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PREFACE

Volume III of *International Monetary Fund Administrative Tribunal Reports* contains the Judgments and Orders of the International Monetary Fund Administrative Tribunal rendered during the period 2003–2004. 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: 2003–2004." 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.

In December 2004, the Tribunal adopted revised Rules of Procedure, with effect in respect of all Applications filed after December 31, 2004. (These Rules will be published beginning with Volume IV, which will contain the first Judgments to which the revised Rules apply.)

Celia Goldman
Registrar

Washington, D. C.
September 2008

Developments in the Jurisprudence of the International Monetary Fund Administrative Tribunal: 2003–2004

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 2003–2004, with Judge Stephen M. Schwebel serving as the Tribunal's President, Judges Nisuke Ando and Michel Gentot as Associate Judges, and Judges Georges

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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).

Abi-Saab and Agustín Gordillo as Alternate Judges.[7] During the period, the Tribunal rendered three Judgments and two Orders.[8] This review highlights some of the most significant issues addressed by the jurisprudence of the IMFAT during the interval 2003–2004.[9]

Overview of Developments

During the period 2003–2004, the IMFAT considered the first challenges to reach the Administrative Tribunal to decisions denying requests for disability retirement under the Staff Retirement Plan ("SRP"). In two separate Judgments, *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003) and *Ms. "K", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-2 (September 30, 2003), the Tribunal rescinded the decisions of the Administration

[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 (2003–2004) 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]At the conclusion of 2004, the Tribunal adopted revisions to its Rules of Procedure with effect in respect of all Applications filed after December 31, 2004. As these amendments have no applicability to the Judgments and Orders reported in the present Volume, their effect will be considered in a later Volume of *International Monetary Fund Administrative Tribunal Reports*.

[9]For reviews of the Tribunal's earlier jurisprudence, *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); and Goldman, "Developments in the Jurisprudence of the International Monetary Fund Administrative Tribunal: 2000–2002," in *International Monetary Fund Administrative Tribunal Reports*, Vol. II, 2000–2002, pp. 1–20 (2008).

Committee of the SRP and ordered that the disability pensions be granted. In reaching these decisions, the Tribunal articulated its standard of review for such cases, which arise through the channel of review provided by the Administration Committee of the SRP.

In *Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004), the Tribunal addressed for the first time the possible preclusive effect of an earlier Judgment on a case brought by the same Applicant, thereby applying the principle of *res judicata* to the Tribunal's Judgments. Reaching the merits of the complaint raised by Mr. "R", the Tribunal resolved a question of equal treatment of staff in the context of coverage of residential security costs of staff members posted abroad.

Finally, as the Tribunal had decided that each of the Applications considered during the period 2003–2004 was well-founded, it awarded relief pursuant to its remedial authority. These developments are elaborated below.

The Tribunal's Standard of Review and Relationship to the Channels of Administrative Review

The Tribunal's standard of review is governed by the second sentence of Article III of the Statute, which 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.

In formulating its standard of review in the case of a challenge to the denial of a request for disability retirement, the Tribunal in *Ms. "J"* had the opportunity to elucidate further its relationship to other elements of the Fund's dispute resolution system, as well as to reflect upon its jurisprudence in respect of review of decisions taken in the exercise of managerial discretion.

The Tribunal began by articulating the meaning of "standard of review" as follows:

> The standard of review, understood as describing the relationship between the Administrative Tribunal and the decision maker responsible for the contested decision, represents the degree of deference accorded by the Tribunal to the decision maker's judgment. The standard of review is designed to set limits on the improper exercise of power and represents a legal presumption about where the risk of an erroneous judgment should lie. The degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is

> contested, and the authority or expertise that has been vested in the original decision maker.[10]

Notably, the case of *Ms. "J"* was the first in which the Tribunal had the benefit of views presented by an *Amicus Curiæ*. The Staff Association Committee ("SAC") applied for and was granted the opportunity to present its views, pursuant to Rule XV[11] of the Tribunal's Rules of Procedure. The controversy as to the applicable standard of review was argued principally between the Fund and the *Amicus Curiæ*. While the Fund emphasized an "arbitrary or capricious" standard of review as applied to individual decisions taken in the exercise of managerial discretion, the *Amicus Curiæ* contended that the Administration Committee's decisions on disability retirement deserved a deeper level of scrutiny.[12]

A distinguishing feature of the problem posed by the case was that, unlike the Grievance Committee, the Administration Committee of the Staff Retirement Plan plays a dual role within the Fund's dispute resolution system:[13] "It is responsible for taking the administrative act that may be contested in the Administrative Tribunal and it also supplies what is deemed a channel of review for purposes of the exhaustion of remedies requirement of Article V of the Tribunal's Statute. . . . Accordingly, while a decision of the Grievance Committee will not be subject to direct review by the Administrative Tribunal, a decision of the SRP Administration Committee necessarily will be."[14]

In defining the Tribunal's standard of review in disability retirement cases, the Tribunal clarified its relationship to the channels of administrative review as follows. The Tribunal confirmed its authority to make both findings of fact and conclusions of law, and therefore to review *de novo* the legality of an administrative act of the Fund. This authority, explained the Tribunal, stems from its "unique role as the sole judicial actor within the

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[10]*Ms. "J"*, para. 99; *see also Ms. "K"*, para. 40.

[11]Rule XV *(Amicus Curiae)* provides: "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." The Tribunal commented that it found the views offered by the SAC to be "discerning and constructive." *Ms. "J"*, para. 20.

[12]*Ms. "J"*, para. 100.

[13]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.

[14]*Ms. "J"*, para. 99; *see also Ms. "K"*, para. 41.

Fund's dispute resolution system." At the same time, the Tribunal "draws upon the record assembled through the review procedures."[15]

Prior to the cases of *Ms. "J"* and *Ms. "K"*, the Tribunal's standard of review had been elucidated in cases of challenges to administrative acts taken in the exercise of the Fund's discretionary authority. The Tribunal noted that, in a variety of contexts, the IMFAT, in discharging its responsibility to review the lawfulness of challenged administrative acts, has acknowledged, and deferred to, the exercise of the managerial discretion of the Fund. This deference is at its height when it reviews regulatory decisions (as contrasted with individual decisions), especially policy decisions taken by the Fund's Executive Board.[16]

At the same time, the Tribunal pointed out that the standard articulated in the Commentary on the Statute for review of individual decisions taken in the exercise of managerial discretion[17] ". . . comprehends a number of different factors. . . . Hence, its operation in a particular case may emphasize one factor over others or it may involve multiple factors, depending upon such variables as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned." The Tribunal emphasized that a "multiplicity of factors" make up the standard of review for individual decisions taken in the exercise of managerial discretion and that ". . . some of these factors contemplate stricter scrutiny on the part of the Administrative Tribunal than do others."[18]

The Tribunal in *Ms. "J"* rejected the Fund's contention that a determination on disability retirement is "quintessentially a discretionary judgment" that should be reviewed by the Tribunal under an "arbitrary and capricious" standard of review.[19] In the view of the Tribunal, two factors differentiate a

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[15]*Ms "J"*, paras. 95–96.

[16]*Ms. "J",* para. 105; *see also Ms. "K",* para. 43.

[17]In cases involving the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary as follows:

> . . . 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 to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund ("Report of the Executive Board") p. 19.

[18]*Ms. "J",* para. 107; *see also Ms. "K",* para. 44.

[19]The Tribunal observed that the "arbitrary and capricious" standard of review represents its "least rigorous level of scrutiny." *Ms. "J",* para. 109; *see also Ms. "K",* para. 44.

disability retirement decision from an act taken in the exercise of the Fund's managerial discretion. First, disability retirement decisions involve quasi-judicial decision making, i.e., construing the applicable terms of the Staff Retirement Plan and applying them to the facts of a particular case. Second, the channel of review applicable to such decisions does not involve the Managing Director; individual decisions taken under the Staff Retirement Plan are exclusively vested in the SRP Administration Committee, subject only to direct appeal (following reconsideration by the Committee itself) to the IMF Administrative Tribunal.[20]

In *Ms. "J"*, the Tribunal referred to its earlier Judgment in *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), in which it had acknowledged the unique nature of the "appellate authority" arising from Section 7.2 of the SRP and Article II of the Tribunal's Statute.[21] The Tribunal noted that it was significant that in that case, arising under the SRP provision governing the giving effect to orders for family support and division of marital property, the IMFAT had reviewed the "soundness" of the SRP Administration Committee's decision and concluded that it was "in error."[22] The Tribunal in *Ms. "J"* clearly differentiated the standard of review it had applied in *Mr. "P" (No. 2)* from that employed when it reviews decisions taken in the exercise of discretionary authority.[23] Additionally, the IMFAT found support in the jurisprudence of other international administrative tribunals for the view that a decision on disability retirement is an act of quasi-judicial decision making, subject to a higher degree of scrutiny than that applied to the review of discretionary acts.[24]

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[20]*Ms. "J"*, paras. 112–113; *see also Ms. "K"*, paras. 45–46.

[21]*Ms. "J"*, para. 114. Article II (1) (b) provides:

> 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.

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. *See Mr. "P" (No. 2)*, para. 141.

[22]*Ms. "J"*, paras. 114–115, quoting *Mr. "P" (No. 2)*, paras. 141–145; *see also Ms. "K"*, paras. 47–48.

[23]*Ms. "J"*, para. 116.

[24]Such heightened scrutiny has also been found to be applicable in review of disciplinary decisions. *Ms. "J"*, paras. 118–127; *see also Ms. "K"*, paras. 50–53. Later, in the first case in which the IMFAT was called upon to review a disciplinary decision, it referred to this jurisprudence. *See Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), paras. 123–125.

Having examined the statutory requirement that the Tribunal apply ". . . generally recognized principles of international administrative law concerning judicial review of administrative acts" (Statute, Article III), as well as the associated Commentary on the Statute, its own jurisprudence and that of other international administrative tribunals, the IMFAT concluded that disability retirement decisions are subject to scrutiny as follows: Did the SRP Administration Committee correctly interpret the requirements of SRP Section 4.3 and soundly apply them to the facts of the case, or was the Committee's decision based on an error of law or fact? Was the Committee's decision taken in accordance with fair and reasonable procedures? Was the Committee's decision in any respect arbitrary, capricious, discriminatory or improperly motivated?[25]

The Law of Disability Retirement

Applying the standard of review for disability retirement decisions established in *Ms. "J"*, the Tribunal considered whether the Administration Committee had correctly interpreted and soundly applied to the facts of the cases of *Ms. "J"* and *Ms. "K"* the requirements of Section 4.3 of the Fund's Staff Retirement Plan. That section provides that a Plan participant may be retired on a disability pension if ". . . such participant, while in contributory service, bec[omes] totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform; [and] such incapacity is likely to be permanent. . . ."

In *Ms. "J"*, the Tribunal was required to construe the disability retirement requirements in the case of a staff member who had performed a very specialized function in the Fund, as a verbatim reporter, and then suffered a disability to her arms and hands that directly impaired her ability to perform that specialized function. The case of *Ms. "K"*, by contrast, presented the circumstance of a staff member who, as a result of psychiatric illness, was impaired on a recurring basis from performing her responsibilities as a Staff Assistant. The dispute in *Ms. "J"* centered on the question of whether, given the Applicant's inability to perform the functions of the position she had occupied when her incapacity arose, there were other duties that the Fund reasonably could ask her to perform. In *Ms. "K"*, the controversy focused on whether or not the Applicant was totally incapacitated from performing the functions of the job she had occupied for many years, on the basis that she was unable on an intermittent basis to discharge her job functions. In both

[25]*Ms. "J"*, para. 128; *see also Ms. "K"*, para. 54.

cases, the Tribunal found the decisions of the SRP Administration Committee not to be sustainable.

Both Ms. "J" and Ms. "K" had raised the contention that it is inherently unfair for the Fund to separate a staff member from service for medical reasons on the basis of having no transferable skills while at the same time denying a request for disability retirement. The Tribunal held that, under the Fund's internal law, separation for medical reasons cannot determine entitlement to a disability pension under the Staff Retirement Plan. Nonetheless, concluded the Tribunal, the ". . . factual circumstances surrounding the separation may be given weight in reviewing the soundness of the SRP Administration Committee's decision on an application for disability retirement."[26]

It was not disputed that Ms. "J" was separated for medical reasons as a result of a repetitive use injury. As she remained unable to use her hands and arms in repetitive motion as required to perform the functions of a verbatim reporter, the Fund framed the question before the Tribunal in the disability retirement case as whether Ms. "J"'s education and abilities could be utilized elsewhere in the Fund without requiring her to use her hands in a manner that would exacerbate her injury.[27] The Fund had identified to the SRP Administration Committee six positions which it asserted Ms. "J" would be considered qualified to perform, with a reasonable amount of training and accommodation, and it was on that basis that the Committee had decided that the Applicant's skills could be used in the Fund and that she accordingly was not "totally incapacitated" under the terms of the Staff Retirement Plan.

The Tribunal's own review of the job standards for the identified positions, however, revealed that the positions contemplated a candidate whose educational background differed significantly from that required to perform the functions of the position that Ms. "J" had occupied as a verbatim reporter. The Tribunal accordingly concluded:

> . . . in view of Ms. "J"'s highly specialized but limited training and experience, it would not be reasonable to expect the Fund to ask her to perform the duties of any of the positions identified by the . . . Fund's Human Resources Department. . . . Nor is it clear that Ms. "J" would be qualified to perform any of these jobs with a reasonable amount of additional training and accommodation, as the Fund maintains.[28]

[26]*Ms. "J"*, para. 147; *Ms. "K"*, para. 64.
[27]*Ms. "J"*, para. 133.
[28]*Id.*, para. 140.

Accordingly, the Tribunal concluded that Ms. "J", while in contributory service, had become "totally incapacitated" under the terms of the pension Plan ". . . not in the sense that she is incapable of working at all but that she is incapable of performing any duty that the Fund may reasonably call upon her to perform." [29]

In the case of *Ms. "K"*, the Applicant maintained that her recurring psychiatric symptoms did not wax and wane in a predictable manner so as to allow for their accommodation in the workplace. The Fund countered that intermittent incapacity should not be considered "total" incapacity as required by the SRP, and that as long as the Applicant could perform her duties "'even if not on a sustained basis'" she did not meet the criteria for a disability pension.[30] In assessing whether the Administration Committee had drawn reasonable conclusions from the evidence, the Tribunal considered such factors as the internal consistency of the physicians' reports, separating observations as to the Applicant's condition from ultimate conclusions with respect to incapacity. The Tribunal concluded that there were aspects of the reviewing physicians' reports that called into question their internal consistency. In addition, the Tribunal questioned ". . . the possible tendency of the decision makers to minimize the seriousness of Applicant's medical condition. . . ." In particular, noted the Tribunal, "[i]t may be asked whether, in the discussion of the Administration Committee, the Medical Advisor somewhat discounted the seriousness of Applicant's medical condition and the difficulty of its treatment, in contrast to his own earlier reports."[31]

After reviewing the evidence, including the Administration Committee's initial finding that a return to the workplace was not a viable option in the case of the Applicant, the Tribunal concluded that ". . . although Ms. "K"'s disabling symptoms may be of an 'intermittent' character, they may well have had a pervasive effect on her ability to maintain the position of Staff Assistant." In the view of the Tribunal, ". . . the Applicant is totally incapacitated, mentally, to perform the duties in the Fund that she might be reasonably called upon to perform, namely those of Staff Assistant. . . ."[32]

Having found in both *Ms. "J"* and *Ms. "K"* that the Applicants met the preliminary requirement of being "totally incapacitated" under the terms of the Staff Retirement Plan, the IMFAT proceeded in each case to consider whether the incapacity was "likely to be permanent." (SRP Section 4.3 (a)

[29] *Id.,* para. 148.
[30] *Ms. "K",* para. 57.
[31] *Id.,* paras. 67–75.
[32] *Id.,* paras. 62, 78.

(ii).) In the case of Ms. "J", after reviewing the evidence, the Tribunal concluded that it was likely that the Applicant's condition would be permanent ". . . in the sense that she will remain unable to be appointed to a position in the Fund."[33] The Tribunal's Judgment reflected the view that both the requirement that the Plan participant be "totally incapacitated" and that the incapacity be "likely to be permanent" were to be interpreted in the light of the duties that the applicant for disability retirement might reasonably be called upon by the Fund to perform.[34]

In *Ms. "K"*, the question of the likely permanency of the Applicant's incapacity centered on the issues of the seriousness and long-standing nature of her illness, the ease of its treatment, and the Applicant's reasonable compliance or not with available treatment options. The Tribunal found insufficient support in the record for the contention that Ms. "K" failed to comply with prescribed treatment regimes. Moreover, it observed, any treatment options and prospects for improvement were to be evaluated in the context of the nature and seriousness of the illness and the length of its duration. On the basis of these considerations, the Tribunal concluded that the Applicant's incapacity was "likely to be permanent" under the terms of the SRP.[35]

Accordingly, the Tribunal concluded that the Applicants in *Ms. "J"* and *Ms. "K"* had met the requirements for disability retirement under the Staff Retirement Plan and that the decisions of the SRP Administration Committee should be rescinded.

Disability Retirement: Alleged Procedural Unfairness

Both Ms. "J" and Ms. "K" additionally contended that the decisions denying their requests for disability pensions had been taken in violation of fair and reasonable procedures. Their Applications, observed the Tribunal, raised the issue of what process is due to applicants for disability retirement under the SRP. That such decisions are to be taken in accordance with fair and reasonable procedures, stated the Tribunal, is "an interest shared by all Plan participants and the organization," and ". . . the applicant's stake in the

[33]*Ms. "J"*, para. 157.

[34]*See Ms. "J"*, para. 149 and *Ms. "K"*, para. 79, quoting *Courtney (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 153 (1996), para. 33.

[35]*Ms. "K"*, paras. 79–95. In both *Ms. "J"* and *Ms. "K"*, the Tribunal additionally took note of SRP Section 4.3(d), which provides for the possibility of periodic medical examination and for the discontinuance or reduction of a disability pension based on a finding that the incapacity has wholly or partially ceased. *See Ms. "J"*, para. 157; *Ms. "K"*, para. 93.

outcome of the decision-making process deserves a high level of procedural protection."[36]

While confirming its authority to review disability retirement decisions for procedural fairness, the Tribunal in the cases of *Ms. "J"* and *Ms. "K"* concluded, having decided in favor of the Applicants on substantive grounds, that there was no need to pass upon their procedural complaints.[37] Nonetheless, the Tribunal commented that there was "room to question" whether the procedures employed by the Administration Committee of the SRP had afforded Ms. "J" and Ms. "K" sufficient and timely notice and opportunity for rebuttal.[38]

The Tribunal additionally offered a series of procedural considerations for the future guidance of the Administration Committee.[39] Notably, the Tribunal observed that it is the function of the SRP Administration Committee, not of its Medical Advisor, to draw ultimate conclusions as to eligibility for disability retirement:

> . . . the advice of the Medical Advisor . . . should be confined to medical questions and not extend to the ultimate conclusion of whether the applicant is, or is not, totally and permanently incapacitated for the performance of any duty which the Fund may reasonably call upon him to perform. Rather, the drawing of that conclusion should be the function of the Administration Committee.[40]

Res Judicata and Challenge to the Admissibility of an Application

Essential to the powers exercised by the IMFAT is its authority to render Judgments that are final and binding on the parties. This authority, which is codified in Article XIII[41] of the Statute, confirms the Tribunal's role as an independent judicial forum. Only limited provision is made

[36]*Ms. "J"*, para. 162; *Ms. "K"*, para. 100.

[37]*Ms. "J"*, para. 171; *Ms. "K"*, para. 108. The Tribunal also declined to award any separate compensation on the ground of procedural irregularity. *Ms. "J"*, para. 180 and Decision; *Ms. "K"*, para. 117 and Decision.

[38]*Ms. "J"*, paras. 167–169; *Ms. "K"*, paras. 104–106.

[39]*Ms. "J"*, paras. 171–176; *Ms. "K"*, paras. 108–113.

[40]*Ms. "J"*, para. 175; *Ms. "K"*, para. 112. The Tribunal returned to this and other principles established in *Ms. "J"* and *Ms. "K"* in *Ms. "CC", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-6 (November 16, 2007) (denying Application contesting denial of disability pension).

[41]Article XIII (2) provides: "Judgments shall be final, subject to Article XVI and Article XVII, and without appeal."

under the IMFAT Statute for the interpretation, correction[42] or revision[43] of a Judgment.

In *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), the Administrative Tribunal had rejected the contentions of the Applicant, an overseas Office Director, that he should have been afforded an overseas assignment allowance and a housing allowance commensurate with the housing benefit accorded the Fund's Resident Representative posted in the same overseas location. Following the Tribunal's Judgment in *Mr. "R"*, the Applicant sought and was denied by the Fund's Human Resources Department reimbursement of security costs incurred indirectly as a result of electing to live in a secure hotel, rather than in a private residence requiring security upgrades, during his three-year term as an overseas Office Director. Mr. "R" challenged this decision via a second Application before the Administrative Tribunal.

The Fund maintained that Mr. "R"'s second Application was barred by the Tribunal's earlier Judgment in *Mr. "R"*. Article XIII of the Tribunal's Statute provides that "Judgments shall be final, subject to Article XVI and Article XVII, and without appeal." This statutory provision, the IMFAT confirmed, applies to the Tribunal's Judgments a "cardinal principle of judicial review, the doctrine *res judicata*." *Res judicata* prevents the relitigation of claims already adjudicated, promoting judicial economy and certainty among the parties. [44] While the IMFAT had twice before affirmed the principle of the finality of its Judgments in rejecting requests for interpretation of Judgments,[45] the case of *Mr. "R" (No. 2)* was the first in which *res judicata* was raised as a defense to an Application.

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[42]Article XVII provides for the interpretation and correction of Judgments as follows:

> The Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.

[43]Article XVI provides for the revision of Judgments as follows:

> 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.

[44]*Mr. "R" (No. 2),* para. 25.

[45]*Ms. "C", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1),* IMFAT Order No. 1997-1 (December 22, 1997). *See also Ms. "Y", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1998-1),* IMFAT Order No. 1999-1 (February 26, 1999) ("The adoption of the requested interpretation would constitute an amendment of the Judgment, which is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to decide by way of an interpretation, because the Judgment is final and without appeal.")

For *res judicata* to bar a subsequent claim, the Tribunal explained in *Mr. "R" (No. 2)*, three common elements must be present in both the new and previously decided cases: the parties must be the same; the outcome sought must be the same; and the cause of action must have the same foundation in law.[46] While the parties were indisputably the same, at issue in the case of *Mr. "R" (No. 2)* was whether the outcome sought and the foundation in law of Mr. "R"'s first and second Applications were distinct. The Tribunal concluded that they were.

Mr. "R", in his first case before the Administrative Tribunal, had contended that as an overseas Office Director posted in a particularly challenging location he should have been entitled to an overseas assignment allowance and a housing allowance commensurate with that accorded the Fund's Resident Representative posted in the same foreign city. The Tribunal held that the Fund had not abused its discretion in deciding to allocate differing benefits to different categories of Fund staff, nor in declining to make an exception in the Applicant's case.

In his second Application, Mr. "R" sought (a) an interpretation of the housing allowance for overseas Office Directors that would take into account security costs in assessing the difference between housing costs in Washington, D.C. and the duty station by recompensing him for the cost of security allegedly included in his rental rate; and/or (b) an interpretation of the Fund's security "policy" that would reimburse security costs incurred indirectly.[47]

In the view of the Tribunal:

> . . . the purpose of the current claim is not the same as that earlier litigated. In the first case, Mr. "R" challenged the Fund's decision not to accord him as Director of JAI the same perquisites as those granted to the Resident Representative in Abidjan. In this case, he contests the application of a Fund security policy that distinguishes between security costs directly incurred and security costs indirectly incurred, the Fund meeting the former but not the latter.[48]

Moreover, concluded the Tribunal, the foundation in law of Mr. "R"'s second cause of action differed from that of his first. In his first Application, Mr. "R" challenged as discriminatory the difference in benefits accorded overseas Office Directors vis-à-vis Resident Representatives in the unique

[46]*Mr. "R" (No. 2),* paras. 27–29.
[47]*Id.,* para. 33.
[48]*Id.,* para. 34.

circumstance in which such officials are posted in the same foreign city. The central question asked and answered by the Tribunal in Mr. "R"'s first case was "'. . . 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.'"[49] The Tribunal had not considered the contention, raised in Mr. "R"'s second Application, that in calculating the housing allowance of an overseas Office Director the Fund unfairly excluded security costs in assessing the difference in housing costs between Washington, D.C. and the duty station.[50]

The Tribunal additionally observed that in its Judgment in Mr. "R"'s first case it had found some of the Fund's justifications for the differing benefits policies more persuasive than others. Notably, the Tribunal in *Mr. "R"* had suggested that the Applicant was correct in pointing out that the distinction in benefits accorded Office Directors vs. Resident Representatives was not supported by security considerations, at least as to Fund personnel posted at his particular duty station.[51] While the Tribunal in *Mr. "R"* had not concluded that the shared factor of security concerns in Abidjan was sufficient to invalidate the distinction in benefits between the Resident Representative and overseas Office Director posted there, neither had it relied on security considerations in upholding the distinction in benefits between the two categories of Fund staff.[52] The Tribunal rather had observed that the Fund's 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.'"[53]

In the view of the Tribunal, ". . . the foundation in law for Applicant's argument in the present case differs, as he identifies a different inequity than the one complained of in the first case. In the present case, Mr. "R"'s complaint focuses upon the inequality allegedly visited upon overseas Office staff who choose to rent security-enhanced quarters vis-à-vis overseas Office staff who choose to take up residence in a facility that requires

[49]*Id.,* para. 38, quoting *Mr. "R",* para. 53.

[50]*Id.,* para. 37.

[51]*Id.,* para. 39, citing *Mr. "R",* para. 56.

[52]The Tribunal cited other factors, in particular the incentive to recruitment of Resident Representatives provided by the overseas assignment allowance, in concluding that the allocation of differing benefits to different categories of staff was reasonably related to the purposes of those benefits. *Id.,* para. 40, citing *Mr. "R",* para. 64.

[53]*Id.,* para. 39, quoting *Mr. "R",* para. 58.

security upgrades."[54] In Mr. "R"'s first case, the matter of reimbursement of security costs allegedly incurred by residing in a hotel was not specifically raised by the Applicant nor considered by the Tribunal.[55]

The Tribunal summarized its decision on the admissibility of the Application as follows:

> The Tribunal concludes that Mr. "R"'s current claim is not debarred on the ground of *res judicata*, because, in its essence, it is a challenge not to treating the benefits of a Resident Representative and an Office Director differently but to meeting security costs differently depending on whether the Fund pays those costs directly or leaves it to the staff member concerned to assume them indirectly as by payment of hotel bills that subsume security protection. This latter question was not addressed in the Tribunal's Judgment in the case initially brought by Mr. "R".[56]

Equal Treatment

Having decided that Mr. "R"'s Application was not debarred on the ground of *res judicata*, the Tribunal proceeded to consider his claim on the merits. As noted, while the Judgment in Mr. "R"'s first case had established that the principle of nondiscrimination serves as a constraint on the Fund's discretionary authority,[57] the particular distinction complained of was not held by the Tribunal to have been an abuse of discretion. By contrast, Mr. "R" succeeded in his second Application, alleging a different inequality of treatment.

The essence of the Applicant's complaint in *Mr. "R" (No. 2)* was that the Fund improperly applied to the circumstances of his case the calculation of the housing allowance for an overseas Office Director. Mr. "R" contended that the allowance, in failing to reimburse him for security costs incurred indirectly through the choice of renting a security-enhanced accommodation, failed to account fully for the difference in housing costs between Washington, D.C. and his overseas post.

The Fund, for its part, maintained that the decision contested by Mr. "R" was consistent with applicable Fund policy and that sound business reasons

[54]*Id.,* para. 42.

[55]The Tribunal also noted that the Fund had reacted to Mr. "R"'s April 2002 request as if it were distinct from the request disposed of by the Administrative Tribunal only one month earlier. *Id.,* para. 43.

[56]*Id.,* para. 44.

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

supported the payment of security costs directly. Mr. "R" challenged the fairness of the Fund's stated policy of covering the necessary costs of providing security in all locations where staff are posted around the world but not to reimburse a staff member for those expenses that may be "avoided" by the staff member's choice of accommodation.

In the view of the Tribunal, Mr. "R"'s argument was the more persuasive. In its dispositive passage, the Tribunal upheld the principle of equal treatment in respect of security costs:

> The Fund "avoided" those costs, but Mr. "R" could not avoid them. The Tribunal sees no cogent consideration, in light of the Fund's policy of meeting security costs, why Respondent should be absolved of those costs in the case of Mr. "R" simply because they were indirectly rather than directly incurred. On the contrary, equal treatment of staff in their fundamental right to enjoy physical security should govern.[58]

At the same time, the Tribunal indicated that it was dealing in the case of Mr. "R" with a "singular factual circumstance."[59]

Remedies and Legal Costs

In each of the Judgments rendered during the period 2003-2004, the Tribunal concluded that the Applications were well-founded. Accordingly, pursuant to its remedial authority, the Tribunal rescinded the contested decisions and ordered measures to correct their effects.[60] In *Ms. "J"* and *Ms. "K"*, the Tribunal ordered that disability pensions be granted retroactive to the Applicants' retirement dates.[61] In *Mr. "R" (No. 2)*, the Tribunal awarded the Applicant the "most reasonable approximation that the record afford[ed]" of the costs incurred by Mr. "R" indirectly in renting a security-enhanced accommodation for the duration of his appointment as overseas Office Director.[62]

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[58] *Mr. "R" (No. 2)*, para. 52.

[59] *Id.*

[60] Article XIV (1) of the Tribunal's Statute provides:

> 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.

[61] *Ms. "J"*, para. 179 and Decision; *Ms. "K"*, para. 116 and Decision.

[62] *Mr. "R" (No. 2)*, paras. 53–54 and Decision.

Additionally, pursuant to Article XIV (4)[63] of the Statute, the Tribunal in *Ms. "J"* and *Ms. "K"* ordered that the reasonable costs of the Applicants' legal representation be borne by the Fund.[64] As the Applicants had prevailed in full in seeking reversal of the decisions denying disability retirement, the Tribunal awarded the full amount of legal costs submitted, having regard for the statutory factors of "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."

In assessing compensable legal costs pursuant to the Judgments in *Ms. "J"* and *Ms. "K"*, the Tribunal accepted the statements prepared by the Applicants' respective counsel as valid representations of the "costs incurred by the applicant in the case," (Statute, Article XIV (4)), thereby denying the Fund's request that the Tribunal inquire into the particular fee arrangements existing between the Applicants and their respective counsel.[65] In the case of Ms. "J", the Tribunal additionally rejected the Fund's request that the fee award be reduced by a sum attributed to consultation concerning a workers' compensation claim that the Applicant, during the course of the Tribunal's proceedings, had conceded was not yet ripe for review. Having recognized in the Judgment on the merits that the workers' compensation claim was of an "intersecting nature" with the Applicant's disability retirement claim,[66] the Tribunal held in assessing compensable legal costs that ". . . at the applicable stage of consultation [between the Applicant and her counsel], both complaints were reasonably being considered in tandem," and that accordingly no diminution of the fee award was appropriate.[67]

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[63]Article XIV (4) provides:

> 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.

[64]*Ms. "J"*, paras. 181–183; *Ms. "K"*, paras. 118–119. Mr. "R", who represented himself in the Tribunal's proceedings, did not seek any award of legal costs.

[65]*Ms. "J", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2003-1),* IMFAT Order No. 2003-1 (December 23, 2003), para. First; *Ms. "K", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2003-2),* IMFAT Order No. 2003-2 (December 23, 2003), para. First.

[66]*Ms. "J"*, para. 89.

[67]*Ms. "J"* (Order No. 2003-1), para. Second. This same principle was later applied in *Ms. V. Shinberg (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-5 (November 16, 2007), note 32.

Conclusion

During the period 2003–2004, the Tribunal was presented with a number of issues of substantive law on which it had not previously been called upon to rule. These included interpretation of the provision of the Fund's Staff Retirement Plan that governs retirement by Plan participants who become totally incapacitated for the performance of any duty which the Fund might reasonably call upon them to perform and whose incapacity is likely to be permanent. In the course of deciding these cases, the Tribunal formulated its standard of review for disability retirement decisions, which are distinguished by "quasi-judicial" decision making on the part of the Administration Committee of the SRP and over which the Tribunal exercises "appellate authority."

Also during 2003–2004, the IMFAT was confronted for the first time with a claim of *res judicata* as a defense to the admissibility of an Application. The Tribunal concluded that while Article XIII (finality of judgments) applies the principle of *res judicata* to the IMFAT's Judgments, the Applicant's second Application was not barred by its Judgment in his earlier case because the foundation in law and the outcome he sought in his second Application differed from his first. The Tribunal applied the principle of equality of treatment in deciding the claim on the merits.

Finally, during the period 2003–2004, the Tribunal exercised its remedial authority pursuant to Article XIV of its Statute. In *Ms. "J"*, *Ms. "K"* and *Mr. "R" (No. 2)*, the Tribunal rescinded the contested decisions and prescribed measures to correct the effects of those decisions. Additionally, in *Ms. "J"* and *Ms. "K"*, the Tribunal awarded the Applicants the reasonable costs of their legal representation, setting down principles for application in future cases.

JUDGMENTS
(Nos. 2003-1 to 2004-1)

JUDGMENT NO. 2003-1

Ms. "J", Applicant v. International Monetary Fund, Respondent

(September 30, 2003)

Introduction

1. On September 29 and 30, 2003, 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. "J", a former staff member of the Fund.

2. Ms. "J" contests the decision of the Administration Committee of the Staff Retirement Plan ("SRP" or "Plan") denying her application for disability retirement. The Administration Committee concluded that Ms. "J" had failed to establish, as required by the terms of the Plan, that she is totally and permanently incapacitated for any duty that the Fund might reasonably ask her to perform.

3. Applicant contends that this decision is in error, that the Administration Committee improperly interpreted and applied the standard for disability retirement, and that the decision was tainted by procedural irregularity. Respondent for its part maintains that the decision of the Administration Committee should be sustained on the ground that it is not arbitrary, capricious or procedurally defective, and that Applicant has not established any factual or legal basis for overturning it.

4. Upon application, the duly authorized representatives of the Staff Association were accorded the opportunity to communicate their views on the case as Amicus Curiae.

The Procedure

Exchange of Pleadings

5. On August 20, 2002, Ms. "J" filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Pro-

cedure, the Registrar advised Applicant that her Application did not fulfill the requirements of paras. 1 and 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.[1]

6. The Application was transmitted to Respondent on August 26, 2002. On September 5, 2002, pursuant to Rule XIV, para. 4,[2] the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Ms. "J"'s Application on October 10, 2002.

7. On October 25, 2002, upon her receipt of documents produced pursuant to the President's order of October 18 *(see below),* Applicant requested an extension of time in which to file the Reply, on the basis that the documents were not made available to her until two weeks following the transmittal of the Fund's Answer. While the matter is not treated by the Rules of Procedure, the President, pursuant to his authority under Rule IX, para. 1[3] and

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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.

. . .

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. . . ."

[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]Rule IX, para. 1 provides:

"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."

Rule XXI, paras. 2 and 3,[4] concluded that an extension of time to account for the period during which the request for production of documents, and compliance with the ensuing order, were pending was reasonable in the circumstances of the case. Accordingly, Applicant's request was granted.

8. Applicant submitted her Reply on November 25, 2002. The Fund's Rejoinder was filed on December 27, 2002.

9. On December 18, 2002, following submission of her Reply, Applicant submitted a statement of her legal costs. On March 5, 2003, the President of the Administrative Tribunal afforded Respondent a fifteen-day period in which to submit any comments on the statement of costs. Respondent filed its comments on March 17, 2003.

Request for Production of Documents

10. In her Application, Ms. "J" included a number of requests for production of documents, as permitted under Rule XVII.[5] Respondent presented its views on the matter in a submission of October 15, 2002, in which it stated that the majority of the requested documents either already had been pro-

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[4]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."

[5]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."

vided to Applicant or would be provided. Two of the document requests, however, remained in dispute:

> "(a) All records of discussions Applicant had with Personnel Officers concerning a suitable position;
>
> (b) All records supporting Respondent's claim that it sought to identify another suitable position for applicant and any efforts to place her in such a position."

Respondent objected to these requests on the basis that the requested documents were, in its view, irrelevant to the decision being challenged in the Application, i.e. the denial of a disability pension.

11. On October 18, 2002, the President of the Tribunal, having considered Applicant's request and the Fund's response, together with the arguments presented by each party in the Application and the Answer, granted the disputed document requests. The President's decision explained that, as a discovery rule, Rule XVII imposes a broad standard for the production of documents and other evidence. A request for documents is to be denied only if the requested documents are "clearly irrelevant" to the case (or the request is unduly burdensome or infringes on the privacy of individuals, grounds not raised by the Fund in this case). Applying this standard, the President concluded that it could not be said, in the context of the discovery provisions of the Tribunal's Rules of Procedure, that the requested documents were "clearly irrelevant" to the question of whether the Administration Committee of the Staff Retirement Plan properly interpreted and applied SRP Section 4.3(a) in the case of Ms. "J". Accordingly, the request was granted.

Oral Proceedings

12. Although Applicant did not expressly request the holding of oral proceedings, in her Reply, Ms. "J" observed:

> "Applicant foresees that there are questions on which the Tribunal may wish to seek clarification from the parties. For this purpose, Applicant's Counsel proposes that Hearings may be required."

13. Later, in Applicant's Comments on the Staff Association's Amicus Curiae Brief, she asserted:

> "There is a conflict in the testimony of Applicant and that of the two staff who gave statements, i.e. Respondent's Rejoinder, Attachment 2 and Applicant's Reply, Annex 5. In view of the conflict in testimony, the Tribunal may wish to hold hearings to determine the facts as represented by Applicant."

