyond the scope of the Grievance Committee's subject matter jurisdiction, namely, challenges to Fund policies rather than to the application of such policies in their individual cases.[60]

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[57]The Tribunal's Statute defines "administrative act[s]" to include both "individual" and "regulatory" decisions taken in the administration of the staff of the Fund. (Statute, Article II (2) (a).)

[58]The Grievance Committee renders a Recommendation and Report to the Fund's Managing Director who then takes a final decision on the matter. Prior to the hearing of his claim by the Grievance Committee, the staff member must exhaust a preliminary administrative review process set out in the Grievance Committee's constitutive instrument GAO No. 31.

[59]Challenges to decisions arising under the Staff Retirement Plan are expressly excluded from the Grievance Committee's jurisdiction. In 1999, the Fund enacted Rules of Procedure of the Administration Committee of the Staff Retirement Plan. These Rules set forth the requirements for the exhaustion of the administrative review procedures provided by the SRP Administration Committee for purposes of filing an application with the Administrative Tribunal. *See Mr. "P" (No. 2)*, paras. 31–35. Section 7.2 (b) of the SRP provides that decisions by the Administration Committee to determine *inter alia* whether any person has a right to any benefit under the Plan, and the amount thereof, are subject to review by the Administrative Tribunal. *Id.*, para. 141.

The Tribunal's appellate authority over cases arising through the channel of review provided by the SRP Administration Committee, and its effect on the standard of review applicable to disability retirement decisions, was later elaborated in *Ms. "J", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2003-1 (September 30, 2003), paras. 90–128, and *Ms. "K", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2003-2 (September 30, 2003), paras. 40–54.

[60]Mr. "R" filed a Grievance, but the Grievance Committee concluded that it fell outside of its subject matter jurisdiction. Ms. "G", by contrast, first filed her Application with the

In *Estate of Mr. "D"*, the Tribunal, deciding on a Motion for Summary Dismissal, was presented with the question of the admissibility of an Application in a case in which the Grievance Committee had dismissed the underlying Grievance for not having been timely filed pursuant to Fund rules. The Tribunal considered whether dismissal by the Grievance Committee for lack of jurisdiction on that ground necessarily debarred an Application in the Administrative Tribunal and held that it did not.

Recognizing that the elements of the IMF's dispute resolution system are to be complementary and effective, the Tribunal ruled that the Grievance Committee's determination as to whether the Applicant had exhausted the prior steps required for Grievance Committee review is "relevant to but not necessarily dispositive of" the question of whether the Applicant has exhausted the applicable channels of administrative review for purposes of admissibility of an Application in the Administrative Tribunal.[61] Accordingly, while the Grievance Committee judges its own jurisdiction for purposes of proceeding with a Grievance, the Administrative Tribunal, in considering a challenge to the admissibility of an Application, necessarily decides for itself whether channels of administrative review have been exhausted.[62]

Concluding in the circumstances of the case that "exceptional circumstances" excused the Applicant's failure to seek timely recourse to the review procedures antecedent to the Grievance Committee, the Tribunal in *Estate of Mr. "D"* exercised jurisdiction over the Application. The Tribunal described its authority with reference to its role within the Fund's system of dispute resolution:

> The Tribunal concludes that it does have authority to consider the presence and impact of exceptional circumstances at such anterior stages. . . . [T]he recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to

Administrative Tribunal and then filed a Grievance in order to preserve her right to review in that forum, in the event that the Tribunal were to conclude that exhaustion of the Grievance procedure was required. In each case, the Tribunal affirmed the view that the claims lay beyond the scope of the Grievance Committee's jurisdiction as set out in GAO No. 31. *See Mr. "R"*, paras. 16–17; *Ms. "G"*, paras. 19–20.

[61]*Estate of Mr. "D"*, para. 91. The Tribunal has reaffirmed the same view in subsequent Judgments. *See Mr. "O", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2006-1 (February 15, 2006), paras. 48-49; *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application),* IMFAT Judgment No. 2006-5 (November 27, 2006), paras. 30–31.

[62]*Estate of Mr. "D"*, paras. 85, 90.

> debar them. If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse.[63]

Moreover, the Tribunal found in the exhaustion requirement of Article V the requisite basis for it to "assess the performance" of the channels of administrative review.[64]

While finding ground in the singular circumstances of *Estate of Mr. "D"* to conclude that the Applicant had met the exhaustion requirement of Article V of the Tribunal's Statute,[65] the Tribunal nonetheless cautioned, ". . . in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal processes, such requirements should not be lightly dispensed with and 'exceptional circumstances' should not easily be found."[66]

In the case of *Ms. "Y" (No. 2)*, the Tribunal had occasion to underscore the significance of timely review by the Fund's formal channels of administrative review, holding that a discrimination claim initially raised under an alternative dispute resolution mechanism was subject to only limited review by the Tribunal.[67] Citing the "value of timely administrative review to the reliability of later adjudication by the Administrative Tribunal,"[68] the Tribunal held that because the mandatory time periods for invoking the prior steps prescribed by Fund rules had expired and Ms. "Y"'s discrimination claim had been brought initially through an ad hoc discrimination review exercise, the only decision that could be subject to review by the Tribunal was the decision of the Fund's Director of Administration affirming the findings of the discrimination review. Accordingly, the Administrative Tribunal ". . . squarely rejected any suggestion that because Ms. "Y"'s allegations of discrimination had been subject to the DRE [Discrimination

[63]*Id.*, para. 102.

[64]*Id.*

[65]In the case of a non-staff member successor in interest to a non-staff enrollee in the Medical Benefits Plan, the Tribunal concluded that it was incumbent on the Fund to have informed the Applicant, who could not have been assumed to have known, of the applicable administrative review requirements. *Id.*, para. 128.

[66]*Id.*, para. 104.

[67]Ms. "Y"'s earlier Application before the Administrative Tribunal had been summarily dismissed for failure to seek recourse to the Grievance Committee. *See Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998). The case of *Ms. "Y" (No. 2)* followed the Grievance Committee's consideration of her case.

[68]*Ms. "Y" (No. 2)*, para. 40.

Review Exercise], they could be reviewed by the Tribunal *as if* they had been pursued on a timely basis through GAO No. 31."[69]

The Tribunal in *Ms. "Y" (No. 2)* thereby confirmed the significance of Article V's limitation on its judicial review authority in the following terms:

> . . . while the Fund as part of its human resource functions may have created an alternative dispute resolution mechanism to remedy instances of past discrimination stretching beyond statutory bars and not previously raised through administrative review, the Administrative Tribunal, as a judicial body, remains controlled by its Statute.[70]

Accordingly, in *Estate of Mr. "D"* and *Ms. "Y" (No. 2)*, the Administrative Tribunal gave recognition to its role as part of the larger system of dispute resolution within the Fund, both encouraging recourse to the channels of review and assuring that access to the Tribunal not be hampered by error in those same channels.

Conclusion

During the period 2000–2002, the Tribunal considered issues of substantive law with which it had not previously been confronted. These included interpretation of a provision of the Fund's Staff Retirement Plan that permits the IMF to give effect to orders for family support and division of marital property issued by domestic courts. The Tribunal resolved a question of potential conflict of laws by reference to what it termed the "public policy" of the forum, that is, the internal law of the Fund, and held that the order of a Maryland court dividing a Fund retiree's pension payments for the benefit of his former spouse be given effect pursuant to Fund rules. In two other Judgments, the Tribunal invoked the principle of nondiscrimination as a constraint on management's discretionary authority. In each of these cases, the allegedly impermissible discrimination arose in the context of the allocation of differing employment benefits to different categories of Fund staff. The Tribunal applied a "rational nexus" test and upheld the Fund's exercise of discretion.

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[69]*Id.,* para. 39. (Emphasis in original.) The same approach was taken in two subsequent Judgments emanating from the Discrimination Review Exercise. *See Ms. "W", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2005-2 (November 17, 2005), paras. 62–69; *Ms. "Z", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2005-4 (December 30, 2005), paras. 45–52.

[70]*Ms. "Y" (No. 2),* para. 40.

Also during 2000–2002, the IMFAT addressed, and rejected, several challenges to the admissibility of parties and claims before the Tribunal. The Tribunal held that its jurisdiction *ratione personæ* extends to a successor in interest to a non-staff member enrollee in the Fund's Medical Benefits Plan. Drawing upon that decision, the Tribunal in two subsequent Judgments addressed the related question of intervention in Tribunal proceedings by persons within the Tribunal's jurisdiction *ratione personæ* whose rights may be affected by the Judgment. In each case, the Tribunal rejected arguments by the Applicant, the Fund, or both that the application for intervention should be denied. The Tribunal additionally had occasion to interpret for the first time the statutory provision that an Applicant has standing to challenge only an administrative act "adversely affecting" him. It also revisited the question of the statutory time bar on challenges to administrative acts predating the period of the Tribunal's competence. In each instance, the IMFAT, responding to its statutory mandate and its role within the Fund's system for the resolution of staff disputes, rejected arguments that would have denied the admissibility of parties or claims before the Tribunal.

Finally, the Tribunal also grappled during the period 2000–2002 with the complexities of its relationship to other elements of the Fund's dispute resolution system. The IMFAT addressed the question of the admissibility before the Tribunal of an Application following dismissal of the complaint as untimely by the Fund's Grievance Committee. The Tribunal held that the Grievance Committee's resolution of the issue of its own jurisdiction was not dispositive of the question of whether the Applicant had satisfied the exhaustion of remedies requirement of the Tribunal's Statute and admitted the Application. In another Judgment, the Tribunal reaffirmed the importance of timely review by available channels of formal administrative review, concluding that the substance of a discrimination claim that initially had been raised pursuant to an alternative dispute resolution procedure was subject only to limited review by the Administrative Tribunal.

JUDGMENTS
(Nos. 2001-1 to 2002-3)

JUDGMENT NO. 2001-1

Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)

(March 30, 2001)

Introduction

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

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

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

4. The Fund has responded to the Application in the Administrative Tribunal with a Motion for Summary Dismissal, contending that Applicant

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

The Procedure

5. On October 31, 2000, the Estate of Mr. "D" filed an Application with the Administrative Tribunal. In accordance with the Tribunal's Rules of Procedure, the Application was transmitted to the Respondent on November 3, 2000. Pursuant to Rule XIV, para. 4,[1] the Office of the Registrar issued a summary of the Application within the Fund.[2]

6. On December 11, 2000,[3] the Fund filed a Motion for Summary Dismissal pursuant to Rule XII[4] of the Tribunal's Rules of Procedure. As the

[1]Rule XIV, para. 4 provides:

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

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

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

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

[4]Rule XII provides:

> *"Summary Dismissal*
>
> 1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.
>
> 2. The Fund may file such a motion within thirty days of its receipt of the application.

Motion did not comply fully with the requirement of Rule XII, para. 3 that "[t]he complete text of any document referred to in the motion shall be annexed thereto in accordance with the rules established for the application in Rule VII," the Registrar advised the Fund that, by analogy to Rule VII, para. 6,[5] it would have a fifteen-day period to supplement the Motion's annexes to comply with Rule XII, para. 3.

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

8. Under the Rules of Procedure, the Applicant may file an Objection to a Motion for Summary Dismissal within thirty days from the date on which the Motion is transmitted to him. However, the President of the Administrative Tribunal, in the exercise of his authority under Rule XXI, para. 2,

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The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.

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

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

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

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

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

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

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

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

[6]Article V, para. 1 provides:

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

granted Applicant an additional ten days before the start of the thirty-day period in which to amend the list of documents she had requested the Tribunal to order the Fund to produce pursuant to Rule XVII,[7] so as to limit that request to those documents relevant to the issue raised by the Fund's Motion for Summary Dismissal, i.e., the admissibility of the Application.[8] Applicant submitted her Amended Document Request on January 11, 2001, on which date it was transmitted to the Fund. The Fund's Response was received on January 19.

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

10. Following receipt of Applicant's Objection, Respondent on February 14 filed a request for leave to submit an Additional Statement. The President of the Tribunal, pursuant to his authority under Rule XI[9] and Rule

[7]Rule XVII provides:

"Production of Documents

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

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

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

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

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

[9]Rule XI provides:

"Additional Pleadings

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

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

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

XXI, paras. 2 and 3,[10] granted the request. The Additional Statement was transmitted to Applicant on February 15, 2001. On February 21, Applicant too sought to file an Additional Statement, responding to Respondent's Statement. This request also was granted by the President, pursuant to the same Rules. Applicant's Additional Statement was transmitted to Respondent on February 23, 2001.

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

12. On the same date, the President issued a Request for Information to the Fund, pursuant to paras. 3 and 4 of Rule XVII, which permits the Admin-

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

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

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

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

1) The internal review claimed to have been made by the Fund, as stated in [the Director of Human Resources]'s letter of February 1, 2000;
2) Any document evidencing Respondent's statement that the ["D"]s were encouraged by Fund Officers to pursue the Fund's internal grievance procedure;
3) Any document evidencing that the ["D"]s were told by Fund Officers about the procedures for filing grievances or given GAO No. 31, Rev. 3;
4) All Grievance Committee decisions on jurisdiction; and
5) All instances in which the Fund has exercised its power under GAO No. 31, Rev. 3 to submit cases for consideration by the Grievance Committee without regard for time limits.

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

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

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

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

The Factual Background of the Case

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

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[13]The Request for Information sought the following:

1) How many grievances have been filed since the Grievance Committee's inception in 1981?
2) How many grievances have been dismissed by the Grievance Committee for failure to meet the requirements for exhaustion of administrative review under GAO No. 31?
3) How many grievances have been filed by:
   a) non-staff members who are enrollees in a benefit plan maintained by the Fund as employer, or
   b) non-staff members who are successors in interest to deceased enrollees in a benefit plan maintained by the Fund as employer?

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

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

Mr. "D"'s medical condition

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

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

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

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

19. According to the Application, Mr. "D"'s children contacted both the Plan administrator United HealthCare and the Staff Benefits Division of the IMF's Department of Human Resources, initially on May 18, seeking authorization for coverage under the Medical Benefits Plan of their father's medical evacuation. On May 18, Mr. "D"'s son spoke by phone with a UHC representative who, Mr. "D"'s son maintains, told him that the evacuation would be covered if it were "medically necessary" and that a letter to that effect would need to be supplied by the attending physician. On May 28,

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

when Mr. "D"'s condition had stabilized sufficiently to allow for his transport, Mr. "D"'s son again spoke with the same UHC representative who, Mr. "D"'s son claims, confirmed their earlier conversation. On May 29, he faxed a letter from the overseas attending physician asserting that "due to the extreme, life threatening nature of his condition," it was a "medical necessity" immediately to evacuate Mr. "D" to the United States, specifically to the hospital where he previously had been undergoing treatment. According to Applicant, Mr. "D"'s son spoke again that day with the UHC representative to make sure she had received the letter, and she told him that "everything looked fine."

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

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

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

Additionally, the letter stated:

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

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

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

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

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

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

Mr. "D"'s son her understanding that the transportation expenses were excluded under the MBP.

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

Appeals with UHC (July–October 1998)

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

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

> "Under the International Monetary Fund plan, benefits are not available for transportation or travel, except for the use of local ambulance service in connection with hospital confinement, medical emergencies, or as specified under the hospice care benefit. This information is contained in the employee's summary plan description."

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

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

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

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

Approaches to Fund for review (November–December 1998)

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

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

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

Decision of January 26, 1999

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

> "I received a telephone call from Ms. ["D"], Mr. ["D"]'s daughter, on January 26, 1999. I told her that the results of Intracorp's external review of the ["D"] family's claim for MBP coverage of Mr. ["D"]'s transportation costs were consistent with UHC's denial of coverage. Ms. ["D"] stated that she was due to leave the U.S. in a few days, and, at her request, I quickly prepared a letter confirming the results of the Intracorp review and the

> denial of MBP coverage based on the plan's exclusion of transportation expenses other than local ambulance service. I faxed her the letter, dated January 26, 1999. . . . In our telephone conversation, despite her earlier letter describing the Intracorp review as the 'final determination' of MBP coverage . . . , Ms. ["D"] advised me that she intended to appeal the Fund's denial of MBP coverage further when she returned to the United States. She stated that she would be in contact with me regarding the appeal, but she was very hurried and did not request any information on the appeal procedure. I expected to hear from her again, and would have advised her of the appeals procedure and time limits had she called me again as she said she would. I did not receive any telephone calls or correspondence from her again after that date."

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

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

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

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

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

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

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

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

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

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

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

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

On the substance of the claim, she argued:

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

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

> "The last fax comes from [Mr. "E"]; please note that he does not inform me of any time frame for responding further. Nor did he ever send me a hard copy of his denial as I had requested. He sent me this fax two days before I left the country to conduct my dissertation research . . . which had been repeatedly postponed due to my parents' illnesses. Having come back into the country, I have been making some inquiries as to my options in pursuing this matter. I have just learned that there may be time frames for appeal of which I should have been advised. However, please note that I was not made aware of them, nor the protocol for further appeal.
>
> I ask you to kindly review our case and, in the interest of fairness, to please waive any time frames for appeal that may exist so that I may have access, on behalf of my father's estate, to approach the grievance committee for final review. As stated earlier, I was never advised of any time frame in [Mr. "E"]'s last letter, and it is not reasonable to assume that I would know the proper procedures as I am not a staff member.
>
> . . . I appeal to you now on moral grounds, in addition to those of fairness, to please address our claim and resolve this issue. I believe the IMF has a moral obligation to take responsibility for the errors of its agents; we should not be penalized for acting on misinformation we were given by UHC, the IMF's preferred administrator for health insurance at that time."

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

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

43. In addition, the Director of Human Resources informed Ms. "D" that although the remedies under GAO No. 31 were unavailable, she had requested ". . . an internal review of the actions taken by my staff on your father's case." The conclusion of this review was that ". . . it cannot be claimed

that you believed that the cost of your father's flight back to the United States would be covered under the MBP." The Director concluded her correspondence as follows:

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

Approach to the Grievance Committee (March–May 2000)

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

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

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

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

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

> "After review of the record in your grievance, I regret to inform you that the Grievance Committee has no jurisdiction to consider your claim.

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

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

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

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

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

Finally, stated Applicant:

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

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

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

> "Your request for administrative review was not submitted until January 14, 2000, or almost one year after the final administrative decision was taken. The statute of limitations that establishes time limits for submitting requests for administrative review and grievances is not a legal technicality as you suggest. It is present in virtually all legal systems to help ensure that cases are heard in a timely manner before the memories of witnesses fade or documentary evidence is displaced. As in any judicial system, lack of knowledge about the rules does not constitute a valid reason for making an exception to the rules. I also attach a good deal of importance to maintaining the integrity of our Grievance Committee and consistency in the application of our rules and regulations as they apply to approximately 3,000 current employees and 1,000 pensioners. In this regard, the Fund's management has never overturned a ruling of the Grievance Committee since the Committee's inception in 1980."

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

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

51. On August 7, Ms. "D" telephoned the Registrar of the Administrative Tribunal seeking clarification of the filing deadline. The Registrar, who understood Ms. "D"'s inquiry as a good faith effort to comply with the applicable statutory provisions, concluded that, pursuant to Articles V and VI of

the Statute, Ms. "D" would have three months from the Deputy Managing Director's letter of August 4, in which to file her claim.[18] The Application was filed with the Administrative Tribunal on October 31, 2000.

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

Article V, para. 2 provides:

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

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

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

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

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

53. **Applicant's contentions on the merits**

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

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

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

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

54. **Applicant's contentions opposing summary dismissal**

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

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

[19]This argument is inconsistent with another argument: "*. . . arguendo* Applicant did not skip any intermediate stage of the review process, since she had previously requested the

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

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

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

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

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

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

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

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

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

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

Division Chief concerned, Mr. ["E"], for review." Respondent, in its Additional Statement, points out that Mr. "E" was not the Division Chief but rather a Human Resources Officer three levels below the Division Chief. In response, Applicant has stated that she "regrets the mischaracterization" of Mr. "E"'s position. Nonetheless, she goes on to argue that as Mr. "E" had responsibility for the Medical Benefits Plan, he was thereby entitled to receive a request to review on behalf of the "actual" Division Chief.

Respondent's principal contentions

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

56. **Respondent's contentions on the merits**

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

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

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

57. **Respondent's contentions in favor of summary dismissal**

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

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

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

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

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

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

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

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

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

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

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

Consideration of the Issues of the Case

The Administrative Tribunal's jurisdiction under Article II

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

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

"1. The Tribunal shall be competent to pass judgment upon any application:
   a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
   b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.

2. For purposes of this Statute:
   . . .
   c. the expression 'member of the staff' shall mean:
      (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;
      (ii) any current or former assistant to an Executive Director; and
      (iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund. . . ."

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

> "Section 1(b) sets forth the competence of the tribunal with respect to the retirement and other benefit plans maintained by the Fund, such as the Staff Retirement Plan (SRP), the Medical Benefits Plan (MBP), and the Group Life Insurance Plan. [footnote omitted.] *This provision would allow individuals who are not members of the staff but who have rights under these plans to bring claims before the tribunal concerning decisions taken under or with respect to the plan.* Such individuals would *include* beneficiaries under the SRP and nonstaff enrollees in the MBP, *for example, a deceased staff member's widow who continues to participate in the MBP.* Such individuals would, however, be entitled to assert claims only with respect to decisions arising under or concerning the Fund's retirement or benefit plans; they would not have the right to challenge other types of administrative acts before the tribunal."

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

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

> "The definition also includes persons who would be entitled to assert the rights of the *staff member* in the event of his death; thus, if an issue as to the

> termination payments due to a *staff member* were unresolved at the time of his death, that claim could be pursued by the personal representative of the estate."

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

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

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

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

> "1. The Tribunal shall be competent to hear those cases in which members of the staff of the General Secretariat of the Organization of American States allege nonobservance of the conditions established in their respective appointments or contracts or violation of the General Standards for the operation of the General Secretariat or other applicable provisions, including those concerning the Retirement and Pension Plan of the General Secretariat.
>
> 2. The Tribunal shall be open to:
>
> a) Any staff member of the General Secretariat of the Organization, even after his employment or duties have ceased, and to any person who has succeeded to the staff member's rights upon his death.
>
> b) Any other person who can show that he is entitled to rights derived from a contract of employment or an appointment or from a provision of the General Standards or of other administrative regulations upon which the staff member could have relied.
>
> 3. For the purposes of this Statute, anyone who is connected with the Secretariat by an appointment, a contract of employment, or some other employer-employee relationship, in accordance with provisions of the General Standards or other administrative regulations shall be considered to be a staff member of the General Secretariat."

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

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

The exhaustion of remedies requirement of Article V

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

> ***"ARTICLE V***
>
> 1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.
>
> 2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:
>
> a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;
>
> b. a decision denying the relief requested has been notified to the applicant; or
>
> c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.
>
> 3. For purposes of this Statute, where the available channels of review do not include the procedure described in Section 2, a channel of administrative review shall be deemed to have been exhausted when:

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

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

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

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

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

"ARTICLE VI

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

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

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

4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.

5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application."

66. The requirement for exhaustion of remedies serves the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication. These goals are reflected in the Commentary on the Statute found in the Report of the Executive Board, and in the jurisprudence of the Tribunal. The Commentary

emphasizes that the Administrative Tribunal is intended as a last resort after the administration has had a full opportunity to determine whether corrective measures should be taken:

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

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

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

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

> "'(The) statutory exhaustion requirement is of utmost importance. It ensures that the management of the Bank shall be afforded an opportunity to redress any alleged violation by its own action, short of possibly protracted and expensive litigation before this Tribunal. In addition, the pursuit of internal remedies, in particular the findings and recommendations of the Appeals Committee, greatly assists the Tribunal in promptly and fairly disposing of the cases before it. The Appeals Committee permits a full and expeditious development of the parties' positions, including the testimony of witnesses, and often results in the announcement of recommendations that are satisfactory to both the Bank and to the aggrieved

> staff members (*Berg*, Decision No. 51 [1987], para. 30; *Dhillon*, Decision No. 75 [1989], para. 22).'"

(*de Jong*, para. 32.)

The process of administrative review pursuant to GAO No. 31

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

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

> "7.01.1 *Present and Former Staff Members.* Any present or former staff member shall have access to the Grievance Committee. For this purpose, the expression 'staff member' shall mean (i) any person currently or formerly employed by the Fund whose letter of appointment, whether regular or fixed-term, states or stated that he or she shall be a member of the staff; (ii) any successor in interest to a deceased member of the staff, to the extent that he or she is entitled to assert a right of such staff member against the Fund; and (iii) any enrollee in a benefit plan maintained by the Fund as employer, with respect to decisions arising under any such plan."

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

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

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

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

"4.02 *Exhaustion of Administrative Review.* The Committee shall have jurisdiction to hear a case only after the grievant has exhausted the applicable channels of administrative review set forth in Section 6 of this Order, unless the Managing Director, or the Managing Director's designee, agrees that the grievance may be submitted directly to the Committee."

. . .

"7.01.2 *The Fund.* The Managing Director or the Director of Administration[23] may, with the prior consent of the grievant, refer to the Committee any case brought directly to their attention, and the Committee shall have jurisdiction to hear the case."

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

"6.03 *Grievances Regarding Staff Benefits.* For decisions regarding the application of a staff benefit, the staff member shall first submit a request for review in writing to the division chief in the Administration Department whose division is responsible for the administration of the benefit in question, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. The request must be submitted within three months after the staff member was informed of the intended application of the benefit. The division chief shall have 15 days to respond in writing.

6.04 *Appeal to the Director of Administration.* If dissatisfied with the response to a request under either Section 6.02 or 6.03, or if no response is received within 15 days after submission of such a request, then the staff member may request in writing a review by the Director of Administration. The written request must be submitted within 30 days after the response from the division chief or Department Head, as applicable, has been received or the deadline for a response has passed, whichever is earlier.

6.05 *Exhaustion of Administrative Review.* The channels of administrative review shall be considered exhausted, for purposes of filing a grievance with the Committee, when the staff member has received a response to his or her written request or no response has been received within 15 days of its submission to the Director of Administration.

6.06 *Decisions Taken by Managing Director or Director of Administration.* With respect to any decision that was taken directly by the Director of Administration or by the Managing Director, or by the Managing Direc-

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

> tor's designee, the staff member may file a grievance with the Committee within six months after the challenged decision was made or communicated to the staff member, whichever is later."
>
> . . .
>
> "7.03 *Time Limit for Submission to Grievance Committee.* Other than with respect to decisions taken directly by the Director of Administration or the Managing Director, as provided in Section 6.06 above, a grievant shall have 60 days after the administrative remedies have been exhausted to submit a grievance to the Committee."

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

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

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

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

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

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

> limits for the exhaustion of administrative review under any applicable provision of GAO No. 31?"

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

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

The Fund's response also states:

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

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

78. According to the Fund's response to the Tribunal's Request for Information, approximately sixty-two grievances have been filed from the initial issuance of GAO No. 31 in 1980 through the end of 2000. Of these, only three have been dismissed for failure to meet the requirements for exhaustion of administrative review under GAO No. 31. Sixteen grievances have related to benefit questions of any kind, and five of these have related to the Medical Benefits Plan. The Fund asserts that it has no record of any non-staff member grievances related to benefits. Neither has a successor in interest to a deceased staff member filed a grievance since GAO No. 31 was revised in 1995 to permit such persons to file grievances.

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

79. In assessing whether Applicant has met the exhaustion of remedies requirement of Article V and filed a timely application pursuant to Arti-

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

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

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

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

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

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

> "7.01.1 *Present and Former Staff Members.* Any present or former staff member shall have access to the Grievance Committee. For this purpose, the expression 'staff member' shall mean (i) any person currently or formerly employed by the Fund whose letter of appointment, whether regular or

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

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

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

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

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

85. A preliminary question raised by the filing of the Motion for Summary Dismissal in this case is what effect the decision of the Grievance Committee Chairman that the Committee was without jurisdiction to consider Applicant's grievance should have upon the Administrative Tribunal's

consideration of whether Applicant has met the requirements of Article V of the Tribunal's Statute. In its Explanatory Memorandum accompanying Order No. 1999-1, *Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent* (February 26, 1999), the Tribunal had occasion to consider this very question and concluded:

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

(Explanatory Memorandum, p. 10.)

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

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[24]Likewise, the WBAT has recognized:

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

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

87. The question considered in the Explanatory Memorandum arose as a result of the Fund's request for interpretation of the Tribunal's Judgment in *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998). In *Ms. "Y"*, the issue presented was whether the applicant was required by Article V of the Tribunal's Statute to have brought her complaint to the Grievance Committee when she had availed herself of an ad hoc discrimination review process that had been specially instituted by the Fund for a limited period of time. The Tribunal's Judgment in *Ms. "Y"* , which referenced the "singular circumstances" of the case, held that ". . . in the event that the Grievance Committee, if seized, should decide that it does not have jurisdiction over Applicant's claim, the Administrative Tribunal will reconsider the admissibility of that claim on the basis of the Application now before it." (*Ms. "Y"*, para. 43).

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

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

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

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

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

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

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

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

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

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

On the basis of an examination of the facts, the AsDBAT went on to conclude that "[s]urely, under the circumstances already recounted, the Applicant knew—or clearly should have known—of the Bank's decision, even prior to

June 1994, so that the six-month period for filing his grievance had already begun to run." (*Alcartado*, para. 18.) The AsDBAT accordingly held that the application in the tribunal was inadmissible for failure to exhaust internal remedies as required by its Statute. (Para. 21.)

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

94. In the World Bank, the rules governing the Appeals Committee are explicit in providing that the Committee's decision on an objection to its competence is subject to review by the Administrative Tribunal. (SR 9.03, para. 4.01.) Moreover, the WBAT has recognized that its Appeals Committee ". . . is part and parcel of the administrative review process." *Helen Lewin v. International Bank for Reconstruction and Development*, WBAT Decision No. 152 (1996), para. 43.

Importance of timely pursuit of administrative review

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

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

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

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

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

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

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

(Setia, para. 23.)

Exceptional circumstances

98. In assessing compliance with statutory requirements for the exhaustion of administrative review, international administrative tribunals sometimes consider claims of exceptional circumstances to excuse a failure to comply on a timely basis with the underlying review procedures. Tribunals may similarly consider whether exception may be made in a given case to the time limits for filing an application with the administrative tribunal once administrative review has been exhausted.

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

> "2. No such application shall be admissible, *except under exceptional circumstances* as decided by the Tribunal, unless:
>
> (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and

(ii) the application is filed within ninety days after the latest of the following:

(a) the occurrence of the event giving rise to the application;

(b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or

(c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice."

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

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

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

"2. No application shall be admissible unless:

(i) the applicant has exhausted all other administrative review remedies available within the Bank, except in cases where the applicant and the Bank have agreed to submit the application directly to the Tribunal; and

(ii) the application is filed within ninety days after the latest of the following:

(a) occurrence of the event giving rise to the application,

(b) receipt of notice (after the applicant has exhausted all other remedies available within the Bank) that the relief asked for or recommended will not be granted, or

(c) receipt of notice that the relief asked for or recommended will be granted, and the expiry of thirty days after receipt of such notice, without such relief being granted.

. . .

4. Notwithstanding the provisions of paragraph 2 of this Article, the Tribunal may decide in exceptional circumstances, where it considers the delay justified, to waive the time limits prescribed under this Article in order to receive an application that would otherwise be inadmissible."

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

Telecommunication Union, was correct in deciding that no such exceptional circumstances existed. (*Al Joundi*, p. 5.)

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

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

The Commentary explains this provision as follows:

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

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

102. The question is whether, given the statutory basis for the waiver of its own time limit for the filing of an application, the IMFAT may consider exceptional circumstances that may excuse a failure to comply fully with time limits in the underlying, anterior administrative review procedure, or whether Article V's silence as to exceptional circumstances precludes the consideration of such circumstances. The Tribunal concludes that it does have authority to consider the presence and impact of exceptional circumstances at such anterior stages, for these reasons. First, the recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to debar them. If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse. Second, there is support in the regimes of other administrative tribunals for authority to find exceptional circumstances, for example, in

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

that most senior Tribunal, that of the International Labour Organisation. No reason appears for denying this Tribunal that authority. Indeed, since under Article V, paragraph 1 of the Statute, an application may be filed with the Tribunal only after the exhaustion of available channels of administrative review, there is the requisite basis in the Statute for the Tribunal to assess the performance of such channels.

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

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

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

> "25. . . . Under the terms of Article II the specified time limits may be disregarded only when the Tribunal finds that exceptional circumstances exist.
>
> 26. The Tribunal also does not accept the Applicant's contention that enforcement of the time bar prescribed by Article II is contingent on the Respondent's showing that it suffered injury or damage resulting from the Applicant's failure to observe the prescribed time limits. Time limits are not prescribed in the interest of the Respondent alone. Rather, they have a wide purpose. They are prescribed as a means of organizing judicial proceedings in a reasonable manner. Their object is to prevent unneces-

> sary delays in the settlement of disputes. As such they are of a mandatory nature and are enforced by courts in the public interest."

(*Yousufzi*, paras. 25–26.)

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

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

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

(*Ferdinand P. Mesch and Robert Y. Siy (No. 3) v. Asian Development Bank*, AsDBAT Decision No. 18 (1996), para. 31.)

Admissibility of the Application under Article V

108. Applicant has cited several factors in an effort to excuse her failure to initiate administrative review on a timely basis. Consistent with the jurisprudence of international administrative tribunals, these factors must be evaluated in light of the extent and nature of the delay, as well as the purposes intended to be served by the requirement for exhaustion of administrative remedies.

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

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

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

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

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

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

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

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

115. Therefore, Applicant's assertion as to the purport of her exchange with the Ombudsperson must be decided on the basis of credibility. Applicant vigorously pursued all appeals with UHC. Beginning in January 2000, she attempted other channels of review within the Fund, each time meeting the requisite deadlines. The question is whether mistaken advice may have contributed to her delay in initiating the administrative review process under GAO No. 31 or whether, for other reasons, Applicant chose to ignore the issue of the contested benefit for close to a year. It is also significant that

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

"**Confidentiality**

11.The Ombudsperson will keep all dealings with persons who seek his or her services strictly confidential, except to the extent that the person seeking assistance consents to disclosure for the purpose of the performance of the duties specified in paragraph 5. However, the Ombudsperson may, at his or her sole discretion, break confidentiality if the physical safety of any person is threatened.

12. All information and records compiled by the Ombudsperson shall be for the use of the Ombudsperson and for no other purpose than the functions of the office of the Ombudsperson. Any reports of the Ombudsperson shall be prepared in a manner that will preserve the right to confidentiality of the persons who have brought matters to the attention of, or provided information to, the Ombudsperson. Details of specific cases may be disclosed only with the concurrence of such persons."

Paragraph 5 provides:

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

while Applicant alleges that she told the Ombudsperson that she would be away for at most five months, she delayed pursuit of the matter for an additional six months.[29] In view of this latter consideration, the Tribunal, while accepting the Applicant's rendering of her exchange, is not disposed to accord it weight.

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

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

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

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

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

120. As a general rule, it has been held that lack of individual notification of review procedures does not excuse failure to comply with such proce-

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

dures. For example, in *Deborah Guya v. International Bank for Reconstruction and Development*, WBAT Decision No. 174 (1997), the WBAT held as follows:

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

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

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

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

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

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

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

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

125. It is significant that, at each stage in which Applicant was informed of the requisite procedures, she conformed to the deadlines. Hence, her

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

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

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

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

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

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

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

> "35. It is first necessary to consider the Respondent's challenge to the Tribunal's jurisdiction. *The position of the Respondent in this regard has been ambivalent. On the one hand, it has contended that the Applicant*, when she consulted the Pension Information Assistant in February 1987, *neither sought nor received an 'administrative decision' from which an appeal could ultimately be taken to the Tribunal*; she merely claims that the Pension Information Assistant failed to give accurate advice and there is no claim that she asked, and was denied, any income tax reimbursement or any form of relief or any other decision. *On the other hand, the Respondent claims that the Applicant failed to invoke in a timely manner her internal administrative review, but such review applies only (under Staff Rule 9.01, para. 3.01) to 'review of an administrative decision.'*

36. Although, as the Tribunal will note shortly, its own jurisdiction is not limited to review of affirmative administrative decisions but can encompass as well certain omissions or failures to act, *the reference in Staff Rule 9.01 to review of an 'administrative decision' can obviously give rise to uncertainties on the part of staff members.* In the circumstances of this case in particular, it is difficult to say what kind of specific relief or decision the Applicant could have expected from the Pension Information Assistant, in view of the fact that the revised U.S. tax law was indisputably applicable to her late-1986 commuted pension payments; she was indeed informed by him that there was nothing that the Bank could do for her. *If, as the Respondent sometimes argues in this case, this did not amount to an 'administrative decision' that this Tribunal can review, it is understandable that there could be uncertainty on the part of the Applicant as to whether the Bank's administrative review provisions in Staff Rule 9.01 were applicable and as to whom the Applicant should turn to for recourse.* She was therefore not unreasonable when she moved promptly to seek the advice of the Staff Association and then of the Ombudsman. The Applicant might well have moved equally promptly to file an appeal with the Appeals Committee had she not been accurately advised by the Ombudsman that she need not do so because of a pending appeal that the Bank had agreed to apply to her should the outcome favor the staff member. It is noteworthy, in any event, that when the Applicant did take her case to the Appeals Committee, the Bank challenged the Committee's jurisdiction for lack of an 'administrative decision' from which administrative review and ultimately appeal could be taken.

37. *The Tribunal is of the view that Staff Rule 9.01 and its provisions for administrative review should not be construed in an overly technical manner. Those provisions are designed to rectify misunderstandings and to resolve a wide range of claims by staff members in an expeditious but essentially informal manner. Between the Bank and its staff members, there are often ongoing communications and exchanged letters and memoranda that sometimes render it unclear whether firm decisions have been made and time periods crystallized. As this case shows, there may be ambiguities about whether the administrative review procedures are intended to apply at all. Given the fact that these procedures were designed to be utilized by all categories of staff members, most of them lacking legal expertise and most of them presumably acting without the aid of counsel at this relatively early dispute stage, the Tribunal concludes that they should be applied flexibly in accordance with their terms and their spirit.*

38. It is perhaps for these reasons that the Appeals Committee, despite the Respondent's challenge to its jurisdiction for reasons similar to those raised here, decided to rule upon the Applicant's appeal on the merits. The Tribunal also concludes that Staff Rule 9.01 should not provide a bar to the application in the circumstances of this case."

(Emphasis supplied.)

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

The question of returning the case to the Grievance Committee

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

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

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

130. The Fund's argument that the Tribunal could return the case to the Grievance Committee is a departure from the view it urged upon the Tribunal in the *D'Aoust* case.[32] In *D'Aoust*, the Tribunal rejected the suggestion of

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

> "The Respondent contests that the Tribunal functions as an appellate body, advancing as reasons for that view that:
>
> '. . . if the proceedings before the Tribunal were intended as a review of the action of the Grievance Committee, this would involve two significant departures from the authority conferred on the Tribunal under its Statute: first, the Tribunal would be limited to reviewing questions of law and could not take evidence directly (which is not the case under the Statute); and second, the appropriate remedy would not be to order the relief the Applicant is seeking but rather to remand the case to the Griev-

the applicant in that case that the Tribunal functions as an appellate body with respect to the Grievance Committee. (*D'Aoust*, para. 17.)

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

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

133. It should also be noted that the Tribunal in *Ms. "Y"* did not direct the parties to return to the Grievance Committee. It simply stated that *if* the Grievance Committee were seized of Applicant's grievance and the Committee decided that it was without jurisdiction, the Administrative Tribunal would be open to reconsidering the admissibility of the Application in the Tribunal. (*Ms. "Y"*, para. 43 and Decision.) It is in that very posture, following dismissal by the Grievance Committee Chairman on jurisdictional grounds, that Ms. "D"'s case arrives at the Tribunal.

134. Respondent has not cited authority in support of its view that the Tribunal is empowered to remand the case to the Grievance Committee. It is possible that the Applicant could be directed to file a request for review with

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ance Committee for new proceedings, as an appellate court may reverse and remand in order for a new trial to be held, but it would not normally be empowered to make findings and award damages.'

In addition, the Respondent suggests that if the Tribunal were an appellate body over the Grievance Committee, 'the Tribunal would be reviewing the recommendations of the Grievance Committee and would be limited in its scope of review as to the matters considered by the Committee; this is clearly not the case.'"

(*D'Aoust,* para. 16.)

the Division Chief of the Staff Benefits Division, but, in the circumstances that obtain, the Tribunal is not of the view that she should be so directed.

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

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

Decision

FOR THESE REASONS

The Fund's Motion for Summary Dismissal is denied.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
March 30, 2001

JUDGMENT NO. 2001-2

Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent

(November 20, 2001)

Introduction

1. On November 19 and 20, 2001, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "P", a retiree of the Fund. (A meeting for this purpose scheduled for September 12–14 was cancelled because Judges Ando's and Gentot's flights to Washington were cut short due to the events of September 11.)

2. Mr. "P" contests the decision of the Administration Committee of the Staff Retirement Plan ("SRP" or "Plan") to withhold a portion of his pension payments pursuant to Section 11.3 of the SRP and the corresponding Rules of the Administration Committee. Applicant's former spouse Ms. "Q" had requested the Committee, under its Rules, to give effect to a provision of a Maryland divorce judgment awarding her a portion (28%) of Applicant's pension. Mr. "P" objected that the Maryland Judgment was not valid in light of a conflicting and pre-existing Egyptian divorce. Following an examination of the Maryland and Egyptian divorce documents, the Administration Committee determined, under its Rules, that the disputed portion of the pension payments would be withheld and placed in escrow, on the ground that there was a bona fide dispute as to the efficacy, finality or meaning of the Judgment upon which Ms. "Q" had based her request.

3. Mr. "P"'s Application in the Administrative Tribunal challenges the legality of the Administration Committee's decision to withhold the disputed portion of his pension benefit. Ms. "Q" has been admitted as an Intervenor in the proceedings, seeking to have the Maryland Judgment given effect under the SRP. Respondent asks the Tribunal to sustain the Adminis-

tration Committee's decision placing in escrow the disputed amount until such time as the dispute is resolved between the parties.

The Procedure

4. On February 28, 2001, Mr. "P" filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Office of the Registrar advised Applicant that his Application did not fulfill the requirements of paras. 1, 2(c) and 3 of that Rule. Accordingly, Applicant was given additional time to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.[1]

5. The Application was transmitted to Respondent on March 26, 2001. On March 28, 2001, pursuant to Rule XIV, para. 4, the Office of the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Mr. "P"'s Application on May 10, 2001. On May 21, 2001, Applicant submitted his Reply. The Fund's Rejoinder was filed on June 20, 2001.

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[1]Rule VII provides in pertinent part:

"Applications

1. Applications shall be filed by the Applicant or his duly authorized representative, following the form attached as Annex A hereto. If an Applicant wishes to be represented, he shall complete the form attached as Annex B hereto.

2. . . . Each application shall contain:

. . .

(c) the decision being challenged, and the authority responsible for the decision;

. . .

3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.

. . .

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

(i) notify the Applicant that the period of time within which to make the appropriate changes has been extended, indicating the length of time thereof;

(ii) make the necessary corrections when the defects in the application do not affect the substance; or

(iii) by order of the President, notify the Applicant that the submission does not constitute an application and cannot be filed as such. . . ."

6. On April 10, 2001, Applicant's former spouse Ms. "Q" submitted an Application for Intervention pursuant to Rule XIV[2] of the Tribunal's Rules of Procedure. As the Application for Intervention failed to comply fully with Rule VII's requirements for the preparation of an application, which apply *mutatis mutandis* to applications for intervention, the potential intervenor was accorded fifteen days in which to bring the Application for Intervention into compliance. On April 20, 2001, the Application for Intervention, having been supplemented to comply fully with the requirements of Rule VII, para. 3, was transmitted to Applicant and Respondent pursuant to Rule XIV. Under para. 3 of that Rule, Mr. "P" and the Fund each were accorded, simultaneously, thirty days in which to present their views as to the admissibility of Ms. "Q"'s Application for Intervention. Both Applicant and Respondent filed comments opposing the admissibility of the Application for Intervention.

7. Following consideration of the views of the parties, on June 26, 2001, the President of the Administrative Tribunal, in consultation with the other members of the Tribunal, decided to grant the Application for Intervention, and Ms. "Q" was so notified. Consistent with Rule XIV's requirement that an intervenor "participate in the proceedings as a party," all of the pleadings on the merits were transmitted to Ms. "Q" and she was given thirty days in which to file a responsive pleading. The Intervenor's responsive pleading was filed with the Administrative Tribunal on July 24, 2001.

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[2]Rule XIV provides:

"Intervention

1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal. Such person shall for that purpose draw up and file an application to intervene in accordance with the conditions laid down in this Rule.

2. The rules regarding the preparation and submission of applications specified above shall apply *mutatis mutandis* to the application for intervention.

3. Upon ascertaining that the formal requirements of this Rule have been complied with, the Registrar shall transmit a copy of the application for intervention to the Applicant and to the Fund, each being entitled to present views on the issue of intervention within thirty days. Upon expiration of that deadline, whether or not the parties have replied, the President, in consultation with the other members of the Tribunal, shall decide whether to grant the application to intervene. If intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party.

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

8. Pursuant to his authority under Rule XVII, para. 3 and 4,[3] the President of the Administrative Tribunal, on July 9, 2001, issued Requests for Information to each of the parties. The Request for Information issued to the Respondent sought information with respect to the Intervenor's current and past employment status with the Fund. The Requests for Information issued to the Applicant and the Intervenor were to ascertain whether any litigation was pending in the courts of any jurisdiction, the outcome of which might be relevant to the Tribunal's consideration of the case. Responses to these Requests were received on July 20, 24 and 25, 2001.

9. On July 12, 2001, Applicant made a request under Rule XI[4] of the Rules of Procedure to file an additional pleading. The pleading initially had been received by the Office of the Registrar on June 6 and rejected under Rule IX (Reply), as an earlier Reply already had been filed on behalf of Applicant. On July 25, 2001, the President granted Applicant's request to have his additional pleading accepted for filing under Rule XI.

10. Also on July 25, 2001, the President of the Administrative Tribunal, pursuant to his authority under Rule XI and in the exceptional circumstances of the case, issued a call to all three parties to submit, within fifteen days, simultaneous Additional Statements. The Additional Statements provided a final opportunity for the parties to respond to any outstanding matters.

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[3]Rule XVII, paras. 3 and 4 provide:

> *"Production of Documents*
>
> . . .
>
> 3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment.
>
> 4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

[4]Rule XI provides:

> *"Additional Pleadings*
>
> 1. In exceptional cases, the President may, on his own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be furnished in the original or in an unaltered copy and accompanied by any necessary translations.
>
> 2. The requirements of Rule VII, Paragraphs 4 and 8, or Rule VIII, Paragraphs 2 and 3, as the case may be, shall apply to any written statements and additional documents.
>
> 3. Written statements and additional documents shall be transmitted by the Registrar, on receipt, to the other party or parties."

11. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.[5]

The Factual Background of the Case

12. Mr. "P", an Egyptian national, was a staff member of the International Monetary Fund from January 16, 1982 until his disability retirement took effect on August 1, 1998.

13. On July 25, 1989, Mr. "P" married Ms. "Q", also an Egyptian national. The marriage took place in Paris under the authority of the Egyptian consul, who certified that a "legal and religiously recognized marriage took place according to the Holy Book between the bridegroom and the bride." Thereafter, the marriage was registered with Egyptian civil authorities. On the marriage certificate, the "residential address" of Mr. "P" is listed as "Washington USA." For Ms. "Q", an address in Egypt is given.

14. The couple immediately took up residence in Maryland where they lived together as husband and wife for more than eight years until, on September 23, 1997, Ms. "Q" established a separate residence, also in Maryland. Mr. "P" continued to live in Maryland as well, until leaving the United States for Egypt in July 1998.

Proceedings in the Montgomery County Circuit Court

15. On September 30, 1997, Ms. "Q" filed a Complaint for Limited Divorce in the Montgomery County (Maryland) Circuit Court. Mr. "P" filed his Answer on October 28, 1997, and a hearing was held before a Domestic Relations Master on January 21, 1998. On March 3, 1998, the court entered an Order requiring Mr. "P" to pay Ms. "Q" alimony *pendente lite* in the sum of $2000 per month.

16. Mr. "P" continued to participate in the Maryland proceedings, taking part in an Alternative Dispute Resolution session on May 22 and submitting a Pre-Trial Statement of May 27, 1998. The merits divorce trial was set for January 1999.

[5]Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held ". . . if the Tribunal decides that such proceedings are necessary for the disposition of the case."

