

**International Monetary Fund
Administrative Tribunal**

Reports

**Volume IV
2005**

**International Monetary Fund
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2009**

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INTERNATIONAL MONETARY FUND
ADMINISTRATIVE TRIBUNAL
2005

Judge Stephen M. Schwebel, President

Former President, International Court of Justice

Associate Judge Nisuke Ando

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

Former President of the Judicial Chamber, Conseil d'Etat, France

President, International Labour Organisation Administrative Tribunal

Alternate Judge Georges Abi-Saab

Emeritus Professor of International Law,

Graduate Institute of International Studies, Geneva

Chairman of the Appellate Body, World Trade Organization

Alternate Judge Agustín Gordillo

Emeritus Professor, University of Buenos Aires School of Law

Judge, Organization of American States Administrative Tribunal

Judge, International Labour Organisation Administrative Tribunal

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PREFACE

Volume IV of *International Monetary Fund Administrative Tribunal Reports* contains the Judgments and Orders of the International Monetary Fund Administrative Tribunal rendered during the year 2005. 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: 2005." 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, along with those governing Applications filed prior to that date, are included in this volume.

Celia Goldman
Registrar

Washington, D. C.
January 2009

Developments in the Jurisprudence of the International Monetary Fund Administrative Tribunal: 2005

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 year 2005, with Judge Stephen M. Schwebel serving as the Tribunal’s President, Judges Nisuke

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¹The 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).)

²The 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).)

³Statute, Article II (1) and (2).

⁴Statute, Article V (1).

⁵Statute, Article XIII (2).

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

Ando and Michel Gentot as Associate Judges, and Judges Georges Abi-Saab and Agustín Gordillo as Alternate Judges.⁷ During 2005, the Tribunal rendered four Judgments and two Orders. This review highlights some of the most significant issues, both substantive and procedural, addressed by the IMFAT during the year.⁸

Developments in the Substantive Law

The case of *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005) presented the Tribunal for the first time with the following issues of substantive law: (a) the lawfulness of the abolition of a position; (b) an allegation of religious discrimination; and (c) a claim that a staff member had been the object of harassment and a hostile work environment. Allegations of discrimination were also at issue in two additional Applications decided during 2005. In *Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November

⁷The 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 (2005) 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
 Chairman of the Appellate Body, World Trade Organization;
 Alternate Judge Agustín Gordillo (Argentina)
 Emeritus Professor, University of Buenos Aires School of Law
 Judge, Organization of American States Administrative Tribunal
 Judge, International Labour Organisation Administrative Tribunal.

⁸For 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); 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); and Goldman, "Developments in the Jurisprudence of the International Monetary Fund Administrative Tribunal: 2003–2004," in *International Monetary Fund Administrative Tribunal Reports*, Vol. III, 2003–2004, pp. 1–18 (2008).

17, 2005), and *Ms. "Z", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), the Tribunal reviewed challenges to decisions taken under the Fund's Discrimination Review Exercise ("DRE"), applying principles set out in an earlier Judgment.

Abolition of Position

The case of *Mr. "F"* required the Tribunal to interpret for the first time the law governing abolition of posts, which is set out in the Fund's internal law in GAO No. 16. *Mr. "F"* asserted that the decision to abolish his position, which was part of a restructuring of his department, was not justified by institutional needs but rather served as a pretext for removing him from his work unit. *Mr. "F"* alleged that the abolition decision was motivated by religious discrimination and that during his employment he had been subjected to harassment and a hostile work environment based on his religious affiliation, which differed from that of his immediate co-workers. *Mr. "F"* additionally maintained that he was not given adequate notice of the abolition of his post nor good faith assistance in attaining a reassignment.

The Tribunal initially addressed the Applicant's principal claim, that the abolition of his position represented an abuse of managerial discretion. Referring to the governing provisions of the Fund's internal law, the Tribunal noted that the essential requirements for a lawful abolition of position are that the position has been abolished or redesigned to meet institutional needs and the incumbent is no longer qualified to fulfill its requirements.⁹

Reviewing the evidence, the Tribunal considered whether there were "material differences" between the duties assigned to *Mr. "F"* in his former post and those allocated to the position that was introduced in his section following its restructuring. The IMFAT concluded that the new position involved responsibilities materially different from, and more demanding than, those that had been performed by the Applicant.¹⁰ Moreover, in the view of the Tribunal, the Fund reasonably had exercised its discretion in determining that *Mr. "F"* was not qualified to meet the requirements of the redesigned position.¹¹

⁹*Mr. "F"*, para. 51.

¹⁰*Id.*, para. 59.

¹¹*Id.*, para. 70. In so concluding, the Tribunal referred to the following passage from the Commentary on the Statute in respect of the Tribunal's deference to managerial discretion:

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

In considering whether the abolition of Mr. "F"'s position was taken to meet institutional needs, the Tribunal also examined the rationale set out by the Fund for the structural changes affecting the Applicant's work unit. The Tribunal concluded that the reasons advanced by the Fund in justification for these changes, including redeployment of positions to areas experiencing increased workload, were "credible and sufficient" to justify abolition of the Applicant's post.¹² The Tribunal rejected Mr. "F"'s contention that the abolition of his position had been "improperly motivated,"¹³ either to resolve longstanding personnel problems¹⁴ or by religious discrimination (*see below*).

While sustaining the abolition decision itself, the Tribunal nonetheless found in the Applicant's favor as to his contention that the decision had not been taken in accordance with fair and reasonable procedures. The Tribunal concluded that while the procedures followed in the case of Mr. "F" were consistent with the Fund's interpretation of Section 13.02 of GAO No. 16, i.e., that the notice period functions as notice of separation from service rather than of the abolition of position, ". . . the fair and transparent procedures that govern or should govern the operations of the Fund require that a staff member whose position is abolished be given reasonable notice of that prospect" and that the "summary notice" given to Mr. "F" was not adequate for that purpose. The Tribunal accordingly held that the Fund had failed to

have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.

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.

¹²Mr. "F", paras. 61–62.

¹³The IMFAT observed that international administrative jurisprudence suggests that improper motive may be found, for example, if the purpose of the abolition of a position is to terminate a particular individual for misconduct or unsatisfactory performance, and that there must be a causal link between the contested decision and the alleged irregular motive. *Id.*, paras. 71–74.

¹⁴Mr. "F" alleged *inter alia* that the "real purpose" for the restructuring was to resolve longstanding personnel problems in his Section rather than to achieve institutional efficiency. Having found the abolition decision to be justified by the institutional needs cited by the Fund, the Tribunal considered whether ". . . the fact that the Fund saw the restructuring not only as justified by [these] considerations . . . but as carrying the further advantage of overcoming the Section's notorious personnel conflicts deprive[d] the restructuring of its legitimacy." The Tribunal concluded that the legitimacy of the Fund's exercise of discretionary authority was not vitiated by this additional motive. *Id.*, paras. 78–79.

give Mr. "F" reasonable notice of the abolition of his post¹⁵ and awarded him compensation for this failure.¹⁶

Discrimination Prohibited by Universally Accepted Principles of Human Rights

The case of Mr. "F" was also the ". . . first in which the IMFAT ha[d] been called upon to address an allegation that a staff member's career ha[d] been adversely affected by religious prejudice, a source of discrimination prohibited by the Fund's internal law [footnote omitted] as well as by universally accepted principles of human rights."¹⁷ Other Applicants, observed the Tribunal, had alleged discrimination of a "distinctly different and less serious type," namely, that a classification scheme relating to Fund salary or benefits unfairly favored one category of staff members over another.¹⁸ In the view of the Tribunal, the allegation that the abolition of Mr. "F"'s position had been discriminatory on the ground of his religion was a "serious charge that may be subject to particular scrutiny by the Tribunal."¹⁹

¹⁵*Id.*, para. 106. (This element of the Tribunal's Judgment became the subject of a request by the Fund for interpretation of judgment. See *infra* Admissibility of Parties and Claims before the Administrative Tribunal.) Mr. "F" additionally maintained that the Fund had failed to comply with the requirement of Section 13.01 of GAO No. 16, which provides, in the case of abolition of position, that efforts shall be made to reassign the affected staff member to another position, consistent with his qualifications and the requirements of the Fund. The Tribunal concluded, upon reviewing the evidence, that fault was to be borne by both parties for "failure to energetically pursue such possibilities" and declined to award compensation to the Applicant on that ground. *Id.*, para. 117.