Respondent did not offer any view as to the merit of holding oral proceedings in the case.

14. 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." It is noted that the "conflict in testimony" referenced above relates to the issue of whether Applicant evidenced interest in being placed in an alternative position within the Fund following her injury. In the view of the Tribunal, determination of that issue was not necessary to the disposition of the case, and accordingly oral proceedings were not held.

Application of Staff Association Committee to file Amicus Curiae Brief

15. On October 29, 2002, the Staff Association Committee ("SAC") filed an application with the Tribunal, pursuant to Rule XV of the Rules of Procedure, seeking to communicate its views on the case as Amicus Curiae. Rule XV provides:

> ***"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."

The SAC's application asserted that it sought to address "systemic issues" relating to the procedures employed by the SRP Administration Committee in taking decisions on applications for disability retirement, as well as the Committee's construction of the relevant provisions of the SRP.

16. Rule XV does not supply any procedural requirements for the consideration of a request to file an amicus curiae brief, and the SAC's application in this case was the first such request to have been lodged with the IMFAT. The President of the Tribunal, pursuant to his authority under Rule XXI, para. 3,[6] on October 31, 2002 decided to transmit the SAC's application to Applicant and Respondent, inviting their views as to 1) whether to grant the request, and 2) if the request were granted, whether the pleadings in the

[6]Rule XXI, para. 3 provides:

> "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."

case, which ordinarily are kept confidential, should be opened to the SAC for the purpose of preparation of its brief. Both parties were accorded thirty days, simultaneously, in which to submit their views.

17. Applicant submitted her views on November 20, 2002, stating that she had no objection to the SAC's request and giving her consent to the opening of the pleadings to the SAC's authorized representatives. Respondent filed its views on December 2, 2002, maintaining that the SAC had not identified any systemic issue, such as a regulatory decision of the Fund, properly before the Tribunal and that therefore Respondent ". . . reserve[d] its position as to whether this criterion had been met. . . ." Additionally, the Fund objected to the opening of the pleadings to the SAC on the ground that they contain confidential medical information.

18. The Tribunal, considering that Rule XV does not prescribe substantive criteria for the admission of a request to communicate views as an amicus curiae and finding the objections of the Fund unpersuasive, as well as noting the Applicant's consent to the opening of the pleadings to the SAC, on December 9, 2002 decided to grant the SAC's request to file an amicus curiae brief. Accordingly, following the receipt of the final pleading in the case, i.e. Respondent's Rejoinder, the entire dossier was transmitted to the duly authorized representatives of the SAC, who were given thirty days in which to file their brief. Following submission of the brief on January 29, 2003, Applicant and Respondent were accorded twenty days, simultaneously, in which to offer any observations on the views of the Amicus Curiae. These observations were submitted on February 20 and 21, 2003.

19. It is noted that the procedures followed by the Tribunal with respect to the submission of the views of the Amicus Curiae differed from those it has applied to an intervenor. While an intervenor is expressly entitled to "participate in the proceedings as a party," Rule XIV, para. 4, an amicus curiae is not.[7]

20. The Tribunal wishes to add that it found the Amicus Curiae statement of the views of the Staff Association Committee discerning and constructive. It has taken the views of the SAC into full consideration in arriving at its disposition of the issues of the case.

[7]This distinction has been earlier drawn by the Tribunal, which has held that, following the admission of an intervention, the intervenor participates fully in the exchange of pleadings. *See Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2001-2 (November 20, 2001), paras. 50, 66–68; *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-3 (December 18, 2002), para. 7.

The Legal Framework

21. Before reviewing the facts of the case of Ms. "J", the legal framework within which these facts arise may be recalled, in particular the pertinent provisions of the Staff Retirement Plan. Additionally, although the administrative act principally contested by Ms. "J" in the Administrative Tribunal is the decision of the SRP Administration Committee denying her application for disability retirement, other requirements of the Fund's internal law relating to the medical disabilities of staff members, namely the separation of staff for medical reasons and the Fund's workers' compensation policy, are sufficiently imbedded in the factual circumstances of the case and in the contentions of the parties that they are reviewed as well.

Disability Retirement under the IMF Staff Retirement Plan

22. Disability retirement from the IMF is governed by Section 4.3 of the Staff Retirement Plan. SRP Section 4.3(a) sets forth the criteria for granting a request for a disability pension:

> **"4.3 Disability Retirement**
>
> (a) A participant in contributory service shall be retired on a disability pension before his normal retirement date on the first day of a calendar month not less than 30 nor more than 120 days immediately following receipt by the Administration Committee of written application therefor by the participant or the Employer; on the condition that the Pension Committee must find, on the recommendation of the Administration Committee and the certification of a physician or physicians designated by the Administration Committee, that:
>
> (i) such participant, while in contributory service, became totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform;
>
> (ii) such incapacity is likely to be permanent; and
>
> (iii) such participant should be retired."

The formula for calculation of the disability pension is given 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."

Sections 4.3(c), (d) and (e) provide for the possibility of periodic medical examination of the retired participant and for the discontinuance or reduction of the disability pension based on a finding that the incapacity has wholly or partially ceased:

"(c) The Administration Committee may require a retired participant who is receiving a disability pension and who has not reached his normal retirement date to be medically examined from time to time, not more often than once a year, by a physician or physicians designated by the Administration Committee. Such examination shall be made at the home of such retired participant, unless some other place shall be agreed upon by him and the Administration Committee. If such a retired participant shall fail to permit such an examination to be made, his disability pension may be discontinued by the Administration Committee until he shall permit such examination to be made and, in the discretion of the Administration Committee, if he shall fail to permit such examination to be made within a period of one year from the mailing or other sending to him, at his address as it appears on the records of the Administration Committee, of request therefor by the Administration Committee, his incapacity may be deemed to have wholly ceased, and he may be deemed to have withdrawn from the Plan as of the date when his disability pension was discontinued, with the eligible service accrued to the date of his disability retirement.

(d) If the Administration Committee shall find, as a result of a medical examination or on the basis of other satisfactory evidence, that the incapacity of a retired participant (who has not reached his normal retirement date), on account of which he is receiving a disability pension, has wholly ceased or that he has regained the earning capacity which he had before such incapacity, his disability pension shall cease, and if the Committee shall find that such incapacity has partly ceased for the performance of any work which he might reasonably be required to do, and that his earning capacity (in any such work) has been partially regained, his disability pension shall be reduced by the Administration Committee in a reasonable amount. If the disability pension is so discontinued or reduced and the retired participant shall again become incapacitated exclusively through and because of the same incapacity, his disability pension shall be restored upon the same conditions that applied to the original pension and the granting thereof, subject, however, to the provisions of subsection (e) of this Section 4.3.

> (e) If a disability pension is discontinued pursuant to subsection (c) or (d) of this Section 4.3 and shall not be restored pursuant to subsection (d) of this Section 4.3 within a period of five years from such discontinuance, and if such retired participant shall not within such period again become a participant, he shall be deemed to have withdrawn from the Plan as of the date his disability pension was discontinued, with the eligible service accrued to the date of his disability retirement, and he shall be entitled to the benefits provided in Section 4.2 or Section 4.5(a), (b), or (c), whichever is applicable."

Finally, Section 4.3(f) defines "normal retirement date" for purposes of disability retirement:

> "(f) For purposes of this Section 4.3, normal retirement date shall mean the first day of the calendar month next following the 65th anniversary of his date of birth, or the date of such anniversary if it shall fall on the first day of a calendar month."

Separation of a Staff Member for Medical Disability

23. Separation of a staff member in the case of medical disability—as distinguished from according such staff member a disability pension—is provided for by GAO No. 13, Rev. 5 (June 15, 1989) at Annex I. Separation may be either at the staff member's initiative or at the Fund's initiative. Section 1 provides for separation at the staff member's initiative as follows:

> *"Section 1. Separation at the Staff Member's Initiative*
>
> 1.01 A staff member may request that he be separated from the Fund on grounds of medical disability. He shall address the request to the Director of Administration [now the Director of Human Resources] in writing. The staff member must be ready to present medical evidence in support of his request and must also be willing to undergo any examinations which the Fund's medical advisors deem necessary."

24. Section 2 provides for separation at the Fund's initiative. In the case of a staff member in sick leave status, such separation may be effected if ". . . on the basis of medical advice the Director of Administration has formed the opinion that the staff member will not be able to return to duty in the foreseeable future." (Section 2.01.1.) Separation at the Fund's initiative may also take place when:

> ". . . over a prolonged period the staff member has been prevented, for medical reasons, from performing the duties assigned to him in an acceptable manner, and if another position suitable for the staff member is not found in accordance with the provisions of GAO No. 11 (Salary Adminis-

> tration), the Director of Administration shall seek the advice of the Fund's Health Services Department on the prospects for improvement within a reasonable period of time. If, on the basis of this advice, the Director of Administration forms the opinion that the staff member should be separated for medical reasons, the procedures outlined below shall be initiated."[8]

(Section 2.01.2.)

25. Section 2.02 sets forth the procedures to be followed in case of separation for medical reasons at the Fund's initiative, including notification to the staff member of the right to object to the proposed separation:

> "2.02.1 When the Director of Administration has reached the opinion that a staff member should be separated for medical reasons, he shall communicate this opinion to the staff member in writing, stating the reasons for his opinion and specifying the last date by which any objection on the part of the staff member must be received by the Fund."

26. Under Section 2.02.2, if no objection is notified to the Fund, the procedures of GAO No. 16 take effect. *(See below.)* In the case in which the staff member does file an objection to the proposed medical separation, an opinion is to be rendered by a panel of medical experts (one designated by the Administration, one by the staff member and the third selected by the other two) as to the staff member's condition in the context of the work demands placed on him. (Section 2.03.) Pursuant to Section 2.03.4, "[n]ormally, the panel shall examine the staff member personally." The Director of Administration thereafter decides on the basis of the medical opinion rendered by the panel of experts whether there are sufficient grounds for medical separation. (Section 2.04.1.)

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[8]The referenced provisions of GAO No. 11, Rev. 3 (January 14, 1999) state:

> "6.04 *Performance Impeded for Medical or Other Personal Reasons*. If it is determined that, for medical or other personal reasons beyond his or her control, the staff member is unable to perform in full the duties of his or her position, and if no other vacant position is available at the same grade with duties that the staff member could reasonably be expected to perform, a staff member may, as an alternative to separation, be assigned to a vacant position at a lower grade where the staff member could be expected to perform the duties in full. Such an assignment will be subject to such special terms and conditions relating to the tenure of the position as the Managing Director or the Director of Administration, as appropriate, may decide after consultation with the Head of the relevant department.
>
> 6.04.1 The determination that a staff member is unable to perform the duties of his or her position shall be made in accordance with the provisions of Annex I to General Administrative Order No. 13, Rev. 5."

27. Finally, GAO No. 13, Annex I, Section 2.04.2 describes the interplay among GAO No. 13, GAO No. 16 and SRP Section 4.3 as follows:

> "2.04.2 If the Director of Administration decides that the staff member should be separated for medical reasons, the procedures in GAO No. 16 shall be followed. In the case of participants in the Staff Retirement Plan, this will also include a determination of eligibility for a disability pension."

Accordingly, GAO No. 16, Rev. 5 (July 10, 1990), Section 11 describes the procedures effective "[i]n case of permanent incapacity, when a determination has been made in accordance with the provisions of Annex I to General Administrative Order No. 13 that a staff member shall be separated for medical reasons. . . ." It is noted that the terms of GAO No. 16, Section 11.02 require that separation of a staff member who is a participant in the SRP shall not be implemented until a determination has been made under the Plan as to whether or not the participant will receive a disability pension. In the circumstance that the staff member separated for medical reasons does not receive a disability pension, Section 11.04 provides that he will be automatically granted a separation payment from the Separation Benefits Fund.[9]

Workers' Compensation

28. Finally, the tripartite structure is completed by the Fund's workers' compensation policy, set forth in GAO No. 20, Rev. 3 (November 1, 1982), which ". . . provides staff members with benefits and compensation in the event of illness, accidental injury or death arising out of, and in the course of, their employment." (Section 1.01.) The policy is administered by a Claim Administrator, an outside company engaged to administer the provisions of the policy. (Sections 2.01.5 and 10.01.)

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[9]Such payment is calculated as follows:

> "4.06 *Payments Under the Separation Benefits Fund*. Whenever, under this Order, a staff member is entitled to a payment on separation from the Separation Benefits Fund (separation for medical reasons without access to a disability pension, abolition of position, reduction in strength, or change in job requirements), the payment shall be in an amount equivalent to one and one-fourth months' salary for each year of service, subject to a maximum that is the smaller of:
>
> (a) the equivalent of 22½ months' salary; and
>
> (b) the amount of salary that would otherwise have been payable to the staff member between the last day on duty and his mandatory retirement age of 65.
>
> The salary rate used for calculating the payment shall be the salary the staff member is receiving on the last day on duty; [footnote omitted] and length of service shall be computed to the nearest full month served."

29. Section 5 describes the compensation available in the event of permanent disability, either total or partial, of a staff member:

> *"Section 5. Compensation for Disability*
>
> 5.01 In the event of an illness or injury of a staff member arising out of, and in the course of, Fund employment the following provisions shall apply:
>
> 5.01.1 *Permanent Total Disability.* In the case of permanent total disability the staff member shall receive an annuity equivalent to 66–2/3 percent of his final pensionable remuneration. Such payment shall commence immediately upon the date of his separation from the Fund and continue for the duration of such total disability. Permanent total disability shall be determined by the Claim Administrator in accordance with the procedure for determining such disability under the Fund's Staff Retirement Plan.
>
> 5.01.2 *Permanent Partial Disability.* In the case of injury or illness resulting in permanent loss of a member or function, the staff member shall be paid a lump sum determined in accordance with the Schedule and the principles set forth in the Annex to this Order. The schedule of payments shall be adjusted annually for cost-of-living increases as described in subsection 7.02 below."

30. With respect to compensation for permanent *total* disability, it is noted that the text of the provision presumes the separation of the staff member. In addition, permanent total disability is to be determined by the Claim Administrator ". . . in accordance with the procedure for determining such disability under the Fund's Staff Retirement Plan."[10] Section 6.01 requires that annual compensation payments for permanent total disability under workers' compensation be reduced by the amount of all non-lump sum benefits paid under the SRP for the same illness or injury.

31. In addition to compensating the staff member for a work-related disability, the workers' compensation policy reimburses reasonable, associated medical expenses:

> *"Section 8. Medical Expenses*
>
> 8.01 In the event of an illness, accidental injury or death of a staff member arising out of, and in the course of, Fund employment, the Fund shall pay all reasonable medical, hospital and directly related costs."

Additionally, a related provision, GAO No. 13, Rev. 5 (June 15, 1989), Section 4.07, extends "special sick leave" to a staff member in the case of an illness or injury covered under workers' compensation.

[10]According to Respondent's pleadings in this case, "A disability determination made by the SRP is binding on [the Claim Administrator]. . . ."

32. Finally, a staff member who is dissatisfied with the disposition by the Claim Administrator of his claim for workers' compensation may seek review of that decision in the Fund's Grievance Committee:

> *"Section 10. Disposition of Claims*
>
> . . .
>
> 10.02 *Right of Appeal.* A staff member may appeal the Claim Administrator's finding to the Grievance Committee under the procedures set forth in subsection 4.01 of General Administrative Order No. 31, Rev. 1. The normal procedures of the Grievance Committee shall apply.
>
> . . . "

The Factual Background of the Case

Applicant's Injury and the Fund's Response

33. Ms. "J" began her employment with the Fund on July 24, 1995, on which date she also began participating in the Staff Retirement Plan. Ms. "J" served as a Verbatim Reporting Officer ("VRO") (commonly known as a "court reporter"), preparing stenographic transcriptions of the minutes of the meetings of the Fund's Executive Board and Executive Board Committees. As such, her responsibilities involved almost exclusively the use of stenographic and computer keyboards. The position was one for which Ms. "J" had qualified by specialized training and experience, having earned an associate degree in the subject following high school graduation in her country of origin. Ms. "J" was 25 years old when she began working for the Fund in 1995.

34. It is not disputed that in September 1999 Applicant experienced a repetitive use injury, causing pain and discomfort in both hands and arms, arising from the use of her hands as a verbatim reporter. Later, in her request to the SRP Administration Committee for reconsideration of her application for disability retirement, Ms. "J" described the injury as follows:

> "At approximately 4 pm on September 8, 1999, my whole life changed. The Board schedule had been particularly hectic, and we were all tired, but I knew that our workload would eventually ease up and I just had to hang in there. I was just completing my turn in the boardroom when, as if struck by a lightning bolt, my hands, wrists, and forearms no longer felt like my own – they would not obey my commands and, in fact, seemed to punish me for using them, causing shooting pains, like electric shocks, burning and aches, as well as substantial loss of dexterity and strength. . . ."

35. In the ensuing weeks and years following her injury, Applicant has been evaluated by numerous medical professionals, both as part of her own efforts to seek treatment for her condition and as part of the Fund's process of assessing Ms. "J"'s medical status. These medical professionals have included specialists in the fields of rheumatology, orthopedics, pain and rehabilitation medicine, psychiatry, and occupational medicine. She also has been evaluated by a vocational rehabilitation specialist. Nonetheless, a precise diagnosis of or prognosis for Ms. "J"'s medical condition has not been established with certainty, a factor that underlies the dispute between the parties in this case.

36. In the course of pursuing treatment of her condition, Applicant has undertaken numerous therapies to improve the functioning of her hands, to reduce associated discomfort, and to deal with related psychological issues. These therapies have included the taking of medication, physical therapy, chiropractic manipulation and psychiatric counseling. In a statement prepared in late 2002 for the purpose of this litigation, Applicant asserted that although her injury had occurred more than three years earlier, "I am still affected by it. I hope every day that my hands will improve, but the reality is that they might stay the same or even worsen."

37. On the day following Applicant's injury, September 9, 1999, Respondent placed Ms. "J" on paid workers' compensation leave, a status on which she continued into October of 2000, attempting unsuccessfully to return to work for a brief period in February 2000. In addition, efforts were set in motion to assess Ms. "J"'s condition in relation to her ability to continue in her job.

38. On May 25, 2000, an occupational health physician with the Bank/Fund Health Services Department concluded, based on a review of medical documentation and an interview with Ms. "J", that it was ". . . highly unlikely that Ms. ["J"] will be able to perform her current job in the foreseeable future," and communicated this opinion to officials of the Fund's Human Resources Department ("HRD"). According to Applicant, on June 7, 2000, she was called to a meeting with officials of her own department and HRD at which she was advised to apply for a disability pension in light of the Fund's conclusion that she could not return to her former position and that no other suitable position was available. An HRD official has noted that it was explained to Ms. "J", in connection with the option of medical separation pursuant to GAO No. 16, that she would be eligible to receive mandatory (as opposed to discretionary) separation benefits only if she first pursued disability retirement under the SRP.

Applicant's Request for Disability Retirement

39. On June 8, 2000, Ms. "J" filed with the Administration Committee of the Staff Retirement Plan a Request for disability retirement. In that Request, Applicant asserted that, since the time of her injury,

> ". . . I have been incapable of operating my shorthand machine or performing the other functions of a VRO, and I have been severely limited in all activities involving the use of my hands, due to chronic pain and discomfort.
>
> In the nine months since this injury occurred, my condition has improved only slightly, despite rest and intensive rehabilitation.
>
> The consensus of medical opinion is that I will not be able to return to my former position in the foreseeable future which renders me incapable of earning my livelihood as a verbatim reporter, the only field in which I am qualified, or in any position which depends upon similarly repetitive hand movements."

Views of the Medical Advisor and HRD

40. On August 29, 2000, the Medical Advisor to the SRP Administration Committee reported to the Committee's Secretary on Ms. "J"'s condition. He noted that her treating rheumatologist had prescribed anti-inflammatory medication, rest and splinting, and that she had been diagnosed with "overuse syndrome" and "wrist flex tendonitis." Tests showed ". . . no evidence of Carpal Tunnel Syndrome, peripheral neuropathy or cervical radiculopathy." The Medical Advisor concluded his report by offering the following Opinion and Recommendation:

> **"OPINION:**
>
> Ms. ["J"] lacks the residual functional capacity to perform, on a sustained basis, intensive repetitive arm and hand functions as a result of 'chronic pain syndrome.' It would be expected that she would be able to perform, with appropriate accommodations, tasks that the IMF might reasonable [sic] ask of her. It is doubtful that her work performance incapacity is likely to be permanent.
>
> **RECOMMENDATION:**
>
> Consider an independent medical evaluation by a Pain Specialist
>
> Consider an independent medical evaluation by a Psychologist/Psychiatrist
>
> Consider a formal assessment of her vocational status and capacity."

41. On October 23, 2000, upon the expiration of her workers' compensation leave, Ms. "J" was placed on administrative leave with pay pending

further review of her medical records pursuant to her disability pension application. This leave status continued until July 25, 2001.

42. Notes maintained by the Human Resources Department on Ms. "J"'s case indicate that the Medical Advisor in September 2000 sought and received information from Applicant's department about her verbatim reporting work. Later, in the fall of 2000 and early 2001, Ms. "J" was evaluated by a vocational rehabilitation specialist who reported on her condition to the workers' compensation Claim Administrator. These reports indicated *inter alia*:

> "There are very few options open to the client that do not require frequent use of the hands. Often these jobs are menial in nature and it [is] difficult to identify an employer who will take a person with severe hand limitations."

The Claim Administrator transmitted these reports to the Joint Bank/Fund Health Services Department on January 5, 2001.

43. On January 7, 2001, the Fund's Human Resources Department issued the following letter To Whom It May Concern (and copied to Ms. "J"):

> "This is to confirm that the Staff Development Division of the Human Resources Department could not identify any other suitable opening in the Fund for Ms. ["J"] when she was no longer able to perform verbatim reporting work for which she had been hired."

This conclusion followed an e-mail communication of October 2000 in which an official of Ms. "J"'s department asserted "[b]ecause her medical condition affects the use of her hands, and given that her training is in a very specialized area, we have no other position to offer Ms. ["J"]. . . ." HRD confirmed that "[h]er skills are not transferable anywhere else, so she cannot be moved."

44. Thereafter, on February 16, 2001 the Medical Advisor submitted to the Secretary of the SRP Administration Committee an Addendum to his August 29, 2000 report. The Addendum noted that Ms. "J" had been diagnosed with tendonitis and myofascial pain syndrome, that she was ". . . said to have reached the maximum benefit of therapy, and could return to work with modifications, but not as a verbatim reporter." The source(s) of the above conclusions are not identified. Views of a pain specialist and vocational specialist are also noted by the Medical Advisor. The emphasis of the Addendum, however, is on the findings of an "independent medical evaluation by a psychiatrist experienced in evaluating psychophysiologic disorders." Based largely on the latter findings, the Medical Advisor rendered the following opinion:

> **"OPINION:**
>
> Ms. ["J"] had a psychophysiologic reaction to her work as a verbatim transcriptionist, that culminated in patterned avoidance response to the use of her hands in pronation. Presumably, her work as a transcriptionist conflicted with her desire for what she perceived to be more challenging/interesting type of work. She indirectly coped with the conflict in a psychophysiological manner, resulting in a conversion reaction rendering her unable to perform repetitive functions. Nevertheless, [s]he has the requisite skills to perform tasks at the same or even higher level than her current position. For the reasons referenced by the independent evaluator, she does not permanently lack the residual functional capacity to perform tasks consistent with her education, training and experience. She is not totally or permanently incapacitated from performing tasks that the IMF might reasonably as[k] of her."

It should be noted that Ms. "J" vigorously rebutted the foregoing hypothesis in a Memorandum to the Administration Committee of March 8, 2002. (*See infra*.)

Decision of the Administration Committee

45. On February 22, 2001, in preparation for the upcoming meeting of the SRP Administration Committee, the Secretary of the Committee transmitted to its members Ms. "J"'s Request for disability retirement, a brief summary of her employment history prepared by HRD, and the Medical Advisor's Addendum. (The Medical Advisor's August 29, 2000 report does not appear to have been included, although the members were advised that additional documentation was available upon request.) A week later, on March 1, 2001, the Administration Committee met to render a decision on Ms. "J"'s Request for disability retirement. The Committee's discussion of Applicant's case is summarized in its Final Minutes, which read in their entirety as follows:

> "This case involved carpal tunnel syndrome and severe tendonitis complicated by a psychological reaction to the condition. The Fund's workers' compensation administrator was involved with this case and had recommended possible retraining as a proofreader. A rehabilitation specialist indicated that the person has capabilities to work in other fields and wishes to do so but she could not return to her former job. The Committee agreed with the Medical Advisor that the person clearly did not meet the criteria for a disability pension. The Committee asked if the person could be found another job while she underwent retraining for another position or career either within or outside the Fund."

46. The Committee's Decision was issued on March 14, 2001, informing Ms. "J":

> "It has been found that your case does not meet the requirement of Section 4.3 (a) (i) of the Staff Retirement Plan, which states 'such participant, while in contributory service, became totally incapacitated, mentally or physically for the performance of any duty with the Employer that he might reasonably be called upon to perform.'"

The Decision included no reasons for the Committee's determination or any information as to avenues of recourse. Instead, it advised Applicant to contact a particular official of HRD ". . . to discuss other options."

Medical Separation of Ms. "J"

47. According to Applicant's account, when she contacted the HRD official she was informed that medical separation was the only option as she had no transferable skills. The Fund maintains that it had discussed with Ms. "J" the possibility of alternate placement within the Fund but that she had indicated that she preferred to retrain for employment elsewhere. In notes maintained by HRD relative to Ms. "J"'s case, an entry of March 26, 2001 states: "[Ms. "J"] informed [HRD official] that she realizes she has no other skills apart from verbatim reporting – ideally she would like to continue her education and develop other skills so eventually she can work."

48. On May 18, 2001, the Director of HRD notified Applicant by letter as follows:

> "I regret to inform you that the Fund will be separating you for medical reasons effective July 21, 2001 under General Administrative Order 16 (GAO), Revision 5, which sets out the terms of separation for staff members for whom it has been determined that no disability pension is payable."

The letter described the financial terms of the separation (which was to become effective March 4, 2002), as prescribed by GAO No. 16. Ms. "J" acknowledged reading the letter by her signature dated May 29, 2001.

49. A second letter of the same date, also from the Director of HRD, described issues for Ms. "J" to consider if she were to request reconsideration of the SRP Administration Committee's denial of her application for disability retirement and included a copy of the Administration Committee's Rules of Procedure.[11] The HRD Director's letter also explained that if

[11]The Secretary of the Administration Committee earlier had supplied Ms. "J" with the Committee's Rules of Procedure by letter of April 12, 2001.

the Committee's Decision were to be reversed while Ms. "J" was receiving separation benefits, those benefits would cease in favor of the disability pension. Finally, it noted that neither the entitlement to separation benefits nor a request for reconsideration of the Administration Committee's Decision would have any effect on her workers' compensation claim, which would remain open. Ms. "J" signed the appended resignation form, effective March 4, 2002. On June 15, 2001, Ms. "J" submitted to the SRP Administration Committee an application for review of its Decision. On March 5, 2002, upon expiration of her separation leave, Applicant was placed on administrative leave without pay pending the outcome of that review.

The Channels of Administrative Review

50. This case of Ms. "J"—and another of Ms. "K" also decided this day—are the second and third to come to the Administrative Tribunal through the channels of administrative review established by the issuance in 1999 of Rules of Procedure by the SRP Administration Committee, and they are the first cases to reach the Tribunal to arise from the denial of requests for disability retirement.[12] (Decisions arising under the SRP that are within the competence of the Administration or Pension Committees of the Plan are expressly excluded from the jurisdiction of the Fund's Grievance Committee.)[13] Rule VIII of the Rules of Procedure of the SRP Administration Committee[14] provides that a Requestor may file with the SRP Administration

[12] *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2001-2 (November 20, 2001), paras. 31–35, considered the exhaustion of administrative review in a case involving a dispute arising under Section 11.3 of the Plan.

[13] GAO No. 31, Rev. 3 (November 1, 1995) provides in pertinent part:

> "4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to . . . (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan."

[14]

> **"RULE VIII**
>
> Review of Decisions
>
> 1. A Requestor, or any other person claiming any rights or benefits under the Plan, who wishes to dispute a Decision may submit an Application for Review of a Decision (hereinafter 'Application') to the Secretary within ninety (90) days after the Requestor receives a copy of the Decision. An Application shall satisfy all of the requirements as to form set forth in Rule III and otherwise applicable to a Request. Subject to Rule X, paragraph 2, if no Application has been submitted within this period and an extension of time described in Rule IX, paragraph 2 has not been granted, the right to submit an Application shall cease.
> 2. The Committee may review a Decision, either in response to a timely Application or at its own initiative. The Committee may also be required to review a decision

Committee an application for review of a Decision of the Committee within ninety days of its receipt, and Rule X[15] provides that the channel of review for a Request submitted to the SRP Administration Committee has been exhausted for the purpose of filing an application with the IMF Administrative Tribunal when the Committee has notified the applicant of the results of its review of that Decision.

Ms. "J"'s Application to Administration Committee for Review of Decision

51. On June 15, 2001, Ms. "J" submitted to the SRP Administration Committee an application for review of its Decision denying her Request for

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at the request of the Pension Committee in accordance with the jurisdiction of that Committee as set out in Section 7.1(c) of the Plan. The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:

(a) misrepresentation of a material fact;
(b) the availability of material evidence not previously before the Committee; or
(c) a disputed claim between two or more persons claiming any rights or benefits under the Plan.

3. If the Committee undertakes to review a Decision, or if it declines to review a Decision, all parties to the Decision shall be notified in writing.
4. Any review of a Decision shall be conducted in accordance with Rules IV, VI and VII. The Committee shall notify the Applicant of the results of its review within three months of the receipt of the Application by the Secretary."

[15] **"RULE X**

Exhaustion of Administrative Review

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."

disability retirement. To that application, Ms. "J" attached letters from three of her treating physicians, a rheumatologist, a pain specialist and a psychiatrist, along with a functional capacity evaluation assessing her impairment.

52. The treating rheumatologist's letter, dated May 30, 2001 noted that Ms. "J" had been under his care since October 1999 for the treatment of bilateral wrist and forearm tendonitis, carpal tunnel syndrome and fibromyalgia. He offered the following opinion:

> "It is my medical opinion that Ms. ["J"] will never be able to return to Verbatim Reporting. . . . I am hopeful that she will be able to return to some basic typing in a limited capacity when resolution of her current condition occurs. The time of that resolution is indeterminate."

The pain specialist, also in a letter of May 30, 2001, similarly recorded persistent pain in the forearms and hands, along with additional symptoms ". . . present[ing] a picture of fibromyalgia syndrome." Ms. "J"'s pain specialist went on to observe:

> "Despite medical treatment, she still suffers from a substantial amount of pain when she engages in even light to moderate activity requiring repetitive usage of her wrists and hands. . . . As such, there is no way she could continue work as a verbatim reporter. Any keyboard work whatsoever would have to be severely limited."

Finally, the treating psychiatrist's letter, May 31, 2001, reports that as a result of her injury Ms. "J" ". . . became beset with anxiety, depressive thoughts, tearfulness, helplessness, dysphoric mood and a constant preoccupation about what was going to become of her professionally and personally." The psychiatrist concluded that Ms. "J" was responding successfully to psychiatric treatment.

Additional Medical Review by the Administration Committee

53. Following the filing of Ms. "J"'s June 15, 2001 application for review of its Decision, the SRP Administration Committee embarked upon an additional assessment of her medical status. The Committee engaged three physicians of its choosing—a rheumatologist, an orthopedist, and a psychiatrist specializing in neuropsychiatric medicine and occupational psychiatry—to undertake reviews of those medical records that earlier had been collected by the Joint Bank/Fund Health Services Department and had been used by the Committee's Medical Advisor to develop his initial opinion. Additionally, the reviewing psychiatrist requested and was granted the opportunity to conduct an in-person assessment of the Applicant. The impressions of the

three reviewing physicians were then transmitted to the Medical Advisor who, in turn, indicated his opinion.

54. The reviewing rheumatologist, on November 4, 2001, after examining the records of six physicians and a physical therapist, characterized the difference of medical opinion as follows:

> "One camp believes that Ms. ["J"] has acute-onset carpal tunnel syndrome, overuse syndrome, and secondary fibromyalgia. The other group believes that Ms. ["J"] has psychogenic rheumatism with a component of conversion reaction."

Additionally, he opined, based on test results, that Ms. "J" ". . . does not have evidence of carpal tunnel syndrome." In the opinion of the reviewing rheumatologist:

> ". . . Her diagnosis of fibromyalgia is equivocal. At most, she has myofascial pain syndrome. She did have evidence of overuse syndrome associated with tendonitis. This diagnosis fits her initial symptoms of hand and forearm pain.
>
> Her disability continues in regard to the use of her hands. Any attempts to use a computer have resulted in an exacerbation of her symptoms.
>
> . . .
>
> She can do non-repetitive activities with her hands. Her lifting capability is limited to light objects. She can travel to and from a work environment without difficulty."

55. The reviewing orthopedist, writing on February 5, 2002, also expressed the opinion, based on diagnostic studies, that Ms. "J" does not have carpal tunnel syndrome. With respect to Ms. "J"'s employability, the reviewing orthopedist offered the following perspective:

> "The question of whether or not she is able to continue with the same job is not an easy one. She is clearly capable of working, especially in occupations that do not require repetitive use of her hands. She could certainly do such things as communicate over the phone, personal interaction, limited writing, and minimal keyboard work, etc. She is certainly employable, but perhaps not in the same kind of occupation which requires extensive keyboard and repetitive use of her hands."

56. The most extensive report submitted by the reviewing physicians was that produced by the reviewing psychiatrist, a specialist in neuropsychiatric medicine and occupational psychiatry. He performed an initial review of records and reported on September 4, 2001 that a diagnosis of fibromyalgia was "not tenable," observing that ". . . her presentation sug-

gests a psychogenic origin to her pain symptoms." Thereafter, the reviewing psychiatrist undertook his own "psychophysiologic evaluation" of Ms. "J", which included *inter alia* psychological testing and physical examination of the Applicant. He reported his conclusions in a detailed report of March 21, 2002, in which he asserted that he could find no objective findings of myofascial disorder or carpal tunnel syndrome. His salient conclusions may be summarized as follows:

> ". . . While this is a difficult case to typify, it appears as if the patient had an initial episode of overuse and then became fixed in a somatoform way upon her hands as being incapacitated. . . . Putting all the physical testing and positive psychological testing together, I believe yields a diagnosis of undifferentiated Somatoform Disorder, possible Conversion Disorder as the most logical diagnosis.
>
> . . .
>
> I do not believe the patient is permanently disabled, as I believe that continued psychotherapy and the use of psychotropic medication may well ameliorate her condition to the point where she is able to once again resume a productive career as a verbatim reporter."

Applicant's Response to Medical Advisor's Earlier Report

57. Also during the pendency of her application to the Administration Committee for review of its Decision, Ms. "J" had the opportunity to review and respond to the Medical Advisor's Addendum of February 16, 2001, i.e. the opinion of the Medical Advisor that the Administration Committee had before it in rendering its *initial* Decision denying disability retirement. Applicant's Memorandum of March 8, 2002, addressed to the Secretary of the Administration Committee, took issue with a series of statements that had been made in the Medical Advisor's report.

58. Ms. "J" denied that she felt that she was "overworked;" affirmed that her avoidance of use of her hands in pronation was not because of a "phobia" but because such use was painful; and denied that she had no interest in returning to verbatim reporting, stating rather that with much difficulty she had accepted the reality of her situation and adopted new goals. Ms. "J" challenged the statement in the Medical Advisor's Opinion that she sought "more challenging/interesting type of work," affirming that she found the proceedings of the Fund's Executive Board "very interesting and capturing every single word spoken is extremely challenging . . . " She added, "[d]ue to my work-related injury, I am permanently unable to return to verbatim reporting." Ms. "J" observed that she had ". . . expressed keen interest in

doing whatever was necessary to fill another position in the Fund," but that it was determined that she "could not perform any other task in the IMF." She wrote:

> "As I stated in my appeal letter, I loved my job. It was challenging and fun and interesting. I was well paid, had great colleagues, and relished the Fund's multicultural environment. I was a good reporter and proud of it. I included my APRs in my appeal package to illustrate my commitment to my chosen career and to my position as a verbatim reporter in the Fund."

59. In particular, Ms. "J" challenged the conclusion that she had a "'conversion syndrome' resulting in a phobic-like aversion to use of hands in pronation." (Medical Advisor's February 16, 2001 Addendum, p.1). In Ms. "J"'s view:

> "My avoidance of using my hands in pronation was not because of a phobia, but because it hurt. As a result of physical therapy, pain medication, my daily stretching and strengthening exercises, et cetera, my pain levels have become more manageable, and I can do more things with my hands in this position."

As to the statement that "most of Ms. ["J"]'s symptoms seem to have abated," Applicant responded:

> "Still, regular activities such as bathing, dressing, and cleaning the house can cause an instant flare-up of my condition. There is no time when I am not aware that there is something wrong with my hands. As I said, my fingers always feel stiff, and they as well as my wrists, frequently ache, which intensifies when I engage in certain repetitive activities."

As noted, Ms. "J" expressed her objection to the Medical Advisor's conclusion that she had no interest in returning to verbatim reporting or that her position had ". . . conflicted with her desire for what she perceived to be more challenging/interesting type of work":

> "Coming to terms with the fact that my verbatim reporting career was over has been a long and difficult process. . . . Gradually, through counseling and antidepressant treatment, I have been able to accept the reality of my situation and make new goals rather than focus on what I can no longer do.
>
> . . . [The work was] extremely challenging, particularly in this international environment."