17. On June 24, 1998, Ms. "Q", asserting that Mr. "P" had applied for disability retirement and had indicated an intention to return to Egypt if it were granted, filed a Motion for Injunctive Relief with the Montgomery County Circuit Court. The Motion further asserted that Mr. "P" had indicated to Ms. "Q" that he believed that she should have no share in his pension, and that Mr. "P" had been moving assets out of the country. Therefore, contended Ms. "Q", if he were to leave, there would be no means for the Court to enforce the *pendente lite* alimony order. For these reasons, the Motion sought an order of the Court requiring Mr. "P" to execute a direction to the Staff Retirement Plan that $2000 per month of any disability or other retirement granted to him be paid to Ms. "Q".

18. In a hearing on the Motion, held on the following day, Mr. "P" expressed to the Court his intention to remain within its jurisdiction:

> "MR. ["P"]: The second point I would like to make, Your Honor, is that there is no emergency involved. I have just signed a lease for an apartment for a year because I sold my house, and there is no decision by the pension—in fact, my pension evaluation has been going on since 1996, and I have the medical records here. So they are still undecided. We are months, at best, away from a decision.
>
> . . .
>
> THE COURT: You are currently paying the support?
>
> MR. ["P"]: Yes. Yes, I am, and I'm not, you know, running away or anything. We are both Egyptian citizens. We are both under the same visa and legal obligations and so on.
>
> But my intention is to pursue this matter and to abide by the law of the land as best as I could. I don't see why there is this feeling that there's an emergency or that I'm packing and leaving tomorrow or that kind of thing. It's totally inaccurate.
>
> . . .
>
> MR. ["P"]:
>
> . . .
>
> Finally, Your Honor, as I said, we are both citizens of Egypt, and we are here and we abide by the law of the land here, and it is my intention to pursue this case until the end. I have no other intention.
>
> But there is nothing to fear in Egypt because there is a legal system in Egypt as well, and there are courts, and she could pursue her rights if, for any reason, I, you know, I'm disabled or whatever, you know, etc. So I think all the—
>
> . . .
>
> THE COURT: She is afraid you are going to leave tonight or very soon.

> MR. ["P"]: There is absolutely no—I mean, I have things to prove I'm staying. I have an apartment lease. I have my son who's a permanent resident, and he's going to be a citizen this year. I'm not a fugitive."

(June 25, 1998 Hearing Transcript, pp. 6, 7, 10, 11, 18.)

19. At the conclusion of the hearing, the Court entered the Order requiring that Mr. "P" sign a direction (to be held in the Court's files) that Ms. "Q" be allocated $2000 per month of any disability or other retirement granted to Mr. "P".[6]

20. Mr. "P", however, refused to comply with the Court's Order and, instead, on July 8, filed a Motion to Alter or Amend Judgment seeking the Court's reconsideration of the matter. Mr. "P"'s Motion was followed the next day by the filing by Ms. "Q" of an Emergency Motion for Contempt.

21. On July 15, 1998, the Court entered a Contempt Order against Mr. "P" for failure to comply with its Order of June 25, 1998. The Court ordered furthermore:

> ". . . that a body attachment shall issue to take the Defendant into custody, the Defendant shall be imprisoned at the Montgomery County Detention Center for a period of 179 days or until such earlier time as he shall purge himself of his contempt by directing in writing to the Secretary of the Administration Committee that $2,000 per month of any disability or other retirement granted to him be paid to the Plaintiff, [Ms. "Q"];"

Mr. "P"'s Disability Retirement from the IMF and Divorce in Egypt

22. Two days later, on July 17, 1998, the Pension Committee of the Staff Retirement Plan approved Mr. "P"'s application for disability retirement (effective August 1, 1998).[7] Thereafter, on July 22, Mr. "P" appeared before

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[6]The direction was based upon the 1995 revision of SRP Section 11.3, which permitted voluntary directions by a Plan participant that a portion of the pension entitlement be paid to a spouse or former spouse on the basis of a court order. *See infra* for the history of the Fund's internal law relating to the giving effect to domestic relations orders.

[7]A disability retirement pension is calculated under the SRP as follows:

> "(b) A disability pension shall become effective upon retirement and shall be equal to the normal pension that would be payable to the participant if his normal retirement date had fallen on the date of his disability retirement, but using for such computation his highest average remuneration and eligible service at the time of his disability retirement. In no event, however, shall such pension be less than the smaller of:
>
> (i) 50 percent of such highest average gross remuneration; or
>
> (ii) the normal pension that the participant would have received if he had remained a participant until his normal retirement date without change in such highest average remuneration."

(SRP, Section 4.3 (b).)

a religious notary in Egypt and obtained a "first revocable divorce" from Ms. "Q". Ms. "Q", as noted on the divorce certificate, was "absent from the sitting," and the divorce made no provision for division of property or support. The divorce was registered with the local Civil Registration Office in Egypt on July 25, 1998.

Mr. "P"'s First Case in the IMF Administrative Tribunal

23. On July 28, 1998, Ms. "Q" brought to the attention of the Administration Committee of the SRP the Maryland Court's Orders which had required Mr. "P" to execute a direction to the Plan and which had held him in contempt for not doing so. Likewise, Mr. "P" informed the Fund of the Egyptian divorce. On July 29, 1998, the Administration Committee decided to withhold and place in escrow the disputed portion of the pension payments on the ground that there existed a dispute under Section 9.10 of the SRP.[8]

24. On November 20, 1998, Mr. "P" filed an application with the IMF Administrative Tribunal contesting the legality of the Administration Committee's decision. On March 19, 1999, however, the Administration Committee reversed its decision to withhold a portion of Mr. "P"'s pension payment, on the basis of the then applicable SRP provisions (subsequently amended, see below). The Administrative Tribunal, considering that Mr. "P"'s position had been satisfied, issued Order No. 1999-2, (*Mr. "P", Applicant v. International Monetary Fund, Respondent) (Mootness of Application*) (August 12, 1999), treating as moot the Application that was then pending in the Tribunal.

Further Proceedings in the Montgomery County Circuit Court

25. Meanwhile, proceedings continued in the Montgomery County Circuit Court and a merits divorce trial was held on January 24, 2000. Mr. "P" neither

[8]SRP Section 9.10 provides:

"**9.10** The Employer may make payment of any pension, annuity, benefit, or other amount hereunder at such place and in such manner as it shall determine. The Employer shall not be required to make any investigation to determine the identity or mailing address of any person entitled to any such payment hereunder. It may, however, defer making any such payment until it is satisfied with respect to the identity and the mailing address of the person or persons entitled to any such payment. If there shall be any dispute, or if the Employer or the Administration Committee shall have any doubt concerning the identity or rights of any person or persons entitled to payments hereunder, the Employer may withhold payment thereof until such dispute shall have been settled or such doubts shall have been satisfied by arbitration or by a court of competent jurisdiction or by a written stipulation binding on all the parties concerned."

appeared nor was represented at the trial. The record in the Administrative Tribunal is silent as to what notice Mr. "P" (who presumably remained in Egypt) may have had of that trial, but Mr. "P" has not contended that he was without notice of the continuing proceedings in Maryland. Indeed, sometime in the course of those proceedings, Mr. "P" had informed the Maryland Court of the Egyptian divorce.[9]

26. The Maryland Court expressly considered and rejected Mr. "P"'s argument that the foreign divorce divested it of jurisdiction to grant a final divorce and division of marital property to Ms. "Q":

> "4. The instant action was filed by the Plaintiff in 1997. The Defendant was properly served in the action while the parties both resided in the State of Maryland. The Defendant participated in the proceedings in Maryland until July 1998 when he left the United States. The Plaintiff has continued to be domiciled in the State of Maryland throughout. Under these facts, this Court continues to have jurisdiction to grant a final divorce to the Plaintiff, with all applicable relief concerning disposition of marital property. Even had a valid final divorce been obtained by the Defendant abroad, this Court would continue to have authority to enter appropriate orders concerning disposition of marital property under Family Law Article 8-212, Annotated Code of Maryland, and to resolve continuing questions of alimony under Section 11-105, Family Law Article, Annotated Code of Maryland."

(Report and Recommendations of the Family Division Master, January 31, 2000, p. 2.)

27. The Family Division Master also found, *inter alia*, that (a) Mr. "P" had been in arrears of his alimony payments from July 1998 onward, and (b) 56 per cent of his pension entitlement was acquired during his marriage to Ms. "Q". The findings of the Family Division Master were copied to Mr. "P" at his address in Egypt. (Report and Recommendations of the Family Division Master, January 31, 2000, pp. 2, 6.)

28. On the basis of the findings of the Family Division Master, the Montgomery County Circuit Court entered the following Judgment of Absolute Divorce on March 2, 2000:

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[9]The Family Division Master noted:

> "The Defendant submitted to the Court, in connection with an earlier motion, a copy of what appears to be a certificate of 'a first revocable divorce' registered by a religious notary of the Maadi First Division, affiliated to the Maadi Court, Cairo, Egypt."

(Report and Recommendations of the Family Division Master, January 31, 2000, p. 1.)

> "ADJUDGED, that the Plaintiff, [Ms. "Q"] be granted an absolute divorce from the Defendant, [Mr. "P"]; and it is further
>
> ORDERED, that the Plaintiff is hereby granted a monetary award in the amount of $95,016.50; and it is further
>
> ORDERED, that the Plaintiff shall be entitled to a continuing share of the Defendant's ongoing pension entitlement in the amount of 50% of the marital portion (56%) of all monies due the Defendant under his retirement annuity from the International Monetary Fund, plus a proportionate share of all cost of living supplements; and it is further
>
> ORDERED, that the Plaintiff shall be entitled to 100% of all survivor benefits under the Defendant's pension attributable to the portion of the pension earned during the marriage; and it is further
>
> ADJUDGED, that the Defendant is in arrears of *pendente lite* alimony in the amount of $38,000.00 through January 24, 2000; and it is further
>
> ORDERED, that the Plaintiff is hereby granted the reasonable necessary costs of her attorney's fees in the amount of $27,000.00 to be paid by the Defendant; and it is further
>
> ORDERED, that judgment is hereby entered in favor of the Plaintiff against the Defendant in the amount of $160,016.50, representing the amounts awarded herein."

29. According to Applicant and Intervenor, no appeal has been taken by Mr. "P" from the Maryland Judgment of Absolute Divorce. Furthermore, both parties have averred in their responses to the Tribunal's Requests for Information that no litigation is pending in the courts of any jurisdiction that would bear upon the finality of that Judgment.

30. It is the March 2, 2000 Judgment of Absolute Divorce that forms the basis for Ms. "Q"'s March 9, 2000 Request to the Administration Committee of the Staff Retirement Plan. The Committee's decision on that Request is the decision presently contested by both Applicant and Intervenor in the Administrative Tribunal.

The Channels of Administrative Review

31. The case of *Mr. "P" (No. 2) v. IMF* is the first to come to the Administrative Tribunal through the channels of administrative review established in 1999 by the Administration Committee of the Staff Retirement Plan.[10]

[10]Two other applications in the IMFAT contesting decisions under the SRP arose before the promulgation of the Administration Committee's Rules of Procedure. (*Mr. "X", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1994-1 (August 31, 1994);

The Rules of Procedure of the Administration Committee, which were notified to the staff by Staff Bulletin No. 99/17 (June 23, 1999), are designed to explain when an individual has fulfilled the requirement of exhausting the channels of administrative review on a matter brought before the Administration Committee of the SRP.[11] The Committee's Rules of Procedure are, by their terms, designed to be read together with (a) the Fund's Articles of Agreement; (b) the SRP and the rules made thereunder; and (c) the Statute and Rules of Procedure of the Administrative Tribunal. (Administration Committee Rules of Procedure, Rule I (2).)

32. The Rules of Procedure of the Administration Committee provide broadly for "[a]ny person claiming any rights or benefits under the Plan" to submit to the Committee a Request for a Decision ". . . concerning the administration, application, or interpretation of the Plan in his individual case. . . ." (Administration Committee Rules of Procedure, Rule II (1).) Once a Decision is rendered by the Committee, it is transmitted to the Requestor and to ". . . any other party who may have become identified to, and accepted by, the Committee as a person with an interest in the Decision. . . ." (Administration Committee Rules of Procedure, Rule II (6).)[12]

33. Rule VIII of the Administration Committee Rules of Procedure permits review of Decisions by the Committee, upon request, or at the Committee's own initiative, within ninety days. An Application for Review of a

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Ms. "S", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1995-1 (May 5, 1995).)

[11]GAO No. 31, Section 4.03 (iii) expressly excludes from the Grievance Committee's jurisdiction decisions arising under the Staff Retirement Plan that are within the competence of the Administration or Pension Committees of the Plan.

Under Section 7.2 (b) of the SRP, the Administration Committee is charged, *inter alia,* with:

> ". . . the exclusive right to interpret the Plan; to determine whether any person is or was a staff member, participant, or retired participant; to direct the employer to make disbursements from the Retirement Fund in payment of benefits under the Plan; to determine whether any person has a right to any benefit hereunder and, if so, the amount thereof; and to determine any question arising hereunder in connection with the administration of the Plan or its application to any person claiming any rights or benefits hereunder, and its decision or action in respect thereof shall be conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of the Administrative Tribunal."

[12]Alternatively, the Administration Committee may refer to the Pension Committee any Request which raises a matter of a general policy nature arising under the Plan or any other matter required to be decided by the Pension Committee under the provisions of the Plan, or which raises questions that the Administration Committee determines should be decided by the Pension Committee. (Administration Committee Rules of Procedure, Rule V.)

Decision may be submitted by the original Requestor or by ". . any other person claiming any rights or benefits under the Plan, who wishes to dispute a Decision. . . . " (Administration Committee Rules of Procedure, Rule VIII (1).) The Administration Committee must notify the applicant for review of the results thereof, within three months of the application for review. (Administration Committee Rules of Procedure, Rule VIII (4).)

34. Rule X of the Administration Committee Rules of Procedure sets forth the requirements for the exhaustion of the administrative review procedures provided by that Committee, for purposes of filing an application with the Administrative Tribunal:

> "1. The channel of administrative review for a Request submitted to the Committee shall be deemed to have been exhausted for the purpose of filing an application with the Administrative Tribunal of the Fund when, in compliance with Article V of the Statute of the Administrative Tribunal (Statute):
>
> (a) three months have elapsed since an Application for review of a Decision was submitted to the Committee in accordance with Rule VIII, paragraph 1 and the results of the review have not been notified to the Applicant; or
>
> (b) the Committee has notified the Applicant of the results of any review of a Decision, or its decision to decline to review a Decision; or
>
> (c) the conditions set out in Article V, Section 3(c) of the Statute have been met.
>
> 2. The channel of administrative review for:
>
> (a) a Request or a Decision referred by the Committee to the Pension Committee for decision in accordance with Rule V; or
>
> (b) a matter otherwise before the Pension Committee for decision, shall not be deemed to have been exhausted until a decision has been made by the Pension Committee and notified to the Requestor or a person otherwise seeking the decision. If a Request is referred back by the Pension Committee to the Committee for decision, in accordance with Rule V, paragraph 3, then Rule X, paragraph 1 shall apply."

(Administration Committee Rules of Procedure, Rule X.)

35. The requirements of Rule X of the Administration Committee Rules of Procedure parallel those of Article V, Section 3 of the Statute of the Administrative Tribunal, and must be read in conjunction with that statutory language:

"ARTICLE V

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

2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

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

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

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

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

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

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

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

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

(Statute of the Administrative Tribunal, Article V.) (Emphasis supplied.)

36. Additionally, in considering the exhaustion of administrative review in this case, it is necessary to refer not only to the general requirements of the Administration Committee's Rules of Procedure but also to the specific requirements of the Committee's 1999 Rules Under Section 11.3 of the Staff

Retirement Plan, under which this claim arises.[13] These Rules were notified to the staff by Staff Bulletin No. 99/12 (June 8, 1999) shortly before the promulgation of the Committee's Rules of Procedure. They provide for a spouse or former spouse of an SRP participant (or retired participant) to request the Administration Committee to give effect to a court order requiring that spouse or child support payments or division of marital property be made from SRP benefits that otherwise would be payable to the participant.[14]

37. Specifically, the Administration Committee's Rules Under Section 11.3 of the Staff Retirement Plan provide that in the event that the SRP participant fails to make a direction to the Plan pursuant to the relevant court order within thirty working days of its issuance, the spouse or former spouse who is party to the order may submit a Request directly to the Administration Committee to give effect to that order. The participant is thereafter notified of the Request and permitted thirty working days in which either to consent or object to the Request. (1999 Rules of the Administration Committee Under Section 11.3 of the Staff Retirement Plan, 1(b).)

38. In the case of Mr. "P", the relevant court order, the Maryland Judgment of Absolute Divorce, was dated February 11, 2000 and entered by the Clerk of the Court on March 2, 2000. That order states, in relevant part:

> ". . . the Plaintiff [Ms. "Q"] shall be entitled to a continuing share of the Defendant's [Mr. "P"'s] ongoing pension entitlement in the amount of 50% of the marital portion (56%) of all monies due the Defendant under his retirement annuity from the International Monetary Fund, plus a proportionate share of all cost of living supplements. . . ."

39. On March 9, 2000, Ms. "Q" submitted her Request to the Administration Committee to give effect to the order, pursuant to Section 11.3 of the Staff Retirement Plan. On April 10, 2000, the Secretary of the Administration Committee notified Mr. "P", through counsel, of Ms. "Q"'s Request, permitting him thirty working days in which to file his consent or objection

[13]These Rules and the evolution of the IMF's policy with respect to giving effect to domestic relations orders are considered in greater detail *infra*.

[14]The basis for these Rules is the 1999 amendment of Section 11.3 of the SRP to provide in part:

> "In the event that a participant or retired participant fails to submit a timely written direction in compliance with the court order or decree to the Secretary of the Administration Committee, under such rules and conditions of acceptance as are prescribed by the Administration Committee, a spouse or former spouse of a participant or retired participant who is a party to the court order or decree may request that the Administration Committee give effect to such court order or decree and treat the request in the same manner as if it were a direction from a participant or a retired participant."

to the request. Mr. "P", by counsel, replied on May 15, 2000, opposing the Request.

40. Although neither the Rules of the Administration Committee Under Section 11.3 of the SRP nor the Committee's Rules of Procedure would appear to provide for subsequent pleadings, on June 15, 2000 Ms. "Q"'s counsel filed a Response to Mr. "P"'s May 15, 2000 submission, and on July 10, 2001 Mr. "P"'s counsel replied thereto.

41. As the Fund has informed the Tribunal, the Administration Committee examined the arguments of both parties, and also consulted with an Egyptian lawyer as to the validity of the Egyptian divorce and with the Fund's Legal Department regarding the regularity of the Maryland Judgment. The resulting Decision of the Committee was issued on July 27, 2000 in a letter to Mr. "P"'s attorney, which was copied to Mr. "P", Ms. "Q", and Ms. "Q"'s attorney. That Decision provides in pertinent part:

> "Under the Rules, the Committee will not resolve questions where there is a bona fide dispute about the efficacy, finality or meaning of an order or decree and activation of a request and associated payment may be suspended until such dispute or ambiguity is settled. Under Section 11.3 of the SRP and the Rules, the Committee may withhold payments pending resolution of a dispute regarding payments under the SRP and deposit such payments in the Bank-Fund Staff Federal Credit Union in an interest bearing account until entitlement to payment is resolved.
>
> Accordingly, the Committee has decided to withhold from Mr. ["P"]'s early retirement pension the payments claimed by Ms. ["Q"] (28%) and to deposit such payments in escrow until such time as the dispute over entitlement to the payments is satisfactorily resolved. In this connection the Committee encourages the parties to come to a mutual agreement upon which the Committee can take action."

42. Thereafter, on September 27, 2000, Mr. "P" filed an Application for Review of the Administration Committee's Decision. Mr. "P"'s Application for Review by the Administration Committee of its initial Decision was made expressly pursuant to Rule VIII of the Administration Committee's Rules of Procedure, as no right of review is provided within the terms of the Committee's Rules Under Section 11.3 of the SRP. Filing of the Application for Review in the Administration Committee was a necessary predicate to the exhaustion of administrative review prerequisite to the admissibility of the Application in the Administrative Tribunal. (Ms. "Q" apparently took no action to request review of the Decision of the Administration Committee, which, while resulting in placing in escrow a portion of Mr. "P"'s pension

payments, also failed to grant her Request for the Administration Committee to give effect to the Maryland Judgment.)[15]

43. On November 30, 2000, the Administration Committee informed Mr. "P" that it found no basis to reverse its Decision of July 27, 2000, holding, accordingly, that the withholding of the disputed portion of the pension would continue ". . . until this matter has been resolved by the agreement of parties, or otherwise." Additionally, the Committee's letter informed Mr. "P" of his right to file an Application with the Administrative Tribunal within three months of the notification. (The letter was copied as well to Ms. "Q" and counsel.)

44. Mr. "P" filed his Application in the Administrative Tribunal on February 28, 2001.

Summary of Parties' Principal Contentions

Applicant's principal contentions

45. Applicant's principal arguments as presented in the Application and Reply, as well as in additional pleadings, are summarized below.

Applicant's contentions on the merits

1. The Rules of the Administration Committee of the SRP under §11.3 do not authorize the escrow of pension payments in the circumstances of this case.

2. Rule 1(b) of the Rules of the Administration Committee presumes a foreseeable conclusion to the controversy between the parties, and therefore is not applicable here.

3. The Egyptian divorce, which was granted prior to the Maryland Judgment of Absolute Divorce, was final and legal, and was entitled to recognition under the principles of comity applied by Maryland courts. The Maryland court, therefore, was without subject matter jurisdiction to enter its Judgment of February 11, 2000, as no valid marriage existed at that time.

4. Under Maryland law, the Egyptian divorce is presumed valid absent evidence to the contrary. There can be no showing that the Egyptian

[15]Ms. "Q"'s failure to request review in the Administration Committee does not affect her right to participate in the Tribunal's proceedings as an Intervenor. *See infra.*

divorce, involving two Egyptian nationals, was invalid for lack of jurisdiction, violation of due process, or otherwise offending public policy. Ms. "Q" was served in the Egyptian divorce action at her domicile in Egypt and her abode in Maryland. Her attorney also received service of process on her behalf at her office in Maryland.

5. Under Egyptian conflict-of-law rules (Egyptian Civil Code, Arts. 12 and 13), the effects of the marriage, including the patrimonial effects, and the consequences of its termination are subject to the law of nationality, i.e. Egyptian law.

6. As Egyptian law mandates a total patrimonial separation of assets between the spouses throughout the marriage and thereafter, Ms. "Q" could not be entitled to claim any rights to Mr. "P"'s pension.

Applicant's contentions opposing the admissibility of the Application for Intervention

1. Applicant for Intervention lacks standing to intervene. That Ms. "Q" has a right that may be affected by the Judgment to be given by the Tribunal is an insufficient basis for intervention.

2. Whatever rights Ms. "Q" claims to have by virtue of the Maryland Court's Judgment of Absolute Divorce are legal claims that will have to be resolved by the courts, not the International Monetary Fund.

3. The Articles of Agreement of the International Monetary Fund, as well as the International Organizations Immunities Act, 22 U.S.C. §288 et seq., provide the IMF and its assets immunity from judicial process. Therefore, Ms. "Q"'s remedy, if any, must be found under an express waiver of immunity by the Fund.

Respondent's principal contentions

46. Respondent's principal arguments as presented in the Answer and Rejoinder, as well as in additional pleadings, are summarized below.

Respondent's contentions on the merits

1. The Administration Committee of the SRP acted properly and in accordance with its Rules in deciding to withhold and place in escrow a portion of Applicant's pension benefits.

2. The Committee properly decided that a bona fide dispute existed as to the application, interpretation, effectiveness, finality or validity of the

court order which it had been asked to enforce. The Administration Committee followed a reasonable process by obtaining an opinion from Egyptian legal counsel, advising that the Egyptian divorce was valid under Egyptian law, and relying upon the Fund's Legal Department that the Maryland Judgment was in order and consistent with the Plan's provisions and Rules.

3. The legality of the Committee's action would be subject to challenge only if it could be shown that the Committee improperly determined that a bona fide dispute existed.

4. Section 11.3 of the SRP and the Administration Committee's Rules thereunder are valid and legal. They reflect a balancing of the Fund's interest in the equitable treatment of staff of different nationalities with its interest in ensuring that staff (and former staff) not use the organization's immunities to avoid personal legal obligations.

5. Placing the disputed amounts in escrow is intended to protect the rights of both parties, who must resolve the dispute between themselves or through the courts.

6. As an international organization, the Fund may not favor the legal system of one member country over another. There are no universally accepted principles for resolving conflicts such as the one presented in this case.

7. The underlying conflict of laws issue is not appropriate for resolution by the Administration Committee of the SRP and need not be reached by the Administrative Tribunal.

Respondent's contentions opposing the admissibility of the Application for Intervention

1. Ms. "Q" is not a staff member;[16] nor is she an enrollee in, or beneficiary under, the SRP. Therefore, she is not a person to whom the Tribunal is open under Article II, Section 1 of the Statute and, as such, is not a member of the class of persons who are permitted to intervene under Rule XIV of the Tribunal's Rules of Procedure.

2. The provision of Section 11.3 of SRP that permits a spouse or former spouse of an SRP participant to request that a court order be given effect does not create any rights or interests in the SRP, as it specifically provides that "[a] direction or accepted request or payment incident

[16] *See infra*.

thereto shall not convey to any person an interest in the Retirement Fund of the Plan or give any elective rights under the Plan to such person." (Section 11.3.) Ms. "Q" has no beneficial interest in or rights under the Plan; rather, she is in the position of a creditor vis-à-vis Mr. "P".

3. While the Application for Intervention should be denied, Ms. "Q" should be allowed to submit her views to the Tribunal as an *amicus curiæ*, pursuant to Rule XV of the Tribunal's Rules of Procedure, as these views are relevant to the Tribunal's consideration of the Application.

Intervenor's principal contentions

47. Intervenor's principal arguments as set forth in the Application for Intervention and additional pleadings are summarized below.

Intervenor's contentions on the merits

1. The Maryland Judgment, entitling Ms. "Q" to a portion of Mr. "P"'s pension, is valid and should be given effect immediately.

2. The Maryland Court properly rejected the argument that principles of comity divested the Maryland Court of subject matter jurisdiction.

3. The Maryland Court specifically found that, in the circumstances of the case, it continued to have jurisdiction to grant a final divorce and to order relief concerning the disposition of marital property. The action was filed in 1997 and Mr. "P" participated in the proceedings in Maryland until he left the country in July 1998, while Ms. "Q" has continued to be domiciled in Maryland throughout.

4. The Maryland Court further found that even had a final divorce been obtained abroad by Mr. "P", under Maryland Family Law §8-212 and §11-1105, the Maryland Court would continue to have authority to enter orders concerning the disposition of marital property and support.

5. The Maryland Court properly obtained jurisdiction over Mr. "P", who actively participated in the litigation until July 1998, thereby submitting himself to the Court's jurisdiction.

6. By contrast, the Egyptian divorce would not be binding under principles of comity, as there was no personal jurisdiction over Ms. "Q" in the Egyptian action. Ms. "Q" has no domicile in Egypt. Nor did she receive service in Maryland or via her counsel. The Egyptian divorce offends the public policy of Maryland.

7. The Egyptian action did not involve the exercise of jurisdiction over Ms. "Q" or over any property of the parties, including the IMF pension. As it does not purport to deal with support or marital property issues, the Egyptian action, on its face, is not in conflict with the Maryland Judgment.

8. Prior to his marriage to Ms. "Q", Mr. "P" was divorced by decree of a Virginia court from his first wife, who was also an Egyptian national.

Intervenor's contentions in support of the admissibility of her Application for Intervention

1. Ms. "Q" has a right which may be affected by the Judgment to be given by the Tribunal.

2. Ms. "Q" is a person to whom the Tribunal is open under Article II, Section 1 of the Statute, as the core issue before the Tribunal is that, by order of the Maryland Court, she is a beneficiary of a portion of monthly pension payments from the Fund's SRP.

The Application for Intervention

48. During the pendency of the proceedings, the President of the Administrative Tribunal, pursuant to Rule XIV, para. 3 of the Rules of Procedure, and in consultation with the other members of the Tribunal, decided (for reasons set forth below) to admit the Application for Intervention filed in this case by Applicant's former spouse, Ms. "Q". Mr. "P" had filed an Opposition to the admissibility of Ms. "Q"'s Application for Intervention. The Fund also had opposed Ms. "Q"'s Application for Intervention, suggesting that instead Ms. "Q" should be invited to communicate her views to the Tribunal as *amicus curiæ*.

49. Intervention in the Administrative Tribunal is governed by Article X of the Tribunal's Statute and Rule XIV of the Rules of Procedure. Article X, Section 2(b) provides for "intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment."[17] Hence, there are two statutory requirements for intervention. First, the inter-

[17]These requirements for intervention in the IMFAT mirror those found in the statutes and rules of procedure of other international administrative tribunals. *See, e.g.*, AsDBAT Statute Art. VI (2) (d); AsDBAT Rules of Procedure, Rule 18; AfDBAT Statute, Art. IX (2) (c); AfDBAT Rules of Procedure, Rule XVII; ILOAT Statute Art. X (c); ILOAT Rules of Procedure, Article 13 (1); UNAT Statute Art. 6 (1) (d); UNAT Rules of Procedure, Art. 19; WBAT Statute Art. VII (2) (d); WBAT Rules of Procedure, Rule 19.

venor must be a person who is within the Tribunal's jurisdiction *ratione personæ*. Second, the intervenor must have a right that may be affected by the judgment to be given by the Tribunal. Both of these statutory requirements are re-affirmed in Rule XIV, para. 1 of the Tribunal's Rules of Procedure.[18]

50. It should be noted that the requirements for intervention are distinct from those for *amicus curiæ*, by which "[t]he Tribunal may, at its discretion, permit any persons, including the duly authorized representatives of the Staff Association, to communicate their views to the Tribunal."[19] (Emphasis supplied.) While an intervenor, once an application for intervention has been granted, ". . . thereafter participate[s] in the proceedings as a party,"[20] an *amicus curiæ*, by contrast, does not.

The issue of whether Ms. "Q" is a person to whom the Tribunal is open under Article II, Section 1 of the Statute[21]

51. It is not disputed that Ms. "Q", having brought the Request in the Administration Committee to give effect to the Maryland Judgment, has

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Additionally, the Rules of Procedure of the IDBAT and the OASAT provide not only for intervention by persons to whom the Tribunal is open under its jurisdiction *rationae personæ*, but also provide that "[a]ny person whose rights might be affected by the judgment of the Tribunal may be called upon to intervene in the proceedings, either at the request of a party or on the initiative of the Tribunal." (IDBAT Rules of Procedure, Art. 28 (3).) In the OASAT this is known as "compulsory intervention." (*See* OASAT Rules of Procedure, Art. 45.)

[18]Rule XIV, para. 1 provides:

> "*Intervention*
>
> 1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal. Such person shall for that purpose draw up and file an application to intervene in accordance with the conditions laid down in this Rule."

[19]Rule XV.

[20]Rule XIV, para. 3.

[21]Subsequent to the Tribunal's decision to admit Ms. "Q" as an Intervenor in the case, she was appointed a "member of the staff" of the Fund. As such, she is indisputably a person to whom the Tribunal is open under Article II, Section 1 of the Statute. Nonetheless, at the time that the issue of the admissibility of the Application for Intervention was before the Tribunal, the question was whether the Tribunal was open to a non-staff member spouse (or former spouse) of an SRP participant (or retired participant) who had been adversely affected by the Administration Committee's Decision regarding the effect to be given to a domestic relations order.

Prior to her appointment to the staff, Ms. "Q" had served as a contractual employee of the Fund. Contractual employees are not encompassed by the IMFAT's jurisdiction *ratione personæ. (Mr. "A", Applicant v. International Monetary Fund, Respondent,* Judgment No. 1999-1 (August 12, 1999).)

interests that may be affected by the judgment of the Tribunal. Therefore, the admissibility of the Application for Intervention turned solely upon whether Ms. "Q" fell within the jurisdiction *ratione personæ* of the Administrative Tribunal.[22] The question is identical to the question of whether Ms. "Q" could herself have filed an Application with the Tribunal contesting the Decision of the Administration Committee. Hence, it raises the important issue of whether the amendment of Section 11.3 of the SRP, granting rights to spouses and former spouses of SRP participants to request the Fund to give effect to domestic relations orders, provides a parallel right of review of such decisions of the Administration Committee in the Administrative Tribunal, in the case in which the decision of the Committee is adverse to the former spouse but not to the SRP participant.[23]

52. Article II, Section 1 of the Statute of the Administrative Tribunal prescribes the Tribunal's jurisdiction *ratione personæ* as follows:

> ***"ARTICLE II***
>
> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
>
> b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant."

53. Ms. "Q" contended in support of her Application for Intervention that she was a person to whom the Tribunal is open under Article II, Section 1 of the Statute because the issue before the Tribunal is her claim, by virtue of the Maryland divorce Judgment, to be a beneficiary under the Staff Retirement Plan.

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[22]It should be noted that, consistent with the practice of other international administrative tribunals, there is no requirement in the IMFAT's Statute or Rules of Procedure that an Applicant for Intervention must have exhausted channels of administrative review. (*See generally* C.F. Amerasinghe, *The Law of the International Civil Service,* Vol. I (2nd ed. 1994), pp. 593–594; *In re Haas,* ILOAT Judgment No. 473 (1982), p. 4; *Ferdinand P. Mesch and Robert Y. Siy (No. 3) v. Asian Development Bank,* AsDBAT Decision No. 18 (1996), paras. 40–41.)

[23]In this case, the decision, placing in escrow a portion of Applicant's pension payments, is adverse to the SRP participant as well as to the former spouse, and hence it has not escaped review by the Administrative Tribunal. The only issue as to admissibility is whether the former spouse may participate as a party to the proceedings in the Tribunal.

54. The Fund, by contrast, took the position that Ms. "Q" did not have standing under Article II, Section 1 of the Statute because she was neither a staff member,[24] nor an enrollee in or beneficiary under the SRP. In the Fund's view, the wording of Section 11.3 of the SRP precludes Ms. "Q" from being regarded as a "beneficiary" under the SRP because it provides that:

> "A direction or accepted request or payment incident thereto shall not convey to any person an interest in the Retirement Fund of the Plan or give any elective rights under the Plan to such person."

(Section 11.3, SRP.) Hence, argued the Fund, Ms. "Q"'s position is that of a creditor vis-à-vis Mr. "P" and not that of an owner of an interest in the Retirement Fund or of a beneficiary under the SRP. Having "no beneficial interest in or rights under the Plan," contended the Fund, Ms. "Q" does not fall within the scope of Article II, Section 1(b) of the Tribunal's Statute.

55. Mr. "P", in his Opposition, did not address directly the question of whether Ms. "Q" is a person to whom the Tribunal is open under Article II, Section 1; nonetheless, he stated that Ms. "Q" lacked standing to intervene because having a right that may be affected by the Tribunal's Judgment is "an insufficient basis" for intervention. In addition, Applicant contended that any interest Ms. "Q" may have should be resolved by the courts and that any remedy she might seek would have to be found under an express waiver of immunity by the International Monetary Fund.

The issue of whether Ms. "Q" is a "beneficiary" under the SRP for purposes of Article II, Section 1 of the Statute of the Administrative Tribunal

56. The essence of the Fund's opposition to the admissibility of the Application for Intervention was its contention, based upon language in Section 11.3 of the SRP, that a person receiving benefits under the Plan as the result of a direction or accepted request under that Section is not a "beneficiary" under the Plan. The question presented was whether the terms of the SRP preclude the Tribunal from exercising jurisdiction over Ms. "Q" as ". . . an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant." (Statute, Article II, Section 1 (b).)

[24] *See supra.*

57. The Administrative Tribunal recently had occasion to examine the reach of its jurisdiction *ratione personæ* with respect to non-staff members challenging decisions under the Fund's benefit plans. In *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), the Tribunal exercised jurisdiction over a successor in interest to a non-staff enrollee in the Fund's Medical Benefits Plan. As the category of interest represented by the Estate of Mr. "D" is not one provided for expressly by the language of the Statute,[25] the Tribunal looked to the published Commentary on the Statute, which explains the intent of the jurisdictional provision as follows:

> "Section 1(b) sets forth the competence of the tribunal with respect to the retirement and other benefit plans maintained by the Fund, such as the Staff Retirement Plan (SRP), the Medical Benefits Plan (MBP), and the Group Life Insurance Plan.[footnote omitted.] *This provision would allow individuals who are not members of the staff but who have rights under these plans to bring claims before the tribunal concerning decisions taken under or with respect to the plan.* Such individuals would *include* beneficiaries under the SRP and nonstaff enrollees in the MBP, *for example*, a deceased staff member's widow who continues to participate in the MBP. Such individuals would, however, be entitled to assert claims only with respect to decisions arising under or concerning the Fund's retirement or benefit plans; they would not have the right to challenge other types of administrative acts before the tribunal."

(Report of the Executive Board, p. 13.) (Emphasis supplied.) (*See Estate of Mr. "D"*, para. 59.) Based on the Commentary, the Tribunal concluded that the examples provided of those persons covered by Section 1(b) were not meant to be exhaustive and that the structure of the Fund's benefit plans supported the view that successors in interest to non-staff enrollees were to be included within the Tribunal's jurisdiction. (*Estate of Mr. "D"*, para. 63.)

58. The Tribunal's conclusion in *Estate of Mr. "D"* is readily distinguishable from that reached in *Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999). In *Mr. "A"*, the Tribunal held, based on the Statute's legislative history, that exclusion of con-

[25]Article II, Section 2(c)(iii) of the Statute does provide for jurisdiction over a successor in interest to a "member of the staff." The Tribunal therefore considered ". . . whether that omission [of express jurisdiction over successors in interest to non-staff enrollees in Fund benefit plans] is an inadvertent vacuum in the ambit of jurisdictional terms or an intentional decision by the Statute's drafters that the interests of a staff member enrollee should survive that person's death but that the interests of a non-staff member enrollee should not," and found no basis to conclude that the exclusion was intentional. (*Estate of Mr. "D"*, para. 62.)

tractual employees from the Tribunal's jurisdiction *ratione personæ* was not only explicit, but intentional, reflecting a considered choice of the Statute's drafters. Furthermore, the terms of the Statute's jurisdictional provision expressly define "member of the staff" as "any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff" (Art. II, para. 1.a.) and Mr. "A"'s letter of appointment expressly stated that he would "not be a staff member of the Fund." (*Mr. "A"*, para. 61.)

59. The question raised by the present case was whether there is any language in the SRP that would preclude the Tribunal's exercise of jurisdiction over the Applicant for Intervention. As noted above, the Fund has argued that Section 11.3 of the SRP should be read to exclude from the Tribunal's jurisdiction *ratione personæ* persons such as Ms. "Q" because that provision states that acceptance of a Request to give effect to a domestic relations order does "not convey to any person an interest in the Retirement Fund of the Plan or give any elective rights under the Plan to such person."

60. However, nowhere in Section 11.3 is it stated that a person who receives benefits on the basis of a direction or accepted request under that Section is *not* a "beneficiary" under the Plan. While Section 11.3 does use the term "designee" to refer to such person, it also speaks of the "*benefit* payable to the spouse or former spouse" (emphasis supplied). Perhaps more importantly, the term "beneficiary" is not defined anywhere within the SRP Plan document.[26] The fact that such a person has no "elective rights" under the Plan is not dispositive, as such rights to election, for example, of an early retirement pension (Section 4.2), a reduced pension with a pension to a survivor (Section 4.6), or commutation of a portion of the pension to a lump sum payment (Section 15.1), are rights generally reserved only to SRP *participants* (or retired participants).[27] Hence, under the language of the Plan, the absence of "elective rights" does not preclude a person from being a "beneficiary."

61. Moreover, in interpreting the jurisdictional provision of the Statute of the Administrative Tribunal, the "elective rights" referred to by Section 11.3 are to be distinguished from "rights" under the Plan more generally, as referred to by the Statute's Commentary. The Tribunal in *Estate of Mr. "D"* emphasized that Article II, Section 1(b) of the Statute is designed to allow individuals who are not members of the staff, but who "have rights under

[26] *See* SRP, Article I—Definitions.

[27] One exception is election of the currency of payment, which is available to a survivor as well as to a retired participant. (SRP, Section 16.3.)

these [benefit] plans," to have their claims under these plans adjudicated by the Administrative Tribunal.[28] It cannot be disputed that Section 11.3 grants rights under the Plan to persons such as the Applicant for Intervention to request the Administration Committee to give effect to applicable domestic relations orders, and that the SRP's Administration Committee has created an administrative review procedure which is open to "any person claiming any rights or benefits under the Plan,"[29] a procedure which Ms. "Q" initiated with her Request to the Administration Committee to give effect to the Maryland Judgment.[30]

62. The parties have not raised the issue of whether it is necessary to examine the merits of Ms. "Q"'s claim under SRP Section 11.3 in order to decide the jurisdictional question of the admissibility of the Application for Intervention. In *Mr. "A"*, the IMFAT rejected the applicant's contention that it was necessary to examine the merits of the claim in order to decide the jurisdictional question of the admissibility of his application. While the Tribunal observed that there was jurisprudence in other international administrative tribunals to support the view that it may sometimes be necessary to examine the merits in order to decide a jurisdictional matter, it was not necessary to do so in the case of Mr. "A", given the express jurisdictional language of the applicable statutory provision and of applicant's contract of employment. (*Mr. "A"*, paras. 63–86, 100(6).)

63. In the present case, the question of the admissibility of the Application for Intervention was decided by the IMFAT President in consultation with the Associate Judges on the basis that Ms. "Q" is a person who has a right under the benefit plan in question. That right, as stated in SRP Section 11.3, is of a ". . . spouse or former spouse of a participant or retired participant who is a party to the court order or decree [to] request that the Administration Committee give effect to such court order or decree and treat the

[28]The jurisdictional provisions of the statutes of several other international administrative tribunals do not employ the term "beneficiary," but rather include ". . . any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan." (WBAT Statute, Art. II (3); AfDBAT Statute, Art. II (1) (ii). Another variation is UNAT Statute, Art. 13 (2) (b) which extends that tribunal's jurisdiction to "[a]ny other person who can show that he is entitled to rights under the regulations of the Pension Fund by virtue of the participation in the Fund of a staff member of such member organization."

[29]Administration Committee Rules of Procedure, Rule II (1).

[30]In *Estate of Mr. "D"*, the Tribunal took note of the importance of coordination between the jurisdiction of the Administrative Tribunal and the Fund's underlying administrative review procedures. (*See* para. 84, interpreting GAO No. 31 to afford Grievance Committee review to successors in interest to non-staff enrollees in the Fund's Medical Benefits Plan.)

request in the same manner as if it were a direction from a participant or a retired participant." (SRP, Section 11.3.)

64. It is also noted that the scope of the Administrative Tribunal's jurisdiction *ratione personæ* under Article II, Section (1)(b) is a narrow one, embodying a limitation on its jurisdiction *ratione materiæ* in such cases to challenges to administrative acts taken under the applicable benefit plan and adversely affecting the applicant.

65. Accordingly, the President of the Administrative Tribunal concluded that, consistent with the Statute's legislative history and the Tribunal's jurisprudence, the Applicant for Intervention was, for purposes of Article II, Section 1 of the Tribunal's Statute, a beneficiary under a Fund benefit plan, for purposes of challenging the legality of the Administration Committee's Decision on her Request to give effect to the Maryland order. Accordingly, Ms. "Q"'s Application for Intervention was granted.

Implementation of the requirement of Rule XIV, para. 3 that the Intervenor "participate in the proceedings as a party"

66. Ms. "Q"'s Application for Intervention having been granted, the Tribunal proceeded to implement the requirement of Rule XIV, para. 3 that an intervenor "participate in the proceedings as a party." The significance of the provision is twofold. First, by granting Ms. "Q"'s request to participate as a party, the Tribunal is able to adjudicate with finality her rights vis-à-vis the administrative act of the Fund that is the subject of Mr. "P"'s Application, i.e. the contested Decision of the Administration Committee. Second, from a procedural perspective, participation as a party has given Ms. "Q" the opportunity to engage in an exchange of pleadings with the other parties, providing her notice of the Applicant's and Respondent's respective arguments and an opportunity to respond to these arguments.[31]

67. The Tribunal considered how to implement the exchange of pleadings in light of the procedural posture of the case. The Rules of Procedure make

[31]It may be noted that the circumstances of this case are unusual inasmuch as an intervenor typically shares a similar factual and legal position to that of an applicant. (*See* C.F. Amerasinghe, *The Law of the International Civil Service,* Vol. I (2nd ed. 1994), p. 594.) In this case, both Mr. "P" and Ms. "Q" are adversely affected by the same administrative act of Respondent (a Decision by the Administration Committee of the SRP in which neither achieved the outcome he or she sought). Nonetheless, their interests on the merits (i.e. the resolution of the question of whether the Maryland Judgment should be given effect by the Administration Committee) are adverse to one another's.

no provision for suspension of the exchange of the pleadings on the merits while an application for intervention is pending. Therefore, in this case, at the conclusion of the period for submission of the parties' views on the admissibility of the Application for Intervention, only one pleading on the merits remained to be filed, i.e. Respondent's Rejoinder.

68. The Tribunal also considered that the procedure should take account of the fact that the Application for Intervention itself might be considered as an initial presentation of Ms. "Q"'s position on the merits, as the factual presentation and legal argumentation found in the Application for Intervention had not been limited to the issue of its admissibility. Therefore, the Application for Intervention might be regarded as analogous to Mr. "P"'s Application and the Fund's Answer. As Ms. "Q" had not, however, had an opportunity for a responsive pleading (analogous to the Reply of Applicant and the Rejoinder of Respondent), she was given thirty days from the notification of the admissibility of the Application for Intervention in which to file such a pleading, to address the pleadings on the merits filed by Applicant and Respondent.[32]

Consideration of the Issues of the Case

The Fund's Internal Law Regarding the Effect to be Given to Domestic Relations Orders

69. The case of *Mr. "P" (No. 2) v. IMF* arises under the Fund's revised policy, adopted in 1999, of giving effect, upon request of a spouse or former spouse of an SRP participant or retired participant, to a court order requiring that spouse or child support payments or the division of marital property be made from SRP benefits that otherwise would be payable to the participant. The evolution of the Fund's policy (and the policies of other international organizations headquartered in the United States) with regard to the effect to be given to local court orders arising from marital relationships has been significantly influenced in recent years by adverse publicity surrounding the failure of some international civil servants to comply with such orders and by the response that the United States Government has adopted.

[32]As noted *supra,* the President of the Administrative Tribunal, in the exceptional circumstances of the case, thereafter called upon the parties to submit Additional Statements under Rule XI of the Tribunal's Rules of Procedure.

The IMF's Immunity from Judicial Process

70. The problem of non-compliance by international civil servants with the domestic relations orders of local courts arises directly from the privileges and immunities of international organizations as provided, for example, in the IMF Articles of Agreement, and codified in the statutory law of the United States.

71. Article IX of the IMF Articles of Agreement provides in pertinent part:

> **"Article IX**
> **Status, Immunities, and Privileges**
>
> Section 1. *Purposes of Article*
>
> To enable the Fund to fulfill the functions with which it is entrusted, the status, immunities, and privileges set forth in this Article shall be accorded to the Fund in the territories of each member.
>
> Section 2. *Status of the Fund*
>
> The Fund shall possess full juridical personality, and in particular, the capacity:
>
> (i) to contract;
>
> (ii) to acquire and dispose of immovable and movable property; and
>
> (iii) to institute legal proceedings.
>
> Section 3. *Immunity from judicial process*
>
> The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.
>
> Section 4. *Immunity from other action*
>
> Property and assets of the Fund, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation, or any other form of seizure by executive or legislative action.
>
> Section. 5 *Immunity of archives*
>
> The archives of the Fund shall be inviolable.
>
> Section 6. *Freedom of assets from restrictions*
>
> To the extent necessary to carry out the activities provided for in this Agreement, all property and assets of the Fund shall be free from restrictions, regulations, controls, and moratoria of any nature.

> Section 7. *Privilege for communications*
>
> The official communications of the Fund shall be accorded by members the same treatment as the official communications of other members.
>
> . . .
>
> Section 10. *Application of Article*
>
> Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Fund of the detailed action which it has taken."

The Fund is also a Specialized Agency under the United Nations Convention on the Privileges and Immunities of the Specialized Agencies, which provides in similar terms for the privileges and immunities of those organizations.[33] Article VI, Section 23 of that Convention also provides:

> "Each specialized agency shall co-operate at all times with the appropriate authorities of member States to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuses in connexion with the privileges, immunities and facilities mentioned in this article."