¹⁶*Id.*, Decision. See *infra* Remedies.

¹⁷Mr. "F", para. 81. In *Ms. "S", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1995-1 (May 5, 1995), the Tribunal summarily dismissed, as beyond the reach of the Tribunal's jurisdiction *ratione temporis*, an Application raising a claim of gender discrimination, as the complained of acts occurred prior to the effective date of the Statute. In *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal confronted indirectly a claim of gender discrimination in reviewing conclusions under the Discrimination Review Exercise. See *infra* Cases arising from the Discrimination Review Exercise ("DRE").

¹⁸Mr. "F", para. 81. See *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996) (economist v. non-economist staff); *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002) (overseas Office Directors v. Resident Representatives); *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002) (Lawful Permanent Residents v. G-4 visa holders).

¹⁹Mr. "F", para. 50. Compare Mr. "F" with Mr. "R", para. 47 and Ms. "G" para. 79 (applying "rational nexus" test to resolve claims of alleged discrimination in allocation of differing benefits to different categories of Fund staff).

The Tribunal noted that the Fund had “recognized from its inception the importance to a global institution of maintaining a nondiscriminatory workplace,” incorporating a rule against discrimination in its “N Rules.”²⁰ In recent years, the Fund had “taken additional steps evidencing the significance which it attaches to this matter,” in particular the adoption of the Discrimination Policy, which protects against “. . . differences in the treatment of individuals or groups of employees where [*inter alia*] the differentiation is not based on the Fund’s institutional needs and . . . is made on the basis of personal characteristics such as age, creed, ethnicity, gender, nationality, race, or sexual orientation”²¹

Mr. “F” alleged both that the abolition of his position had been improperly motivated by religious discrimination and that he had been the object of religious intolerance and workplace harassment during his employment with the Fund. As to the first claim, the Tribunal’s answer to the question of whether the decision to abolish Mr. “F”’s position was motivated by religious discrimination was “decidedly negative.” The Tribunal found “. . . no evidence that those who took the decision to abolish Mr. “F”’s position were so motivated.”²²

The Tribunal responded to Mr. “F”’s second contention, i.e., that he had suffered discriminatory treatment during his career with the Fund, with reference to the Fund’s Discrimination Policy. Specifically, the IMFAT asked whether the Applicant had shown that he had been subjected to a “. . . pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.”²³ The answer to that question was to be found by referring also to the Fund’s internal law prohibiting harassment in the workplace.

²⁰Mr. “F”, paras. 82-83. Rule N-2 provides:

N-2. Subject to Rule N-1 above, the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, creed, or nationality.

Adopted as N-1 September 25, 1946, amended June 22, 1979.

The “N Rules” form part of the Rules and Regulations of the International Monetary Fund, supplementing the Articles of Agreement and By-Laws adopted by the Board of Governors. See Mr. “F”, note 15.

²¹*Id.*, paras. 83-84 and note 16.

²²*Id.*, para. 90.

²³*Id.*, quoting Discrimination Policy (July 3, 2003).

Harassment and Hostile Work Environment

Accordingly, the case of *Mr. "F"* was not only the first to present the IMFAT with an allegation of discrimination on a ground prohibited by universally accepted principles of human rights, but also the first in which a staff member contended that he had been the object of harassment and a hostile work environment prohibited by the Fund's Policy on Harassment. These contentions of discrimination and harassment were closely intertwined in the facts presented in *Mr. "F"*.

Moreover, in considering whether *Mr. "F"* had been "subjected to a hostile work environment in contravention of the Fund's internal law," the Tribunal observed that ". . . discrimination and harassment are closely related under the law of the Fund inasmuch as harassment on the basis of specified characteristics may amount to discrimination on such grounds . . ." ²⁴ At the same time, the Fund's prohibition on harassment provides more broadly that harassment is "any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment."²⁵

Examining the facts presented in the case of *Mr. "F"*, the Tribunal concluded that ". . . the evidence predominantly sustains the conclusion that the Section in which *Mr. "F"* worked suffered from an atmosphere of religious bigotry and malign personal relations among certain of its members, and that he in particular suffered accordingly. . . ." The IMFAT found "ground to conclude that Applicant suffered from harassment in the workplace, as that concept is defined in the Fund's Policy on Harassment." This was so, held

²⁴*Id.*, para. 91. "The Fund's Discrimination Policy, p. 5, explains that harassment can manifest itself as a form of discrimination:

'Harassment, unfair treatment, abuse of power, and favoritism are also separate from discrimination, but they can all become discriminatory if they develop into a pattern and systematically address certain individuals or groups of individuals and have an impact on employees' performance, development, career opportunities, and career progress."

Mr. "F", para. 93.

In two subsequent Judgments, the Tribunal was to distinguish the harassment complained of by *Mr. "F"* from allegations of harassment unrelated to discriminatory animus. See *Ms. "BB"*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), paras. 73-77; *Mr. "DD"*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), paras. 67-70.

²⁵Policy on Harassment, January 1995; Staff Bulletin No. 99/15 Harassment – Policy and Guidance to Staff, June 18, 1999, quoted in *Mr. "F"*, para. 91.

the Tribunal, "though there is also evidence that he may have contributed to the malign atmosphere in the Section by his own behavior."²⁶

In the view of the Tribunal,

. . . there is evidence in the record that Mr. "F" felt, and had reason to feel, that he was the object of hostility on the part of certain of his colleagues because his religion was different from theirs . . . [T]here is also evidence that an atmosphere of religious animosity was tantamount to harassment that adversely affected the work performance and perhaps health of Mr. "F". Harassment also appears to have had origins not of a religious kind.²⁷

Moreover, the Tribunal found "no evidence in the record that Fund supervisors took effective action to deal with that unacceptable situation."²⁸ While a senior economist had been assigned to investigate and resolve personnel problems plaguing Mr. "F"'s work unit, in the view of the Tribunal, these efforts were "not enough to absolve the Fund of responsibility for not addressing Mr. "F"'s complaints of religious hostility."²⁹ In the light of the record, the Tribunal concluded that the Fund had failed to take effective measures in response to the religious intolerance and workplace harassment of which Mr. "F" was an object and awarded him compensation on that ground.³⁰

Cases arising from the Discrimination Review Exercise ("DRE")

During 2005, the IMFAT rendered Judgments in two cases arising from the Discrimination Review Exercise ("DRE"), an alternative dispute resolution mechanism implemented by the Fund for a brief period in the late 1990s to resolve longstanding complaints of discrimination that had not been raised through the Fund's formal channels. Following its precedent in *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the IMFAT in *Ms. "W"* and *Ms. "Z"* reaffirmed that decisions taken under the DRE were subject to only limited review by the Tribunal. The Tribunal therefore declined to engage in a *de*

²⁶*Mr. "F"*, para. 100.

²⁷*Id.*, para. 101.

²⁸*Id.*, para. 100.

²⁹*Id.*, para. 101.

³⁰*Id.*, Decision. See *infra* Remedies.

novoo consideration of the merits of the Applicants' underlying discrimination claims.³¹

Accordingly, while the case of *Mr. "F"* presented the Tribunal directly with the question of whether a staff member had experienced discrimination violative of the Fund's internal law as well as universally accepted principles of human rights, in the cases of *Ms. "W"* and *Ms. "Z"*, the Tribunal's inquiry was limited to the sustainability of the DRE review teams' conclusions and their ratification by the Director of Administration.

Both *Ms. "W"* and *Ms. "Z"* maintained that their careers with the Fund had been adversely affected by gender discrimination. *Ms. "Z"* also cited her national origin and age as bases of alleged discrimination, which she contended had prevented her from attaining a Fund career commensurate with her qualifications and experience. *Ms. "W"* had put forth statistical data, which she contended established that gender discrimination had affected her grade and salary.