Finally, as to the permanency of her condition, Ms. "J" asserted:

> "My main concern is that I do not know whether my condition will remain stable, continue to improve, or deteriorate. Only time will tell. Therefore, in

> my appeal letter, I requested access to a disability pension until I was able to support myself. I am optimistic that this day will come, but I cannot see it in my short-term future. Another fear is that, even with qualifications, I will not be able to secure a position because of my existing condition."

Medical Advisor's Final Report to the Administration Committee

60. On April 25, 2002, the Medical Advisor delivered his final report to the SRP Administration Committee in connection with Ms. "J"'s application for review of the Committee's initial Decision. The Medical Advisor commented on Ms. "J"'s March 8, 2002 memorandum and summarized his findings and conclusions in her case, noting:

> "In rendering my opinion based on multifaceted medical sources, I accredited some of the submitted information differently. . . . In particular, I accredited the experience, objectivity and clarity of expression of the physician reviewers in evaluating this complex case.
>
> . . .
>
> In formulating my opinion, I accredited the two independent psychiatric examiners more than other practitioner's conclusionary statements regarding the cause of [Ms. "J"]'s impairments."

The report includes brief summaries of the findings of the two reviewing psychiatrists and the reviewing rheumatologist. Neither the views of the reviewing orthopedist nor those of Ms. "J"'s treating physicians are mentioned. The Medical Advisor's conclusion reads as follows:

> "A psychophysiologic reaction to her work as a verbatim transcriptionist culminated in a patterned avoidance response to pronating her hands, rendering her unable to perform repetitive functions. Although her hand use is presently impaired, she has the requisite skills to perform tasks at the same level as her current position. She does not permanently lack the residual functional capacity to perform tasks consistent with her education, training and experience. She is not totally or permanently incapacitated from performing tasks that the IMF might reasonably ask of her. Repetitive hand use at this time, without directed psychotherapy, would likely exacerbate her hand symptoms. Therefore, she currently lacks the residual functional capacity to perform, on a sustained basis, intensive repetitive arm and hand functions."

Additional Memorandum from HRD

61. On May 1, 2002, an official of HRD addressed a memorandum to the Secretary of the SRP Administration Committee stating:

> "This note is to confirm that [the] Staff Development Division was not able to identify any other suitable positions in the Fund for Ms. ["J"] when her carpal tunnel syndrome made it impossible for her to continue work as a Verbatim Reporter. She had no other skills, not requiring the use of the computer or her hands, that would have made it possible to accommodate in [sic] her in another position."

This memorandum closely mirrored the note to Whom it May Concern issued by the Staff Development Division almost a year earlier, on June 7, 2001. The 2002 communication additionally mentions that the possibility of using voice recognition software had been explored with Ms. "J"'s former department and had received a negative response with respect to its use in the function of verbatim reporting. The memorandum also observed that the "state of voice recognition" was "borne out" by Ms. "J"'s observation that it is a poor substitute for the freedom of manually typing and editing on screen, and that it is not readily used by other employers. Finally, the HRD official commented that Ms. "J" ". . . realized she had no other skills apart from verbatim reporting, and that ideally she would like to continue her education and develop other skills so she could eventually work."

The Administration Committee's Decision on Review

62. On the following day, May 2, 2002, the Secretary of the Administration Committee transmitted to the Committee's members documentation for their consideration of Ms. "J"'s application for review. This documentation included: (a) Ms. "J"'s original Request for disability retirement, the Medical Advisor's original opinion, Ms. "J"'s response thereto and her application for review; (b) documentation from the Staff Development Division on Ms. "J"'s job and efforts regarding alternate jobs; (c) a list of jobs developed by the Compensation and Benefits Policy Division (*see below*); (d) reports of the vocational counselor retained by the workers' compensation Claim Administrator; (e) reports of the reviewing rheumatologist, orthopedist and psychiatrist; and (f) the Medical Advisor's final report.

63. Of note is the list (undated) of jobs prepared by the Compensation and Benefits Policy Division which states:

> "The Human Resources Department has determined that Ms. ["J"] would be considered qualified to perform the following jobs with a reasonable amount of training and accommodation, including the use of voice activated software, and that she would be eligible to apply for any such vacancies were they to occur."

The listed jobs were: Editorial Officer; Executive Board and Member Services Officer; Public Affairs Officer; Information Officer; Translation Editorial Officer; and Publications Officer.

64. In a covering memorandum to the Committee, the Secretary of the Administration Committee noted that the reviewing physicians and the Medical Advisor were of the opinion that the Applicant was not totally and permanently disabled. In addition, the Secretary asserted that with respect to the assessment of alternative duties the relevant test is whether there are duties that the Fund could ask the employee to perform ". . . taking into account his/her education and reasonable accommodation or additional training, rather than whether vacancies exist." Based on the assessment by the Compensation and Benefits Policy Division, the Secretary concluded: "[c]onsequently, the Fund does have jobs that Ms. ["J"] could perform." Finally, the Secretary stated that "Ms. "J" has a valid workers' compensation claim" based on a finding by the workers' compensation Claim Administrator of permanent but *partial* loss of function, and that settlement of that claim had been suspended pending the SRP Administration Committee's decision as to whether Ms. "J" was permanently and *totally* incapacitated under the terms of the Staff Retirement Plan.

65. The following week, on May 9, 2002, the Administration Committee met to decide on Ms. "J"'s application for review. According to the Committee's Final Minutes, the discussion ranged from consideration of the fact that there were discrepancies among the views of the treating and reviewing physicians to review of the list of jobs produced by the Compensation and Benefits Policy Division. A representative of the Division asserted that reasonable accommodation could be made and that voice recognition software would be obtained for the jobs. The positions had been identified on the basis that they were of the same grade level as Applicant's former position and required minimal use of the hands in repetitive motion. The discussion indicated that a proofreader's position had been excluded from the list because it was of a lower grade level and required foreign language proficiency which Applicant did not have. The Legal Representative noted, as to the actual availability to Ms. "J" of the identified positions, that if a vacancy arose, she would have to compete through the regular vacancy application process, but that she could not be disqualified on the basis that she required reasonable accommodation of her physical impairments.

66. The Legal Representative and the Medical Advisor both offered the view that Ms. "J"'s enrollment in community college classes was relevant to her ability to perform duties that the Fund might ask of her. The Legal

Representative noted that Ms. "J" was required to prepare papers for which she used voice activated software, and the Medical Advisor observed that in attending school she was undertaking normal physical activities and working against deadlines. A Committee member suggested that attending school was not consistent with withdrawal from the labor market because of disability.

67. As to Ms. "J"'s physical condition, the Medical Advisor indicated that ". . . the expectation was that she could improve over time." He further asserted that there was "no objective finding of physical incapacity," that Applicant suffered from "tendonitis but nothing more severe," and that her psychosomatic condition should respond over time to treatment.

68. Accordingly, the Administration Committee decided unanimously to sustain its original Decision and communicated to Applicant its Decision on Review by letter of May 17, 2002.[16] The decision letter set forth the process of medical review that the Committee had undertaken, as well as the assessment of alternative duties, asserting that the "relevant test" under the SRP is:

> ". . . whether there are duties that the Fund could reasonably ask the employee to perform, taking into account his/her education and reasonable accommodations or additional training. The test is not whether vacant positions exist, but whether the participant has the capacity to perform duties that she might reasonably be called upon to perform."

It went on to note that, at Ms. "J"'s grade level,

> ". . . there were a number of positions (see Attachment) which would require little use of the computer and where voice activated software could be employed. This software is currently available in the Fund. Consequently, the Committee concluded that the Fund does have positions in which you could perform the required duties in your condition."

69. The Administration Committee set forth its conclusion as follows:

> "Taking all of the circumstances into account, the Committee concluded that while your condition is likely to be permanent, it is not disabling to the extent that you are totally incapacitated from performing any duties that the Fund might call upon you to perform. Your condition is treatable and could be accommodated by the Fund if you were assigned duties such as those required in the positions listed in the attachment."

70. The final paragraphs of the Decision on Review advised Ms. "J" of her right to contest the decision in the Administrative Tribunal. At the same

[16]Applicant has indicated that she received the decision letter on May 20, 2002.

time it noted that Applicant had a workers' compensation claim which had been determined by the Claim Administrator to be compensable as a "permanent, partial impairment," and that the Fund would not enter into negotiations on the lump-sum settlement of that claim until the appeal process regarding "permanent, total disability" under the SRP had concluded.

71. On August 20, 2002, Ms. "J" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

72. The principal arguments presented by Applicant in her Application, Reply and Comment on the Amicus Curiae Brief are summarized below.

1. Applicant is, within the meaning of the SRP, totally and permanently disabled. The Administration Committee's decision is in error and is therefore an abuse of its power and discretion.

2. A disability must be determined in relation to the work normally performed by the employee.

3. The medical evidence fully supports Applicant's claim that her disability deprives her of the use of her hands for the specific functions for which she was trained and employed, as well as for all similar functions available with the employer.

4. It has been admitted or not denied that Applicant's skills are not readily transferable to other work that the Fund has available.

5. Respondent induced error on the part of the Administration Committee by claiming without sound analysis or factual data that there were positions she could fill. There was no actual matching of Applicant's education and skills to the positions.

6. The Plan's requirement that a disability must be "likely to be permanent" should be interpreted to mean that there is a reasonable medical certainty that the disability is continuing and no improvement can be expected.

7. Applicant was denied due process by the Administration Committee, which acted on the opinion of its Medical Advisor who did not actually examine Applicant, was not required to give oral testimony or to be cross-examined by Applicant's representative, and whose opinion was

not given to Applicant until after the Committee's decision was taken. The Committee acted on an incomplete record, its Decision did not state the reasons therefor, and, contrary to its Rules of Procedure, the Decision was not given until almost a year after Ms. "J"'s application. The Committee's decision making was improperly influenced by conflicts of interest.

8. Applicant was denied her rights under the Fund's medical separation policy because no other suitable position was sought for Applicant, nor was she notified of the right to object to the proposed medical separation. While Applicant was at all times eager to return to work at the Fund, she was told that she had no transferable skills and no alternative position was ever mentioned to her. The Tribunal has jurisdiction over the matter of Applicant's medical separation.

9. Applicant's workers' compensation claim is not yet ripe for adjudication as no final determination has been made by the Claim Administrator.

10. The Amicus Curiae Brief correctly observes that the standard of review contained in GAO No. 31 is not applicable to denial of a disability pension. The appropriate standard of review is given by Article III of the Statute of the Administrative Tribunal.

11. The Amicus Curiae Brief accurately suggests that disability is to be judged in relation to earning capacity, as SRP Section 4.3(d) relates discontinuance of a disability pension to regaining of earning capacity.

12. Applicant seeks as relief:

a. that the Tribunal order that Applicant be granted a disability pension retroactive to March 5, 2002;

b. two years net salary as compensation for mental suffering caused by "Respondent's repeated instances of unfair treatment;" and

c. legal costs.

Respondent's principal contentions

73. The principal arguments presented by Respondent in its Answer, Rejoinder and Response to the Amicus Curiae Brief are summarized below.

1. The SRP Administration Committee correctly applied the criteria for disability retirement. The Committee's decision was not arbitrary or capricious.

2. The SRP does not require that disability be determined by reference to the requirements of the employee's current position. The reasonable-

ness standard must be interpreted in light of the Applicant's education and abilities. It does not require consideration of whether vacancies are actually available.

3. The unequivocal weight of the medical evidence was that Applicant suffered a repetitive use injury that would likely prevent her from carrying out the duties of a Verbatim Reporting Officer in the future, but that she was not totally or permanently incapacitated.

4. Disability retirement, which entails a life-long commitment by the Fund, is intended for the most extreme medical conditions and Applicant does not meet that high standard. Applicant is attending college and performing functions similar to those she would be expected to carry out in a work setting with accommodations.

5. Applicant was not denied due process by the Administration Committee, which acted in accordance with its Rules of Procedure. The Committee is not required to hold oral hearings or review directly the underlying records of the treating physicians, but may do so if it deems such review necessary. The Committee may suspend deadlines to seek additional information. The Committee's decision making was not affected by any conflict of interest.

6. The Administration Committee properly relied on the expert advice of its Medical Advisor. The Committee has no grounds to act in a manner inconsistent with the Medical Advisor's recommendation, absent an indication that he reached his conclusion in an arbitrary or improper manner. Records now before the Administrative Tribunal provide no basis for concluding that the Medical Advisor's opinion was arbitrary or not well founded. In this case, the Administration Committee also considered the findings of three independent medical evaluators.

7. The Administrative Tribunal does not have jurisdiction over any challenge to Applicant's separation for medical reasons, as she has failed to exhaust administrative review of such a claim, and, in any event, the separation decision was not adverse to Applicant who requested medical separation.

8. The Amicus Curiae Brief confuses the Administrative Tribunal's "scope of review," which is *de novo*, with its "standard of review" as set forth in Article III of the Statute.

9. The SRP Administration Committee's determination on eligibility for disability retirement is quintessentially a discretionary judgment to which international administrative tribunals are to accord deference,

absent a showing that the decision is arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or procedurally defective.

10. The interpretation of SRP Section 4.3(a) advocated in the Amicus Curiae Brief is inconsistent with the Plan's language and intent. The provision does not require that the applicant must be found incapacitated from performing the duties for which he had been trained or was carrying out at the time of the incapacity. The Administration Committee has not interpreted the standard to mean that the applicant could be asked to perform "lesser" duties; the Committee examined whether the Applicant could perform other functions consistent with her qualifications and salary level.

The Views of the Amicus Curiae

74. The principal views of the Amicus Curiae, the duly authorized representatives of the Staff Association, as presented in the Amicus Curiae Brief are summarized below.

1. The Administrative Tribunal should not apply an "arbitrary or capricious" standard of review as suggested by Respondent's pleadings. Article III of the Tribunal's Statute governs its standard of review.

2. Different standards of review apply to employment disputes heard by the Fund's Grievance Committee and those involving denial of disability retirement by the SRP Administration Committee.

3. The nature of the dispute in this case lends itself to *de novo* review by the Administrative Tribunal, as interpretation of the Plan provisions involves legal questions and the factual issues are reflected in a written record accessible to the Tribunal.

4. As the SRP forms part of the employment contract with the staff, its provisions should be interpreted in the light most favorable to the participants.

5. The reasonableness standard of SRP Section 4.3(a) must be interpreted in relation to the duties that the participant was performing at the time that the incapacity occurred, not in the future when rehabilitation and training might qualify the individual to perform a lesser duty in the Fund.

6. SRP Section 4.3(d), providing for discontinuance of a disability pension when incapacity has ceased or the participant ". . . has regained the earning capacity which he had before such incapacity. . . ," supports the

view that the Plan's intent is that disability be determined in relation to the duties the applicant was performing at the time the incapacity arose, not after rehabilitation, training and accommodation.

7. Due process requires that the Administration Committee review the records of an applicant's treating physicians so that it may determine whether the Medical Advisor acted improperly or arbitrarily in reaching his conclusion.

Consideration of the Issues of the Case

The Decision under Review

75. The Administrative Tribunal must determine as a preliminary matter what administrative act or acts of the Fund it properly has been called upon to review in this case.

76. Applicant identifies on her Form of Application two contested decisions: the denial of disability retirement and "involuntary separation on medical grounds." While the challenge to the SRP Administration Committee's denial of her Request for disability retirement predominates Applicant's pleadings and requests for relief, she presses as well a claim for failure of due process with respect to her medical separation and also contends that the Fund has failed to justify the separation while it maintains, with respect to Ms. "J"'s application for disability retirement, that there are functions within the organization that she can perform. Applicant's pleadings also discuss her workers' compensation claim although she concedes the claim is "not yet ripe for adjudication," as there has been no final determination by the Claim Administrator or appeal to the Fund's Grievance Committee.[17] Respondent, for its part, requests the Tribunal to dismiss as irreceivable

[17]With respect to the status of Applicant's workers' compensation claim, the following is noted. The Secretary of the SRP Administration Committee in both his memorandum to the Committee of May 2, 2002 and the May 17, 2002 letter notifying Ms. "J" of the Committee's Decision on Review indicated that the Claim Administrator had made a finding of permanent, partial loss of function compensable under the Fund's workers' compensation policy, but that the Fund would not negotiate a lump-sum settlement of that claim until the appeal process (through the Administrative Tribunal) had concluded with respect to Applicant's Request for disability retirement under the SRP. Respondent, in its pleadings, asserts that Ms. "J" has received medical and leave benefits pursuant to the workers' compensation policy and that the Claim Administrator had been in the process of evaluating the claim for compensation for permanent, partial disability pursuant to GAO No. 20, Section 5.01.2; however, that process was suspended pending resolution of the application for disability retirement on the basis of permanent, total disability.

all issues relating to medical separation and workers' compensation on the ground that Applicant has failed to exhaust administrative remedies with respect to these matters.

77. The dispute between the parties as to Applicant's medical separation may be summarized briefly as follows. Applicant contends that the conditions precedent to invocation of the medical separation procedures of GAO No. 16 were not met by the Fund. As reviewed *supra*, these conditions include either a request by the staff member for separation, or, alternatively, a finding initiated by the Fund (with certain procedural safeguards) that the individual should be separated. Ms. "J" contends that her case falls within the second category and, as such, under Section 2 of GAO No. 13, Annex I, she was to have been notified and given the opportunity to object to the proposed medical separation and to have the matter brought to a panel of medical experts for determination. Additionally, in Applicant's view, the Fund should have ascertained that no other suitable position for the staff member could be found in accordance with GAO No. 11. Ms. "J" maintains that the Fund failed to comply with these steps, instead notifying her in May 2001, following the SRP Administration Committee's initial Decision denying her Request for disability retirement, that the Fund ". . . regret[s] to inform you that the Fund will be separating you for medical reasons. . . ."

78. By contrast, Respondent maintains that Ms. "J"'s separation was at her own initiative, that she chose not to pursue alternative work with the Fund following her injury but rather to retrain for another career when she was no longer able to work as a verbatim reporter. Accordingly, in the Fund's view, the procedures cited by Ms. "J" were not required of Respondent. Nonetheless, the Fund contends, it did seek to find alternative placement for Ms. "J" within the organization. Following the Administration Committee's initial Decision, it was, in the Fund's view, "agreed" that Applicant would be separated pursuant to GAO No. 13, Annex I and GAO No. 16.

79. Moreover, the Fund urges that it is inconsistent for Applicant to seek disability retirement and at the same time to challenge medical separation, as an application for disability retirement necessarily subsumes a request for medical separation on the basis of total and permanent inability to work for reasons of health. Applicant, by contrast, maintains that she was told by Fund officials that her skills were not transferable and that therefore she had no choice but to proceed with medical separation. As an SRP participant, the regulations required her to exhaust the disability retirement application process as a prerequisite to concluding the medical separation.

80. While the contentions of the parties highlight the web of intersecting procedures that may come into play when a staff member is affected by a medical disability, the task for the Tribunal is to determine what decision or decisions of the Fund are properly subject to its review in the present case. It is noted that Applicant already has received the full financial benefit of medical separation under GAO No. 16 and she does not, in her pleadings before the Tribunal, seek reinstatement with the Fund. The question, therefore, is whether her complaint of procedural unfairness with respect to the separation is properly before the Tribunal for review.

81. Applicant takes the position that the Tribunal has jurisdiction to consider issues relating to her medical separation because these matters and the denial of disability retirement are "all one ball of wax." Respondent, on the other hand, contends that although a determination as to eligibility for disability retirement is "part of the process of separation for medical reasons," the process involves separate decisions by separate decision makers, with separate channels of review applicable to each.

82. Article II, Section 1[18] of the Tribunal's Statute confines its jurisdiction *ratione materiæ* to challenges to the legality of an administrative act of the Fund, or of an administrative act arising under a benefit plan maintained by the Fund, adversely affecting the applicant. Article V, Section 1 imposes the additional requirement 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." The Tribunal has emphasized on a number of occasions the importance of the exhaustion requirement of Article V, a requirement common to the statutes of all major international administrative tribunals for the reason that the tribunal is intended as the forum of last resort for the resolution of employment disputes. (*See* Report of the Executive Board, p. 23.)

83. In *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), the Tribunal granted the Fund's

[18]Article II, Section 1 provides:

"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."

Motion for Summary Dismissal on the ground that the applicant had failed to meet the exhaustion requirements of Article V. Ms. "Y", who claimed that her career had been adversely affected by discrimination had submitted her case to an ad hoc discrimination review procedure instituted by the Fund on a one-time basis to review charges of discrimination. The problem presented to the Tribunal was whether the applicant, who had not brought her complaint to the Fund's Grievance Committee, had, by invoking the ad hoc discrimination review procedure, satisfied the statutory prior review requirement. The Tribunal observed that the memoranda establishing the ad hoc discrimination review lacked clarity as to the relationship between that procedure and the Fund's established Grievance procedure. Significantly, the Tribunal chose to resolve the ambiguity in favor of requiring Grievance Committee review where available:

> ". . . it is the view of the Tribunal that exhaustion of the remedies provided by the Grievance Committee, where they exist, is statutorily required and that the memoranda in question do not exclude that requirement. Moreover, 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."

(*Ms. "Y"*, para. 42.)[19]

84. Later, following the Grievance Committee's review and denial of her claim, Ms. "Y" again sought recourse in the Administrative Tribunal. In *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal was confronted with the question of what decision or decisions of the Fund were properly subject to its review. The Tribunal concluded that:

> ". . . 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."

(*Ms. "Y" (No. 2*), para. 36.) The Tribunal accordingly rejected the view that Ms. "Y"'s underlying claims of discrimination (as distinguished from the Director of Administration's decision concurring in the conclusions of the ad hoc discrimination review team) could be reviewed by the Tribunal *as if* they had been pursued on a timely basis through the procedures of GAO

[19]Given the singular circumstances of the case, the Tribunal additionally held that in the event that the Grievance Committee, if seized, should decide that it did not have jurisdiction over Ms. "Y"'s claim, the Tribunal would reconsider the admissibility of her application. (*Ms. "Y"*, para. 43.)

No. 31 (Grievance Committee). (*Ms. "Y" (No. 2*), para. 39.) In so holding, the Tribunal again emphasized the value of timely exhaustion of administrative review to later adjudication by the Administrative Tribunal. (*Ms. "Y" (No. 2)*, para. 40.)

85. In *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), the Tribunal considered the question of whether exceptional circumstances could excuse failure to initiate in a timely manner the administrative review procedures of GAO No. 31. In that case, the applicant, a non-staff member successor in interest to a deceased non-staff member enrollee in the Fund's medical benefits plan was held to have fulfilled the requirements of Article V in the unique circumstances of the case. The successor in interest had taken up appeals with the medical benefits plan's outside Administrator and later filed a Grievance with the Fund's Grievance Committee; she had, however, missed the deadline for initiation of the steps prescribed by GAO No. 31 antecedent to Grievance Committee review. The Tribunal observed that at each stage the successor in interest, when informed of the requisite procedures, had complied with the deadlines, but that as a non-staff member herself and as a successor in interest to a non-staff member enrollee in the Fund's medical plan she could not be presumed to have knowledge of the Fund's dispute resolution procedures. Moreover, the Fund's actions had given her the impression that no further channels of recourse were available. (*Estate of Mr. "D"*, paras. 108–128.)

86. While finding exceptional circumstances in the unusual case of *Estate of Mr. "D"*, the Tribunal reiterated the importance of the exhaustion requirement of Article V:

> "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."

(*Estate of Mr. "D"*, para. 104.) (*See also Ms. "Y" (No. 2)*, para. 37 and note 21, confirming that failure of notice does not ordinarily excuse failure to exhaust channels of administrative review.)

87. It is against this background that the Tribunal is called upon to assess whether Ms. "J"'s challenge to the fairness of her medical separation is properly before the Tribunal for review in this case. There is no indication in the record that Applicant has taken any of the steps required for review of the medical separation pursuant to GAO No. 31, culminating in consideration by the Grievance Committee. She concedes as much, but faults the Fund for

not providing notice of the proposed separation pursuant to GAO No. 13, Annex I, Section 2.02.1. The Fund counters that the provision did not apply in the circumstances of her case and that, in any event, Ms. "J" could have contested the separation decision following notice thereof by the Director of Human Resources.

88. The issue now to be decided is whether, given the statutory requirement of Article V and the Tribunal's jurisprudence, there is any basis for drawing an exception on the ground, as Applicant suggests, that the determinations on medical separation and disability retirement are procedurally intertwined, or alternatively whether, as the Fund argues, the claim relating to medical separation is precluded from Tribunal review because the two decisions were taken by separate decision makers, were subject to different channels of review, and only the channel relating to the disability retirement claim has been exhausted in this case.

89. In the circumstances of this case, the Administrative Tribunal has some sympathy for Ms. "J"'s contention that, in view of the intersecting nature of a medical separation claim, a workers' compensation claim and a disability pension claim, it was not clear to her that in order to challenge separation, she was obliged to exhaust her remedies in the Grievance Committee. Her position is evocative of a recent statement of the Fund's Ombudsperson:

> "The current jumble of GAOs (some out of date), Staff Bulletins and Administrative Circulars, as well as other documents of limited circulation, means that it is often difficult for staff members to know the rules and to determine that they have been treated fairly. An example would be trying to access the policies relating to dealing with disability. This involves consulting a variety of documents about medical benefits, leave, workers' compensation, definition of disability, disability retirement, involuntary separation procedures, and separation benefits, among others. There is no single source for a manager or staff member to go to for information on how to deal with a disability situation. This dispersion of information also reflects a dispersion of responsibility, which means that managers and staff may end up dealing with different authorities, with sometimes differing interpretations of the rules and their inter-relationships."

(Twenty-third Annual Report of the Ombudsperson, October 1, 2001–September 30, 2002 (March 5, 2003), pp. 6–7.) The fact remains that Ms. "J" did not attempt to exhaust her remedies in the Grievance Committee. Moreover, and in any event, it is difficult to see what material interest Ms. "J" has in challenging at this stage the separation procedures and their issue, in view of the fact that separation has been effected and that she unreservedly

accepted its financial benefits. Accordingly, the Administrative Tribunal will confine its consideration of the Applicant's claims to her challenge to the decision of the SRP Administration Committee to deny her application for disability retirement.

The Administrative Tribunal's Standard of Review

90. The Amicus Curiae Brief of the Staff Association Committee draws attention to the important issue of the Administrative Tribunal's standard of review in this case. That standard is governed by the second sentence of Article III of the Statute of the Administrative Tribunal, which 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."

This case requires the Tribunal to elaborate that standard in the context of review of the denial by the Administration Committee of the Staff Retirement Plan of a request for disability retirement.

1. Standard of Review Distinguished from Channels of Review

91. At the outset, it is necessary to dispel some points of confusion that have clouded the interchange among the parties and the Amicus Curiae with respect to the issue of the Administrative Tribunal's standard of review. The first matter is the effect of GAO No. 31.

92. GAO No. 31 is the constitutive instrument of the Fund's Grievance Committee and, as such, it provides, at Section 5,[20] the standard of review to be applied by the Grievance Committee in reviewing employment disputes that come within its jurisdiction. It does not, however, govern the standard of review applied by the Administrative Tribunal. That is true irrespective of whether the administrative act challenged in the Tribunal is one that

[20]GAO No. 31, Rev. 3 (November 1, 1995), Section 5 provides:

"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."

has emerged from the channel of review provided by the Grievance Committee or from another channel of review, for example, as in this case, the Administration Committee of the Staff Retirement Plan. While the parties and the Amicus Curiae all agree that the relevant provision is Article III of the Tribunal's Statute, the discussion in the pleadings suggests some confusion as to whether the GAO No. 31 standard of review affects the Tribunal's standard of review in some way. It does not.

93. The second point requiring clarification is the distinction between a) the Administrative Tribunal's standard of review, described by Article III as relating to ". . . judicial review of administrative acts," and b) the Tribunal's authority to make findings of fact as well as conclusions of law, sometimes called *de novo* review. While the first authority defines the relationship between the Tribunal and the underlying administrative act being contested therein, the latter authority defines the relationship between the Tribunal and the channel of administrative review. Respondent asserts that this second authority is known as the "scope of review" (as distinguished from the "standard of review") and therefore takes issue with the suggestion of Amicus Curiae that the Tribunal should apply a "*de novo* standard of review" in this case.

94. The need for clarification here is partially semantic and partially substantive. First, it may be observed that the terms "standard of review" and "scope of review" are often used synonymously. Indeed, the published Commentary on the Statute, in discussing the second sentence of Article III, speaks at one point of "standards of review," asserting that "the standards of review applied by the tribunal should not go beyond those applied by other tribunals," and later, in commenting on the Tribunal's competence to review regulatory decisions, notes that "the scope of that review is quite narrow." (Report of the Executive Board, pp. 17, 19.) Therefore, the discussion herein will not adopt the semantic distinction advocated by the Fund. However, for convenience and clarity, the term "standard of review" will be used whenever referring to the relationship between the Tribunal and the contested administrative act. Defining the standard of review in this case is the primary focus of this section of the Tribunal's Judgment.

95. In defining the standard of review, it is nonetheless important to clarify its operation within the context of the Tribunal's relationship to the channels of administrative review. The authority of the Administrative Tribunal to make both findings of fact and conclusions of law, and therefore to review *de novo* the legality of an administrative act of the Fund, stems from the Tribunal's unique role as the sole judicial actor within the Fund's dispute

resolution system.[21] In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17, the Tribunal rejected the view that it ". . . functions as an appellate body from the Grievance Committee," observing that ". . . the Tribunal's competence is not limited as it would be if it were a court of appeal; e.g., it makes findings of fact as well as holdings of law." Later, in *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), the Tribunal further held 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," (para. 129) noting that, vis-à-vis the Grievance Committee, ". . . the Tribunal decides each case *de novo*. . . " (para. 130).[22]

96. At the same time, while the Administrative Tribunal's review authority fully penetrates the layer of administrative review provided by the Grievance Committee, the Tribunal, in making its findings and conclusions, draws upon the record assembled through the review procedures. The Tribunal has held that it is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it," (*D'Aoust*, para. 17) and has commented on the utility of the administrative review process in creating a record for the Administrative Tribunal's review of the challenged act. (*See, e.g.*, *Ms. "Y"*, para. 42; *Estate of Mr. "D"*, paras. 66–68.)

97. As explained by the Tribunal in *D'Aoust*, the reason that a decision of the Grievance Committee is not itself subject to review by the Administrative Tribunal is that it does not constitute an "administrative act" of the Fund under Article II of the Statute. Rather, the Grievance Committee is empowered only to make recommendations to the Managing Director, who is charged with taking the final administrative decision. [23] (*D'Aoust*, para.

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[21]*See generally* Report of the External Panel, "Review of the International Monetary Fund's Dispute Resolution System" (November 27, 2001).

[22]The Tribunal's authority in this regard includes the power to decide independently of the Grievance Committee whether an applicant has satisfied administrative review procedures antecedent to Grievance Committee review, thereby determining whether the applicant has met the exhaustion requirement of Article V of the Tribunal's Statute. (*Estate of Mr. "D"*, paras. 85–94.)

[23]*See* GAO No. 31, Rev. 3 (November 1, 1995), Section 1:

> *"Section 1. Purpose*
>
> The purpose of this Order, in accordance with Rule N-15, is (1) to establish a Grievance Committee to hear cases within its jurisdiction and to make recommendations to the Managing Director in order to facilitate the fair and expeditious resolution of disputes, and (2) to establish procedures for the hearing of cases."

17.) Accordingly, there is no "standard of review" that applies as between the Tribunal and the Grievance Committee.

98. A distinguishing feature of the problem posed in the present case is that, unlike the Grievance Committee, the Administration Committee of the Staff Retirement Plan plays a dual role within the dispute resolution system. It is responsible for taking the administrative act that may be contested in the Administrative Tribunal and it also supplies what is deemed a channel of review for purposes of the exhaustion of remedies requirement of Article V of the Tribunal's Statute when, pursuant to Article VIII of its Rules of Procedure, it reconsiders its own decision.[24] Accordingly, while a decision of the Grievance Committee will not be subject to direct review by the Administrative Tribunal, a decision of the SRP Administration Committee necessarily will be. The question now to be considered is the standard of review to apply when the Tribunal considers a challenge to the legality of a decision of the SRP Administration Committee to deny a request for disability retirement.

2. The IMFAT's Standard of Review

99. The standard of review, understood as describing the relationship between the Administrative Tribunal and the decision maker responsible for the contested decision, represents the degree of deference accorded by the Tribunal to the decision maker's judgment. The standard of review is designed to set limits on the improper exercise of power and represents a legal presumption about where the risk of an erroneous judgment should lie. The degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker.

100. The essence of the controversy over the standard of review in this case, argued principally between Amicus Curiae and Respondent, is that while Respondent in its pleadings emphasizes an "arbitrary or capricious"

[24]In this regard, it may be considered that the "standard of review" applied by the Administration Committee in reviewing its own decisions is supplied by Rule VIII of its Rules of Procedure. Paragraph 2 of that Rule provides in pertinent part:

> "2. . . .
>
> The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:
>
> a) misrepresentation of a material fact;
>
> b) the availability of material evidence not previously before the Committee; or
>
> c) a disputed claim between two or more persons claiming any rights or benefits under the Plan."

standard of review as applied to individual decisions taken in the exercise of managerial discretion,[25] Amicus Curiae contends that the Administration Committee's decision on disability retirement deserves a deeper level of scrutiny by the Administrative Tribunal. Respondent characterizes the decision under review as "quintessentially a discretionary judgment," suggesting a high measure of deference. Amicus Curiae, by contrast, contends that the decision lends itself to a greater depth of review by the Tribunal because a) interpretation and application of the Staff Retirement Plan involves legal questions, and b) the Administration Committee's proceedings did not include credibility determinations based on oral testimony and therefore there is "no need to grant deference to the fact finder. [footnote omitted]"

101. Applicant, for her part, suggests that the Tribunal's standard of review may be differentiated with respect to review for substantive vs. procedural error:

> "International Administrative Law clearly recognizes such principles as 'abuse of power', 'détournement de pouvoir' (misuse of power) and more generally error, violation of contract, etc. Those concepts may more artfully be applied to a *substantive violation* of the rule laid down in the Retirement Plan.
>
> . . . The concepts of 'arbitrary, capricious, abuse of discretion' etc. may more properly apply to *violations of procedural due process*. Applicant has argued both a substantive violation of her rights under the Retirement Plan, i.e. a failure to apply the rule in the Plan, and the failure of the Respondent to observe procedural due process, particularly with regard to the process employed."

(Emphasis in original.)

[25]Respondent in its Answer asserts that "[t]he issue that the Tribunal is being asked to decide is whether or not the decision by the Committee should be quashed because it was arbitrary, capricious or procedurally defective," later adding that "[t]he decision of the Committee was in no way arbitrary or capricious and there is therefore no basis for disturbing it." Respondent does, however, advert to additional bases for scrutiny by contending that Applicant has provided "no legal or factual basis" to support her request that the decision be set aside and that the SRP Administration Committee properly applied the criteria for disability retirement under the Plan. In its Response to the Amicus Curiae Brief, the Fund defends the applicability of the "arbitrary or capricious" standard of review on the ground that the decision under review is a discretionary one, while at the same time citing the full standard as given by the Commentary, noting that ". . . one of the cardinal principles of international administrative law is applicable here: that is, tribunals should accord deference to managerial discretion, absent a showing that the decision under review is arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or procedurally defective."

3. Legislative History and IMFAT Jurisprudence

102. In resolving the question of the appropriate standard of review in a given case, the Administrative Tribunal looks to the following sources: a) the text of Article III, requiring that it apply ". . . generally recognized principles of international administrative law concerning judicial review of administrative acts," b) the published Commentary on the Statute, i.e. the Report of the Executive Board proposing the Statute's adoption, c) the jurisprudence of the IMFAT, and d) the jurisprudence of other international administrative tribunals.

103. The legislative history of the applicable Statutory provision, as reflected in the published Commentary on the Statute, emphasizes the Tribunal's role in reviewing the Fund's exercise of discretionary authority and distinguishes between judicial review of regulatory vs. individual decisions of the Fund. The Commentary also adverts expressly to the standards of review applied by other international administrative tribunals in like situations.

104. In pertinent part, the Commentary provides as follows:

> "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.
>
> . . .
>
> 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. [footnote omitted] 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. [footnote omitted]"

(Report of the Executive Board, pp. 17, 19.)

105. The IMFAT's jurisprudence has confirmed many of the principles articulated in the Statutory Commentary. Hence, in a variety of contexts, the Administrative Tribunal, in discharging its responsibility to review the lawfulness of challenged administrative acts, has acknowledged, and deferred to, the exercise of the managerial discretion of the Fund. (*See*, *e.g.*, *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para 65: "The management of the Fund necessarily enjoys a managerial and administrative discretion which is subject only to limited review by this Tribunal.") This deference is at its height when the Tribunal reviews regulatory decisions (as contrasted with individual decisions), especially policy decisions taken by the Fund's Executive Board. *See, e.g., Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 80 (reviewing Executive Board's decision on expatriate benefits). *See also Ms. "Y" (No. 2)*, paras. 42–52 (implementation of ad hoc discrimination review procedure was a proper exercise of Fund's discretionary authority).

106. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary as follows:

> ". . . 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.) *See, e.g., Mr. "R"*, para. 32; *Ms. "Y" (No. 2)*, para. 53. It is this standard of review that Respondent urges the Tribunal to apply in the present case.

107. It is essential to note that the standard articulated in the Commentary for review of individual decisions involving managerial discretion comprehends a number of different factors.[26] Hence, its operation in a particular case may emphasize one factor over others or it may involve multiple factors, depending upon such variables as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned. The case of *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), illustrates the multiplicity of factors that make up the standard of review for individual decisions taken in the exercise of managerial discretion; some of these factors contemplate stricter scrutiny on the part of the Administrative Tribunal than do others.