72. Moreover, in the United States, the IMF is covered by the International Organizations Immunities Act, 22 U.S.C. § 288 et seq. ("IOIA"), which codifies under U.S. law recognition by the United States Government of the Fund's privileges and immunities. Section 288a provides in part:

> **"Sec. 288a. Privileges, exemptions, and immunities of international organizations**
>
> International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:
>
> . . .
>
> (b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.
>
> (c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such

[33] *See Selected Decisions and Selected Documents of the International Monetary Fund,* Eighteenth Issue, Washington, D.C., June 30, 1993, pp. 574–592.

> immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.
>
> . . . "

73. The United States Court of Appeals for the District of Columbia Circuit has upheld the immunity of international organizations under the IOIA in wage garnishment actions, *Atkinson v. Inter-American Development Bank*, 156 F. 3d 1335 (D.C. Cir. 1988), and the practice of the International Monetary Fund had been to decline to comply with such orders, based upon its immunity from judicial process. Furthermore, Section 9.1 of the Fund's Staff Retirement Plan provides that all contributions, assets, funds, and income of the Plan are the property of the IMF.[34]

74. As the IMF's immunities protect both the Organization and its retirement fund from judicial process, the Fund in recent years has taken alternative steps to provide mechanisms for giving effect to court orders arising from marital relationships, while at the same time preserving its immunities.

1995 Changes to the Staff Retirement Plan

75. In 1995, the IMF took an initial step toward revising its policy with respect to giving effect to domestic relations orders by amending Section 11.3 of the SRP to allow participants and retired participants—on a voluntary basis—to direct the Plan to make payments to spouses or former spouses pursuant to legal separation or divorce, as required by a court order or decree:

> "From June 1, 1995, the Plan will permit a participant or retired participant to make an irrevocable instruction to have the Plan pay a part of his or her pension benefits to a former spouse, provided that the instruction is made to satisfy the marital obligations of a divorce or legal separation, and that the sum to be paid represents an amount needed to meet alimony or support obligations, or to effect a division of assets relating to a divorce or legal separation."

[34]"**9.1** All the contributions made by the Employer and by participants pursuant to Article 6 hereof, and all other assets, funds, and income of the Plan, shall be transferred to and become the property of the Employer, and shall be held and administered by the Employer, separately from its other property and assets, as the Retirement Fund, solely for use in providing the benefits and paying the expenses of the Plan, and no part of the corpus or income of the Retirement Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of participants and retired participants or their beneficiaries under the Plan, prior to the satisfaction of all liabilities with respect to such participants, retired participants, and beneficiaries. No person shall have any interest in or right to any part of the Retirement Fund or of the earnings thereof or any rights in, or to, or under the Plan, or any part of the assets thereof, except as and to the extent expressly provided in the Plan." (SRP, Section 9.1.)

(Staff Bulletin No. 95/4 (March 16, 1995).) In May 1996, Rules of the Administration Committee under the amended Section 11.3 were notified to the staff. These Rules clarified that activation of a direction to the Plan was contingent on review of the applicable court order by the Fund's Legal Department to determine that it was "in order . . . and not inconsistent with the provisions of the Plan and the [Administration Committee's] Rules." (Rule 1(a), 1995 Rules of the Administration Committee under Section 11.3 of the Staff Retirement Plan.) The Administration Committee Rules also provided for suspension of both the direction and associated payment pending resolution of a dispute between the parties with respect to the court order or decree.[35]

76. It was under the 1995 amendment of SRP Section 11.3 and the associated Rules of the Administration Committee that Mr. "P"'s first case before the Administrative Tribunal had arisen.[36]

1998 Code of Conduct

77. In July 1998, the Fund issued a Code of Conduct governing current staff members, both in the workplace and externally. While addressing a wide variety of ethical matters, such as financial disclosure and clearance of publications, the Code of Conduct is explicit that it is a violation of the Code for a member of the staff to fail to comply with court-mandated spousal or child support obligations:

> **"II. Basic Standard of Conduct**
>
> . . .
>
> 8. The Fund respects the privacy of staff members and does not wish to interfere with their personal lives and behavior outside the workplace. However, the status of an international civil servant carries certain obligations as regards conduct, both at work and elsewhere. *The Fund attaches great importance to the observance of local laws by staff members, as well as the avoidance of actions that could be perceived as an abuse of the privileges and immunities conferred on the Fund and its staff, as the failure to do so would reflect adversely on the Fund. For example, staff members are expected to meet their*

[35]"1. (b) The Administration Committee will not (i) interpret agreements between spouses or former spouses, directions to pay or orders or decrees of courts in cases of ambiguity, or (ii) resolve questions where there is a *bona fide* dispute about the efficacy, finality or meaning of an order or decree. In these cases, activation of the direction and any associated payment may be suspended until such ambiguity or dispute shall have been settled."
(Rule 1(b), 1995 Rules of the Administration Committee Under Section 11.3 of the Staff Retirement Plan.)

[36]Order No. 1999-2 *(Mr. "P", Applicant v. International Monetary Fund, Respondent) (Mootness of Application)* (August 12, 1999).

> *private legal obligations to pay child support and alimony*, and to comply with applicable laws concerning the treatment of G-5 domestic employees, as this program is available as a special privilege for international organization personnel. The Fund would also be seriously concerned about notoriously disgraceful conduct by a staff member involving domestic violence or abuse of family members.
>
> 9. The Fund is not in a position to investigate allegations that a staff member has violated local law. However, if concerns about a staff member's behavior outside the workplace are brought to its attention by third parties, it is both appropriate and prudent that the staff member be informed about the matter. *It is not the Fund's role to determine whether local laws have been violated by a staff member, as that is for the domestic courts to decide. However, if the Fund receives a lawful order from a court or other governmental authority instructing it to withhold an amount of salary to be paid to a staff member to satisfy an outstanding legal obligation, the Fund will not allow the staff member to take undue advantage of the fact that it is immune from such orders.*"

(IMF Code of Conduct, p. 6.) (Emphasis supplied.)

> **"VII. Examples**
>
> **Basic standard of conduct**
>
> 1. *A staff member fails to pay his or her spousal or child support obligations, notwithstanding a court order to do so. Does this violate the Fund's standards of conduct?*
>
> Yes. Staff members may not take improper advantage of the fact that the Fund is not subject to mandatory wage garnishments in order to avoid such obligations."

(IMF Code of Conduct, p. 16.) (Italic in original.)

1998 Diplomatic Note of the United States Secretary of State

78. On July 8, 1998, the United States Secretary of State sent a Diplomatic Note to the IMF Managing Director and all of the other Chiefs of International Organizations designated under the International Organizations Immunities Act. The purpose of the Diplomatic Note, as set forth in a covering letter, was to seek the organizations'

> ". . . voluntary efforts to ensure that court-ordered child- and spouse-support payments involving employees of their organizations are made, and that employees are not permitted to use the organizations' immunity to shield themselves from their personal obligations."

The letter goes on to discuss the social responsibility of the organization to protect the welfare of the spouses and children of its staff members:

> ". . . the natural instinct to 'protect' the organization by invoking immunity may not serve *our greater interest in protecting the welfare of children and spouses who have been a part of the IMF community. Invoking immunity, if unaccompanied by measures which effectively address the difficulties that institutional immunity creates for spouses and children, is wrong.* I believe that the International Monetary Fund must be a model for the highest standards of social responsibility, and thus the means must be found to carry out the right and just course of action. Neither of us wants the International Monetary Fund to protect—or to be seen as protecting—individuals who refuse to provide for their children and former spouse."

(Letter from U.S. Secretary of State to IMF Managing Director, July 8, 1998.) (Emphasis supplied.)

79. The Diplomatic Note itself observed:

> ". . . it is highly inappropriate for international organizations to allow their privileges and immunities to be used by employees of the organizations to avoid meeting their court-ordered obligations to divorced spouses and dependent children. Recent cases drawn to the attention of the Department of State indicate that the practices and policies of some international organizations are not effective in ensuring prompt compliance with court orders in family separations and divorce proceedings involving employees of the organizations."

Therefore, continues the Note:

> "The Secretary of State requests that steps be taken promptly to ensure that all international organizations designated under the IOIA voluntarily provide court-ordered or subpoenaed information required to determine the salary and benefits of an employee involved in divorce and family law proceedings, and that all international organizations voluntarily take steps to enforce court-ordered payments to divorced spouses and dependent children."

The Diplomatic Note concludes by warning that:

> ". . . the perception that immunities are being used to avoid just financial obligations is likely to lead to the imposition of non-voluntary remedies which may result in either a diminution of privileges and immunities under the IOIA or protracted litigation, neither of which is in the best interest of the international organizations community."

(Diplomatic Note from U.S. Secretary of State to Chiefs of International Organizations designated under the International Organizations Immunities Act, July 8, 1998.)

1999 Revisions to the Fund's Internal Law

80. As a result of the mounting concern surrounding the issue, the IMF formed a working group to consider measures to address the problem of non-compliance with court orders arising from marital relationships.[37] By mid-1999, the Fund had adopted several significant changes to its internal law. For the first time, mechanisms were put into place to give effect to such orders, with regard to both current and former members of the staff, at the request of a spouse or former spouse of a staff member or retiree. It is under these 1999 revisions that the present case of Mr. "P" arises.

Staff Bulletin No. 99/11

81. On May 4, 1999, the Fund issued Staff Bulletin No. 99/11, announcing two changes in policy. First, under the new policy, the Fund will respond directly to court orders which seek information, in the context of divorce and child support proceedings, as to an employee or former employee's compensation, SRP benefits and beneficiaries. Second, at the request of a spouse or former spouse, the Fund will give effect to wage garnishment or withholding orders. In the latter case, the affected employee or former employee is given notice and an opportunity to object to the Fund's intention to give effect to the order.[38]

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[37] *See* Staff Bulletin No. 99/11 (May 4, 1999), p. 2.

[38] **"Requirements and Conditions for Giving Effect to Court Orders for Garnishment or Withholding from Wages for Spouse or Child Support**

. . .

3. The Fund employee in question will be given written notice and a copy of such request and will be given at least ten working days to object to the Fund complying with the request.
4. If the employee objects to the Fund giving effect to the court order, the employee may challenge the adequacy of the order for failure to meet the criteria set forth below:
   - The order resulted from proceedings in which (i) a reasonable method of notification was employed; (ii) a reasonable opportunity to be heard and to contest the proposed actions was afforded to the persons affected; and (iii) the judgment was rendered by a court of competent jurisdiction and in accordance with such requirements as were necessary for the valid exercise of power by the court.
   - The order was the product of fair proceedings.
   - The order is final and binding on the parties and not subject to or pending appeal.
   - The order does not conflict with and is not inconsistent with any other valid court order or decree.

A court order will be given effect unless the employee demonstrates that the court order does not satisfy the criteria set forth above, in which case the parties concerned will be notified in writing of the reasons for such determination."

(Staff Bulletin No. 99/11 (May 4, 1999), Attachment.)

82. In making these changes in policy, the Fund emphasized that the new procedures were being undertaken "voluntarily," and "without waiving [the Fund's] privileges and immunities."[39] The Staff Bulletin also referred to the Diplomatic Note of the U.S. Secretary of State and the background of the issues involved. Finally, the Staff Bulletin noted that while the Fund's Code of Conduct regulates current staff members, the new policies being announced would apply to retirees as well:

> "3. Please bear in mind that the Fund has always insisted that staff meet their legal obligations and comply with court orders. The standards of conduct required by the Fund are set out in the Rules and Regulations and in the Code of Conduct. [Footnote omitted.] The changes announced in this Bulletin simply reinforce the importance the Fund places on its **employees—both active and retired**—honoring their personal legal obligations and conducting themselves in a manner that does not reflect negatively on the Fund as an employer. Measures similar to those announced in this Bulletin have already been taken by the World Bank and are under consideration by several other international organizations."

(Staff Bulletin No. 99/11 (May 4, 1999, p. 1).) (Emphasis in original.)

Staff Bulletin No. 99/12—1999 Revision of SRP Section 11.3

83. In Staff Bulletin No. 99/12, the Fund announced changes to Section 11.3 of the Staff Retirement Plan approved by the Fund's Executive Board on May 26, 1999. The Staff Bulletin also attached new rules of the Administration Committee under the revised SRP Section 11.3. In notifying the staff of these changes, the Staff Bulletin emphasized that the new policy was designed specifically to address the problem of retired SRP participants who have moved out of the jurisdiction of the court that issued the applicable domestic relations order, and who, as former staff, are no longer governed by the Code of Conduct:

> "Under the previous provisions, a participant could avoid compliance with court orders that required spouse and child support to be paid from the participant's SRP benefits by simply not making a direction to the Plan. Because of the Fund's immunities, neither the Fund nor the SRP can be required to give effect to court orders with respect to any such payments to spouses or others. *Therefore, a participant subject to a court order could ignore the order and avoid its enforcement by moving outside the area where the court had jurisdiction or where its orders would be given effect. While the*

[39]Staff Bulletin No. 99/11, pp. 1, 2.

> *Fund can insist that serving staff members fulfill their personal legal obligations under the Fund's Rules and Regulations and Code of Conduct, the Fund has no comparable authority with respect to a retired participant who fails to comply with a court order."*

(Staff Bulletin No. 99/12 (June 9, 1999) p. 1.) (Emphasis supplied.)

84. The 1999 amendment of SRP Section 11.3 expands the reach of the 1995 revision by authorizing the SRP's Administration Committee to give effect to an applicable domestic relations order not solely upon the voluntary direction of the Plan participant but, alternatively, upon the request of the affected spouse or former spouse:

> "11.3 Notwithstanding the provisions set forth in Section 11.1, a participant or retired participant may, pursuant to a legal obligation arising from a marital relationship (which shall be understood to include an obligation to make child support payments) evidenced by an order of a court or by a settlement agreement incorporated into a divorce or separation decree, direct in writing to the Secretary of the Administration Committee that a benefit that would otherwise be payable to him during his life under the Plan be paid to one or more former spouses or a current spouse from whom there is a decree of legal separation.
>
> . . .
>
> In the event that a participant or retired participant fails to submit a timely written direction in compliance with the court order or decree to the Secretary of the Administration Committee, under such rules and conditions of acceptance as are prescribed by the Administration Committee, a spouse or former spouse of a participant or retired participant who is a party to the court order or decree may request that the Administration Committee give effect to such court order or decree and treat the request in the same manner as if it were a direction from a participant or a retired participant."

(SRP Section 11.3 (1999 Revision).)

Section 11.3 also authorizes the withholding of disputed amounts pending resolution of a dispute:

> "Pending the Administration Committee's consideration of such request or the resolution of a dispute between a participant or retired participant and the spouse or former spouse regarding payment of amounts payable under the Plan, the Administration Committee may withhold, in whole or in part, payments otherwise payable to the participant or retired participant or the spouse or former spouse."

(SRP Section 11.3 (1999 Revision).)

1999 Rules of the Administration Committee under SRP Section 11.3

85. The 1999 Rules of the Administration Committee under SRP Section 11.3 elaborate the procedures by which a court order for spousal or child support or division of marital property may be given effect at the request of a spouse or former spouse of an SRP participant or retired participant. These Rules provide for notice to the Plan participant and an opportunity to respond to the request:

> "The Secretary of the Administration Committee will give a participant or retired participant written notice of such a request from a spouse or former spouse. The participant or retired participant will be allowed, as the Administration Committee shall specify, at least thirty (30) working days either to consent or to object to the request, giving a full written explanation for any objection."

(1999 Rules of the Administration Committee under SRP Section 11.3 (Rule 1 (b)).)

86. Furthermore, the Rules also set forth four substantive criteria under which a court order is accorded a presumption of validity:

> "2. Unless a participant or retired participant, spouse or former spouse objects, the Administration Committee may presume that a court order or decree concerning the payment of amounts from the Staff Retirement Plan
>
> (A) is valid by reason that:
>
> (1) a reasonable method of notification has been employed and a reasonable opportunity to be heard has been afforded to the persons affected; and
>
> (2) the judgment has been rendered by a court of competent jurisdiction rendition [sic] and in accordance with such requirements of the state of as are necessary for the valid exercise of power by the court;
>
> (B) is the product of fair proceedings;
>
> (C) is final and binding on the parties; and
>
> (D) does not conflict and is not inconsistent with any other valid court order or decree."

(1999 Rules of the Administration Committee under SRP Section 11.3 (Rule 2).) In the case of an objection, the Committee will assess the adequacy of the court order by reference to the same criteria:

> "If a party objects to giving effect to a court order or decree, the Administration Committee will assess its adequacy based on the criteria listed in

> (A) through (D) in the preceding sentence. The Administration Committee will not review the court order or decree concerning the merits of the case and will not attempt to review the judgment of the court regarding the rights or equities between the parties."

(1999 Rules of the Administration Committee under SRP Section 11.3 (Rule 2).) Finally, the order will not be given effect if it fails to satisfy any of the stated criteria:

> "If the Administration Committee finds that the court order or decree does not satisfy any one or more of the criteria listed in (A) through (D) above, the parties will be notified of its conclusions and the order or decree will not be given effect unless and until the deficiencies are remedied. In addition, if there is an inconsistency or conflict under (D) above with the court order or decree that was the basis of a prior direction or accepted request, the Administration Committee will notify the parties that neither order or decree will be given effect unless and until the conflict or inconsistencies are resolved."

(1999 Rules of the Administration Committee under SRP Section 11.3 (Rule 2)).

87. Finally, the Rules place limitations on the Administration Committee's authority to act upon a request. The Committee will take no final action in the circumstance that there is a "bona fide dispute" regarding the validity of the court order in question, but may place in escrow the disputed amount:

> "If the Administration Committee is satisfied that there is a bona fide dispute as to the application, interpretation, effectiveness, finality or validity of the court order or decree, no action shall be taken on the request unless and until the matter is resolved to the satisfaction of the Administration Committee."

(1999 Rules of the Administration Committee under SRP Section 11.3 (Rule 1 (b)).)

> "(c) The Administration Committee will not (i) interpret agreements between spouses or former spouses, directions or accepted requests to pay or orders or decrees of courts in cases of ambiguity, or (ii) resolve questions where there is a *bona fide* dispute about the efficacy, finality or meaning of an order or decree. In these cases, activation of the direction or accepted request and any associated payment may be suspended until such ambiguity or dispute shall have been settled in the judgment of the Administration Committee."

(1999 Rules of the Administration Committee under SRP Section 11.3 (Rule 1 (c)).)

Issues of the Conflict of Laws Relevant to the Dispute

88. Underlying the dispute between the Applicant and Intervenor in this case are differing approaches to the law of divorce, and to choice of law, under the law of Egypt and the United States (State of Maryland). These differences and their consequences may be summarized as follows.

The Egyptian Divorce in the Context of Egyptian Law

89. On July 22, 1998, Mr. "P" obtained a "first revocable divorce" from Ms. "Q" by declaration before a religious notary in Egypt. Ms. "Q" was not present, nor did she have prior notice of the declaration. The divorce involved no provision for marital support or division of property.

90. The validity of such a divorce under Egyptian law is supported by the record before the Tribunal. According to the explanation of Egyptian law provided to the IMF Legal Department by a qualified Egyptian attorney,[40] a Moslem husband may unilaterally, and without the presence of or prior notice to the wife, effect a divorce by declaration before a religious notary:

> ". . . under Egyptian Law, a Moslem husband may divorce his wife by making declaration to this effect before a duly licensed Religious Notary in the presence of two witnesses notwithstanding wife being present or not. This means that the husband does not need to go to court in order to obtain a divorce order.
>
> . . .
>
> In other words, there had been no legal proceedings initiated with any court in Egypt, nor were such proceedings at all required, in order for the husband to obtain the divorce he seeks.
>
> . . .
>
> I reiterate that this is not a divorce judgment."

Access to divorce differs for a wife, who, by contrast, must bring a court action to effect a divorce, unless there has been an agreement otherwise in the contract of marriage.

91. The meaning of the term "first revocable divorce" is explained by the Egyptian attorney as follows. The husband has a two-month period in which, at his own prerogative, he may restore the marital relationship. Once the two-month period has elapsed, however, the divorce is considered final.

[40]Neither Applicant nor Intervenor has challenged the explanation of Egyptian law provided therein.

There is no dispute that in this case the two-month period has run without the marital relationship having been restored under Egyptian law, and that it had run before the entry of the Judgment of Absolute Divorce by the Maryland Court.

92. Egyptian law does not provide for mandatory division of property as a consequence of divorce. According to the explanation provided by the Egyptian lawyer, division of property could, however, be effected through an agreement made at the time of marriage. In the absence of such an agreement, the divorced wife would have the right to seek a court judgment for a deferred portion of the dowry as agreed in the certificate of marriage, as well as for "living support alimony" of one year, and for "enjoyment alimony" of two years. Apparently no such court action in Egypt, if available to her, was undertaken by Ms. "Q", who continued to pursue the divorce proceedings in Maryland.

93. As to the enforceability in Egypt of a U.S. court order for division of marital property, the Egyptian lawyer expressed the following view:

> "It is to be mentioned here that any U.S. Court judgment for a division of property between the spouses would *not* be enforceable in Egypt in connection with any of the husband's property located in Egypt as such judgment would be deemed inconsistent with Egypt's Public Policy."

(Emphasis in original.) Applicant has annexed to his Application an opinion by another Egyptian attorney who likewise asserts:

> "As an absolute rule of mandatory application under Egyptian Law, there is a total patrimonial separation of assets between the two spouses, throughout the period of marriage, and *a fortiori* after the coming to an end of the marital relationship."

94. It is also noted that, apparently in an effort to extinguish any possible claims of Ms. "Q" under Egyptian law as a result of the July 1998 divorce, Mr. "P" has filed a declaratory court action in Egypt ". . . requesting a ruling deciding the clearance of the claimant of any financial liabilities. . . . " According to information provided in Applicant's Additional Statement, that action is presently pending.

The Issue of Notice of the Egyptian Divorce

95. Considerable attention has been drawn by the parties in this case to the issue of what notice Ms. "Q" has had of the Egyptian divorce. This controversy must be understood in the context of the requirements of Egyptian law.

96. The Egyptian attorney advising the Fund emphasized:

> "The divorce declaration by the husband is documented in an official certificate (per form enclosed with your letter) to be duly signed by Notary, husband and the two witnesses. The Notary would then enter such divorce declaration into a special ledger kept for this purpose with the Court of Jurisdiction. Meantime, copy of such declaration is formally served on the divorced wife at the address stated by the husband, at his own responsibility, in the divorce certificate.
>
> . . .
>
> . . . no court proceedings did take place for consummating the divorce in question and, consequently, no need for serving notice has arisen."

Hence, notice is to be given to the wife ("at the address stated by the husband") only *after* the divorce has been declared by the husband. "Notice," in this sense, is not relevant to the issue of having an opportunity to be heard, as there are no adversary legal proceedings contemplated. Applicant confirms that a "proof of service" is ". . . required only for notification purposes and does not affect the legality or finality of the divorce."

97. Nonetheless, much has been made in the pleadings before the Administrative Tribunal of a factual dispute between Applicant and Intervenor as to whether Ms. "Q" ". . . was served or received notice of the Egyptian proceedings." Accordingly, Applicant has asserted:

> "Ms. ["Q"] was served in the Egyptian divorce action at her domicile in Egypt and at her abode in Maryland. Her attorney also received service of process on her behalf at her office in Maryland."

In addition, Applicant has attached documentation that the divorce certificate was delivered on August 30, 1998—more than a month after the declaration of divorce—to a neighbor of Ms. "Q" in Cairo who Applicant contends was authorized to receive it on Ms. "Q"'s behalf.

98. Ms. "Q" denies that she was served in Egypt or Maryland with documents relating to an Egyptian divorce proceeding:

> ". . . Ms. ["Q"] was not personally served with process in the purported Egyptian action and had no notice of any proceeding, and no opportunity to be heard there."

Likewise, Ms. "Q"'s counsel denies having received "service of process of an Egyptian proceeding involving Ms. ["Q"]."[41]

[41]It is not disputed, however, that Ms. "Q" and her counsel soon *after* the fact of the Egyptian divorce learned of its existence through the 1998 dispute before the SRP Administration Committee and the litigation pending in Maryland.

99. Underlying the dispute regarding "notice" of the Egyptian divorce is a dispute as to Ms. "Q"'s true domicile. Applicant contends that Ms. "Q"

> ". . . does maintain a domicile in Cairo, Egypt, ... A friend and neighbor, . . . , who lives in the same building, is authorized to collect Ms. ["Q"]'s mail, pay her utilities, and look after the apartment in her absence."

100. Ms. "Q", by contrast, maintains in a sworn statement attached to her Application for Intervention:

> "1. I am resident and domiciliary of the state of Maryland, and have been since August, 1989.
>
> 2. I do not maintain a domicile in Egypt.
>
> . . .
>
> 4. To the extent that an Affidavit submitted by Mr. ["P"] sets forth that I was informed of anything at my quarters in Egypt and/or served with any documents in Egypt, his assertions are absolutely untrue.
>
> . . .
>
> 6. I was not served with any documents relating to an Egyptian divorce proceeding at my abode in Maryland.
>
> 7. I did not appear at any divorce proceeding in Egypt.
>
> . . . "

101. As considered *infra*, the issues of notice and of domicile also have relevance with respect to the application of Maryland law.

Conflict of Laws Rules of Egypt

102. Applicant maintains, and it has not been disputed by the other parties, that the conflict of laws rules of Egypt support the validity in Egypt of the Egyptian divorce.[42] These conflict of laws rules, as set forth in the Egyptian Civil Code, provide as follows:

> *"Conflicts of laws as to place:*
>
> **Art. 10—**Egyptian law will rule to determine the nature of a legal relationship in order to ascertain the law applicable in the event of a conflict between various laws in any particular suit.

[42]Intervenor has noted in her Reply that several of the questions propounded by the Fund's Legal Department to the Egyptian attorney were not directly answered by him. These questions included ones designed to ascertain the effect with respect to the Egyptian divorce of ongoing divorce proceedings in the United States.

Art. 11—The status and the legal capacity of persons are governed by the law of the country to which they belong by reason of their nationality.[1] . . .

Art. 12—The fundamental conditions relating to the validity, of marriage are governed by the (national)[2] law of each of the two spouses.

Art. 13—The effects of marriage, including its effects upon the property of the spouses, are regulated by the law of the country to which the husband belongs at the time of the conclusion of the marriage.

Repudiation of marriage is governed by the law of the country to which the husband belongs[3] at the time of repudiation, whereas divorce and separation are governed by the law of the country to which the husband belongs at the time of the commencement of the legal proceedings.

Art. 14—If, in the cases provided for in the two preceding articles one of the two spouses is an Egyptian at the time of the conclusion of the marriage, Egyptian law alone shall apply except as regards the legal capacity to marry.

Art. 15—Obligations as regards payment of alimony to relatives are governed by the (national) law of the person liable for such payment.

. . .

1. The phrase 'law of the country to which they belong by reason of their nationality' is the literal translation of the Arabic text. The phrase used in the French official translation is 'their national law'.

2. Neither the word 'national' nor the words 'of the country to which the husband belongs' appear in the Arabic text. The word 'national' has however been inserted in the official French translation.

3. The phrase 'the law of the country to which the husband belongs' is the literal translation of the Arabic text. The words used in the French official translation are however 'the national law'."

(Egyptian Civil Code.)

103. Accordingly, Applicant maintains that both the marriage and divorce of July 1998 of Mr. "P" and Ms. "Q" are governed by the law of Egypt:

> "(C) . . . According to the explicit wording of Article 13, all the effects of the marriage, including the patrimonial effects, as well as the consequences of termination of the relationship are subject to the law of nationality, which is Egyptian Law.
>
> (D) As an absolute rule of mandatory application under Egyptian Law, there is a total patrimonial separation of assets between the two spouses, throughout the period of marriage, and *a fortiori* after the coming to an end of the marital relationship.
>
> (E) Consequently, within the context of the present case, [Ms. "Q"] could not be entitled, under Egyptian Law, to claim any rights on the sums of

money allocated by the International Monetary Fund as retirement pension to [Mr. "P"].

(F) The above-stated lack of standing to claim any rights on the pension payments [received] by [Mr. "P"] is clearly the rule in conformity with Egyptian Law which governs the relationship that existed with the former wife and which continues to prevail after the divorce which took place in July 1998.

(G) Whatever contrary decision emerges as a result of the 'Judgement of Absolute Divorce' rendered on February 11th, 2000, rendered by the Circuit Court of Montgomery County, Maryland, U.S.A., against [Mr. "P"] could not have any effect under Egyptian Law, as the Divorce already took place in July 1998 and the total separation of property rights between the two spouses represents the mandatory applicable rule."

The Maryland Divorce in the Context of Maryland Law

104. Unlike the Egyptian divorce, the Judgment of Absolute Divorce entered by the Montgomery County Circuit Court on March 2, 2000 was the product of adversary legal proceedings, initiated by the filing by Ms. "Q" of a Complaint for divorce. Mr. "P" participated fully in the court proceedings, filing pleadings and appearing at hearings, until he left the United States in July 1998.

105. The Maryland divorce judgment is based upon findings of fact made by a Domestic Relations Master who recommended the divorce be granted on the basis of the two-year separation of the parties. Consistent with Maryland law, the Domestic Relations Master assessed a series of factors in recommending the division of marital property to be ordered by the Court. These factors included: the contributions, monetary and non-monetary, of each party to the well-being of the family; the value of all property interests of each party; the economic circumstances of each party; the circumstances that contributed to the estrangement of the parties; the duration of the marriage; and the age, physical and mental condition of each party. Furthermore, consideration was given to how and when specific marital property, including Mr. "P"'s IMF pension entitlement, was acquired. As a result of this assessment, and consonant with Maryland's law of divorce, the Court ordered a monetary award to Ms. "Q" representing one-half of the total marital property (less the value of her personal property and one-half interest in an automobile); a continuing share (28%) of Mr. "P"'s IMF pension entitlement (an amount representing one-half of the amount of the pension earned during Mr. "P"'s marriage to Ms "Q"); survivor benefits under the pension attributable to the portion earned during the marriage; judgment

for the amount of *pendente lite* alimony payments that Mr. "P" had ceased to make after he left the country; and attorney's fees.

Conflict of Laws and the Maryland Court's Application of the Doctrine of Divisible Divorce

106. The Maryland Court, in entering the Judgment of Absolute Divorce, expressly considered the conflict of laws issue posed by Mr. "P"'s obtaining a divorce in Egypt during the pendency of the Maryland proceedings. The Court held, under Maryland law, that it retained jurisdiction to grant a divorce and to order a division of marital property on the grounds that Ms. "Q" had remained domiciled in Maryland and that there was no exercise of personal jurisdiction over Ms. "Q" by an Egyptian court in a divorce action:

> "3. The Defendant submitted to the Court, in connection with an earlier motion, a copy of what appears to be a certificate of 'a first revocable divorce' registered by a religious notary of the Maadi First Division, affiliated to the Maadi Court, Cairo, Egypt.
>
> The Plaintiff testified that she was not given any notification of divorce proceedings in Egypt, and did not participate in such proceedings.
>
> 4. The instant action was filed by the Plaintiff in 1997. The Defendant was properly served in the action while the parties both resided in the State of Maryland. The Defendant participated in the proceedings in Maryland until July 1998 when he left the United States. The Plaintiff has continued to be domiciled in the State of Maryland throughout.
>
> Under these facts, this Court continues to have jurisdiction to grant a final divorce to the Plaintiff, with all applicable relief concerning disposition of marital property. Even had a valid final divorce been obtained by the Defendant abroad, this Court would continue to have authority to enter appropriate orders concerning disposition of marital property under Family Law Article 8-212, Annotated Code of Maryland, and to resolve continuing questions of alimony under Section 11-105, Family Law Article, Annotated Code of Maryland."

(Report and Recommendations of the Family Division Master, January 31, 2000, pp. 1–2.)

107. The cited statutory provisions read as follows:

> **"§ 8-212. Exercise of powers after foreign divorce or annulment.**
>
> If an annulment or a divorce has been granted by a court in a foreign jurisdiction, a court in this State may exercise the powers under this subtitle if:
>
> (1) 1 of the parties was domiciled in this State when the foreign proceeding was commenced; and

(2) the court in the other jurisdiction lacked or did not exercise personal jurisdiction over the party domiciled in this State or jurisdiction over the property at issue. (CJ § 3-6A-02; 1984, ch. 296, § 2.)"

(Family Law Article, Subtitle 2 "Property Disposition in Annulment and Divorce," Maryland Annotated Code.)

"§ 11-105. Same—Following decree by another jurisdiction.

If an annulment or a limited or absolute divorce has been granted by a court in another jurisdiction, a court in this State may award alimony to either party if:

(1) the court in the other jurisdiction lacked or did not exercise personal jurisdiction over the party seeking alimony; and

(2) the party seeking alimony was domiciled in this State at least 1 year before the annulment or divorce was granted. (Ann. Code 1957, art. 16, § 1; 1984, ch. 296 § 2.)"

(Family Law Article, Maryland Annotated Code.)

108. These Maryland Code provisions represent a codification of the state law doctrine of "divisible divorce." The operation and rationale for this choice of law rule was described by the United States Supreme Court in *Estin v. Estin*, 334 U.S. 541 (1948).

109. The *Estin* case arose under the Full Faith and Credit Clause of the United States Constitution, which provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." With the adoption of the Constitution, the Full Faith and Credit Clause replaced the principles of comity that had governed relations between the States when they were independent sovereigns. The Full Faith and Credit Clause made mandatory the ". . . submission by one State even to hostile policies, reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it." *Estin*, 334 U.S. at 546. The question presented to the Supreme Court in *Estin* was whether, under the Full Faith and Credit Clause, the State of New York could continue to enforce a support and maintenance order incident to legal separation when subsequent to that order, the husband—having changed his domicile to Nevada—had obtained an ex parte divorce in that state and, under Nevada law, divorce extinguished an obligation for support.

110. The Supreme Court distinguished the *Estin* case from one in which a wife might be personally served or appear in the divorce proceedings in the other state. In *Estin*, the notice to the wife (who remained domiciled in New

York) of the Nevada proceedings was by publication ("constructive service") and she did not appear in the Nevada Court.

111. The Court in *Estin* at the same time reaffirmed an earlier decision, *Williams v. North Carolina*, 317 U.S. 287 (1942), in which it had held that a divorce decree granted by a state to one of its domiciliaries is entitled to full faith and credit in a bigamy prosecution in another state. (The Court noted that, in that case, it had held that the finding of domicile by the divorce-granting state is entitled to *prima facie* weight but is not conclusive in another state and may be relitigated there.) The holding in *Estin* is that even in circumstances in which a change in marital status of a domiciliary may be entitled to full faith and credit, the state in which a spouse receiving support remains domiciled may retain jurisdiction to enforce the support order earlier granted by its courts if that spouse did not participate in the divorce proceedings in the other state.

112. The Court explained its rationale in terms of the interests of the state in the welfare of its domiciliary:

> "In this case New York evinced a concern with this broken marriage when both parties were domiciled in New York and before Nevada had any concern with it. New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest. The New York court, having jurisdiction over both parties, undertook to protect her by granting her a judgment of permanent alimony. Nevada, however, apparently follows the rule that dissolution of the marriage puts an end to a support order. . . . But the question is whether Nevada could under any circumstances adjudicate rights of respondent under the New York judgment when she was not personally served or did not appear in the proceeding.
>
> . . .
>
> . . . we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding."[43]

Estin, 334 U.S. at 547, 548.

113. The Court concluded by articulating the rule of "divisible divorce":

> ". . . the fact that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected.

[43]This statement is in contrast with Egyptian Civil Code, Article 15: "Obligations as regards payment of alimony to relatives are governed by the (national) law of the person liable for such payment."

> . . . An absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests.
>
> . . .
>
> The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."

Estin, 334 U.S. at 545, 547. The Maryland Court's decision in the divorce action brought by Ms. "Q" against Mr. "P" reflects the policies underlying the Supreme Court's ruling in *Estin.*

Applicant's Argument that the Maryland Court Misapplied Maryland Law

114. Applicant has argued before the Administrative Tribunal that the Maryland Court misapplied Maryland law when it granted the Judgment of Absolute Divorce and ordered a division of marital property between the parties. In Applicant's view, the Maryland Court, applying principles of comity among nations, should have recognized the validity of the Egyptian divorce and on that basis should have held that it no longer retained jurisdiction as the parties were no longer married. Applicant's argument would appear either to overlook the statutory grounds upon which the Court rested its decision or to assert that those grounds were not applicable because—according to Applicant—Ms. "Q"'s domicile was Egypt and there was personal jurisdiction over Ms. "Q" with respect to the Egyptian divorce.

115. Intervenor contends that Maryland law, as embodied in the statutory provisions providing for divisibility of divorce, was properly applied by the Maryland Court in the circumstances of the case. Intervenor further asserts that, even in the absence of these statutory provisions, under principles of comity, the Egyptian divorce would not be entitled to recognition in Maryland because it offends the public policy of Maryland. Specifically, in the view of Intervenor, the Egyptian divorce was not the product of fair proceedings as Ms. "Q" did not have notice of and did not appear in a divorce proceeding in Egypt. Furthermore, the Egyptian divorce was effected after Mr. "P" had submitted himself to the jurisdiction of the Maryland Court

and later fled the United States while in contempt of an order of the Maryland Court and in contravention of his statements to the Court that he would not leave.

116. In support of his position, Mr. "P" cites the Maryland case of *Wolff v. Wolff*, 40 Md. App. 168, 389 A.2d 413 (1978), *affd*, 285 Md. 185, 401 A.2d 479 (1979). In *Wolff*, the Maryland Court of Special Appeals considered the jurisdiction of the trial court to entertain a suit for enforcement of the alimony provision of an English divorce decree and concluded that the decree ". . . may be entitled to recognition under general principles of comity." (389 A.2d at 418.)

117. The Maryland Court, however, in *Wolff* qualified its ruling as follows:

> "A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction."

Wolff, 389 A.2d at 418-19.

118. Two additional observations may be made concerning the *Wolff* case. First, the decision did not appear to involve an issue of any competing divorce decree. Second, in *Wolff*, the exercise of jurisdiction by the Maryland Court had the effect of supporting—rather than defeating—the award of marital support. Indeed, Maryland public policy favoring the enforcement of support orders was one basis for the court's decision:

> ". . . 'when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband,. . . courts of equity will interfere to prevent the decree from being defeated by fraud.'"

Wolff, 389 A.2d at 419–20, quoting *Barber v. Barber*, 62 U.S. 582, 690–91 (1858).

> "The fact that Maryland considers the obligation to pay alimony a duty, resting upon sound public policy, and not merely a debt collectible in an action at law, supports, we think, our holding that equity courts have jurisdiction to enforce the alimony provisions of foreign country decrees when such decrees are subject to recognition in this State."

Wolff, 389 A.2d at 421. Hence, the ruling in *Wolff* would seem to have little applicability in support of Applicant's argument that the Maryland Court misapplied Maryland law.

The issue of the Administrative Tribunal's authority to decide whether the Maryland Judgment should be given effect under Section 11.3 of the Staff Retirement Plan

119. An essential issue raised by this case is the Administrative Tribunal's authority to resolve on the merits the question of whether the Maryland Judgment of Absolute Divorce, awarding Ms. "Q" an ongoing share of Mr. "P"'s pension entitlement, should be given effect under SRP Section 11.3 and the Administration Committee's Rules thereunder. Respondent has argued in its Answer:

> ". . . the sole issues before this Tribunal are: first, whether the Committee acted properly and in accordance with the Rules in deciding to place into escrow a portion of Applicant's pension benefits; and second, whether the Rules which authorize the withholding of that portion of his pension benefits by the Fund are legal.
>
> The unresolved questions of family law concerning the conflicting divorce decrees which provide the underlying basis for the Committee's decision, and the resolution of a supra-national conflict of jurisdiction regarding the divorce decrees issued in Egypt and Maryland in divorce matters are not appropriate for resolution by the Committee, and need not be reached by the Tribunal in order to resolve the issues outlined above."

The Fund contends furthermore:

> "The legality of the Committee's action could only be challenged if it could be shown that the Committee improperly determined that a *bona fide* dispute existed."

By contrast, Applicant and Intervenor both seek a decision on the merits from the Tribunal, determining whether the Maryland Judgment should be given effect under SRP Section 11.3.

120. It must be noted at the outset that the IMF Administrative Tribunal, as it has observed in its jurisprudence,[44] is a tribunal of limited jurisdiction. Its authority is conferred exclusively by its Statute:

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

(Statute, Article III (first sentence).) The Administrative Tribunal's authority to pass upon the underlying question in this case, i.e. whether the Maryland

[44] *See Mr. "A" Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1999-1 (August 12, 1999), paras. 56–59, 96; *Mr. "V", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1999-2 (August 13, 1999), para. 110.

Judgment should be given effect under SRP Section 11.3, may be determined by reference to three statutory factors: the Tribunal's subject matter jurisdiction; its remedial authority; and the law that it is authorized to apply.

The Administrative Tribunal's Jurisdiction *Ratione Materiæ*

121. The Tribunal's jurisdiction *ratione materiæ* is prescribed as follows:

> ***"ARTICLE II***
>
> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
>
> b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.
>
> 2. For purposes of this Statute:
>
> a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;
>
> b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;
>
> . . . "

122. Hence, the subject matter jurisdiction, which the Administrative Tribunal clearly possesses, is limited to review of the legality of administrative acts. Accordingly, the authority of the Administrative Tribunal to resolve the underlying dispute in this case must be predicated upon a finding of error in the contested decision of the Administration Committee. If the Tribunal concludes that the Committee did not properly apply SRP Section 11.3 or the Rules thereunder, or that these regulations are themselves invalid, then the Tribunal would be authorized to invoke its remedial authority to correct the effects of the decision.

The Administrative Tribunal's Remedial Authority

123. The Tribunal's remedial powers are set forth in Article XIV of the Statute:

> ***"ARTICLE XIV***
>
> 1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescis-

sion of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain."

124. Article XIV, Section 1 authorizes the Tribunal to take all measures required to correct the effects of an erroneous decision.

The Law to be Applied by the Administrative Tribunal

125. The second sentence of Article III provides:

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

It is this statutory provision, prescribing the law to be applied by the Administrative Tribunal, that guides the Administrative Tribunal in determining whether the Administration Committee's decision should be rescinded.

The Character of the "Regulatory Decision"

126. The administrative act contested in this case is the decision of the SRP Administration Committee to place in escrow the disputed portion of Mr. "P"'s pension entitlement. While the focus of the dispute in the Tribunal is the legality of the "individual decision," Applicant also appears to challenge the legality of the underlying pension regulations, i.e. the "regulatory decision."

127. Applicant asserts that whatever rights Ms. "Q" claims to have by virtue of the Maryland divorce judgment are "legal claims which will have to be resolved by the courts," and that "Ms. ["Q"'s] remedy, if any, must be found under an express waiver [of immunity] of the IMF." Applicant thus puts into question whether Section 11.3 of the SRP, authorizing the Committee to give effect, under prescribed conditions, to local court orders, is legal under the applicable law of the Fund.[45]

128. Pursuant to Article III, the Administrative Tribunal must apply the internal law of the Fund in deciding on an application. The IMF Articles of Agreement are among the governing sources of the Fund's internal law to which the published Commentary on the Tribunal's Statute expressly refers.[46] Furthermore, the primacy of the Articles of Agreement in the Fund's internal law is referred to both in the Commentary and the text of the Statute of the Administrative Tribunal.[47] Accordingly, the legality of a regula-

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[45]As the Commentary on the Tribunal's Statute makes clear, it is ". . . the function of the tribunal, as a judicial body, to determine whether a decision transgressed the applicable law of the Fund." (Report of the Executive Board, p. 13.)

[46]"With respect to employment-related matters, the internal law of the Fund includes both formal, or written, sources (such as the Articles of Agreement, the By-Laws and Rules and Regulations, and the General Administrative Orders) and unwritten sources."
(Report of the Executive Board, pp. 16–17.)

[47]The Commentary observes:

> "With respect to formal sources of law, insofar as the Executive Board derives its authority from the Articles of Agreement, its decisions must be consistent with the Articles as a higher authority of law. Likewise, the Executive Board is also bound by resolutions of the Board of Governors as the highest organ of the Fund."

(Report of the Executive Board, p. 18.) Article III provides in part:

> "***Article III***
>
> . . .
>
> Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund. The Tribunal shall be bound by any interpretation of the Fund's Articles of Agreement decided by the Executive Board, subject to review by the Board of Governors in accordance with Article XXIX of that Agreement."

tory decision of the Fund may not be sustained if it is inconsistent with the higher authority of the Articles of Agreement.

129. As reviewed *supra*, Article IX, Section 3 of the Fund's Articles of Agreement provides for immunity from judicial process of the IMF and its retirement fund:

> "Section 3. *Immunity from judicial process*
>
> The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."

Applicant appears to argue that the policy embodied in SRP Section 11.3 and the Administration Committee Rules thereunder of giving effect to local court orders, without an express waiver of immunity, violates this provision. Applicant does not elaborate on this argument and the Fund has not expressly addressed it before the Tribunal. Nonetheless, the Fund, in documents explaining its decision to create mechanisms to give effect to court orders for family support and division of marital property, has asserted that such decisions are taken "voluntarily" and "without waiving [the Fund's] privileges and immunities." (Staff Bulletin No. 99/11, pp. 1, 2.)

130. This position is supported by the fact that Respondent, by SRP Section 11.3 and the Rules thereunder, does not subject itself to the jurisdiction of any court, nor does the Fund comply automatically with court orders. Instead, the Fund has incorporated into its internal law a policy of giving effect, on a case by case basis, to a particular type of court order. The order is given effect only after procedures are followed, within the Fund, allowing for consideration of the views of the affected parties. A decision is then rendered by the Administration Committee, subject to appeal to the Administrative Tribunal.

131. Applicant has not explained how the process employed under SRP Section 11.3 might contravene the Fund's immunities as prescribed in the Articles of Agreement or why an "express waiver" would be required to give effect to the policy. The policy, approved by the Fund's Executive Board in its authoritative interpretation of the Articles of Agreement, governs this Tribunal. In light of it, the Administrative Tribunal concludes that the "regulatory decision" does not violate the Articles of Agreement.

The Legality of the "Individual Decision"

132. The challenge to the legality of the individual decision may be stated as follows: Did the Administration Committee properly apply

SRP Section 11.3 and the Rules thereunder in the circumstances of the case?

133. Respondent has taken the view that the challenge to the individual decision is limited to the question of whether a bona fide dispute exists that would justify the withholding of the disputed amount. Applicant and Intervenor have argued, in effect, that the dispute is not "bona fide," inasmuch as each regards the other's position as without merit. Each contends that his or her viewpoint should prevail by proper application of the Rules.

134. In addition, Applicant raises other challenges to the legality of the individual decision. First, he contends that SRP Section 11.3 is not applicable to orders for division of marital property but only to support orders. Second, he challenges the legality, in the circumstances of the case, of the decision to hold the disputed portion in escrow when, in his view, there is no foreseeable resolution to the dispute between the parties. (Respondent has characterized this latter argument as a challenge to the "regulatory decision.")

Does SRP Section 11.3 apply to orders for the division of marital property?

135. Applicant has disputed the application of SRP Section 11.3 in the circumstances of the case on the ground that the Court Judgment that forms the basis of Ms. "Q"'s request to the Administration Committee is an order for the division of marital property rather than spousal support.

136. As Respondent has pointed out in its Additional Statement, it is clear from the terms of SRP Section 11.3 that the provision applies broadly to a "legal obligation arising from a marital relationship." (SRP Section 11.3.) Furthermore, specific references made in the text to the division of marital property reveal that the provision encompasses such orders:

> "The benefit payable to the spouse or former spouse shall not exceed: (1) 50 percent of the portion of the participant's or retired participant's benefit that is attributable to his eligible service during the couple's marriage whenever the obligation or obligations to which the court order or decree relates are for support of the spouse or former spouse or *division of marital property* or both, and (2) 66 2/3 percent of the benefit payable to the participant or retired participant whenever the obligation or obligations to which the court order or decree relates includes child support, provided, however, that the amounts payable as support of the spouse and *division of marital property* remain subject to the limits under (1), above, and any increase that exceeds those limits must be directly related to the amount of the child support portion of such court order or decree."

(SRP Section 11.3.) (Emphasis supplied.) (A similar reference is found in Rule 3 of the Rules of the Administration Committee under Section 11.3.)

137. The Administrative Tribunal accordingly concludes that Applicant's contention that SRP Section 11.3 applies only to support orders is without merit.

Did the Administration Committee act erroneously by withholding a portion of Applicant's pension entitlement in the circumstance that there is no foreseeable resolution of the dispute between the parties?

138. Applicant contends that a "reasonable interpretation of Rule 1(b) is that there must be a foreseeable conclusion to the controversy between the parties," and that as the foreseeability of such a conclusion "is certainly not the case here," the Rule is inapplicable in the circumstances of the case.[48] In response, the Fund has framed Applicant's argument as a challenge not only to the "individual decision" in the case of Mr. "P" but also to the underlying "regulatory decision."