In each case, the Tribunal sustained the DRE review's finding of nondiscrimination, concluding that the findings were not arbitrary or capricious but rather were reasonably supported by evidence.³² In the case of *Ms. "W"*, the Tribunal took account of the fact that the Applicant had been awarded relief as a result of the DRE process for "unfair or uneven treatment" and that the DRE by its terms was not designed to determine "discrimination" to a legal standard.³³ Both *Ms. "W"* and *Ms. "Z"* also challenged the adequacy of the remedies granted them as a result of the DRE review; in each case, the Tribunal concluded that the remedies were reasonably based.³⁴

The Tribunal additionally rejected a series of procedural complaints brought by each of the Applicants, holding that the procedures applied were "reasonable, appropriate and consistent with the DRE procedures and with the fair resolution of Applicant's claim."³⁵ Notably, the Tribunal sustained the considerable leeway accorded the DRE teams in the methodology by which they conducted their reviews pursuant to the alternative dispute resolution mechanism. The way in which individual cases were

³¹*Ms. "W"*, para. 66 and note 23; *Ms. "Z"*, para. 49 and note 27, citing *Ms. "Y"* (No. 2).

³²*Ms. "W"*, paras. 91–102; *Ms. "Z"*, paras. 79–112.

³³*Ms. "W"*, para. 102.

³⁴*Ms. "W"*, paras. 103–113; *Ms. "Z"*, paras. 113–116.

³⁵*Ms. "W"*, para. 90; *Ms. "Z"*, para. 76. The Applicants had challenged such matters as the composition of the review teams and the alleged influence of the Administration Department in the review, as well as the methodology applied by the DRE review team in each case. *See Ms. "W"*, paras. 70–90; *Ms. "Z"*, paras. 53–76.

to be considered was, by the terms of the DRE, to depend on the circumstances giving rise to the complaint. Accordingly, as Ms. “W” had raised with the DRE review team no specific instances or acts of discrimination from which her Fund career allegedly had suffered, it was, in the view of the Tribunal, understandable that the DRE team sought to discover whether there were reasons other than discrimination to explain her career progression.³⁶ The Tribunal observed that the approach taken in the DRE review of Ms. “W”’s complaint differed from that taken in the case of Ms. “Z”, in which the Applicant did bring to the DRE team’s attention a series of incidents which, in her view, evidenced discrimination in her Fund career. In the case of Ms. “Z”, the Tribunal sustained the team’s approach as “entirely consistent with the overall method contemplated for the DRE exercise,” noting that the Applicant had appeared to take issue with the review team’s methodology of focusing its investigation on the series of incidents that she herself had drawn to its attention.³⁷

In both cases, the Tribunal held that it was not arbitrary, capricious or discriminatory for the Fund to base the DRE review of individual cases upon qualitative as well as statistical factors and rejected the view that statistics alone might establish discrimination under the DRE.³⁸ The Tribunal emphasized that the fact of the Applicants’ non-advancement was not proof of discrimination.³⁹ Likewise, the Tribunal held that statistics relating to the outcomes of the discrimination review were not probative of discrimination in the DRE process or in the review of the Applicants’ complaints.⁴⁰

Admissibility of Parties and Claims before the Administrative Tribunal

During 2005, the IMFAT also addressed the admissibility of parties and claims before the Tribunal. In *Mr. “F”, Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 2005-1)*, IMFAT Order No. 2005-2 (December 6, 2005), the Tribunal, rejecting a request for interpretation of judgment pursuant to Article XVII of the Statute, underscored that, as a judicial body, its authority is limited to the resolution of concrete controversies and that it is not empowered to render advisory opinions. In *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the*

³⁶Ms. “W”, paras. 85–88.

³⁷Ms. “Z”, paras. 68–73.

³⁸Ms. “W”, paras. 18–21; Ms. “Z”, para. 74.

³⁹Ms. “W”, para. 98; Ms. “Z”, para. 109.

⁴⁰Ms. “W”, paras. 28, 112; Ms. “Z”, para. 115.

Applications), IMFAT Judgment No. 2005-3 (December 6, 2005), the Tribunal, denying a Motion for Summary Dismissal, elaborated the meaning of the “adversely affecting” requirement of Article II in the context of a direct challenge to a “regulatory” decision of the Fund. In *Ms. “W”* and *Ms. “Z”*, the Tribunal considered challenges to the admissibility of claims secondary to the Applicants’ principal contentions, on the ground that the Applicants had failed to meet the exhaustion of remedies requirement of Article V in respect of those claims.

Request for Interpretation of Judgment

As detailed above, the Tribunal in its Judgment in *Mr. “F”* sustained the Fund’s decision to abolish the Applicant’s position as a reasonable exercise of discretionary authority. Nonetheless, it found in favor of Mr. “F” on two other grounds, namely, that the Fund had failed (a) to take effective measures in response to religious intolerance and workplace harassment of which he was an object, and (b) to give Mr. “F” reasonable notice of the abolition of his position. The latter holding gave rise to a request by the Fund for interpretation of judgment.⁴¹

Article XVII of the Tribunal’s Statute provides that “[t]he Tribunal may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error.” The Fund in its request acknowledged that the operative provisions of the Judgment were clear in respect of their application in the case of Mr. “F”, i.e., there was no question as to how the Judgment should be executed. The Fund nonetheless contended that the request for interpretation was admissible on the ground that, with respect to future cases, the impact of the Tribunal’s decision on the Fund’s practices was unclear.⁴² The request identified two issues in particu-

⁴¹The Fund’s request sought clarification of the following passage from the Tribunal’s Judgment:

[T]he Tribunal’s view is that the fair and transparent procedures that govern or should govern the operations of the Fund require that a staff member whose position is abolished be given reasonable notice of that prospect. The staff member should be in a position when such a decision first is conveyed to him to set out any reasons that he or she may have to contest the propriety or equity of the abolition decision. [footnote omitted] The summary notice given to Mr. “F” in this case was hardly adequate for that purpose. Thus, on this ground, the Tribunal concludes that the Fund did not follow fair and reasonable procedures.

Mr. “F”, para. 106.

⁴²*Mr. “F”* (Order No. 2005-2), para. 12. The Fund maintained that interpretation of the Judgment by the Tribunal was appropriate in order that management could “. . . formulate corrective action that is consistent with the Tribunal’s views,” asserting that such clarification

lar on which the Fund sought the Tribunal's views: (1) the nature and purpose of the requirement of advance notice of a decision to abolish a position; and (2) how long a period of notice would be considered "reasonable."⁴³

The Tribunal denied the Fund's request for interpretation of judgment, emphasizing that its statutory authority to render an interpretation of judgment is one of two narrowly drawn exceptions to the general rule of finality of judgments.⁴⁴ In the view of the Tribunal, the Fund had not specified in what respect the operative provisions of the Judgment were "obscure or incomplete" (Statute, Article XVII; Rule XX (2)).⁴⁵ Moreover, observed the Tribunal:

The Tribunal is not an advisory body. Its powers do not go beyond the resolution of the cases brought before it by applicants. In the words of the Commentary on the Statute:

". . . the Tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions."⁴⁶

The Tribunal concluded that ". . . the Fund is seeking advice rather than interpretation. It seeks advice as to how it should apply a holding in the case of Mr. "F" that in itself is not obscure or incomplete. The rendering of such advice is not within the powers of the Tribunal."⁴⁷

The "Adversely Affecting" Requirement of Article II and Direct Challenge to a Regulatory Decision

The limitation on the IMFAT's authority to decide only concrete controversies was also at issue in *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005), in which the Fund sought summary dismissal of Applications contesting a decision of the IMF Executive Board revising the system of staff compensation.⁴⁸ The Tribunal denied the Fund's Motion

will assist the Fund in complying with the Tribunal's ruling in subsequent cases of abolition of position, thereby avoiding possible future litigation." *Id.*

⁴³*Id.*, para. 14.

⁴⁴*Id.*, para. 6. Article XIII (2) provides: "Judgments shall be final, subject to Article XVI and Article XVII, and without appeal." See generally *Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004).