108. In *Ms. "C"*, the applicant challenged the Fund's decision not to convert her appointment from fixed-term to regular staff. The Tribunal first considered whether the non-conversion decision represented an error of law, i.e. whether it was ". . . unlawful because it was retaliatory and in violation of principles of law . . ." (para. 21), based upon the applicant's contention that the decision was taken in retaliation for complaints she had made of alleged sexual harassment. The Tribunal concluded on the evidence that the decision was not so motivated. (Paras. 28, 41.) The Tribunal next considered whether the performance-based decision not to convert Ms. "C"'s appointment represented an abuse of discretion and held that it did not. Noting evidence in the record of performance deficiencies, the Tribunal deferred

[26]Accordingly, the Tribunal's standard for review of discretionary decisions, as elaborated in the Statutory Commentary, appears to have greater breadth than that granted to the Grievance Committee by GAO No. 31, Section 5.02. It has been suggested that the Grievance Committee's standard of review should be aligned with that applied by the Administrative Tribunal. *See* Report of the External Panel, "Review of the International Monetary Fund's Dispute Resolution System" (November 27, 2001), p. 48.

to management's assessment[27] that Ms. "C" had not met the standard of performance required for conversion of her appointment to regular staff. (Paras. 36, 38, 41.) Finally, the Tribunal considered whether the decision had been taken consistent with fair and reasonable procedures. The Tribunal concluded that procedural irregularities had indeed marked the process of the assessment of Ms. "C"'s performance, and, on that basis, awarded the applicant partial compensation. (Paras. 41–44.)

109. When the Tribunal reviews an administrative act of the Fund to determine if the decision taken has been "arbitrary or capricious," i.e. the component of the standard of review that Respondent emphasizes for application in this case, it applies its least rigorous level of scrutiny. As the Tribunal observed in *Ms. "Y" (No. 2)*, "[t]he 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." (Para. 63.) Similarly, in *Mr. "V"*, the Tribunal concluded that it was a "reasonable act of managerial discretion" for the Fund to classify a particular report and limit its distribution, on the basis that the Fund had "explained and documented its rationale" for limiting circulation of the report to a particular group of individuals. (Para. 96.)

4. The Nature of the Decision-Making Process Under Review

110. The IMFAT's jurisprudence also suggests that an important factor in determining the standard of review may be the nature of the underlying decision-making process that is subject to the Tribunal's review. In *Ms. "Y" (No. 2)*, after concluding that it was within the Fund's discretionary authority to fashion an alternative dispute resolution mechanism to serve the needs of the Fund and its staff, the Tribunal held that the conduct of that alternative process, as applied in individual cases, was itself subject to review for abuse of discretion. (Para. 53.) In so holding, the Tribunal underscored the limited measure of its review of the informal discrimination review process, which ". . . by definition and design [was] intended to offer

[27] *See* Statutory Commentary:

> "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."

(Report of the Executive Board, p. 19.)

a mechanism for resolution of claims distinct from those afforded by legal proceedings" (para. 49):

> "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."

(Para. 65.)

111. Respondent characterizes the decision of the SRP Administration Committee under review in this case as "quintessentially a discretionary judgment." The Fund emphasizes that ". . . the Committee is required to exercise its considerable discretionary judgment in applying the criteria set out in the Plan to the facts and circumstances of the case." Thus, it must ". . . inquire into the circumstances and make an[ ] assessment as to whether a condition exists, whether it is *reasonable* to expect an employee to perform certain functions, or whether a disability is *likely* to be permanent or not." (Emphasis in original.) On this basis, the Fund asserts that the standard of review that should be applied to this case is that applied to review of individual decisions taken in the exercise of managerial discretion.

112. The question is whether the process undertaken by the SRP Administration Committee in taking a decision on an application for disability retirement is properly characterized as an act of managerial discretion or as something different. In the view of the Administrative Tribunal, the process of construing the applicable terms of the Staff Retirement Plan and applying them to the facts of a particular case to determine the applicant's entitlement or not to the requested benefit more closely resembles a judicial act than one typically taken pursuant to managerial authority. It is difficult to equate a decision of the Administration Committee of the Staff Retirement Plan on eligibility for disability retirement with, for example, the transfer of a staff member, *Ms. "C"*, para. 16, the classification of a confidential report, *Mr. "V"*, para. 96, or a decision on classification and grading which calls for the exercise of judgment in the appreciation of a number of factors, *D'Aoust*, para. 25.

113. A second respect in which a decision arising from the SRP Administration Committee is to be distinguished from an administrative act taken in the exercise of managerial discretion is that the channel of review applicable to such decisions does not involve review by the Managing Director. Individual decisions taken under the Staff Retirement Plan are exclusively vested in the Administration Committee, subject only to direct appeal (following reconsideration by the Committee) to the Administrative Tribunal. Accordingly, SRP Section 7.2 provides:

> **"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 . . . "[28]

114. In *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001),[29] the IMFAT had the opportunity to explore the nature of this appeal process. While not addressing explicitly the matter of the standard of review to be applied when a decision of the SRP Administration Committee is contested in the Administrative

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[28]A parallel provision of the SRP vests the Pension Committee with a policy-making authority, subject also to direct appeal to the Administrative Tribunal:

> **"7.1 Pension Committee**
>
> . . .
>
> (d) The Pension Committee shall have authority to make and establish such rules, policies, and procedures for the overall administration and functioning of the Plan, and the collection, investment, management, safekeeping, and disbursement of the Retirement Fund as shall not be contrary to the provision hereof. All such rules, policies, and procedures shall be binding upon the Employer, participants, retired participants, and all other persons having any interest in the Plan or the Retirement Fund, subject to appeal in accordance with the procedures of the Administrative Tribunal."

[29]*Mr. "P" (No. 2)* is the only other case arising from a decision of the SRP Administration Committee that has been reviewed on the merits by the IMFAT.

Tribunal, it recognized the unique nature of the appellate authority arising from Section 7.2 of the Plan and Article II[30] of the Tribunal's Statute:

> "The significance of the Tribunal's appellate authority is illustrated by the present case. Absent it, the Applicant and the Intervenor could find themselves without third party remedy."

(Para. 141.)

115. In *Mr. "P" (No. 2)*, the Tribunal considered a case arising under SRP Section 11.3 (and Rules thereunder) regarding the giving effect under the Plan to certain domestic relations orders. Respondent framed the question in that case as "'. . . whether the Committee acted properly and in accordance with the [applicable] Rules in deciding to place into escrow a portion of Applicant's pension benefits.'" (Para. 119.) The Tribunal echoed this formulation:

> "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?"

(Para. 132.) Significantly, the Tribunal reviewed the "soundness" (para. 144) of that decision and concluded that although the decision of the Committee was "understandable," it was "in error and must be rescinded." (Para. 145).

116. The standard of review applied by the Tribunal in *Mr. "P" (No. 2)*, leading to the conclusion that the decision of the SRP Administration Committee was in error and therefore had to be rescinded, may be sharply distinguished from the Tribunal's decision, for example, in *Ms. "G"* in which the Tribunal made clear that it was not ratifying the correctness of the Fund's policy decision:

> "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

[30]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."

> policy . . . , 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. . . ."

(Para. 80.) Equally, the standard of review applied in *Mr. "P" (No. 2)* may be differentiated from the Tribunal's review, for abuse of discretion, of the individual decision taken under the ad hoc discrimination review procedure in *Ms. "Y" (No. 2)*. (Para. 65.)

117. In conclusion, two factors differentiate a decision of the SRP Administration Committee on a request for disability retirement from an act of managerial discretion. First, functionally, the decision may be regarded as "quasi-judicial," requiring the decision maker, i.e. the SRP Administration Committee, to construe the requirements of the applicable provision of the pension Plan and to apply the Plan's terms to the facts of a particular case. Second, the decision is made by an entity, i.e. the SRP Administration Committee, that is vested with the authority to take such decisions on behalf of the Plan without review by the Managing Director. Instead, they are subject to direct appeal (following a decision on reconsideration by the Committee) to the Administrative Tribunal.

5. International Administrative Jurisprudence

118. The distinctions identified above, i.e. quasi-judicial decision making and special appellate authority, have been noted as well by international administrative tribunals and commentators with regard to review of both disciplinary decisions and decisions under a staff retirement plan. These precedents will be discussed below.

119. To be addressed first, however, is Respondent's contention that ". . . the determination of disability eligibility is a discretionary matter is a well-recognized principle of international administrative tribunal law." Respondent cites for this proposition *In re Duran*, ILOAT Judgment No. 375 (1979), as follows:

> "The question whether a staff member is incapacitated from work is in a case of this sort a matter of judgment. The Tribunal will not substitute its judgment for that of the Director [of the Joint Medical Service] or the expert Advisors on whom he relies: it will intervene only if on the evidence the judgment appears to it to be wholly unreasonable or based on clearly mistaken conclusions."

(Para. 12.)

120. In *Duran*, the applicant contested, on the basis of her medical status, the decision to terminate her sick leave and transfer her to an overseas post.

A close reading of *Duran* reveals that the International Labour Organisation Administrative Tribunal ("ILOAT") did not simply defer to the judgment of the medical Director, but rather engaged in a detailed review of the evidence, positing the question as whether ". . . on the whole of the material known to the Director . . . it was reasonable for him, first to terminate the complainant's sick leave and, secondly, to assign her to Brasilia." (Para. 13.) In particular, the ILOAT explored the question of whether the medical Director should have rescinded or modified his decision in light of the recommendation of the Board of Inquiry which, after considering additional evidence, had concluded that the sick leave should be continued. Reviewing the character of the medical evidence at issue, the ILOAT concluded, in view of the lack of clear evidence to the contrary, that it was not unreasonable for the Director to decide that the applicant's incapacitation had not been established. (Para. 16.)

121. It has been observed, most often in the context of review of disciplinary decisions, that decisions of an international organization that may appear to be discretionary in character may, in fact, involve quasi-judicial decision making. In such cases, the administrative tribunal's standard of review may be heightened accordingly:

> *". . . Quasi-judicial powers*
>
> There is a very exceptional category of power which may be described as a quasi-judicial power and which administrative authorities may exercise under their internal law. These powers, although apparently framed in terms of discretionary criteria, are regarded by tribunals as subject to total judicial control unlike discretionary powers. The tribunal can examine the decision taken by the administrative authority *de novo* in order to establish whether the decision was one which the tribunal would have itself taken, had it been called upon to take the initial decision taken by the administrative authority. Thus, it acts rather as a court of appeal than as a court of review.
>
> . . . There is evidence that most tribunals regard the power to take disciplinary measures as being subject to total judicial control.[footnote omitted]"

C.F. Amerasinghe, *The Law of the International Civil Service* (1994), Vol. I, p. 267.

122. In *Kiwanuka v. Secretary General of the United Nations*, UNAT Judgement No. 941 (1999), the United Nations Administrative Tribunal similarly recognized that while a challenged decision may involve the exercise of discretion, that discretion may be of a quasi-judicial character. In such cases, the depth of the Tribunal's review process is affected accordingly:

> "IV. Clearly the Tribunal takes the view that the imposition of disciplinary sanctions involves the exercise of a discretionary power by the Administration. It further recognizes that, unlike other discretionary powers, such as transferring and terminating services, it is also a special exercise of quasi-judicial power. For these reasons the process of review exercised by the Tribunal is of a particular nature. . . ."

123. With respect to the review of disciplinary decisions, the UNAT in *Kiwanuka* has described its review process as follows:

> "III. . . . In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. . . .
>
> . . .
>
> V. In regard to (i) in paragraph III above, the Tribunal makes a judgement based on its examination of the facts. In regard to (ii) in paragraph III above, the Tribunal judges whether the characterization of misconduct or serious misconduct is, in its opinion, appropriate, which is a matter of law."

124. Such heightened scrutiny on the part of an international administrative tribunal is not, however, limited to cases involving review of disciplinary sanctions. Accordingly, it has been observed:

> ". . . Some discretionary powers amount in fact to the exercise of a quasi-judicial function by the administration, as is typically the case of the adoption of disciplinary measures. The standard of review generally becomes more strict in this connection. . . .
>
> . . . In some matters the WBAT has been given a special appellate jurisdiction, which must be distinguished from the role of the Appeals Committee and from its own exercise of review of managerial discretion. This jurisdiction is both exceptional and broader than the review of managerial discretion. Appellate jurisdiction applies in respect of the decisions of the Pension Benefits Administration Committee where appeals are made directly to the Tribunal as there are no other internal remedies available in the Bank.[footnote omitted] In this context, the Tribunal examines the

> same elements as in the case of quasi-judicial review, but also undertakes the broader examination of whether the conditions required by the Staff Retirement Plan for granting the benefits were met, and whether the PBAC has correctly interpreted the applicable law."

Francisco Orrego Vicuña, "The review of managerial discretion by international administrative tribunals: comments in the light of the practice of the World Bank Administrative Tribunal," (Unpublished paper presented at 20th Anniversary Conference of the World Bank Administrative Tribunal (Paris, May 2000), pp. 3–4.)

125. Finally, the World Bank Administrative Tribunal ("WBAT"), of which Professor Orrego Vicuña is currently President, supplies the most closely analogous jurisprudence to the problem presented in the instant case. The WBAT, reviewing decisions of the Bank's Pension Benefits Administration Committee ("PBAC") on applications for disability retirement, has recognized the distinctive nature of this review, expressly distinguishing the "special appellate jurisdiction" established by the terms of the Bank's pension plan from the Tribunal's ordinary review of acts of managerial discretion:

> "28. In this case the Applicant has, pursuant to Section 10.2 (f) of the Staff Retirement Plan (SRP), appealed from a decision of the Pension Benefits Administration Committee (PBAC) denying his request for a disability pension.
>
> 29. The scope of the review undertaken by the Tribunal varies according to the nature of the case before it. Thus, in matters that fall exclusively within the discretion of the Respondent, the function of the Tribunal is limited to examining whether those decisions are arbitrary, discriminatory, improperly motivated, based on error of fact, carried out in violation of a fair and reasonable procedure or otherwise tainted by an abuse of power (*Saberi*, Decision No. 5 [1981], para. 24; *Suntharalingam*, Decision No. 6 [1981], para. 27; *Thompson*, Decision No. 30 [1986], para. 24; *Bertrand*, Decision No. 81 [1989], para. 15). In other matters, such as disciplinary measures, however, the jurisdiction of the Tribunal is broader in that it may review the merits of the Respondent's decision. As stated in prior decisions in this respect, 'the Tribunal is not confined to a limited control of abuse of power as if it were purely a matter of executive discretion and. . . it may exercise broader powers of review in relation to both facts and law' (*Carew*, Decision No. 142 [1995], para. 32; *Planthara*, Decision No. 143 [1995], para. 24). This is also the case when the Tribunal is invited to intervene under a special appellate jurisdiction established in the Rules of the Bank.
>
> 30. Under the Staff Retirement Plan, Section 10.2 (f), the decision of the PBAC is final, but it is subject to appeal to the Tribunal. No other internal remedies are available in the Bank. The appeal is made directly to the

> Tribunal. The determination made by the PBAC in this case, denying the request for a disability pension, cannot be regarded purely as a matter of executive discretion . . . "

John Courtney (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 153 (1996), paras. 28–30. The WBAT has described its review process in such cases as follows:

> ". . . Accordingly, the Tribunal may examine (i) the existence of the facts, (ii) whether the conditions required by the Staff Retirement Plan for granting the benefits requested were met or not, (iii) whether the PBAC in taking the decision appealed has correctly interpreted the applicable law, and (iv) whether the requirements of due process have been observed."

(*Id*., para. 30.)

126. While in *Courtney (No. 2)*, the WBAT upheld the decision of the Bank's Pension Benefits Administration Committee to deny an application for disability retirement, in a subsequent decision, *Ahlam Shenouda v. International Bank for Reconstruction and Development*, WBAT Decision No. 177 (1997), the WBAT, applying the identical standard of review (para. 12), concluded to the contrary that the applicant was entitled to disability retirement. The WBAT in *Shenouda* explained its authority to review the merits of the PBAC's decision, i.e. to decide whether or not the Committee's conclusion was supported by the weight of the evidence. At the same time, it noted that some weight could be given to the views of the Committee's Medical Advisor:

> "22. The Tribunal has reviewed the same medical information and opinions that were before the PBAC at the time it considered, and then reconsidered, the Applicant's request . . . The Tribunal concludes that the result reached by the PBAC, which concurred with the Medical Advisor, is contrary to the clear weight of the evidence.
>
> 23. The Staff Retirement Plan contemplates that the PBAC is to reach a decision that is warranted by the diagnoses and prognoses of the doctors who have directly examined and treated the applicant. The Committee is not to rely solely upon the secondary assessment of the Medical Advisor, who does not examine the applicant and who, he himself concedes, may not necessarily be an expert in all of the wide range of illnesses that come before the PBAC, including fibromyalgia. Yet Section 3.4(a) of the SRP provides that a staff member 'shall be retired on a disability pension if one or more physicians designated by the Committee finds,' that the applicant was then disabled and likely to remain so. In effect, this prevents the award of a disability pension whenever the Medical Advisor believes it to be unwarranted—no matter whether the PBAC disagrees. If it does disagree, the only way such a pension can be awarded is if the PBAC appoints another physician who reaches the same conclusion as the PBAC.

> 24. But the Tribunal is not so constrained. In sitting on 'appeal' from the decision of the PBAC, the Tribunal can—giving some weight to the views of the Medical Advisor—review independently the written opinions of the physicians who examined or treated the Applicant, and may conclude that the great weight of the evidence, or of the medical opinions, supports or not the claim of a likely permanent disability."

After reviewing the record in *Shenouda*, the WBAT overruled the decision of the PBAC and held that the applicant should be awarded a disability pension. (Para. 35.)

127. The same result was reached in *A v. International Bank for Reconstruction and Development*, WBAT Decision No. 182 (1997), in which the WBAT decided that, in light of the medical evidence, the conclusions of the PBAC could not be sustained. (Para. 16). As to the standard of review, the WBAT in *A* again reaffirmed the standard enunciated in *Courtney (No. 2)*, observing that "[t]he power of the Tribunal under Section 10.2(f) [of the pension plan] is very broad and allows for the examination of all elements of fact and law as well as of procedural fairness and transparency." (Para. 4.)

6. Standard of Review for Disability Retirement Cases

128. In the light of the foregoing exposition, the following standard of review is to be applied by the Administrative Tribunal in reviewing a decision by the Administration Committee of the Staff Retirement Plan to deny a request for disability retirement:

> 1. Did the SRP Administration Committee correctly interpret the requirements of SRP Section 4.3 and soundly apply them to the facts of the case, or was the Committee's decision based on an error of law or fact?
>
> 2. Was the Committee's decision taken in accordance with fair and reasonable procedures?
>
> 3. Was the Committee's decision in any respect arbitrary, capricious, discriminatory or improperly motivated?

Did the Administration Committee Properly Interpret and Apply SRP Section 4.3?

129. The Administrative Tribunal now will consider whether the Administration Committee correctly interpreted the requirements of SRP Section 4.3(a) and soundly applied them to the facts of Ms. "J"'s case.

130. SRP Section 4.3(a) provides in its entirety:

"4.3 Disability Retirement

(a) A participant in contributory service shall be retired on a disability pension before his normal retirement date on the first day of a calendar month not less than 30 nor more than 120 days immediately following receipt by the Administration Committee of written application therefor by the participant or the Employer; on the condition that the Pension Committee must find, on the recommendation of the Administration Committee and the certification of a physician or physicians designated by the Administration Committee, that:

(i) such participant, while in contributory service, became totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform;

(ii) such incapacity is likely to be permanent; and

(iii) such participant should be retired."

Hence, the two essential qualifications for disability retirement are that 1) the applicant is ". . . totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform," and 2) the incapacity is "likely to be permanent." The case of Ms. "J" requires the Tribunal to interpret and apply SRP Section 4.3(a) in the circumstance of a staff member who has performed a very specialized function within the Fund and then suffers a disability that directly impairs her ability to perform that specialized function.

1. Under the terms of the Plan, is Applicant ". . . totally incapacitated, mentally or physically, for the performance of any duty with the Employer that [s]he might reasonably be called upon to perform"?

131. The medical evidence pertaining to Applicant's condition has been reviewed in considerable detail above. In addition, with her pleadings in the Administrative Tribunal, Applicant has included additional medical reports, i.e. notes of her rheumatologist for the period October 1999–May 2000 and of her pain specialist for June–July 2000. These notes are consistent with the opinions expressed in these treating physicians' letters. They support the view that, during the covered period, Ms. "J" was engaged in an intensive regimen of medication and other therapies to alleviate her condition while continuing to report severe pain in her hands and arms.

132. While it is significant that there exists a divergence of opinion as to how to characterize Applicant's medical condition (as well as to the prospects for its rectification), it is undisputed that for years following the initial injury in September 1999, Ms. "J" has remained unable to use her hands

and arms in repetitive motion, as is required to perform the functions of a verbatim reporter. In his final report to the SRP Administration Committee, the Committee's Medical Advisor concluded that Ms. "J" ". . . currently lacks the residual functional capacity to perform, on a sustained basis, intensive repetitive arm and hand functions." At the same time, he concluded that although Ms. "J"'s ". . . hand use is presently impaired, she has the requisite skills to perform tasks at the same level as her current position [and] does not permanently lack the residual functional capacity to perform tasks consistent with her education, training and experience."

133. Accordingly, Respondent has framed the question under the SRP as whether ". . . Applicant's level of education and cognitive abilities . . . could be utilized elsewhere in the Fund without requiring her to use her hands in repetitive patterns such as would exacerbate her injury." Respondent concludes that Applicant's skills could be used in the Fund, with a reasonable amount of additional training and accommodation, and that therefore her condition does not meet the standard of total incapacity prescribed for disability retirement under the pension Plan.

134. The Administration Committee, construing the requirement in Ms. "J"'s case, held:

> ". . . the relevant test is whether there are duties that the Fund could reasonably ask the employee to perform, *taking into account his/her education and reasonable accommodations or additional training*. The test is not whether vacant positions exist, but whether the participant has the capacity to perform duties that she might reasonably be called upon to perform."

Administration Committee's Decision on Review, May 17, 2002. (Emphasis supplied.) The Committee, applying this test, concluded that the Fund did have positions in which Ms. "J" could perform the required duties. (*Id*.)

135. Respondent's position raises a number of questions of law and fact that invite the Tribunal's consideration. These include what relationship, if any, must such duties have to the duties that the staff member was performing at the time the incapacity arose? May the duties require additional training or accommodation? If additional training may be required, how much such training may be considered "reasonable" and who is to provide it? In determining whether there are duties that the Fund might reasonably call upon Applicant to perform, is it necessary that there be a current vacancy for which she may be eligible? In the case of Ms. "J", are the positions identified by the Fund ones which Applicant may reasonably be called upon to perform? What is the significance of Applicant's separation for medical reasons under GAO No. 16 and the finding by HRD that Applicant had no transferable skills?

136. Applicant urges the Tribunal to adopt the view that the incapacity must be determined in relation to the work normally performed by the employee and that the medical evidence fully supports her claim that her disability deprives her of the use of her hands for the specific functions for which she was trained and employed, as well as for all similar functions available with the Fund. Amicus Curiae also contends that the reasonableness standard of SRP Section 4.3 must be interpreted in relation to the duties that the participant was performing at the time that the incapacity occurred. Respondent, by contrast, maintains that the Plan provision does not require that the applicant must be found incapacitated from performing the duties for which he had been trained or was carrying out at the time of the incapacity. Accordingly, Respondent asks the Tribunal to uphold the Administration Committee's interpretation that additional training and accommodation of the employee may be considered in determining if there are duties that the employer reasonably could ask him to perform.

137. The jurisprudence of the World Bank Administrative Tribunal suggests that an applicant for disability retirement need not be able to perform exactly the same functions that formerly he could, but that such duties would be expected to be similar or comparable to those previously performed. Accordingly, in *Courtney (No. 2)*, para. 33, the WBAT, upholding the PBAC's decision to deny an application for disability retirement held:

> "The standard of reasonableness does not require that the participant should continue to able to do *exactly* what he had been doing. If a staff member, for example, is unfit to travel but is capable of performing duties at headquarters which are compatible both with his experience and the Bank's needs, then it cannot be concluded that he is totally and permanently incapacitated for any duty that he is reasonably called upon to perform and the requirement of the Retirement Plan is not met."

(Emphasis supplied.) The same formulation was repeated by the WBAT in *A*, para. 12, in which it emphasized:

> ". . . The test here is whether the Applicant is capable, notwithstanding her illness, of performing other duties which the 'Employer' may 'reasonably' require of the Applicant and which are compatible both with her experience and the Bank's needs."

(Para 13.) In *A*, the WBAT reversed the PBAC's denial of the applicant's request for disability retirement, distinguishing *Courtney (No. 2)* on the basis that his incapacity was not "total"; while it prevented him from continuing to travel in his work, it did not preclude his undertaking other assignments that did not require travel. By contrast, with respect to the applicant in *A*, "[t]he medical record evidences, however, that the Applicant cannot per-

form any duty *comparable* to those of her former position with the Employer." (*A*, para. 13.) (Emphasis supplied.) On the ground that ". . . it is unlikely that the Applicant would ever function effectively in another job in the Bank which is *similar* to the one which she held," (para. 18) (emphasis supplied), the WBAT in *A* concluded that the applicant was totally incapacitated and that such incapacity was likely to be permanent.

138. Accordingly, the standard that appears to be applied by the WBAT is that to be "reasonable" the duties must be compatible with the staff member's experience and the organization's needs. Nonetheless, the WBAT has not addressed expressly the question whether duties that the staff member might reasonably be called upon to perform could include those involving some additional training.

139. Applicant contends that Respondent induced error on the part of the Administration Committee by claiming, without sound analysis or factual data, that there were positions that she was qualified to fill and that there was no actual matching of Applicant's education and skills to the positions. Moreover, Applicant contends, given her training and experience it would not be reasonable for the Fund to ask her to perform the duties of the positions it has listed, nor is it likely that she would be selected for such positions:

> "14. On the matter of the positions the Fund submitted it could reasonably expect me to perform. . . . Although these positions are at the same grade level, it is implausible to suggest that the Fund would in reality expect me to be able to perform them. One of the reasons I was separated was that I had no transferable skills. . . . The selection of alternative positions based solely on the same grade level does not take into account the educational requirements and experience needed, which clearly would exceed 'some training.'
>
> 15. The standard requirement for verbatim reporting is a two-year associate diploma in court reporting, with the key requirements being proficiency and on-the-job experience. In other areas of the Fund, however, the requirement is for university degrees and/or years of experience in the relevant field. I do not have a university degree or experience in the positions identified. In addition 'The Legal Representative indicated that the participant would have to compete for the position according to the Fund's standard vacancy application process.' (p. 2 [of Final Minutes of Administration Committee, May 9, 2002]) Considering the caliber of candidates who apply for and are offered positions in the Fund, there is no way the Fund would realistically consider me capable of performing any of the positions put forward. Therefore, the Fund's assertion that it could reasonably expect me to perform such duties is, in fact, unreasonable."

(Statement of Ms. "J", November 22, 2002.)

140. The Administrative Tribunal concludes that in view of Ms. "J"'s highly specialized but limited training and experience, it would not be reasonable to expect the Fund to ask her to perform the duties of any of the positions identified by the Compensation and Benefits Policy Division of the Fund's Human Resources Department, i.e. Editorial Officer, Executive Board and Member Services Officer, Public Affairs Officer, Information Officer, Translation Editorial Officer, or Publications Officer. Nor is it clear that Ms. "J" would be qualified to perform any of these jobs with a reasonable amount of additional training and accommodation, as the Fund maintains. It is unclear whether the Fund contemplated providing the requisite training and what accommodation could be made.

141. A review of the job standards for the listed positions suggests that these positions would appear to contemplate a candidate for employment whose background differs significantly from one qualified to perform the functions of a Verbatim Reporting Officer. As Applicant notes, a college degree is not required for the VRO position. With regard to the other positions, qualifications generally include educational development "typically acquired through the completion of an advanced university degree," although the requirement may include or be supplemented by work experience.

142. For example, the Editorial Officer's qualifications (at Grade A9) are stated as follows:

> **"DESIRABLE QUALIFICATIONS**
>
> **Training and Experience**
>
> For Grade A9, educational development typically acquired through the completion of an advanced university degree in a field related to the editorial officer's work, or equivalent, including and/or supplemented by work experience, is required. A university degree in economics or equivalent experience is desirable.
>
> . . . .
>
> **Knowledge, Skills and Abilities**
>
> For Grade A9, thorough knowledge of Fund editing standards. Specialized knowledge of writing and editing, and understanding of Fund policies and operations.
>
> Thorough knowledge of editorial techniques and practices.
>
> May be required to pass written test."

Similarly, for the Public Affairs Officer (at Grade A9):

> **"Training and Experience**
>
> For Grade A9, educational development, including and/or supplemented by work experience, typically acquired through the completion of an advanced university degree program in economics, political science, international relations, or related field, is required.
>
> . . .
>
> **Knowledge, Skills and Abilities**
>
> At Grade A9, good knowledge of the legislative process in the U.S. Congress.
>
> Some knowledge of the current economic, monetary, and political issues, and the Fund's role, functions and history.
>
> Ability to communicate effectively, orally and in writing, and to synthesize reports of interest to management."

143. Similar educational qualifications have been posted for Publications Officers vacancies. It may also be noted that the Information Officer position has been re-graded so that it is currently listed as a A11/A12/A13 position.

144. The position that might be said to dovetail most closely with Applicant's experience is the Executive Board and Member Services Officer, as Ms. "J"'s experience as a Verbatim Reporting Officer involved working with the Executive Board. Positions within this job ladder ". . . provide support and guidance to Executive Directors, Alternates, and Advisors in connection with official, personnel, and protocol matters, and with human resources matters pertaining to their assistants." For grade A9, the educational qualifications are as follows:

> "For Grade A9, educational development, typically acquired by the completion of an advanced university degree in business administration, economics, information technology, public administration and government, or related field, or equivalent, is required. Alternatively, a minimum of three years of experience in a related position at Grade A8, or equivalent, is required."

145. The inclusion of the Translation Editorial Officer position on the list of positions for which Ms. "J" was said to qualify, "with a reasonable amount of training and accommodation," is particularly anomalous in light of the discussion of the Administration Committee, as reported in its Final Minutes, that Applicant would not be qualified for a position requiring facility with foreign languages:

> "There followed a discussion of the jobs identified on the list developed by CBD. The Chair asked why the proofreader's job was not on the list.

> The Division Chief of CBD replied that the proofreader's job was a lower grade than the participant's grade and was in the Bureau of Language Services. The job would require a facility with languages other than the participant's native language which she did not have."

(Final Minutes of Administration Committee, May 9, 2002.) Nonetheless, the "Job summary" for the Translation Editorial Officer reads: "Under the general supervision of the Senior Translation Editorial Officer, proofreads, indexes and edits any translated Fund publications and documents." Translation of routine documents is among the "[m]ain duties and responsibilities" of the position.

146. Finally, Applicant suggests that it is inherently unfair for the Fund to separate her from service for medical reasons on the basis that she has no transferable skills while at the same time denying that she is totally and permanently incapacitated under the terms of the SRP. Respondent has countered by differentiating the standards for disability retirement and separation on medical grounds as follows:

> ". . . in the most severe cases involving total and permanent disability, the staff member may receive a disability pension under the SRP as a substitute for the permanent loss of employability. If this standard is not met but the staff member is incapacitated and will not be able to perform the duties of his/her job in the foreseeable future, he/she may be separated for medical reasons, which triggers a mandatory payment of separation benefits based on the employee's length of service."

Accordingly, the Fund cautions that interpretation of the SRP must be made in light of the other safety nets provided to Fund staff in cases of medical disability.

147. It is noted that GAO No. 16, by its terms, contemplates that there will be SRP participants separated on medical grounds who will *not* qualify for disability retirement. Accordingly, Section 11.02 of that GAO requires that separation not be implemented until a determination on disability retirement has been made under the SRP, a determination which, in turn, affects entitlements to separation benefits. Therefore, under the Fund's internal law, separation for medical reasons cannot determine entitlement to a disability pension. Nonetheless, in the Tribunal's view, the factual circumstances surrounding the separation may be given weight in reviewing the soundness of the SRP Administration Committee's decision on an application for disability retirement. In this case, Applicant was deemed not to have skills that were transferable to other work within the Fund, as she ". . . had no other skills, not requiring the use of the computer or her hands, that would

have made it possible to accommodate . . . her in another position." (HRD Memorandum of May 1, 2002.) The question then arises of whether Ms. "J" was accordingly totally incapacitated for any duty that the employer might reasonably call upon her to perform or whether, as the Fund contends, she could be called upon to perform duties requiring some additional training.

148. The answer of the Administrative Tribunal to that question is that Ms. "J", while in contributory service, became totally incapacitated, not in the sense that she is incapable of working at all but that she is incapable of performing any duty that the Fund may reasonably call upon her to perform. The Tribunal is not convinced that there is any reasonable prospect of the Fund's calling upon Ms. "J" to perform any of the positions listed above, nor her particular function of Verbatim Reporting Officer. In the view of the Tribunal, the Fund is correct in stating that whether a current vacancy in a particular type of position exists is not determinative. But what is dispositive is that the Fund has not succeeded in demonstrating that there is any genuine prospect of the Fund's in the future calling upon Ms. "J" for the performance of any duty, given Applicant's experience and the needs of the organization. Thus, in respect of the performance of any such duty, Ms. "J" is totally incapacitated.

2. Having found that Applicant is "totally incapacitated" under the terms of the Plan, is that incapacity "likely to be permanent"?

149. Having found that Ms. "J" is totally incapacitated for the performance of any duty that the Employer may reasonably ask her to perform, the Tribunal next must consider whether that incapacity is "likely to be permanent." (SRP Section 4.3 (a) (ii).) "Disability must first be total and, secondly, likely to be permanent (that is, not transitory) and both elements are related to any duty that the participant might reasonably be called upon to perform." *Courtney (No. 2)*, para. 33.

150. While the Administration Committee in its Decision on Review held that Ms. "J" was not totally incapacitated under the standards of the Plan, it is striking that it nonetheless concluded that her medical condition was likely to be permanent:

> "Taking all of the circumstances into account, the Committee concluded that *while your condition is likely to be permanent*, it is not disabling to the extent that you are totally incapacitated from performing any duties that the Fund might call upon you to perform."

(Emphasis supplied.) At the same time, the Committee also expressed the view that the condition was "treatable."

151. While the Administrative Tribunal recognizes that the schemes for medical separation, workers' compensation and disability retirement are distinct, it nevertheless finds it appropriate to observe that the finding by the Administration Committee that Applicant's condition was "likely to be permanent" is consistent with her separation for medical reasons under GAO No. 16, Section 11, which applies "[i]n case of permanent incapacity." (Section 11.01.) Likewise, Ms. "J"'s workers' compensation claim arises under GAO No. 20, Section 5, which provides compensation in the event of "permanent disability." The dispute between the parties with respect to workers' compensation, it will be recalled, centers on whether Ms. "J"'s *permanent* disability is "total" (Section 5.01.1) or "partial" (Section 5.01.2).

152. In its pleadings in the Administrative Tribunal, Respondent contends that the weight of the medical evidence before the SRP Administration Committee showed that Ms. "J" is neither totally *nor permanently* incapacitated for the performance of any duty which the Fund might reasonably ask of her. Likewise, the Medical Advisor consistently took that view in his series of reports to the Committee on Ms. "J"'s application for disability retirement. (*See* reports of August 29, 2000 and, February 16, 2001.) In his final report to the Committee of April 25, 2002, he stated: "She is not totally or permanently incapacitated from performing tasks that the IMF might reasonably ask of her."

153. The Medical Advisor's conclusion as to the lack of permanency of Applicant's medical condition was tied to his crediting the view of the reviewing psychiatrist, who opined:

> "I do not believe the patient is permanently disabled, as I believe that continued psychotherapy and the use of psychotropic medication may well ameliorate her condition to the point where she is able to once again resume a productive career as a verbatim reporter."

The Final Minutes of the Administration Committee's meeting of May 9, 2002 indicate that the Medical Advisor confirmed his opinion that ". . . the expectation was that she could improve over time," based on the theory that the condition was primarily psychosomatic. It should be noted that there is no evidence in the record bearing on the question of whether Ms. "J"'s impairment, if psycho-physiological, would be more (or less) responsive to treatment than if the condition were purely physical in origin. Moreover, the applicable Plan provision treats physical and mental incapacity identically for purposes of eligibility for disability retirement.

154. The opinions of the Medical Advisor and the reviewing psychiatrist may be contrasted with the view expressed by Ms. "J"'s treating rheumatolo-

gist on May 30, 2001 that although he was "hopeful" that Ms. "J" would be able to return to ". . . some basic typing in a limited capacity when resolution of her current condition occurs. The time of that resolution is indeterminate." Likewise, Applicant's own evaluation of her condition as of March 2002 was that her ". . . main concern was that I do not know whether my condition will remain stable, continue to improve, or deteriorate." She reported that her ". . . pain levels have become more manageable. . . " but that ". . . regular activities such as bathing, dressing, and cleaning the house can cause an instant flare-up of my condition," and that there was no time when she was not aware that something was wrong with her hands.

155. In *A*, the WBAT considered a case in which the dispute between the parties was not as to the existence of the applicant's incapacity but whether the incapacity was likely to be permanent. The Medical Advisor's opinion was that treatment would restore the applicant's work capability and that she was not permanently incapacitated. The WBAT reversed the PBAC's decision (which was based on the Medical Advisor's conclusion) because the medical records showed that the applicant suffered from a severe and long-standing condition:

> "In light of such a long history of severe depression and psychological disorders, which seemed to have deteriorated with the years, the Applicant may be regarded as totally incapacitated for the performance of any duty with the Bank which she might reasonably be called upon to perform and such incapacity is 'likely to be permanent.'"