139. It may be observed that the lack of foreseeability to the resolution of the dispute in this case is borne out by the record before the Tribunal, in which the parties have reported that there are no pending court proceedings that might bear upon the finality or validity of the Maryland Judgment. Hence, the only foreseeable resolution would be either through a negotiated settlement between the parties or by a decision on the merits by the Administrative Tribunal.

140. The Fund defends the legality of the Rules, and the underlying provision of SRP Section 11.3, on the basis that they ". . . place[ ] the onus on the parties to resolve what are essentially private, domestic disputes . . ." in the circumstance in which there are no universally accepted principles for resolving conflicts of law and jurisdiction. In the Fund's view, the Rules create an incentive for the parties to resolve the dispute between themselves while maintaining the Fund's neutrality vis-à-vis differing legal systems:

> "Contrary to Applicant's assertion, the Rule does admit of a foreseeable conclusion. However, that conclusion is one which must be agreed upon or pursued by the parties themselves, or resolved in the courts, without the intervention of the Fund as employer. Although it is understood that these matters may be difficult to resolve, the Rules are premised on the

[48]While Applicant refers to Rule 1(b), it is Rule 1(c) that authorizes suspension of a disputed payment ". . . until such . . . dispute shall have been settled in the judgment of the Administration Committee."

expectation that the financial interests of both parties in the disputed payments would provide sufficient motivation for them to reach agreement or compromise.

To do otherwise would require the Committee to give greater credence to either the Maryland or the Egyptian legal system, and would be inconsistent with the Fund's general principle of uniformity of treatment of its members. The approach reflected in Section 11.3 avoids the need for the Committee to act in a manner that is partial to any particular legal system or to one of the parties. Consistent with this objective, the withholding of the disputed portion of the pension benefits pending resolution of the dispute by the parties themselves maintains the neutrality of the Fund vis-à-vis a domestic law matter, maintains the status quo and is a prudent measure that avoids the Fund making payments that might be deemed inappropriate once the dispute is resolved."

141. At the same time, Section 7.2 (b) of the Staff Retirement Plan provides that decisions by the Administration Committee to determine *inter alia* whether any person has a right to any benefit under the Plan, and the amount thereof, are subject to review by the Administrative Tribunal:

"7.2 Administration Committee

. . .

(b) . . . Except as may be herein otherwise expressly provided, the Administration Committee shall have the exclusive right to interpret the Plan; to determine whether any person is or was a staff member, participant, or retired participant; to direct the employer to make disbursements from the Retirement Fund in payment of benefits under the Plan; to determine whether any person has a right to any benefit hereunder and, if so, the amount thereof; and to determine any question arising hereunder in connection with the administration of the Plan or its application to any person claiming any rights or benefits hereunder, and its decision or action in respect thereof shall be conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of the Administrative Tribunal. . . ."

Likewise, the Tribunal's Statute places review of such decisions within its jurisdiction *ratione materiæ*.[49] The significance of the Tribunal's appellate

[49]Article II 1(b) provides:

"***ARTICLE II***

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

. . .

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

authority is illustrated by the present case. Absent it, the Applicant and the Intervenor could find themselves indefinitely without third party remedy. Even if there were merit to the Applicant's contention that the Administration Committee acted erroneously in withholding when there was no foreseeable resolution of the dispute—a contention which is necessarily conjectural—that Objection can be overcome by recourse to this Tribunal.

Did the Administration Committee properly conclude that there exists a "bona fide dispute" under Rule 1(c)?

142. In Respondent's view, the fundamental question in this case is whether the Administration Committee was correct in determining that a bona fide dispute exists, under the applicable provisions of the Committee's Rules, so as to justify the Committee's decision to withhold the amount in dispute. Rule 1(c) provides:

> "(c) The Administration Committee will not (i) interpret agreements between spouses or former spouses, directions or accepted requests to pay or orders or decrees of courts in cases of ambiguity, or (ii) resolve questions where there is a *bona fide* dispute about the efficacy, finality or meaning of an order or decree. In these cases, activation of the direction or accepted request and any associated payment may be suspended until such ambiguity or dispute shall have been settled in the judgment of the Administration Committee."

143. Rule 2 of the Administration Committee Rules under SRP Section 11.3 directs that in the case of an objection to the giving effect to a court order or decree, the Committee will assess the adequacy of the order in light of four factors (A) through (D) to determine whether the order:

> "(A) is valid by reason that:
>
> (1) a reasonable method of notification has been employed and a reasonable opportunity to be heard has been afforded to the persons affected; and
>
> (2) the judgment has been rendered by a court of competent jurisdiction rendition [sic] and in accordance with such requirements of the state of as are necessary for the valid exercise of power by the court;
>
> (B) is the product of fair proceedings;
>
> (C) is final and binding on the parties; and
>
> (D) does not conflict and is not inconsistent with any other valid court order or decree."

In the absence of an objection, the presence of these factors affords a presumption of validity to the court order or decree. (Rule 2.) Apparently because it was not clear to the Committee whether the Maryland Judgment met the specified criteria in light of the objection raised by Mr. "P", it concluded that a bona fide dispute existed under the terms of Rule 1(c).

144. In reviewing the soundness of the Committee's decision, each factor must be considered in turn.

- "(A) is valid by reason that:
  (1) a reasonable method of notification has been employed and a reasonable opportunity to be heard has been afforded to the persons affected; and
  (2) the judgment has been rendered by a court of competent jurisdiction rendition [sic] and in accordance with such requirements of the state of as are necessary for the valid exercise of power by the court;"

The nub of the controversy between the parties is whether under Rule 2(A)(2) the Judgment that Ms. "Q" seeks to have given effect was rendered by a "court of competent jurisdiction." That a reasonable method of notification and a reasonable opportunity to be heard were employed by the Maryland Court has not been contested by Mr. "P". Intervenor has contrasted the adversary proceedings employed by the Maryland Court with the ex parte divorce declaration effected by Mr. "P" in Egypt.

- "(B) is the product of fair proceedings;"

It is not the fairness of the proceedings in Maryland that is at issue, but rather whether the Court had jurisdiction.

- "(C) is final and binding on the parties;"

The finality of the Maryland Judgment is supported by the fact that no appeal has been taken and both Applicant and Intervenor have averred to the Administrative Tribunal that no litigation is pending that would bear upon its validity. Whether or not the judgment is binding on the parties raises once more the question of the Court's jurisdiction.

- "(D) does not conflict and is not inconsistent with any other valid court order or decree."

The relevance of Rule 2(D) is unclear in the circumstances of the case. *Prima facie*, the Egyptian divorce represents a conflicting court order or decree. Intervenor has pointed out, however, that the Egyptian divorce is not, in terms, a court order or decree (although its validity may be equivalent thereto), and that the terms of the divorce do not reach the question of

the division of marital property. Moreover, the text of the Rule suggests that factor "D" relates to a court order or decree that formed the basis of a *prior direction or accepted request* under the Plan.[50] Certainly, the Egyptian divorce declaration is not such an order.

145. In the view of the Administrative Tribunal, the Administration Committee's decision that there exists a "bona fide dispute" as to the efficacy, finality or meaning of the Maryland Judgment, supporting its decision to maintain the disputed portion of the pension payment in escrow, was understandable. Nevertheless, for the reasons set forth below, the Tribunal has concluded that that decision was in error and must be rescinded.

146. Under its Statute, the Administrative Tribunal has no competence to pass upon the validity of municipal law as interpreted and applied by the legal authorities of either Maryland or Egypt.[51] Hence, whether the Maryland Court correctly applied Maryland law may be regarded as a question that only the Maryland courts are competent to answer. As no appeal has been taken, the Administrative Tribunal regards the Circuit Court decision as the prevailing statement of Maryland law under the circumstances of the case. Similar considerations apply to the validity of the Egyptian divorce.

147. The Tribunal accordingly must take as its starting point, supported by the record in this case, that the Maryland Judgment of Absolute Divorce is valid under Maryland law and that the Egyptian divorce as recorded by a religious notary and registered with Egyptian civil authorities is valid under Egyptian law.

148. The difficulty posed in this case is well articulated in the following commentary by a former senior legal advisor of the International Labour Organisation:

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[50]"... if there is an inconsistency or conflict under (D) above with the court order or decree that was the basis of a prior direction or accepted request, the Administration Committee will notify the parties that neither order or decree will be given effect unless and until the conflict or inconsistencies are resolved." (Rule 2).

[51]*See also Jean-Michel Verdier v. International Bank for Reconstruction and Development,* WBAT Order (May 15, 1998), para 6:

> "The request of the Applicant to the Tribunal thus to declare invalid his acceptance of the settlement of his claims necessarily involves his asking the Tribunal to review and to declare invalid the procedures followed, and the decisions made by the French judicial authorities in accordance with French law, with a view to protecting his interests. *This Tribunal manifestly has no jurisdiction to pass judgment upon the application of the provisions of the French "Code Civil" by the French judiciary.* The Tribunal, therefore, finds that the Request is clearly irreceivable and, consequently, must be summarily dismissed."

(Emphasis supplied.)

> "An alternative possibility is to accept any formal legal document issued by an authority competent for the purpose in the country of issue, or to do so at least unless or until the validity of such a document has been denied by the judgment of a court of the staff member's nationality or domicile, as the case may be. Such an approach—followed by a number of organizations—can be justified, on the one hand, by the respect owed by the organization to the legal institutions of all its Members and, on the other, by the lack of competence of the organization to review the acts of these institutions and their recognition, or otherwise, elsewhere. As an administrative arrangement, for such purposes as family allowances or travel, it probably corresponds to the current facts of the staff member's family situation and provides a practical solution. However, it would not seem to be a legal solution that could be applied by an administrative tribunal called upon to adjudicate on two conflicting claims to a pension;
>
> . . .
>
> In effect, there is not at present any generally valid solution to problems of family law as seen from an international 'forum'."

F. Morgenstern, *Legal Problems of International Organizations* (1986), pp. 44–45.

149. The problem may be particularly acute, Ms. Morgenstern points out, when ". . . the organization may be called upon to deal with legal situations in respect of which there exists a conflict of laws, without being able to draw upon rules reflecting a public policy of its own." (*Id*., p. 37.)

150. Such a situation may be distinguished from that before this Tribunal, in which a public policy of the organization has, indeed, been determined by the Managing Director with the approval of the Executive Board.

151. In seeking a reasoned solution to the issue posed in this case, within the framework of the Fund's internal law, the following factors may be weighed. The Fund's policy embodied in SRP Section 11.3, and the Rules of the Administration Committee thereunder, comports with the law of the host country. The underlying purpose of the policy is to encourage enforcement of orders for family support and division of marital property, and hence the policy favors legal systems in which such measures are recognized. The interest of the host country in the giving effect to orders rendered therein may be analogized, under the doctrine of "divisible divorce," to the interest of the forum in the welfare of its domiciliary.

152. Moreover, the Fund's internal law favors legal decisions that are the result of adversary proceedings, in which reasonable notice and the opportunity to be heard are the essential elements. Proceedings involving notice and hearing are expressly accorded a presumption of validity under

Rule 2 of the Administration Committee Rules under SRP Section 11.3. The Fund's internal law more generally, as articulated in the Commentary on the Tribunal's Statute, specifies that ". . . certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund." (Report of the Executive Board, p. 18.). The jurisprudence of the Administrative Tribunal has applied notice and hearing as essential principles of international administrative law. *See, e.g., Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 37; *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), paras. 116–128.

153. The Administrative Tribunal has weighed as well the following factors. Until July 1998, Mr. "P" had submitted himself to the jurisdiction of the Maryland Court to adjudicate the termination of his marriage to Ms. "Q". Having told the Maryland Court that he would not leave its jurisdiction, he summarily left for Egypt and declared a divorce from Ms. "Q", thereafter repudiating the jurisdiction of the Maryland Court. SRP Section 11.3, and the Administration Committee Rules thereunder, were expressly designed to apply to retired participants who have moved outside the jurisdiction of the court issuing the applicable order. (Staff Bulletin No. 99/12, p. 1.) As an element of its employment policy, the Fund may condition receipt of retirement benefits on compliance with valid orders for family support or division of marital property.

154. It is moreover important to recall that the Egyptian divorce contains no provisions governing the disposition of marital assets. Only the Maryland Court Judgment treats the division of marital property and it does so in clear and specific terms. The Maryland Court held that, even had a valid final divorce been obtained in Egypt, the Maryland Court would continue to have authority to issue orders concerning disposition of marital property under Maryland law, in the interest and welfare of a domiciliary of the State of Maryland. In that sense, it saw no conflict between the existence of the Egyptian divorce and the disposition of the case before it in accordance with Maryland law.

155. It is furthermore of cardinal importance to recall that the Maryland Court Judgment conformed to the criteria of enforceability set out in the internal law of the Fund, notably in Rule 2 of the Administration Committee's Rules under SRP Section 11.3.

156. In the light of these factors, the Administrative Tribunal concludes that the request of the Intervenor should have been given effect under the Staff Retirement Plan by the Administration Committee. In so concluding, the Administrative Tribunal does not enforce the law of Maryland and decline to enforce the law of Egypt. Its decision rather responds to what may be termed the public policy of its forum, namely, the internal law of the Fund.

157. The Tribunal notes the provisions of Article XIV, Section 4 of the Statute in respect of the discretionary award of reasonable costs to be borne by the Fund where an application is adjudged to be well-founded. In the circumstances of this case, the Tribunal rules that the Applicant, the Fund and the Intervenor shall bear their own legal costs.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

The decision of the Administration Committee placing in escrow the disputed portion of the pension of the Applicant is rescinded and the Respondent is directed to pay to the Intervenor the amount now held in escrow, including interest, and, in future, to pay to the Intervenor the proportion (28%) of the pension of the Applicant as requested by the Intervenor.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
November 20, 2001

JUDGMENT NO. 2002-1

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

(March 5, 2002)

Introduction

1. On March 4 and 5, 2002, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "R", a staff member of the Fund.

2. Applicant challenges as discriminatory the effect of Respondent's applying differing benefits policies to two categories of staff posted abroad (overseas Office Directors and Resident Representatives) in the case in which an overseas Office Director and a Resident Representative both serve in the same foreign city. Mr. "R" is the Director of the Joint Africa Institute (JAI),[1] located in Abidjan, Côte d'Ivoire, the only locality to which an overseas Office Director and a Resident Representative are both assigned by the Fund. Specifically, Mr. "R" contests the October 2, 2000 decision of Fund management which denied his requests for payment, on an exceptional basis, of 1) an overseas assignment allowance, and 2) an increased housing allowance commensurate with that afforded to the Resident Representative.

[1]In 1997, the Administrative Tribunal adopted the following policy with respect to the privacy of individuals, including applicants, referred to in the Tribunal's judgments:

> "1. In order to protect the privacy of the persons referred to in the text of the Tribunal's judgments, these persons shall be designated by acronyms; the departments and divisions of the Fund shall be referred to by numerals. However, the application of these procedures shall not prejudice the comprehensibility of the Tribunal's judgments."

IMFAT Decision on the protection of privacy and method of publication (December 23, 1997).

It is observed that in the case of Mr. "R", the basis of Applicant's complaint is found in the unique factual circumstances of the position he holds, hence, consistent with the Tribunal's policy that measures for protection of privacy ". . . shall not prejudice the comprehensibility of the Tribunal's judgments," it has not been possible to avoid reference to Mr. "R"'s position.

Mr. "R" seeks as relief the award of these benefits retroactive to his appointment as Director of the JAI.

The Procedure

3. On June 25, 2001, Mr. "R" filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on the following day, and on June 29, 2001, pursuant to Rule XIV, para. 4[2] of the Rules of Procedure, the Registrar issued a Summary of the Application within the Fund.

4. Respondent filed its Answer to Mr. "R"'s Application on August 10, 2001. Applicant submitted his Reply on September 7, 2001.[3] The Fund's Rejoinder was filed on October 15, 2001.

5. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.[4]

The Factual Background of the Case

The relevant facts may be summarized as follows.

6. Mr. "R", an economist, has been a staff member of the Fund since 1981. He was serving as a Fund Senior Resident Representative in Dakar, Senegal when on July 19, 1999 he was appointed to the post of Director of the Joint Africa Institute. The JAI, located in Abidjan, Côte d'Ivoire, is a joint undertaking of the IMF, World Bank and African Development Bank. Pursuant to the Memorandum of Understanding entered into between the three organi-

[2]Rule XIV, para. 4 provides:

> "4. In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund."

[3]On October 5, 2001, Applicant copied to the Registrar a memorandum that he had sent that day to the Fund's Director of Human Resources, notifying the Fund of information he allegedly learned after the filing of his Reply. That memorandum is the subject of comment in the Fund's Rejoinder. Hence, the Tribunal takes notice of this document, which has not formally been made a part of the record of the case.

[4]Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held ". . . if the Tribunal decides that such proceedings are necessary for the disposition of the case."

zations, the Director of the JAI is to rotate among these organizations every three years, with each organization being responsible for the compensation and benefits of its respective appointee. Mr. "R" is the first Director of the JAI.

7. According to Mr. "R", he learned on July 16, 1999 from one of the Fund's Deputy Managing Directors (an official who was soon to resign from the Fund), of his impending appointment as JAI Director. Mr. "R" reports that this Deputy Managing Director told Mr. "R" that he:

> ". . . should receive the same benefits as the resident representative posted in Abidjan did, because of (i) [Mr. "R"]'s current position as a Senior Resident Representative in Dakar, Senegal (1997–1999), (ii) the fact that the office director post in Abidjan was the first such post established by the IMF in a developing country, and, above all, (iii) the parallel presence in Abidjan of a Fund resident representative."

8. On July 19, 1999, the date of his appointment, Mr. "R" sent an e-mail to the Fund's Staff Benefits Division (copied to the same Deputy Managing Director, as well as to the Director and Assistant Director of the Human Resources Department), comparing benefits for a Resident Representative and the JAI Director in Abidjan. The e-mail stated ". . . I think an appropriate solution to the problem posed by the shown discrepancy would be that I keep receiving the benefits attached to the Resident Representative position."

9. On August 13, 1999, the Director of Human Resources wrote to the Fund's First Deputy Managing Director, seeking approval, on an exceptional basis, to pay a housing allowance to Mr. "R" that would fall outside of the approved housing allowance for staff assigned to overseas Offices. The request for exception was made ". . . in light of the unusual circumstances surrounding Mr. ["R"]'s appointment to this position," as he had previously been serving as a Resident Representative in Senegal. The Director of Human Resources noted that Resident Representative benefits are "substantially more generous" than the package offered to staff in overseas Offices ". . . in order to provide an incentive for staff to serve in conditions that are more difficult than overseas offices."

10. In recommending this exception to policy with respect to the housing allowance, the Director of Human Resources also informed the First Deputy Managing Director that she had advised Mr. "R" that Human Resources was prepared to seek a change in the benefits package to provide for payment of a hardship allowance to staff in overseas Offices. The hardship allowance was at that time applicable only to the Resident Representative program.

She noted that of the locations in which the Fund has overseas Offices, only Abidjan met the qualifications for a hardship location.

11. A week later, on August 20, 1999, Mr. "R" sent an e-mail to the Human Resources Director designed to ". . . take stock of the elements that could make it very difficult or even impossible for me to take up my job as the JAI Director notwithstanding the immense interest I find in it." Mr. "R" continued:

> "When, on July 19, 1999, **I accepted the Management's decision to appoint me** as the Director of the new JAI in Abidjan, Côte d'Ivoire, I was quite aware of the limitations of the benefits package for staff in overseas offices. However, I was confident that, before my departure to Abidjan, Management would approve measures that would increase the benefits for staff in offices to be located in countries where living conditions are difficult. My confidence was all the more justified because [of the former[5] Deputy Managing Director's statement]."

(Emphasis in original.) Mr. "R" concluded by requesting an early resolution of the matter, as he would ". . . have to make a final decision at the beginning of next week."

12. On August 24, 1999, the Human Resources Director informed Mr. "R" that a general review of benefits for overseas staff was currently being undertaken. Pending the outcome of that review, a hardship allowance was granted to Mr. "R" on a provisional, and exceptional, basis:

"• **It has been decided that the policy on allowances for overseas offices will be reviewed in the context of the review currently being undertaken of resident representative allowances**. The review of allowances for overseas offices will focus on the needs arising from overseas offices now being created also in developing countries. Particular issues to be reviewed include the housing allowance, security arrangements, and the payment of hardship allowances. This review is expected to be completed in about two months.

- **Pending the outcome of this review you will receive the hardship allowance applicable for the resident representatives in Abidjan.** This requires an exception to the policy on allowances for directors of overseas offices (which [the First Deputy Managing Director] approved).

- **In the event the review results in a net increase in financial and housing allowances for overseas offices, you will receive any adjustment**

[5]The Deputy Managing Director with whom Mr. "R" had communicated at the time of his appointment was, by this time, no longer employed by the Fund.

> **retroactively to the date you take up your appointment in Abidjan.** ([The First Deputy Managing Director] approved this in consultation with the Managing Director). In the case of housing, this would not exceed the **actual amount** of your housing costs for the period covered by the retroactivity."

(Emphasis in original.)

13. Mr. "R" took up his duties as JAI Director on September 20, 1999. More than a year elapsed before a final decision was taken by the First Deputy Managing Director on Applicant's requests for a) a hardship allowance on a permanent rather than provisional basis; b) an overseas assignment allowance, and; c) a housing allowance commensurate with that accorded the Fund's Resident Representative in Abidjan.

14. In the interim, the Fund's Human Resources Department completed an extensive review of the benefits policies applicable to the Resident Representative program. As part of that review, Respondent also compared Resident Representative benefits with the benefits applicable to staff employed in its overseas Offices, and addressed the issue raised by Mr. "R" in this case, i.e., any inequity presented by the posting of an overseas Office Director and a Resident Representative in the same location but with differing benefits:

> ". . . with the establishment of the Joint Africa Institute in Côte d'Ivoire in 1999, for the first time in its history the Fund is operating both an overseas office and a resident representative post in the same country. In itself, this does not in any way alter the intrinsic differences that continue to exist between the two operations and the job descriptions of the staff involved. Nevertheless, the co-existence of an overseas office and a resident representative post in the same country does raise the question of equity and parity of treatment.
>
> At the very least, equity considerations would suggest that all hardship-related benefits provided to resident representatives should also be extended to staff of overseas offices located in the same countries. . . ."

("Resident Representative Program: Review of Benefits and Incentives," February 18, 2000, pp. 41–42.) Accordingly, on September 2, 2000, Fund management approved the application of the hardship allowance to overseas Offices on the same basis as for Resident Representatives.

15. On October 2, 2000, Mr. "R" received a communication from the Chief of the Staff Benefits Division, advising him of the decision of the First Deputy Managing Director on his request for parity of benefits with the

Resident Representative in Abidjan. This decision 1) made permanent (and retroactive to his appointment as JAI Director) the provisional grant of a hardship allowance to Mr. "R", consistent with the change in policy applying this allowance to overseas Offices; but 2) denied Mr. "R"'s two other requests for (a) an overseas assignment allowance, and (b) an increased housing allowance. It is the denial of these latter two requests that Applicant challenges in the Administrative Tribunal.

The Channels of Administrative Review

16. In informing Mr. "R" of the denial of his requests for an overseas assignment allowance and an increased housing allowance, the Staff Benefits Division advised him that, as the decision was that of Fund management, Mr. "R" was not required to invoke administrative review procedures prior to contesting the decision in the Fund's Grievance Committee.[6] Mr. "R" submitted his Grievance on November 13, 2000.

17. Following a pre-hearing conference and an exchange of written submissions between Mr. "R" and the Fund, the Grievance Committee issued its Recommendation and Report on May 29, 2001. The Grievance Committee determined that it did not have jurisdiction to consider Mr. "R"'s Grievance, because, in the Committee's view, Mr. "R"'s complaint represented a challenge to a Fund policy rather than a challenge to the consistency of its application in an individual case; hence, it fell outside the category of cases that the Grievance Committee is empowered to decide.[7] By contrast, the

[6]GAO No. 31 provides in pertinent part:

"6.01.1 *Administrative Review.* The applicable channels of administrative review and the procedures to be followed are set forth below. A staff member shall not be required to pursue administrative remedies at any level subordinate to the level at which the challenged decision was taken, up to and including the level of the Director of Administration.

. . .

6.06 *Decisions Taken by Managing Director or Director of Administration.* With respect to any decision that was taken directly by the Director of Administration or by the Managing Director, or by the Managing Director's designee, the staff member may file a grievance with the Committee within six months after the challenged decision was made or communicated to the staff member, whichever is later."

[7]Section 4 of GAO No. 31 prescribes the Grievance Committee's jurisdiction as follows:

Section 4. Jurisdiction of the Grievance Committee

4.01 *Committee's Jurisdiction.* Subject to the limitations set forth at Section 4.03, the Grievance Committee shall have jurisdiction to hear any complaint brought by a staff member to the extent that the staff member contends that he or she has been

Administrative Tribunal is empowered by its Statute to consider challenges to "regulatory decisions" of the Fund.[8]

18. On June 25, 2001, Mr. "R" filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

19. The principal arguments presented by Applicant in his Application and Reply are summarized below.

1. Respondent's decision of October 2, 2000 upholds the discriminatory treatment of an Office Director vis-à-vis a Resident Representative posted in the same city.

2. The posting of an overseas Office Director and a Resident Representative in the same overseas city created an exceptional circumstance requiring exceptional treatment. Therefore, Applicant is entitled on an exceptional basis to the same benefits accorded to the Resident Representative.

3. Equity concerns were recognized by the Fund's Human Resources Department when it found that "at the very least" hardship-related benefits should be extended to overseas Office staff. However, these equity concerns have not been fully addressed through the hardship allowance.

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adversely affected by a decision that was *inconsistent with Fund regulations governing personnel and their conditions of service.*

. . .

4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to . . . (ii) staff regulations as approved by the Managing Director; . . ."

(Emphasis supplied.)

[8]Article II of the Tribunal's Statute provides in part:

"ARTICLE II

1. The Tribunal shall be competent to pass judgment upon any application:
   a. by a member of the staff challenging the legality of an administrative act adversely affecting him;

. . .

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

4. The risks and disadvantages attached to expatriation to developing countries are not compensated by the hardship allowance, especially in the case of Côte d'Ivoire, in which there are serious dangers resulting from violent unrest.

5. Although different, the role, responsibilities, and representation duties of the JAI Director are not inferior to or less risk-oriented than those of the Resident Representative in Abidjan.

6. The large financial disparity in compensation between the Office Director and Resident Representative in Abidjan cannot be justified in the case of two professional economist staff members working in the same conditions.

7. Applicant seeks as relief:

   a. retroactive to his appointment as JAI Director, the same overseas assignment allowance as received by the Resident Representative in Abidjan; and

   b. an increased housing allowance, for the past to cover actual housing costs incurred, and in future to allow Applicant to live in Abidjan with the same comfort and security as the Resident Representative.

Respondent's principal contentions

20. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1. As overseas Office Directors and Resident Representatives are not alike, the principle of equality has not been violated in maintaining differing benefits. Reasonable distinctions may be made between staff categories without violating the principle of equality of treatment. The Fund's benefits policy differentiates on the basis of sound business reasons between two categories of staff.

2. Applicant's position is not equal to a Resident Representative in functions, responsibility or standing. Moreover, different recruitment needs apply to the two positions. Coincidence of location should not be the predominant factor in the design of Office Directors' benefits.

3. The manner and extent to which particular factors are weighed for benefits purposes is a business decision within the discretion of the Fund. The Fund gave appropriate consideration to the fact that the Director of JAI would be posted in the same city as a Resident Representative.

4. In order for the Tribunal to substitute its judgment for that of the competent organs of the Fund in formulating employee benefits policy, the Tribunal would have to find that the Fund had no legitimate reason to provide different benefits packages to Office Directors and Resident Representatives.

5. The Fund's decision not to grant an exception in Applicant's case was not an abuse of discretion.

6. For the organization to provide an exception for one staff member raises questions of creation of precedent and broader applicability, which is tantamount to reformulation of the policy itself. Management decisions about making an exception to a valid policy should be accorded a high degree of deference.

7. Applicant is not entitled to exceptional treatment that would create a serious inequity between himself and other Office Directors.

Consideration of the Issues of the Case

"Regulatory decision" or "individual decision"

21. Article II of the Statute of the Administrative Tribunal sets forth the Tribunal's jurisdiction *ratione materiæ* as follows:

"ARTICLE II

1. The Tribunal shall be competent to pass judgment upon any application:
   a. by a member of the staff challenging the legality of an administrative act adversely affecting him; . . .
2. For purposes of this Statute:
   a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;
   b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund."

22. As the Commentary on the Statute explains:

"This definition is intended to encompass all decisions affecting the terms and conditions of employment at the Fund, whether related to a staff

> member's career, benefits, or other aspects of Fund appointment, including the staff regulations set forth in the N Rules. In order to invoke the jurisdiction of the tribunal, there would have to be a 'decision,' whether taken with respect to an individual or a broader class of staff, identified in the application filed by the staff member. . . .
>
> The statute makes explicit that the tribunal would have jurisdiction to review regulatory decisions, either directly or in the context of a review of an individual decision based on the regulatory decision. This would encompass, for example, Executive Board decisions regarding employment policy (such as adjustments to compensation, pensions, tax allowance, benefits, and job grading), the SRP, and staff rules and regulations promulgated by management, such as the General Administrative Orders."

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

23. In its Answer, Respondent contends that the only decision before the Tribunal for review is the "regulatory decision" by the Fund to maintain differing benefits packages for overseas Office Directors and Resident Representatives:

> ". . . the only decision at issue is the legality of the policy itself, under which the benefits package for an Office Director is not identical to that for a Resident Representative, even if the two are serving in the same city.
>
> . . . .
>
> Although this Tribunal has previously considered the legality of regulatory decisions in the context of challenges to individual decisions, [footnote omitted] this Application is *the first case in which the only issue before the Tribunal is the lawfulness of a regulatory decision*. More specifically, the issue before this Tribunal is whether a regulatory decision must be invalidated based on a claim of unjustifiably unequal treatment."

(Emphasis in original.)

24. Applicant, in his Reply, counters that he ". . . has never claimed that the Fund's benefits package for Office Directors violates the principle of equal treatment." Instead, Applicant focuses his challenge on what may be characterized as the "individual decision" in this case, i.e., the decision by Fund management not to grant his request for exception to the generally applicable policies:

> "Contrary to [the] Fund's statements, the Applicant is not challenging the validity of the Fund's benefit policy for overseas office staff and he is not claiming that the Fund has abused its discretion when it designed the benefits package for overseas office directors differently from that for resident representatives.

> What the Applicant is claiming is that, by way of exceptions to the Fund's benefits policy for overseas office staff, remedies must be brought to the inequitable and discriminatory treatment he has been subjected to. Abidjan, Côte d'Ivoire, is the only city in the world where a Fund Resident Representative and a Fund Overseas Office Director are posted simultaneously and have to live and work in identical surrounding conditions. Posting the JAI Director in Abidjan has created an unique, an **exceptional situation** that calls for an **exceptional treatment**, one that can be carried out by adapting to his case the hardship, housing, and overseas assignment allowances."

(Emphasis in original.)

25. It may be observed that in this case the "individual decision" and "regulatory decision" are essentially indistinguishable analytically, inasmuch as the decision taken not to grant Mr. "R" an exception to the policy may be said to be tantamount to upholding the validity of the policy itself.[9] Thus, it seems clear that an "individual decision" was taken on October 2, 2000, when management declined Applicant's request for exceptions to the benefits policy;[10] however, the content of that "individual decision" was to uphold the validity of the "regulatory decision" assigning differing benefits packages to different categories of staff. Hence, it is not possible to address the question posed expressly by Mr. "R"'s Application, i.e. whether the Fund abused its discretion in denying the requested exceptions, without also subjecting to review the benefits classification scheme itself. Therefore the "regulatory decision" to maintain the differing policies and the "individual decision" to deny Applicant an exception to these policies must be considered together.

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[9]It was apparently for this reason that the Grievance Committee concluded that it was without jurisdiction to consider Mr. "R"'s Grievance. As the Fund had rejected Mr. "R"'s request for exceptional treatment ". . . on the ground that it is inconsistent with Fund policy," it was the Grievance Committee's view that ". . . this grievance presents a challenge to the Fund's policy of maintaining different benefit packages for overseas Directors and RRs."

[10]It is noted as well that were this case to involve solely a challenge to a "regulatory decision," it would be subject to dismissal for being out of time, an argument that Respondent has not made. On the other hand, if a "regulatory decision" is challenged in the context of an "individual decision", its timeliness is determined by the date that administrative review of the individual decision has been exhausted. Article VI para. 2 provides:

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

The differing benefits policies applicable to overseas Office Directors and Resident Representatives

26. Fund staff members serving abroad fall into two categories for purposes of employment benefits, those who serve in the overseas Offices and those serving under the Resident Representative program. The Fund maintains seven "overseas" offices: a) the four information and liaison offices (the Office in Europe (in Paris), the Office in Geneva, the Regional Office for Asia and the Pacific (in Tokyo), and the Fund's Office at United Nations Headquarters in New York City); and b) the three overseas training offices that fall organizationally under the IMF Institute (the Joint Vienna Institute, the Singapore Training Institute, and the JAI). According to Respondent, all of these Office Directors receive the same benefits package, due to the similarity of their responsibilities and functions.

27. At the same time, the Fund deploys 88 Resident Representatives at different locations throughout the developing world. The Resident Representatives work closely with country authorities, providing policy review and advice, and supporting the Fund's programs. The Resident Representatives receive a different benefits package than do the overseas Office Directors.

28. It is not disputed that Resident Representative benefits are "substantially more generous" than those afforded to overseas Office Directors. (Letter from Director of Human Resources to First Deputy Managing Director, August 13, 1999.) As Respondent's own benefits review revealed, using Abidjan as an example, ". . . it is evident that both the cash benefits and the non-cash benefits provided to the hypothetical resident representative at grade A14 are significantly greater than those provided to the hypothetical Director of the office at Grade B4." ("Resident Representative Program: Review of Benefits and Incentives," February 18, 2000, p. 25.) Applicant calculates the difference in his case to equal US$114,000 per annum. Respondent has not contested this calculation.

29. While a variety of employment benefits are offered both to overseas Office Directors and Resident Representatives, the two benefits in dispute in this case are the overseas assignment allowance and the housing allowance. The overseas assignment allowance, which is available solely under the Resident Representative program, is calculated at 30 percent of salary (capped at the mid-point of the B-1 salary range).[11] As for housing, in the case of a

[11]For assignments beginning on or after February 15, 2001, the allowance has been reduced to 20 percent of salary. (Fund's Intranet, "Benefits and Allowances for Resident Representatives.")

Resident Representative, the Fund provides furnished housing in the city of assignment. By contrast, the housing allowance for overseas Office Directors provides for the difference in housing costs between the duty station and Washington, D.C., and for the shipment of household items.

The principle of nondiscrimination

30. Article III of its Statute requires the Administrative Tribunal to apply the internal law of the Fund, ". . . including generally recognized principles of international administrative law concerning judicial review of administrative acts." It is a well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization.

31. In the *de Merode* case, the World Bank Administrative Tribunal, reviewing the exercise of legislative powers of the Bank in making changes to the terms or conditions of employment, enunciated the following standard:

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

(*de Merode*, WBAT Decision No. 1 (1981), para. 47.) (Emphasis supplied.)

32. That nondiscrimination is essential as well to the lawful exercise of the administrative functions of the organization is emphasized by the Commentary on the IMFAT Statute:

> ". . . with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown 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."

(Report of the Executive Board, p. 19.) (Emphasis supplied.) Hence, whether the decision in the present case is conceptualized as a regulatory decision

or an individual decision, it is subject to review on the ground of alleged unjustified discrimination.

33. At the same time, the Tribunal's duty to assure that the Fund's discretionary authority has been exercised consistently with the principle of nondiscrimination must be understood within the context of the deference that the law requires that international administrative tribunals accord to the exercise of managerial discretion, especially where matters implicating managerial expertise are at issue. As the Asian Development Bank Administrative Tribunal has observed:

> "The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed."

(*Carl Gene Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992), para. 12.)

34. In articulating a standard of review for individual decisions, the Commentary on the IMFAT Statute notes:

> "This principle [of the limited circumstances under which an act of managerial discretion may be overturned] is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility. [footnote omitted]"

(Report of the Executive Board, p. 19.) Likewise, the IMFAT has observed with respect to the grading of posts:

> "International administrative tribunals have regularly held that the assignment of grades to posts is an exercise of discretionary authority. Tribunals have been reluctant to interfere in the grading of posts, holding that the evaluation of the work to be done and the degree of responsibility involved, factors on which the grading depends, should be performed by persons trained to apply the relevant technical criteria. (*In re Dunand and Jacquemod*, ILOAT, 65th Session, Judgment No. 929, para. 5). They have substituted their own assessment or required that a new assessment be made only where the evaluation of a post was tainted by irregularity (*In re Garcia*, ILOAT, 51st Session, Judgment No. 591, paras. 3–4)."

(*Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 26.) More generally, the Commentary on the Statute states:

> ". . . judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred. [footnote omitted] Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions. [footnote omitted]"

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

35. In the case posed by Mr. "R", the Administrative Tribunal is required to resolve the tension between deference to administrative discretion and the need to assure that this discretion is exercised in a manner compatible with the principle of nondiscrimination. Discharge of this task may be illuminated by reference to the case-law on nondiscrimination.

36. Cases of alleged discrimination may arise in two distinct ways. First, a classification may expressly differentiate between two or more groups of staff members, giving rise to a charge of discrimination. Second, a policy, neutral on its face, may result in some kind of consequential differentiation between groups. This was the case for example in *de Merode*, WBAT Decision No. 1 (1981). In that case, the challenged policy emerged from changes in the organization's tax reimbursement system, changes that had a disproportionate financial impact upon U.S. nationals. The legislation was upheld on the basis that its objective had been nondiscriminatory and hence there had been no abuse of motive. This resolution of the case, based on the doctrine of *détournement de pouvoir*, has been termed "unusual, though significant."[12]

37. Perhaps more common are those cases in which an allegation of discrimination arises with respect to an outright distinction that has been drawn between categories of staff members. Such a distinction was the subject of review by this Tribunal in the *D'Aoust* case. The applicant had challenged the Fund's practice, in the setting of compensation, of truncating the weight given to prior experience at ten years for non-economists, while imposing no such limit on the recognition of prior experience when it came to setting the salaries of economists. The Tribunal upheld the practice in

[12]C.F. Amerasinghe, *The Law of the International Civil Service*, Vol. I (2nd ed. 1994), p. 323.

its application to Mr. D'Aoust,[13] as not violating the principle of equality of treatment:

> "As to the merits or demerits of the practice as applied to Mr. D'Aoust, the Tribunal finds that the Fund may not unreasonably favor economists in deciding upon the terms of staff employment since economics is at the heart of the Fund's mission. Thus when the Fund applied the so-called non-economist matrix to the determination of the salary of Mr. D'Aoust, cutting off the credit given to his prior experience at ten years, that of itself did not give rise to a cause of action against the Fund on the ground of inequality of treatment."

(*D'Aoust*, para. 29.) Hence, the Tribunal concluded that there was a reasonable basis, grounded in the Fund's mission, for the distinction drawn by the Fund between economist and non-economist staff in the discretionary act of setting compensation.

38. The conclusion reached by the IMFAT in *D'Aoust*, that there was a reasonable basis for the distinction at issue, has been drawn as well by other international administrative tribunals in reviewing allegations of discriminatory treatment. The World Bank Administrative Tribunal has articulated as a standard for review that for a classification to withstand a challenge based on inequality of treatment there must be a ". . . rational nexus between the classification of persons subject to the differential treatment and the objective of the classification." (*Maurice C. Mould v. International Bank for Reconstruction and Development*, WBAT Decision No. 210 (1999), para. 26.) It was this formulation that the World Bank Administrative Tribunal applied when it concluded as follows:

> "The Applicant also contends that the SRP [Staff Retirement Plan] discriminates against the Applicant's wife should he divorce her. The Tribunal notes that the SRP does provide for differential treatment between the divorced spouse and the surviving spouse. But differential treatment is not necessarily discriminatory if there is a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification. Here the objective is to provide for the needs

[13]The Tribunal held that it was authorized to review only the "individual decision" of the application of the contested practice to Mr. D'Aoust, because the practice was

> ". . . distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund. Rather, at the time that that practice was applied to Mr. D'Aoust, it was an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund."

(*D'Aoust*, para. 35.) Therefore, the practice did not, in the Tribunal's view, constitute a "regulatory decision" under the Statute.

> of persons who remain married to and dependent on the former staff member at the time of his death and as such the classification made by the SRP is not unreasonable. The Tribunal notes that the SRP does not treat differently beneficiaries who are in the same circumstances. There is thus no substance to this argument."

(*Mould*, para. 26.)

39. The International Labour Organisation Administrative Tribunal has phrased the principle of nondiscrimination as follows: ". . . for there to be a breach of equal treatment there must be different treatment of staff members who are in the same position in fact and in law." (*In re Vollering*, ILOAT Judgment No. 1194 (1992), para. 2.) Furthermore, the difference in circumstance must be one that the decision-maker "is free to take into account." (*Id.*)

40. In the *Vollering* case, the ILOAT upheld as nondiscriminatory the decision of the President of the European Patent Office (EPO) to grant special leave only to its German employees stationed at The Hague (but not to other nationalities at the same duty station) on the date of German reunification. (The EPO's two offices in Germany were closed by virtue of the declaration of a public holiday.) Non-German employees at The Hague alleged that the decision was discriminatory. The ILOAT rejected their claim as follows:

> "The case law says that for there to be breach of equal treatment there must be different treatment of staff members who are in the same position in fact and in law. In other words, equal treatment means that like facts require like treatment in law and different facts allow of different treatment. It follows that treatment may vary provided that it is a logical and reasonable outcome of the circumstances. The material question is therefore whether the difference in treatment of EPO staff at The Hague rested on any difference in factual circumstances that the President of the Office was free to take into account according to that criteria.
>
> . . . Reunification . . . was an important event for other nations too. Yet it was the Germans themselves who were most deeply concerned and indeed the historic importance of the occasion is seen in the declaration of 3 October as Germany's national day. German staff were therefore not in the same position of fact as staff of other nationalities."

(*Vollering*, at para. 2.)

41. In *In re Tarrab*, ILOAT Judgment No. 498 (1982), a case involving employment benefits, the ILOAT likewise upheld the differing treatment of different categories of staff on the ground that there was a rational basis for the distinction. In *Tarrab*, a Professional category official of the International Labour Office challenged as discriminatory the decision to increase the

family allowances of General Service category employees while Professional category allowances remained unchanged. This decision, claimed the applicant, resulted in a gross inequality between officials employed in the same organization and at the same duty station. (*Id*., para. B.)

42. The underlying benefits scheme at issue in *Tarrab* rested on a distinction between locally and non-locally recruited staff:

> "For G officials the criterion is the best prevailing local rates, which apply to salary and to all social benefits and which served as the basis for calculating the increase in the child allowances. For the salaries of the P category the criterion is the level of remuneration in the best paid national civil service."

(*Id*., para. C.) In upholding the challenged increase in family allowances applicable only to the General Service staff, the ILOAT cited the "incentive to recruitment" as a lawful reason for the difference:

> "There is a reason for the difference. G staff are recruited largely in Switzerland or neighbouring countries. It is therefore only right that as an incentive to recruitment their pay, including family allowances, should be in line with pay scales in Switzerland. Officials in other categories, however, may come from and be required to serve anywhere in the world. For them there is no reason to follow pay scales in Switzerland, and the ILO takes as its standard of comparison the best-paid national civil service. Consequently the allegation of unlawful discrimination fails."

(*Tarrab*, para. 1.)

43. While international administrative tribunals often have upheld the application of different benefits to different categories of staff as a non-discriminatory exercise of an organization's discretionary authority, such distinctions do not always pass muster. In *De Armas et al. v. Asian Development Bank*, AsDBAT Decision No. 39 (1998), the Asian Development Bank Administrative Tribunal considered an application brought by Filipino staff members alleging that they had been discriminated against on the basis of their nationality with respect to a series of employment benefits. The AsDBAT recast the claim as one not of discrimination on the basis of nationality but rather on the basis of expatriate v. non-expatriate status, and stated the principle of equality at issue as follows:

> "An expatriate staff member, i.e. one who serves outside his home country, is subject to some obvious disadvantages *vis-à-vis* a colleague who serves in his home country. On principle, the grant of compensatory benefits to the former does not constitute discrimination if such benefits are reasonably related and proportionate to those disadvantages. . . .

> The Tribunal will therefore examine the disputed benefits in that light: whether the 'expatriate benefits' are reasonable compensation for the disadvantages which expatriates experience. . . ."

(*De Armas*, paras. 33–34.)

44. Thus, the standard set forth in *De Armas* was that, to be upheld as nondiscriminatory, the expatriate benefits were required not only to be "reasonably related" to but also "proportionate" to the disadvantages of expatriation. This standard, it may be observed, subjects the decision under review to a relatively high degree of scrutiny. Accordingly, the AsDBAT proceeded to examine each of the benefits at issue, looking to the purported purposes of the contested policies and entertaining subtleties regarding their application.

45. For example, with respect to the *force majeure* protection program, the AsDBAT engaged in the following analysis. The *force majeure* protection program was an insurance program, provided only to expatriate staff, covering loss and damage to personal property caused by riots, nationalization and similar acts. The Bank sought to justify the limitation of this employment benefit to expatriates on the ground that the program was "carefully tailored" to protect those at greatest risk, asserting that it had drawn reasonable distinctions based on differences both in levels of risk and in capacity to recover losses:

> ". . . The Tribunal has therefore to consider the two factors on which—according to the pleadings—that distinction is sought to be justified: the *risk* of loss and damage, and the *capacity to recover* such loss and damage."

(*De Armas*, para. 85.) (Emphasis in original.) The Tribunal concluded:

> ". . . Thus both local and expatriate staff do have remedies, although they may differ in nature and efficacy. Indeed, the purpose of providing protection, in the nature of insurance, is precisely because existing legal remedies are inadequate or ineffective.
>
> . . . The Tribunal holds that since the benefit does not consist of a fixed allowance, but is in the nature of insurance, the Bank's liability to make payments will vary proportionately to the levels of risk and the capacity to recover loss and damage. Thus, all professional staff must be considered to be similarly circumstanced, and *force majeure* protection should have been afforded to local staff as well."

(*De Armas*, paras. 87–88.)

46. By contrast, also in *De Armas*, the AsDBAT upheld as nondiscriminatory a distinction in severance pay benefits between expatriate and nonexpatriate staff, while engaging in a similarly detailed examination of the

rationale underlying the contested distinction. The policy imposed a one-third reduction in the severance pay benefit in the case of a staff member remaining in the duty station. The non-expatriate applicants in *De Armas* contended that because the amount of severance pay, under the Bank's regulations, is directly related to length of service, it represents remuneration for loyal service and any diminution based on the place of retirement is discriminatory. The Bank, on the other hand, argued that the purpose of severance pay is not to reward service but to facilitate retirement. The Tribunal, in deciding the matter, expressly adopted the Bank's reasoning, rather than casting the decision in terms of deference to the organization's proper exercise of discretionary authority:

> "The Tribunal holds that severance pay—although its amount is based on length of service—is not a reward for service, but a payment towards the expenses of re-settlement; that it is a legitimate assumption that a staff member who resettles outside the duty station will incur greater expense than a colleague who remains in the duty station; and that it is not discriminatory to grant a smaller allowance to the latter."

(*De Armas*, para. 92.)

Has Respondent abused its discretion by maintaining differing benefits policies applicable to two categories of Fund staff posted abroad, overseas Office Directors and Resident Representatives, with respect to a) overseas assignment allowance, and b) housing allowance?

47. From the preceding review of the jurisprudence, the following principles may be extracted for application in the present case. First, Respondent's proffered reasons for the distinction in benefits (with respect to the overseas assignment allowance and housing allowance) between overseas Office Directors and Resident Representatives must be supported by evidence. In other words, the Tribunal may ask whether the decision ". . . could . . . have been taken on the basis of facts accurately gathered and properly weighed." (*Lindsey*, para.12.) Second, the Tribunal must find a ". . . rational nexus between the classification of persons subject to the differential treatment and the objective of the classification." (*Mould*, para. 26.) Thus, the Tribunal may consider the stated reasons for the different benefits and assess whether their allocation to the two categories of staff is rationally related to those purposes. Finally, should the Tribunal choose to apply the standard articulated in *De Armas*, it would consider whether the difference in benefits between the overseas Office Directors and the Resident Representatives is not only reasonably related but proportionate to greater disadvantages faced

by Resident Representatives than Office Directors posted abroad, or whether the disparity may be justified by some other valid distinction between the two categories of staff.