⁴⁵*Mr. "F"* (Order No. 2005-2), para. 14.

⁴⁶*Id.*, para. 16, quoting Report of the Executive Board, p. 13.

⁴⁷*Id.*, para. 17.

⁴⁸In *Baker*, seven staff members filed identical Applications upon which the Tribunal rendered a single Judgment on the Fund's Motion for Summary Dismissal.

for Summary Dismissal, rejecting the contention that the Applicants had not been “adversely affect[ed]” by the contested decision, as required by Article II⁴⁹ of the Statute.

The statutory provision at issue prevents the Tribunal from exercising jurisdiction to decide a claim if the Applicant lacks standing to raise it. Drawing upon its earlier Judgment in the case of *Ms. “G”, Applicant and Mr. “H”, Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), the Tribunal reaffirmed that the “intend-ment of [the “adversely affected”] requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy.”⁵⁰

The Fund had contended that the *Baker* Applicants had not been “adversely affected” by the Executive Board’s decision because the widening of discretion embodied in the contested decision had not resulted in any adverse financial consequences for the staff members in the 2005 compensation round. The Tribunal concluded, however, that the challenged decision did have “some present effect” on the Applicants’ position: “That effect is inherent in the wider discretion that the Executive Board has assumed in respect of salary adjustments which, in the absence of further action by the Executive Board, will be applied in 2006.”⁵¹

In the view of the Tribunal, the widening of the Fund’s discretion to adjust the compensation of its staff permitted the Applications to “cross the threshold of admissibility,” which the Tribunal noted was “. . . not steep, because, by the terms of Rule XII of the Rules of Procedure, an application may be summarily dismissed only ‘if it is clearly inadmissible.’”⁵² The Tribunal, in sustaining the admissibility of Applications directly challenging a “regulatory” (as contrasted with an “individual”) decision of the Fund, found additional support in the Commentary on the Statute, which “. . . looks to resolution of a question of the legality of regulatory decisions ‘. . . before there has been considerable reliance on, or implementation of, the

⁴⁹Article II (1) provides in pertinent part:

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

⁵⁰*Baker*, para. 17, quoting *Ms. “G”*, para. 61.

⁵¹*Baker*, para. 21.

⁵²*Id.*, para. 20.

contested decision.”⁵³ The Motion for Summary Dismissal accordingly was denied.⁵⁴

The Exhaustion of Remedies Requirement and the Admissibility of Related Claims

In Ms. “W” and Ms. “Z”, the Applicants not only challenged the results of the DRE review of their longstanding discrimination complaints but also sought to raise allegations secondary to those principal claims. Relying upon its jurisprudence elaborating the importance of and rationale for the exhaustion of remedies requirement of Article V,⁵⁵ the Tribunal concluded that some of the Applicants’ related claims were admissible, while others were not. None of the additional claims was sustained on the merits.

In the case of Ms. “W”, the Applicant alleged that the Fund had failed to implement career development measures prescribed as part of the remedial action resulting from the DRE and had improperly used the report of the DRE investigation to deny her a promotion. These issues had arisen following Ms. “W”’s initiation of administrative review of the Director of Administration’s decision. The IMFAT concluded that it had no difficulty in passing upon Ms. “W”’s additional contentions, which related to the implementation of the contested DRE decision, “. . . insofar as they are a) closely linked with the challenge to the DRE decision itself and b) have been given some measure of review in the context of a procedure intended to give finality to longstanding claims.”⁵⁶

⁵³*Id.*, para. 22, quoting Report of the Executive Board, p. 25:

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.

⁵⁴The pleadings resumed on the merits. Following a subsequent Executive Board decision further amending the compensation system, however, the Tribunal dismissed the Applications as moot. See *Baker et al., Applicants v. International Monetary Fund, Respondent (Dismissal of the Applications as Moot)*, IMFAT Judgment No. 2006-4 (June 7, 2006). New Applications were filed contesting the later decision of the Executive Board, resulting in the Tribunal’s Judgment in *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007).

⁵⁵Article V (1) provides: “When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.”

⁵⁶Ms. “W”, para. 119.

The Tribunal explained its reasoning both in terms of the purposes of the administrative review requirement and the fact that the additional claims “. . . arose in the unique circumstance of the pendency of a complex review procedure, including voluntary mediation, designed to achieve a final resolution of the DRE complaints.”⁵⁷ Moreover, the Grievance Committee, during its hearings in Ms. “W”’s case, had admitted testimony as to the allegations that the Applicant sought to raise before the Tribunal: “The Tribunal accordingly has the benefit of this evidentiary record and the parties have had the opportunity to settle their claims, thereby fulfilling policies underlying the requirement for exhaustion of administrative review.”⁵⁸

Applying the same test to a different set of facts, however, in Ms. “Z”, the Tribunal held inadmissible a claim relating to past merit increases that the Applicant attempted to present via an additional pleading before the Tribunal but which had not been the subject of administrative review. In the circumstances, the Tribunal concluded that the claim was “neither ‘closely linked with the challenge to the DRE decision itself,’ nor ha[d] it ‘been given some measure of review’ in the Grievance Committee.”⁵⁹

Additionally, Ms. “W” and Ms. “Z” both contended in their pleadings before the Tribunal that they continued to be subjected to discrimination on the same grounds of which they had complained through the DRE. In each case, the IMFAT held these contentions of “continuing” discrimination inadmissible on the basis that the Applicants had failed to exhaust the requisite channels of administrative review. The Tribunal underscored the importance of timely presentation of claims through the Fund’s formal channels for the resolution of staff disputes:

[I]n view of the conclusion . . . that the scope of the Tribunal’s review of DRE cases is limited and that the Tribunal may not examine underlying contentions of discrimination raised in the DRE *as if* they had been pursued through the steps required under GAO No. 31 . . . , there can be no ground for the Tribunal to find jurisdiction to review, as part of a challenge to a DRE decision, discrimination claims arising after the conclusion of the DRE process, based upon any theory of “continuing” discrimination.⁶⁰

⁵⁷*Id.*, para. 118.

⁵⁸*Id.*

⁵⁹Ms. “Z”, para. 14, quoting Ms. “W”, para. 119. The same test was also applied in Ms. V. Shinberg (No. 2), *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-5 (November 16, 2007), paras. 85-89 (retaliation claim held inadmissible where it had not been given any measure of review through the Fund’s dispute resolution process).

⁶⁰Ms. “W”, para. 121 (emphasis in original); *see also* Ms. “Z”, paras. 15–16. The Tribunal distinguished Ms. “W”’s claim of “continuing” discrimination from the allegations presented

The IMFAT's Fact-Finding Authority and its Relationship to the Fund's Grievance Committee

In addition to refining its interpretation of the exhaustion of remedies requirement of Article V of its Statute, the IMFAT during 2005 had occasion to revisit the question of its relationship to the Fund's Grievance Committee.⁶¹ In an earlier Judgment, the Tribunal had held that it does not function as an appellate body vis-à-vis the Grievance Committee because (a) the Tribunal makes both findings of fact and conclusions of law, and (b) the recommendation of the Grievance Committee to the Managing Director on the merits of a Grievance is not an "administrative act" within the IMFAT's jurisdiction *ratione materiae*.⁶² At the same time, the IMFAT, in reaching its findings and conclusions, "draws upon the record assembled through the review procedures."⁶³ "The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it,"⁶⁴ and the IMFAT has commented on the value of the Grievance proceedings to the "reliability of later adjudication" by the Tribunal.⁶⁵ Additionally, the Tribunal may "take account of the treatment of an applicant before, during and after recourse to the Grievance Committee."⁶⁶

in the case brought by Mr. "F":

The Tribunal in *Mr. "F"* . . . took cognizance of a pattern of conduct where separate administrative review had not been undertaken as to each individual act. The case of *Mr. "F"* may be distinguished, however, from the present case [of *Ms. "W"*] because the discriminatory conduct alleged by Mr. "F" had taken place prior to, rather than following, the initiation of administrative review procedures under GAO No. 31.

Ms. "W", para. 120.