(Para. 17.)

156. In concluding that the incapacity was likely to be permanent, the WBAT noted:

> ". . . Section 3.4(a) does not say that incapacity must be permanent but only 'likely' to be permanent. The test is confirmed by Section 3.4(d) of the Staff Retirement Plan which empowers the Bank to terminate the disability pension on medical examination or other satisfactory evidence that the incapacity of a retired participant has wholly ceased or that he or she has regained the earning capacity which he or she had before the disability."

(Para. 17.) Similarly, in this case, Ms. "J" has noted:

> "My main concern is that I do not know whether my condition will remain stable, continue to improve, or deteriorate. Only time will tell. Therefore, in my appeal letter, I requested access to a disability pension until I was able to support myself. I am optimistic that this day will come, but I cannot see it in my short-term future. Another fear is that, even with

> qualifications, I will not be able to secure a position because of my existing condition."

(Applicant's Memorandum of March 8, 2002)

157. The evidence shows that Ms. "J"'s condition, impairing the use of her hands in repetitive motion, has persisted following injury in 1999. While there may have been some improvement, the Fund concedes that her repetitive use impairment will prevent her from carrying out the duties of a Verbatim Reporting Officer. Given that the focus of the dispute in this case is whether Applicant may be reasonably asked to perform other duties within the Fund, the question arises whether the fact that Applicant is pursuing studies in a community college with the aid of voice-activated software may affect the determination of whether her incapacity is "likely to be permanent." In the view of the Administrative Tribunal, it is likely that Ms. "J"'s condition will be permanent in the sense that she will remain unable to be appointed to a position in the Fund. Moreover, the Tribunal takes note of the provision of the Staff Retirement Plan, set out in Section 4.3(d) that, if the Administration Committee ". . . shall find, as a result of a medical examination or on the basis of other satisfactory evidence, that the incapacity of a retired participant . . . has wholly ceased or that he has regained the earning capacity which he had before such incapacity, his disability pension shall cease. . . ." Equally, in the event of partial recuperation, there may be proportionate reduction of the disability pension.

Was the Administration Committee's Decision Taken in Accordance with Fair and Reasonable Procedures?

158. In addition to seeking reversal of the Administration Committee's decision on the basis that the Committee erred in its interpretation and application of the requirements of the Staff Retirement Plan to the facts of her case, Ms. "J" seeks to impugn the fairness of the procedures by which the decision was taken. As considered *supra*, the question of whether the Administration Committee's decision has been taken in accordance with fair and reasonable procedures is one of the elements of the standard of review to be applied by this Tribunal to decisions of the SRP Administration Committee on disability retirement. The World Bank Administrative Tribunal has held that ". . . a decision by the PBAC may also be overruled, among other reasons, if the requirements of due process are not observed." (*Shenouda*, para. 36.)

159. Moreover, the IMFAT's authority to review the procedural fairness of any decision contested therein is found in the requirement of Article III, second sentence, that it apply ". . . the internal law of the Fund, including

generally recognized principles of international administrative law concerning judicial review of administrative acts." The significance of fair process as a general principle of international administrative law is highlighted by the Statutory Commentary:

> ". . . 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.)

160. Applying this principle in *Ms. "C"*, the Tribunal awarded compensation for procedural deficiency while sustaining the contested decision, the non-conversion of the applicant's appointment from fixed-term to regular staff. (Para. 44.) The Tribunal concluded that it was a "lapse in due process" for the applicant not to have been afforded a meaningful opportunity to rebut adverse evidence regarding her performance. (Paras. 41–42.) The Tribunal further observed that ". . . adequate warning and notice are requirements of due process because they are a necessary a prerequisite to defense and rebuttal," (para. 37), citing *Safavi v. The Secretary General of the United Nations*, UNAT Judgement No. 465, paras. VI–VIII (1989). *See also Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999), para. 94. The principle of *audi alteram partem* was invoked more recently by this Tribunal in *Mr. "P"(No. 2)*, para. 152, in which it reaffirmed that ". . . 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."

161. The case of Ms. "J" raises the issue of what process is due to applicants for disability retirement under the SRP, whether the Rules of Procedure of the Administration Committee comport with the requirements of international administrative law, whether the Rules have been followed in her case, as well as whether there are any other practices or procedures of the Administration Committee evidenced in this case that call into question the procedural fairness of the decision-making process.

162. In considering the procedural rights of applicants for disability retirement, it is to be borne in mind that a retirement pension (whether for disability or otherwise) is not merely a "benefit" conferred by the Fund on its staff. The pension Plan is a joint insurance scheme. While the Fund contributes substantially to the Plan and is responsible for its administration, the SRP participant likewise makes regular and significant contributions

from earnings over the course of a career to ensure his entitlement, as authorized by the terms of the Plan, to income replacement at early retirement, normal retirement or in the event that he becomes totally and permanently incapacitated. Accordingly, the applicant's stake in the outcome of the decision-making process deserves a high level of procedural protection. The Committee itself may be regarded as representing the Plan's other stakeholders, protecting the assets of the Plan in the interests of the other participants similarly entitled to the Plan's benefits and of the Fund as a major contributor to those assets. That the process for deciding on applications be a fair and reasonable one is an interest shared by all Plan participants and the organization.

163. The World Bank Administrative Tribunal has had occasion to comment on the application of principles of fair procedure and transparent decision making in the context of its review of disability retirement decisions:

> "The Tribunal notes, *inter alia* that: the PBAC does not give the reasons for rejecting an application for disability pension; the opinion of the Medical Advisor is normally not made available to the applicant (at least before the deliberations of the PBAC); a representative of the applicant is not entitled to participate in the proceedings; the PBAC's decision-making and approval of benefits is excessively tied to the opinion of the Medical Advisor; there is apparent reluctance to utilize independent medical experts in the pertinent field; and there is great uncertainty as to the meaning of a disability to do Bank-related work, especially in light of the Bank's reference in its pleadings to the possibility of a staff member's performing assignments at home during very brief, flexibly scheduled work periods. These are all elements that can readily interfere with due process and with the transparency of decision-making by the Bank."

(*Shenouda*, para. 37.) It may be observed that some of the same concerns regarding procedural fairness raised by the WBAT are the subject of controversy in the present case.

164. Ms. "J"'s procedural arguments may be summarized as follows. Applicant contends that she was denied due process by the Administration Committee, which acted on the opinion of its Medical Advisor who did not actually examine Applicant, was not required to give oral testimony or to be cross-examined by Applicant's representative, and whose opinion was not given to Applicant until after the Committee's decision was taken. The Committee acted on an incomplete record, its Decision did not state the reasons therefor, and, contrary to its Rules of Procedure, the Decision was not taken until almost a year after Ms."J"'s application. The Committee's decision making was improperly influenced by conflicts of interest.

165. Amicus Curiae takes the view that due process requires that the Administration Committee review the records of an applicant's treating physicians so that it may determine whether the Medical Advisor acted improperly or arbitrarily in reaching his conclusion.

166. By contrast, Respondent maintains that Applicant was not denied due process and that the Administration Committee acted in accordance with its Rules of Procedure. The Committee is not required to hold oral hearings or to review directly the underlying records of the treating physicians, but may do so if it deems such review necessary. The Committee may suspend deadlines to seek additional information. The Committee's decision making was not affected by any conflict of interest. In addition, Respondent contends that the Administration Committee properly relied on the expert advice of its Medical Advisor. The Committee has no grounds to act in a manner inconsistent with the Medical Advisor's recommendation, absent an indication that he reached his conclusion in an arbitrary or improper manner. Furthermore, records now before the Administrative Tribunal provide no basis for concluding that the Medical Advisor's opinion was arbitrary or not well founded. In this case, the Administration Committee also considered the findings of three independent medical evaluators.

167. It may be observed that Rule VI of the Administration Committee's Rules of Procedure appears to give the Committee considerable discretion to ". . . inquire about all information it needs for an equitable consideration of a Request," including the possibility of holding oral hearings with cross-examination. Rule VI provides in its entirety:

"RULE VI

Proceedings

> 1. The Committee will inquire about all information it needs for an equitable consideration of a Request. In considering a Request, the Committee may rely on written submissions or it may decide to convene an oral hearing, and decide who may attend such hearing. The Secretary will provide the Requestor with reasonable notice of the date of any proceeding in the matter, except in the circumstances described in Rule II, paragraph 5.
>
> 2. Upon request by the Requestor or upon its own initiative, the Committee may determine that any oral hearing or the evidence presented shall be confidential and the extent and modalities of such confidentiality. Any non-confidential information relied on by the Committee shall be subject to review and discussion, including cross-examination in the case of oral testimony. In the event that the Committee recognizes the confidentiality of any evidence, and a waiver of confidentiality cannot be obtained, then

> the Requestor shall be given an opportunity to review and respond to a summary of that evidence which shall be prepared by the Secretary.
>
> 3. The Requestor and any other party may be represented by counsel, each at his own expense.
>
> 4. The deliberations of the Committee shall be treated as confidential. Unless the Committee decides otherwise, the minutes of its deliberations shall be confidential and shall not be made available to the Requestor or any other party."

There is room to question whether the Administration Committee's implementation of this Rule in the case of Ms. "J" afforded Applicant sufficient and timely opportunity for rebuttal.

168. Rule VII, para. 1 of the Administration Committee's Rules of Procedure requires:

> "1. Each Decision shall be in writing, stating the reasons on which it is based and any action that the Committee may take or recommend."

In the case of Ms. "J", the Committee's initial Decision denying her application for disability retirement did not set forth any reasons for the Decision. Instead, it simply recited the standard for disability retirement and announced that the Committee had concluded that she did not meet that standard. This lapse in process not only appears to be in violation of the text of the Rule[31] but also has the effect of denying Applicant an opportunity for meaningful response.

169. It may be further noted that para. 3 of the same Rule provides:

> "Upon request, the Secretary of the Committee will furnish to the Requestor copies of any non-confidential documents and a summary, prepared by the Secretary, of confidential evidence that it considered in making its decision."

Ms. "J" apparently availed herself of this provision. During the pendency of her request for review with the Administration Committee, Applicant had the opportunity to examine and respond to the report of the Medical Advisor that the Committee had before it in rendering its initial Decision denying disability retirement. This opportunity, however, came long after the Medical Advisor's conclusions had been submitted and acted upon by the Committee. Moreover, considerable additional medical evaluation was undertaken by the Committee during the pendency of Ms. "J"'s applica-

[31]International administrative tribunals have emphasized the importance of observance by an organization of its procedural rules. *See D'Aoust*, para. 23; *Ms. "Y" (No. 2)*, para. 55.

tion for review. Applicant did not have the opportunity to respond to this additional medical assessment. The question therefore arises whether the Administration Committee's procedures in her case afforded Applicant reasonable notice and opportunity to be heard.

170. Applicant also raises other procedural issues of concern. For example, was the decision of the Administration Committee improperly influenced by information formally communicated to it by its Secretary that the workers' compensation Claim Administrator had made a finding of partial rather than total loss of function?

171. The Tribunal has decided Ms. "J"'s Application in her favor on substantive grounds. In this case, the Tribunal finds no need to pass upon her procedural complaints. But it observes for the future guidance of the Administration Committee that the Committee may wish to consider the following points.

172. The Administration Committee may consider enabling an applicant to submit observations in a current and timely way upon any medical reports and opinions submitted to or rendered by the Medical Advisor in the case.

173. Since in the Tribunal's view the applicant is entitled to see and comment upon all medical reports and opinions submitted to or rendered by the Medical Advisor in the case, the members of the Administration Committee should be entitled themselves to review those medical reports, with the object of weighing fully the views of both treating and reviewing physicians and evaluating the conclusions of the Medical Advisor.

174. Additionally, there might be room for consideration by the Administration Committee of review of an Applicant's condition, and opinions relating to it, not by a single Medical Advisor but by a Board of Medical Advisors, as in other international organizations such as the ILO and UNESCO. One member would be designated by the Applicant, a second by the Administration Committee, and the third by agreement between the two so designated. The Tribunal observes that this tripartite model of medical evaluation already is embodied in the Fund's internal law in cases of medical separation at the Fund's initiative.[32]

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[32]GAO No. 13, Rev. 5 (June 15, 1989), Annex I provides in pertinent part:

> "2.03.1 A panel of medical experts shall be constituted in the following way: the Director of Administration and the staff member shall each appoint a panel member, and a third panel member shall be selected jointly by the first two members. . . ."

See supra, The Legal Framework; Separation of a Staff Member for Medical Disability.

175. A further consideration that may be borne in mind by the Administration Committee is that the advice of the Medical Advisor (or of any Board of Medical Advisors) should be confined to medical questions and not extend to the ultimate conclusion of whether the applicant is, or is not, totally and permanently incapacitated for the performance of any duty which the Fund may reasonably call upon him to perform. Rather, the drawing of that conclusion should be the function of the Administration Committee.

176. Finally, the applicant should be permitted to comment upon any statements of Fund officers regarding the applicant's capacity to perform any particular duty that the Fund might maintain that he or she might reasonably be called upon to perform.

Remedies

177. In her pleadings, Applicant requests that the Tribunal grant as relief: a) disability retirement retroactive to March 5, 2001; b) two years net salary as compensation for alleged mental suffering caused by unfair treatment; and c) legal costs.

178. The Tribunal's remedial authority is provided by Article XIV of the Statute, which states in its entirety:

> ***"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."

179. In exercise of the foregoing authority, the Tribunal decides that the decision of the Administration Committee denying a disability pension to Ms. "J" shall be rescinded and orders that the disability pension be granted.

180. Since the Tribunal has felt it unnecessary to pass upon the Applicant's claim of procedural unfairness, it awards no separate compensation to the Applicant in this regard.

181. As to Applicant's request for legal costs, it is noted, consistent with Section 4 of Article XIV, that if the Tribunal concludes that the application is "well-founded in whole or in part," reasonable legal costs may be awarded ". . . 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." In the case of *Ms. "C"*, the Tribunal awarded partial costs, taking account of the submissions of the parties, the Statutory criteria, and the limited degree to which the applicant in that case was successful in comparison with her total claims. (*Assessment of compensable legal costs pursuant to Judgment No. 1997-1*, IMFAT Order No. 1998-1 (December 18, 1998).)

182. In the present case, Applicant has submitted a detailed statement of hours and services as of December 18, 2002. In a submission of March 17, 2003, Respondent set forth its preliminary observations, while requesting the opportunity to comment more fully on the request for costs after the Tribunal had rendered its Judgment on the merits of the case.

183. The Tribunal has found Ms. "J"'s Application on the merits to be well-founded. Accordingly, pursuant to Article XIV, Section 4 of the Statute, the Fund shall pay Applicant the reasonable costs of her legal representation. The Tribunal will assess the amount of such compensable legal costs following the submission of further observations by Respondent and an

opportunity for response by Applicant, according to a schedule to be transmitted with this Judgment.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides:

1. The decision of the Administration Committee denying Applicant a disability pension is rescinded and it is ordered that a disability pension be granted to Ms. "J", retroactive to the date of Applicant's retirement.

2. The request of Applicant for two years salary to compensate for alleged unfair treatment is denied.

3. The Fund shall pay Applicant the reasonable costs of her legal representation, in an amount to be assessed by the Tribunal following the further submissions of the parties according to the schedule transmitted with this Judgment.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
September 30, 2003

JUDGMENT NO. 2003-2

Ms. "K", Applicant v. International Monetary Fund, Respondent

(September 30, 2003)

Introduction

1. On September 29 and 30, 2003, 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. "K", a former staff member of the Fund.

2. Ms. "K" contests the decision of the Administration Committee of the Staff Retirement Plan ("SRP" or "Plan") denying her application for disability retirement. The Administration Committee concluded that Ms. "K" had failed to establish, as required by the terms of the Plan, that she is totally and permanently incapacitated for any duty that the Fund might reasonably ask her to perform.

3. Applicant contends that this decision is in error, that the Administration Committee improperly interpreted and applied the standard for disability retirement, and that the decision was tainted by procedural irregularity. Respondent for its part maintains that Applicant has not established any factual or legal basis for overturning the Committee's decision, which correctly applied the standard for disability retirement and was taken in accordance with fair and reasonable procedures.

The Procedure

4. On August 15, 2002, Ms. "K" 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 para. 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The Application, hav-

ing been brought into compliance within the indicated period, is considered filed on the original date.[1]

5. The Application was transmitted to Respondent on September 5, 2002. On September 9, 2002, pursuant to Rule XIV, para. 4,[2] the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Ms. "K"'s Application on October 21, 2002.

6. Applicant submitted her Reply on November 25, 2002. The Fund's Rejoinder was filed on December 27, 2002.

7. 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." Neither party in this case requested oral proceedings and the Tribunal did not find them to be required.

The Legal Framework

8. Before reviewing the facts of the case of Ms. "K", the legal framework within which these facts arise may be recalled, in particular the pertinent provisions of the Staff Retirement Plan. In addition, although the administrative act contested by Ms. "K" in the Administrative Tribunal is the decision of the SRP Administration Committee denying her application for disability retire-

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[1]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.

. . .

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. . . . "

[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."

ment, the requirements of the Fund's internal law relating to the separation of staff for medical reasons are reviewed as well, as they are referenced in the factual elements of the case and in the contentions of the parties.

Disability Retirement under the IMF Staff Retirement Plan

9. Disability retirement from the IMF is governed by Section 4.3 of the Staff Retirement Plan. SRP Section 4.3(a) sets forth the criteria for granting a request for a disability pension:

> **"4.3 Disability Retirement**
>
> (a) A participant in contributory service shall be retired on a disability pension before his normal retirement date on the first day of a calendar month not less than 30 nor more than 120 days immediately following receipt by the Administration Committee of written application therefor by the participant or the Employer; on the condition that the Pension Committee must find, on the recommendation of the Administration Committee and the certification of a physician or physicians designated by the Administration Committee, that:
>
> (i) such participant, while in contributory service, became totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform;
>
> (ii) such incapacity is likely to be permanent; and
>
> (iii) such participant should be retired."

The formula for calculation of the disability pension is given 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."

10. Sections 4.3(c), (d) and (e) provide for the possibility of periodic medical examination of the retired participant and for the discontinuance or reduction of the disability pension based on a finding that the incapacity has wholly or partially ceased:

"(c) The Administration Committee may require a retired participant who is receiving a disability pension and who has not reached his normal retirement date to be medically examined from time to time, not more often than once a year, by a physician or physicians designated by the Administration Committee. Such examination shall be made at the home of such retired participant, unless some other place shall be agreed upon by him and the Administration Committee. If such a retired participant shall fail to permit such an examination to be made, his disability pension may be discontinued by the Administration Committee until he shall permit such examination to be made and, in the discretion of the Administration Committee, if he shall fail to permit such examination to be made within a period of one year from the mailing or other sending to him, at his address as it appears on the records of the Administration Committee, of request therefor by the Administration Committee, his incapacity may be deemed to have wholly ceased, and he may be deemed to have withdrawn from the Plan as of the date when his disability pension was discontinued, with the eligible service accrued to the date of his disability retirement.

(d) If the Administration Committee shall find, as a result of a medical examination or on the basis of other satisfactory evidence, that the incapacity of a retired participant (who has not reached his normal retirement date), on account of which he is receiving a disability pension, has wholly ceased or that he has regained the earning capacity which he had before such incapacity, his disability pension shall cease, and if the Committee shall find that such incapacity has partly ceased for the performance of any work which he might reasonably be required to do, and that his earning capacity (in any such work) has been partially regained, his disability pension shall be reduced by the Administration Committee in a reasonable amount. If the disability pension is so discontinued or reduced and the retired participant shall again become incapacitated exclusively through and because of the same incapacity, his disability pension shall be restored upon the same conditions that applied to the original pension and the granting thereof, subject, however, to the provisions of subsection (e) of this Section 4.3.

(e) If a disability pension is discontinued pursuant to subsection (c) or (d) of this Section 4.3 and shall not be restored pursuant to subsection (d) of this Section 4.3 within a period of five years from such discontinuance, and if such retired participant shall not within such period again become a participant, he shall be deemed to have withdrawn from the Plan as of the date his disability pension was discontinued, with the eligible service accrued to the date of his disability retirement, and he shall be entitled to the benefits provided in Section 4.2 or Section 4.5(a), (b), or (c), whichever is applicable."

Finally, Section 4.3(f) defines "normal retirement date" for purposes of disability retirement:

"(f) For purposes of this Section 4.3, normal retirement date shall mean the first day of the calendar month next following the 65th anniversary of his date of birth, or the date of such anniversary if it shall fall on the first day of a calendar month."

Separation of a Staff Member for Medical Disability

11. Separation of a staff member in the case of medical disability—as distinguished from according such staff member a disability pension—is provided for by GAO No. 13, Rev. 5 (June 15, 1989) at Annex I. Separation may be either at the staff member's initiative or at the Fund's initiative. Section 1 provides for separation at the staff member's initiative as follows:

"Section 1. Separation at the Staff Member's Initiative

1.01 A staff member may request that he be separated from the Fund on grounds of medical disability. He shall address the request to the Director of Administration [now the Director of Human Resources] in writing. The staff member must be ready to present medical evidence in support of his request and must also be willing to undergo any examinations which the Fund's medical advisors deem necessary."

12. Section 2 provides for separation at the Fund's initiative. In the case of a staff member in sick leave status, such separation may be effected if ". . . on the basis of medical advice the Director of Administration has formed the opinion that the staff member will not be able to return to duty in the foreseeable future." (Section 2.01.1.) Separation at the Fund's initiative may also take place when

". . . over a prolonged period the staff member has been prevented, for medical reasons, from performing the duties assigned to him in an acceptable manner, and if another position suitable for the staff member is not found in accordance with the provisions of GAO No. 11 (Salary Administration), the Director of Administration shall seek the advice of the Fund's Health Services Department on the prospects for improvement within a reasonable period of time. If, on the basis of this advice, the Director of Administration forms the opinion that the staff member should be separated for medical reasons, the procedures outlined below shall be initiated."[3]

(Section 2.01.2.)

[3]The referenced provisions of GAO No. 11, Rev. 3 (January 14, 1999) state:

"6.04 *Performance Impeded for Medical or Other Personal Reasons*. If it is determined that, for medical or other personal reasons beyond his or her control, the staff member is unable to perform in full the duties of his or her position, and if no other vacant position is available at the same grade with duties that the staff member could reasonably be

13. Section 2.02 sets forth the procedures to be followed in case of separation for medical reasons at the Fund's initiative, including notification to the staff member of the right to object to the proposed separation:

> "2.02.1 When the Director of Administration has reached the opinion that a staff member should be separated for medical reasons, he shall communicate this opinion to the staff member in writing, stating the reasons for his opinion and specifying the last date by which any objection on the part of the staff member must be received by the Fund."

Under Section 2.02.2, if no objection is notified to the Fund, the procedures of GAO No. 16 take effect. (*See below*.) In the case in which the staff member does file an objection to the proposed medical separation, an opinion is to be rendered by a panel of medical experts (one designated by the Administration, one by the staff member and the third selected by the other two) as to the staff member's condition in the context of the work demands placed on him. (Section 2.03.) Pursuant to Section 2.03.4, "[n]ormally, the panel shall examine the staff member personally." The Director of Administration thereafter decides on the basis of the medical opinion rendered by the panel of experts whether there are sufficient grounds for medical separation. (Section 2.04.1.)

14. Finally, GAO No. 13, Annex I, Section 2.04.2 describes the interplay among GAO No. 13, GAO No. 16 and SRP Section 4.3 as follows:

> "2.04.2 If the Director of Administration decides that the staff member should be separated for medical reasons, the procedures in GAO No. 16 shall be followed. In the case of participants in the Staff Retirement Plan, this will also include a determination of eligibility for a disability pension."

Accordingly, GAO No. 16, Rev. 5 (July 10, 1990), Section 11 describes the procedures effective "[i]n case of permanent incapacity, when a determination has been made in accordance with the provisions of Annex I to General Administrative Order No. 13 that a staff member shall be separated for

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expected to perform, a staff member may, as an alternative to separation, be assigned to a vacant position at a lower grade where the staff member could be expected to perform the duties in full. Such an assignment will be subject to such special terms and conditions relating to the tenure of the position as the Managing Director or the Director of Administration, as appropriate, may decide after consultation with the Head of the relevant department.

6.04.1 The determination that a staff member is unable to perform the duties of his or her position shall be made in accordance with the provisions of Annex I to General Administrative Order No. 13, Rev. 5."

medical reasons. . . . " It is noted that the terms of GAO No. 16, Section 11.02 require that separation of a staff member who is a participant in the SRP shall not be implemented until a determination has been made under the Plan as to whether or not the participant will receive a disability pension. In the circumstance that the staff member separated for medical reasons does not receive a disability pension, Section 11.04 provides that he will be automatically granted a separation payment from the Separation Benefits Fund.[4]

The Factual Background of the Case

History of Employment

15. Ms. "K", who served the Fund in the capacity of a Staff Assistant, was first hired on a contractual basis in 1985 and became a member of the staff in December 1986. Beginning in 1993, Ms. "K" experienced a series of illnesses resulting in intermittent absences and periods of extended sick leave. In August 1999, Applicant began a period of extended sick leave (at full pay) as a result of the condition for which she now seeks disability retirement.

16. Ms. "K"'s period of extended sick leave expired March 30, 2000. On April 1, 2000, she was placed on administrative leave with pay pending the outcome of her disability retirement application (filed December 20, 1999). Following the SRP Administration Committee's decision of March 14, 2001 denying the disability retirement application, Ms. "K" was separated from the Fund pursuant to the procedures provided in GAO No. 16, Rev. 5. As a result of the length of her service, Ms. "K" received the maximum 22½ months separation benefit, which expired June 7, 2003.

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[4]Such payment is calculated as follows:

> "4.06 *Payments Under the Separation Benefits Fund.* Whenever, under this Order, a staff member is entitled to a payment on separation from the Separation Benefits Fund (separation for medical reasons without access to a disability pension, abolition of position, reduction in strength, or change in job requirements), the payment shall be in an amount equivalent to one and one-fourth months' salary for each year of service, subject to a maximum that is the smaller of:
>
> (a) the equivalent of 22-1/2 months' salary; and
>
> (b) the amount of salary that would otherwise have been payable to the staff member between the last day on duty and his mandatory retirement age of 65.
>
> The salary rate used for calculating the payment shall be the salary the staff member is receiving on the last day on duty; [footnote omitted] and length of service shall be computed to the nearest full month served."

Applicant's Request for Disability Retirement and Report by Medical Advisor

17. On December 20, 1999, Ms. "K" filed with the Administration Committee of the Staff Retirement Plan a Request for disability retirement.

18. On January 26, 2001, the Medical Advisor to the SRP Administration Committee delivered his report on Ms. "K"'s condition. The Medical Advisor reviewed Ms. "K"'s medical history, which included treatment and surgeries for breast cancer, as well as "depressive episodes resulting in suicide attempts." He noted that she has been diagnosed with "borderline personality" but had not undergone psychotherapy of "sufficient intensity and frequency" to treat the condition. He also observed that "[w]orking at the IMF has heightened her feeling of vulnerability, which due to her personality structure [has] been transformed into persecutory feelings." In the Medical Advisor's view, "[a]lthough she has the cognitive capacity to work at a job similar to the one she performed at the IMF, she lacks the motivation to seek to return to work with the IMF or to seek employment elsewhere." The Medical Advisor concluded his report by offering the following Opinion and Recommendation:

> **"OPINION:**
>
> The independent psychiatric evaluator has diagnosed Mrs. ["K"] with a 'borderline personality' with dissociative features. 'Borderline Personality' is a characterologic disorder hallmarked by a pervasive pattern of unstable and intense interpersonal relationships. It is characterized by alternating idealization and devaluation of relationships; associated with recurrent suicidal gestures or threats; marked reactivity of mood, such as irritability, and transient stress related paranoid ideation or disassociation. Treatment may be difficult because a person with the disorder often adopts the attitudes and behaviors of others, giving the impression of being fairly well adjusted. Medication usually can control the depressive aspects of the condition. The problems with relationships may require that a person with the disorder to make an effort to change surroundings in order to bolster self-esteem.
>
> This primary characterologic disorder impairs Mrs. ["K"]'s ability to successfully perform, on a sustained basis, collaborative tasks because it causes her to perceive the IMF as demanding and insensitive. Nevertheless, it does not totally incapacitate her from performing tasks that the IMF might reasonably ask of her. Her other medical conditions are not thought to be major contributors to [her] impairments. Her depression is in remission. Her breast cancer has not recurred. Although intensive therapy would be expected to lessen the negative consequences of her characterologic disorder; given her personality type, she is unlikely to

substantially commit herself to long-term intensive psychotherapy. Under the circumstances, Mrs. ["K"] is unfit to perform satisfactorily her IMF job function because of the constellation of psychologic factors associated with her characterologic disorder.

Although not totally incapacitating, her characterologic disorder causes her to have difficulty effectively collaborating with co-workers. This impairment becomes more problematic when she is experiencing other problems, such as anxiety associated with breast cancer therapy, or when it becomes associated with depression. Such co-existent factors aggravate her coping ability. Her limited personal adaptive capabilities perpetuate her unfitness to successfully perform her job.

Furthermore, her capacity to satisfactorily perform her job function has been aggravated by her protracted absence from the IMF work environment. Her condition is permanent in that she will not be able to return to the IMF and perform satisfactorily.

Accordingly, Mrs. ["K"] is unfit to successfully perform the tasks of her position; therefore, an agreed upon employment separation on that basis is likely to be mutually beneficial and warranted to her and the IMF.

RECOMMENDATION:

Mutually agreed upon separation because of unfitness."

Decision of the Administration Committee

19. On March 1, 2001, the Administration Committee met to render a decision on Ms. "K"'s Request for disability retirement. The Committee's discussion of Applicant's case is summarized in its Final Minutes, which read in part as follows:

> "This . . . case involved a staff member with a personality disorder and for whom ma[n]y accommodations had been made in the work place. The Medical Advisor felt that the external evaluator had done a thorough job in assessing the person's current condition. Prior medical conditions were either in remission or under control. The person's attitude and ability to work might improve but their personality precluded them from committing to a course of therapy that could improve their condition. The person was neither acutely depressed nor psychotic and could perform the duties of their job. However, because of their unpredictable personality, there would likely be interpersonal friction if they returned to the workplace.
>
> . . .
>
> A return to the workplace was no longer a viable option because the person was reluctant to return to work and co-workers were fearful of her behavior."

20. The Committee also discussed whether the Applicant could work at home, but considered that this option would still require extensive contact with the workplace, resulting in "interpersonal friction." The Administration Committee concluded that Ms. "K" did not qualify for disability retirement.

21. The Committee's Decision was issued on March 14, 2001, informing Ms. "K":

> "It has been found that your case does not meet the requirement of Section 4.3 (a) (i) of the Staff Retirement Plan, which states 'such participant, while in contributory service, became totally incapacitated, mentally or physically for the performance of any duty with the Employer that he might reasonably be called upon to perform.'"

The Decision included no reasons for the Committee's determination or any information as to avenues of recourse. Instead, it advised Applicant to contact a particular official of HRD ". . . to discuss other options."

The Channels of Administrative Review

22. The case of Ms. "K"—and another of Ms. "J" also decided this day—are the second and third to come to the Administrative Tribunal through the channels of administrative review established by the issuance in 1999 of Rules of Procedure by the SRP Administration Committee, and they are the first cases to reach the Tribunal to arise from the denial of requests for disability retirement.[5] (Decisions arising under the SRP that are within the competence of the Administration or Pension Committees of the Plan are expressly excluded from the jurisdiction of the Fund's Grievance Committee.)[6] Rule VIII of the Rules of Procedure of the SRP Administration Committee[7] provides that a Requestor may file with the SRP Administration

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[5]*Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2001-2 (November 20, 2001), paras. 31–35, considered the exhaustion of administrative review in a case involving a dispute arising under Section 11.3 of the Plan.

[6]GAO No. 31, Rev. 3 (November 1, 1995) provides in pertinent part:

> "4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to ... (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan."

[7]

> "**RULE VIII**
>
> Review of Decisions
>
> 1. A Requestor, or any other person claiming any rights or benefits under the Plan, who wishes to dispute a Decision may submit an Application for Review of a Decision (hereinafter 'Application') to the Secretary within ninety (90) days after the

Committee an application for review of a Decision of the Committee within ninety days of its receipt, and Rule X[8] provides that the channel of review for a Request submitted to the SRP Administration Committee has been exhausted for the purpose of filing an application with the IMF Administrative Tribunal when the Committee has notified the applicant of the results of its review of that Decision.

Requestor receives a copy of the Decision. An Application shall satisfy all of the requirements as to form set forth in Rule III and otherwise applicable to a Request. Subject to Rule X, paragraph 2, if no Application has been submitted within this period and an extension of time described in Rule IX, paragraph 2 has not been granted, the right to submit an Application shall cease.

2. The Committee may review a Decision, either in response to a timely Application or at its own initiative. The Committee may also be required to review a decision at the request of the Pension Committee in accordance with the jurisdiction of that Committee as set out in Section 7.1(c) of the Plan. The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:
   (a) misrepresentation of a material fact;
   (b) the availability of material evidence not previously before the Committee; or
   (c) a disputed claim between two or more persons claiming any rights or benefits under the Plan.
3. If the Committee undertakes to review a Decision, or if it declines to review a Decision, all parties to the Decision shall be notified in writing.
4. Any review of a Decision shall be conducted in accordance with Rules IV, VI and VII. The Committee shall notify the Applicant of the results of its review within three months of the receipt of the Application by the Secretary."

[8] "**RULE X**

Exhaustion of Administrative Review

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."

Ms. "K"'s Application to Administration Committee for Review of Decision

23. On June 16, 2001, Ms. "K" submitted to the SRP Administration Committee an application for review of its Decision denying her Request for disability retirement. To that application, Ms. "K" appended a letter from her treating psychiatrist, as additional information for the Committee's consideration.

24. The treating psychiatrist's letter, dated June 15, 2001 indicated that Ms. "K" had been a patient of his since August 21, 2000. She had a history of "major depressive episodes" over the preceding six years, precipitated by her breast cancer and difficulties at work. She also experienced "overwhelming persistent anxiety" and "paranoid behavior" related to the workplace, and the treating psychiatrist expressed concern that a return to work would exacerbate her symptoms. He concluded by expressing his opinion that Ms. "K" is totally incapacitated from work:

> "Based on her mental disorder, which is major depressive disorder recurrent, severe, in addition to chronic Lyme disease, which is manifested by mood swings, generalized fatigue, difficulty concentrating and arthritic problems; and history of breast cancer, which is fortunately currently in remission, Mrs. ["K"]'s conditions are permanent in that they not only totally incapacitate her from performing tasks that the IMF might reasonably ask of her, but from performing a job anywhere else."

Additional Medical Review by the Administration Committee

25. Following the filing of Ms. "K"'s June 16, 2001 application for review of its Decision, the SRP Administration Committee embarked upon an additional assessment of her medical status. The Committee engaged a psychiatrist specializing in neuropsychiatric medicine and occupational psychiatry to undertake reviews of those medical records that earlier had been collected by the Joint Bank/Fund Health Services Department ("HSD") and had been used by the Committee's Medical Advisor to develop his initial opinion. Additionally, the reviewing psychiatrist requested and was granted the opportunity to conduct an in-person assessment of the Applicant. The impressions of the reviewing psychiatrist were later transmitted to the Medical Advisor who, in turn, indicated his opinion.

26. The reviewing psychiatrist performed an initial review of records August 25, 2001. These records consisted of information from several different physicians and dated back to 1998. A note of March 30, 2000 from an earlier treating physician (recommending disability retirement to HSD) is quoted:

> "Since going on medical disability, she has continued to have intermittent periods of depression in spite of antidepressant medication and psychotherapy."

The record review also revealed various life circumstances, including the death from cancer of Ms. "K"'s husband, a head injury to her son, and her 1995 diagnosis with breast cancer followed by medical and surgical complications. Ms. "K" had recounted to one physician that she had been depressed most of her life, but "usually not 'badly.'"

27. The reviewing psychiatrist concluded, based on the record review, that the three most plausible diagnoses for Ms. "K"'s condition were "Borderline Personality Disorder, Recurrent Depression secondary to that, and/or an alternate form of Bipolar Disorder." He elaborated his views on her employability as follows:

> "If the diagnoses are correct as above, this patient would be periodically hampered from performing adequately in the workplace, but not permanently. There would be a general tendency to misinterpret and mistrust, making it difficult to work with coworkers and vice versa and overreaction with mood swings. Although technically she could do any job within the IMF, on a practical level it would be very difficult for her to work within a vocational context without overreacting to what she perceives as discrimination, rejection or 'different treatment,' and would be very difficult for the organization to tolerate her behavior. I do agree with Dr. . . . that technically she is not disabled, but on a practical level would find working difficult and the organization would find her difficult to work with based on the above.
>
> . . . She is technically not disabled, but both she and any organization would find it hard to work together."

28. Thereafter, on September 5, 2001, the reviewing psychiatrist undertook his own psychiatric evaluation of Ms. "K", which included an interview and psychological testing. He noted that Ms. "K" was continuing to see the treating psychiatrist who had provided the letter of June 15, 2001 and that her treatment included medication. The reviewing psychiatrist's conclusions are summarized as follows.

> ". . .
>
> This is a patient with multiple psychiatric problems. Her view of her surroundings is colored and altered by several factors: One, the tendency towards paranoid ideation, which is not frank paranoia, but suspiciousness with ideas of reference, possibly the bipolar disorder. There is no clear delineation that this is bipolar, although she has certainly been treated for it. . . .

. . . .