48. In its pleadings, Respondent has offered several reasons in support of the distinction it has drawn between overseas Office Directors and Resident Representatives with respect to the overseas assignment allowance and housing allowance. These include differences in job functions, intangible "pressures" inherent in the Resident Representative role, recruitment needs, representational duties and security concerns.

49. With regard to the overseas assignment allowance, Respondent asserts:

> "The overseas assignment allowance for Resident Representatives, which is considered essential to recruitment of qualified candidates, compensates the Resident Representative for the pressures that are inherent to the position, given the importance of their responsibilities to the core mission of the Fund, their close working relationship with high government officials, the highly sensitive nature of their tasks and the security risks associated with their high profile."

50. As for the difference in housing allocation, Respondent offers the following explanation:

> "With regard to the provision of housing, Office Directors receive a housing allowance to compensate for the difference between the cost of housing in Washington and their duty station. They choose their own housing and receive a full shipment allowance to move their household goods to the duty station or store them in Washington as they choose. In contrast, Resident Representatives have a limited entitlement to ship personal effects to the duty station. Resident Representatives receive furnished housing selected by the Fund, at no cost to themselves except that they must meet the first $2,400 of maintenance expenses annually. The Fund has considered the option of paying Resident Representatives a housing allowance, in lieu of Fund-provided housing. However, it has been determined that *the existing housing benefit is justified because of the need for Resident Representatives to entertain officials of the government and the international community in the residence, the difficulty of recruiting qualified candidates, and the enhanced security necessitated by the Resident Representatives' high profile, which requires that the Fund select and outfit their housing."*

(Emphasis supplied.)

51. Respondent concludes:

> "Both the overseas assignment allowance and the housing benefit for Resident Representatives reflect the real and substantial differences in

> the responsibilities and functions of Resident Representatives, in comparison to Office Directors. Resident Representatives perform a range of functions—analytical country work, technical assistance and policy advice to the authorities of the country of assignment, close liaison with headquarters on a daily basis in relation to operational work, and diplomatic and representational activities—that simply do not figure in the terms of reference of Office Directors. A Resident Representative bears much responsibility for the success or failure of the Fund program in a country, giving him or her a greater profile and standing within the country and the Fund, as compared to Office Directors. Naturally, the Fund's benefits packages for Resident Representatives and Office Directors will reflect these real and substantial differences."

52. Similarly, in its review of benefits, the Fund's Human Resources Department contrasted the functions of the two programs as follows:

> "In comparing these benefits, it is important to distinguish between the different objectives and philosophy underlying the RR program and overseas offices. It should be stressed that resident representatives perform a range of functions—analytical country work, technical assistance and policy advice to the authorities of the country of assignment, close liaison with headquarters on a daily basis in relation to operational work, and diplomatic and representational activities—that simply do not figure in the terms of reference of most staff in overseas offices. Overseas office staff have minimal contact with country authorities and officials at the highest levels or with senior officials of the international economic and financial community, both from international organizations and embassies representing the major member countries of the Fund. In addition, staff in overseas offices generally have little direct involvement in the work of negotiating or surveillance-related missions."

("Resident Representative Program: Review of Benefits and Incentives," February 18, 2000, p. 24.)

53. It may be asked whether the reasons given by Respondent for the differential treatment of overseas Office Directors and Resident Representatives are supported by evidence and are rationally related to the purposes of the employment benefits at issue.

54. First, as to the respective duties and responsibilities of the two positions, Respondent has emphasized that Resident Representatives engage in "diplomatic and representational activities" and enjoy a "greater profile and standing within the country and the Fund" than do Office Directors. Nonetheless, the vacancy announcement for the JAI Director states that among the responsibilities of the position are to "represent the JAI in its dealings with third parties." In addition,

> "The Director will maintain contacts and coordinate the work of the JAI with the authorities in the countries being served by the JAI. The Director will work closely with the Director of INS and officials of the AfDB and WBI in formulating the training program of the JAI, and will deliver lectures, as needed, in connection with Fund training at the JAI. The Director will be expected to travel to countries in the region."

(Vacancy announcement—Director, JAI.)

55. Indeed, that overseas Office Directors have representational responsibilities on behalf of the IMF has been partially recognized in the existing benefits policy, which provides "enhanced" benefits to overseas Office Directors vis-à-vis other overseas Office staff:

> ". . . the Director, will be eligible to receive enhanced benefits in terms of shipment and housing allowance. The housing allowance will be paid at the family rate in all cases. The shipping entitlement will be based on a family size consisting of a spouse and three children over the age of four, regardless of whether the staff member is single, or has fewer dependents."

(Fund's Intranet, "Benefits and Allowances for Staff Transferring to Overseas Offices.")[14] The reason for this enhancement is revealed in a memorandum of September 1, 1998 from the Human Resources Department to one of the Fund's Deputy Managing Directors which stated: "A single director should receive the higher housing allowance and be permitted to receive a larger shipping entitlement, equivalent to that of a married staff member, *to help meet the representation requirements of the position*." (Emphasis supplied.)

56. There are, however, differences in the standing and representational responsibilities of Resident Representatives and overseas Office Directors that underlie the differences in benefits.[15] The Resident Representative occu-

[14]The Tribunal has taken note of announcements of benefits and allowances pertinent to this case that appear on the Fund's Intranet rather than, as far as it has been possible to ascertain, in Staff Bulletins and GAO texts. Since the Tribunal feels bound to take account of the "living law" of the Fund found in the "public" domain, which is accessible to staff of the Fund, it has decided to include such Intranet data in this Judgment. It may be a question for the consideration of Fund management whether elaboration of Fund regulations that finds its way into the Intranet should be otherwise codified.

[15]It may be noted that job grade, which might ordinarily be expected to compensate for job functions and responsibilities is *not* higher for Resident Representatives than overseas Office Directors. The Fund's study of Resident Representative benefits posited a hypothetical Resident Representative at grade A14 compared with a hypothetical Office Director at B4. ("Resident Representative Program: Review of Benefits and Incentives," February 18, 2000, Table 12.) Mr. "R" was promoted from grade B2 to B3 when he moved from the post of Senior Resident Representative in Senegal to Director of the JAI.

pies a post akin to that of an ambassador accredited to the government of the host state; his or her representational responsibilities, particularly vis-à-vis agencies of the host government, are broad and constant, while those of Office Directors—especially Directors of the IMF Institutes—will be less prominent. As for security concerns, however, Applicant has rightly emphasized that, because of conditions in Côte d'Ivoire, serious security risks are faced by any staff member posted in that location, not only the Resident Representative.

57. There is ample support in the record for the Respondent's position that the Resident Representative program has posed recruitment challenges for the Fund. These challenges appear to be attributable to two factors, the number of positions that must be filled (and re-filled every 2–3 years), a number that has grown in recent years with the emergence of new nations, and the perception among some staff that an assignment as a Resident Representative is less desirable than a position at headquarters. This latter perception may in turn be attributed to two factors, 1) the relatively difficult living conditions associated with many of the Resident Representative locations, and 2) the perception (strongly disputed by the Fund) that taking up a Resident Representative assignment may have an adverse effect on career advancement.

58. The Fund has sought to address these recruitment challenges both by providing increased employment benefits (beginning in 1993) and by addressing directly the concerns of staff with regard to career advancement. (*See* Staff Bulletin No. 94/7.) Remedying the recruitment problem appears to be a chief objective of the overseas assignment allowance. As described in the information communicated to staff via the Fund's Intranet, the objective of the allowance is:

> "To provide a financial incentive to accepting a field assignment, and to compensate the staff member for unidentified financial and individual costs."

(Fund's Intranet, "Benefits and Allowances for Resident Representatives.") The extent to which the allowance is designed (or operates) to overcome reluctance of staff to serve as Resident Representatives based on living conditions vs. career advancement concerns is, however, impossible to ascertain. An emphasis on overcoming the undesirability of the posts' location, however, seems to be emphasized in the Fund's study of benefits:

> *"Many RR posts are located in developing countries where living conditions, medical facilities, and security levels may be substandard, unlike conditions prevailing in countries where most offices are located.* In recognition of these fundamental differences in their role, responsibilities, and functions, the Fund has tra-

> ditionally provided [a] more generous benefits package to resident representatives, both as compensation for working in generally less comfortable surroundings and as a way of providing adequate incentives to attract well-qualified staff to consider undertaking these critical assignments."

("Resident Representative Program: Review of Benefits and Incentives," February 18, 2000, pp. 24–25.) (Emphasis supplied.) It is noted that this policy is dependent on generalizations, i.e., generalizations about the living conditions in the locations in which "many" Resident Representatives, as compared with the conditions in the countries in which "most" overseas Office staff serves. Hence, the question that the instant case poses arises, namely, whether the rationale underlying the differing benefits may be invalidated by the exceptional case of an Office Director and Resident Representative being posted in the same challenging overseas location.

59. Finally, in seeking to justify the application to Mr. "R" of the contested difference in benefits packages, Respondent notes that the Fund studied and then rejected the view that exceptional circumstances would justify an amendment of or exception to the policy. In *de Merode*, the World Bank Administrative Tribunal observed that in reviewing the exercise of legislative powers of an international organization to make changes to the terms or conditions of employment, ". . . the care with which a reform has been studied and conditions attached to a change are to be taken into account by the Tribunal." (Para. 47.) In this case, the fact that Respondent studied and then rejected the proposition that there should be complete parity of benefits between overseas Office Directors and Resident Representatives supports the view that the contested policy decision has not been taken arbitrarily.

60. The case raises two issues for determination, only the second of which remained in dispute between the parties:

1. Has Respondent abused its discretion by maintaining differing benefits policies applicable to two categories of Fund staff posted abroad, overseas Office Directors and Resident Representatives, with respect to a) overseas assignment allowance, and b) housing allowance?

2. Assuming that Respondent did not abuse its discretion in maintaining the differing benefits policies for overseas Office Directors and Resident Representatives, did it abuse its discretion in declining to grant Applicant an exception to those policies, with respect to a) overseas assignment allowance, and b) housing allowance?

61. While as indicated in para. 25 above, in this case it is difficult to distinguish between the policy at issue and its claimed exception, in any

event in the course of the exchange of pleadings it became clear that the Applicant withdrew any challenge to the regulation providing for differing benefits for Resident Representatives and Office Directors. The Applicant confined his complaint to the second question, the unwillingness of the Fund to grant him an overseas assignment allowance and a housing allowance as an exception to general policy, an exception that he contended was justified by his "unique" situation. Only he and the Resident Representative among all senior Fund officials were both economists, stationed in the same overseas city, and subject to the same hazards and difficulties. Both were charged with senior managerial and representational functions. The Applicant, while serving as Resident Representative in a neighboring African country, had accepted appointment as Office Director of the JAI in the light of his promising exchange with a then Deputy Managing Director of the Fund and of assurances that benefits of Office Directors would be reviewed. Because of this unique conjunction of circumstances, the Applicant contends he is entitled to the making of an exception in his favor.

62. In the Tribunal's view, the Applicant's contentions are far from frivolous. On the contrary, they are natural and understandable. It was natural and understandable that, moving from the perquisites of Resident Representative in stable Dakar to the uncertainties of the responsibilities of the JAI Director in Abidjan, the Applicant sought maintenance of those perquisites. He was encouraged in that objective by the then Deputy Managing Director who offered the Abidjan position to him; and the Fund's undertaking a review of the benefits of overseas Office Directors also may have nurtured his expectations. Those expectations were partially satisfied by extension to him and other similarly situated staff of the hardship allowance, but not the housing allowance and the overseas assignment allowance.

63. But however comprehensible the Applicant's position, this judgment call was not his but that of Fund management to make. After extended consideration, and rejection of a recommendation by the Director of Human Resources that the Applicant be afforded the housing allowance, the Fund decided that the further very material benefits enjoyed by the Resident Representative in Abidjan (and all other Resident Representatives, but no Office Directors) should not be extended to the Applicant. The manner of arriving at the decision taken was deliberate and within the Fund's managerial authority.

64. The Fund's management gave consideration to more than one option, and made the decision that it made. The distinction in the benefits accorded to Resident Representatives and Office Directors was rational, related to objective factors, and untainted by any animus against the Applicant. The

allocation of differing benefits to different categories of staff was, in this case, reasonably related to the purposes of these benefits, in particular, the incentive to recruitment of Resident Representatives that is provided by the overseas assignment allowance.

65. The management of the Fund necessarily enjoys a managerial and administrative discretion which is subject only to limited review by this Tribunal. If it is the Fund's considered decision that differences in the functions and recruitment of Resident Representatives and Office Directors justify a consequential difference in the benefits accorded those officials—even while uniquely serving in the same city overseas—it is not for the Tribunal to overrule that decision. This conclusion applies as well to the refusal of the Fund to make an exception to its policy in favor of the Applicant. While, in the view of the Tribunal, the granting of such an exception in this case would have been reasonable, the Fund's decision not to make an exception in favor of the Applicant on the ground of the undesirability of awarding one Office Director perquisites not accorded to other Office Directors is also reasonable and one within the ambit of the Fund's managerial discretion.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

The Application of Mr. "R" is denied.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
March 5, 2002

JUDGMENT NO. 2002-2

Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent

(March 5, 2002)

Introduction

1. On March 4 and 5, 2002, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "Y", a retiree of the Fund.

2. This is the second application brought in the Administrative Tribunal by Ms. "Y" seeking review of the May 8, 1998 decision of the Fund's former Director of Administration upholding the conclusions of an ad hoc discrimination review team that Applicant's career, in particular the grading and subsequent abolition of her position, was not adversely affected by discrimination. Ms. "Y" had contended that she had experienced discrimination on the basis of her gender, age and career stream. In referring to her career stream, the Applicant contrasts that of the Fund's economists (which may be termed the mainstream) from other career ladders.

3. In *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), the Administrative Tribunal summarily dismissed Applicant's challenge to the same May 8, 1998 decision of the Director of Administration on the ground that Ms. "Y" had not met the requirement of Article V[1] of the Tribunal's Statute to exhaust

[1]Article V provides in pertinent part:

"***ARTICLE V***

1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.
2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints

all available channels of administrative review, as she had not sought review of the Director of Administration's decision in the Fund's Grievance Committee.

4. The Grievance Committee now has considered, and denied, Applicant's claim, and Ms. "Y" has filed a new Application with the Administrative Tribunal. In her current Application, Ms. "Y" contends that the review team constituted under the Fund's Discrimination Review Exercise (DRE)[2]—a special, one-time review of discrimination complaints initiated by the Fund in 1996—did not fully and fairly review her discrimination claims. She asks the Tribunal to examine *de novo* her allegations of discrimination, to enter a finding that her career was unlawfully affected by discrimination, and to order *inter alia* reinstatement, retroactive promotion and back pay as remedies.

5. Respondent, by contrast, contends that the DRE was a lawful exercise of the Fund's discretion, and that its application in the case of Ms. "Y" was not tainted by any irregularity of procedure, nor were the review team's (or the Director of Administration's) conclusions arbitrary, capricious or discriminatory. Accordingly, Respondent urges the Tribunal to deny Ms. "Y"'s Application.

The Procedure

6. On July 6, 2001, Ms. "Y" filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicant that her Application did not fulfill the requirements of paras. 3 and 4 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The Application, hav-

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and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;
b. a decision denying the relief requested has been notified to the applicant; or
c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken."

[2]In Judgment No. 1998-1, the Administrative Tribunal used the term "Ad Hoc Discrimination Review Process" to refer to the DRE. The terms are used interchangeably herein.

ing been brought into compliance within the indicated period, is considered filed on the original date.[3]

7. The Application was transmitted to Respondent on July 25, 2001. On July 30, 2001, pursuant to Rule XIV, para. 4,[4] the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Ms. "Y"'s Application on September 10, 2001. On October 15, 2001, Applicant submitted her Reply. The Fund's Rejoinder was filed on November 16, 2001.

8. On January 23, 2002, the Office of the Registrar received a Motion by Applicant to file an additional pleading, along with the proposed pleading. The submission was transmitted to the President of the Administrative Tribunal for his consideration, pursuant to Rule XI[5] of the Tribunal's Rules of Procedure. On February 6, 2002, the President, having found unpersuasive

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[3]Rule VII provides in pertinent part:

"*Applications*

. . .

3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.
4. Four additional copies of the application and its attachments shall be submitted to the Registrar.

. . .

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

[4]Rule XIV, para. 4 provides:

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

[5]

"RULE XI

Additional Pleadings

1. In exceptional cases, the President may, on his own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be furnished in the original or in an unaltered copy and accompanied by any necessary translations.
2. The requirements of Rule VII, Paragraphs 4 and 8, or Rule VIII, Paragraphs 2 and 3, as the case may be, shall apply to any written statements and additional documents.
3. Written statements and additional documents shall be transmitted by the Registrar, on receipt, to the other party or parties."

Applicant's contention that the Fund's Rejoinder ". . . raised several new legal and factual arguments to which Applicant has not had a reasonable opportunity to respond," and concluding that no exceptional circumstances existed in the case, accordingly denied the Motion.

Requests for Production of Documents and for Oral Proceedings

9. Applicant had included within her Application nine requests for production of documents. During the course of the proceedings, the majority of these requests were satisfied voluntarily by Respondent. Two requests, however, remained outstanding. These requests sought 1) copies of the Separation Benefits Fund Reports for 1995 to the present, and 2) copies of official notices sent to Fund staff whose positions were abolished in 1994, 1995 and 1996. Respondent opposed the disclosure of both sets of documents on grounds of relevancy to the case and privacy of individuals. On February 12, 2002, the President of the Administrative Tribunal, having considered the views of the parties and pursuant to his authority under Rule XVII[6], denied Applicant's requests for the production of documents on the basis that the documents sought were "clearly irrelevant to the case."

10. In addition, Applicant requested that the Administrative Tribunal hold oral proceedings in the case ". . . to present her claim for relief and to finally develop a complete factual record of her claims of discrimination." Respondent opposed the request, contending that ". . . all of the relevant information is contained in the full record before the Tribunal." On February 12, 2002, the Tribunal denied Applicant's request for oral proceedings, as

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6 ***"RULE XVII***
Production of Documents

1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.
2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.
3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment.
4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

the condition laid down in Rule XIII, para. 1[7] that they be held only if "necessary for the disposition of the case" in its view was not met.

11. The Tribunal had the benefit of a transcript of oral hearings by the Fund's Grievance Committee, at which Ms. "Y", the members of the DRE review team (an outside consultant and a senior official of the Fund's Administration Department[8]), and an additional member of the Administration Department were heard. As the Tribunal previously has observed: "The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." (*Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17).[9]

The Factual Background of the Case

The relevant facts may be summarized as follows.

Ms. "Y"'s Career with the Fund

12. Applicant was employed as an editorial clerk of the Fund on July 1, 1971, and was promoted to a professional position as an editorial officer in 1983. In 1987, after she appealed her job grade, she was promoted to grade A11, which grade she still held in 1995, when the position of which she was the incumbent—as an assistant editor—was abolished.[10]

13. Applicant was advised of the options available to her under the Fund's policy governing abolition of posts. In accordance with that policy, efforts were made over a six-month period to find her an alternative position.[11] In

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[7] ***"RULE XIII***
Oral Proceedings

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

[8]The human resources functions of the Fund's former Administration Department are now carried out by the Human Resources Department. The term Administration Department, however, is used herein, as the department was known by that name at the time of the DRE.

[9]*See also Mr. "V", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1999-2 (August 13, 1999), note 5.

[10]Respondent notes that in the course of her career Ms. "Y" moved seven levels, from a starting grade equivalent to the current A4 to A11.

[11]GAO No. 16, Section 13.01 provides, in part, that ". . . efforts shall be made over a period of not less than six months to reassign [the staff member] to another position consistent with his qualifications and the requirements of the Fund."

addition, on an exceptional basis, arrangements were made for Ms. "Y" to be assigned to a Temporary Assignment Position (TAP) for an initial period of 10 months, later extended for an additional 4-month period through the end of February 1997. Applicant's selection for the TAP meant that she remained a staff member for 21 months after the effective date of the abolition of her post, in addition to the 120-day notice period and the 22.5 months of separation leave provided under GAO No. 16. Accordingly, Applicant was "bridged" to an early retirement pension and lifetime access to the Fund's health insurance. Ms. "Y"'s retirement from the Fund became effective March 31, 1999.

The Discrimination Review Exercise (DRE)

14. The Discrimination Review Exercise (DRE) was a special, one-time review of cases of alleged discrimination that were filed with the Director of Administration during a narrow time frame, between August 28 and September 30, 1996. The DRE was initiated by the Fund to investigate and remedy, through an alternative dispute resolution mechanism, instances of past discrimination that had adversely affected the careers of Fund staff.

15. The DRE resulted from the issuance of the report "Discrimination in the Fund" (December 1995), prepared by the Chairman of the Fund's Advisory Group on Discrimination. That report cited the benefits of instituting such an alternative dispute resolution procedure:

> "It could be argued that there are appeal channels already in place, such as the Grievance Committee and the Administrative Tribunal. These tend to involve rather elaborate legal procedures; what is being suggested here is a much simpler *ad hoc* forum for settling discrimination complaints that rankle staff who are reluctant to invoke the existing procedures for fear of inviting reprisals if they fail at what tends to be regarded as adversarial proceedings against their current, or recent, supervisors."

("Discrimination in the Fund" (December 1995), p. 34, note 1.)

16. In a Memorandum to Staff in early 1996, the Managing Director noted:

> "The report contains proposals for addressing the concerns of those staff who feel that they have been discriminated against, typically on grounds of race, either in terms of promotion or salary. It suggests that we might appoint an independent panel, perhaps with expert assistance from outside the Fund, to examine these cases on a confidential basis and reach conclusions as to whether the perceptions of discrimination, in career progression or in salary levels, are warranted by the facts."

(Memorandum from the Managing Director to Members of the Staff, February 9, 1996, "The Report of the Consultant on Discrimination.") In July of

that year, the Managing Director again addressed the issue of the effect of possible past discrimination on the careers of current Fund staff:

> "A difficult question remains: cases where discrimination may have adversely affected the careers of Fund staff in the past. One message that has come through quite clearly from Mr. Mohammed's work is that there are some staff who consider that they have been discriminated against to the detriment of their careers. Questions of past discrimination must be addressed, and even where these staff could have availed themselves of the Fund's grievance procedures I believe the onus is on us."

(Memorandum from the Managing Director to Members of the Staff, July 26, 1996, "Measures to Promote Staff Diversity and Address Discrimination.")

17. Procedures for an ad hoc review of individual cases of alleged discrimination were announced on August 28, 1996 by a Memorandum to Staff from the Director of Administration, "Review of Individual Discrimination Cases." That Memorandum set forth several avenues for the identification of cases for review, including a provision for self-identification by those individuals who believed their careers had been adversely affected by discrimination. As to how the review process would actually work, the Memorandum stated:

> "The way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination. In coordinating these reviews, the Administration Department will draw on the input of subordinates, peers, and supervisors. The career record will be reviewed and those undertaking the reviews may meet with the individual employees under consideration, at the initiative of the reviewer or the employee. Where warranted, the aim will generally be to suggest remedial actions that are prospective and constructive, including assignments, mobility, training, promotions, and salary adjustments."

18. The Memorandum also addressed the subject of the interrelationship between the ad hoc discrimination review process and grievance procedures available in the Fund:

> "The consideration being given to individual cases of possible discrimination is a one-time action and is not intended to replace or replicate the Fund's grievance procedures."

19. Additional information regarding the ad hoc discrimination review process was communicated to staff on January 13, 1997 in a further Memorandum from the Director of Administration to Members of the Staff, titled "Procedures for Review of Individual Discrimination Cases." The staff was informed that the review of individual discrimination cases would be car-

ried out by external consultants assisted by a small number of Fund staff from both within and outside the Administration Department. The procedures and aims of the review were set forth as follows:

> "The team of consultants and staff, working in pairs, will review the background of each individual discrimination case, meet with the individuals concerned as well as others familiar with their circumstances, and make recommendations. In cases where remedial action is warranted, the aim will generally be to suggest actions that are prospective and fall within the Fund's existing personnel policies, including reassignments, training and other development initiatives, promotions, and salary adjustments. An initial meeting will be held with each employee requesting a review to obtain background information, to discuss current and former staff members (subordinates, peers, and/or supervisor) who might be contacted by members of the review group to obtain additional information, and to identify the types of forward-looking remedies that may be considered appropriate if it is concluded that past discrimination has adversely affected the employee's career. . . .
>
> . . . Every effort will be made to carry out this review in as discrete and sensitive a manner as possible. While feedback sessions will be undertaken with each concerned employee to inform him or her of the outcome of this review, in those cases where discrimination has been identified, this review will not be an end in itself, but just a beginning of a process for identifying opportunities. At the end of the review process, every effort will be made to utilize the lessons learned from past discrimination cases to help further strengthen the Fund's policies and practices to prevent discrimination in the future."

The Application of the DRE to the Case of Ms. "Y"

20. In response to the Director of Administration's August 28, 1996 Memorandum to Staff, Applicant on September 30, 1996, requested review under the DRE on the grounds that her Fund career had been adversely affected by discrimination based on profession, gender and age, which she contended had affected the grading of her position and culminated in the abolition of her post.

21. The Director of Administration initially informed Applicant that she was not eligible to participate in the DRE, as she would shortly be separating from the Fund on early retirement. Applicant contested this decision by filing a formal grievance with the Grievance Committee. Shortly thereafter, on June 27, 1997, the Director of Administration reversed her initial determination and advised Applicant that upon review of the matter she had

concluded that the Fund should carry out a review of Applicant's discrimination claim under the DRE.[12]

22. The review was conducted by an ad hoc review team appointed by the Fund, consisting of an outside consultant and a senior official of the Administration Department. The team met with Applicant on several occasions. The conclusion reached by the team was that there was no evidence to support the allegation that the grading of Applicant's position or the abolition of her post was influenced by factors of discrimination. The team therefore determined that it had no basis on which to recommend a re-grading of Applicant's position, which was the remedy she sought.

23. Applicant met with the team on December 19, 1997 and was informed of its conclusions. She asserts that on that occasion the official of the Administration Department informed her that if she was not satisfied with the decision she should request administrative review by the Director of Administration. Thereupon, Applicant, through counsel, by letter dated January 27, 1998, requested the Director of Administration to conduct such a review.

24. The Director of Administration replied February 10, 1998 by explaining the basis for the conclusion that no relief was warranted and offering Applicant an opportunity to meet again with the review team so that it could further explain the process, and so that Applicant could raise any new facts or arguments that she might wish to make regarding her allegations. Applicant did not take up this offer, but on March 24, 1998, her counsel wrote again to the Director of Administration, challenging the nature of the process and repeating her request for an administrative review.

25. On May 8, 1998, the Director of Administration wrote to Applicant's counsel advising that she had carefully reviewed the investigation carried out by the review team, and that she fully concurred with its recommendation. It is this May 8, 1998 decision of the Director of Administration that is the decision contested in the Administrative Tribunal.

The Channels of Administrative Review

26. As noted *supra,* the Administrative Tribunal in Judgment No. 1998-1 summarily dismissed Ms. "Y"'s earlier Application on the basis that by not

[12]As the decision that Applicant was challenging before the Grievance Committee had been reversed, the Grievance was rendered moot. (This 1997 Grievance is to be distinguished from the one filed by Ms. "Y" in 1998, challenging the decision of the Director of Administration to concur in the conclusions reached by the review team.) *See infra* The Channels of Administrative Review.

having sought review in the Grievance Committee she had not met the exhaustion requirement of Article V of the Tribunal's Statute. In drawing that conclusion, the Tribunal explored the relationship between the DRE and the Fund's established administrative review procedures set forth in GAO No. 31, which culminate in Grievance Committee review. The Tribunal concluded that in the case of Ms. "Y", examination of her discrimination allegations by the DRE not only did not go through the steps outlined in Sections 6.02-6.05 of the GAO,[13] but ". . . could not have done so, because the mandatory time periods for each of these steps had expired when the review was undertaken." (*Ms. "Y"*, para. 40.)

27. Nonetheless, the Tribunal found a predicate for Grievance Committee review of Ms. "Y"'s case by concluding that the contested decision of the Director of Administration should be considered a decision "taken directly by the Director of Administration" within the meaning of Section 6.06[14] of GAO No. 31. At the same time, the Tribunal was mindful of a lack of clarity in management's communications to staff with respect to the relationship between the ad hoc review of discrimination and recourse to the Grievance Committee. This lack of clarity, in the Tribunal's view, ". . . understandably may have led Applicant to conclude that exhaustion of Grievance Committee channels was not required in her case." (*Ms. "Y"*, para. 42.)

28. Accordingly, the Administrative Tribunal granted the Fund's Motion for Summary Dismissal, but at the same time held that:

> "Given the singular circumstances of this case, in the event that the Grievance Committee, if seized, should decide that it does not have jurisdiction over Applicant's claim, the Administrative Tribunal will reconsider the admissibility of that claim on the basis of the Application now before it."

(*Ms. "Y"*, para. 43.)[15]

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[13]The relevant provisions of GAO No. 31 are reproduced at para. 29 of *Ms. "Y"*.

[14]GAO No. 31, Section 6.06 provides:

> "6.06 *Decisions Taken by Managing Director or Director of Administration.* With respect to any decision that was taken directly by the Director of Administration or by the Managing Director, or by the Managing Director's designee, the staff member may file a grievance with the Committee within six months after the challenged decision was made or communicated to the staff member, whichever is later."

[15]This language became the subject of a request by Respondent for Interpretation of Judgment under Article XVII of the Statute and Rule XX of the Rules of Procedure. Respondent sought an interpretation of the term "jurisdiction" as used in that provision of the Judgment to refer only to jurisdiction *ratione materiæ*. The Tribunal held that the application for interpretation should not be admitted, as the Fund had not shown the term to be "obscure or incomplete" and the proposed interpretation would constitute an impermissible amendment of the Judgment. (Order No. 1999-1, *Interpretation of Judgment No. 1998-1* (February 26, 1999).)

29. The Tribunal later was to learn that in the month preceding the issuance of Judgment No. 1998-1, Applicant had indeed filed a Grievance with the Fund's Grievance Committee, challenging for the first time in that forum the May 8, 1998 decision of the Director of Administration.[16] Following a period of unsuccessful voluntary mediation, the Grievance was considered by the Grievance Committee in the usual manner, on the basis of oral hearings and briefs of the parties.

30. The Grievance Committee issued its Recommendation and Report on April 10, 2001. Based on its review of the conduct of the DRE as applied to the investigation of Ms. "Y"'s various allegations of discrimination, the Grievance Committee concluded that Applicant had failed to show that the findings and conclusions of the discrimination review team (and their affirmation by the Director of Administration) were arbitrary, capricious or discriminatory, or were procedurally defective in a manner that substantially affected the outcome.[17] Accordingly, the Grievance Committee recommended that the Grievance be denied. The Committee's recommendation was accepted by Fund management on April 18, 2001.

31. Ms. "Y" filed her Application in the Administrative Tribunal on July 6, 2001.

Summary of Parties' Principal Contentions

Applicant's Principal Contentions

32. The principal arguments presented by Applicant in her Application and Reply are summarized below.

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[16]As the Committee accepted jurisdiction over the Grievance, the possibility reserved by the Tribunal in its Judgment No. 1998-1 of revisiting the admissibility of Ms. "Y"'s Application in the Tribunal on the basis of her initial filing there was not exercised. The Application being decided upon in the present Judgment is that filed with the Tribunal on July 6, 2001.

[17]In so concluding, the Grievance Committee invoked its standard of review applicable to discretionary decisions:

> *"Section 5. Standard of Review*
>
> 5.01 *Non-Discretionary Decisions.* The Grievance Committee shall review each non-discretionary decision challenged by the grievant and shall determine whether the challenged decision was consistent with and taken in accordance with applicable Fund rules and regulations.
>
> 5.02 *Review of Discretionary Decisions.* When a grievant challenges a decision made in the exercise of discretionary authority, the Committee shall uphold the challenge only if it finds that the decision was arbitrary, capricious, or discriminatory, or was procedurally defective in a manner that substantially affected the outcome."

(GAO No. 31.)

1. During her career with the Fund, and in the abolition of her position, Applicant experienced discrimination on the basis of her gender, age and career stream (non-economist).
2. Respondent has failed to remedy discrimination that Applicant brought to the attention of the Fund for resolution in accordance with a procedure established for that purpose.
3. Applicant did not receive the type of review contemplated by the Managing Director to cure past discrimination, as the DRE team failed to conduct a thorough review of Applicant's claims.
4. The conduct of the DRE in the case of Ms. "Y" was marked by seven major errors.
   a. The DRE team failed to interview approximately two-thirds of the witnesses suggested by Ms. "Y";
   b. The DRE team disregarded most of Applicant's suggested witnesses without any basis for determining if they had relevant evidence;
   c. In reviewing Applicant's job classification, the DRE team interviewed individuals who were ". . . not knowledgeable of her work and who may have been biased against her;"
   d. In reviewing the appropriateness of Ms. "Y"'s job classification, the DRE team did not follow appropriate procedures for conducting such a review;
   e. The DRE team erroneously assumed that as a retiree, Applicant would not be entitled to any relief under the DRE;
   f. The DRE team found that Applicant's career had been "mismanaged by the Fund," but determined that she was not entitled to any relief; and
   g. The DRE team's explanations for the abolition of Ms. "Y"'s position were "plainly erroneous."
5. The DRE team failed to investigate all of the issues that Applicant had brought to its attention.
6. The DRE team was biased against conducting a full and fair review of Ms. "Y"'s claims, especially with regard to the abolition of her position, because the Director of Administration initially had determined that Applicant's case was not appropriate for review under the DRE, as Ms. "Y" soon would be separating from the Fund.
7. Applicant's career parallels larger patterns of discrimination in the Fund as revealed by Respondent's own studies. Therefore, Applicant

should be considered as having established a *prima facie* case of discrimination, and Respondent should carry the burden of establishing why its treatment of Applicant was not discriminatory.

8. Respondent's examination of Applicant's discrimination claims through the DRE has not been subjected to any meaningful review.

9. Applicant is entitled to a substantive review in the Administrative Tribunal of the factual merits of her actual claims of discrimination, not only a review of whether the DRE was properly conducted in her case. Applicant seeks to present evidence to the Tribunal to establish her claims of discrimination and to show that the DRE team's examination of these claims was flawed, thereby prejudicing its outcome.

10. Applicant seeks as relief:

    a. a finding by the Tribunal that Applicant's career with the Fund was adversely affected by discrimination;

    b. reinstatement;

    c. retroactive promotion to grade A13, with corresponding back pay and pension adjustment;

    d. compensatory damages; and

    e. attorneys' fees.

Respondent's Principal Contentions

33. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1. The DRE was a valid exercise of Respondent's discretionary authority to provide alternative means of dispute resolution.

2. The individual decision taken by the Director of Administration was correctly based on the DRE team's findings that there was no basis to conclude that Applicant's career had been adversely affected by discrimination.

3. The DRE team fully and fairly investigated Applicant's claims of discrimination, and the team's conclusions are substantiated by the information obtained in their investigation. Specifically:

    a. following an examination of the duties of Ms. "Y"'s position, the Fund's standards for job grading, interviews with Applicant's

supervisors as well as with staff in Ms. "Y"'s career stream who are employed in other parts of the Fund, the DRE team properly concluded that Applicant's grade was consistent with the job she occupied (and that, in fact, as a result of "personal incumbency" she occupied a grade one grade higher than others in the same job employed in other area departments of the Fund);

b. the denial of a job audit in 1991 was consistent with the Fund's policies and procedures on job classification;

c. lack of a day-to-day supervisor and of a formal position description was neither the result of discrimination, nor did it have a negative impact on the way that Ms. "Y"'s work was assessed or valued;

d. the decision to abolish the position occupied by Ms. "Y" was based on the work needs of the departments she served and was unrelated to the identity of the position incumbent;

e. based on a review of data on other job abolitions in the Fund, the DRE team found no evidence of age or gender discrimination;

f. the DRE team found no support for claims that the abolition of Applicant's position was in any way related to sexual harassment or retaliation.

4. Contrary to Applicant's assertion, the DRE team did not make a finding that Ms. "Y"'s career had been "mismanaged."

5. The review of Applicant's claims was in accord with the procedures established for the DRE and was conducted in the same manner as the review of other staff members' complaints.

6. The review of Applicant's case was not biased by the initial decision not to include her case in the DRE.

7. Applicant has not shown that any of the alleged procedural defects in the DRE process had any material effect on the outcome of the review of her case.

8. Applicant has had a full opportunity to present relevant evidence of discrimination but has failed to establish her claims.

9. *De novo* review by the Administrative Tribunal of the merits of Ms. "Y"'s underlying discrimination claims is not appropriate, as Applicant did not raise these claims in the manner and within the time limits prescribed in the Fund's rules and regulations. The DRE did not confer new rights on staff who failed to exercise legal rights to

grieve prior decisions. The only decision properly before the Tribunal for review is the decision arising out of the DRE.

Consideration of the Issues of the Case

The scope of the Tribunal's review

34. The Administrative Tribunal must address at the outset a matter vigorously contested between the parties, the scope of the Tribunal's review in this case. Applicant seeks *de novo* review by the Tribunal of the merits of her underlying claims of discrimination, which she contends were not fully and fairly examined under the DRE process. Respondent, by contrast, contends that review of the underlying claims by the Administrative Tribunal is not appropriate because Applicant failed to raise these claims on a timely basis under the administrative review procedures of GAO No. 31. Hence, contends Respondent, while the Fund legitimately could create an alternative review process to consider otherwise time-barred claims, any review in the Administrative Tribunal would be limited in such cases to challenges to the fairness of the conduct of the DRE process itself.

35. It is noted that Respondent's view is consistent with the approach taken by the Grievance Committee in this case. The Grievance Committee limited its conclusions to holding that the decisions of the DRE team and of the Director of Administration upholding the review team's findings, were not arbitrary, capricious or discriminatory, or procedurally defective in a manner that substantially affected the outcome.

36. The Statute of the Administrative Tribunal limits the Tribunal's jurisdiction *ratione materiæ* to challenges to the legality of an "administrative act."[18] "Administrative act" is defined to mean ". . . any individual or regulatory decision taken in the administration of the staff of the Fund."[19] Article V imposes the additional requirement that review by the Tribunal of challenges to the legality of an administrative act will be made ". . . only after the applicant has exhausted all available channels of administrative

[18] ***"ARTICLE II***

1. The Tribunal shall be competent to pass judgment upon any application:
   a. by a member of the staff challenging the legality of an administrative act adversely affecting him."

[19] ***"ARTICLE II***

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

review."[20] Hence, to determine the scope of the matters under review by the Tribunal in this case, it is necessary to identify what administrative act (or acts) has been the subject of prior administrative review.

37. In Judgment No. 1998-1, the Tribunal held that "[t]he ad hoc review of Applicant's complaint did not go through the steps outlined in Section 6.02, 6.03, 6.04 and 6.05 of the GAO, and could not have done so, because the mandatory time periods for each of these steps had expired when the review was undertaken." (*Ms. "Y"*, para. 40.) The record in the present case confirms that Ms. "Y" took no steps to contest the abolition of her position, or any other decisions of the Fund that she alleges were discriminatory, through the formal channels of review provided by the Fund under GAO No. 31 for staff to challenge adverse personnel decisions.[21]

38. Moreover, in summarily dismissing Ms. "Y"'s earlier Application for failure to seek review in the Grievance Committee, the Administrative Tribunal in effect rejected Applicant's view that, for purposes of meeting the exhaustion requirement of Article V, the DRE had opened a channel of review (under para. 3 of Article V)[22] alternative to that provided by the

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[20] ***"ARTICLE V***

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

[21] Indeed, Applicant admits as much, seeking to excuse her failure to bring such challenges on a timely basis on the ground that the Fund had not informed her of her right to appeal the abolition of her position.

The Tribunal is not aware of any "exceptional circumstance" that would excuse the failure of the applicant in this case to invoke the administrative review procedures of GAO No. 31. In *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), the Tribunal warned that ". . . in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal processes, such requirements should not be lightly dispensed with and 'exceptional circumstances' should not easily be found." (Para. 104.) In *Estate of Mr. "D"*, the Tribunal held that Respondent's lack of notice to the executrix of Mr. "D"'s estate of procedures for review of denial of medical benefits claims was an "exceptional circumstance" excusing a failure to invoke administrative review in a timely manner. The holding, however, was grounded on the unusual facts of the case. Mr. "D" had been a non-staff member enrollee in the Fund's medical benefits plan and the executrix herself was not a staff member. Hence, the applicant could not have been assumed to have access to information on administrative review procedures that is disseminated to staff members. (Para. 122.) This conclusion is clearly inapposite to the case of Ms. "Y", a long-time staff member of the Fund.

[22] Article V, para 3 provides:

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

review procedures (described by para. 2 of Article V)[23] culminating in hearing by the Grievance Committee.[24] The Tribunal observed: ". . . the Fund on several occasions emphasized that the ad hoc review did not confer new rights, and did not replicate or replace the grievance procedure." (*Ms. "Y"*, para. 38.) The Tribunal noted additionally:

> "There is no contemporaneous indication in the memoranda circulated by the Administration that by bringing a complaint to the ad hoc review a staff member would be entitled to pursue a dispute before the Grievance Committee that otherwise would be barred from its review."

(*Ms. "Y"*, para. 35.)

39. At the same time, in holding that review of Ms. "Y"'s underlying discrimination claims had been foreclosed because the mandatory time periods for invoking prior steps prescribed by GAO No. 31 had expired, the Administrative Tribunal made clear that the only decision that could be subject to review by the Grievance Committee (and thereafter by the Administrative Tribunal) was the May 8, 1998 decision of the Director of Administration. The Tribunal deemed this decision a decision "taken directly" for purposes of GAO No. 31, Section 6.06. (*Ms. "Y"*, para. 40.) Accordingly, the Administrative Tribunal in Judgment No. 1998-1 squarely rejected any suggestion

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a. three months have elapsed since the request for review was made and no decision stating that the relief requested would be granted has been notified to the applicant;
b. a decision denying the relief requested has been notified to the applicant; or
c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken."

[23]Article V, para 2 provides:

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

[24]Observing that ". . . the memoranda establishing the ad hoc discrimination review procedure and explaining that it was not meant to be in lieu of, and not meant to obviate recourse to, the Grievance Committee, could have been more explicit," the Tribunal cushioned this holding by reserving the possibility of reconsidering the admissibility of the Application if the Grievance Committee were to determine not to exercise jurisdiction. (*Ms. "Y"*, paras. 42–43.)

that because Ms. "Y"'s allegations of discrimination had been subject to the DRE, they could be reviewed by the Tribunal *as if* they had been pursued on a timely basis through GAO No. 31.

40. Finally, in considering whether the merits of Ms. "Y"'s discrimination claims may now be examined *de novo* in the Administrative Tribunal, it is well to recall the value of timely administrative review to the reliability of later adjudication by the Administrative Tribunal. As this Tribunal recently observed:

> *"**Importance of timely pursuit of administrative review***
>
> 95. International administrative tribunals have emphasized the importance not only of the exhaustion of administrative remedies but also that the process be pursued in a timely manner. The timeliness of the review process is directly linked to the purposes of that review:
>
> > 'Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors—when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies, as is the case here.'
>
> (*Alcartado*, AsDBAT Decision No. 41, para. 12.)"

(*Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001).) Additionally, noted the IMFAT,

> "'[Time limits] are prescribed as a means of organizing judicial proceedings in a reasonable manner. Their object is to prevent unnecessary delays in the settlement of disputes. As such they are of a mandatory nature and are enforced by courts in the public interest.'"

(*Estate of Mr. "D"*, para. 105, quoting *Mariam Yousufzi v. International Bank for Reconstruction and Development*, WBAT Decision No. 151 (1996), paras. 25–26.) Hence, while the Fund as part of its human resource functions may have created an alternative dispute resolution mechanism to remedy instances of past discrimination stretching beyond statutory bars and not previously raised through administrative review, the Administrative Tribunal, as a judicial body, remains controlled by its Statute.

41. At the same time, since the Applicant challenges the May 8, 1998 decision of the Director of Administration upholding the conclusion of the DRE that the Applicant's career was not adversely affected by discrimination, examination of that conclusion necessarily entails some consideration of whether the Applicant's career did suffer discrimination. That consideration

may be distinguished, however, from the *de novo* examination by the Tribunal of the underlying claims that Applicant seeks.

The regulatory decision

42. While the emphasis of Ms. "Y"'s complaint in the Administrative Tribunal is her challenge to the legality of the "individual decision" in her case, aspects of her Application would appear to impugn the DRE process more generally. Respondent asserts that Applicant challenges the DRE as a "regulatory decision" under Article II of the Statute, and contends that the DRE was a proper exercise of the Fund's discretionary authority.[25]

43. The gist of Applicant's challenge to the DRE process generally is that the DRE lacked many of the attributes of a formal legal proceeding. In particular, Applicant challenges the fact that no written record of proceedings was produced, contending that therefore she has not been afforded a meaningful review of the DRE team's investigation of her claims. This challenge is reflected in Ms. "Y"'s Application in the Tribunal, which contests the Director of Administration's May 8, 1998 decision in part because allegedly it denied her ". . . request for . . . a full and fair accounting of the administrative procedure instituted by the Managing Director of the Fund in his Memorandum of July 26, 1996 to address past discrimination in the Fund," and which contends that ". . . the discrimination review process' examination of the merits of Applicant's discrimination claims has never been subjected to any type of meaningful review."

44. These twin concerns likewise were the subject of an exchange of correspondence in early 1998 between Ms. "Y"'s counsel and the Director of Administration. In a January 1998 letter, Ms. "Y"'s counsel asserted that "[i]n light of the fact that substantive rights of Ms. ["Y"] were being decided, a written record should have been created." He went on to suggest:

> "Because of the undocumented process employed by the Fund, at this stage we are deprived of the ability to advance specific lines of rebuttal argument on Ms. ["Y"]'s behalf. Therefore, it appears that a complete de novo review of Ms. ["Y"]'s claim is in order."

The Director of Administration responded:

> "The procedures established by the Fund for reviewing individual discrimination cases took into account the fact that a number of cases raise issues

[25]It is noted that, in her Reply, Applicant states: "Applicant does not assert that the entire DRE process was invalid."

> that go back as much as 20-25 years, or well beyond any normal time limitations. The procedures were designed to be informal and expeditious and did not provide the same rights or entitlements available to staff under the Fund's grievance procedures which are subject to a strict time bar."

Additionally, in that letter, the Director of Administration described the actions undertaken by the review team to investigate Ms. "Y"'s allegations of discrimination.[26]

45. In its pleadings before the Administrative Tribunal, Respondent amplifies its view that the DRE process was designed for the benefit of staff to expedite the remedying of past discrimination, free from the constraints of formal adversary proceedings. This approach was consistent with that which had been recommended by the Chairman of the Fund's Advisory Group on Discrimination. In Respondent's view, the DRE represented:

> ". . . a good faith attempt to encourage the voluntary participation of staff members who had concerns but who might not be in a position to advance those concerns as legal claims either because they were time-barred or because relevant information was no longer available.
>
> Accordingly, statutes of limitation were not applicable to the claims that would be considered, and staff members were not required to meet legal evidentiary standards or to bear the burden of proof. Staff members were not represented by counsel because this was not an adversarial procedure, nor was the staff member being accused of misconduct or performance deficiencies such as would warrant the assistance of legal counsel to protect the staff member's employment rights. There was no formal record-keeping or transcription of testimony because both the participants and those interviewed were given assurances that their recollections and views would remain strictly confidential. This was considered essential in order to obtain the cooperation of the interviewees and to encourage frankness and candor on their part. While these elements may be integral to an adversarial, legal proceeding, they are neither mandatory nor appropriate in the context of a human resources exercise such as the DRE, which by its very nature could not have utilized a legalistic process and still achieved the intended results."

The question accordingly arises whether it was within the Fund's discretionary authority to fashion such an alternative dispute resolution mechanism to serve the needs of the Fund and its staff.

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[26]In a follow-up letter, Ms "Y"'s counsel again called for the creation of a written record upon which findings might be disputed. The Director of Administration responded with the May 8, 1998 decision, detailing the findings of the review team and concurring in its conclusions.

46. Article III of the Tribunal's Statute provides in part:

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

The Commentary on the Statute suggests that a high degree of deference is to be accorded to the Fund's policy-making:

> "As applied to the review of regulatory decisions, the case law of administrative tribunals in general demonstrates that although there exists a competence to review regulatory decisions, the scope of that review is quite narrow. There are broad and well-recognized principles protecting the exercise of authority by the decision-making organs of an institution from interference by a judicial body. The Fund tribunal would have to respect those principles in reviewing the legality of regulatory decisions."

(Report of the Executive Board, p. 19.)