⁶¹With respect to "individual decisions" of the IMF that are challenged before the Administrative Tribunal, the administrative review requirement of Article V of the Statute typically is exhausted through the Fund's Grievance Committee, in which the Applicant's claims and the Fund's defenses are first presented in a forum that is advisory to the Fund's management. The Grievance Committee renders a Recommendation and Report to the Fund's Managing Director who then takes a final decision on the matter.

⁶²*D'Aoust*, para. 17.

⁶³*Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 96. "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." *Id.*, para. 95. The Tribunal ". . . is not bound by the reasoning or recommendation of the Grievance Committee." *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 129.

⁶⁴*D'Aoust*, para. 17.

⁶⁵*Ms. "Y" (No. 2)*, para. 40.

⁶⁶*D'Aoust*, para. 17.

Against this jurisprudential background, the Tribunal in 2005 considered a claim by Ms. "Z" that the Grievance Committee, in its review of her challenge to the DRE decision antecedent to her Application in the Tribunal, had failed to conduct its proceedings in a "neutral and professional manner" or in accordance with due process.⁶⁷ The IMFAT responded to these allegations by declining to pass upon the Grievance Committee's own fact-finding process while at the same time taking account of the role that the record of the Committee's proceedings plays in the Tribunal's decision making.

As to Ms. "Z"'s contentions that the Committee "blocked" her expert witness from testifying and improperly denied her request for documents, the Tribunal concluded that ". . . the Grievance Committee's decisions as to the admissibility of evidence and production of documents are not subject to review by the Administrative Tribunal." These decisions, held the Tribunal, like the final recommendation of the Grievance Committee on the merits of a Grievance, are not "administrative acts" within the contemplation of Article II of the Tribunal's Statute. Rather, they rest exclusively within the authority granted the Grievance Committee under its constitutive instrument GAO No. 31.⁶⁸

In light of its jurisprudence holding that it may weigh the record generated by the Grievance Committee as an element of the evidence before it, however, the IMFAT examined the record of the proceedings in the case of Ms. "Z" to determine whether there was "any cause to discount that record in the weighing of the evidence." In the view of the Tribunal, the extensive transcripts of the Committee's proceedings, in which Ms. "Z" had the active assistance of counsel and the opportunity herself to comment and pose questions to witnesses, revealed "no ground to question that [the record] be given any less than the full measure of weight that the Tribunal ordinarily accords to those proceedings."⁶⁹

While abstaining in Ms. "Z" from passing upon the Grievance Committee's fact-finding process, the Tribunal also took note of the availability of its own fact-finding tools, observing that ". . . any lapse in the evidentiary record of the Grievance Committee may be rectified, for purposes of the Tribunal's consideration of the case, through the Tribunal's authority, pursuant to Article X of its Statute and Rules XVII and XIII of its Rules of Procedure to order the production of documents, to request information and to hold oral

⁶⁷Ms. "Z", para. 117.

⁶⁸*Id.*, para. 119.

⁶⁹*Id.*, paras. 121-122.

proceedings." Ms. "Z", the Tribunal observed, had made no such evidentiary requests of the Tribunal.⁷⁰

The independence of the IMFAT's fact-finding process was highlighted in the cases of Mr. "F" and Ms. "W", in which the Applicants did avail themselves of the Tribunal's authority to consider requests for production of documents. In applying Rule XVII of the Tribunal's Rules of Procedure, the IMFAT decided independently of the Grievance Committee's earlier determination the question of whether the requested documents were to be produced. In Mr. "F", the Tribunal reviewed *in camera* documents that similarly had been examined by the Grievance Committee in order to assess their relevance to the issues of the case, along with competing privacy interests, under the terms of the Tribunal's discovery Rule.⁷¹

Remedies and Legal Costs

The IMFAT, having decided in the case of Mr. "F" that the Applicant had prevailed in part on his claims, exercised its remedial authority as set out in Article XIV (1) of the Statute.⁷² The Tribunal's Judgment in Mr. "F" was the second in which it awarded relief for intangible injury. Reaffirming its "... authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision,"⁷³ the Tribunal concluded that "... the relevant jurisprudence establishes that ... relief may be awarded for intangible injury."⁷⁴ The Tribunal ordered the

⁷⁰*Id.*, para. 120 and note 32.

⁷¹Mr. "F", paras. 10–12; *see also* Ms. "W", paras. 15–26. Rule XVII, para. 2 of the Tribunal's Rules of Procedure provides:

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.

⁷²Article 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.

⁷³Mr. "F", para. 120, quoting Ms. "C", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44 (awarding the sum equivalent to six months salary for irregularities of process in the non-conversion of a fixed-term appointment).

⁷⁴Mr. "F", para. 121.

Fund to pay Mr. "F" compensation in the sum of \$100,000 for its failures (a) to take effective measures in response to the religious intolerance and workplace harassment of which Mr. "F" was an object, and (b) to give him reasonable notice of the abolition of his post.⁷⁵

In assessing Mr. "F"'s compensable legal costs pursuant to Article XIV (4),⁷⁶ the Tribunal acknowledged that the Applicant was ". . . not successful on his principal and most complex claim, that the abolition of his position represented an abuse of discretion by the Fund." Nonetheless, the Tribunal awarded Mr. "F" seventy-five percent of the total costs submitted, explaining its rationale in the following terms:

Although Applicant did not succeed on his principal claim, the Administrative Tribunal considers that the record assembled and argued by Applicant's counsel in pursuit of that claim was indispensable to the Tribunal's award to Applicant of substantial relief on other substantial counts, and that accordingly the Fund should bear the great majority of Applicant's legal costs.⁷⁷

Conclusion

During 2005, the Tribunal considered issues of substantive law with which it had not previously been confronted. These included: the requirements for a lawful abolition of position; allegations of discrimination on the basis of religion, which the IMFAT recognized as prohibited by universally accepted principles of human rights; and the relationship under the Fund's internal law between discrimination and harassment in the workplace. While the case of *Mr. "F"* presented the Tribunal directly with the question of whether a staff member had been the object of impermissible discrimination, the cases of *Ms. "W"* and *Ms. "Z"* required the Tribunal to consider the

⁷⁵*Mr. "F"*, para. 122 and Decision. The Tribunal's Judgment did not apportion the award as between the two counts upon which Mr. "F" had prevailed.

⁷⁶Article XIV (4) of the Tribunal's Statute 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.

⁷⁷*Mr. "F", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2005-1)*, IMFAT Order No. 2005-1 (April 18, 2005). In its Judgment in *Mr. "F"*, para. 124, the IMFAT also reaffirmed that a request for costs deriving from representation in proceedings antecedent to the Tribunal's consideration of a case falls within the scope of the Tribunal's remedial authority.

sustainability of findings of nondiscrimination that had been made under an alternative dispute resolution procedure.

The IMFAT in 2005 also responded to several challenges to the admissibility of parties and claims before the Tribunal, confirming the essence of its judicial character to decide only concrete controversies presented by adversely affected Applicants. It declined to render an interpretation of judgment in *Mr. "F"* where the terms of the Judgment were not "obscure or incomplete" and, in the view of the Tribunal, the Fund was seeking an advisory opinion. In *Baker*, the Tribunal concluded that Applicants seeking to challenge a revision to the Fund's compensation system had met the "adversely affecting" requirement of Article II; although no financial consequences had been shown, the contested decision, by widening the Fund's discretion in the setting of staff salaries, had "some present effect" upon the Applicants. In *Ms. "W"* and *Ms. "Z"*, cases arising from the Discrimination Review Exercise, the Tribunal assessed the issue of the admissibility of related claims in light of the purposes underlying the exhaustion of remedies requirement of Article V.

The Tribunal also elaborated during 2005 its relationship to the Fund's Grievance Committee, reaffirming that it makes its own findings of fact and conclusions of law, while drawing upon the record assembled through the review procedures. In *Ms. "Z"*, the Tribunal abstained from regulating the Grievance Committee's fact-finding process. In *Mr. "F"* and *Ms. "W"*, the Tribunal underscored its own independent fact-finding authority.