> The patient certainly would have difficulty in fitting into groups and working consistently without problems. However, this is not a consistently disabling condition and I do not believe at this time that she is disabled. I do believe that she sees her life through the prism of referential thinking part of, in this case, the personality disorder and at times through the prism of bipolar, but in general, the patient seems to be able to do her work.
>
> Therefore, my original impression is reinforced, that is, that the patient finds it intermittently difficult to work in groups and groups find it intermittently difficult to work with the patient, but that she is not totally disabled from her work by any psychiatric condition.
>
> There is no suggestion that work contributed in any meaningful manner to this patient's psychiatric difficulties. While she may have had reactions to her perceptions and to events at the workplace, her psychiatric symptoms emanate from biologic, developmental characterologic constructs endemic to her personality and neurochemistry."

29. Additionally, the reviewing psychiatrist reviewed records of the treating psychiatrist and reported on these on November 11, 2001. These notes indicate diagnosis by the treating psychiatrist of bipolar disorder. The reviewing psychiatrist drew the following conclusion:

> "Basically, however, in reviewing his notes, they are consistent with my evaluation of the patient. The inconsistency arises because [the treating psychiatrist] feels that she is totally disabled for all work and I do not."

30. Finally, the reviewing psychiatrist also provided a review of psychological testing that had been performed by a psychologist. This testing revealed a patient ". . . who has considerable psychological pathology which alters the way in which she perceives external stimuli." The reviewing psychiatrist opined:

> "Ms. ["K"] has significant premorbid pathology which does not formally disable her from work, but which would make it very difficult to work with her or for her to work with others. However, she is not disabled from her occupation or for any occupation for which she is trained or has reasonable experience."

Medical Advisor's Final Report to the Administration Committee and Additional Information

31. On April 25, 2002, the Medical Advisor prepared his final report to the SRP Administration Committee in connection with Ms. "K"'s application for review of the Committee's initial Decision. The Medical Advisor noted

that he had reviewed the findings of the reviewing psychiatrist, the letter from the treating psychiatrist, and records of Ms. "K"'s infectious disease specialist, but that this additional information had not changed his opinion. He stated his conclusions as follows:

> "I had concluded that Mrs. ["K"] had a 'Borderline Personality' with dissociative features that was characterized by a pervasive pattern of unstable interpersonal work relationships. These conditions required her to make efforts to change her surroundings in order to bolster self-esteem and stress-related paranoid ideation. Medication had controlled the depressive aspects of this mental condition.
>
> Although not totally incapacitating, her characterologic disorder and her limited personal adaptive capabilities make it difficult for her to collaborate with co-workers; and therefore, to successfully perform the required tasks of her position. Intensive psychotherapy would be expected to lessen the negative consequences that her personality disorder has upon her workplace functioning."

32. Finally, at the suggestion of the Administration Committee, additional review (of records) was sought from an infectious disease specialist, with regard to references in Ms. "K"'s records of "chronic Lyme Disease." According to the Fund, that review was delivered in the format of a letter from external counsel because the reviewing physician was unable to provide a written report before the Committee's upcoming meeting date. The letter summarized the conclusions of the reviewing infectious disease specialist that Ms. "K" most likely had suffered from Lyme Disease in the past but that she had been successfully treated, as there was no evidence of persistent disease of the joints or central nervous system. The Medical Advisor expressed his concurrence with that assessment on May 2, 2002.

The Administration Committee's Decision on Review

33. On the same day, May 2, 2002, the Secretary of the Administration Committee transmitted to the Committee's members documentation for their consideration of Ms. "K"'s application for review. This documentation included: (a) Ms. "K"'s original Request for disability retirement and the Medical Advisor's original opinion; (b) Ms. "K"'s application for review; (c) reports of the reviewing psychiatrist; (d) the letter summarizing views of the reviewing infectious disease specialist; and (e) the Medical Advisor's final report.

34. In the covering memorandum to the Committee, the Secretary of the Administration Committee noted that in the course of collecting medi-

cal records from known treating physicians, additional treating physicians were identified and that a time-consuming effort had been made to collect additional records for review in the case. The Secretary concluded that the reviewing physicians and the Medical Advisor were of the opinion that the Applicant is not totally and permanently disabled, that her condition is treatable, and that there are jobs at the Fund that she could be called upon to perform.

35. The following week, on May 9, 2002, the Administration Committee met to decide on Ms. "K"'s application for review. Salient excerpts of the Committee's Final Minutes are provided below:

> ". . .
>
> . . . A member asked for clarification of points in the Medical Advisor's opinion. The member wanted to know . . . how difficult it was for others to work with the participant and if these difficulties could make it impossible for the person to do the job even though they were technically capable of performing the duties of the job.
>
> The Legal Representative noted that the underlying cause of the person's difficulties had to be considered. Another member asked if the person's medical condition qualified her as disabled under the Plan. A member noted that there was a certain moral hazard in granting a disability pension to a person who had an apparent treatable personality disorder as opposed to an incapacitating mental illness. The Committee agreed on this point. . . .
>
> . . . [The Medical Advisor] also noted that the participant frequently changes physicians and does not fully comply with prescribed medical regimes. He went on to indicate that the participant has been diagnosed as a borderline personality and this characterological condition primarily influences the participant's behavior. Treatment is difficult because the participant can but does not comply with the treatment regimes. . . .
>
> . . . The Medical Advisor indicated that the condition can be controlled with medication usually for depression and anxiety.
>
> A member asked if a harassing environment would induce such a condition. The Medical Advisor replied that the records indicate that this condition existed at an early developmental period in the participant's life and that while it is not easy to classify, the condition does not start with one or two incidents but develops over a person's life time.
>
> The Chair asked if this condition would be considered disabling by the Plans of other organizations, to which external counsel replied that it would not be considered disabling. . . . The Advisor also noted that the

key to determining incapacity in this instance is whether there is a volitional problem as with thought disorders where the person has no choice because they are confused, disoriented or delusional. In this case, the person's thinking is not disordered and they do have a choice to comply or not to comply with a treatment regime which could help her. The Medical Advisor further elaborated that the participant's condition reflected poor impulse control. She could follow a treatment regime by taking prescription drugs to control her behavior. There is no reason in the record why she cannot do so.

. . . It was noted that the Plan cannot require anybody either to take medicine or undergo surgery, but that does not mean that the Plan is required to grant a disability pension to a member who refuses treatment that will alleviate or eliminate the disability. The member asked whether the condition was not an illness, and the Medical Advisor reiterated that the condition was a character disorder reflecting the participant's difficulties in relating to other people. . . . It was not clear why the person stopped taking medication. Another member remarked that the participant seemed very sick, and referenced one of the reviewing physicians' reports where it was noted that while the person was not disabled, practically it would be difficult for the person to work with others. The Medical Advisor asked rhetorically if a person does not get along with others should they qualify for a disability pension. External counsel noted that she can perform the functions of her job. A member asked if the participant's inability to get along with other people is a medical condition that could qualify them for a disability pension. The Legal Representative noted that when the person can do the job, even though not on a sustained long-term basis, they are not permanently and totally disabled. Another member noted that it is not appropriate to grant a disability pension simply because a person cannot or does not want to work within the organization's structure and deal with other staff.

The Medical Advisor reiterated that this was a developmental disorder, and not a thought disorder. Since there are jobs that the participant could perform, she is not totally disabled. In addition, since her condition can be controlled with prescription drugs even though there is expected to be recidivism, she is not permanently disabled.

. . ."

36. Accordingly, the Administration Committee decided unanimously to sustain its original Decision and communicated to Applicant its Decision on Review by letter of May 17, 2002. The decision letter set forth the standard for disability retirement and described the process of medical review that the Committee had undertaken in her case. The Committee stated its conclusions as follows:

> "Since 1990, you have been given opportunities to work as a Staff Assistant in several different areas. . . . The Committee concluded that it is within your capacity to perform the duties required of Staff Assistants.
>
> Taking all of the circumstances into account, the Committee concluded that your condition is treatable and so is not a total and permanent disability as required by the Plan."

The final paragraphs of the Decision on Review advised Ms. "K" of her right to contest the decision in the Administrative Tribunal.

37. On August 15, 2002, Ms. "K" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

38. The principal arguments presented by Applicant in her Application and Reply are summarized below.

> 1. Applicant is totally and permanently incapacitated within the meaning of SRP Section 4.3.
>
> 2. The SRP Administration Committee incorrectly interpreted the applicable Plan provision to require the symptoms of a psychiatric disorder to be continuous in order to be totally incapacitating. Applicant's symptoms do not wax and wane in a predictable manner so as to allow the employer to accommodate their periodicity.
>
> 3. An incapacity is "permanent" within the meaning of SRP Section 4.3 when the symptoms arise at irregular intervals but with such frequency as to prevent the Applicant from functioning as an employee for indeterminate periods.
>
> 4. Applicant is unable to perform her job or any other job.
>
> 5. Within the context of Applicant's remaining working life, she is totally and permanently disabled, although a younger person might not be so classified.
>
> 6. The Fund's administration is in the best position to determine the effect of Applicant's medical condition on her ability to perform her job or other work with the IMF. The physicians' definitions of total incapacity are entitled to no more deference than are laymen's in determining fitness for work. The administration has concluded that Ms. "K" is not a candidate for continued employment with the IMF, yet she is determined not to be totally incapacitated for purposes of disability retirement.

7. Applicant has attempted to alleviate her condition by undergoing psychotherapy and taking prescribed medications; she has cooperated with the treatment regimens of her treating physicians.

8. The medical evidence shows that a return to work would likely exacerbate Applicant's symptoms.

9. The nature of borderline personality disorder should not be minimized, as the term "borderline" signifies the border between neurosis and psychosis, not between normalcy and mild neurosis.

10. The Administration Committee's decision was procedurally defective because the medical experts were not jointly selected to be truly independent, the Committee considered a hearsay report of the findings of one of the reviewing physicians, and " [t]he information provided the Committee excluded applicant's [i]nformation in its entirety."

11. Applicant seeks as relief:

a) that the Tribunal order that Applicant be granted a disability pension retroactively;

b) that "all funds deducted from her service accounts be recredited;"[9] and

c) legal costs.

Respondent's principal contentions

39. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1. The Administration Committee correctly applied the terms of the Plan to determine that Applicant is not totally and permanently incapacitated within the meaning of SRP Section 4.3.

2. Intermittent incapacity is not "total" incapacity under the SRP. As long as Applicant can perform her duties, even if not on a sustained basis, she is not totally and permanently incapacitated.

3. The Administration Committee properly determined that Applicant could perform the functions of a Staff Assistant even though her personality disorder could make it intermittently difficult for her to get along with colleagues.

4. Assuming that Applicant is currently totally incapacitated, this incapacity is not likely to be permanent. Applicant's condition is treatable.

[9]Respondent has answered that no credits have been deducted from any accounts of Applicant and that Applicant has not elaborated what credits she believes should be restored.

5. The record shows that Applicant has been insufficiently committed to a treatment program that would control her symptoms. Her thinking is not disordered, and she could choose to comply with such a program.

6. At age 52, Applicant has approximately 13 years of remaining working life until mandatory retirement. She has not established that this is insufficient time for treatment of her personality disorder.

7. Disability retirement, which entails a lifelong commitment on the part of the Fund, is intended for the most extreme medical conditions. A condition such as Applicant's may be an appropriate case for medical separation but not for disability retirement.

8. The terms of the SRP clearly contemplate that the Administration Committee's decision must be based on, and consistent with, the expert advice of its Medical Advisor.

9. The Administration Committee acted appropriately in considering the opinions of both reviewing and treating physicians. That the underlying records of the treating physicians are not provided to Committee members does not represent a failure of process because the records are of a sensitive nature and the members do not have the expertise to evaluate them.

10. Applicant has not shown any bias on the part of the reviewing physicians or that it was improper for the Committee to accept a summary by external counsel of the report of the infectious disease specialist. Applicant has not shown that the Committee failed to take into account any material information that would have affected its decision.

Consideration of the Issues of the Case

The Administrative Tribunal's Standard of Review for Disability Retirement Cases

The Administrative Tribunal in this case applies the standard of review for disability retirement cases as adopted and elaborated in greater detail in the case of *Ms. "J"* also decided today. The essence of that standard is set forth below.

40. The Administrative Tribunal's standard of review in all cases is governed by the second sentence of Article III of the Statute of the Administrative Tribunal, which 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."

The standard of review describes the relationship between the Administrative Tribunal and the decision maker responsible for the contested decision. It represents the degree of deference accorded by the Tribunal to the decision maker's judgment. The standard of review is designed to set limits on the improper exercise of power and represents a legal presumption about where the risk of an erroneous judgment should lie. The degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker.

41. A distinguishing feature of the problem posed by review of decisions of the Administration Committee of the Staff Retirement Plan is that the Committee plays a dual role within the dispute resolution system. It is responsible for taking the administrative act that may be contested in the Administrative Tribunal and it also supplies what is deemed a channel of review for purposes of the exhaustion of remedies requirement of Article V of the Tribunal's Statute when, pursuant to Article VIII of its Rules of Procedure, it reconsiders its own decision.[10] Accordingly, while a decision of the Grievance Committee will not be subject to direct review by the Administrative Tribunal,[11] a decision of the SRP Administration Committee necessarily will be.

42. In resolving the question of the appropriate standard of review in a given case, the Administrative Tribunal looks to the following sources: a) the text of Article III, requiring that it apply ". . . generally recognized principles of international administrative law concerning judicial review of administrative acts," b) the published Commentary on the Statute, i.e. the Report of the Executive Board proposing the Statute's adoption, c) the jurisprudence of the IMFAT, and d) the jurisprudence of other international administrative tribunals.

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[10]In this regard, it may be considered that the "standard of review" applied by the Administration Committee in reviewing its own decisions is supplied by Rule VIII of its Rules of Procedure. Paragraph 2 of that Rule provides in pertinent part:

> "2. . . .
>
> The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:
>
> a) misrepresentation of a material fact;
> b) the availability of material evidence not previously before the Committee; or
> c) a disputed claim between two or more persons claiming any rights or benefits under the Plan."

[11]*See Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

43. In *Ms. "J"*, the Tribunal reviewed the Statutory Commentary and observed that the IMFAT's jurisprudence has confirmed many of the principles articulated therein. Hence, in a variety of contexts, the Administrative Tribunal, in discharging its responsibility to review the lawfulness of challenged administrative acts, has acknowledged, and deferred to, the exercise of the managerial discretion of the Fund. This deference is at its height when the Tribunal reviews regulatory decisions (as contrasted with individual decisions), especially policy decisions taken by the Fund's Executive Board. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary as follows:

> ". . . 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.) It is this standard of review that Respondent in *Ms. "J"* urged the Tribunal to apply to the review of disability retirement decisions of the Administration Committee.

44. In *Ms. "J"*, the Tribunal observed that the standard articulated in the Commentary for review of individual decisions involving managerial discretion comprehends a number of different factors. Hence, its operation in a particular case may emphasize one factor over others or it may involve multiple factors, depending upon such variables as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned. When the Tribunal reviews an administrative act of the Fund to determine if the decision taken has been "arbitrary or capricious," i.e. the component of the standard of review that Respondent emphasized for application in *Ms. "J"*, it applies its least rigorous level of scrutiny.

45. The IMFAT's jurisprudence also suggests that an important element in determining the standard of review may be the nature of the underlying decision-making process that is subject to the Tribunal's review. *See Ms. "Y" (No. 2)*, para. 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." Respondent in *Ms. "J"* characterized a decision of the SRP Administration Committee denying an application for disability retirement as "quintessentially a discretionary judgment." The Administrative Tribunal considered whether the process undertaken by the SRP Administration Committee in taking a decision on an application for disability retirement is properly

characterized as an act of managerial discretion or as something different. The Tribunal concluded that the process of construing the applicable terms of the Staff Retirement Plan and applying them to the facts of a particular case to determine the applicant's entitlement or not to the requested benefit may more closely resemble a judicial act than one typically taken pursuant to managerial authority.

46. A second respect in which a decision arising from the SRP Administration Committee may be distinguished from an administrative act taken in the exercise of managerial discretion is that the channel of review applicable to such decisions does not involve review by the Managing Director. Individual decisions taken under the Staff Retirement Plan are exclusively vested in the Administration Committee, subject only to direct appeal (following reconsideration by the Committee) to the Administrative Tribunal.[12]

47. In *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001),[13] the IMFAT had the opportunity to explore the nature of this appeal process. While not addressing explicitly the matter of the standard of review to be applied when a decision of the SRP Administration Committee is contested in the Administrative Tribunal, it recognized the unique nature of the appellate authority arising from Section 7.2 of the Plan and Article II[14] of the Tribunal's Statute:

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[12]SRP Section 7.2 provides:

> "**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. . . . "

[13]*Mr. "P" (No. 2)* is the only other case arising from a decision of the SRP Administration Committee that has been reviewed on the merits by the IMFAT.

[14]Article II (1b) 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."

> "The significance of the Tribunal's appellate authority is illustrated by the present case. Absent it, the Applicant and the Intervenor could find themselves without third party remedy."

(Para. 141.)

48. In *Mr. "P" (No. 2)*, the Tribunal considered a case arising under SRP Section 11.3 (and Rules thereunder) regarding the giving effect under the Plan to certain domestic relations orders. Respondent framed the question in that case as "'. . . whether the Committee acted properly and in accordance with the [applicable] Rules in deciding to place into escrow a portion of Applicant's pension benefits.'" (Para. 119.) The Tribunal echoed this formulation:

> "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?"

(Para. 132.) Significantly, the Tribunal reviewed the "soundness" (para. 144) of that decision and concluded that although the decision of the Committee was "understandable," it was "in error and must be rescinded." (Para. 145).

49. Hence, in *Ms. "J"*, the Tribunal identified two factors that differentiate a decision of the SRP Administration Committee on a request for disability retirement from an act of managerial discretion. First, functionally, the decision may be regarded as "quasi-judicial," requiring the decision maker, i.e. the SRP Administration Committee, to construe the requirements of the applicable provision of the pension Plan and to apply the Plan's terms to the facts of a particular case. Second, the decision is made by an entity, i.e. the SRP Administration Committee, that is vested with the authority to take such decisions on behalf of the Plan without review by the Managing Director. Instead, they are subject to direct appeal (following a decision on reconsideration by the Committee) to the Administrative Tribunal.

50. The distinctions identified above have been noted as well by international administrative tribunals and commentators with regard to review of both disciplinary decisions and decisions under a staff retirement plan. Accordingly, it has been observed that decisions of an international organization that may appear to be discretionary in character may, in fact, involve quasi-judicial decision making. In such cases, the administrative tribunal's standard of review may be heightened accordingly:

> *". . . Quasi-judicial powers*
>
> There is a very exceptional category of power which may be described as a quasi-judicial power and which administrative authorities may exercise

> under their internal law. These powers, although apparently framed in terms of discretionary criteria, are regarded by tribunals as subject to total judicial control unlike discretionary powers. The tribunal can examine the decision taken by the administrative authority *de novo* in order to establish whether the decision was one which the tribunal would have itself taken, had it been called upon to take the initial decision taken by the administrative authority. Thus, it acts rather as a court of appeal than as a court of review.
>
> . . . There is evidence that most tribunals regard the power to take disciplinary measures as being subject to total judicial control.[footnote omitted]"

C.F. Amerasinghe, *The Law of the International Civil Service* (1994), Vol. I, p. 267.

51. Such heightened scrutiny on the part of an international administrative tribunal is not, however, limited to cases involving review of disciplinary sanctions. Accordingly, the World Bank Administrative Tribunal ("WBAT"), reviewing decisions of the Bank's Pension Benefits Administration Committee ("PBAC") on applications for disability retirement, has recognized the distinctive nature of this review, expressly distinguishing the "special appellate jurisdiction" established by the terms of the Bank's pension plan from the Tribunal's ordinary review of acts of managerial discretion:

> "28. In this case the Applicant has, pursuant to Section 10.2 (f) of the Staff Retirement Plan (SRP), appealed from a decision of the Pension Benefits Administration Committee (PBAC) denying his request for a disability pension.
>
> 29. The scope of the review undertaken by the Tribunal varies according to the nature of the case before it. Thus, in matters that fall exclusively within the discretion of the Respondent, the function of the Tribunal is limited to examining whether those decisions are arbitrary, discriminatory, improperly motivated, based on error of fact, carried out in violation of a fair and reasonable procedure or otherwise tainted by an abuse of power (*Saberi*, Decision No. 5 [1981], para. 24; *Suntharalingam*, Decision No. 6 [1981], para. 27; *Thompson*, Decision No. 30 [1986], para. 24; *Bertrand*, Decision No. 81 [1989], para. 15). In other matters, such as disciplinary measures, however, the jurisdiction of the Tribunal is broader in that it may review the merits of the Respondent's decision. As stated in prior decisions in this respect, 'the Tribunal is not confined to a limited control of abuse of power as if it were purely a matter of executive discretion and . . . it may exercise broader powers of review in relation to both facts and law' (*Carew*, Decision No. 142 [1995], para. 32; *Planthara*, Decision No. 143 [1995], para. 24). This is also the case when the Tribunal is invited to intervene under a special appellate jurisdiction established in the Rules of the Bank.

> 30. Under the Staff Retirement Plan, Section 10.2 (f), the decision of the PBAC is final, but it is subject to appeal to the Tribunal. No other internal remedies are available in the Bank. The appeal is made directly to the Tribunal. The determination made by the PBAC in this case, denying the request for a disability pension, cannot be regarded purely as a matter of executive discretion. . . . "

John Courtney (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 153 (1996), paras. 28–30. The WBAT has described its review process in such cases as follows:

> ". . . Accordingly, the Tribunal may examine (i) the existence of the facts, (ii) whether the conditions required by the Staff Retirement Plan for granting the benefits requested were met or not, (iii) whether the PBAC in taking the decision appealed has correctly interpreted the applicable law, and (iv) whether the requirements of due process have been observed." (*Id.*, para. 30.)

52. While in *Courtney (No. 2)*, the WBAT upheld the decision of the Bank's Pension Benefits Administration Committee to deny an application for disability retirement, in a subsequent decision, *Ahlam Shenouda v. International Bank for Reconstruction and Development*, WBAT Decision No. 177 (1997), the WBAT, applying the identical standard of review (para. 12), concluded to the contrary that the applicant was entitled to disability retirement. The WBAT in *Shenouda* explained its authority to review the merits of the PBAC's decision, i.e. to decide whether or not the Committee's conclusion was supported by the weight of the evidence. At the same time, it noted that some weight could be given to the views of Committee's Medical Advisor:

> "22. The Tribunal has reviewed the same medical information and opinions that were before the PBAC at the time it considered, and then reconsidered, the Applicant's request. . . . The Tribunal concludes that the result reached by the PBAC, which concurred with the Medical Advisor, is contrary to the clear weight of the evidence.
>
> 23. The Staff Retirement Plan contemplates that the PBAC is to reach a decision that is warranted by the diagnoses and prognoses of the doctors who have directly examined and treated the applicant. The Committee is not to rely solely upon the secondary assessment of the Medical Advisor, who does not examine the applicant and who, he himself concedes, may not necessarily be an expert in all of the wide range of illnesses that come before the PBAC, including fibromyalgia. Yet Section 3.4(a) of the SRP provides that a staff member 'shall be retired on a disability pension if one or more physicians designated by the Committee finds,' that the applicant was then disabled and likely to remain so. In effect, this prevents the award of a disability pension whenever the Medical Advisor

> believes it to be unwarranted—no matter whether the PBAC disagrees. If it does disagree, the only way such a pension can be awarded is if the PBAC appoints another physician who reaches the same conclusion as the PBAC.
>
> 24. But the Tribunal is not so constrained. In sitting on 'appeal' from the decision of the PBAC, the Tribunal can—giving some weight to the views of the Medical Advisor—review independently the written opinions of the physicians who examined or treated the Applicant, and may conclude that the great weight of the evidence, or of the medical opinions, supports or not the claim of a likely permanent disability."

After reviewing the record in *Shenouda*, the WBAT overruled the decision of the PBAC and held that the applicant should be awarded a disability pension. (Para. 35.)

53. The same result was reached in *A v. International Bank for Reconstruction and Development*, WBAT Decision No. 182 (1997), in which the WBAT decided, in light of the medical evidence, that the conclusions of the PBAC could not be sustained. (Para. 16). As to the standard of review, the WBAT in *A* again reaffirmed the standard enunciated in *Courtney (No. 2)*, observing that "[t]he power of the Tribunal under Section 10.2(f) [of the pension plan] is very broad and allows for the examination of all elements of fact and law as well as of procedural fairness and transparency." (Para. 4.)

54. Accordingly, in *Ms. "J"* the IMF Administrative Tribunal adopted the following standard of review applicable to a decision by the Administration Committee of the Staff Retirement Plan to deny a request for disability retirement:

> 1. Did the SRP Administration Committee correctly interpret the requirements of SRP Section 4.3 and soundly apply them to the facts of the case, or was the Committee's decision based on an error of law or fact?
>
> 2. Was the Committee's decision taken in accordance with fair and reasonable procedures?
>
> 3. Was the Committee's decision in any respect arbitrary, capricious, discriminatory or improperly motivated?

It is this standard that shall be applied in the present case.

Did the Administration Committee Properly Interpret and Apply SRP Section 4.3?

55. Applying the standard of review set forth above, the question on which the Administrative Tribunal must now decide is whether the Admin-

istration Committee correctly interpreted the requirements of SRP Section 4.3(a) and soundly applied them to the facts of Ms. "K"'s case.

56. SRP Section 4.3(a) provides in its entirety:

> **"4.3 Disability Retirement**
>
> (a) A participant in contributory service shall be retired on a disability pension before his normal retirement date on the first day of a calendar month not less than 30 nor more than 120 days immediately following receipt by the Administration Committee of written application therefor by the participant or the Employer; on the condition that the Pension Committee must find, on the recommendation of the Administration Committee and the certification of a physician or physicians designated by the Administration Committee, that:
>
> (i) such participant, while in contributory service, became totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform;
>
> (ii) such incapacity is likely to be permanent; and
>
> (iii) such participant should be retired."

Hence, the two essential qualifications for disability retirement are that 1) the applicant is ". . . totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform," and 2) the incapacity is "likely to be permanent." It is recalled that in *Ms. "J"* the dispute as to the interpretation and application of SRP Section 4.3(a) centered on the question of whether, given the applicant's inability to perform the functions of the job she had occupied when her incapacity arose, there were *other* duties that the Fund reasonably could ask her to perform. By contrast, in the case of Ms. "K", the dispute focuses on whether or not the applicant's condition incapacitates her from performing the functions of the job she had occupied for many years. Specifically, this case requires the Tribunal to interpret and apply SRP Section 4.3(a) in the circumstance of a staff member who has been impaired on a recurring basis from performing her job functions as a result of psychiatric illness.

1. Under the terms of the Plan, is Applicant ". . . totally incapacitated, mentally or physically, for the performance of any duty with the Employer that [s]he might reasonably be called upon to perform"?

57. Applicant contends that the Administration Committee incorrectly construed the requirements of the SRP by requiring that the symptoms of a psychiatric disorder be "continuous" to be totally incapacitating. Ms. "K"

asserts that her case raises the question of whether a person with a condition marked by symptoms that are ". . . irregular in time of appearance, but [which occur] with such frequency as to render the sufferer unable to function as an employee at irregular times for indeterminate durations" is totally and permanently incapacitated under the Plan. Applicant maintains that her symptoms do not wax and wane in a predictable manner so as to allow for their accommodation by the employer. Respondent, on the other hand, contends that "intermittent" incapacity is not "total" incapacity under the SRP, and that as long as Applicant can perform her duties, "even if not on a sustained basis," she is not totally and permanently incapacitated.[15] The conflicting views of the parties raise questions of both law and fact, i.e. whether (or when) recurring incapacity may amount to total incapacity under the terms of the SRP, and whether Applicant's condition so qualifies.

58. Respondent seeks support in the Word Bank Administrative Tribunal's decision in *Courtney (No. 2)* for the view that a participant who is able to perform some work, even if not on a sustained basis, is not eligible for disability retirement. In *Courtney (No. 2)*, the medical evidence showed that the applicant had developed an illness that had been successfully treated, although a recurrence could not be ruled out. He applied for disability retirement on the basis that he was no longer able to undertake extensive travel and stressful situations that marked his full-time career with the Bank. In rendering its decision upholding the denial of disability retirement, the WBAT observed:

> "The standard of reasonableness does not require that the participant should continue to be able to do exactly what he had been doing. If a staff member, for example, is unfit to travel but is capable of performing duties at headquarters which are compatible both with his experience and the Bank's needs, then it cannot be concluded that he is totally and permanently incapacitated for any duty that he is reasonably called upon to perform and the requirement of the Retirement Plan is not met."

(Para. 33.) Accordingly, the WBAT rejected the applicant's view that his disability should be measured against the kind of work and work-related travel that had been part of his routine activity as a staff member. The Tribunal found that he ". . . could have still undertaken reasonable work assignments and, therefore, that he was not totally incapacitated." (Para. 34.) In reviewing the facts, the WBAT also noted that the Applicant had engaged in occasional

[15]This same standard was articulated by the Legal Representative during the deliberations of the Administration Committee. (Administration Committee Final Minutes, May 9, 2002.)

teaching and consultancy arrangements, contradicting his initial assertion that he was unemployed. (Para. 31.)

59. The question arises whether the WBAT's decision in *Courtney (No. 2)* supports the principle that a pension plan participant who can perform job functions but not on a "sustained basis" is not totally incapacitated for purposes of the SRP. In a subsequent judgment, the WBAT summarized its holding in the case as follows: "In *Courtney (No. 2)*, the Applicant's disability was not regarded as total because although it precluded him from continuing to travel for the Bank as part of his employment, it did not prevent him from performing other assignments that required no such travel." (*A*, para. 13.) Moreover, it may be observed that in other cases a specific finding by the Medical Advisor of inability to perform the functions of a position "on a sustained basis" led to a conclusion that the applicant for disability retirement was totally (although not necessarily permanently) incapacitated. *See, e.g.*, *Shenouda*, in which the Medical Advisor had opined that the applicant was "'. . . currently incapacitated from performing on a sustained basis, any tasks that The Bank might reasonably ask of her,'" leading the WBAT to conclude that the consensus among the doctors was that incapacity at the time was total. (Para. 18.) *See also A*, para. 15. Similarly, in *Ms. "J"*, in determining that the applicant for disability retirement could not perform the tasks of a verbatim reporter, the Medical Advisor had advised that Ms. "J" ". . . currently lacks the residual functional capacity to perform, on a sustained basis, intensive repetitive arm and hand functions."

60. Furthermore, it may be asked whether the (apparently successful) performance of occasional teaching and consulting assignments by Mr. Courtney is analogous to the facts of Ms. "K"'s case, or whether Ms. "K"'s inability to perform her tasks occurred with such frequency, severity, or unpredictability as to render her totally incapacitated for the performance of any duty which the Fund might reasonably call upon her to perform. In analyzing this question it is to be recalled that the finding of the Administration Committee on review was that ". . . it is within [Ms. "K"'s] capacity to perform the duties required of Staff Assistants." At the same time, the Committee in rendering its initial Decision had concluded that a ". . . return to the workplace was no longer a viable option because the person was reluctant to return to work and co-workers were fearful of her behavior." The Administration Committee also noted that many accommodations had already been made in the workplace for Ms. "K". Additionally, the Committee considered and rejected the possibility that Ms. "K" would be able to perform her functions by working at home. (Administration Committee Final Minutes, March 1, 2001.)

61. The medical evidence in this case does not speak directly to the question of how frequently Applicant was impaired in her functioning or the precise nature of this intermittent or periodic incapacity. The Medical Advisor and the reviewing psychiatrist both remarked on the recurrent nature of Ms. "K"'s symptoms and drew conclusions about the potential impact on her job performance. The Medical Advisor observed that Ms. "K"'s ". . . erratic emotional storms have resulted in people in the workplace becoming wary of her," leading him to conclude that her psychiatric disorder ". . . impairs [her] ability to successfully perform, on a sustained basis, collaborative tasks. . . . " At the same time, he concluded that it "does not totally incapacitate" her from performing tasks that the IMF might reasonably ask of her. (Medical Advisor's report of January 26, 2001.) Similarly, the reviewing psychiatrist opined ". . . this patient would be periodically hampered from performing adequately in the workplace, but not permanently." (Reviewing psychiatrist's report of August 25, 2001.) Additionally, he noted, ". . . the patient finds it intermittently difficult to work in groups and groups find it intermittently difficult to work with the patient. . . ." He concluded that ". . . this is not a consistently disabling condition. . . . in general, the patient seems to be able to do her work." (Reviewing psychiatrist's report of September 5, 2001.)

62. These views may be contrasted with Applicant's own assertion that she is disabled on an unpredictable basis, preventing her disability from being accommodated by the employer. In the opinion of her treating psychiatrist, Ms. "K"'s medical status ". . . not only totally incapacitate[s] her from performing tasks that the IMF might reasonably ask of her, but from performing a job anywhere else." (Report of treating psychiatrist, June 15, 2001.) The assertion that Ms. "K"'s disability rendered her unable to carry out her job functions would appear to be borne out by the Administration Committee's initial findings that a return to the workplace was not a viable option in the case of Ms. "K", chiefly on account of the effect of her condition on her ability to maintain effective working relationships with colleagues, who were said to be fearful of her behavior. (*See also* Medical Advisor's initial report finding Ms. "K" unfit to perform her job.) Accordingly, although Ms. "K"'s disabling symptoms may be of an "intermittent" character, they may well have had a pervasive effect on her ability to maintain the position of Staff Assistant.

63. In a like vein to Ms. "J", Ms. "K" propounds the view that it is inconsistent for the Fund to determine that Applicant is not a candidate for continued employment, separating her from service for medical reasons under GAO No. 13, Rev. 5, Annex I and GAO No. 16, Rev. 5, while at the same

time denying that she is totally incapacitated for purposes of her eligibility for disability retirement. The Fund counters that disability retirement is intended only for the most extreme medical conditions which render the individual totally incapable of performing functions within the organization, and that the eligibility standard for disability retirement is higher than for other benefits because it entails a "lifelong commitment by the Fund."[16]

64. It is noted that GAO No. 16, by its terms, contemplates that there will be SRP participants separated on medical grounds who will *not* qualify for disability retirement. Accordingly, Section 11.02 of that GAO requires that separation not be implemented until a determination on disability retirement has been made under the SRP, a determination which, in turn, affects entitlements to separation benefits. Therefore, under the Fund's internal law, separation for medical reasons cannot determine entitlement to a disability pension. Nonetheless, in the Tribunal's view, the factual circumstances surrounding the separation may be given weight in reviewing the soundness of the SRP Administration Committee's decision on an application for disability retirement. Ms. "K" urges that "[c]ommon sense is the touchstone of decision making regarding disability . . .," and that "[t]o describe the conduct of a long time employee as intolerable to her employer, to attribute that intolerable conduct to the employee's mental health and then to draw the conclusion that the condition does not constitute total incapacity is illogical."

65. Applicant, furthermore, has linked the issue of the significance of her medical separation to the question of which decision maker is in the best position to decide questions of disability. Applicant maintains that it is the Fund's administration (which has deemed Ms. "K" unsuited for service) that is best equipped to determine fitness for work. Hence, Applicant contends that the physicians' opinions are entitled to no more deference than are laymen's in determining her capacity for employment.

66. Applicant accordingly raises the important issue of who decides incapacity under the SRP, specifically, what role the members of the Administration Committee (vis-à-vis the Medical Advisor) take in the decision-making process. By its terms, SRP Section 4.3(a) requires that a participant in contributory service shall be retired on a disability pension ". . . on the recommendation of the Administration Committee and the certification of a

[16]It should be noted that the SRP is an insurance scheme to which both participants and the employer make contributions. In addition, participants receiving disability retirement are subject to periodic reassessment of their eligibility, pursuant to SRP Section 4.3(c) and (d).

physician or physicians designated by the Administration Committee." In *Shenouda*, the World Bank Administrative Tribunal observed that while the parallel provision of the Bank's retirement plan might prevent the Pension Benefits Administration Committee from deviating from the conclusions of the Medical Advisor (unless another physician were appointed who concluded differently), the Administrative Tribunal was not so constrained. Accordingly, in *Shenouda*, the WBAT reversed the PBAC's decision denying the request for disability retirement on the basis that the Committee's decision was "contrary to the clear weight of the evidence." (Paras. 22–24.) The same result was reached by the WBAT in the case of *A*, para. 16, in which the WBAT held that the PBAC's conclusions could not be sustained in light of the reports of the treating physicians.

67. In reviewing the soundness of the Administration Committee's decision to deny Ms. "K"'s application for disability retirement, the Tribunal accordingly must consider whether the decision is supported or not by the weight of the evidence. In this assessment, it is appropriate for the Tribunal to consider such factors as a) the internal consistency of the physicians' reports, separating observations as to Applicant's condition from ultimate conclusions with respect to incapacity, and b) whether the Administration Committee drew reasonable conclusions from the evidence.

68. There are, in this case, aspects of the reviewing physicians reports that call into question their internal consistency. For example, in the same report in which the Medical Advisor opined that Ms. "K"'s inability successfully to perform collaborative tasks on a sustained basis ". . . does *not* totally incapacitate her from performing tasks that the IMF might reasonably ask of her" (emphasis supplied), he also repeatedly stated that she was "unfit" to perform the functions of her position:

> ". . . Ms. ["K"] is unfit to perform satisfactorily her IMF job function because of the constellation of psychologic factors associated with her characterologic disorder.
>
> . . . Her condition is permanent in that she will not be able to return to the IMF and perform satisfactorily.
>
> Accordingly, Ms. ["K"] is unfit to successfully perform the tasks of her position."