47. In *de Merode*, WBAT Decision No. 1 (1981), the World Bank Administrative Tribunal elaborated a standard for reviewing the exercise of the authority of an international organization to make changes to the terms or conditions of employment:

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

(*de Merode*, para. 47.) Reviewed against this standard, the Respondent's decision to undertake the DRE did not, in the view of the Tribunal, represent any abuse of its discretionary authority.

48. The record before the Tribunal supports the conclusion that the DRE was a good faith effort on the part of the Fund, perhaps unprecedented among international organizations, to resolve lingering allegations of past discrimination and to remedy the adverse effects of discrimination on the careers of aggrieved staff members. According to the Fund, approximately 70 staff members availed themselves of these procedures, with half of these

individuals receiving some form of relief. The DRE was undertaken as a result of reasoned consideration by the Fund's administration, based on recommendations made in an extensive study "Discrimination in the Fund" (December 1995), suggesting that a procedure alternative to formal adjudication would facilitate the resolution of longstanding complaints.

49. The procedures adopted for the DRE appear to have been rationally related to its purposes. For example, confidentiality and lack of a written record were features of the review exercise that were designed to encourage the cooperation and candor of witnesses. In addition, the development of the procedures for the review, and the review itself, were carried out by the Fund in partnership with outside consultants whose specialty was alternative dispute resolution. Such alternative procedures are, by definition and design, intended to offer a mechanism for resolution of claims distinct from those afforded by legal proceedings.

50. Finally, in considering whether Respondent's "regulatory decision" to institute the DRE represented an abuse of discretion, the Tribunal must address a contention put forth by Applicant in her Reply. In that pleading, Applicant asserts:

> *"In effect, the Fund is arguing that it had the authority to create an administrative process to investigate claims [footnote omitted] within the jurisdiction of the Tribunal, which are, however, completely free of formal review by the Tribunal. Applicant contends that although the Fund desired to create such an informal process, it had no authority to so limit the Tribunal's jurisdiction.* [footnote omitted] Applicant does not assert that the entire DRE was invalid. Rather, she contends that the Fund could not restrict the subsequent review of the DRE process solely to whether the actions taken in the investigation itself were arbitrary, capricious or discriminatory."

(Emphasis supplied.)

51. As considered *supra*, a principal purpose of the DRE was to provide a mechanism for considering claims—such as Applicant's—that were *not* within the jurisdiction of the Administrative Tribunal because they had not been raised through the Fund's administrative review procedures. Hence, the DRE did not insulate claims from Tribunal (or Grievance Committee) review in cases in which the administrative review channels of GAO No. 31 *had* been followed.[27] Indeed, implementation of the DRE could not have altered the jurisdiction of the Administrative Tribunal, which is granted

[27]It is not known to what extent staff members may have pursued claims simultaneously through the DRE and the standard channels of administrative review.

by its Statute and is subject to revision only by the Fund's Board of Governors.[28] Rather, the DRE created an alternative means of review to include claims that *could not* have reached the Administrative Tribunal for adjudication, affording possible relief to staff members whose complaints otherwise would have gone unremedied.[29] Hence, the question for consideration is whether the Fund's decision to elect voluntarily to afford review (and possible remedy) to staff whose legal rights to review and remedy had expired was a proper exercise of discretion.

52. For the reasons set forth above, the Administrative Tribunal concludes that implementation of the DRE was a proper exercise of the Fund's discretionary authority.

The individual decision

53. While Respondent's decision to afford alternative review procedures to aggrieved staff members (including those whose legal rights may have expired) is entitled to a high degree of deference on review, the conduct of the alternative dispute resolution mechanism as applied in individual cases is itself subject to review for abuse of discretion. In reviewing acts of administrative discretion, the Commentary on the Tribunal's Statute suggests the following standard:

> ". . . with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown 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."

(Report of the Executive Board, p. 19.) The World Bank Administrative Tribunal has stressed that the applicant carries the burden of proof in such cases: "In all cases of discretion, unless otherwise proven, it is assumed that the administrative authority will exercise its discretion in an objective and non-discriminatory manner." (*Iona Sebastian (No. 2) v. IBRD*, WBAT Decision No. 57 (1988), para. 22.)

54. The International Labour Organisation Administrative Tribunal has summarized its case law on review of administrative discretion as follows:

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[28]Article XIX provides:

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

[29]Applicant's contention that by seeking review in the DRE of claims that had not been raised through GAO No. 31 procedures she could bypass the exhaustion of remedies requirement of Article V of the Tribunal's Statute has been considered and rejected *supra,* Consideration of the Issues of the Case; The scope of the Tribunal's review.

> ". . . [The Tribunal] will set the decision aside only if it shows a formal or procedural flaw, or a mistake of fact or of law, or if some essential fact was overlooked, or if it was *ultra vires,* or if there was misuse of authority, or if an obviously wrong conclusion was drawn from the evidence."

(*In re Pary (No. 4*), ILOAT Judgment No. 1500 (1996), para. 5.) As applied in the present case, these principles suggest the following questions for consideration:

1. Were the procedures applied to Ms. "Y"'s case consistent with the procedures set forth for the DRE and with those applied by the DRE teams in other cases?
2. Were the conclusions of the DRE team in Ms. "Y"'s case (and their ratification by the Director of Administration) reasonably supported by evidence?
3. Was the investigation of Ms. "Y"'s claims affected by bias?

1. Were the procedures applied to Ms. "Y"'s case consistent with the procedures set forth for the DRE and with those applied by the DRE teams in other cases?

55. As this Tribunal observed in an earlier Judgment, in reviewing a decision for abuse of discretion, "[i]nternational administrative tribunals have emphasized the importance of observance by an organization of its procedural rules. . . ." (*Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 23.)[30] As described *supra*,[31] the procedures under which the DRE would operate were set forth in Memoranda to Staff of August 28, 1996 and January 13, 1997. The hallmark of these procedures was their flexibility: "The way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination." (Memorandum to Staff from Director of Administration, "Review of Individual Discrimination Cases,"

[30]The Tribunal was commenting on the exercise of discretionary authority with respect to classification and grading:

> "That classification and grading is an exercise of discretionary authority, subject to judicial review only for irregularity, is settled jurisprudence. (*Lyra Pinto v. IBRD*, WBAT Reports 1988, Part I, Decision No. 56, para. 36.) International administrative tribunals have emphasized the importance of observance by an organization of its procedural rules, for instance, on the internal publication of vacancies so as to enable the staff members of the organization to apply for the vacant position. (*In re Diotallevi and Tedjini*, ILOAT, 75th Session, Judgment No. 1272, paras. 12, 15–17)."

(*D'Aoust*, para. 23.)

[31]*See* The Factual Background of the Case.

August 28, 1996.) Hence, the procedures contemplated a considerable degree of latitude for the review teams in undertaking their investigation.[32]

56. Nonetheless, certain parameters were established. Each review team would be comprised of an outside consultant and a Fund official working as a pair. An initial meeting would be held with the staff member to obtain background information and to identify subordinates, peers and supervisors who might provide information. The career record would be reviewed. The review would be taken in "as discrete and sensitive a manner as possible." Where it was concluded that past discrimination had adversely affected the staff member's career, "forward-looking remedies" would be identified. Finally, feedback sessions would be undertaken with the staff member to inform him of the conclusions of the review. (Memorandum to Staff from Director of Administration, "Review of Individual Discrimination Cases," August 28, 1996; Memorandum to Staff from Director of Administration, "Procedures for Review of Individual Discrimination Cases," January 13, 1997.)

57. In his testimony before the Grievance Committee in this case, the senior Administration Department official who served on the team reviewing Ms. "Y"'s claims (and who had responsibilities as well with regard to the implementation of the DRE more generally) confirmed that the procedures in the Memoranda were those followed in Ms. "Y"'s and the other cases considered under the DRE:

> "A Well, the procedures that we adopted were the same that we tried to follow in all 70 cases. We reviewed the submission made by the staff member, we met with the staff member to try to get an elaboration of their original written submission, we exchanged views with the staff member on the witnesses or the other staff members that we might contact to try to get more information on the individual case. We reviewed the staff member's career file, their background, the positions that they had held. We reviewed their performance reports.
>
> We then went out and spoke with the witnesses, with other staff members who were in a position to provide information to us on the background of the staff member. And in some cases, we might have done some additional review work by looking at comparators to the staff member and how their career had progressed in terms of promotions and salary increases."

[32]The World Bank Administrative Tribunal has observed: "The very fact of allowing [decision-making bodies] a wide range of discretion does not by itself invalidate the scheme." (*Iona Sebastian (No. 2) v. IBRD,* WBAT Decision No. 57 (1988), para. 22) (referring to "grading and reviewing bodies").

(Tr. pp. 148–149.) In her Grievance Committee testimony, the outside consultant who served as the other member of the review team assigned to Ms. "Y"'s case confirmed that "[i]n this case, we followed the same format that we did in each of them. . . ." (Tr. p. 313.)

58. That the essential steps for DRE review, as set forth in the applicable Memoranda, were taken in Applicant's case is corroborated by the review team's confidential case Report, which includes the names of the persons interviewed and summarizes the content of the information gathered. It is not disputed that an initial background meeting and later feedback sessions were held with Applicant.

59. Ms. "Y" identifies in her Application in the Tribunal several alleged errors made by the DRE team in examining her claims. Among those alleged errors are that the team failed to interview approximately two-thirds of the witnesses she had suggested, that the choice of witnesses by the team was made without having relevant evidence on which to make such choices, and that persons interviewed were not knowledgeable about Ms. "Y"'s work or may have been biased against her.

60. In his testimony before the Grievance Committee, the senior Administration Department official described the rationale of the review team in selecting persons to interview in Ms. "Y"'s case:

> "And I can tell you we spoke with 22 people, all in total, and many of those were staff members from the [area departments in which Ms. "Y" had worked]. And that included a number of senior staff, including the directors of those departments, the SPMs of those departments, that is the senior personnel managers. It also included I think some ten staff members whose work Ms. ["Y"] had edited or who Ms. ["Y"] had worked for in different capacities.
>
> Then we spoke with a number of individuals in the Administration Department who had been involved in the decision and some of the administrative aspects surrounding the abolition of Ms. ["Y"]'s position. And then we spoke with some individuals in the Administration Department who were working on the job grading side of our work. And we spoke with some individuals in both the Secretary's Department and the External Relations Department who were supervisors in the editorial stream in the Fund and who were knowledgeable about other editorial positions and who could help us interpret the job grading standards and give us some comparisons between Ms. ["Y"]'s duties and responsibilities and those of others in the editorial ladder."

(Tr. pp. 152–153.) He also compared the selection of witnesses in Ms. "Y"'s case with the examination of other cases under the DRE:

> "A . . . on average, about seven to eight witnesses were interviewed per case. And as I mentioned earlier, in Ms. ["Y"]'s case, we interviewed 22 individuals.
>
> Q In the other cases that you reviewed, did you interview all the persons that had been suggested by the individuals?
>
> A No. I mean we tried to interview as many as possible, but sometimes, it wasn't always possible to interview everyone. In some cases, we made judgments that we were picking sample people from different groups that might represent peers, subordinates, supervisors, people who could provide some expert testimony on an issue or type of systemic issue that arose. So we always tried to have broad coverage, but we didn't necessarily interview everybody. In other cases, people were just not available."

(Tr. p. 175.)

61. Finally, Applicant also contends that the DRE team failed to fulfill its mandate in her case by allegedly not investigating all of the allegations of discrimination that she had brought to its attention. The Grievance Committee testimony of the review team members demonstrates that while some of the allegations received relatively more attention than others, the team sought information and drew conclusions about all of Ms. "Y"'s claims. These conclusions are discussed in the following section.

62. Accordingly, the Administrative Tribunal concludes that the procedures applied to Ms. "Y"'s case were consistent with the procedures set forth for the DRE and with those applied by the DRE teams in other cases.

2. Were the conclusions of the DRE team in Ms. "Y"'s case (and their ratification by the Director of Administration) reasonably supported by evidence?

63. The IMFAT and other international administrative tribunals have recognized that an important element of the lawful exercise of discretionary authority with respect to individual administrative acts is that conclusions must not be arbitrary or capricious, but rather must be reasonably supported by evidence. For example, in concluding that ". . . it was a reasonable act of managerial discretion . . ." for the Fund to classify a particular report and to limit its distribution to individuals with a need to know the information, the IMFAT observed:

> ". . . *the Fund has explained and documented its rationale for circulating the Report to this limited group of individuals*. The policy was undertaken in the interest of promoting transparency of personnel practices and to provide Fund-wide reactions, in response to criticisms that had arisen

> over the years with respect to the equitable allocation of scarce resources of the SBF."

(*Mr. "V"*, para. 96.) (Emphasis supplied.)

64. By contrast, a decision may be set aside if it ". . . rested on an error of fact or of law, or if some essential fact was overlooked . . . or if clearly mistaken conclusions were drawn from the evidence." (*In re Durand-Smet (No. 4)*, ILOAT Judgment No. 2040 (2000), para. 5.) Review is also limited by the admonition that ". . . tribunals . . . will not substitute their judgment for that of the competent organs. . . ." (Report of the Executive Board, p. 17.) As the World Bank Administrative Tribunal has recognized, ". . .in matters involving the exercise of discretion by the Bank, the Tribunal is not charged with the task of re-examining the substance of the Bank's decision with a view to substituting the Tribunal's decision for the Bank's." (*Pierre de Raet v. IBRD*, WBAT Decision No. 85 (1989), para. 56.)

65. It may be noted as well that the degree of the Tribunal's review is necessarily dictated by the nature of the process being reviewed. Here, in the case of review of the application of an alternative dispute resolution procedure, the depth of the Tribunal's review is governed not only by its deference to those decision-makers competent to take the decision, but also by the fact that the applicable procedures were quite informal and did not provide for any contemporaneous record of proceedings. Therefore, the measure of the review undertaken by this Tribunal in considering the fairness of the DRE process as applied in the case of Ms. "Y" is clearly distinguishable from the type of review that would be entertained, for example, by an appellate court reviewing trial court proceedings for error.

66. Nonetheless, the Tribunal must satisfy itself that the contested decision is reasonably supported by evidence gathered by the DRE team. It is noted that among the seven principal errors that Applicant alleges with respect to the conduct of the DRE was that the review team's explanations for the abolition of her position were "plainly erroneous."

67. The principal findings of the team are set out in a confidential case Report, which has been made part of the record before the Tribunal. This Report reviews in considerable detail the information gathered in the investigation of Ms. "Y"'s chief claims, i.e. that the grading of her position and its later abolition were affected by discrimination, and draws conclusions based directly on this evidence. The review team's findings and the rationale for its conclusions were further elucidated by the Grievance Committee testimony of the review team's two members.

Following is a brief summary of the team's conclusions and the bases therefor.

68. *Job grading*—The DRE team examined in considerable detail Ms. "Y"'s assertion that her position should have been graded at A13 rather than A11. After canvassing staff members (both supervisory and non-supervisory) who were familiar with her work, along with persons in the same career stream employed in other Fund departments, and Administration Department personnel familiar with the job grading standards, the DRE team concluded that there was no basis for the claim that the grading of Ms. "Y"'s position had been adversely affected by discrimination.

69. Specifically, the team concluded that, at A11, Ms. "Y" was at the ceiling of the ladder for her career stream in area departments, owing to the nature of editorial work performed in those departments and that she had not sought positions in other departments that might offer greater opportunity for advancement. The team, moreover, found a "clear demarcation" between A11 and A12 in the editorial stream, with positions at A11 and below limited primarily to editing internal documents drafted by others and positions at A12 and above dominated by creation of original work, including for publication. (Tr. pp. 157–159, 162, 215–216, 229, 236, 241–242; Report, pp. 3–7.)

70. *Abolition of position*—The review team interviewed senior staff who were involved in the decision to abolish the post occupied by Ms. "Y". The team's conclusion was that the abolition was the result of budgetary developments in the Fund and was not affected by discrimination. Departments had been asked to make small reductions in overall staffing, and the pressure of the economics work in the two departments served by Ms. "Y" led to the decision that it would be preferable not to lose an economist.[33] Those involved in the decision emphasized that Ms. "Y"'s work was indeed valued and efforts were made to relocate her within the Fund. (Tr. pp. 208, 210–212, 275.) Based on its investigation, the team determined that the decision reflected:

[33]It is noted that in *D'Aoust* this Tribunal held that it was not unreasonable for the Fund to favor economists over non-economists ". . . in deciding upon the terms of staff employment since economics is at the heart of the Fund's mission." (Para. 29.) Accordingly, the Tribunal concluded:

> "Thus when the Fund applied the so-called non-economist matrix to the determination of the salary of Mr. D'Aoust, cutting off the credit given to his prior experience at ten years, that of itself did not give rise to a cause of action against the Fund on the ground of inequality of treatment."

(*D'Aoust*, para. 29.)

> ". . . a functional and rational prioritization as between editorial and economic functions. This prioritization of functions also appeared to the review team to have been made independent of the position incumbents."

(Report, p. 6.)

71. *Other claims*—Grievance Committee testimony of the DRE team members supports the view that the team examined all of the claims raised by Ms. "Y" in her initial request for DRE review, and that it drew conclusions based upon the evidence gathered. The team's investigation, which included interviews with persons having information germane to the allegations, concluded that none of the following factors had adversely affected the grading of Ms. "Y"'s position or led to its abolition: lack of a day-to-day supervisor (Tr. pp. 154, 203, 226, 257); lack of a formal job description (Tr. pp. 155–156, 213–215); decision of Ms. "Y"'s department not to appeal the denial of a job audit (Tr. pp. 160–161, 216); alleged sexual harassment or retaliation (Tr. pp. 171–172, 324).

72. Furthermore, as to Ms. "Y"'s contention that abolition of her position was related to age discrimination, the DRE team examined the records of other separations from staff in the same period. The team concluded that staff separating as the result of abolition of position tended to be older because, when such abolitions were necessary, the Fund had approached persons eligible for early retirement to take advantage of separation incentives. This policy was, in the DRE team's view, "not a reflection of age discrimination" but rather was a "humanitarian and sensible approach." (Tr. pp. 164, 260–261.)

73. Finally, in reviewing the DRE team's conclusions, the Director of Administration in her May 8, 1998 decision drew directly upon the evidence gathered by the review team, documenting her findings that Applicant's job grade and the abolition of her post had not resulted from discrimination by the Fund. (Letter from Director of Administration to Ms. "Y"'s Counsel, May 8, 1998.)

74. The Administrative Tribunal accordingly concludes that the conclusions of the DRE team (and their ratification by the Director of Administration) were reasonably supported by the evidence adduced in their investigation of Ms. "Y"'s claims.

3. Was the investigation of Ms. "Y"'s claims affected by bias?

75. Applicant contends that the DRE team was biased against conducting a full and fair review of Mrs. "Y"'s claims, especially with regard to the abo-

lition of her position, because the Director of Administration initially had determined that Applicant's case was not appropriate for review under the DRE, as Ms. "Y" was soon to be separating from the Fund.

76. In his Grievance Committee testimony, the Administration Department official who served on the DRE review team offered his view that the team's work was not influenced by that initial decision:

> "A . . . I don't believe that [the Director of Administration]'s initial judgment and then the decision to reverse that judgment had any influence whatsoever on [the consultant] or myself. In fact, I don't even know if [the consultant] was aware of the fact that [the Director of Administration] had initially declined to consider Ms. ["Y']'s case. There was nothing different about the way we treated the review of Ms. ["Y"]'s case from the other 14, 15 cases that I was involved with.
>
> Q Did [the Director of Administration] ever express anything to you that this was possibly not a deserving case or that there should be any difference in the way this case was handled, as opposed to other cases?
>
> A No, no, she did not."

(Tr. pp. 247–248.)

77. In addition, the members of the review team indicated, both in their Grievance Committee testimony and in the confidential case Report, that relatively less emphasis was given to the matter of abolition of position than of job grading because the remedy Ms. "Y" had sought under the DRE was promotion rather than reinstatement. (Tr. pp. 232; Report at p. 4.)

78. Finally, as noted *supra*, the Director of Administration's May 8, 1998 decision reviewing the DRE team's conclusions was based squarely upon the findings of the review team.

79. Accordingly, the Administrative Tribunal concludes that the DRE review of Ms. "Y"'s discrimination claims and the Director of Administration's subsequent ratification of the review team's conclusions were not affected by personal animus or bias that would support the rescission of a discretionary administrative decision.

Conclusions

80. In the light of the foregoing analysis, the Administrative Tribunal holds, first, that the proceedings of the DRE in respect of the Applicant's claims were regular, appropriate and unexceptionable and, second, that

there is no ground for questioning the conclusion of the DRE that the Applicant's career disposition was unaffected by discrimination.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

The Application of Ms. "Y" is denied.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
March 5, 2002

JUDGMENT NO. 2002-3

Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent

(December 18, 2002)

Introduction

1. On December 16, 17, and 18, 2002, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "G", a staff member of the Fund, and in which Mr. "H", also a member of the staff, was admitted as an Intervenor.

2. Ms. "G", a staff member of the Fund employed at its Washington, D.C. headquarters, is a national foreign to the United States holding lawful permanent resident ("LPR")[1] status. She contests the denial of her request for an exception to the Fund's policy governing expatriate benefits. That policy, as amended by the Fund's Executive Board effective in 2002, extends expatriate benefits to current and newly appointed Fund staff who are U.S. LPRs on the condition that they relinquish their LPR status in favor of obtaining a G-4 visa. Applicant sought, and was denied, an exception to the policy to allow her to receive expatriate benefits while retaining her LPR status. Ms. "G" and Mr. "H", who has been admitted as an Intervenor in the case, contend that the amended policy impermissibly discriminates among categories of Fund staff and that exceptions should be drawn to the policy to correct the effects of that discrimination.

[1]Lawful permanent residents of the United States ("LPRs") hold Permanent Resident ("PR") visas, which are also known as Resident Alien ("RA") visas or "green cards." For simplicity, the term "LPR" is used herein, consistent with the Fund's usage in Staff Bulletin No. 02/2 (January 11, 2002).

The Procedure

3. On July 2, 2002, Ms. "G" filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on the following day. On July 10, 2002, the Registrar issued a summary of the Application within the Fund, pursuant to Rule XIV, paragraph 4 of the Rules of Procedure which provides:

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

4. On August 1, 2002, Mr. "H", also a member of the staff of the Fund, having been so notified of the pending case, filed an Application for Intervention under Rule XIV[2] of the Tribunal's Rules of Procedure. Pursuant to paragraph 3 of that Rule, on August 2, 2002, the Application for Intervention was transmitted to both Applicant and Respondent, and each was accorded, simultaneously, thirty days in which to present views as to the admissibility of Mr. "H"'s Application for Intervention.

5. Following an inquiry from the Fund seeking clarification as to whether the filing of the Application for Intervention suspended the deadline for submission of the Answer, the President of the Administrative Tribunal

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[2]Rule XIV provides:

"Intervention

1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal. Such person shall for that purpose draw up and file an application to intervene in accordance with the conditions laid down in this Rule.

2. The rules regarding the preparation and submission of applications specified above shall apply *mutatis mutandis* to the application for intervention.

3. Upon ascertaining that the formal requirements of this Rule have been complied with, the Registrar shall transmit a copy of the application for intervention to the Applicant and to the Fund, each being entitled to present views on the issue of intervention within thirty days. Upon expiration of that deadline, whether or not the parties have replied, the President, in consultation with the other members of the Tribunal, shall decide whether to grant the application to intervene. If intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party.

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

directed the parties that Respondent's Answer would remain due, as usual, forty-five days from the transmittal of the Application, but that the Answer would be held in the Office of the Registrar of the Tribunal until the matter of the admissibility of the Application for Intervention was resolved.[3]

6. Respondent filed its Answer to Ms. "G"'s Application on August 19, 2002.[4]

7. On September 18, 2002, following consideration of the views of the Applicant and Respondent as to the admissibility of Mr. "H"'s Application for Intervention, the President of the Administrative Tribunal, in consultation with its other members, decided to admit the Intervention, and the parties were so notified. Consistent with Rule XIV's requirement that an intervenor "participate in the proceedings as a party," the previously submitted pleadings on the merits, i.e. Ms. "G"'s Application and the Fund's Answer, were transmitted to Mr. "H". The Applicant and the Intervenor each were given thirty days in which, simultaneously, to file a Reply to the Fund's Answer.

8. The Intervenor submitted his Reply on October 17, 2002, and the Applicant submitted her Reply on October 18, 2002. The Fund's Rejoinder was filed on November 20, 2002.

9. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.[5]

The Factual Background of the Case

The relevant facts may be summarized as follows.

10. Ms. "G" has been continuously employed by the Fund since 1994, serving initially as a contractual employee, later as a fixed-term staff member, and, since 1999, as a regular staff member of the Fund. At the time that Ms. "G" was first employed by the Fund in 1994, she was a lawful permanent resident ("LPR") of the United States and remains in that visa status

[3]The President's action was taken pursuant to his residual powers under Rule XXI, paras. 2 and 3 to modify the application of the rules, including time limits thereunder, and to deal with any matter not expressly provided for in the Rules.

[4]As the Answer did not comply fully with the requirement of Rule VIII, paragraph 1 to annex all documents referred to in the Answer, Respondent was given until September 4, 2002 to supplement the Answer, which was done on August 23, 2002.

[5]Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII, paragraph 1 of the Rules of Procedure provides that such proceedings shall be held ". . . if the Tribunal decides that such proceedings are necessary for the disposition of the case."

today. According to Applicant, at the time of her employment by the Fund, she was living in the U.S. on a temporary basis for the purpose of seeking work, while at the same time maintaining a residence in her home country, in which she had acquired earlier work experience. As of the time of her Application to the Administrative Tribunal, Ms. "G" was 46 years of age.

11. In 1998, when considering acceptance of the fixed-term appointment offered by the Fund, Ms. "G" raised with representatives of the Human Resources Department ("HRD") the matter of expatriate benefits. She expressed dissatisfaction that her LPR status rendered her ineligible for such benefits and she attempted to negotiate special provision in her letter of appointment to compensate for the lack of those benefits and the costs associated with maintaining ties with her home country and educating her children in her language and culture. Ms. "G" was advised that no exceptions could be made to the policy and, accordingly, no consideration could be given to her request for provision for special compensation. Ms. "G" apparently took no steps to contest that decision.

12. As discussed in greater detail below, in January 2002, the Fund amended, in certain respects, the eligibility criteria for receiving expatriate benefits. Unlike the previous policy, the amended policy makes such benefits available to staff members currently in LPR status, on the condition that they relinquish their LPR status in favor of G-4 visa status. Under the United States immigration laws, G-4 visa status is provided specifically to employees of international organizations and only for the duration of their employment. Other provisions of the immigration laws permit G-4 visa holders, upon completion of at least 15 years of employment *in that visa status*, to convert to LPR status. An individual with LPR status may remain in the United States indefinitely and seek employment with private employers.

13. Following notification to the staff via Staff Bulletin No. 02/2 (January 11, 2002) of the change in the Fund's policy on eligibility for expatriate benefits, on April 9, 2002 Ms. "G" wrote to an official of the Fund's Human Resources Department requesting an exception to the recently adopted amendment so that she might receive expatriate benefits without giving up her LPR visa status. Applicant noted that she sought the exception ". . . principally to rectify the discrimination created by the Amendment."

14. Ms. "G" set forth a number of arguments in favor of her position, similar to those she now presents to the Administrative Tribunal. First, contended Ms. "G", the current policy discriminates against her vis-à-vis other staff members with LPR status, who, having begun work for the Fund before a policy change in 1985, receive expatriate benefits while maintain-

ing their LPR visa status because they have been "grandfathered" under the former policy, which used nationality as the basis for determining eligibility for expatriate benefits. Second, in Ms. "G"'s view, the policy discriminates against mid-career LPR staff such as herself vis-à-vis mid-career G-4 staff because if mid-career LPR staff now relinquish that visa status in favor of G-4 status they may not be able to attain 15 years of employment in G-4 status before retirement age, so as to avail themselves of the opportunity provided under (currently applicable) U.S. law to regain LPR status following separation from the Fund. As a corollary to this argument, Ms. "G" also presented the view that her career development might suffer unfairly because there would be a disincentive for her to take Fund assignments overseas, as these would not count toward the 15-year requirement. Finally, Ms. "G" challenged the underlying policy of offering expatriate benefits on the basis of visa status, asserting that the distinction between LPR and G-4 status may not correlate with the goal of expatriate benefits to compensate for the additional costs of maintaining contacts with one's home country. In Ms. "G"'s view, the degree of "cultural proximity" to one's home country or the degree of one's permanence in the U.S. may not be reflected by visa status.

15. Ms. "G"'s April 9, 2002 request for exceptional treatment was referred to another officer in HRD who advised Ms. "G" by memorandum of April 12, 2002 of the denial of her request. The denial explained that the policy, approved by the Fund's Executive Board, does not grant any authority to management to make exceptions and is to be applied uniformly to all staff members. In addition, the memorandum noted that the arguments Ms. "G" had raised in her request for exception to the policy were ones that were discussed, and ultimately rejected, by the Fund during the formulation of the 2002 amendment to its expatriate benefits policy.

The Channels of Administrative Review

16. On May 6, 2002, Ms. "G" addressed a written request for administrative review to the Director of the Fund's Human Resources Department. By memorandum of May 20, 2002, the Director affirmed the denial of Ms "G"'s April 9 request for an exception to the expatriate benefits policy. The Human Resources Director reaffirmed that the Executive Board had not authorized management to make exceptions to the newly adopted policy and rejected, in the following terms, Ms. "G"'s contentions that the policy is discriminatory. While acknowledging that ". . . an intention to sever ties with one's home country cannot be inferred automatically from possession of an RA visa," the Director explained:

> ". . . the Fund cannot offer expatriate benefits to every staff member for reasons of costs and to remain consistent with the policy objective of these benefits. The Fund must draw a line somewhere. Any eligibility criteria will, by necessity, differentiate among groups of staff, and the Executive Board concluded that the most reasonable place to draw the line is to provide expatriate benefits to any staff member who is not a permanent resident or citizen of the duty station country, including allowing permanent residents who relinquish that status and obtain a G-4 visa to become eligible for such benefits.
>
> . . .
>
> All staff who are not U.S. citizens have the option to obtain G-4 visas and thereby gain eligibility for expatriate benefits. Therefore, similarly situated staff are being treated in a like manner, and this cannot be considered discriminatory. The differential compensation, as between staff who are eligible for expatriate benefits and those who are not, reflects the disadvantages faced by G-4s vis-à-vis their colleagues who are U.S. citizens or permanent residents, and are appropriate to the recruitment and retention goals of the Fund."

17. The Director's decision also expressed the view that difficulties in regaining LPR status that result from converting to G-4 status stem from the operation of U.S. law, not from the Fund's policy. Finally, it was observed that "grandfathering" of staff under a pre-existing policy is a commonly recognized practice when a change in rules would otherwise abolish a benefit enjoyed by a staff member.

18. Following the May 20, 2002 decision of the Director of Human Resources, Ms. "G" filed her Application with the Administrative Tribunal on July 2, 2002.

19. It has not been disputed that Applicant has fulfilled the requirement of Article V, Section 1[6] of the Tribunal's Statute to exhaust all available channels of administrative review before filing an application with the Administrative Tribunal. It is noted that on July 16, 2002, following the filing of her Application, Applicant filed a Grievance with the Fund's Grievance Committee in order to preserve her right to review in that forum, in the event that exhaustion of that procedure were required.

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[6]Article V, Section 1 provides:

> "1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review."

20. The Fund took the position in the Grievance Committee that the Committee did not have jurisdiction over the matter, as Applicant presented a challenge to a decision of the Fund's Executive Board, a matter which is expressly excluded from the Grievance Committee's jurisdiction under GAO No. 31, Rev. 3 (November 1, 1995).[7] Subsequently, the Grievance Committee dismissed Ms. "G"'s Grievance on that basis.[8]

The Intervention of Mr. "H"

21. As noted *supra*, on August 1, 2002, Mr. "H", a member of the staff of the Fund, filed an Application for Intervention in the case of Ms. "G" pursuant to Rule XIV.[9] Mr. "H", like Ms. "G", is a national foreign to the

[7]Section 4 of GAO No. 31 prescribes the Grievance Committee's jurisdiction as follows:

> *"Section 4. Jurisdiction of the Grievance Committee*
>
> 4.01 *Committee's Jurisdiction.* Subject to the limitations set forth at Section 4.03, the Grievance Committee shall have jurisdiction to hear any complaint brought by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service.
>
> . . . .
>
> 4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to (i) a decision of the Executive Board; (ii) staff regulations as approved by the Managing Director; or (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan."

[8]The case of Ms. "G" is similar in form to the type of dispute reviewed in *Mr. "R", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-1 (March 5, 2002), i.e. a challenge to denial of a request for exception to a generally applicable policy. In *Mr. "R",* the applicant had sought review by the Grievance Committee *before* filing his application with the Administrative Tribunal. The Grievance Committee dismissed the grievance for lack of jurisdiction, on the basis that Mr. "R"'s complaint represented a challenge to a Fund policy rather than a challenge to ". . . a decision . . . inconsistent with Fund regulations governing personnel and their conditions of service." (GAO No. 31, Section 4.01.) Thereafter, Mr. "R" sought review by the Tribunal. (*See Mr. "R",* para. 17.)

[9]Rule XIV provides in its entirety:

> *"Intervention*
>
> 1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal. Such person shall for that purpose draw up and file an application to intervene in accordance with the conditions laid down in this Rule.
> 2. The rules regarding the preparation and submission of applications specified above shall apply *mutatis mutandis* to the application for intervention.
> 3. Upon ascertaining that the formal requirements of this Rule have been complied with, the Registrar shall transmit a copy of the application for intervention to the

United States with LPR visa status employed at the IMF's Washington, D.C. headquarters. Mr. "H" first joined the Fund in 1990 when he was hired on a contractual basis, in which capacity he served until 2001 when he was appointed as a fixed-term member of the staff. Previously, Mr. "H" had been employed with the World Bank. As of the time of the Application for Intervention, he was 54 years of age.

22. On September 18, 2002, following consideration of the views of the parties, the President, in consultation with the Associate Judges, decided to admit Mr. "H"'s Application for Intervention. The basis for that decision is reviewed below.

23. The admissibility of an application for intervention is governed by Article X, Section 2 (b) of the Statute and Rule XIV, paragraph 1 of the Rules of Procedure. Article X, Section 2 (b) of the Statute of the Administrative Tribunal provides:

> "2. Subject to the provisions of this Statute, the members of the Tribunal shall, by majority vote, establish the Tribunal's Rules of Procedure. The Rules of Procedure shall include provisions concerning:
>
> . . .
>
> b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment."

24. Rule XIV, paragraph 1 of the Rules of Procedure provides in pertinent part:

> "1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal."

25. As the Tribunal noted in *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, Judgment No. 2001-2 (November 20, 2001), para. 49, there are two statutory requirements for intervention in the IMF

Applicant and to the Fund, each being entitled to present views on the issue of intervention within thirty days. Upon expiration of that deadline, whether or not the parties have replied, the President, in consultation with the other members of the Tribunal, shall decide whether to grant the application to intervene. If intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party.

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

Administrative Tribunal. First, the intervenor must be a person who is within the Tribunal's jurisdiction *ratione personæ*. Second, the intervenor must have a right that may be affected by the judgment to be given by the Tribunal.

26. The views of Applicant and Respondent with respect to the admissibility of the Application for Intervention may be summarized as follows.

27. Applicant opposed granting the Application for Intervention on the basis that she did not consider the intervention to be in her interest. Specifically, she asserted that the Application for Intervention raised issues that she did not wish to raise and that the intervention of Mr. "H" would add another layer of procedures and hence an additional burden for her as a litigant, not matched by any obvious benefits. Applicant did not address the statutory requirements for intervention or consider whether Mr. "H" had met these requirements.

28. Respondent, by contrast, concluded that, on balance, it did not object to the Tribunal's granting Mr. "H"'s Application for Intervention in the case. At the same time, Respondent suggested that the Administrative Tribunal has discretion to deny an application for intervention when the prospective intervenor has only an "indirect" interest in the outcome of the case. In such circumstances, maintained the Fund, the Tribunal should weigh the following factors to determine whether or not the intervention should be granted: a) the timing of the application for intervention, in terms of whether a party would be prejudiced by delay or "hampered in their arguments;" b) the "relatedness" of the intervenor's factual and legal situation to that of the applicant and the degree to which resolution of the original claim might be complicated by the intervention; c) the extent to which the intervenor's situation and arguments are so similar to those of the applicant that they are ". . . simply duplicative or cumulative . . . such that no reasonable purpose is served by permitting intervention;" and d) any potential prejudice to the applicant for intervention were his application to be denied.

29. Applying its proposed test to the present case, Respondent observed that Mr. "H" submitted his Application for Intervention relatively early in the proceedings, before the Fund had filed its Answer. In addition, in Respondent's view, Mr. "H"'s argument of age discrimination is but a different expression of Ms. "G"'s own theory of the case. Accordingly, admission of the intervention, asserted Respondent, would not complicate resolution of the case. On the other hand, argued the Fund, consideration of the two other factors (whether the potential intervenor's claims are duplicative of the applicant's and whether the applicant for intervention would be prejudiced

by denial of his application) weighed against admission of the intervention. In Respondent's view, Mr. "H"'s

> ". . . only real interest in this case is as a member of the group which stands to benefit from a judgment in favor of Ms. ["G"]. Indeed, it is difficult to see how he would suffer any prejudice if he is not permitted to intervene, because his rights are adequately represented by Ms. ["G"]. Thus, it would be within the Tribunal's discretionary judgment to deny intervention, as Mr. ["H"] would still be entitled to pursue his own application with the Tribunal should the outcome of this case be unfavorable to the Applicant."

30. Respondent concluded that, on balance, Mr. "H"'s Application for Intervention should be granted in the interest of judicial economy, considering the timeliness of its filing and the similarity of his claims to those of the Applicant.

31. In the view of the Tribunal, it is not disputed that Mr. "H", a member of the staff of the Fund, is a person to whom the Tribunal is open under Article II, Section 1 of the Statute.[10] In addition, he has a right that may be affected by the judgment of the Tribunal. Like the Applicant, Mr. "H" has LPR status and would be affected by any decision taken by the Tribunal with respect to the legality of the expatriate benefits policy.

32. The Tribunal did not find persuasive Respondent's contention that the Tribunal had discretion to deny the Application for Intervention because Mr. "H" would be only "indirectly" affected by the judgment of the Tribunal in Ms. "G"'s case. First, Respondent presented no basis, e.g. in the legislative history of the IMFAT Statute or in the jurisprudence of other international administrative tribunals, for its view that the Tribunal is vested with discretion to deny an application for intervention in the circumstance that the prospective intervenor may be only "indirectly" affected by the judgment. Second, the contention that Mr. "H"'s interest in the outcome of the case is only "indirect" was not persuasive. While it is true that, pursuant to Article XIV of the Statute,[11] Mr. "H" would be in the class of persons who

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[10]Article II, Section 2 (c) (i) provides:

> "c. the expression 'member of the staff' shall mean:
>
> (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff."

[11]Article XIV, Section 3 provides:

> "3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void."

would benefit from a favorable outcome in Ms. "G"'s case even without the intervention, that fact did not serve as a viable argument for denying an application for intervention. Indeed, that the prospective intervenor would be affected by such an outcome supported the conclusion that he should be admitted as an intervenor and thereby granted the opportunity to attempt to persuade the Tribunal of his views on the matter.

33. It may also be observed that the standard "may be affected" by the judgment is a broad one. Hence, the intervenor's interests need not be *determined* by the judgment but merely *affected* by it. Additionally, the Fund's position that Mr. "H" would be entitled to pursue his own application with the Tribunal should the outcome of the case be unfavorable to Ms. "G" may not be realistic. While a judgment is *res judicata* only with respect to the actual parties, in the case of a challenge to a regulatory decision, the precedent established would affect any future challenge on similar grounds to the policy at issue.

34. Finally, Respondent's contention that the Tribunal has discretion to deny an application for intervention on the basis that it is merely duplicative of the claims of the applicant runs counter to the purposes of intervention. An identity between the claims of an applicant and of an intervenor is ordinarily the touchstone for a decision to admit an intervention.

35. As to Ms. "G"'s view that the intervention would pose additional burdens for her as a litigant, this contention also was found not to be persuasive, as there is no support for the view that the Tribunal would have discretion to deny an application for intervention on such a basis. Moreover, in light of the similarity between the contentions of the prospective intervenor and her own, Ms. "G"'s burdens as a litigant should not be significantly affected by the admission of the intervention.

36. Accordingly, having met the statutory requirements for intervention, Mr. "H"'s Application for Intervention was granted.

Summary of Parties' Principal Contentions

Applicant's principal contentions

37. The principal arguments presented by Applicant in the Application and the Applicant's Reply are summarized below.

1. The Fund's expatriate benefits policy discriminates against Applicant vis-à-vis staff members in LPR status who were hired by the Fund before 1985 and remain eligible to receive expatriate benefits without

relinquishing their LPR status pursuant to a "grandfathering" provision of the policy adopted in 1985.

2. The Fund's expatriate benefits policy discriminates against Applicant vis-à-vis staff members who differ only in their visa histories, i.e. having the same number of years of service but who began their careers in G-4 status, with respect to the ability to regain LPR status in the future. If Applicant converted now to G-4 status, she would not be able to acquire 15 years of service in that status before early retirement. In addition, she would face disincentives to taking Fund assignments overseas, as this service would not qualify as part of the 15-year period.

3. Applicant's request for exception is fully within the spirit of the Fund's expatriate benefits policy, which is designed to compensate international staff for the costs of maintaining and renewing cultural ties with their home countries.

4. The possibility of obtaining LPR status must be considered part of the overall benefits package, although it is not directly a Fund benefit. This option allows time and flexibility in making plans for whether and when to return to one's home country. The advantages of regaining LPR status are recognized by the Fund in Staff Bulletin No. 02/2.

5. Applicant is adversely affected by the timing of the new policy. Had the policy been implemented earlier she would have had the opportunity to complete 15 years in G-4 status by early retirement and therefore would have been "much less adversely affected." In situations where timing is an issue, "grandfathering" is appropriate.

6. Staff members in LPR status face many of the same challenges as do their G-4 colleagues, yet G-4s with comparable rank and family status have substantially higher income due to expatriate benefits.

7. Applicant seeks as relief that she be granted full expatriate benefits as of May 1, 2002, while maintaining her LPR visa status.

Intervenor's principal contentions

38. The principal arguments presented by Intervenor in the Application for Intervention and the Intervenor's Reply are summarized below.

1. Intervenor supports the contentions in Ms. "G"'s Application.

2. The Fund's current policy on expatriate benefits represents age discrimination because it ". . . requires older staff to perform an action

that deprives them of an opportunity that is available to younger staff with identical employment and national characteristics." This is because of the 15-year period required to regain LPR status if one converts to G-4 status. Intervenor will not be able to complete that service by retirement age, although he would have worked for international organizations for 25 years (including his service with the World Bank).

3. The current policy is discriminatory because it lacks the "grandfathering" clause that was granted under a previous policy change to staff holding LPR status.

4. The Tribunal has jurisdiction under Article XX of its Statute because the January 2002 amendment, Ms. "G"'s request for exception to that amendment, and the denial of the request are post-October 15, 1992. The Fund's current policy on expatriate benefits is a new policy by virtue of its amendment, even though it contains elements of the 1985 and 1947 policies.

5. Uniform application of the 2002 amendment to the following categories of staff has discriminatory results:

   a) staff who may now relinquish LPR status but, because of their age, will be able to complete 15 years of service before retirement so as to retain the option of later regaining LPR status;
   b) staff who (like Applicant), because of their age, will not be able to complete 15 years of service before reaching early retirement age; and
   c) staff who (like Intervenor), because of their age, will not be able to complete 15 years of service before mandatory retirement age.

   Accordingly, the policy discriminates against long-serving staff and older staff.

6. LPR status should be considered a "benefit," which is not administered by the Fund but "facilitated" by it.

7. Granting an exception to those staff discriminated against by the policy will not interfere with the policy's fundamental intent. The Fund's Human Resources Department ("HRD") has authority to grant such an exception.

8. Intervenor seeks as relief, preferably, (a) the "grandfathering" of all Fund staff holding LPR status as of the time of the January 2002 amendment or, alternatively, (b) "grandfathering" only of those who, because

of their age at the time of the amendment, would lose the option to apply for LPR status at retirement from the Fund.

Respondent's principal contentions

39. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1. Applicant and Intervenor do not challenge any administrative act falling within the Tribunal's jurisdiction *ratione materiæ* under Article II, Section 1 of the Statute because the terms and conditions of their employment have not been adversely affected by the 2002 amendment to the Fund's expatriate benefits policy. That change only expanded their choices and, for the first time, gave them the opportunity to become eligible for expatriate benefits.

2. When an organization implements a change in employment conditions favorable to employees, a staff member who benefits less from the change than do other members of the staff has no legal claim. Such a staff member has not been adversely affected by the amendment or its timing, even if he would have benefited more had it been enacted earlier.

3. The essence of Applicant's and Intervenor's complaints is to challenge the policy implemented by the Fund in 1985 to deny expatriate benefits to staff with LPR status. As this policy pre-dates the Tribunal's Statute, these claims fall outside the Tribunal's jurisdiction *ratione temporis* as prescribed by Article XX of the Statute. Later requests for exception to a policy pre-dating the Statute are also outside the Tribunal's jurisdiction. Additionally, it is not possible to address the question of denial of exception to a generally applicable policy without subjecting the policy itself to review.

4. Assuming that the Tribunal has jurisdiction to consider the question, the Fund's policy on expatriate benefits is a proper exercise of managerial discretion, supported by evidence and rationally related to legitimate purposes. The policy is not discriminatory, as there is a rational nexus between the visa test for eligibility and the recruitment and retention objectives of the expatriate benefits policy. Additionally, the Fund may consider not only the policy objectives of the benefits but also their costs.

5. The Fund's decision to "grandfather" existing staff when adopting the 1985 change in eligibility for expatriate benefits was legal and is not discriminatory.

6. The 2002 amendment to the Fund's expatriate benefits policy is not discriminatory as between Applicant or Intervenor and younger staff in LPR status. The Fund is not required to place all staff in the same situation with regard to becoming permanent residents of the duty station country. The ability to attain LPR status following 15 years in G-4 status is not a Fund "benefit" but rather a function of U.S. law. Applicant's emphasis on being disadvantaged with respect to regaining LPR status if she were now to relinquish it conflicts with a key rationale for providing expatriate benefits, i.e. repatriation following separation from the Fund.

7. The term "grandfathering" normally refers to the preservation of an entitlement to a benefit after the benefit is abolished or made less favorable. As Applicant and Intervenor have never been entitled to expatriate benefits, there is no basis for "grandfathering."

8. The Fund's expatriate benefits policy as enacted in 1985 and amended in 2002 makes no provision for exception in individual cases. Therefore, any such exception would be *ultra vires*.

The Fund's Policy on Expatriate Benefits

40. Central to assessing the contentions of the parties in this case is an understanding of the Fund's policy on expatriate benefits and the evolution of that policy over time.

41. As an international organization comprised of member countries from all continents, the IMF is mandated by its Articles of Agreement to ". . . pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible."[12] To recruit and retain a geographically diverse staff representative of its membership, the IMF, like other international organizations, offers "expatriate benefits," designed to compensate staff members for the additional costs of maintaining associations with their home countries during their employment and to facilitate their repatriation thereafter. This policy benefits both the international civil servants, who incur certain disadvantages in taking employment away from their home

[12]IMF Articles of Agreement, Article XII, Section 4(d). *See also* IMF Rules and Regulations, Rule N-1: "Persons on the staff of the Fund shall be nationals of members of the Fund unless the Executive Board authorizes exceptions in particular cases. In appointing the staff the Managing Director shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible."

countries, and the organizations for which they work by sustaining their international character and outlook.

42. Expatriate benefits currently offered by the Fund include Home Leave (GAO No. 17, Rev. 9) (May 6, 1999), Education Allowances (GAO No. 21, Rev. 7) (June 12, 2000), and certain aspects of repatriation benefits pursuant to GAO No. 8, Rev. 6 (January 1, 1988). The stated purpose of Home Leave is to enable eligible staff members to ". . . spend periods of authorized leave with their families in their home countries as a means of maintaining their cultural and personal ties to those countries." The benefit includes allowances for travel costs of the staff member and qualifying family members, an allowance toward the expenses incurred at the home leave destination, insurance coverage, and travel time for staff members who take home leave during periods of accrued annual leave. (GAO No. 17, Rev. 9, Section 1.01.) Similarly, Education Allowances are intended to assist eligible staff members serving outside their home countries ". . . in educating their children, either in their home countries or elsewhere, in a manner intended to facilitate their children's eventual return to their home countries." The associated allowances may partially defray, as applicable, tuition, boarding or subsistence, travel and certain types of tutoring. (GAO No. 21, Rev. 7, Section 1.01.)