Additionally, the Tribunal during 2005 exercised its remedial authority pursuant to Article XIV of its Statute. It awarded compensation for intangible injury and ordered that the Fund bear the greater part of Mr. "F"'s legal costs, in view of the efforts required of his counsel in prevailing in part on multiple claims.

JUDGMENTS
(Nos. 2005-1 to 2005-4)

JUDGMENT NO. 2005-1

***Mr. "F", Applicant v. International
Monetary Fund, Respondent***
(March 18, 2005)

Introduction

1. On March 17 and 18, 2005, 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. "F", a former staff member of the Fund.

2. Mr. "F" contests the decision to abolish his position, resulting in his separation from service. Applicant contends that the decision was motivated by religious discrimination. Additionally, Mr. "F" alleges that during his employment he was subjected to a hostile work environment based on his religious affiliation, which differed from that of his immediate co-workers. Applicant maintains that the abolition of his position, which was part of a restructuring of his department, was not justified by institutional needs but rather was a pretext for removing him from his work unit. Applicant contends that he was qualified to meet the requirements of the redesigned position as well as those of a second position, but that he was not considered for these positions nor given good faith assistance in finding alternative employment in the Fund. He also maintains that he was not given adequate notice of the abolition of his position.

3. Respondent maintains that the decision to abolish Applicant's position was a lawful exercise of managerial discretion. The abolition, in Respondent's view, was taken in the interest of legitimate institutional needs and Mr. "F" was not qualified for the redesigned position or a second position that became available as a result of the restructuring of the department. Respondent also contends that neither the abolition decision nor Applicant's

career with the Fund was adversely affected by religious discrimination. Finally, Respondent asserts that the abolition of post and subsequent separation of Applicant's service with the Fund, including efforts to assist in reassignment, were carried out in accordance with applicable procedures, including that for notice of separation.

4. The case of Mr. "F" is the first to place squarely before the Tribunal three important issues: 1) the lawfulness of an abolition of position; 2) an allegation of religious discrimination, discrimination prohibited by the Fund's internal law; and 3) a claim that a staff member has been subjected to a hostile work environment.

The Procedure

5. On November 20, 2003, Mr. "F" filed his 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

6. The Application was transmitted to Respondent on December 9, 2003, and on January 6, 2004, pursuant to Rule XIV, para. 4² of the Rules of Proce-

¹Rule 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. . . ."

²Rule 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."

dure, the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Mr. "F"'s Application on January 23, 2004. Applicant submitted his Reply on March 1, 2004. The Fund's Rejoinder was filed on April 1, 2004.

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 Tribunal had the benefit of a transcript of oral hearings of the Grievance Committee, at which Applicant and other witnesses testified.

Requests for Production of Documents

8. In his Application, Mr. "F" made the following requests for production of documents:

1. Working papers, memoranda, e-mails, etc. showing how the decisions on restructuring and abolition of Applicant's position were made;
2. The report of the former Ombudsperson that had led to the appointment of a senior Fund economist from outside of Language Services to manage the Section in which Applicant worked and advise on solving problems that had arisen in the Section;
3. The senior economist's reports on the Section, extracts of which had been produced during the Grievance Committee's proceedings;
4. The senior economist's terms of reference or management instructions regarding his tasks; and
5. The report of an outside consultant who had been engaged by the Director of Human Resources to investigate some of Applicant's claims after Mr. "F" lodged a request for administrative review pursuant to GAO No. 31.

In accordance with Rule XVII⁴ of the Tribunal's Rules of Procedure, Respondent had the opportunity to present its observations, as both parties

³Article 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."

⁴Rule 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

exchanged views in their subsequent pleadings as to whether the document requests should be granted. On December 6, 2004, Applicant filed an additional memorandum regarding one of the requests, to which the Fund responded on December 8, 2004.

9. On December 10, 2004, the Administrative Tribunal, meeting in session, decided to deny three of the requests. Requests 1 and 4 were denied on the ground that Applicant had not shown that he had been denied access to the documents by the Fund, as the Fund had responded that it had provided all documents responsive to these requests as part of the Grievance Committee's proceedings.⁵ Applicant did not dispute this response and the record before the Tribunal appeared to corroborate it. Request 2 was denied on the ground that the Ombudsperson's Terms of Reference provide that the

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."

⁵Discovery in the Grievance Committee is governed by GAO No. 31, Rev. 3 (November 1, 1995) (Grievance Committee), Section 7.06.4:

"7.06.4 *Production of Evidence*. The Committee may at any time during the conduct of a hearing require evidence or argument in addition to that put forth by the parties. Upon the request of a party and with good cause shown, the Committee may, in its sound discretion, instruct the other party to provide to the Committee and to the opposing party documentary or other evidence. In deciding whether to order the production of documents, the Committee shall take into account the potential relevance of the documents sought to the issues presented and the extent to which the producing party would suffer any undue burden in producing such documents. The Committee may require the production of documents or other evidence from the Fund, except that the Managing Director may withhold evidence if he or she determines that the production or introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document or evidence. Such a determination shall be binding on the Grievance Committee, provided that the grievant'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."

Ombudsperson may not be called as a witness or otherwise be required to provide information in Tribunal proceedings.⁶

10. As to the remaining requests, the Administrative Tribunal requested the Fund to transmit the responsive documents to the Tribunal for examination *in camera* in order to decide upon their disposition. On December 15, 2004 the documents were delivered for the Tribunal's inspection.

11. On February 28, 2005, the Administrative Tribunal, following consideration of the views of the parties, including the briefs and oral arguments in the Grievance Committee that had been made part of the record before the Tribunal, decided to deny Requests 3 and 5 on the following grounds.

12. As to Request 3, reports of the senior economist assigned to advise on the personnel problems in the Section, the Tribunal concluded that, in order to protect the privacy of other persons, only those documents relating directly to Applicant should be produced. Examination of the documents revealed that the same standard had been applied by the Grievance Committee in producing extracts of the materials to Mr. "F" during the Grievance Committee's proceedings. Accordingly, no further production of these documents was appropriate.

13. With respect to Request 5, the report of an outside consultant who had been engaged by the Director of Human Resources to investigate some of Applicant's claims following his request for administrative review pursuant to GAO No. 31,⁷ the Tribunal concluded that there was merit to the Fund's contention that the investigator's report, flowing as it did not from proceedings leading up to the impugned decision⁸ but rather from Applicant's request for administrative review of the acts now contested in the Administrative Tribunal, should be shielded from disclosure as not relevant since it did not bear on that decision. In addition, although not embracing the "work product doctrine" as a ground for denying the request, as had the Grievance Commit-

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

Ombudsperson's Terms of Reference, June 1999.

⁷See *infra* The Channels of Administrative Review.

⁸Cf. *In re Malhotra*, ILOAT Judgment No. 1372 (2000), Consideration 11.

tee, the Tribunal considered that its conclusion was consistent with protecting the candor essential to preserving the twin purposes of administrative review: to reconsider and provide opportunities for settlement of a dispute and to prepare for litigation. *See Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66.

14. At the same time, the record reflected that there was some ambiguity as to the exact nature of the outside consultant's role with respect to the administrative review process, and that Applicant possibly may have understood that he would have access to the report. The fact that an individual outside the Fund was engaged to perform the investigation was itself notable. Moreover, in inquiring into the question of whether Applicant had been subjected to a hostile work environment, the consultant in effect was charged with reviewing the Fund's alleged failure to act rather than a specific contested decision as is ordinarily the subject of administrative review under GAO No. 31.

15. In light of these circumstances, it was appropriate for the Tribunal to examine *in camera* the disputed document. Having examined the Report, the Tribunal concluded that the Director of Human Resources in her August 8, 2002 letter to Applicant's counsel marking the exhaustion of the administrative review process had fairly summarized the conclusions of the Report, and that the Report's contents did not support Applicant's claim that it contained "information damaging to Respondent's position and favorable to his own." Moreover, as similar information was found elsewhere in the record before the Tribunal, its disclosure would not have been of probative value to Applicant. Request 5 was therefore denied.

The Factual Background of the Case

16. The relevant factual background, some of which is disputed between the parties, may be summarized as follows. Additional factual elements will be included in the consideration of the issues of the case.