(Medical Advisor's report of January 26, 2001.) Striking among the reports of the reviewing psychiatrist is a tendency to juxtapose "technical" or "formal" competence to do a job with a practical assessment of the difficulties Applicant is likely to encounter (or has encountered) in the workplace. Hence, the reviewing psychiatrist commented:

> "Although *technically* she could do any job within the IMF, on a *practical* level it would be very difficult for her to work within a vocational context . . . and [it] would be very difficult for the organization to tolerate her behavior. . . .
>
> She is *technically* not disabled, but both she and *any* organization would find it hard to work together."

(Reviewing psychiatrist's report of August 25, 2001.) (Emphasis supplied.) In a subsequent report, the reviewing psychiatrist commented that Ms. "K"'s symptoms do not ". . . *formally* disable her from work, but . . . make it very difficult to work with her and for her to work with others." (Emphasis supplied.)

69. The question arises of what weight should be accorded to the ultimate conclusions of the physicians regarding incapacity (as contrasted with their specific findings and observations) and whether any internal inconsistencies in their reports render them entitled to less deference. The WBAT spoke to this question in part in *Courtney (No. 2)*, para. 32, commenting on a physician's statement (which the record revealed had been drafted by counsel with the objective of supporting the application for disability retirement), cautioning: "The views expressed on disability are opinions and not facts." Moreover, in a telling comment, the reviewing psychiatrist in the present case distinguished his evaluation of Ms. "K" from that of her treating psychiatrist as follows:

> "Basically, however, in reviewing his notes, they are consistent with my evaluation of the patient. The inconsistency arises because [the treating psychiatrist] feels that she is totally disabled for all work and I do not."

(Reviewing psychiatrist's report of November 11, 2001.) Accordingly, in reviewing the medical records, it is necessary to separate the physicians' observations and descriptions of Applicant's condition from the conclusions that they drew as to her incapacity.

70. An additional concern in this case is the possible tendency of the decision makers to minimize the seriousness of Applicant's medical condition, especially as the review process progressed and most strikingly in the deliberations of the Administration Committee on review. By the reviewing psychiatrist's account, Ms. "K" ". . . is a person with multiple psychiatric problems." She has been diagnosed with depression secondary to borderline personality disorder and possibly bipolar disorder. (Reviewing psychiatrist's reports of August 25, 2001 and September 5, 2001.)

71. With regard to Ms. "K"'s depression, after examining Applicant's medical records, the reviewing psychiatrist remarked that ". . . Ms. ["K"]'s notes

are characterized by diagnoses most consistently of recurrent depression." (Reviewing psychiatrist's report of August 25, 2001.) Applicant's treating psychiatrist characterized her mental disorder as "major depressive disorder recurrent, severe," noting that she had suffered major depressive episodes over the preceding six years. (Report of treating psychiatrist, June 15, 2001.) The Medical Advisor in his initial report to the Administration Committee noted a history of "depressive episodes resulting in suicide attempts." (Medical Advisor's report of January 26, 2001.) Nonetheless, the Medical Advisor characterized Applicant's recurrent depression as "in remission," based on the findings of an earlier evaluator.[17] (Medical Advisor's report of January 26, 2001.)

72. Significantly, the reviewing psychiatrist was of the opinion that Ms. "K"'s depression was "secondary to" borderline personality disorder. (Reviewing psychiatrist's report of August 25, 2001.) The Medical Advisor later opined that "[m]edication had controlled the depressive aspects of this mental condition." (Medical Advisor's report of April 25, 2002.) Accordingly, the opinions of the reviewing psychiatrist and Medical Advisor, and later the discussion in the Administration Committee, focused upon Applicant's diagnosis of borderline personality disorder, addressing the question of whether the symptoms of that condition rendered Ms. "K" "totally incapacitated" under the terms of the SRP.

73. The following statement in the public domain, a publication of the U.S. National Institutes of Health, is pertinent[18]:

> "Borderline personality disorder (BPD) is a serious mental illness characterized by pervasive instability in moods, interpersonal relationships, self-image, and behavior. . . . Originally thought to be at the 'borderline' of psychosis, people with BPD suffer from a disorder of emotion regulation. . . . There is a high rate of self-injury without suicide intent, as well as a significant rate of suicide attempts and completed suicide in severe cases.[footnote omitted] Patients often need extensive mental health services, and account for 20 percent of psychiatric hospitalizations.[footnote omitted] . . .
>
> . . .
>
> . . . BPD often occurs together with other psychiatric problems, particularly bipolar disorder, depression, anxiety disorders, substance abuse, and other personality disorders.

[17]By contrast, the reviewing psychiatrist in his record review noted a report of a treating physician that, as of March 30, 2000, Ms. "K" continued to experience intermittent periods of depression despite treatment. (Reviewing psychiatrist's report of August 25, 2001.)

[18]Somewhat similar information, from a private mental health website, was included with Applicant's Reply as Attachments A and B.

. . . .

> Treatments for BPD have improved in recent years. Group and individual psychotherapy are at least partially effective for many patients. Within the past 15 years, a new psychosocial treatment termed dialectical behavior therapy (DBT) was developed specifically to treat BPD, and this technique has looked promising in treatment studies.[footnote omitted] Pharmacological treatments are often prescribed based on specific target symptoms shown by the individual patient. Antidepressant drugs and mood stabilizers may be helpful for depressed and/or labile mood. Antipsychotic drugs may also be used when there are distortions in thinking.[footnote omitted]
>
> . . .
>
> Although the cause of BPD is unknown, both environmental and genetic factors are thought to play a role in predisposing patients to BPD symptoms and traits. . . .
>
> . . . "

(NIH Publication No. 01-4928, found at http://www.nimh.nih.gov/publicat/bpd.cfm) This quotation indicates that borderline personality disorder is both a serious mental illness and one that may be difficult to treat.

74. The Final Minutes of the Committee's deliberations on Ms. "K"'s application for review reflect that "[t]he Committee agreed" that ". . . there was a certain moral hazard in granting a disability pension to a person who had an apparent treatable personality disorder *as opposed to* an incapacitating mental illness." (Administration Committee's Final Minutes, May 9, 2002.) (Emphasis supplied.) Later in the discussion, a member of the Committee ". . . asked whether the condition was not an illness and the Medical Advisor reiterated that it was a character disorder reflecting the participant's difficulties in relating to other people." (*Id.*) When another member remarked that the participant "seemed very sick," it was reported that "[t]he Medical Advisor asked rhetorically if a person does not get along with others should they qualify for a disability pension." (*Id.*) A Committee member thereafter observed that ". . . it is not appropriate to grant a disability pension simply because a person cannot or does not want to work within the organization's structure and deal with other staff." (*Id.*)

75. It may be asked whether, in the discussion of the Administration Committee, the Medical Advisor somewhat discounted the seriousness of Applicant's medical condition and the difficulty of its treatment, in contrast to his own earlier reports. For example, in the Medical Advisor's initial report of January 26, 2001, he had asserted that treatment of borderline per-

sonality disorder "may be difficult," noting that Ms. "K" had not undergone psychotherapy of "sufficient intensity and frequency" to treat the condition. He also observed that medication can usually control the "depressive aspects" of the condition. (Medical Advisor's report of January 26, 2001.) In his final report of April 25, 2002, the Medical Advisor reaffirmed that "intensive psychotherapy" would be expected to "lessen" the negative consequences of the disorder on Ms. "K"'s workplace functioning. (Medical Advisor's report of April 25, 2002.)

76. These views, it may be observed, are consistent with the information provided in the NIH publication, i.e. that patients with borderline personality disorder often need extensive mental health services, that psychotherapy is at least partially effective in many cases, and that medication may be helpful for depressed mood. (NIH Publication No. 01-4928.) Similarly, the information source on borderline personality disorder attached to Applicant's pleadings suggests: "Psychotherapy is nearly always the treatment of choice for this disorder; medications may be used to stabilize mood swings." (Borderline Personality Disorder, http://www.mentalhealth.com.)

77. Nonetheless, despite the Medical Advisor's reports citing the importance of psychotherapy to the treatment of Ms. "K"'s personality disorder, the Final Minutes of the deliberations of the Administration Committee do not contain any discussion of psychotherapy as an element in her treatment. Instead, it is noted that ". . . her condition can be controlled with prescription drugs." (Administration Committee's Final Minutes, May 9, 2002.)

78. There is thus a certain inconsistency in the evaluation of the medical condition of the Applicant. Nonetheless, the Administrative Tribunal, having reviewed the evidence that was before the Medical Advisor and the Administration Committee, concludes that the Applicant is totally incapacitated, mentally, to perform the duties in the Fund that she might be reasonably called upon to perform, namely those of Staff Assistant, particularly because her mental condition renders her unable to collaborate constructively with co-workers.

2. Having found that Applicant is "totally incapacitated" under the terms of the Plan, is that incapacity "likely to be permanent"?

79. Having found that Applicant is totally incapacitated for the performance of any duty that the Employer may reasonably ask her to perform, the Tribunal next must ask whether that incapacity is "likely to be permanent." (SRP Section 4.3 (a) (ii).) "Disability must first be total and, secondly, likely to be permanent (that is, not transitory) and both elements are related to

any duty that the participant might reasonably be called upon to perform." *Courtney (No. 2),* para. 33.

80. In *Shenouda,* the WBAT identified several factors to be considered in determining whether total incapacity is likely to be permanent:

> ". . . the extent to which the Applicant's condition was or was not improving over time, whether it could be expected to respond to medication, exercise, and the like, and whether the Applicant was reasonably complying or not with such a regimen."

(Para. 22.) In the case of Ms. "K", the question of the likely permanency of her condition centers on the issues of the seriousness of her illness, the ease of its treatment, and Applicant's reasonable compliance or not with available treatment options. It is recalled that the decision of the Administration Committee on review was that, taking all of the circumstances into account, Ms. "K"'s condition was ". . . treatable and so is not a total and permanent disability as required by the Plan." (Administration Committee's decision on review, May 17, 2002.) Is this conclusion consistent with the proper interpretation of the SRP and with the evidence in the case?

81. The potential for permanency of Applicant's condition was remarked upon by a number of observers. Significantly, the Medical Advisor in his initial report to the Administration Committee concluded that Ms. "K"'s ". . . condition is permanent in that she will not be able to return to the IMF and perform satisfactorily." (Medical Advisor's report of January 26, 2001.) Similarly, the Administration Committee, while taking its initial decision to deny Ms. "K"'s application for disability retirement, at the same time, in its discussion, had taken the view that a return to the workplace was "no longer a viable option." (Administration Committee Final Minutes, March 1, 2001.) The Administrative Tribunal accordingly concludes that the Administration Committee's initial decision that Ms. "K" was not permanently incapacitated runs counter to the weight of the evidence.

82. On review, Ms. "K"'s treating psychiatrist supported her application for review with the assertion that her conditions are ". . . permanent in that they not only incapacitate her from performing tasks that the IMF might reasonably ask of her, but from performing a job anywhere else." (Treating psychiatrist's report of June 15, 2001.) In contrast, the reviewing psychiatrist concluded ". . . this patient would be periodically hampered from performing adequately in the workplace, but not permanently." (Reviewing psychiatrist's report of August 25, 2001.) In his final report to the Administration Committee, the Medical Advisor did not opine specifically on the likely permanency of Applicant's condition, instead citing his agreement

with the reviewing psychiatrist that Ms. "K" is "capable of performing her job functions" and hence was not totally disabled. (Medical Advisor's report of April 25, 2002.)

83. The deliberations of the Administration Committee on review and the litigation in the Administrative Tribunal have focused the issue of permanency on a factual dispute as to whether Applicant has been reasonably compliant or not with prescribed treatment regimens. Respondent contends that Applicant has been insufficiently committed to a treatment program that would control her symptoms and, as her thinking is not disordered, that she could choose to comply with such a program. Applicant asserts that she ". . . has attempted at every opportunity to alleviate her condition" by undergoing psychotherapy and taking prescribed medications, cooperating with the treatment regimens of her treating physicians.

84. The Final Minutes of the Administration Committee reflect that the Committee based its decision on review in part on the view that Applicant was not compliant with prescribed treatment:

> ". . . [The Medical Advisor] . . . noted that the participant frequently changes physicians and does not fully comply with prescribed medical regimes. . . . Treatment is difficult because the participant can but does not comply with the treatment regimes. . . .
>
> . . .
>
> . . . It was not clear why the person stopped taking medication."

(Administration Committee Final Minutes, May 9, 2002.) The Committee also noted in its discussion that while the Plan cannot require a participant to take medication or undergo surgery, it was not required to grant a disability pension to an individual who "refuses treatment." (*Id.*)

85. Moreover, the Medical Advisor identified as the "key to determining incapacity in this instance" as ". . . whether there is a volitional problem as with thought disorders where the person has no choice because they are confused, disoriented or delusional." (*Id.*) The Medical Advisor concluded that:

> "In this case, the person's thinking is not disordered and they do have a choice to comply or not to comply with a treatment regime which could help her. . . . She could follow a treatment regime by taking prescription drugs to control her behavior. There is no reason in the record why she cannot do so."

(*Id.*) At the same time, the Medical Advisor ". . . further elaborated that the participant's condition reflected poor impulse control." (*Id.*)

86. With regard to the factual dispute as to Ms. "K"'s compliance or not with the treatment options offered by her physicians, the record before the Tribunal appears to be lacking in evidentiary support for any of the following findings: a) that Ms. "K" was noncompliant with prescribed treatment, b) that she frequently changes physicians, or c) that she had stopped taking medication. The record review by the reviewing psychiatrist would seem instead to confirm that Ms. "K" had availed herself of treatment options for her multiple psychiatric conditions. The medical records show that she had been under psychiatric care and had been prescribed numerous medications over the years. While it is not possible to know whether Applicant was fully compliant, for example, in taking prescribed medications, there are no notations in the records that she was not. In fact, the Medical Advisor's own final report to the Administration Committee stated that "[m]edication had controlled the depressive aspects of this mental condition [i.e. borderline personality disorder]." (Medical Advisor's report of April 25, 2002.) As to the specific contention that Ms. "K" had frequently changed physicians, it may be observed that the reviewing psychiatrist's November 11, 2001 review of the records of the treating psychiatrist revealed that Ms. "K" had remained under the treatment of that physician for more than a year. (Reviewing psychiatrist's report of November 11, 2001.)

87. As noted earlier, the Medical Advisor expressed the view in his initial report that Ms. "K" had not undertaken psychotherapy of sufficient intensity or frequency to treat her mental condition:

> "She has never undergone long-term psychotherapy. Although her recent therapy has been supportive, it has not been of sufficient intensity and frequency to treat her character disorder. She has not been motivated to attempt individual intensive therapy, tending to focus instead on activities which enable her to avoid distress."

(Medical Advisor's report of January 26, 2001.) This conclusion is not tantamount, however, to a finding that Ms. "K" had been "noncompliant" in pursuing treatment of her condition.

88. An important question presented by this case is the extent to which Applicant's alleged "noncompliance" with treatment, if, in fact, there has been such noncompliance, may be attributable to the effects of the condition itself. Interestingly, in the same portion of the Administration Committee's discussion in which the Medical Advisor expressed the view that Applicant's alleged failure to comply with treatment was a matter of volition and that she could follow a treatment program, he "further elaborated" that Ms. "K"'s ". . . condition reflected poor impulse control." (Administration Com-

mittee Final Minutes, May 9, 2002.) Similarly, in his initial report, the Medical Advisor had noted: "Although intensive therapy would be expected to lessen the negative consequences of her characterologic disorder; *given her personality type*, she is unlikely to substantially commit herself to long-term intensive psychotherapy." (Medical Advisor's report of January 26, 2001.) (Emphasis supplied.) Regarding Ms. "K"'s cognitive state, the reviewing psychiatrist had noted that it is ". . . probably overwhelmed at times by her moods and emotions." (Reviewing psychiatrist's report of August 25, 2001.) Accordingly, it is possible that Applicant's mental disorder may itself have impeded its treatment.

89. In the view of the Administrative Tribunal, there is insufficient support in the record for the conclusion that Applicant did not comply with prescribed treatment regimes; moreover, if there were basis for a finding of noncompliance, it is possible that such noncompliance would be regarded as "reasonable" given the nature of Applicant's illness.

90. The WBAT addressed the issue of alleged noncompliance with treatment options in the *Shenouda* case, in which the Applicant had been diagnosed with fibromyalgia. In that case, the Bank had contended that ". . . any failure on the part of the Applicant to improve in health is primarily attributable to her unreasonable failure to take recommended medications, exercise and therapy." (Para. 25.) The WBAT concluded that these assertions were "clearly contradicted by the record," (*id*.) as the evidence showed that physical therapy was not likely to improve the individual's condition and that any failure to use prescribed medications was attributable to the adverse side effects they produced. (Paras. 26–27, 30.) The WBAT also noted physician reports of the applicant's "severe" impairment, as well as the recent deterioration of her condition, concluding that "it was much more likely than not that this disability would be permanent." (Paras. 28–30.)

91. Ms. "K" additionally contends that within the context of her remaining working life she is totally and permanently incapacitated, although a younger person might not be so classified. Respondent contends that at age 52 (Ms. "K"'s age at the time of the Administration Committee's Decision on Review), Applicant has approximately thirteen years of remaining working life until reaching the Fund's mandatory retirement age of 65 and that she has not shown that this is insufficient time for treatment of her personality disorder.

92. The WBAT has recognized that age may be a consideration in determining permanent incapacity under the parallel provision of the Bank's pension plan. In *Shenouda*, para. 33, the WBAT held that determination of

whether total incapacity is "likely to be permanent" is to be made "in relation to the normal retirement age" of 62 under the Plan.[19] In *Shenouda*, the applicant was 57 at the time that her application for disability retirement had been rejected; she had been, at that time, fully disabled for more than two and one-half years. The WBAT decided, under all of the circumstances, that there was no reasonable basis to conclude that the applicant's condition would improve in the following five years. In this case, Ms. "K"'s proximity to her normal retirement date (defined by SRP Section 4.3(f) for purposes of disability retirement as age 65)[20] is a factor to be considered in determining whether her incapacity is likely to be permanent.

93. Finally, any treatment options and prospects for improvement naturally must be evaluated in the context of the seriousness of the illness and the length of its duration. In *A*, the WBAT considered a case in which the dispute between the parties was not as to the existence of the applicant's incapacity but whether the incapacity was likely to be permanent. The Medical Advisor's opinion was that treatment would restore the applicant's work capability and that she therefore was not "permanently" incapacitated. The WBAT reversed the PBAC's decision (which was based on the Medical Advisor's conclusion) because the medical records showed that the applicant suffered from a severe and long-standing psychiatric condition:

> "In the view of the Tribunal, the PBAC's conclusions cannot be sustained in the light of the said Medical Reports, particularly in the following respects:
>
> (i) They fail to take sufficient account of the fact that the Applicant had suffered from severe depression since childhood. In 1992, Dr. X concluded that she had a 'severe psychiatric condition.' The underlying cause of the Applicant's illness is a long-standing one and the Medical Reports do not show that this problem has been eradicated or improved by treatment.
>
> . . ."

(Para. 16.) Accordingly, the WBAT concluded:

> "In light of such a long history of severe depression and psychological disorders, which seemed to have deteriorated with the years, the Applicant may be regarded as totally incapacitated for the performance of any duty

[19]The WBAT's rationale was that, as is the case under the Fund's SRP, disability retirees under the Bank's Plan are subject to periodic reassessment up until normal retirement age. (*Shenouda,* para. 33.)

[20]For purposes other than disability retirement, "normal retirement date" is defined under the Fund's Plan as age 62. (SRP Section 1.1(k).)

> with the Bank which she might reasonably be called upon to perform and such incapacity is 'likely to be permanent.'"

(Para. 17.) In holding that the incapacity was "likely to be permanent," the WBAT further suggested that the determination is to be made in light of the provision of the World Bank's pension plan, parallel to the Fund's SRP, authorizing the periodic reassessment of disability retirees:

> ". . . Section 3.4(a) does not say that incapacity must be permanent but only 'likely' to be permanent. The test is confirmed by Section 3.4(d) of the Staff Retirement Plan which empowers the Bank to terminate the disability pension on medical examination or other satisfactory evidence that the incapacity of a retired participant has wholly ceased or that he or she has regained the earning capacity which he or she had before the disability."

(Para. 17.)

94. In the case of Ms. "K", there is evidence in the record that Applicant's condition is of a long-standing character. The Medical Advisor in his initial report had noted a history of depressive episodes, the treating psychiatrist dated these as extending over the preceding six years, and Ms. "K" had recounted to another physician that she had been depressed most of her life, although "usually not 'badly'." Moreover, the reviewing psychiatrist made clear that Applicant's ". . . psychiatric symptoms emanate from biologic, developmental characterologic constructs endemic to her personality and neurochemistry." (Reviewing psychiatrist's report of September 5, 2001.) Similarly, the Final Minutes reflect that the Medical Advisor told the Administration Committee during its discussion that ". . . the records indicate that this condition existed at an early developmental period in the participant's life and that . . . the condition . . . develops over a person's life time." (Administration Committee Final Minutes, May 9, 2002.) Moreover, it may be observed that while the Medical Advisor in his reports faulted Applicant for not undertaking "intensive" psychotherapy, he also held out only limited hope for its efficacy, noting that it would be expected to "lessen" the negative consequences that her personality disorder has upon her workplace functioning. (Medical Advisor's reports of January 26, 2001 and April 25, 2002.)

95. The immediate question for decision is whether Applicant's incapacity is the result of a long-standing, intractable condition for which she has reasonably but unsuccessfully attempted treatment and hence is "likely to be permanent" or whether the conclusion of the Administration Committee may be sustained that ". . . since her condition can be controlled with prescription drugs even though there is expected to be recidivism, she is not permanently disabled." (Administration Committee Final Minutes, May

9, 2002.) In the Tribunal's view, the Applicant's incapacity is "likely to be permanent" for the reasons indicated above.

Was the Administration Committee's Decision Taken in Accordance with Fair and Reasonable Procedures?

96. In addition to seeking reversal of the Administration Committee's decision on the basis that the Committee erred in its interpretation and application of the requirements of the Staff Retirement Plan to the facts of her case, Ms. "K" seeks to impugn the fairness of the procedures by which the decision was taken. As considered *supra*, the question of whether the Administration Committee's decision has been taken in accordance with fair and reasonable procedures is one of the elements of the standard of review to be applied by this Tribunal to decisions of the SRP Administration Committee on disability retirement. The World Bank Administrative Tribunal has held that ". . . a decision by the PBAC may also be overruled, among other reasons, if the requirements of due process are not observed." (*Shenouda*, para. 36.)

97. Moreover, the IMFAT's authority to review the procedural fairness of any decision contested therein is found in the requirement of Article III, second sentence, that it apply ". . . the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." The significance of fair process as a general principle of international administrative law is highlighted by the Statutory Commentary:

> ". . . 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.)

98. Applying this principle in *Ms. "C"*, the Tribunal awarded compensation for procedural deficiency while sustaining the contested decision, the non-conversion of the applicant's appointment from fixed-term to regular staff. (Para. 44.) The Tribunal concluded that it was a "lapse in due process" for the applicant not to have been afforded a meaningful opportunity to rebut adverse evidence regarding her performance. (Paras. 41–42.) The Tribunal further observed that ". . . adequate warning and notice are requirements of due process because they are a necessary a prerequisite to defense and rebuttal," (para. 37), citing *Safavi v. The Secretary General of the United*

Nations, UNAT Judgement No. 465, paras. VI–VIII (1989). *See also Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999), para. 94. The principle of *audi alteram partem* was invoked more recently by this Tribunal in *Mr. "P" (No. 2)*, para. 152, in which it reaffirmed that ". . . 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."

99. The case of Ms. "K" raises the important issue of what process is due to applicants for disability retirement under the SRP, whether the Rules of Procedure of the Administration Committee comport with the requirements of international administrative law, whether the Rules have been followed in her case, as well as whether there are any other practices or procedures of the Administration Committee evidenced in this case that call into question the procedural fairness of the decision-making process.

100. In considering the procedural rights of applicants for disability retirement, it is to be borne in mind that a retirement pension (whether for disability or otherwise) is not merely a "benefit" conferred by the Fund on its staff. The pension Plan is a joint insurance scheme. While the Fund contributes substantially to the Plan and is responsible for its administration, the SRP participant likewise makes regular and significant contributions from earnings over the course of a career to ensure his entitlement, as authorized by the terms of the Plan, to income replacement at early retirement, normal retirement or in the event that he becomes totally and permanently incapacitated. Accordingly, the applicant's stake in the outcome of the decision-making process deserves a high level of procedural protection. The Committee itself may be regarded as representing the Plan's other stakeholders, protecting the assets of the Plan in the interests of the other participants similarly entitled to the Plan's benefits and of the Fund as a major contributor to those assets. That the process for deciding on applications be a fair and reasonable one is an interest shared by all Plan participants and the organization.

101. The World Bank Administrative Tribunal has had occasion to comment on the application of principles of fair procedure and transparent decision making in the context of its review of disability retirement decisions:

> "The Tribunal notes, *inter alia* that: the PBAC does not give the reasons for rejecting an application for disability pension; the opinion of the Medical Advisor is normally not made available to the applicant (at least before the deliberations of the PBAC); a representative of the applicant is not entitled to participate in the proceedings; the PBAC's decision-making and approval of benefits is excessively tied to the opinion of the Medical Advi-

> sor; there is apparent reluctance to utilize independent medical experts in the pertinent field; and there is great uncertainty as to the meaning of a disability to do Bank-related work, especially in light of the Bank's reference in its pleadings to the possibility of a staff member's performing assignments at home during very brief, flexibly scheduled work periods. These are all elements that can readily interfere with due process and with the transparency of decision-making by the Bank."

(*Shenouda*, para. 37.) It may be observed that some of the same concerns regarding procedural fairness raised by the WBAT are the subject of controversy in the present case.

102. Ms. "K"'s procedural arguments may be summarized as follows. The Administration Committee's decision was procedurally defective because "[t]he information provided the Committee excluded applicant's [i]nformation in its entirety"; the medical experts were not jointly selected to be truly "independent"; and the Committee considered a hearsay report of the findings of one of the reviewing physicians.

103. For its part, Respondent maintains that the terms of the SRP clearly contemplate that the Administration Committee's decision must be based on, and consistent with, the expert advice of its Medical Advisor. The Administration Committee acted appropriately in considering the opinions of both reviewing and treating physicians. That the underlying records of the treating physicians are not provided to Committee members does not represent a failure of process because the records are of a sensitive nature and the Committee members do not have the expertise to evaluate them. Applicant has not shown any bias on the part of the reviewing physicians or that it was improper for the Committee to accept a summary by external counsel of the report of the infectious disease specialist. Applicant has not shown that the Committee failed to take into account any material information that would have affected its decision.

104. It may be observed that Rule VI of the Administration Committee's Rules of Procedure appears to give the Committee considerable discretion to ". . . inquire about all information it needs for an equitable consideration of a Request," including the possibility of holding oral hearings with cross-examination. Rule VI provides in its entirety:

> "**RULE VI**
>
> Proceedings
>
> 1. The Committee will inquire about all information it needs for an equitable consideration of a Request. In considering a Request, the Committee may rely on written submissions or it may decide to convene an oral hear-

> ing, and decide who may attend such hearing. The Secretary will provide the Requestor with reasonable notice of the date of any proceeding in the matter, except in the circumstances described in Rule II, paragraph 5.
>
> 2. Upon request by the Requestor or upon its own initiative, the Committee may determine that any oral hearing or the evidence presented shall be confidential and the extent and modalities of such confidentiality. Any non-confidential information relied on by the Committee shall be subject to review and discussion, including cross-examination in the case of oral testimony. In the event that the Committee recognizes the confidentiality of any evidence, and a waiver of confidentiality cannot be obtained, then the Requestor shall be given an opportunity to review and respond to a summary of that evidence which shall be prepared by the Secretary.
>
> 3. The Requestor and any other party may be represented by counsel, each at his own expense.
>
> 4. The deliberations of the Committee shall be treated as confidential. Unless the Committee decides otherwise, the minutes of its deliberations shall be confidential and shall not be made available to the Requestor or any other party."

There is room to question whether the Administration Committee's implementation of this Rule in the case of Ms. "K" afforded Applicant sufficient and timely opportunity for rebuttal.

105. Rule VII, para. 1 of the Administration Committee's Rules of Procedure requires:

> "Each Decision shall be in writing, stating the reasons on which it is based and any action that the Committee may take or recommend."

In the case of Ms. "K", the Committee's initial Decision denying her application for disability retirement did not set forth any reasons for the Decision. Instead, it simply recited the standard for disability retirement and announced that the Committee had concluded that she did not meet that standard. This lapse in process not only appears to be in violation of the text of the Rule[21] but also has the effect of denying Applicant an opportunity for meaningful response.

106. It may be further noted that para. 3 of the same Rule provides:

> "Upon request, the Secretary of the Committee will furnish to the Requestor copies of any non-confidential documents and a summary,

[21]International administrative tribunals have emphasized the importance of observance by an organization of its procedural rules. *See D'Aoust,* para. 23; *Ms. "Y"(No. 2),* para. 55.

> prepared by the Secretary, of confidential evidence that it considered in making its decision."

Ms. "K" apparently did not avail herself of this opportunity. Nonetheless, as the proceedings in the case of Ms. "J" demonstrate, such rebuttal may be of only limited significance, as it does not provide any opportunity for the applicant to review and respond to the evidence prior to the taking of the Administration Committee's Decision. The question therefore arises whether the Administration Committee's procedures afford an applicant reasonable notice and opportunity to be heard.

107. Another procedural matter of concern evident in Ms. "K"'s case, although not specifically raised by Applicant, is the role played by external counsel during the Administration Committee's deliberations on review. The Final Minutes indicate: "The Chair asked if this condition would be considered disabling by the Plans of other organizations, to which external counsel replied that it would not be considered disabling." The question arises whether this comment, a generalization for which no basis is supplied, may have improperly influenced the Committee's decision-making process.

108. The Tribunal has decided Ms. "K"'s Application in her favor on substantive grounds. In this case, the Tribunal finds no need to pass upon her procedural complaints. But it observes for the future guidance of the Administration Committee that the Committee may wish to consider the following points.

109. The Administration Committee may consider enabling an applicant to submit observations in a current and timely way upon any medical reports and opinions submitted to or rendered by the Medical Advisor in the case.

110. Since in the Tribunal's view the applicant is entitled to see and comment upon all medical reports and opinions submitted to or rendered by the Medical Advisor in the case, the members of the Administration Committee should be entitled themselves to review those medical reports, with the object of weighing fully the views of both treating and reviewing physicians and evaluating the conclusions of the Medical Advisor.

111. Additionally, there might be room for consideration by the Administration Committee of review of an Applicant's condition, and opinions relating to it, not by a single Medical Advisor but by a Board of Medical Advisors, as in other international organizations such as the ILO and UNESCO. One member would be designated by the Applicant, a second by the Adminis-

tration Committee, and the third by agreement between the two so designated. The Tribunal observes that this tripartite model of medical evaluation already is embodied in the Fund's internal law in cases of medical separation at the Fund's initiative.[22]

112. A further consideration that may be borne in mind by the Administration Committee is that the advice of the Medical Advisor (or of any Board of Medical Advisors) should be confined to medical questions and not extend to the ultimate conclusion of whether the applicant is, or is not, totally and permanently incapacitated for the performance of any duty which the Fund may reasonably call upon him to perform. Rather, the drawing of that conclusion should be the function of the Administration Committee.

113. Finally, the applicant should be permitted to comment upon any statements of Fund officers regarding the applicant's capacity to perform any particular duty that the Fund might maintain that he or she might reasonably be called upon to perform.

Remedies

114. In her pleadings, Applicant seeks as relief a) that the Tribunal order that she be granted a disability pension retroactively; b) that "all funds deducted from her service accounts be recredited";[23] and c) legal costs.

115. The Tribunal's remedial authority is provided by Article XIV of the Statute, which states in its entirety:

> *"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

[22]GAO No. 13, Rev. 5 (June 15, 1989), Annex I provides in pertinent part:

> "2.03.1 A panel of medical experts shall be constituted in the following way: the Director of Administration and the staff member shall each appoint a panel member, and a third panel member shall be selected jointly by the first two members. ..."

See supra, The Legal Framework; Separation of a Staff Member for Medical Disability.

[23]Respondent has answered that no credits have been deducted from any accounts of Applicant and that Applicant has not elaborated what credits she believes should be restored.

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."

116. In exercise of the foregoing authority, the Tribunal decides that the decision of the Administration Committee denying a disability pension to Ms. "K" shall be rescinded and orders that the disability pension be granted.

117. Since the Tribunal has felt it unnecessary to pass upon the Applicant's claim of procedural unfairness, it awards no separate compensation to the Applicant in this regard.

118. As to Applicant's request for legal costs, it is noted, consistent with Section 4 of Article XIV, that if the Tribunal concludes that the application is "well-founded in whole or in part," reasonable legal costs may be awarded ". . . 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." In the case of *Ms. "C"*, the Tribunal awarded partial costs, taking account of the submissions of the parties, the Statutory criteria, and the limited degree to which the applicant in that case was successful in comparison with her total claims. (*Assessment of compensable legal costs pursuant to Judgment No. 1997-1*, IMFAT Order No. 1998-1 (December 18, 1998).)

119. The Tribunal has found Ms. "K"'s Application on the merits to be well-founded. Accordingly, pursuant to Article XIV, Section 4 of the Statute, the Fund shall pay Applicant the reasonable costs of her legal representation. The Tribunal will assess the amount of such compensable legal costs following the submission of a statement of costs by Applicant and an opportunity for comment by the Fund, according to a schedule to be transmitted with this Judgment.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

1. The decision of the Administration Committee denying Applicant a disability pension is rescinded and it is ordered that a disability pension be granted to Ms. "K", retroactive to the date of Applicant's retirement.

2. The Fund shall pay Applicant the reasonable costs of her legal representation, in an amount to be assessed by the Tribunal following the further submissions of the parties according to the schedule transmitted with this Judgment.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
September 30, 2003

JUDGMENT NO. 2004-1

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

(December 10, 2004)

Introduction

1. On December 9 and 10, 2004, 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", now a retired staff member of the Fund.

2. Applicant, the former Director of the Joint Africa Institute (JAI), then located in Abidjan, Côte d'Ivoire, contests a decision of the Department of Human Resources to deny his request for reimbursement of security expenses said to have been incurred by him indirectly when he elected to live in a hotel rather than a private residence at his overseas post. Applicant contends that the Fund's housing allowance for overseas Office staff, while designed to compensate for the difference between housing costs in Washington, D.C. and the duty station, unreasonably fails to take into account differences in security costs at the two locations, except in the circumstance in which the Fund has occasion to pay directly for security enhancements of and protection to the overseas residence. Therefore, asserts Mr. "R", Respondent unfairly penalizes a staff member such as himself who decides to rent quarters in a facility already outfitted with security equipment and guard services, the costs of which he maintains are included in the rental rate. Applicant seeks as relief the amount he estimates that he would have incurred directly for guard services had he elected to live in a private residence at his overseas post.

3. This is the second case brought to the Administrative Tribunal by Mr. "R" challenging the benefits he received during his assignment as Director of the JAI. In his earlier Application, Mr. "R" contested the denial of his request for a) an overseas assignment allowance, and b) a housing allowance commensurate with the housing benefit received by the Resident Represen-

tative in Abidjan. In that Application, he challenged as discriminatory the difference in benefits accorded overseas Office Directors vis-à-vis Resident Representatives in the unique circumstance in which such officials are posted in the same foreign city. In *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), this Tribunal rejected Applicant's contentions, holding that the allocation of differing benefits to overseas Office Directors and Resident Representatives was rational, related to objective factors, and untainted by any animus against Applicant, and that it was within the Fund's managerial discretion to decline to make an exception to policy in Applicant's case. (*Mr. "R"*, paras. 64–65.)

4. Respondent urges the Administrative Tribunal to deny Mr. "R"'s present Application on the ground that Article XIII of the Tribunal's Statute (finality of judgments) prevents Applicant from relitigating the same claims as were decided in *Mr. "R"*. Alternatively, Respondent contends that the denial by the Human Resources Department of Mr. "R"'s request to be compensated for security expenses he allegedly incurred by choosing to live in a hotel during his term as JAI Director was not an abuse of discretion but rather was consistent with the application of appropriate Fund policy.

The Procedure

5. On September 26, 2003, Mr. "R" filed his present Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicant that his Application did not fulfill all of the requirements of para. 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiency. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.[1]

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[1]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.

. . .

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. . . ."

6. The Application was transmitted to Respondent on October 16, 2003, and on October 22, 2003, pursuant to Rule XIV, para. 4[2] of the Rules of Procedure, the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Mr. "R"'s Application on December 1, 2003. Applicant submitted his Reply on December 24, 2003. The Fund's Rejoinder was filed on February 4, 2004. On August 4, 2004, at the Registrar's request, Applicant filed two additional documents, of which Respondent already had knowledge and which had been referenced in the pleadings, so as to complete the record before the Administrative Tribunal.

7. 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.[3]

The Factual Background of the Case

8. The relevant facts may be summarized as follows.[4]

9. Mr. "R", who had been a staff member of the Fund since 1981, was serving as Senior Resident Representative in Dakar, Senegal when in July 1999 he was appointed to serve as the first Director of the Joint Africa Institute, then situated in Abidjan, Côte d'Ivoire.[5] For purposes of the Fund's benefits policies, the JAI is considered as one of the Fund's seven overseas Offices.[6] Also posted at Abidjan was a Fund Resident Representative, who, pursuant to Fund policies, enjoyed more generous benefits.[7]

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[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]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."

[4]For a detailed presentation of the facts antecedent to Mr. "R"'s earlier case, *see Mr. "R",* paras. 6–15.

[5]The JAI is a joint undertaking of the IMF, World Bank and African Development Bank, with its directorship rotating among these organizations every three years; each organization is responsible for the compensation and benefits of its respective appointee. *Mr. "R",* para. 6.

[6]*See Mr. "R",* para. 26.