43. Over time, the Fund has enacted changes to the eligibility requirements for receiving expatriate benefits. These changes are the subject of the dispute in this case.

44. During approximately the first forty years of its existence, from 1947 until 1985, the IMF granted expatriate benefits to staff members on the basis of nationality foreign to the duty station, regardless of their particular visa status. By the early 1980s, however, both the Fund and the World Bank had concluded that eligibility for expatriate benefits should be re-examined and consideration given to alternatives to the nationality test. To that end, a Joint Bank/Fund Working Group was established to study the matter.

45. The Working Group assessed five possible bases for allocating expatriate benefits: (I) nationality; (II) international recruitment; (III) visa status prior to recruitment; (IV) length of residence in the U.S.; and (V) a combination of visa status prior to appointment and residency. The Working Group's conclusion was to recommend option III, visa status prior to appointment, because it was, in their view, ". . . the most logical criterion and recognizes the different circumstances and needs of U.S. nationals and permanent residents on the one hand and expatriates in G-4 status on the other." (Report of the Working Group on Expatriate Benefits, June 27, 1984.)

46. Heeding the Working Group's recommendation, on January 28, 1985, the IMF Executive Board replaced the nationality test with a policy based on visa status prior to appointment to the Fund. As notified to the staff in Staff Bulletin No. 85/1 (February 1, 1985), ". . . all staff members stationed at headquarters who have held permanent resident (PR) status or U.S. citizenship at any time during the 12 months prior to their entry-on-duty date in the Fund, or who acquire PR status or U.S. citizenship after their entry on duty, will *not* be eligible for expatriate benefits." (Staff Bulletin No. 85/1, Section 1.a.) (Emphasis in original.) A "grandfathering" exception was drawn to allow present staff members in LPR status (and those who had initiated procedures to attain LPR status) to remain eligible for present and future expatriate benefits. (Staff Bulletin No. 85/1, Section 1.b.)

47. The advent of the 1985 policy was not without controversy, however, and, in the ensuing years, the Fund has on more than one occasion undertaken to reassess its policy on eligibility for expatriate benefits. In 1994, the IMF Executive Board reviewed the following options: (I) reverting to the nationality criterion; (II) adopting the "modified INTELSAT option," which would take into account not only a staff member's visa status but also that of the staff member's spouse; or (III) retaining the policy embodied in Staff Bulletin No. 85/1. The first two options were rejected on the basis of cost and difficulty of administration, respectively. Accordingly, the Fund's Executive Board in 1994 decided to retain the 1985 policy.

48. The eligibility issue, however, continued to remain alive following its reaffirmation by the Executive Board in 1994. In 1997, the Staff Association Committee ("SAC") circulated a Discussion Paper titled "Expatriate Benefits and Green Card Holders: Is Visa Status a Fair Criterion for Eligibility?" (October 1997), exploring difficulties with the system as adopted in 1985 (and reaffirmed in 1994) and discussing alternative approaches.

49. In 2001, the matter of eligibility for expatriate benefits returned once again to the agenda of the Fund's Executive Board. As of May of that year, of the Fund's 2,649 staff members, 26 percent were U.S. nationals (*ineligible* for expatriate benefits), 60 percent were G-4 visa holders (*eligible* for expatriate benefits), 9 percent were LPRs who were *ineligible* for expatriate benefits under the policy adopted in 1985, and 5 percent were LPRs who were *eligible* for expatriate benefits by reason of the "grandfathering" provision of that policy. The annual cost to the Fund of providing expatriate benefits was approximately $11,000 per eligible staff member.

50. During the period preceding the Executive Board's 2001 consideration of the issue of eligibility for expatriate benefits, the Staff Association

Committee ("SAC") presented its views by memorandum to the Fund's Deputy Managing Director, requesting re-establishment of the nationality test because the ". . . current practice is discriminatory, creating wide inequalities in benefits for staff members in broadly similar situations." At the same time, the SAC described as an "alternative, which we could contemplate" the granting of expatriate benefits to those LPRs willing to convert to G-4 status, as there is ". . . a manifest inequity in the existing rule that staff members who had resident alien status within 12 months of joining the Fund are ineligible for expatriate benefits even if they give up their green cards and apply for a G-4 visa." (Memorandum from SAC Chair to Deputy Managing Director, June 13, 2001.)

51. On October 26, 2001, the Fund's Human Resources Department ("HRD") reported to the Executive Board its proposal for revision of the policy first adopted in 1985. The report noted that expatriate benefits are a key instrument for promoting the international character of the Fund, as such benefits enhance the ability to recruit and retain an internationally diverse staff.

52. In proposing a change in policy, the HRD report asserted that the nationality criterion previously used by the Fund would in many respects be the one that is most consistent with the diversity mandate of the Articles of Agreement, as LPR visa status holders are considered non-U.S. nationals for meeting the Fund's geographic diversity objectives, while at the same time they do not receive the benefits associated with their expatriate status. In addition, the report highlighted some of the difficulties with the operation of the visa test. In particular, noted the report, with the increase in international labor market mobility since 1985, inferences based on visa status regarding intention to stay in the United States have grown increasingly problematic. Each year, the Fund hires non-U.S. nationals who have completed their education in the United States. Many of these individuals secured LPR visa status to support themselves during their studies, although they may have no intention to remain permanently in the United States. In addition, some non-U.S. nationals joining the staff as mid-career recruits have gained work experience in the United States and, as a consequence, hold LPR visa status. Finally, the report noted that the current policy therefore puts individuals who acquire work experience in the United States at a disadvantage compared with their compatriots who have not previously worked in the United States, because they cannot become eligible for expatriate benefits even if they convert to a G-4 visa.

53. Accordingly, the report identified as the most problematic aspect of the policy adopted in 1985 the asymmetric treatment of those who wish to

give up their LPR visa status but are still ineligible to qualify for expatriate benefits. Therefore, the report's recommendation was that the Executive Board enact the policy that was to be embodied in Staff Bulletin No. 02/2. Such a change in policy was, in the view of HRD, designed to better reflect the principle of equal treatment of similarly situated staff and would be more in line with the classification of staff for the purpose of meeting the Fund's diversity objectives.

54. On December 18, 2001, the Executive Board approved the change in policy that forms the basis for the dispute before the Administrative Tribunal. That amendment, which was notified to the Fund's staff on January 11, 2002 in Staff Bulletin No. 02/2 ("Amendment of Eligibility for Expatriate Benefits"), with effect from May 1, 2002, is referred to herein as the "2002 amendment." It extends expatriate benefits to current and newly appointed Fund staff who are LPRs on the condition that they relinquish their LPR status in favor of obtaining a G-4 visa. Under the policy, only one such change in status is permitted per IMF career. Current G-4 staff who previously had been denied eligibility for expatriate benefits because they held LPR status sometime within the 12 months prior to their entry on duty are also now eligible for such benefits. (Staff Bulletin No. 02/2.)

55. In announcing the change in policy, the Staff Bulletin addressed at some length the matter of reacquisition of LPR status, cautioning staff who contemplate relinquishing LPR status and converting to G-4 status with the expectation of returning to LPR status in the future carefully to consider all factors before doing so, including the fact that the U.S. immigration laws are subject to change and that, under currently applicable law, only time spent in G-4 status in the United States will count toward the 15 years required for reacquisition of LPR status. The Staff Bulletin announced that information and counseling sessions would be made available to assist staff in making a fully informed decision.

Consideration of the Issues of the Case

56. The Respondent has raised in its Answer and Rejoinder two challenges to the jurisdiction of the Tribunal.

Jurisdiction Ratione Materiæ

57. Article II of the Statute of the Administrative Tribunal sets forth the Tribunal's jurisdiction *ratione materiæ* as follows:

"ARTICLE II

1. The Tribunal shall be competent to pass judgment upon any application:
   a. by a member of the staff challenging the legality of an administrative act adversely affecting him; . . .
2. For purposes of this Statute:
   a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;
   b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund."

58. Respondent contends that Applicant's complaint falls outside the scope of the Tribunal's jurisdiction *ratione materiæ* because, in Respondent's view, Applicant has not been "adversely affected" by any administrative act of the Fund. Specifically, asserts the Fund, Applicant challenges a policy that, from the time of her appointment to the present, has not changed in any respect that is adverse to her. She has been, and continues to be, ineligible for expatriate benefits because she is a U.S. LPR employed after 1985. The 2002 amendment, notes the Fund, only expanded Applicant's options by permitting her to become eligible for expatriate benefits if she chooses to convert to G-4 visa status.

59. In addition, Respondent cites the following paragraph from the Administrative Tribunal's decision in *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), in which the IMFAT held that when the content of an "individual decision" is to deny a request for exception to a generally applicable policy, it is not possible to analyze the challenge to the "individual decision" without also subjecting to scrutiny the legality of the underlying "regulatory decision":

> "It may be observed that in this case the 'individual decision' and 'regulatory decision' are essentially indistinguishable analytically, inasmuch as the decision taken not to grant Mr. "R" an exception to the policy may be said to be tantamount to upholding the validity of the policy itself.[footnote omitted] Thus, it seems clear that an 'individual decision' was taken on October 2, 2000, when management declined Applicant's request for exceptions to the benefits policy;[footnote omitted] however, the content of that 'individual decision' was to uphold the validity of the 'regulatory decision' assigning differing benefits packages to different categories of staff. Hence, it is not possible to address the question

> posed expressly by Mr. "R"'s Application, i.e. whether the Fund abused its discretion in denying the requested exceptions, without also subjecting to review the benefits classification scheme itself. Therefore the 'regulatory decision' to maintain the differing policies and the 'individual decision' to deny Applicant an exception to these policies must be considered together."

(*Mr. "R"*, paragraph 25.) The Fund contends that because review of the "individual decision" denying Ms. "G"'s request for exception to the expatriate benefits policy requires analysis of the "regulatory decision," i.e. the policy itself, and because that policy has not changed in any way adverse to Ms. "G", Applicant has not been "adversely affected" by any administrative act of the Fund. Accordingly, the Fund concludes that the Tribunal is without jurisdiction *ratione materiæ* pursuant to Article II, Section (1) (a) of the Statute.

60. It may be observed, as a preliminary matter, that the above quoted paragraph from *Mr. "R"* responded to the contentions of the Fund, on the one hand, that the only decision before the Tribunal for review in that case was the "regulatory decision," and of the Applicant, on the other, that his challenge was to the denial of exception to the policy.[13] (*Mr. "R"*, paras. 23–24.) The Tribunal specified that an "individual decision" had been taken but that the Tribunal's review of that decision could not be made without reviewing the "regulatory decision" as well.

61. In analyzing Respondent's contention that Ms. "G"'s Application falls outside the scope of the Tribunal's jurisdiction *ratione materiæ,* it is instructive to consult the Commentary adopted by the Executive Board in adopting the Tribunal's Statute. With respect to the requirement that an applicant be "adversely affected" by an administrative act of the Fund, the Commentary observes as follows:

> ". . . a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions."

(Report of the Executive Board, p. 13.) A question is whether the intendment of this requirement is simply to assure, as a minimal requirement for justi-

[13]Similarly, in the present case, both Applicant and Intervenor emphasize that the dispute centers on the denial of exception to the policy. In Applicant's words: "I accept the current policy. I am merely requesting an exception based on my own particular circumstances." Intervenor asserts: ". . . uniform application of the amended policy will be discriminatory against long-standing and older staff; . . . the exceptions requested by the Applicant and the Intervenor will not fundamentally change the amended policy."

ciability, that the applicant has an actual stake in the controversy. Answering that question affirmatively, it is clear that the Applicant is adversely affected, because her claim is not hypothetical nor is the response that she seeks to her claim merely advisory.

62. The policy in dispute, first adopted in 1985, namely, to allot expatriate benefits in accordance with visa status rather than nationality, was thoroughly reconsidered and reaffirmed in 1994 and materially refashioned as of 2002. Ms. "G" has been "adversely affected" by that policy, under which, as a staff member employed after 1985 and continuing to hold LPR visa status, she is not entitled to receive such benefits. Accordingly, the Tribunal has jurisdiction *ratione materiæ*.

Jurisdiction Ratione Temporis

63. Article XX, Section 1 of the Statute of the Administrative Tribunal prescribes the Tribunal's jurisdiction *ratione temporis*:

> ***"ARTICLE XX***
>
> 1. The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date."

64. Respondent contends that because "in essence" Applicant's challenge is to a policy of the Fund—the "visa test" for expatriate benefits—that has been in effect since 1985, i.e. before the effective date of the Tribunal's Statute, the Tribunal does not have jurisdiction *ratione temporis* over the Application. That the Fund's 1985 expatriate benefits policy continues to bar Ms. "G" from receiving expatriate benefits as long as she retains her LPR visa status, asserts the Fund, cannot give the Tribunal jurisdiction over a challenge to the underlying policy. Moreover, citing the Tribunal's jurisprudence in *Mr. "X", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1994-1 (August 31, 1994) and *Ms. "S", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1995-1 (May 5, 1995), Respondent asserts that the Tribunal has interpreted Article XX to bar an application challenging the denial of a later request for exception to a policy that was established prior to October 15, 1992. On that basis, Respondent urges dismissal of the Application.

65. Applicant has not addressed expressly the jurisdictional challenges to her Application. Intervenor contends that the Tribunal has jurisdiction under Article XX because the January 2002 amendment, Ms. "G"'s request for exception to that amendment, and the denial of the request are post-

October 15, 1992. In addition, asserts Intervenor, the Fund's current policy on expatriate benefits may be considered a "new" policy by virtue of its amendment, even though it contains elements of the 1985 and prior policies.

66. In *Mr. "X", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1994-1 (August 31, 1994) and *Ms. "S", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1995-1 (May 5, 1995), the Tribunal granted the Fund's motions for summary dismissal on the basis of the time-bar of Article XX. In both cases, the Tribunal rejected arguments that jurisdiction could be conferred upon the Tribunal because past administrative acts may continue to have effect in the period of the Tribunal's competence.

67. In *Mr. "X"*, the substantive dispute between Applicant and the Fund centered on the duration of Mr. "X"'s pensionable period of service and hence the amount of his pension payments. The jurisdictional question required the Tribunal to identify the allegedly illegal "administrative act" (in the sense of Article II) taken by the Fund, and to pinpoint when it took place. The Tribunal concluded that it was the determination in 1986 of the period of Mr. "X"'s pensionable service rather than the calculation and disbursement of his pension payments beginning in 1993 that constituted the challenged "administrative act":

> "The calculation of Mr. "X"'s pension in 1993 was a purely arithmetical act governed by the decision of 1986 as to the extent of his pensionable service. . . . The fact that that decision of 1986 produces consequences for Mr. "X" now can have no effect upon the extent of the jurisdiction of the Tribunal; if it were otherwise, then the limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts may well be felt for years after the date when the Tribunal's Statute came into force. Equally, the Applicant's claim that the 1986 decision was open to reconsideration does not mean that it was not taken when it was taken. . . . Continued discontent with the results of an administrative act and eventual renewal of a challenge to its legality cannot put in question the fact that the act was taken, and taken when it was taken."

(*Mr. "X"*, para. 26.)

68. Later, in *Ms. "S"*, the Tribunal expanded on the principles developed in *Mr. "X"*. In that case, the applicant contested the legality of a provision of the Staff Retirement Plan (and its application to her) that excluded prior part-time contractual service from the contractual service that could be credited retroactively as qualified service under the Plan. The Tribunal concluded that the challenged "administrative act" was the Plan provision itself, a provision that pre-dated the Tribunal's competence:

> "Both the 1974 amendment to the Staff Retirement Plan and the 1991 revision of it pre-dated the establishment of the Tribunal. It follows that, pursuant to Article XX, Section 1 of the Statute, the Applicant's complaint, insofar as it challenges the legality of an element of those provisions, is time-barred. The denial of requests for exceptional application or amendment of a 'pre-existing' provision equally cannot confer jurisdiction on the Tribunal it otherwise lacks, nor can a refusal to refer a request for amendment to the Pension Committee do so. That a current complaint about a rule which came into force before October 15, 1992 is not sufficient to give rise to jurisdiction which otherwise is absent follows from the principle that formed the basis of the Tribunal's judgment in the case of *Mr. "X" v. International Monetary Fund*. That principle governs in respect of assertions of the illegality of pre-existing rules. It also governs requests for changes in pre-existing rules and requests for exception to their application."

(*Ms. "S"*, para. 21.) The Tribunal also noted:

> "While Article VI, Section 2 of the Statute provides that 'the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision,' that general proviso is subject to the *lex specialis* of Article XX. The specific governs the general."

(*Ms. "S"*, para. 22.)

69. The question therefore is whether the facts of the present case may be distinguished from those considered by this Tribunal in *Mr. "X"* and in *Ms. "S"*. As in those cases, the Tribunal in the case of Ms. "G" must resolve the question of when the administrative act whose legality is challenged, or whose illegality is asserted, was taken for purposes of its jurisdiction *ratione temporis*.

70. It is not disputed that the Fund's Executive Board first adopted the visa test for eligibility for expatriate benefits in 1985, before the entry into force of the Tribunal's Statute. That test denies access to expatriate benefits to individuals (such as Applicant and Intervenor) who hold LPR visa status and who joined the Fund's staff after 1985. Does the subsequent action of the Executive Board with respect to that policy allow the Tribunal to exercise jurisdiction in this case?

71. A review of the Executive Board's actions within the period of the Tribunal's jurisdiction, as surveyed above, shows that these actions included the reaffirmation of the visa test in 1994 and the refinement of that test by the 2002 amendment. In 1994, the Executive Board considered three options: (I) reverting to the nationality criterion; (II) adopting the "modified

INTELSAT option;" or (III) retaining the 1985 policy. It chose the latter. In 2001, the Fund's Human Resources Department presented the Executive Board with a broad re-examination of the eligibility criteria, including a review of the merits of the visa test. It recommended an amendment refining the eligibility requirements in some respects but retaining as the Fund's fundamental policy that staff members holding G-4 visas are entitled to expatriate benefits and those holding LPR visa status are not. The Executive Board adopted the proposed amendment, to take effect in 2002.

72. As indicated above, the Executive Board's reaffirmation of the eligibility requirements in 1994 and its adoption of the 2002 amendment represented the re-consideration of the contested policy and its adaptation at the highest levels of the Fund's decision-making. As such, they represent an "administrative act" falling within the Tribunal's jurisdiction *ratione temporis*. In the Tribunal's view, the facts in the present case may be distinguished from those of *Ms. "S"*, in which there was no evidence that the contested rule had been re-considered and reaffirmed in the period of the Tribunal's jurisdiction apart from the "individual decision" resulting from Ms. "S"'s request for an exception to the generally applicable policy; no new policy was adopted in that case. In the instant case, because re-consideration, reaffirmation, and amendment of the 1985 policy took place years after the Statute of the Tribunal took effect, the Tribunal concludes that the Application and the Intervention should not be held to be inadmissible on temporal grounds.

Does the Fund's policy, adopted in 1985 and reaffirmed in 1994, of determining eligibility for expatriate benefits on the basis of visa status discriminate impermissibly among categories of Fund staff?

73. As noted *supra*, it is not possible to analyze the challenge to the "individual decision" in this case without also reviewing the "regulatory decision." Moreover, Applicant's contentions make clear that Ms. "G" challenges as discriminatory the Fund's underlying policy of determining eligibility for expatriate benefits on the basis of visa status. In Ms. "G"'s request for exception to the policy, she asserted that the distinction between LPR and G-4 status may not correlate with the objectives of expatriate benefits to compensate for the additional costs of maintaining contacts with one's home country, as the degree of "cultural proximity" to one's home country or the degree of permanence in the United States may not be reflected by visa status.

74. By contrast, the Fund contends that, assuming that the Tribunal has jurisdiction to consider the question, the Fund's policy on expatriate benefits is a proper exercise of managerial discretion, supported by evidence and

rationally related to legitimate purposes. Additionally, asserts the Fund, the policy is not discriminatory as there is a rational nexus between the visa test for eligibility and the recruitment and retention objectives of the policy. Further, the Fund maintains, it may legitimately consider costs associated with benefits as well as their objectives.

75. In *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), the Tribunal examined the contentions of a staff member who challenged as discriminatory another benefits classification system of the Fund, i.e. the differential in benefits allocated to two categories of Fund staff posted abroad, overseas Office Directors and Resident Representatives. Mr. "R" contended that, as an overseas Office Director posted in a particularly challenging location, he should have been entitled to the housing and overseas assignment allowances granted to Resident Representatives. Mr. "R" challenged the classification scheme because, on the basis of the location of his post, he claimed he sustained hardships that were more consistent with those associated with Resident Representative positions than Office Director positions. Similarly, Ms. "G" challenges the distinction drawn by the Fund's expatriate benefits policy, contending that as a staff member holding LPR visa status she has more in common—in terms of the costs associated with maintaining home country contacts—with staff members holding G-4 visa status than she does with U.S. nationals. Accordingly, her Application requires the Tribunal to consider whether the visa test for expatriate benefits is discriminatory.

76. As the Tribunal observed in the case of *Mr. "R"*:

> "30. . . . It is a well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization.
>
> 31. In the *de Merode* case, the World Bank Administrative Tribunal, reviewing the exercise of legislative powers of the Bank in making changes to the terms or conditions of employment, enunciated the following standard:
>
> > 'The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing "the highest standards of efficiency and of technical competence." Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. *They must not discriminate in an unjustifiable manner between individuals or groups within the staff.* Amendments must be made in a reasonable manner seeking to avoid excessive and

> unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal.'

(*de Merode*, WBAT Decision No. 1 (1981), para. 47.) (Emphasis supplied.)

32. That nondiscrimination is essential as well to the lawful exercise of the administrative functions of the organization is emphasized by the Commentary on the IMFAT Statute:

> '. . . with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown 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.'

(Report of the Executive Board, p. 19.) (Emphasis supplied.) Hence, whether the decision in the present case is conceptualized as a regulatory decision or an individual decision, it is subject to review on the ground of alleged unjustified discrimination.

33. At the same time, the Tribunal's duty to assure that the Fund's discretionary authority has been exercised consistently with the principle of nondiscrimination must be understood within the context of the deference that the law requires that international administrative tribunals accord to the exercise of managerial discretion, especially where matters implicating managerial expertise are at issue. As the Asian Development Bank Administrative Tribunal has observed:

> 'The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.'

(*Carl Gene Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992), para. 12.)

34. . . . [T]he Commentary on the Statute [of the IMFAT] states:

> '. . . judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred. [footnote omitted] Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions. [footnote omitted]'

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

35. . . .

36. Cases of alleged discrimination may arise in two distinct ways. First, a classification may expressly differentiate between two or more groups of staff members, giving rise to a charge of discrimination. Second, a policy, neutral on its face, may result in some kind of consequential differentiation between groups. This was the case for example in *de Merode*, WBAT Decision No. 1 (1981). In that case, the challenged policy emerged from changes in the organization's tax reimbursement system, changes that had a disproportionate financial impact upon U.S. nationals. The legislation was upheld on the basis that its objective had been nondiscriminatory and hence there had been no abuse of motive. . . .

37. Perhaps more common are those cases in which an allegation of discrimination arises with respect to an outright distinction that has been drawn between categories of staff members. Such a distinction was the subject of review by this Tribunal in the *D'Aoust* case. The applicant had challenged the Fund's practice, in the setting of compensation, of truncating the weight given to prior experience at ten years for non-economists, while imposing no such limit on the recognition of prior experience when it came to setting the salaries of economists. The Tribunal upheld the practice in its application to Mr. D'Aoust, [footnote omitted] as not violating the principle of equality of treatment:

> 'As to the merits or demerits of the practice as applied to Mr. D'Aoust, the Tribunal finds that the Fund may not unreasonably favor economists in deciding upon the terms of staff employment since economics is at the heart of the Fund's mission. Thus when the Fund applied the so-called non-economist matrix to the determination of the salary of Mr. D'Aoust, cutting off the credit given to his prior experience at ten years, that of itself did not give rise to a cause of action against the Fund on the ground of inequality of treatment.'

(*D'Aoust*, para. 29.) Hence, the Tribunal concluded that there was a reasonable basis, grounded in the Fund's mission, for the distinction drawn by the Fund between economist and non-economist staff in the discretionary act of setting compensation.

38. The conclusion reached by the IMFAT in *D'Aoust*, that there was a reasonable basis for the distinction at issue, has been drawn as well by other international administrative tribunals in reviewing allegations of discriminatory treatment. The World Bank Administrative Tribunal has articulated as a standard for review that for a classification to withstand a challenge based on inequality of treatment there must be a '. . . rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.' (*Maurice C. Mould v.*

> *International Bank for Reconstruction and Development*, WBAT Decision No. 210 (1999), para. 26.) . . .
>
> 39. The International Labour Organisation Administrative Tribunal has phrased the principle of nondiscrimination as follows: '. . . for there to be a breach of equal treatment there must be different treatment of staff members who are in the same position in fact and in law.' (*In re Vollering*, ILOAT Judgment No. 1194 (1992), para. 2.) . . .
>
> . . .
>
> 47. From the preceding review of the jurisprudence, the following principles may be extracted for application in the present case. First, Respondent's proffered reasons for the distinction in benefits . . . must be supported by evidence. In other words, the Tribunal may ask whether the decision '. . . could . . . have been taken on the basis of facts accurately gathered and properly weighed.' (*Lindsey*, para. 12.) Second, the Tribunal must find a '. . . rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.' (*Mould*, para. 26.) Thus, the Tribunal may consider the stated reasons for the different benefits and assess whether their allocation to the two categories of staff is rationally related to those purposes. . . . "

77. It may be recalled that, in the case of *Mr. "R"*, the fact that Respondent studied and then rejected the proposition that there should be complete parity of benefits between overseas Office Directors and Resident Representatives was given weight. Similarly, in *de Merode*, the World Bank Administrative Tribunal observed that in reviewing the exercise of legislative powers of an international organization to make changes to the terms or conditions of employment, ". . . the care with which a reform has been studied and conditions attached to a change are to be taken into account by the Tribunal." (Para. 47.)

78. In this case, the Tribunal considers relevant the approach that it expressed in the case of *Mr. "R"*, in these terms:

> "65. The management of the Fund necessarily enjoys a managerial and administrative discretion which is subject only to limited review by this Tribunal. If it is the Fund's considered decision that differences in the functions and recruitment of Resident Representatives and Office Directors justify a consequential difference in the benefits accorded those officials—even while uniquely serving in the same city overseas—it is not for the Tribunal to overrule that decision. This conclusion applies as well to the refusal of the Fund to make an exception to its policy in favor of the Applicant. . . ."

79. The Tribunal in the case before it must assess whether there is a rational nexus between the goals of the expatriate benefits policy—i.e. to

compensate staff for costs associated with maintaining and renewing ties with their home countries (through home leave and education allowances), to facilitate their repatriation following service with the Fund, and to recruit and retain a diverse staff sustaining the international mission of the Fund—and its method for allocating these benefits. It is noted that the Tribunal's reasoning in *Mr. "R"* suggests that a "rational nexus" does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and indeed that the categories employed may rest upon generalizations.

80. In the view of the Tribunal, the Fund's choice of a visa criterion for allocation of expatriate benefits is reasonable. The procedure of selecting it was not arbitrary but deliberate. The substance of the Fund's choice is rational and defensible. So, perhaps even more so, was its earlier selection of the nationality criterion. But if in the exercise of its undoubted legislative authority and managerial discretion the Executive Board chooses a visa policy in 1985, reconsiders and reaffirms that policy in 1994, and refines that policy as of 2002, these decisions in the exercise of its managerial authority cannot be overridden by this Tribunal when they are rationally related to the mission and objectives of the Fund, in particular as regards expatriate benefits. It is reasonable to accord benefits to G-4 visa holders that are withheld from those in LPR status because the advantages of LPR status run counter to a fixed intention of the staff member concerned to return to his home country upon the completion of his Fund service. This may not necessarily be true in every case, but, in the large, the LPR visa status holder seeks a broadening of options to permit continued residence in the United States, not return to the country of his nationality. He seeks the option of indefinite expatriation in place of definite repatriation. In contrast, the options of the holder of a G-4 visa are more limited and directed towards eventual repatriation.

Does the 2002 amendment to the eligibility requirements of the Fund's expatriate benefits policy discriminate impermissibly among categories of Fund staff?

81. While Ms. "G"'s Application calls into question the validity of the underlying policy of allocating expatriate benefits on the basis of visa status, the focus of her complaint and that of the Intervenor is on the effect of the 2002 amendment.

82. It is well to recall what that amendment provides. It differs from the pre-existing policy by opening eligibility for expatriate benefits to

staff who are currently in LPR status (or were in LPR status within the 12 months prior to their joining the Fund) on the condition that they convert to G-4 visa status. Under the policy in effect from 1985 until 2002, such staff members were, for purposes of eligibility for expatriate benefits, assigned to the category of visa status held during the period preceding their appointment to the Fund's staff, regardless of a change to G-4 visa status thereafter.

83. The salient feature of the 2002 amendment, i.e. to make eligibility for expatriate benefits follow the staff member's choice of a visa, better realizes the objective of a fair and rational allocation of expatriate benefits than did the unamended policy of 1985. Inasmuch as LPR status may suggest an intention to stay in the United States, the new policy of permitting staff members to choose their status rather than to remain locked into their prior status for purposes of the expatriate benefits policy would seem to make the 2002 amendment more finely tailored to achieving the goals of the expatriate benefits policy, especially with regard to the objective of repatriation. As has been noted, a staff member's visa status prior to employment with the Fund may simply be a result of prior educational or employment history. Accordingly, as of 2002, only those staff members willing to incur the risk of not being able to regain LPR status in the future would be accorded the expatriate benefits.

84. Applicant and Intervenor seek to impugn the 2002 amendment on the basis that it places them (and other older and longer-serving staff members) at a disadvantage relative to younger staff and to those already holding G-4 visa status in respect of the ability to regain LPR status in the future.

85. The Applicant refers to the provision of the U.S. immigration law permitting individuals who have spent 15 or more years in G-4 status to move to LPR status, and contends that the possibility of acquiring LPR status in the future must be considered part of the overall benefits package of Fund staff although it is not "directly" a Fund benefit. Likewise, Intervenor asserts that LPR status should be considered a "benefit" which is not administered by the Fund but "facilitated" by it. By contrast, the Fund emphasizes that the ability to regain LPR status is a function of U.S. law and that, moreover, Applicant's focus on the issue of reacquisition of LPR status conflicts with a key rationale for providing expatriate benefits, i.e. repatriation following separation from the Fund.

86. The Tribunal on this question sustains the position of the Fund. LPR status is not a Fund entitlement, it is a feature of current U.S. law. It is a status that facilitates not repatriation but expatriation.

Does the "grandfathering" provision of the eligibility requirements adopted in 1985 discriminate impermissibly among categories of Fund staff? Is a challenge to this provision within the Administrative Tribunal's jurisdiction **ratione temporis***?*

87. Applicant contends that the Fund's expatriate benefits policy discriminates impermissibly among categories of Fund staff because she is disadvantaged vis-à-vis staff members who were employed in LPR visa status prior to 1985 and continue to receive expatriate benefits under a "grandfathering" provision of that policy without relinquishing their LPR visa status. In essence, Applicant challenges the legality of the "grandfathering" provision of the 1985 enactment. Accordingly, the Tribunal must consider at the outset whether it has jurisdiction *ratione temporis* over this claim when there is no evidence that the "grandfathering" provision has been subject to the kind of re-consideration and re-adoption, within the time period of the Tribunal's jurisdiction, that may be said to attach to the visa test itself. In the view of the Tribunal, jurisdiction *ratione temporis* is lacking; the "grandfathering" proviso is and remains just that adopted in 1985.

88. It may be nonetheless observed that Applicant's argument suggests that an international organization would never be free to change terms and conditions of employment, if the effect would be to treat future employees, as a class, less favorably than current employees. In this connection it may be noted that the Asian Development Bank Administrative Tribunal has held, in *Viswanathan v. Asian Development Bank*, AsDBAT Decision No. 12 (1996), that the organization is not obliged to make retroactive a newly introduced benefit. (Para. 19.) "Grandfathering" provisions are intended to maintain the acquired rights of incumbents rather than to ensure equality of treatment of subsequently recruited staff members.[14]

Did the Fund err in denying Applicant's request for an exception to the eligibility requirements of the Fund's expatriate benefits policy?

89. Both Applicant and Intervenor seek exceptions to the eligibility requirements of the Fund's expatriate benefits policy to correct the effects of the dis-

[14]It should be noted that both Applicant and Intervenor use the term "grandfathering" with respect to the relief they seek in the Administrative Tribunal. As Respondent points out, neither Ms. "G" nor Mr. "H" has ever been entitled to expatriate benefits under the Fund's policy. Accordingly, "grandfathering" is not a term correctly to be applied in this case. *See Black's Law Dictionary* (6th ed. 1990, p. 699):

> "**Grandfather clause.** Provision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction."

crimination they allege is inherent in the policy. Applicant seeks an exception for herself, based on her age and personal circumstances. Intervenor seeks an exception for all LPR staff members who, by reason of their age, would not be able to fulfill 15 years of service before retirement if they were now to convert to G-4 status. Respondent contends that the policy itself does not allow for exception and that therefore any exception would be *ultra vires*.

90. Since the Tribunal has concluded that the policy adopted by the Fund in allocation of expatriate benefits is not discriminatory, the Fund did not err in declining to accord exceptions to that policy in favor of the Applicant.

91. Moreover, the expatriate benefits policy adopted by the Executive Board does not expressly empower the Administration of the Fund to grant exceptions to the application of that policy. Administration of the Fund is based on the Articles of Agreement and the policies in pursuance of those Articles adopted by the organs of the Fund. While the Managing Director and his associates necessarily enjoy a measure of appreciation in the exercise of their authority, that discretion does not extend to granting exceptions to a Fund policy which, if granted, would run counter to its essential objectives.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

The Application of Ms. "G", and that of Mr. "H" as Intervenor, are denied.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
December 18, 2002

ORDER
(No. 2001-1)

ORDER NO. 2001-1

Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Withdrawal of the Application)

(July 31, 2001)

The Administrative Tribunal of the International Monetary Fund,

- considering that on October 31, 2000, the Estate of Mr. "D" filed an Application with the Administrative Tribunal contesting the decision of the International Monetary Fund Medical Benefits Plan to deny reimbursement of medical evacuation expenses incurred by the decedent; and
- considering that on March 30, 2001, the Administrative Tribunal in *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application*), IMFAT Judgment No. 2001-1 (March 30, 2001), denied Respondent's Motion for Summary Dismissal, with the result that the exchange of pleadings on the merits was to resume pursuant to the Tribunal's Rules of Procedure; and
- considering further that, following the issuance of Judgment No. 2001-1, the Administrative Tribunal was informed that, pursuant to the agreement of the parties, the Applicant has withdrawn the Application;

unanimously decides to record the termination of the proceedings.

Stephen M. Schwebel, President
Nisuke Ando, Associate Judge
Michel Gentot, Associate Judge

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
July 31, 2001

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(References are made to Judgment, Order and
paragraph numbers, as well as to
pages of this volume.)

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IMFAT JUDGMENTS AND ORDERS
2000–2002

APPENDIX

The following documents, previously published, are reproduced herein for the convenience of the reader. The original pagination of these documents has been retained for clarity.

Statute of the Administrative Tribunal of the International Monetary Fund

Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund

Resolution No. 48-1 Establishment of the Administrative Tribunal of the International Monetary Fund

Rules of Procedure of the Administrative Tribunal of the International Monetary Fund (1994)

Administrative Tribunal

of the

International Monetary Fund

Statute of the Administrative Tribunal

Report of the Executive Board to the Board of Governors

Resolution of the Board of Governors

International Monetary Fund
Washington D.C.
1994

Statute of the Administrative Tribunal of the International Monetary Fund

ARTICLE I

There is hereby established a tribunal of the International Monetary Fund ("the Fund"), to be known as the Administrative Tribunal of the International Monetary Fund ("the Tribunal").

ARTICLE II

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

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

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

2. For purposes of this Statute:

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

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

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

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

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

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

d. the calculation of a period of time shall not include the day of the event from which the period runs, and shall include the next working day of the Fund when the last day of the period is not a working day;

e. the masculine pronoun shall include the feminine pronoun.

ARTICLE III

The Tribunal shall not have any powers beyond those conferred under this Statute. In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts. Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund. The Tribunal shall be bound by any interpretation of the Fund's Articles of Agreement decided by the Executive Board, subject to review by the Board of Governors in accordance with Article XXIX of that Agreement.

ARTICLE IV

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

ARTICLE V

1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the

Tribunal only after the applicant has exhausted all available channels of administrative review.

2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

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

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

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

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

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

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

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

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

ARTICLE VI

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

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

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

4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.

5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

ARTICLE VII

1. The members of the Tribunal shall be appointed as follows:

   a. The President shall be appointed for two years by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board. The President shall have no prior or present employment relationship with the Fund.

   b. Two associate members and two alternates who have no prior or present employment relationship with the Fund shall be appointed for two years by the Managing Director after appropriate consultation.

   c. The President and the associate members and their alternates must be nationals of a member country of the Fund at the time of

their appointments and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

2. The President and the associate members and their alternates may be reappointed in accordance with the procedures for appointment set forth in Section 1 above. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

3. Any member who has a conflict of interest in a case shall recuse himself.

4. The decisions of the Tribunal shall be taken by the President and the associate members, provided that when an associate member has recused himself or, for any other reason, is unable to hear a case, an alternate shall be designated by the President, and provided further that, if the President himself is unable to hear a case, the elder of the associate members shall act as President for that case, and shall be replaced by an alternate as associate member.

5. The Managing Director shall terminate the appointment of a member who, in the unanimous opinion of the other members, is unsuited for further service.

ARTICLE VIII

The members of the Tribunal shall be completely independent in the exercise of their duties; they shall not receive any instructions or be subject to any constraint. In the performance of their functions, they shall be considered as officers of the Fund for purposes of the Articles of Agreement of the Fund.

ARTICLE IX

1. The Managing Director shall make the administrative arrangements necessary for the functioning of the Tribunal.

2. The Managing Director shall designate personnel to serve as a Secretariat to the Tribunal. Such personnel, in the discharge of duties hereunder, shall be under the authority of the President. They shall not, at

any time, disclose confidential information received in the performance of their duties.

3. The expenses of the Tribunal shall be borne by the Fund.

ARTICLE X

1. The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal, provided that the applicant's allegations concerning the contents of any document so withheld shall be deemed to have been demonstrated in the absence of probative evidence to the contrary. The Tribunal may examine witnesses and experts, subject to the same qualification.

2. Subject to the provisions of this Statute, the members of the Tribunal shall, by majority vote, establish the Tribunal's Rules of Procedure. The Rules of Procedure shall include provisions concerning:

a. presentation of applications and the procedure to be followed in respect to them;

b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment;

c. presentation of testimony and other evidence;

d. summary dismissal of applications without disposition on the merits; and

e. other matters relating to the functioning of the Tribunal.

3. Each party may be assisted in the proceedings by counsel of his choice, other than members of the Fund's Legal Department, and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV.

ARTICLE XI

The Tribunal shall hold its sessions at the Fund's headquarters at dates to be fixed in accordance with its Rules of Procedure.

ARTICLE XII

The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

ARTICLE XIII

1. All decisions of the Tribunal shall be by majority vote.

2. Judgments shall be final, subject to Article XVI and Article XVII, and without appeal.

3. Each judgment shall be in writing and shall state the reasons on which it is based.

4. The deliberations of the Tribunal shall be confidential.

ARTICLE XIV

1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain.

ARTICLE XV

1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:

   a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or

   b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.

2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant.

ARTICLE XVI

A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal, and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

ARTICLE XVII

The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.

ARTICLE XVIII

1. The original of each judgment shall be filed in the archives of the Fund. A copy of the judgment, attested to by the President, shall be delivered to each of the parties concerned.

2. A copy shall also be made available by the Secretariat on request to any interested person, provided that the President may decide that the identities or any other means of identification of the applicant or other persons mentioned in the judgment shall be deleted from such copies.

ARTICLE XIX

This Statute may be amended only by the Board of Governors of the Fund.

ARTICLE XX

1. The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date.

2. In the case of decisions taken between October 15, 1992 and the establishment of the Tribunal, the application shall be admissible only if it is filed within three months after the establishment of the Tribunal. For purposes of this provision, the Tribunal shall be deemed to be established when the staff has been notified by the Managing Director that all the members of the Tribunal have been appointed.

ARTICLE XXI

The competence of the Tribunal may be extended to any international organization upon the terms established by a special agreement to be made with each such organization by the Fund. Each such special agreement shall provide that the organization concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization and shall include, inter alia, provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund

Part I. Introduction

1. In 1986, the Executive Board began to consider the possible establishment of an administrative tribunal to adjudicate employment-related disputes at the Fund. The first stage in this process was to review the major administrative tribunals established by other international organizations, including the major features of these tribunals and their general practices and procedures. Having agreed, in principle, that the Fund should have an administrative tribunal, the Executive Board conducted a comprehensive review of the various issues raised by the establishment of a tribunal. Particular attention was given to (1) the role of tribunals in reviewing employment-related decisions; (2) the types of cases which tribunals are authorized to hear; (3) access to tribunals; (4) composition and structure of tribunals; and (5) the remedies and costs which tribunals are authorized to award. On that basis, a draft statute providing for the establishment of an administrative tribunal for the Fund was prepared, with an accompanying commentary.

2. The Executive Board is hereby proposing the adoption by the Board of Governors of the statute. The commentary in Part II of this report explains the meaning of each provision of the proposed statute. Part III describes the procedure for the adoption of the proposed statute. Part IV proposes a resolution for adoption by the Board of Governors. The text of the proposed statute is attached to the proposed resolution.

Part II. Commentary on the Proposed Statute

This commentary explains each provision of the proposed statute in turn.[1]

ARTICLE I

There is hereby established a tribunal of the International Monetary Fund ("the Fund"), to be known as the Administrative Tribunal of the International Monetary Fund ("the Tribunal").

Article I, like its counterpart in the statutes of other tribunals, performs a constitutive function and also names the tribunal. As noted above, it envisages the establishment of a tribunal to serve the Fund exclusively, although provision is made in Article XXI for other international organizations to affiliate with the Fund tribunal.

ARTICLE II

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

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

Article II sets forth the competence of the tribunal. The power of an international administrative tribunal to pass judgment in a particular case brought before it derives from the statute which establishes the tribunal. The scope of competence of the proposed tribunal is defined by this instrument, and the limitations imposed in it establish the bounds of the tribunal's authority.

Section 1(a) provides that the tribunal would be empowered to review a staff member's challenge to the legality of an administrative act (de-

[1]The following acronyms will be used herein: Administrative Tribunal of the Bank for International Settlements ("BISAT"); Court of Justice of the European Communities ("CJEC"); European Economic Community ("EEC"); International Court of Justice ("ICJ"); Inter-American Development Bank Administrative Tribunal ("IDBAT"); International Labour Organisation Administrative Tribunal ("ILOAT"); North Atlantic Treaty Organization ("NATO"); Administrative Tribunal of the Organization of American States ("OASAT"); United Nations Administrative Tribunal ("UNAT"); World Bank Administrative Tribunal ("WBAT").

fined below) that adversely affects him. The statutes of several other tribunals contain similar language as regards jurisdiction.[2] Although the Fund has not adopted a formal statement of principles of staff employment, the employment relationship between the Fund and the staff is subject to legal rights and obligations, one element of which is the obligation of the employer to take employment-related decisions in accordance with the law of the Fund, including applicable rules, procedures, and recognized norms. It would be the function of the tribunal, as a judicial body, to determine whether a decision transgressed the applicable law of the Fund. However, a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.

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

Section 1(b) sets forth the competence of the tribunal with respect to the retirement and other benefit plans maintained by the Fund, such as the Staff Retirement Plan (SRP), the Medical Benefits Plan (MBP), and the Group Life Insurance Plan.[3] This provision would allow individuals who are not members of the staff but who have rights under these plans to bring claims before the tribunal concerning decisions taken under or with respect to the plan. Such individuals would include beneficiaries under the SRP and nonstaff enrollees in the MBP, for example, a deceased staff member's widow who continues to participate in the MBP. Such individuals would, however, be entitled to assert claims only with respect to decisions arising under or concerning the Fund's retirement or benefit plans; they would not have the right to challenge other types of administrative acts before the tribunal.

[2]E.g., CJEC: EEC Treaty, Article 179; NATO Appeals Board: Resolution of the North Atlantic Council, Article 4.21; Council of Europe Appeals Board: Staff Regulations, Article 59(1).

[3]The tribunal would be authorized to review decisions relating to or arising under the Staff Retirement Plan (SRP), whether of an individual or general nature. Other tribunals, including the WBAT, have jurisdiction to consider whether there has been nonobservance of the provisions of a staff retirement plan. See, e.g., WBAT Statute, Article II(1). It should be noted that the SRP, Art. 7.1(d), permits the tribunal to exercise such jurisdiction.

2. For purposes of this Statute,

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

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

Subsections (a) and (b) of Section 2 provide two definitions which are critical to construing the competence of the tribunal; the definitions of "administrative act" and "regulatory decision" delineate the types of cases which comprise the subject matter jurisdiction, or competence *ratione materiae*, of the tribunal. There are several aspects of this competence.

The tribunal would be competent to hear cases challenging the legality of an "administrative act," which is defined as all individual and regulatory decisions taken in the administration of the staff of the Fund. This definition is intended to encompass all decisions affecting the terms and conditions of employment at the Fund, whether related to a staff member's career, benefits, or other aspects of Fund appointment, including the staff regulations set forth in the N Rules. In order to invoke the jurisdiction of the tribunal, there would have to be a "decision," whether taken with respect to an individual or a broader class of staff, identified in the application filed by the staff member. As discussed below, in most cases concerning individual administrative decisions, the staff member would be challenging the decision after unsuccessfully pursuing the established channels for administrative review of his complaint, including recourse to the Grievance Committee.

The statute makes explicit that the tribunal would have jurisdiction to review regulatory decisions, either directly or in the context of a review of an individual decision based on the regulatory decision. This would encompass, for example, Executive Board decisions regarding employment policy (such as adjustments to compensation, pensions, tax allowance, benefits, and job grading), the SRP, and staff rules and regulations promulgated by management, such as the General Administrative Orders. As provided in Article III, the tribunal would be expected to apply well-established principles for review of actions by decision-

making organs, including noninterference with the proper exercise of authority by those organs.

The statute excludes from the tribunal's competence resolutions taken by the organ establishing the tribunal, that is, the Board of Governors. In this fashion, the Executive Board could, through referral of a decision to the Board of Governors for ultimate approval, foreclose review of the legality of that decision by the tribunal. Underlying this provision is the recognition that the Board of Governors is the organ responsible for establishing the tribunal and determining the scope of its jurisdiction. Therefore, it could, at any time, limit the tribunal's jurisdiction by a resolution. Moreover, the Board of Governors is the highest organ of the Fund, and its resolutions should be regarded as the highest expression, short of an amendment of the Articles, of the will of the membership.

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

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

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

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

The definitions in subsections (c)(i) and (ii) include only staff members (i.e., persons on regular or fixed-term appointments to the staff) and assistants to Executive Directors (i.e., persons employed on the recommendation of an Executive Director to assist him in a clerical, secretarial, or technical capacity).

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

The statute would not allow unsuccessful candidates to the staff to bring claims before the tribunal. Nor would persons employed under contract to the Fund have access to the tribunal. The Staff Association

would not be entitled to bring actions in its own name before the tribunal.

d. the calculation of a period of time shall not include the day of the event from which the period runs, and shall include the next working day of the Fund when the last day of the period is not a working day;

This provision clarifies how the periods of time stated in the statute (e.g., the time limits for filing an application in Article VI) are to be calculated. The period would start to run on the day after the date on which the challenged decision is rendered; if the last day of the period fell on a weekend or holiday, the deadline would be extended through the next working day.[4]

e. the masculine pronoun shall include the feminine pronoun.

This provision makes clear that the statute applies equally to males and females; it enables the universal use of the masculine pronoun for the sake of simplicity.

ARTICLE III

(first sentence)

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

The first sentence of this Article, in providing that the powers of the tribunal are limited to those set forth in the statute, states the general principle recognized in international administrative law that tribunals have limited jurisdiction rather than general jurisdiction.[5] As a consequence, administrative tribunals have competence only to the extent that their statutes or governing instruments confer authority to decide disputes. Thus, the statutory provision defining the competence of the tribunal is, at the same time, a prohibition on the exercise of competence outside the jurisdiction conferred.

[4]For an example of how periods are calculated under this provision, see pp. 24–25 below.