Overview

17. Mr. "F" joined the Fund on February 4, 1980 as a Transcriber of his native language ("Language 1").⁹ While holding the title of Transcriber,

⁹The Administrative Tribunal's policy on protection of privacy, adopted in 1997, provides:

"1. In order to protect the privacy of the persons referred to in the text of the Tribunal's judgments, these persons shall be designated by acronyms; the departments and divisions of the Fund shall be referred to by numerals. However, the application of these

Applicant received several promotions. In 1990, he was appointed to the post of Translation Preparation Assistant at Grade A6. In October 1996, following a temporary assignment as Special Projects Assistant, Applicant assumed the position of Translation Coordination Assistant ("TCA") at Grade A6, and in 1998 was promoted to Grade A7. It was in this position that Applicant was serving when the position was abolished effective November 1, 2001.

18. Prior to the abolition of Applicant's position, the work unit of which he was a member, the "Language 1" Section, underwent structural changes within the organization of the Fund. In 1999, the Section, as part of the Bureau of Language Services ("BLS"), was brought under the administration of the newly created department of Technology and General Services ("TGS"). TGS, the largest department in the Fund, combined the functions of the BLS, the Bureau of Computing Services, parts of the Administration Department, and a number of other entities under a single umbrella. In 2001, refinements were made to the organizational structure of TGS, resulting in the merger of the "Language 1" Section into a larger pre-existing language Division to form the "Languages 1 & 2" Division. (A similar merger absorbed two other smaller language sections into another Division, while two other large language Divisions remained intact.) As part of the restructuring of language sections, Mr. "F"'s and two other support positions in the "Languages 1 & 2" Division were abolished.

The Problems in the "Language 1" Section

19. The record before the Administrative Tribunal reflects that almost from its inception (shortly before Applicant's arrival in 1980) and throughout his twenty-one year tenure in the unit, the "Language 1" Section was plagued with problems of interpersonal conflict, questions about its integrity and productivity, and complaints of ineffectual supervision. In Applicant's view, these problems were rooted in religious animosity between adherents to one major religion, who comprised a large majority of the Section's staff, and another religion of which Mr. "F" was an adherent. Applicant asserts that with the abolition of his position the Section became religiously homogeneous with no persons of his religion remaining. The conflicts between majority and minority religions played out within the Section, maintains Applicant, mirrored those that exist within the part of the world in which

procedures shall not prejudice the comprehensibility of the Tribunal's judgments."

Accordingly, Applicant's native language, which is also the name of the Section in which he worked, shall be referred to herein as "Language 1."

“Language 1” is spoken, most particularly in his native country, from which a number of members of the Section were drawn. Respondent’s view, by contrast, is that the problems observed in the Section essentially did not derive from any religious animosity among the staff.

20. In 1998, the difficulties in the Section drew the attention of senior Fund management when, in September of that year, the Deputy Managing Director was informed by the Administration Department that the situation had reached “crisis proportions”:

“The section has been beset with difficulties over the years, attributable largely to strong interpersonal differences and poor working relationships among the staff. Despite changes of personnel and repeated efforts to improve the working atmosphere in the section, the situation has gone from bad to worse and, in the past few months, has reached crisis proportions. The Ombudsperson and ADM [Administration Department] staff have been heavily involved with BLS senior staff in seeking a solution to the problems.”

21. Acknowledging the depth and history of the Section’s problems, in October 1998, the BLS Director put forth a plan to the Deputy Managing Director:

“This plan aims at finding a long-term, permanent solution to the personnel problems that have beset this Section almost since its creation some twenty years ago. As these problems have been long-standing, it would appear that their cause goes beyond [the Section Chief]’s possible deficiencies in management skills and style.”

Accordingly, a senior economist from another Fund department was appointed to assess and recommend solutions to the problems:

“The objective of the plan is to use [the senior economist]’s two-year assignment to diagnose the actual roots of the problems and to recommend concrete, workable, fair, and durable solutions. As an independent observer of the Section in its daily activities, [the senior economist] will be called upon to assess the situation objectively, guide, coach, and advise the Section Chief as necessary, investigate possible complaints, identify any wrongdoings, and eventually make recommendations regarding the future structure, role, size and staffing of the Section. . . . [B]eing of [“Language 1”] culture and having been with the Fund for many years, he will be well positioned to assess the situation in the Section in an informed, balanced, and institutional manner, and make actionable recommendations for the future.”

22. The intensity of the difficulties once again was underscored when the BLS Director announced at a meeting of the Section's staff the senior economist's appointment for a two-year period starting November 30, 1998. According to the minutes of that meeting, the BLS Director commented that ". . . most staff from the ["Language 1"] Section had complained, through various institutional channels, about their general level of dissatisfaction with the running of the Section." Moreover, he noted, the situation had resulted in a ". . . serious disfunctioning and in very high costs in terms of resources spent (often at senior staff level) in many meetings with ADM and the Fund management."

23. The senior economist was to report his observations periodically to senior BLS management. When he did so, he maintained that the then Section Chief "consistently understated the achievements and abilities of some staff members," including those of Mr. "F", while he "inflated the achievement and skills of other staff," including the staff member who ultimately was appointed to occupy the position of TP/PA that was created following the abolition of Mr. "F"'s and another position in the Section. In particular, it was the view of the senior economist that the Section Chief "attempted to put [the other staff member] at a comparative advantage to take a leading role in the work on DTP [Desk Top Publishing] by inflating his qualifications and experience."

24. The senior economist furthermore concluded that there were "doubts regarding the reliability of statistics produced to measure both the production of the Section and the individual performance of the staff," and suggested that statistics were "massaged" in reporting performance of those staff members favored by the Section Chief. The BLS Director himself expressed the concern that "[b]ecause of the long history of mismanagement of the ["Language 1"] Section, the credibility of its production/productivity stats [statistics] is, to put it mildly, seriously in doubt."

25. It is apparent from the record that the senior economist rated the performance of Mr. "F" highly and relied upon him to gather statistical information for his review of the Section:

"At the outset, I found Mr. ["F"] easy to work with; he is a reliable, can-do operator, and possesses superior organizational skills. . . . Although the content of his job remained the same, his work as TCA put tremendous pressure on his time. The translation jobs, both dispatched and requested, had increased by almost 50 percent over the previous year. Due to his superior organizational skills, the Section did not miss a deadline.

. . . [Mr. "F"] rose to the occasion and did a superior job. In fact, he performed at the level of a research assistant. I relied on him.

One objective for Mr. ["F"] was the production of the ["Language 1"] WEO in-house using Desk Top Publishing (DTP) techniques. He was able to produce a dummy version. However, due to the pressures from his work as TCA, the DTP received a lower priority. In addition, he completed the ["Language 1"] Currency list for the first time."

26. It is noted that the senior economist's views of Mr. "F"'s skills differed from the views expressed by the TGS officials in charge of Language Services during the same period. In particular, it was stated in Mr. "F"'s 2000 Annual Performance Review ("APR"), his final review before the abolition of his position, that Applicant had fallen short of some expectations, including that he ". . . bears some responsibility in the fact that team spirit and open communication were still lacking in the ["Language 1"] Section last year. . . ." It was further suggested that ". . . training will be needed to enhance his DTP [Desk Top Publishing] skills and his supervisory skills, his ability to handle stress, and most importantly to bring his written English skills up to Fund standards. . . . [Mr. "F"] must realize that poor writing and communication skills will remain a serious handicap in his career development." Nonetheless, on the recommendation of the senior economist, Mr. "F" received a "1" performance rating for 2000. Applicant's APRs for 1996–1999, which are part of the record before the Tribunal, evidence none of the strong reservations regarding his performance found in the 2000 APR, and throughout his Fund career Mr. "F" uniformly received "1" and "2" performance ratings.

27. It is evident from the testimony in the Grievance Committee's hearings that, over time, the senior economist's relationship with the Language Services senior officials became increasingly strained. Ultimately, amid controversy and maintaining that he was receiving inadequate support in his mission, he resigned from the assignment in frustration in mid-2000.