[7]Representative Representatives represent the Fund at numerous locations throughout the developing world, working closely with country authorities, providing policy review and advice, and supporting the Fund's programs. They receive greater benefits than do overseas Office Directors. *See Mr. "R",* para. 27.

10. From the time of his appointment as JAI Director, Applicant contended that he should be accorded a hardship allowance, overseas assignment allowance and housing allowance that would make his benefits equivalent to those received by the Fund's Resident Representative. The hardship allowance was, at that time, available only to Resident Representatives; the overseas assignment allowance continues to be so limited. With regard to housing, in the case of Resident Representatives, the Fund provides furnished housing in the city of assignment; for overseas Office Directors it pays an allowance to cover the difference in housing costs between the duty station and Washington, D.C. and for the shipment of household items.

11. With respect to his request for an increased housing allowance, Mr. "R" initially found support from the Director of the Fund's Human Resources Department (HRD), who in August 1999 sought approval from the Deputy Managing Director to pay Mr. "R" on an exceptional basis an allowance that would exceed the usual housing allowance for a staff member assigned to an overseas Office. The Director of HRD specifically endorsed Applicant's view that he should be granted a housing allowance equal to the full amount of the estimated cost of his residing at the Hotel Ivoire for the term of his assignment. The HRD Director cited several reasons in support of the request, including the unusual circumstance of Applicant's transferring from a Resident Representative post and the savings to the Fund of not shipping Mr. "R"'s furniture from Washington, as well as of not having to provide security services to Mr. "R" in Abidjan as would be required if he were to live at a private residence:

> "By staying at the Hotel Ivoire, the Fund will save on the cost of security for Mr. ["R"]'s residence. Based on the estimated cost of providing security for the Resident Representative, this cost saving is estimated at $1,500 monthly, or $54,000 over the period of the assignment."

Additionally, the HRD Director recommended a change in policy to make the hardship allowance applicable to staff in overseas Offices; of the locations in which the Fund has overseas Offices, only Abidjan met the qualifications for a hardship location.

12. Applicant soon received an interim response to his requests, advising that an overall review of benefits for overseas staff was being undertaken by HRD.[8] At the same time, he was informed that a hardship allowance would be granted on a provisional basis pending the outcome of that review.

[8]This review included comparison of Resident Representative benefits with the benefits applicable to staff employed in overseas Offices and the possible inequity presented by the posting of an overseas Office Director and a Resident Representative in the same location but with differing benefits. *See Mr. "R"*, paras. 12–14.

13. In the meantime, Mr. "R" took up his duties as JAI Director on September 20, 1999. Following completion of the overseas benefits review by HRD and its consideration by Fund Management, the Deputy Managing Director took a decision on Applicant's request for parity of benefits with the Resident Representative in Abidjan. This decision, relayed to Mr. "R" by the Chief of the Staff Benefits Division by email of October 2, 2000, 1) made permanent (and retroactive to his appointment as JAI Director) the provisional grant of a hardship allowance to Mr. "R", consistent with a change in policy extending this allowance to staff in overseas Offices, but 2) denied Mr. "R"'s requests for (a) an overseas assignment allowance, and (b) an increased housing allowance. Applicant was informed by the Staff Benefits Chief: "There will be no change in the manner in which your housing allowance is computed and paid and, since you are living in a hotel, no security costs need to be covered."

14. It was the October 2, 2000 denial of Mr. "R"'s requests for an overseas assignment allowance and an increased housing allowance that Applicant, following administrative review, challenged in his first case before the Administrative Tribunal. On March 5, 2002, the Tribunal denied Mr. "R"'s Application, concluding that neither the regulatory decision, adopting differing benefits packages for overseas Office Directors and Resident Representatives, nor the individual decision, denying Mr. "R"'s request for exceptional treatment, represented discrimination or abuse of discretion by the Management of the Fund.[9] The matter of reimbursement of security costs allegedly incurred by residing at the hotel was not specifically raised by Applicant nor considered expressly by the Tribunal.

15. Approximately one month following the Administrative Tribunal's decision, Mr. "R", on April 2, 2002, wrote to the Director of Human Resources on the subject of a "Revised Calculation of the Housing Allowance for JAI Office Staff," requesting that the allowance be recalculated to take into account security and utility costs at the duty station. The Director of Human Resources answered on May 3, 2002, noting that utility costs were already comprised in the housing calculation. As for security, she stated the Fund's policy as follows:

> "You are correct that the housing allowance does not cover security costs. However, we have on several occasions advised you that the Fund stands ready to cover the necessary costs of providing security in all locations where staff are placed around the world. In the event that the Fund's secu-

[9] *Mr. "R"*, paras. 64–65.

> rity office considers security measures necessary for you or other Fund staff at the JAI, the Fund will pick up the cost. It would be appropriate for you to raise any security concerns with [the Acting Chief of the Fund's Field Security Office]. . . . "

16. On June 17, 2002, the Acting Chief of the Field Security Office (FSO) reported to the Chief of the Staff Benefits Division that Mr. "R" had visited his office to discuss security concerns and allowances, specifically to ". . . request [ ] the Field Security Office's support in his efforts to obtain a monthly security allowance." According to the Acting Chief of Field Security, "I informed [Mr. "R"] that I am not an authority on compensation and benefits associated with overseas assignments, but that I would be able to comment on the security conditions and the possible impact on allowances." He noted the special security concerns associated with an extended period of civil unrest affecting Côte d'Ivoire, the protections afforded by residing in a hotel, and his view that security costs were passed on as an "invisible part of the room rates":

> "Mr. ["R"] elected to live in a hotel, rather than a private house. This was a very practical and security-conscious decision, and the FSO fully supported it. Major international hotels are normally staffed with security professionals, have comprehensive security programs, and are able to offer better overall protection than individual houses. The cost of the hotel security programs are not insignificant and are passed on to guests as an invisible part of the room rates.
>
> The required security protection measures for private expatriate residences in Abidjan, in view of the security conditions described above, are extensive and include good perimeter fences, metal bars on windows/doors, solid doors with good locking systems, safe havens, security alarm systems, exterior lighting, and full-time security guards.
>
> The typical costs to achieve these minimum essential standards are estimated at a one time expense of approximately $10,000 for enhancements to the property and an annual guard service fee of up to approximately $18,000. If Mr. ["R"] had elected to live in a single-family house, the expenses for these measures to ensure adequate security would have had to have been incurred. As in the case of Technical Assistance Advisors, the FSO would have had to cover the majority of these expenses.
>
> Exceptional precautionary measures are required in Abidjan because of the high level of risk faced by expatriates. The exceptional security measures raise the cost of living, whether at a private residence or at a hotel. Mr. ["R"] made a sound security decision by living at the hotel, and this factor should be considered in reviewing the standard allowances and his specific claim."

17. Through an exchange of emails in July 2002, Mr. "R" and the Staff Benefits Chief disputed the import of the memorandum from the FSO Acting Chief. Applicant maintained that the memorandum supported his view that he should be allotted a sum to cover the estimated cost of security provided by the hotel. The Staff Benefits Chief countered that, having considered the opinion of the FSO Acting Chief, HRD's position remained that the ". . . these costs were not incurred. . . . The Fund will pay for security costs incurred, but will not pay you for costs that were avoided due to your decision [to live at the hotel]."

The Channels of Administrative Review

18. On November 10, 2002, Applicant sought administrative review by the Director of HRD of the decision of the Staff Benefits Chief, contending: ". . . I should receive a security allowance because the monthly rental cost of my apartment at the Hotel Ivoire in Abidjan undoubtedly included security costs." Mr. "R" estimated these costs over his three-year appointment as $54,000 (i.e. three times the rate for annual guard service that the FSO Acting Chief had estimated for a private residence in Abidjan).

19. The Human Resources Director responded November 27, 2002 sustaining the decision of the Chief of Staff Benefits, who had in her view ". . . correctly interpreted and applied the Fund's policies to [Mr. "R"'s] situation." She elaborated these policies as follows:

> "In my memorandum of May 3, I reiterated that the housing allowance is not intended to cover security costs, but that the Fund stood ready to cover the necessary costs of providing security measures. I said, 'In the event that the Fund's security office considers security measures necessary for you or other Fund staff at the JAI, the Fund will pick up the cost.' It was for that reason that I suggested that you contact [the Acting Chief of the Field Security Office].
>
> . . . [The FSO Acting Chief] made no recommendations for additional security measures. Based on this, [the Staff Benefits Chief] concluded correctly that no further action was required.
>
> . . . If you had chosen housing that required guards or additional security equipment, the Fund would have paid for this. However, you chose to live in a hotel, where additional security measures were not needed. The relevant policies simply do not provide for the Fund to pay **to you** a notional amount that it might have had to pay **to other parties** if you had opted to live in a house."

(Emphasis in original.)

20. Mr. "R" submitted his Grievance on January 22, 2003. In a pre-hearing conference, Applicant contended that he was ". . . not asking for any exception to existing rules; I am only requesting that the Fund apply to my peculiar situation its policy of paying for security measures." The Grievance Committee nonetheless concluded in its Recommendation and Report of August 29, 2003 that it did not have jurisdiction over 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.[10]

21. On September 26, 2003, Mr. "R" filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

22. The principal arguments presented by Applicant in his Application and Reply are summarized below.

> 1. The data relied on by the Fund for calculation of the housing allowance for overseas Office staff exclude security costs from housing costs. Therefore, the housing allowance seriously underestimates the actual costs of housing at a duty station in which security is a significant concern.
>
> 2. Although the Fund offsets the inadequacy in the housing allowance for overseas staff who live in private residences because it pays directly for security costs, for those staff members choosing to lease quarters already having security enhancements, the housing allowance is insufficient because rental expenses include the cost of security. Accordingly, Applicant's housing allowance as JAI Director was improperly calculated.
>
> 3. The Administrative Tribunal's decision in *Mr. "R"* does not bar a claim for recalculation of Applicant's housing allowance. Previously, Applicant sought the same benefits as those granted the Resident Representative in Abidjan; these benefits did not include a housing allowance because the Fund pays directly the full housing expense of the Resident Representative. It is precisely because the first Applica-

[10]The Committee had dismissed the Grievance filed by Mr. "R" antecedent to his first Tribunal case on the same ground. *See Mr. "R"*, para. 17.

tion was denied that the problem of an ill-determined housing allowance is now raised.

4. Applicant seeks as relief compensation for the exclusion of security costs from the calculation of his housing allowance during his three-year term as JAI Director. As it is not possible to assess these costs precisely, compensation is estimated in the amount of the guard services that would have been required had Mr. "R" chosen to live in a private residence ($1,500 per month multiplied by 36 months, equaling $54,000).

Respondent's principal contentions

23. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1. Mr. "R"'s Application is barred by the doctrine of *res judicata* because the Tribunal reviewed Applicant's claim for an increased housing allowance in *Mr. "R"*. The present Application has the same purpose as the former one, in which Applicant sought a retroactive increase in the housing allowance to cover his actual housing costs in Abidjan, including rent, furniture and security guards, and for the future to allow him to live with the same comfort and security as the Resident Representative.

2. Applicant's current claim was encompassed within his first unsuccessful Application or, at a minimum, his current claim could have been raised in the first case. The foundation of the claim in law, i.e. that the Fund allegedly abused its discretion concerning the benefits payable to the JAI Director, is substantially identical to what Mr. "R" previously argued before the Tribunal.

3. The Tribunal in *Mr. "R"* reviewed and upheld both the Fund's benefits classification scheme for overseas staff, as well as management's decision to reject an exception to that scheme in Applicant's case. In particular, the Tribunal upheld Fund management's rejection of a recommendation by the Director of HRD that Applicant be paid an exceptional housing allowance, a recommendation based in part upon the security costs avoided by Applicant's selection of housing at the hotel.

4. The memorandum from the FSO Acting Chief does not create previously unknown facts so as to constitute different claims.

5. Even if the present Application is not barred by *res judicata*, it should be denied because Applicant's housing allowance was prop-

erly calculated in accordance with Fund policy. Mr. "R" has received all of the benefits to which he was entitled under the housing policy for overseas Office Directors.

6. Applicant's only challenge is to a regulatory decision. The Fund's housing allowance and security polices are reasonably related to their objectives and do not represent an abuse of discretion. The Fund has sound business reasons for its policy of paying for all security costs directly, as opposed to paying an allowance for security costs said to be implicit in the housing expenses of an overseas Office Director.

7. With regard to the Fund's approach to security costs, there is no difference as between Resident Representatives and Office Directors. In each case, the Fund will take, at its expense, all security measures it considers necessary, but it will not pay any staff member for the value of security measures avoided because of his choice of accommodations.

Consideration of the Issues of the Case

Finality of Judgments

24. Respondent's initial contention is that Mr. "R"'s present Application before the Administrative Tribunal is barred under Article XIII of the Statute (finality of judgments) by the Tribunal's Judgment in *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002).

25. Article XIII, Section 2 of the Tribunal's Statute provides:

> "Judgments shall be final, subject to Article XVI and Article XVII, and without appeal."[11]

This statutory provision codifies and applies to the judgments of the IMF Administrative Tribunal a cardinal principle of judicial review, the doctrine of *res judicata*. *Res judicata* prevents the relitigation of claims already adjudicated, promoting judicial economy and certainty among the parties. It is

[11]Article XVI permits a party to seek revision of judgment in the limited circumstance of discovery of a fact, unknown at the time the judgment was delivered, which might have had a decisive influence on the judgment of the Tribunal. Article XVII allows the Tribunal to interpret or correct a judgment whose terms appear obscure or incomplete or which contains a typographical or arithmetical error.

a principle that has been often recognized by international administrative tribunals. The World Bank Administrative Tribunal (WBAT), commenting on the parallel provision of its Statute, observed:

> "Article XI lays down the general principle of the finality of all judgments of the Tribunal. It explicitly stipulates that judgments shall be 'final and without appeal.' No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff."

van Gent (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 13 (1983), para. 21.

26. The IMFAT twice has affirmed the principle of the finality of a judgment in rejecting requests for interpretation of judgments, concluding: "The legality of the Judgment is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to issue an interpretation, because the judgment is final and without appeal." IMFAT Order No. 1997-1, *Interpretation of Judgment No. 1997-1 (Ms. "C", Applicant v. International Monetary Fund, Respondent)*, (December 22, 1997). *See also* Order No. 1999-1, *Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent)*, (February 26, 1999) ("The adoption of the requested interpretation would constitute an amendment of the Judgment, which is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to decide by way of an interpretation, because the Judgment is final and without appeal.") This case is the first, however, in which *res judicata* has been raised as a defense to an Application.

27. The International Labour Organisation Administrative Tribunal (ILOAT) has referred to the "classic three identities—of person, cause and object" that must be met in each case for *res judicata* to bar a subsequent claim. *In re Belser (No. 2), Bossung (No. 2) and Lederer (No. 2)*, ILOAT Judgment No. 1825 (1998), Consideration 5. In the view of the ILOAT, identity of object or purpose means that ". . . what the complainant is seeking is what he would have obtained had his earlier suit succeeded. And it is not the actual wording of the decision that matters but the complainant's intent." *In re Louis (No. 3)*, ILOAT Judgment No. 1263 (1993), Consideration 4. Similarly, the ILOAT has explained: "What the cause of action means is the foundation of the claim in law. It is not the same

thing as the pleas, which are submissions on issues of law or of fact put forward in support of the claim . . . in many instances the question will be whether the complainant's line of argument does not show some direct link with the earlier case." *In re Sanoi (No. 6)*, ILOAT Judgment No. 1216 (1993), Consideration 4.

28. In *Louis (No. 3)*, the ILOAT concluded as to one of the applicant's claims that ". . . though somewhat differently stated, [it] has much the same purpose as his corresponding claims in the first complaint." (Consideration 6.) By contrast, in *Baartz (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 258 (2001), in which in the earlier case "[i]n reciting the facts of the case, the Tribunal . . . noted that the Applicant 'appear[ed]' to claim compensation for 'significant financial losses' resulting from . . . changes made to the Bank's benefits policy" (para. 11), such claim survived a *res judicata* defense in the subsequent case because in the first case "[a]lthough the Applicant in his pleadings referred casually to the financial loss he incurred as a result of the Bank's failure to convert his employment, he did not pursue the matter further, and the Tribunal did not address this issue in its judgment." (Para. 32.) More recently, the doctrine of *res judicata* has been articulated as follows:

> "*Res judicata* operates to bar a subsequent proceeding if the issue submitted for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard. It extends to bar proceedings on an issue that must necessarily have been determined in the earlier proceeding even if that precise issue was not then in dispute. In such a case, the question whether *res judicata* applies will ordinarily be answered by ascertaining whether one or other of the parties seeks to challenge or controvert some aspect of the actual decision reached in the earlier case."

In re Enderlyn Laouyane (No. 2), ILOAT Judgment No. 2316 (2004), Consideration 11.

29. Applying these principles to case of Mr. "R", the Tribunal must consider what claims were raised by Applicant in his earlier suit, what was the purpose of that litigation, what legal arguments were put forward by the parties and considered by the Tribunal and what was decided by the Tribunal and on what basis.

Are the parties the same?

30. It is not disputed that the parties to the current dispute before the Administrative Tribunal are identical with those before it in *Mr. "R"*.

Is the outcome Applicant seeks now the same as that which he sought in his first case before the Tribunal?

31. Respondent contends that the Application should be dismissed because, in the Fund's view, Mr. "R"'s present suit has the same purpose as his original case. In particular, Respondent notes that in his first Application Mr. "R" sought as relief an increased housing allowance that ". . . for the past, would cover at least his actual housing costs in Abidjan and, for the future, would allow him to live in Abidjan with the same comfort and security as the RR."[12] Hence, the Fund contends Applicant's claim was encompassed in his first unsuccessful Application (in which he sought an overseas assignment allowance and an increased housing allowance commensurate with the housing benefit allocated to the Resident Representative) or that, at a minimum, this claim could have been raised in the first case.

32. By contrast, Applicant explains that the purpose of the former litigation was to attain the same benefits as those granted the Resident Representative in Abidjan. These benefits did not include a housing allowance because the Fund pays directly the full housing expense of the Resident Representative. According to Applicant, it is precisely because the first Application was denied that the problem of an ill-determined housing allowance is now raised. Mr. "R" therefore suggests that it would have been inconsistent for him to have argued both that he should be accorded the same benefits as the Resident Representative while at the same time seeking an adjustment in his housing allowance to account for alleged security costs.

33. In his present Application before the Administrative Tribunal, Mr. "R" seeks a) an interpretation of the housing allowance for overseas Office Directors that would take into account security costs in assessing the difference between housing costs in Washington, D.C. and the duty station by recompensing him for the cost of security allegedly included in his rental rate, and/or b) an interpretation of the Fund's security "policy" that would reimburse security costs incurred indirectly.

34. In the Tribunal's view, the purpose of the current claim is not the same as that earlier litigated. In the first case, Mr. "R" challenged the Fund's decision not to accord him as Director of JAI the same perquisites as those granted to the Resident Representative in Abidjan. In this case, he contests the application of a Fund security policy that distinguishes between security costs directly incurred and security costs indirectly incurred, the Fund meeting the former but not the latter.

[12]*See Mr. "R"*, para. 19.

Does Applicant's cause of action have the same foundation in law as that which he raised in his earlier case?

35. Respondent further contends that Mr. "R"'s current Application has the same foundation in law as his first suit, i.e. that the Fund allegedly abused its discretion concerning the benefits payable to the JAI Director. In particular, the Fund notes that the Tribunal in *Mr. "R"* reviewed and upheld both the Fund's benefits classification scheme for overseas staff and management's decision to reject an exception to that scheme in Applicant's case.

36. In considering the foundation of Applicant's claim in law it is important to observe that in his first Application Mr. "R" challenged management's decision of October 2, 2000 ". . . because this decision upholds the discriminatory treatment of an Office Director and a RR that are both posted in the same city. . . ." The Tribunal likewise responded to Applicant's claim as one of discrimination and analyzed it on that basis, elucidating the principle of nondiscrimination as a substantive limit on the exercise of discretionary authority.[13]

37. In *Mr. "R"*, the Administrative Tribunal identified the content of the decision then under review as follows:

> ". . . 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."

(Para. 25.) Hence, the Tribunal took no note of the statement in the October 2, 2000 communication to Mr. "R" that ". . . since you are living in a hotel, no security costs need to be covered," although that document was part of the record before the Tribunal. Nor was the argument raised that, in calculating the housing allowance for overseas Office Directors, the Fund unfairly excludes security costs in assessing the difference in housing costs between Washington D.C. and the duty station.

38. Instead, the Tribunal considered whether ". . . Respondent abused its discretion by maintaining differing benefits policies applicable to two categories of Fund staff posted abroad. . . ." (p. 20.) Therefore, the central question asked and answered by the Tribunal in *Mr. "R"* was ". . . whether the reasons given by Respondent for the differential treatment of overseas Office Directors and Resident Representatives are supported by evidence

[13]*See Mr. "R"*, paras. 30–46.

and are rationally related to the purposes of the employment benefits at issue." (Para. 53.)

39. The Tribunal reviewed the reasons proffered by Respondent for its differing benefits policies, finding some of the Fund's justifications more persuasive than others. In particular, the Tribunal suggested that Applicant was correct in pointing out, at least as to Fund personnel posted in Abidjan, that security differences did not support the distinction in benefits between Office Directors and Resident Representatives:

> "There are . . . differences in the standing and representational responsibilities of Resident Representatives and overseas Office Directors that underlie the differences in benefits.[footnote omitted] The Resident Representative occupies 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*."

(Para. 56.) (Emphasis supplied.) Nonetheless, the Tribunal did not conclude that the shared factor of security concerns in Abidjan invalidated the distinction in benefits between Mr. "R" and the Fund's Resident Representative. Rejecting Applicant's allegation of impermissible discrimination between two categories of Fund staff, the Tribunal noted that the Fund's 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." (Para. 58.) [14]

40. In assessing the preclusive effect of the Tribunal's Judgment in *Mr. "R"* it may be significant that the decision of the Tribunal did not differentiate in its reasoning between the two allowances, i.e. the overseas assignment allowance and the housing allowance, but rather rested on the permissibility of the difference in the total package of benefits accorded to the two catego-

[14]This point was amplified by the Administrative Tribunal in *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-3 (December 18, 2002), in assessing whether there was a rational nexus between the goals of an expatriate benefits policy and the 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." (*Ms. "G"*, para. 79.)

ries of staff. Moreover, the Tribunal did not rely specifically on the factor of security as a justification for the difference in benefits. Rather, it cited other factors in concluding that the allocation of differing benefits to different categories of staff was reasonably related to the purposes of the benefits ". . . in particular, the incentive to recruitment of Resident Representatives that is provided by the overseas assignment allowance." (Para. 64.)

41. It may be contended that a stronger argument in favor of *res judicata* may be found in the Tribunal's decision respecting the "individual decision" at issue in *Mr. "R"*. With regard to that decision, it may be said that the Tribunal, in denying the first Application, ratified the decision of Fund Management to reject the recommendation of the Director of HRD to extend a special housing benefit to Applicant to cover the entire cost of his residency at the Hotel Ivoire. That recommendation, it will be recalled, was based in part on the savings to the Fund of not having to provide security equipment or guard services for a private house for Mr. "R"'s occupancy. Management's decision to reject the request for exceptional treatment, concluded the Tribunal, was ". . . reasonable and one within the ambit of the Fund's managerial discretion."[15]

42. Security-related concerns associated with his posting in Abidjan also figured in Applicant's argument for parity of benefits with the Resident Representative in his first case. Among Mr. "R"'s contentions were that the risks and disadvantages attached to assignment to developing countries are not compensated by the hardship allowance, especially in the location of his posting, in which there are serious dangers resulting from violent unrest.[16] Nonetheless, the foundation in law for Applicant's argument in the present case differs, as he identifies a different inequity than the one complained of in the first case. In the present case, Mr. "R"'s complaint focuses upon the inequality allegedly visited upon overseas Office staff who choose to rent security-enhanced quarters vis-à-vis overseas Office staff who choose to take up residence in a facility that requires security upgrades. It would seem that in one respect this alleged inequality is closely related to the inequality complained of in the first case, as the selection and outfitting of the Resident Representatives' quarters necessarily includes security requirements. Nonetheless, in its pleadings in the present case, Respondent maintains, "As for the Fund's approach to security costs, there is no difference between Resident Representatives and Office Directors; in both cases, the Fund will take, at its expense, all security measures it considers necessary, but the Fund

[15]*Mr. "R"*, para. 65.
[16]*Mr. "R"*, para. 19.

does not pay any staff member for the value of security measures avoided because of the staff member's choice of accommodation."

43. While it may be also contended that Applicant's eliciting a further decision from the Fund should not be permitted to defeat a defense of *res judicata*, it is notable that the Director of HRD, when confronted in April 2002 with Applicant's request for a "Revised Calculation of the Housing Allowance for JAI Office Staff," referred Mr. "R" neither to the Tribunal's recent Judgment nor to the October 2, 2000 decision contested therein which had included the statement that ". . . because you are living in a hotel, no security costs need to be covered." Rather, the Director replied by asserting that the Fund ". . . stands ready to cover the necessary costs of providing security in all locations where staff are placed around the world," and suggesting that "[i]t would be appropriate for you to raise any security concerns with [the Acting Chief of the Fund's Field Security Office]." Hence, it may be said that the Fund reacted to Mr. "R"'s April 2002 request as if it were distinct from the request disposed of by the Administrative Tribunal only one month earlier. These actions may have led Mr. "R" to believe that HRD was open to considering his interpretation of the policy and later to pursue his claim through the channels of administrative review culminating in its present consideration by the Tribunal.

44. The Tribunal concludes that Mr. "R"'s current claim is not debarred on the ground of *res judicata*, because, in its essence, it is a challenge not to treating the benefits of a Resident Representative and an Office Director differently but to meeting security costs differently depending on whether the Fund pays those costs directly or leaves it to the staff member concerned to assume them indirectly as by payment of hotel bills that subsume security protection. This latter question was not addressed in the Tribunal's Judgment in the case initially brought by Mr. "R".

Individual Decision—Was the decision taken in Mr. "R"'s case, i.e. to deny his request for reimbursement of security costs allegedly incurred indirectly by choosing to lease security-enhanced quarters, consistent with applicable Fund policy? Did Respondent properly interpret and apply to Mr. "R" its policy regarding a) calculation of the housing allowance for overseas Office staff, and b) provision of residential security to staff members posted abroad?

45. The gravamen of Applicant's complaint is that his housing allowance was improperly calculated because it did not reflect the difference in

the cost of housing between Washington, D.C. and the duty station.[17] The housing allowance has been inconsistently applied in his case, contends Mr. "R", because the Fund has applied to him a policy with regard to security costs for personnel posted abroad that denies reimbursement for security expenses said to be incurred indirectly through the choice of renting a security-enhanced accommodation.

46. Applicant emphasizes that he is complaining of the interpretation, in the particular circumstances of his case, of the HRD Director's statement that the Fund ". . . stands ready to cover the necessary costs of providing security in all locations where staff are placed around the world. In the event that the Fund's security office considers security measures necessary for you or other Fund staff of the JAI, the Fund will pick up the cost." Applicant's argument is that the Acting Chief of the Field Security Office did consider residential security measures necessary for expatriates in Abidjan, and therefore the Fund should "pick up the cost" of that part of his hotel rent that may be attributable to the provision of security services. Specifically, Mr. "R" contests the July 2002 decision of the Staff Benefits Chief that ". . . these costs were not incurred. . . . The Fund will pay for security costs incurred, but will not pay you for costs that were avoided due to your decision [to live at the hotel]." The Tribunal concurs with Applicant's view that these costs, far from being avoided, were indeed "incurred," albeit indirectly. On review, the HRD Director, however, concluded that the Staff Benefits Chief ". . . correctly interpreted and applied the Fund's policies to your situation."

The "Regulatory Decision"

47. Respondent, maintaining that the Fund's policy on residential security costs was properly applied to Mr. "R"'s term as Director of the JAI, contends that Applicant's "only challenge" in the present case is to a "regulatory decision"[18] of the Fund.[19] That policy, as articulated by the Fund, is to provide adequate residential security measures to staff posted overseas but

[17]As stated in the information provided on the Fund's internal website as to the housing allowance for overseas Office staff, "The housing allowance paid by the Fund is the difference between the estimated housing cost in the new duty station and Washington D.C."

[18]As the Tribunal has explained in *Mr. "R"* and elsewhere, the IMFAT is vested by its Statute (Article II) with jurisdiction over challenges to both "individual" and "regulatory" decisions of the Fund. *See Mr. "R",* paras. 21–22.

[19]This position, it may be observed, is consistent with that taken by the Fund's Grievance Committee in its Recommendation and Report. *See* The Channels of Administrative Review, *supra*.

not to reimburse any staff member for such expenses that may be "avoided" by his choice of accommodations.

48. Initially, it should be considered whether the security "policy" was indeed a "regulatory decision" for purposes of the Statute of the Administrative Tribunal, defined by Article II, Section 2.b. as ". . . 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." In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), the Tribunal explained:

> "35. It is clear that for a practice to constitute a regulatory decision there must be a 'decision'. That decision must have been taken by an organ authorized to take it. However, the evidence in these proceedings shows that the practice of truncating the weight given to the previous experience of non-economists at ten years was never decided upon by the Executive Board, the Managing Director, or the most senior officials of the Fund. The practice is 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. In view of these uncontested facts, the Tribunal is unable to regard the practice in question as flowing from or constituting a regulatory decision. This being its conclusion, it follows that the Tribunal lacks jurisdiction to pass upon the practice as a regulatory decision, though it has found itself competent to consider the validity of the application of that practice to Mr. D'Aoust as an 'individual' rather than a 'regulatory' decision."

The Tribunal in *D'Aoust* emphasized the importance of transparency of personnel policies:

> "36. At the same time, the Tribunal finds it appropriate to observe that for the Fund to generate and apply a practice that affects the determination of the salary level of a substantial proportion of its staff, but which was and is largely unknown, may require the consideration of the Managing Director. It is clear that neither the members of the staff of the Fund nor this Tribunal can adequately react to a practice which is at once real in its effects but so elusive in its origins, adoption, recording, articulation and transparency.
>
> 37. It may be added that notice by which rights and obligations are clearly conveyed is a requirement not only of due process. Such notice is an element of the structure of the Statute of the Administrative Tribunal of the

Fund, and, as a general proposition, it is held to be required by ample judicial authority."

49. In *Ms. "B", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), the Tribunal summarized the ". . . essential conditions for a valid regulatory decision: a decision, taken by an authorized organ of the Fund, laid down in a published official document of the Fund, with a determinable effective date, of which the staff has been given reasonable notice." (Para. 39.)

50. Whether the Fund's "policy" on residential security costs for staff members posted abroad is a "regulatory decision" for purposes of the Statute of the Administrative Tribunal is open to question. This policy has been found in correspondence with Mr. "R"; it is also noted in the benefits review conducted by HRD that, as to Resident Representatives, "Security upgrades should continue to be financed separately by the Fund wherever warranted." ("Resident Representative Program: Review of Benefits and Incentives," February 18, 2000.) But there is no evidence before the Tribunal that the policy has been communicated to the staff of the Fund at large. The Fund accordingly may wish to consider announcing and circulating a clear and comprehensive statement of its policy in respect of meeting costs for the provision of necessary security for Fund personnel posted abroad.

51. In any event, the Tribunal, even if it lacks jurisdiction to pass upon the security policy as a "regulatory decision," is competent to consider the fairness of its application to Applicant as an "individual decision."[20] Implicit in Applicant's challenge to the "regulatory decision" is that the policy is inherently inequitable, and, although he does not articulate it as such, that it violates the principle of equal pay for equal work. As the Tribunal observed in *Mr. "R"*, charges of discrimination may arise in different ways, and ". . . a policy, neutral on its face, may result in some kind of consequential differentiation between groups."[21] The Fund, for its part, maintains that the housing allowance and security policies are reasonably related to their objectives and do not represent an abuse of discretion. Rather, asserts the Fund, it has sound business reasons for paying for all security costs directly, as opposed to paying an allowance for security costs said to be implicit in the housing expenses of an overseas Office Director. The Fund maintains that it does not wish to pay an allowance for security costs lest it be otherwise applied by the staff member.

[20] *D'Aoust*, para. 35.
[21] *Mr. "R"*, para. 36.

52. While the Tribunal appreciates the Fund's motivation, it finds it insufficient to justify its application in the case of Mr. "R". Mr. "R", in the security situation then prevailing in Abidjan, made a reasonable decision to live in the Hotel Ivoire. As the Fund's Security Chief recognized, not only was that decision sound; it entailed Mr. "R"'s indirect payment of security costs subsumed in his considerable hotel bills. The Fund "avoided" those costs, but Mr. "R" could not avoid them. The Tribunal sees no cogent consideration, in light of the Fund's policy of meeting security costs, why Respondent should be absolved of those costs in the case of Mr. "R" simply because they were indirectly rather than directly incurred. On the contrary, equal treatment of staff in their fundamental right to enjoy physical security should govern. At the same time, the Tribunal, in passing upon Mr. "R"'s current claim, recognizes that it is dealing with a singular factual circumstance.

Remedies

53. Article XIV, Section 1 of the Statute provides:

> "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."

Accordingly, the Tribunal rescinds the decision of the Fund to deny payment of security costs indirectly incurred by Mr. "R".

54. Applicant acknowledges in his pleadings that it is not possible to assess the costs of security that were passed on to individual hotel guests in the rental fee. As a proxy for these costs he requests the amount of the guard services that would have been required had he chosen to live in a private residence ($1,500 per month multiplied by 36 months, equaling $54,000). The source of this figure is found in the August 1999 correspondence from the HRD Director to the Deputy Managing Director seeking an exceptional housing allowance for Mr. "R", in which she notes the cost savings to the Fund of not having to provide security to Mr. "R" at a private residence as $1,500 per month (based upon the security costs for the Resident Representative in Abidjan). This same figure was cited in June 2002 by the Acting Chief of the Field Security Office who estimated the "typical costs to achieve . . . minimum essential standards" for protection of private expatriate residences in Abidjan at a one time expense of approximately $10,000 for enhancements to property plus an annual guard service fee of approximately $18,000 ($1,500 per month). Accordingly, the Tribunal concludes that $54,000 is the most reasonable approximation that the record affords of the security

costs incurred by Mr. "R" and therefore prescribes the Fund's payment of that sum to Applicant to correct the effects of the rescinded decision.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

1. Mr. "R"'s current claim is not debarred by reason of *res judicata*.

2. The decision of the Fund to deny payment of security costs indirectly incurred by Mr. "R" is rescinded.

3. The Fund shall pay the sum of $54,000 to Mr. "R" as the most reasonable approximation that the record affords of security costs incurred by him in the course of his assignment in Abidjan.

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 10, 2004

ORDERS
(Nos. 2003-1 to 2003-2)

ORDER NO. 2003-1

Ms. "J", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2003-1)

(December 23, 2003)

The Administrative Tribunal of the International Monetary Fund,

- having decided in *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003) (para. 183 and Decision, para. 3) that the Fund shall pay Applicant the reasonable costs of her legal representation in accordance with Article XIV, Section 4[1] of the Tribunal's Statute, and
- having considered Applicant's statement of costs, the Fund's response, and the post-Judgment views of the parties regarding the assessment of compensable legal costs,

unanimously adopts the following decision:

First: The Administrative Tribunal accepts the statement of costs prepared by Applicant's counsel as a valid representation of the costs "incurred by the applicant in the case" (Article XIV, Section 4). Accordingly, the Tribunal shall not, as Respondent requests, inquire into the particular fee arrangement existing between Applicant and her counsel.

Second: In the circumstances of the case, the Administrative Tribunal shall not deduct from Applicant's compensable legal costs a sum attributed to consultation regarding Applicant's workers' compensation claim. That claim, which Applicant conceded during the course of the proceedings

[1]Article XIV, Section 4 provides:

"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."

was not yet ripe for review, nonetheless was recognized in the Tribunal's Judgment as being of an "intersecting nature" with Applicant's disability retirement claim. (*Ms. "J"*, para. 89). The disputed entries on the statement of costs reflect that, at the applicable stage of consultation, both complaints were reasonably being considered in tandem.

Third: Therefore, in accordance with the requirements of Article XIV, Section 4 of the Statute, taking into account the nature and complexity of the case, the nature and the quality of the work performed, and the amount of the fees in relation to prevailing rates, the Administrative Tribunal hereby assesses the reasonable costs of Applicant's legal representation in the full amount submitted, i.e. $16,434.32.

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 23, 2003

ORDER NO. 2003-2

Ms. "K", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2003-2)

(December 23, 2003)

The Administrative Tribunal of the International Monetary Fund,

- having decided in *Ms. "K", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-2 (September 30, 2003) (para. 119 and Decision, para. 2) that the Fund shall pay Applicant the reasonable costs of her legal representation in accordance with Article XIV, Section 4[1] of the Tribunal's Statute, and
- having reviewed Applicant's statement of costs and the Fund's response regarding the assessment of compensable legal costs,

unanimously adopts the following decision:

First: The Administrative Tribunal accepts the statement of costs prepared by Applicant's counsel as a valid representation of the costs "incurred by the applicant in the case" (Article XIV, Section 4). Accordingly, the Tribunal shall not, as Respondent requests, inquire into the particular fee arrangement existing between Applicant and her counsel.

Second: Therefore, in accordance with the requirements of Article XIV, Section 4 of the Statute, 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, the Administrative Tribunal hereby

[1]Article XIV, Section 4 provides:

"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."

assesses the reasonable costs of Applicant's legal representation in the full amount submitted, i.e. $14,817.30.

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 23, 2003

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paragraph numbers, as well as to
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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.

Office of the Registrar
International Monetary Fund Administrative Tribunal
700-19th Street, N.W., HQ1-3-544
Telephone: (202) 623-6008 **Washington, DC 20431** **Fax: (202) 623-6016**