[5]See, e.g., the advisory opinion of the ICJ concerning the competence of the ILOAT in *Judgments of the Administrative Tribunal of the International Labour Organisation,* ICJ Reports (1956) 77, at p. 97.

(second sentence)

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

The second sentence of this Article calls upon the tribunal to adhere to and apply generally recognized principles for judicial review of administrative acts. These principles have been extensively elaborated in the case law of both international administrative tribunals and domestic judicial systems, particularly with respect to review of decisions taken under discretionary powers.

The reference to recognized principles of international administrative law is intended to limit the powers of the tribunal by making clear that the standards of review applied by the tribunal should not go beyond those applied by other tribunals, and that the tribunal is expected to recognize the limitations observed by other administrative tribunals of international organizations in reviewing the exercise of discretionary authority by the decision-making organs of the Fund. In other words, the fact that the tribunal has been given competence to review employment-related decisions by the Fund would not mean that it had greater latitude in the exercise of that power than that exercised by other administrative tribunals. In particular, the tribunals have reaffirmed, in a variety of contexts, that they will not substitute their judgment for that of the competent organs and will respect the broad, although not unlimited, power of the organization to amend the terms and conditions of employment.

This limitation on the tribunal's power to review regulatory decisions underscores the basic premise that the creation of an administrative tribunal to resolve employment-related disputes would not alter the employment relationship as such between the Fund and its staff—that is, apart from the avenue of recourse it provides, it neither expands nor derogates from the rights and obligations found in the internal law of the organization.

With respect to employment-related matters, the internal law of the Fund includes both formal, or written, sources (such as the Articles of Agreement, the By-Laws and Rules and Regulations, and the General

Administrative Orders) and unwritten sources. These sources of internal law apply to, and circumscribe, the exercise of discretionary authority by the Executive Board in prescribing the terms and conditions of Fund employment.

With respect to formal sources of law, insofar as the Executive Board derives its authority from the Articles of Agreement, its decisions must be consistent with the Articles as a higher authority of law. Likewise, the Executive Board is also bound by resolutions of the Board of Governors as the highest organ of the Fund.

There are two unwritten sources of law within the internal law of the Fund. First, the administrative practice of the organization may, in certain circumstances, give rise to legal rights and obligations.[6] Second, certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund.

The Fund, like all international organizations, has reserved to itself broad powers to alter the terms and conditions of employment on a prospective basis.[7] However, an important limitation on the exercise of this authority would be where the Fund has obligated itself, either through a formal commitment or through a consistent and established practice, not to amend that element of employment. In the absence of such a commitment by the Fund, there would be no basis for a finding by the tribunal that a decision changing an element of employment violated the rights of the staff. Moreover, even where the organization has voluntarily undertaken such a commitment, subsequent developments,

[6]For example, in the *de Merode* case, the WBAT held that the World Bank had a legal obligation, arising out of a consistent and established practice, to carry out periodic salary reviews. *de Merode*, WBAT Reports, Dec. No. 1 (1981), at p. 56.

[7]One basic limitation on an organization's power of amendment is the protection of acquired or vested rights, whether or not expressly provided for in the staff regulations. However, even this limitation has been very narrowly construed and interpreted as essentially synonymous with the principle of non-retroactivity. In other words, an amendment cannot deprive a staff member of any benefit or emolument that has been earned or accrued before the effective date of the change. Accordingly, respect for acquired rights would not preclude the organization from prospective alterations in the conditions of employment.

such as urgent and unavoidable financial imbalances, may authorize certain adjustments if they are reasonably justified.[8]

As applied to the review of regulatory decisions, the case law of administrative tribunals in general demonstrates that although there exists a competence to review regulatory decisions, the scope of that review is quite narrow. There are broad and well-recognized principles protecting the exercise of authority by the decision-making organs of an institution from interference by a judicial body. The Fund tribunal would have to respect those principles in reviewing the legality of regulatory decisions.

Likewise, with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown 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.[9] This principle is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.[10]

At the same time, the reference to general principles is not intended to introduce concepts that are inapplicable to, or inappropriate for, the Fund. With respect to the concern that the application of the principles enunciated by other administrative tribunals may have the unintended result of interfering with the responsibilities entrusted to the Executive Board, it should be noted that, to the extent that a tribunal's decision is dependent on the particular law of the organization in question (such as the precise language of a staff regulation), the decision would be regarded as specific to the organization in question and not part of the general principles of international administrative law. Moreover, in applying general principles of international administrative law, an administrative tribunal cannot derogate from the powers conferred on the

[8]*Gretz*, UNAT Judgment No. 403 (1987).

[9]E.g., *Durrant-Bell*, WBAT Reports, Dec. No. 24 (1985), at paras. 24, 25.

[10]See generally M. Akehurst, *The Law Governing Employment in International Organizations*, at 118-23 (1967); C.W. Jenks, *The Proper Law of International Organisations*, at 86–88 (1962).

organs of the Fund, including the Executive Board, under the Articles of Agreement. This is made explicit in the third sentence of Article III.

(third sentence)

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

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

This provision is consistent with well-established case law in which judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred.[11] Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions.[12]

(fourth sentence)

The Tribunal shall be bound by any interpretation of the Fund's Articles of Agreement decided by the Executive Board, subject to review by the Board of Governors in accordance with Article XXIX of that Agreement.

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[11]See generally S.A. de Smith, *Judicial Review of Administrative Action*, at 278-79 (4th ed. 1980).

[12]See *von Stauffenberg*, WBAT Reports, Dec. No. 38 (1987), at para. 126; *Decision No. 36*, NATO Appeals Board (1972), Collection of the Decisions (1972).

The statute also explicitly provides that interpretations of the Articles of Agreement rendered by the Executive Board would be binding on the tribunal. This provision would not deprive the tribunal of the authority to interpret the Articles. However, in situations where the Executive Board has adopted a certain interpretation of the Articles, that interpretation, although subject to review by the Board of Governors in accordance with the procedures of Article XXIX, would be binding on the tribunal in the context of a challenge to a decision. The purpose of this provision is to avoid an irreconcilable conflict between interpretations made by the Executive Board, on the one hand, and the tribunal, on the other hand.

With respect to interpretations of the Articles, there is a distinction between interpretations and findings of legality. An interpretation clarifies the meaning of a provision of the Articles; it does not dispose of a particular case. Therefore, a finding of legality of a particular regulatory or individual decision would still be made by the tribunal. This finding would have to be consistent with the interpretation adopted by the Executive Board. Given that interpretations of the Articles of Agreement by the Executive Board are binding on the Fund and all its members,[13] this sentence, which makes such interpretations binding on the tribunal as well, adheres to the general principle of consistency within any legal system, in order that the same provision will have only one meaning.

ARTICLE IV

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

The tribunal would have the authority to determine its own competence within the terms of its statute. Comparable authority has been accorded to virtually every international administrative tribunal,[14] which is intended to allow the tribunal to interpret but not expand its competence with respect to a particular case.

[13]Article XXIX of the Fund's Articles of Agreement.

[14]E.g., UNAT Statute, Article 2(3); ILOAT Statute, Article II(7); WBAT Statute, Article III.

ARTICLE V

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

2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:

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

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

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

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

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

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

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

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

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

Under this Article, in situations where administrative review includes recourse to formal procedures established by the Fund for this purpose, a channel of administrative review would be exhausted by any of the following events, as applicable to the circumstances. First, the requirement would be satisfied if a recommendation on the matter had been made to the Managing Director and the applicant received no decision granting him the relief requested within three months. Second, the requirement would be satisfied if the applicant received a decision denying his request; a decision which granted his request only in part would be treated as a denial for this purpose. Third, if the applicant received a decision granting him the relief requested but the relief was not forthcoming after two months had elapsed, administrative review would be considered exhausted. Finally, if the Fund and the applicant agree to bypass administrative review and submit the dispute directly to the tribunal, all channels of administrative review would be considered exhausted for purposes of this Article.

In situations where recourse to the Grievance Committee or other formal procedure is not applicable, administrative review of a request would be considered as exhausted by any of the outcomes described in Section 3.

ARTICLE VI

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

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

Sections 1 and 2 of Article VI set forth the time limits in which an application must be filed with the tribunal in order to be admissible. In most cases involving individual decisions, a staff member will have three months from the date on which all available channels of administrative review have been exhausted (as prescribed in Article V) in which to bring an action.

The three-month period would not include the time required for administrative review; the period would not begin to run until administrative review, including recourse to internal committees like the Grievance Committee (if applicable), is fully exhausted and the Managing Director has decided whether to implement the Committee's recommendation. At this point, of course, an applicant should have a reasonably good assessment of the issues presented and the strengths and weaknesses of his case.

Under the current rules of the Grievance Committee, grievants have up to one year from the event giving rise to the grievance to bring an action. In cases where the Grievance Committee would have jurisdiction over the question, this year-long period, which would precede the three-month statute of limitations for the tribunal, should give a staff member ample opportunity to assess whether he or she wishes to proceed with the case.

The comparable period in other international administrative tribunals is generally 60 days or 90 days; except in cases of death, the statute of limitations in other tribunals does not exceed 90 days.[15]

An illustration of the interaction of the exhaustion of remedies requirement of Article V and the time limits of Article VI with respect to individual decisions may be helpful. If, on January 2, the Grievance Committee made a recommendation to the Managing Director regard-

[15]Compare the WBAT Statute (90 days); UNAT Statute (90 days); IDBAT Statute (60 days).

ing the disposition of an individual decision, the three-month period prescribed in Article V, Section 2 would run from January 3 to April 2, inclusive.[16] Thus, if the staff member received a response denying his request on the last day of the period, or had not received a response granting his request by that date, he would have exhausted administrative review.[17] He would thereupon have three months, i.e., from April 3 to July 2, in which to file an application with the tribunal. If July 2 was not a working day, the deadline would fall on the next working day thereafter, as prescribed in Article II, Section 2(d). If the staff member received a favorable decision on April 2 granting his request, but did not receive the relief requested by June 2, inclusive, he would have three months, i.e., from June 3 to September 2, inclusive, in which to bring an action before the tribunal. Of course, if the relief was, in fact, granted in that period, there would be no case to go forward.

Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision.

However, the legality of a regulatory decision could be raised as an issue at any time with respect to an individual decision taken pursuant thereto, subject to the rules involving timely filing of challenges to individual decisions. Accordingly, a staff member could contest the denial of a benefit in his particular case on the grounds that the regulation on which the denial was based was illegal, without regard to the date on which the regulation was enacted, subject to the provisions of Article XX.

There could, of course, be cases where an applicant sought to overturn an individual decision on several grounds, e.g., that the decision is either an incorrect application of the underlying regulatory decision, or, alternatively, that the underlying regulatory decision itself is illegal. The Grievance Committee would be competent to consider challenges

[16]Or on the next working day, if April 2 is not a working day.

[17]If a response denying the request was received before April 2, the three-month period for filing an application would run from the date of receipt. For instance, if the response was received on March 19, the application could be filed until June 20, inclusive.

based on the former grounds but not the latter grounds, insofar as the legality of a regulatory decision was at issue.

In cases involving both types of grounds, the requirements of the tribunal statute regarding exhaustion of remedies and the statute of limitations should be understood as follows. The Grievance Committee would first hear the case and dispose of the issues over which it had jurisdiction (i.e., whether the decision at issue involved a correct interpretation or application of the Fund's rules). If the Grievance Committee rejected his case, the staff member could then proceed to the tribunal. At that time, it would be open to him to raise, as grounds for review, not only the issues that were before the Grievance Committee but also, if appropriate, the legality of the underlying regulatory decision, regardless of whether more than three months had passed since the individual decision at issue had been taken. In essence, the pursuit of administrative remedies as to the issue of interpretation or application would suspend the time period for seeking review of the decision on grounds for which no administrative review is available.

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

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

4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.

Section 4 follows the principle applicable to other tribunals that the filing of an application does not stay the effectiveness of the decision being challenged.[18] This is considered necessary for the efficient opera-

[18]E.g., WBAT Statute, Article XII(4).

tion of the organization, so that the pendency of a case would not disrupt day-to-day administration or the effectiveness of disciplinary measures, including removal from the staff in termination cases. This rule is also consistent with the principle, strictly applied in the employment context, that an aggrieved employee will not be granted a preliminary injunction unless he would suffer irreparable injury without the injunction. In this regard, courts are loath to conclude that an injury would be "irreparable," given the nature of the employment relationship and the possibility of compensatory relief if the employee ultimately succeeds in his claim. With respect to potential cases where an applicant in G-4 visa status has been terminated and would otherwise be out of visa status under U.S. law pending the pursuit of administrative remedies and the outcome of his case before the tribunal, it would be preferable to address this as an administrative matter in the staff rules on leave. Apart from this situation, it is difficult to envisage a situation in which the harm to an applicant, in the absence of interim measures, would be "irreparable," as that concept has been construed by the courts. Nevertheless, the statute would not preclude the tribunal from ordering such measures if warranted by the circumstances of a particular case.

5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

Under Section 5, it would be open to the applicant and the Fund to reach an agreement on the dispute involved in the application; thereupon, the application could not be pursued.

ARTICLE VII

1. The members of the Tribunal shall be appointed as follows:

a. The President shall be appointed for two years by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board. The President shall have no prior or present employment relationship with the Fund.

b. Two associate members and two alternates who have no prior or present employment relationship with the Fund shall be appointed for two years by the Managing Director after appropriate consultation.

c. The President and the associate members and their alternates must be nationals of a member country of the Fund at the time of their appointments and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

Article VII, Section 1 of the statute governs the appointment of the tribunal's members. A President (who could not be a present or former Fund staff employee) would be appointed by the Managing Director after appropriate consultation, subject to the approval of the Executive Board. Two associate members and two alternates (none of whom having a prior or present employment relationship with the Fund) would be appointed by the Managing Director after appropriate consultation.

The President and the associate members and their alternates would be required to be nationals of member countries of the Fund at the time of their appointments; subsequent changes in nationality or in the membership of their country of nationality would not disqualify them. They would also have to possess the qualifications and background which are generally required of members of administrative tribunals.[19]

Their terms of service would be two years.

2. The President and the associate members and their alternates may be reappointed in accordance with the procedures for appointment set forth in Section 1 above. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

3. Any member who has a conflict of interest in a case shall recuse himself.

4. The decisions of the Tribunal shall be taken by the President and the associate members, provided that when an associate member has recused himself or, for any other reason, is unable to hear a case, an alternate shall be designated by the President, and provided further that, if the President himself is unable to hear a case, the elder of the associate members shall act as President for that case, and shall be replaced by an alternate as associate member.

5. The Managing Director shall terminate the appointment of a member who, in the unanimous opinion of the other members, is unsuited for further service.

[19]E.g., WBAT Statute, Article IV(1); IDBAT Statute, Article III(1).

Sections 2 through 5 establish the rules by which the President and the associate members of the tribunal may be reappointed, replaced, or dismissed from their duties.

The President and both associate members could be reappointed at the end of their terms.

A member who had a conflict of interest in a particular case would be required to excuse himself. A conflict of interest could arise in an individual case, for example, if a member had a personal relationship with the applicant.

Section 4 prescribes that cases will ordinarily be decided by the President and the two associate members. It provides for the temporary replacement by an alternate of an associate member of the tribunal who is unable to hear a case (for instance, due to illness or scheduling problems) or who, in his own judgment, decides to recuse himself in a particular case for reasons of conflict of interest. In the event that the President was unable to hear a case, he would be replaced by the elder of the two associate members, who would in turn be replaced by an alternate.

Section 5 provides the exclusive means by which a member could be removed from his position on the tribunal by the Managing Director. This provision would apply to any member of the tribunal (including the President); however, dismissal of the member would be authorized only if all of the other members agreed that he was unfit for further service.

ARTICLE VIII

The members of the Tribunal shall be completely independent in the exercise of their duties; they shall not receive any instructions or be subject to any constraint. In the performance of their functions, they shall be considered as officers of the Fund for purposes of the Articles of Agreement of the Fund.

This Article, in providing that the members of the tribunal cannot be subject to instructions from any source, is intended to protect the independence necessary for the performance of judicial duties. It further provides that in the performance of their functions, the members of the tribunal will be considered as officers of the Fund for purposes of the Articles of Agreement.

This provision would confer upon the President and the other members the privileges and immunities enjoyed by officers and employees of the Fund under Article IX, Section 8 of the Articles of Agreement including, in particular, the immunity from judicial process. Such protection would further ensure the independence and impartiality of the tribunal in carrying out its functions. It would also provide a basis for dismissal, on immunity grounds, of any lawsuit brought in a national court of a member country of the Fund by an unsuccessful applicant against a member of the tribunal with respect to the member's performance of his official duties.

ARTICLE IX

1. The Managing Director shall make the administrative arrangements necessary for the functioning of the Tribunal.

2. The Managing Director shall designate personnel to serve as a Secretariat to the Tribunal. Such personnel, in the discharge of duties hereunder, shall be under the authority of the President. They shall not, at any time, disclose confidential information received in the performance of their duties.

3. The expenses of the Tribunal shall be borne by the Fund.

This Article addresses certain administrative aspects of the tribunal. It contemplates that administrative support will be provided to the tribunal by personnel who will be assigned for such purpose by the Managing Director, but who will only take instructions from, and act under the direction of, the President of the tribunal in the performance of their duties. Such personnel would be independent from the Fund in the performance of their duties. Administrative tribunals are usually serviced by a small secretariat. The personnel assigned to serve the tribunal would be required to refrain from disclosing confidential information which they receive in carrying out their duties; this would apply to disclosure both outside and within the Fund, where personnel information is not available to staff except on a need-to-know basis.

The Fund would bear the expenses of the tribunal. These expenses would include the fees paid to and expenses incurred by the President and the associate members in connection with the performance of their duties.

ARTICLE X

1. The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal, provided that the applicant's allegations concerning the contents of any document so withheld shall be deemed to have been demonstrated in the absence of probative evidence to the contrary. The Tribunal may examine witnesses and experts, subject to the same qualification.

2. Subject to the provisions of this Statute, the members of the Tribunal shall, by majority vote, establish the Tribunal's Rules of Procedure. The Rules of Procedure shall include provisions concerning:

a. presentation of applications and the procedure to be followed in respect to them;

b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment;

c. presentation of testimony and other evidence;

d. summary dismissal of applications without disposition on the merits; and

e. other matters relating to the functioning of the Tribunal.

3. Each party may be assisted in the proceedings by counsel of his choice, other than members of the Fund's Legal Department, and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV.

With respect to the issue of document production, the tribunal would be able to require the production of documents from the Fund, except that the Managing Director would retain authority to decide, on a case-by-case basis, whether there was a compelling institutional need to protect the confidentiality of the requested document. In this event, the Managing Director's decision would be binding on the tribunal. However, if an applicant made an assertion regarding the content of a particular document and the Managing Director decided to withhold that document from the tribunal, the applicant's assertion would be prima

facie evidence as to that content, and would create a rebuttable presumption as to the accuracy of the assertion. Accordingly, the tribunal would accept the applicant's assertion as to its content, so long as there was no other evidence presented to contradict that assertion. If there was other probative evidence presented, the tribunal would have to weigh all of the evidence before it in order to make an appropriate finding.

Like other tribunals, the tribunal would be able to hear testimony from witnesses and experts, although most administrative tribunals, in practice, rely largely on written evidence and pleadings in deciding cases.

Like other administrative tribunals, the tribunal would be authorized to establish, consistent with its statute, its own rules of operation and procedure. The matters listed in the statute are those considered essential, but the list is not exhaustive. The rules would be adopted by a majority of the entire membership of the tribunal, i.e., the President, the associate members, and their alternates.

The rules adopted by the tribunal could address such issues as the procedures for filing applications and other pleadings; the obtaining of information by the tribunal; the presentation of cases and oral proceedings; participation of *amicus curiae*; and the availability of judgments.[20] The tribunal could also adopt a rule establishing a procedure for summary dismissal of applications.[21]

Section 3 makes clear that each party may be assisted by counsel in the proceedings. Thus, an applicant would have the opportunity to be assisted by any person of his choice (other than members of the Fund's Legal Department, given the inherent conflict of interest such assistance would pose) at any stage of the case. The tribunal, in adopting its own rules, would be free to prescribe the rules regarding the signing of applications and other pleadings, presentation of oral argument, and other matters concerning the involvement of counsel.

[20]See also Article XVIII of the statute, discussed below.

[21]There is authority in Article 8(3) of the Rules of the ILOAT and in Rule 7(11) of the WBAT, for example, for summary dismissal of cases that are considered to be "clearly irreceivable or devoid of merit." The Rules of Procedure of the tribunal of the Bank for International Settlements authorize summary dismissal of applications that are "manifestly irreceivable in form or manifestly abusive."

As a general rule, each side would bear its own costs, including attorney's fees; however, the tribunal would have authority under Article XIV to order the Fund to bear the reasonable costs, including attorney's fees, incurred by an applicant in bringing an action that is successful in whole or in part, and, under Article XV, it could award reasonable costs against an applicant whose claims were manifestly without foundation.

ARTICLE XI

The Tribunal shall hold its sessions at the Fund's headquarters at dates to be fixed in accordance with its Rules of Procedure.

The tribunal is required to hold its sessions at Fund headquarters. The frequency and scheduling of these sessions would be determined in accordance with rules to be adopted by the tribunal.

ARTICLE XII

The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

As with the WBAT and other tribunals, the Fund tribunal would be empowered to decide whether to hold oral proceedings in a given case.[22] However, oral proceedings are somewhat rare in the practice of international administrative tribunals, which generally decide cases on the basis of written submissions, including the record developed in the course of administrative review and the internal appeals process.

Any oral proceedings conducted by the tribunal would be open to "interested persons," unless the tribunal decided that the nature of the case required that such proceedings be held in private, for example, if sensitive information or matters of personal privacy were involved.

[22]Under the Rules of the UNAT, Article 15(1), oral proceedings are held "if the presiding member so decides or if either party so requests and the presiding member agrees." In the ILOAT, they are held "if the Tribunal so decides, either on its own motion or on the request of one of the parties" (Article 16).

ARTICLE XIII

1. All decisions of the Tribunal shall be by majority vote.

2. Judgments shall be final, subject to Article XVI and Article XVII, and without appeal.

3. Each judgment shall be in writing and shall state the reasons on which it is based.

4. The deliberations of the Tribunal shall be confidential.

As with other tribunals, decisions would be taken by majority vote and would not require unanimity. Although dissents would not need to be registered, dissenting opinions would be possible under the statute.

Judgments of the tribunal would be final and without appeal. Further recourse to the ICJ would not be available. Although the UNAT and ILOAT Statutes authorize appeal to the International Court of Justice under highly limited circumstances, this avenue of recourse was not adopted by other tribunals, including the WBAT.

ARTICLE XIV

1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

Article XIV, Section 1 provides for the remedies which the tribunal may order when it concludes that an individual decision is illegal. Sec-

tion 2 provides that, with respect to nonmonetary relief ordered by the tribunal in individual cases, the Managing Director may opt for monetary relief instead of taking the remedial measures.

Under Section 1, if the tribunal finds that an individual decision is illegal, it shall order the rescission of the decision and all other appropriate corrective measures. These measures may include the payment of a sum of money, or the specific performance of prescribed obligations, such as the reinstatement of a staff member.

In cases where the tribunal concludes that an individual decision is illegal by virtue of the illegality of the regulatory decision pursuant to which it was taken, the judgment would not invalidate or rescind the underlying regulatory decision, nor would it invalidate or rescind other individual decisions already taken pursuant to that regulatory decision.[23] If a regulatory decision had been in effect by the organization for over three months, an application directly challenging its legality would not be admissible. A finding by the tribunal, in the context of reviewing an individual decision, that the regulatory decision was illegal would not nullify the decision as such. Thus, previous decisions taken in reliance on, or on the basis of, the regulatory decision would not be invalidated; the organization could decide as a policy matter whether, and to what extent, to reopen those decisions and take further action in light of the tribunal's judgment. The judgment would, however, render the regulatory decision unenforceable against the applicant in the immediate case. The regulatory decision would also, for all practical purposes, become ineffective vis-à-vis other staff members, since future applications in other individual decisions would themselves be subject to challenge, within the applicable time limits for such claims.

Section 2 provides that where the consequences of the rescission of an individual decision or the corrective measures prescribed by the tribunal are not limited to the payment of money, the Managing Director would be authorized to determine whether, in the interest of the Fund, the applicant should be paid an amount of monetary compensation that has been determined by the tribunal in accordance with the limitations prescribed in the statute, as an alternative to rescission of the individual

[23]Other staff members to whom the regulatory decision had already been applied could seek relief in light of the tribunal's holding only if their applications were made within the specified time limits for challenging individual decisions.

decision or performance of the prescribed obligations.[24] For example, if the tribunal prescribed, as a corrective measure, that a staff member be reinstated, the Managing Director might conclude that such a remedy was not possible or advisable. Such a situation might arise where the applicant's position has, in the meantime, been filled by another qualified individual. In general, the monetary award could not exceed three times the individual's current or last salary from the Fund, as applicable. The tribunal could, however, exceed this limit in exceptional cases, if it was considered justified by the particular circumstances.

3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

Section 3 sets forth the consequences of a ruling in favor of an application challenging the legality of a regulatory decision. In that case, the statute provides that the tribunal shall annul the decision. As a result, the decision could not thereafter be implemented or applied by the organization in individual cases.

Annulment would have certain consequences with respect to individual decisions taken pursuant to the annulled regulatory decision, whether taken before or after the date of annulment. Such individual decisions would be null and void. Accordingly, it would be incumbent on the Fund to take corrective measures with respect to each adversely affected staff member. The failure to take proper corrective measures in an individual case would itself be subject to challenge as an administrative act adversely affecting the staff member. For example, if the tribunal annulled a regulatory decision retroactively reducing a benefit, all staff members to whom that decision had been applied would be

[24]The statutes of most international administrative tribunals permit the award of monetary compensation as an alternative to be chosen by the organization's management in lieu of nonmonetary remedies. Of the major administrative tribunals, three (ILOAT, EC Court of Justice, Council of Europe Appeals Board) have no limit on the amount of monetary compensation to be awarded, three (UNAT, OASAT, IDBAT) place a limit equal to two years' net pay, and the WBAT has a limit of three years' net pay. In all cases with limits, however, there is a provision similar to that in Article XII, Section 1 of the WBAT Statute, to the effect that "[t]he Tribunal may, in exceptional cases, when it considers it justified, order the payment of higher compensation. A statement of the specific reason for such an order shall be made."

entitled to the restoration of that benefit for that period. The failure to restore the benefit in an individual case could then be challenged before the tribunal.

4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

Section 4 authorizes the tribunal to award reasonable costs, including attorney's fees, to a successful applicant, in an amount to be determined by the tribunal, taking into account the factors set forth in the provision. Costs, apart from attorney's fees, that might fall within this provision could include such items as transportation to Washington, D.C. for applicants not working at Fund headquarters and the fees of expert witnesses who testify before the tribunal. With respect to unsuccessful applicants whose claims nevertheless had prima facie merit or significance, the tribunal could always recommend that an ex gratia payment be made by the organization.

Most administrative tribunals, whether pursuant to their rules or as a matter of practice, have comparable authority to award costs. For example, the UNAT has declared in a statement of policy that costs may be granted "if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the tribunal."[25] The tribunals have, however, been rather conservative and cautious in deciding whether, and to what extent, to award costs in a case.[26]

Under this provision, the tribunal would be authorized to award costs against the Fund only where an applicant has succeeded in whole or in part, i.e., the tribunal's decision has found in favor of all or a portion of his claims for relief. With respect to determining the amount of costs incurred that were "reasonable" under the circumstances, the tribunal would be expected to take into account such factors as the nature and

[25]A/CN.5/R.2 (Dec. 18, 1950).

[26]E.g., *Powell*, UNAT Judgment No. 237 (1979), in which the applicant requested payment of costs in excess of $100,000 and was awarded $2,000 by the tribunal.

complexity of the case, as well as the nature and quality of the work performed and the amount of the fees in relation to prevailing rates. These factors reflect the practice of other tribunals[27] and domestic courts in making similar assessments. As the tribunals have recognized, there may be circumstances where, although an applicant has succeeded in one aspect of his claims, the bulk of his claims has been rejected by the tribunal, and considerable and unnecessary time has been devoted to the consideration of these claims.[28] In such circumstances, it would not be fair or reasonable to have an automatic requirement that the organization bear the applicant's costs. Similarly, the effort expended by the applicant's counsel, and the consequent costs, may have been wholly disproportionate to the magnitude and nature of the issues involved. Thus, it is considered appropriate to give the tribunal discretion to determine whether, and to what extent, to award costs to a successful applicant.

The tribunal would be authorized to award costs only to the parties, i.e., an applicant or the Fund (see Article XV), and could not award costs to other persons.

5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain.

Section 5 of Article XIV permits corrective measures in respect of procedural errors committed by the Fund to be implemented after adjournment of a case in lieu of proceeding to decision on the merits.[29]

ARTICLE XV

1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:

[27]See *Lamadie*, ILOAT Judgment No. 262 (1975), at p. 7.

[28]In *Carrillo*, ILOAT Judgment No. 272 (1976), the applicant obtained only partial satisfaction, and the point decided by the tribunal was relatively simple. The record, however, was far more voluminous than necessary for the tribunal's information. Therefore, the ILOAT awarded the staff member only one-tenth of the amount claimed for legal fees as costs reasonably incurred.

[29] There is a comparable provision in Article XII of the WBAT Statute.

a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or

b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.

2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant.

This Article authorizes the tribunal, either on its own or upon a motion by the Fund, to assess an amount in respect of the reasonable costs incurred by the Fund in defending the case against applicants who bring cases which the tribunal determines are patently without foundation. The award of costs, which would not include the expenses incurred by the Fund in the operation of the tribunal, could be enforced through deductions from amounts to the applicant by the Fund (such as salary or separation payments) or through such other means as management deems appropriate; other means would have to be implemented if the applicant was not owed any money from the Fund so as to preclude the possibility of setoff.

This provision is intended to serve as a deterrent to the pursuit of cases that are manifestly without factual basis or legal merit. Unless an application is summarily dismissed by the tribunal,[30] the tribunal must hear the case and dispose of the matter on the merits. This could involve lengthy proceedings and substantial costs, including the commitment of staff time, even if the tribunal ultimately concluded that the applicant's claims were manifestly without any basis in law or fact. Such cases can be expected to be very rare, but when they arise they can be prolonged and costly. This provision is directed at applications that amount to an abuse of the review process[31]; it is not intended to deter an application based on a good faith argument for an extension, modification, or reversal of existing law.

[30]The tribunal would also be authorized to adopt a rule providing for summary dismissal of applications. This would permit disposal of a case that was clearly irreceivable, thus minimizing the time and expense involved.

[31]Compare Article III of the Statute of the Appeals Board of the Council of Europe, which authorizes the Board, "if it considers that an appeal constituted an abuse of procedure, [to] order the appellant to pay all or part of the costs incurred."

ARTICLE XVI

A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal, and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

This Article is the same as in the WBAT and other tribunal statutes. It is intended to serve two purposes. First, it provides that no material fact that was known to a party before a case was decided but was not presented to the tribunal can be presented to the tribunal after it has rendered its decision. Second, it provides that a case may be reopened if a material fact is discovered by a party after the decision has been rendered in order to permit the tribunal to revise its judgment in light of that fact.

ARTICLE XVII

The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.

Article XVII authorizes the tribunal, once a judgment has been rendered, to correct typographical or arithmetical errors and to interpret its own judgment, under certain circumstances. Judgments could be corrected by the tribunal on its own initiative or upon application by one of the parties.

The tribunal would be empowered to interpret its own judgment upon the request of a party if the terms were unclear or incomplete in some respect, as demonstrated by the party requesting the interpretation. Similar authority is conferred upon other tribunals, including the Court of Justice of the European Communities.[32] The ability of the tribunal to interpret its own judgments where the parties are unable to discern the intended meaning would help to ensure that judgments are given effect in accordance with the tribunal's findings and conclusions.

[32]See Article 40 of the Statute of the CJEC.

ARTICLE XVIII

1. The original of each judgment shall be filed in the archives of the Fund. A copy of the judgment, attested to by the President, shall be delivered to each of the parties concerned.

2. A copy shall also be made available by the Secretariat on request to any interested person, provided that the President may decide that the identities or any other means of identification of the applicant or other persons mentioned in the judgment shall be deleted from such copies.

Judgments of the Fund tribunal are to be made available to interested persons upon request; they would be in the public domain and could be cited or published.[33] This Article further provides that the President would be authorized to decide whether to conceal the identity of the applicant or any other person mentioned in the judgment, such as a witness (e.g., the complainant in a sexual harassment case in which the disciplinary measures imposed on the perpetrator are being challenged), in copies of the judgment. The President would be guided by concerns for protecting the privacy of the individual involved or the confidentiality of the matter to the organization.

ARTICLE XIX

This Statute may be amended only by the Board of Governors of the Fund.

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

[33]The statutes of the WBAT and other tribunals provide that the judgments of the tribunal will be published or made available to interested persons.

ARTICLE XX

1. The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date.

2. In the case of decisions taken between October 15, 1992 and the establishment of the Tribunal, the application shall be admissible only if it is filed within three months after the establishment of the Tribunal. For purposes of this provision, the Tribunal shall be deemed to be established when the staff has been notified by the Managing Director that all the members of the Tribunal have been appointed.

As a result of this Article, the tribunal would be competent to hear cases involving only those decisions taken on or after the effective starting date of the tribunal's jurisdiction, which is the date on which the Executive Board formally approved the transmittal of the proposed statute to the Board of Governors. Accordingly, administrative acts taken on or after October 15, 1992 would be reviewable by the tribunal. Administrative acts taken before that date would not be reviewable, even if administrative review of the act was still pending on the effective starting date of the tribunal's jurisdiction. Section 2 provides a transitional provision to extend the period of time specified in Article VI for the initiation of proceedings before the tribunal.

ARTICLE XXI

The competence of the Tribunal may be extended to any international organization upon the terms established by a special agreement to be made with each such organization by the Fund. Each such special agreement shall provide that the organization concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization and shall include, inter alia, provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal.

Article XXI would permit the affiliation of other international organizations with the tribunal pursuant to an agreement with the Fund. As a condition of such affiliation, the organization would have to agree to be bound by the tribunal's judgments, including the obligation to pay compensation as awarded by the tribunal. The agreement with the Fund would need to cover such areas as the sharing of the tribunal's expenses by the affiliating organization and its role in the administrative arrangements of the tribunal. The affiliating organization would not, however, have any authority with respect to appointment of the tribunal's members or amendment of the governing statute.

Part III. Procedure

1. The procedure for the adoption of the proposed statute is as follows. The proposed resolution in Part IV, including the proposed statute, is to be communicated to the Board of Governors. The Executive Board recommends, as proposed in Article XX of the proposed statute, if approved by the Board of Governors, that the statute enter into force as of October 15, 1992, the date on which the Executive Board formally decided to transmit the report and resolution to the Board of Governors.

2. Part IV of this report contains the text of a resolution, to which is attached the text of the proposed statute discussed above. The Chairman of the Board of Governors has requested that the Secretary of the Fund bring the resolution and proposed statute before the Board of Governors for its approval. It is pursuant to this request that the Secretary is transmitting this report to the Board of Governors.

3. In the judgment of the Executive Board, the action requested of the Board of Governors should not be postponed until the next regular meeting of the Board and does not warrant the calling of a special meeting of the Board. For this reason, the Executive Board, pursuant to Section 13 of the By-Laws, requests Governors to vote without meeting. To be valid, votes must be received at the seat of the Fund before 6:00 p.m., Washington time, on December 21, 1992. The resolution will be adopted if replies are received from a majority of the Governors exercising a majority of the total voting power and if a majority of the votes is cast in favor of the resolution. The resolution must be voted on as a whole.

Part IV. Resolution

WHEREAS the Executive Board has considered the establishment of an administrative tribunal to serve the Fund; and

WHEREAS the Executive Board has proposed a statute for the establishment of such a tribunal and prepared a Report on the same; and

WHEREAS the Chairman of the Board of Governors has requested the Secretary of the Fund to bring the proposal of the Executive Board before the Board of Governors; and

WHEREAS the Report of the Executive Board setting forth its proposal has been submitted to the Board of Governors by the Secretary of the Fund; and

WHEREAS the Executive Board has requested the Board of Governors to vote on the following resolution without meeting, pursuant to Section 13 of the By-Laws of the Fund;

NOW, THEREFORE, the Board of Governors, noting the said Report of the Executive Board, hereby RESOLVES that the proposed Statute of the Administrative Tribunal of the International Monetary Fund is hereby adopted.

Resolution No. 48-1
Establishment of the Administrative Tribunal of the International Monetary Fund

WHEREAS the Executive Board has considered the establishment of an administrative tribunal to serve the Fund; and

WHEREAS the Executive Board has proposed a statute for the establishment of such a tribunal and prepared a Report on the same; and

WHEREAS the Chairman of the Board of Governors has requested the Secretary of the Fund to bring the proposal of the Executive Board before the Board of Governors; and

WHEREAS the Report of the Executive Board setting forth its proposal has been submitted to the Board of Governors by the Secretary of the Fund; and

WHEREAS the Executive Board has requested the Board of Governors to vote on the following resolution without meeting, pursuant to Section 13 of the By-Laws of the Fund;

NOW, THEREFORE, the Board of Governors, noting the said Report of the Executive Board, hereby RESOLVES that the proposed Statute of the Administrative Tribunal of the International Monetary Fund is hereby adopted.

RULES OF PROCEDURE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND[1]

RULE I

General

1. These Rules of Procedure shall apply to the Administrative Tribunal of the International Monetary Fund (hereinafter "Tribunal").

2. These Rules shall be subject to the provisions of:

(a) the Fund's Articles of Agreement;

(b) the Statute of the Tribunal.

3. For purposes of these Rules, the masculine pronoun shall include the feminine pronoun.

RULE II

Official Language

The working language of the Tribunal shall be English.

RULE III

President

The President of the Tribunal shall:

(a) preside over the consideration of cases by the Tribunal;

(b) direct the Registry of the Tribunal in the performance of its functions;

[1]These Rules entered into force on February 18, 1994 and were amended on August 31, 1994.

(c) prepare an annual report on the activities of the Tribunal; and

(d) perform the functions entrusted to the President by these Rules of Procedure.

RULE IV

Registry

Under the authority of the President, the Registrar of the Tribunal shall:

(a) receive applications instituting proceedings and related documentation of the case;

(b) be responsible for transmitting all documents and making all notifications required in connection with cases before the Tribunal;

(c) make for each case a dossier which shall record all actions taken in connection with the case, the dates thereof, and the dates on which any document or notification forming part of the procedure are received in or dispatched from his office;

(d) attend hearings, meetings, and deliberations of the Tribunal;

(e) keep the minutes of these hearings and meetings as instructed by the President; and

(f) expeditiously perform the functions entrusted to the Registrar by the Rules of Procedure and carry out tasks as assigned by the President.

RULE V

Recusal

1. Pursuant to Article VII, Section 3 of the Statute, a member of the Tribunal shall recuse himself:

(a) in cases involving persons with whom the member has a personal, familial or professional relationship;

(b) in cases concerning which he has previously been called upon in another capacity, including as advisor, representative, expert or witness on behalf of a party; or

(c) if there exist other circumstances such as to make the member's participation seem inappropriate.

2. Any member recusing himself shall immediately inform the President of the Tribunal.

RULE VI

Counsel

In accordance with Article X, Section 3 of the Statute, each party may at any time choose to be assisted by counsel, whose designation shall be notified to the Registrar.

RULE VII

Applications

1. Applications shall be filed by the Applicant or his duly authorized representative, following the form attached as Annex A hereto. If an Applicant wishes to be represented, he shall complete the form attached as Annex B hereto.

2. Applications instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:

(a) the name and official status of the Applicant;

(b) the name of the Applicant's representative, if any, and whether such representative or another person shall act as counsel for the Applicant;

(c) the decision being challenged, and the authority responsible for the decision;

(d) the channels of administrative review, as applicable, that the Applicant has pursued and the results thereof;

(e) the reasons why he believes the decision is illegal;

(f) a statement of the supporting facts; and

(g) the relief or remedy that is being sought, including the amount of compensation, if any, claimed by the Applicant and the specific performance of any obligation which is requested.

3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.

4. Four additional copies of the application and its attachments shall be submitted to the Registrar.

5. An application shall satisfy the provisions of Article XX, and be submitted to the Tribunal within the time limits prescribed by Article VI, of the Statute.

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

(i) notify the Applicant that the period of time within which to make the appropriate changes has been extended, indicating the length of time thereof;

(ii) make the necessary corrections when the defects in the application do not affect the substance; or

(iii) by order of the President, notify the Applicant that the submission does not constitute an application and cannot be filed as such.

7. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall notify the Fund of the application and shall transmit a copy of it to the General Counsel.

8. The application shall be signed on the last page by the Applicant or the representative, if any, whom he has designated in accordance with Paragraph 1 above. In the event of the Applicant's incapacity, the required signature shall be furnished by his legal representative.

RULE VIII

Answer

1. Once an application has been duly notified by the Registrar to the Fund, the Fund shall answer the application in writing and submit any

additional documentary evidence within forty-five days unless, upon request, the President sets another time limit. The Fund's answer shall be submitted to the Tribunal and to the Applicant through the Registrar. The Fund shall include as annexes all documents referred to in the answer in accordance with the rules established for the application in Rule VII.

2. The answer shall be signed on the last page by the representative of the Fund.

3. Four additional copies of the answer and its attachments shall be submitted to the Registrar.

4. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Fund's answer to the Applicant.

RULE IX

Reply

1. The Applicant may file with the Registrar a written reply to the answer within thirty days from the date on which the answer is transmitted to him, unless, upon request, the President sets another time limit.

2. The complete text of any document referred to in the written reply shall be annexed thereto in accordance with the rules established for the application in Rule VII.

3. The requirements of Rule VII, Paragraphs 4 and 8, shall apply to the reply.

4. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Applicant's reply to the Fund.

RULE X

Rejoinder

1. The Fund may file with the Registrar a written rejoinder within thirty days of receiving the Applicant's reply, unless, upon request, the President sets another time limit.

2. The complete text of any document referred to in the written rejoinder shall be annexed thereto in accordance with the rules established for the application in Rule VII.

3. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the rejoinder.

4. Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Fund's rejoinder to the Applicant.

5. Without prejudice to Rule XI, after the rejoinder has been filed, no further pleadings may be received.

RULE XI

Additional Pleadings

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

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

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

RULE XII

Summary Dismissal

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

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

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

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

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

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

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

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

RULE XIII

Oral Proceedings

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

2. At a time specified by the Tribunal, before the commencement of oral proceedings, each party shall inform the Registrar and, through him, the other parties, of the names and description of any witnesses and experts whom the party desires to be heard, indicating the points to which the evidence is to refer. The Tribunal may also call witnesses and experts.

3. The Tribunal shall decide on any application for the hearing of witnesses or experts and shall determine, in consultation with the parties

or their counsel, the sequence of oral proceedings. Where a witness is not in a position to appear before the Tribunal, the Tribunal may decide that the witness shall reply in writing to the questions of the parties. The parties shall, however, retain the right to comment on any such written reply.

4. The parties or their counsel may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.

5. Each witness shall make the following declaration before giving evidence:

> "I solemnly declare upon my honor and conscience that my testimony shall be the truth, the whole truth and nothing but the truth."

6. Each expert shall make the following declaration before giving evidence:

> "I solemnly declare upon my honor and conscience that my testimony will be in accordance with my sincere belief."

7. The Tribunal may disregard evidence which it considers irrelevant, frivolous, or lacking in probative value.

8. The Tribunal may limit oral testimony where it considers the written documentation adequate.

9. The President is empowered to issue such orders and decide such matters as are necessary for the orderly disposition of cases, including ruling on objections raised concerning the examination of witnesses or the introduction of documentary evidence.

RULE XIV

Intervention

1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal. Such person shall for that purpose draw up and file an application to intervene in accordance with the conditions laid down in this Rule.

2. The rules regarding the preparation and submission of applications specified above shall apply *mutatis mutandis* to the application for intervention.

3. Upon ascertaining that the formal requirements of this Rule have been complied with, the Registrar shall transmit a copy of the application for intervention to the Applicant and to the Fund, each being entitled to present views on the issue of intervention within thirty days. Upon expiration of that deadline, whether or not the parties have replied, the President, in consultation with the other members of the Tribunal, shall decide whether to grant the application to intervene. If intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party.

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

RULE XV

Amicus Curiae

The Tribunal may, at its discretion, permit any persons, including the duly authorized representatives of the Staff Association, to communicate their views to the Tribunal.

RULE XVI

Time Limits

The calculation of time limits prescribed in these Rules of Procedure, all of which refer to calendar days, shall not include the day of the event from which the period runs, and shall include the next working day of the Fund when the last day of the period is not a working day.

RULE XVII

Production of Documents

1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence

which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.

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

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

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

RULE XVIII

Judgments

1. All deliberations of the Tribunal shall be in private. The judgment shall be adopted by majority vote.

2. Once the final text of the judgment has been approved and adopted, the judgment shall be signed by the President and the Registrar and shall contain the names of the members who have taken part in the decision.

3. Any member differing as to the grounds upon which the judgment was based or some of its conclusions, or dissenting from the judgment, may append a separate or dissenting opinion.

4. The judgment and any appended opinions shall be transmitted to the parties and to *amici curiae*. They shall be available to interested persons upon request to the Registrar, who shall arrange for their publication.

5. Clerical and arithmetical errors in the judgment may be corrected by the Tribunal.

RULE XIX

Revision of Judgments

1. A party may request revision of a judgment issued by the Tribunal, but only in the event that a fact or a document is discovered which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time of the judgment was unknown to the Tribunal and to the party to the case making application for the revision and such ignorance was not the responsibility of that party.

2. The revision must be requested within thirty days from the date on which the fact or document is discovered and, in any event, within one year from the date on which the party requesting the revision was notified of the judgment unless, upon request, the President sets another time limit.

3. The procedure set forth in Rules VIII through XI shall be applied, *mutatis mutandis*, to the request for revision.

4. The Tribunal shall decide whether to admit the application for revision. If the application is admitted, the Tribunal shall pass judgment on the matter at issue in accordance with these Rules.

RULE XX

Interpretation of Judgments

1. In accordance with Article XVII of the Statute, after a judgment has been rendered, a party may apply to the Tribunal requesting an interpretation of the operative provisions of the judgment.

2. The application shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure or incomplete.

3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the application for interpretation. If the application is admitted, the Tribunal shall issue its interpretation, which shall thereupon become part of the original judgment.

RULE XXI

Miscellaneous Provisions

1. The President shall, in consultation with the other members of the Tribunal, fix the dates of the Tribunal's sessions.

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

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

ANNEX A[1]

Administrative Tribunal of the International Monetary Fund

FORM OF APPLICATION

I. Information concerning the personal status of the Applicant:

1. full name of Applicant:

2. if Applicant's claim is based on the employment rights of another person:

   (a) name and official status of person whose rights are relied upon:

   (b) the relation of Applicant to person whose status entitles Applicant to come before the Tribunal:

3. address for purposes of the proceedings:

   telephone number:
   fax number:

II. Official status of Applicant or of the person whose status entitles Applicant to come before the Tribunal:

1. Beginning and ending dates of each period of employment with the Fund:

2. Employment status at time of decision contested (whether in active service or in retirement):

3. Type of appointment:

III. Decision being challenged, date of the decision, and the authority responsible for the decision:

[1]Separate application forms of Annexes A and B are available from the Office of the Registrar.

IV. Channels of administrative review of the decision that Applicant has pursued and the results:

V. Reasons why Applicant challenges the decision and its legality:

VI. Statement of supporting facts:

VII. The relief or remedy that is being sought, including the amount of compensation, if any, claimed by Applicant and/or the specific performance of any obligation which is requested:

VIII. Annexes to be attached pursuant to Rule VII, para. 3 of the Tribunal's Rules of Procedure:

"3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof."

IX. Any additional information that Applicant wishes to present to the Tribunal.

ANNEX B

Form of Appointment of Representative (and Counsel)*

*APPOINTMENT OF REPRESENTATIVE (AND COUNSEL)**

I, _____

do hereby designate _____
[Name]

_____
[Address]

as my duly authorized representative [and counsel] to file/maintain (circle as appropriate) an application with the IMF Administrative Tribunal. [If known, give case number.] To this end, the above-named representative [and counsel]* is authorized to sign pleadings, appear before the Tribunal, and take all other necessary action in connection with the pursuance of the case on my behalf. This designation shall take effect immediately and shall remain in effect until revoked by me and the Tribunal has been so informed in writing.

_____ _____
Date Signature

*Delete the brackets if your representative will also assist you as counsel. If not, delete the words "and counsel" in the caption and below.

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