2001 Reorganization and Abolition of Mr. "F"'s position

28. By January 2001, following the departure from the "Language 1" Section of both the senior economist and the Section Chief whose administration had been the subject of his investigation, the time was seen as opportune finally to resolve the long-standing problems in the Section. Accordingly, the Director of TGS urged the Director of Human Resources to consider a proposal for reorganization of the BLS Language Sections, including the "Language 1" Section:

"... BLS urgently needs to launch a campaign to recruit a new ["Language 1"] Section Chief while at the same time solving permanently the remaining problems of the Section.

[At a meeting of senior TGS, BLS, and Human Resources officials,] a solid consensus emerged that the ["Language 1"] Section needs to be rebuilt on new foundations, and without those staff members that have been at the heart of the Section's continuous problems for many years under different supervisors. The view is that the hiring of a new Chief for the Section while the current staffing remains unchanged is likely to result in failure."

Accordingly, the plan proposed in January 2001 was designed

"... to permanently solve the long-standing problems of the ["Language 1"] Section on the occasion of the recruitment of a new Section Chief and, at the same time, to strengthen and streamline the structure of its language sections generally. . . ."

It contemplated combining three small language Sections, including the "Language 1" Section into a single Division. It was noted:

"Economies of scale would be achieved also at the level of the Translation Coordination Assistant (TCA) function, where there is now a clear duplication of effort with each section operating as an independent unit. In a new 'combined' division, only one TCA would control the flow of documents for all three language sections under the supervision of the Chief of the new Division."

29. Moreover, the proposal suggested:

"The proposed restructuring of the language sections would offer a unique opportunity to solve some long-standing personnel problems in the ["Language 1"] Section. It would allow for the elimination of the ["Language 1"] Section Translation Coordination Assistant (TCA) position, and for the consolidation of the Text Processing Assistant/Desktop Publishing (TPA/DTP) and proofreader positions in the ["Language 1"] Section into a **single position**, the functions of which would be roughly similar to those already associated with the corresponding position in the [other small language] Sections. The two 'saved' positions would be redefined as the new division chief and the new divisional TCA positions, and the operation would be budget-neutral. It is unlikely that any of the current incumbents in the ["Language 1"] Section would have the range of skills required for such a 'combined' TPA/DTP/proofreader position, and a new person would therefore need to be hired.

... This would permit the transition to a new team essentially made up of translator/interpreters and one support staff hired by the new managers of the ["Language 1"] Section.

The new Division Chief would have as a priority task to hire new staff and implement the new structure of the ["Language 1"] Section, in close cooperation with the new Section Chief. Such an approach would maximize the chances of success of the new Section Chief, while streamlining some BLS operations in the context of the crucial need to curb the demand for services and to reduce staff resources."

(Emphasis in original.)

30. Meanwhile, by March 2001, plans were also emerging for a further "Phase 2 Reorganization" of the entire TGS Department. The purpose of "Phase 2" was to "... give the Director of the department an opportunity to establish his own TGS front office management team by dissolving a layer of management overhead in the Bureaus and reshaping/redeploying functions performed by the incumbents." The proposal included removing senior management teams from what formerly was denominated as the Bureau of Language Services ("BLS").

31. In June 2001, a final proposal for "Restructuring of the BLS ["Language 1"] Section and Other Smaller Language Service Units," modifying somewhat the plan proposed in January and placing the restructuring within the context of the "Phase 2 Reorganization" of TGS, was presented jointly by the HRD Director and TGS Director for endorsement by the Deputy Managing Director. Whereas the January plan was to create a new Division by combining three small Sections, the new plan was to merge the smaller language Sections into pre-existing Divisions. Once again, the proposal emphasized at the outset the relationship between the restructuring proposal and efforts to resolve the problems in the "Language 1" Section, suggesting that the Section should be rebuilt without those staff members who were seen as having been at the heart of its troubles:

"The purpose of this note is to inform you of the efforts under way to permanently resolve the long-standing problems of the ["Language 1"] Section of the Bureau of Language Services, and to seek your approval for a plan of action involving this Section and other small language service units as part of the restructuring of TGS. ... The proposed restructuring of the BLS sections would be budget neutral, as abolished positions would be redeployed within BLS to areas facing an increased workload.

...

This new structure will require some streamlining of the reporting lines for language services through a merger of certain functions at the section level or below. At the same time, a number of measures have already been taken to find a lasting solution for the problems of the ["Language 1"] Section. Taken together, these steps should help ensure the success of the restructuring of the BLS ["Language 1"] Section.

...

In order to reduce the number of direct reports to the Advisor in charge of language services, it is proposed to integrate the ["Language 1"] and [other small languages] Sections into existing divisions

...

At the support staff level, this integration would make some functions redundant, including the current ["Language 1"] Section Translation Coordination Assistant (TCA) position, of which up to three would be redeployed.

...

. . . the consensus between HRD and TGS regarding the ["Language 1"] Section has been that, given the Section's difficult past, the hiring of a new Chief while the current staffing remained essentially unchanged would likely result in failure. . . . Against this background, we believe that the Section needs to be rebuilt on new foundations, and without those staff members who have been at the heart of its continuous problems for many years under different supervisors."

The proposal further suggested that, following the integration of the "Language 1" Section into the new "Languages 1 & 2" Division (under the direction of the former "Language 2" Division Chief who was also a "Language 1" speaker), the TCA position held by Mr. "F", the Applicant, would be abolished "immediately."

32. The June 2001 proposal received the Deputy Managing Director's approval in July, and the merger creating the "Languages 1 & 2" Division took effect August 1. There was, however, a delay until October in implementing the full restructuring plan, owing to concerns about Mr. "F"'s health. The head of the Counseling and Consultation Service of the Joint Bank/Fund Health Services Department testified that between May and the end of September 2001 (as well as for a period in 1995–1996) he had provided counseling to Mr. "F" for work-related stress. According to the Counseling Services head, Mr. "F" was at the time concerned about his job security, perceiving that work was gradually being taken away from him and that he

had “. . . not really felt support in that office for a long time.” Mr. “F” had also expressed to the counselor “. . . concerns about the differences, both personal and religious differences in the office and how he thought the kind of office environment had been a very difficult one.” In mid-summer, Mr. “F”’s emotional health had declined further, and he was placed on sick leave for a month.

33. Concerns relating to Mr. “F”’s health abated in the fall, and on October 18, 2001, the Division Chief informed the TGS Advisor for Language Services that he was ready to proceed with the abolition of Applicant’s position, along with that of another support position. It appears that the other position, the Translation Editorial Officer at A10 in the “Language 1” Section, was to be redefined as a Text Processing/Proofreading Assistant (“TP/PA”) position at A7 and advertised accordingly. Furthermore, “. . . with a view to aligning the [“Language 1”] Section’s text-processing, typesetting, and proofreading/editing function with those of the [other smaller language Sections] . . . , we recommend that [the incumbent Text Processing Assistant (TPA) at Grade A6] be kept in the team. [He] is developing well in desk top processing and typesetting and has also successfully completed a number of proofreading assignments.” (Additionally, the Division Chief recommended abolition of the Translation Editorial Assistant position serving the “Language 2” part of the Division.)

34. The TGS Advisor forwarded these recommendations with approval to the TGS Assistant Director on October 22, 2001, who in turn sought approval from the HRD Director and TGS Director the following day, noting that the positions earmarked for abolition were to be redeployed elsewhere in Language Services.

35. Accordingly, a total of three positions in the newly merged “Languages 1 & 2” Division were abolished in October 2001. Thereafter, within the “Language 1” Section, two support positions were in place, the new Text Processing/Proofreading Assistant (“TP/PA”) position, and a Text Processing Assistant (“TPA”) position. The incumbent TPA was appointed to the TP/PA job following a vacancy announcement in February 2002 which specified that there was a qualified internal candidate. The TPA position so vacated was filled through external recruitment. The TCA duties earlier performed by Mr. “F” were to be reallocated to the two TCAs who previously functioned solely in the “Language 2” sector of the Division.

36. On October 25, 2001, Applicant was provided official notice of the abolition of position effective November 1, 2001, having been informed of the decision in a meeting a day earlier with his Division Chief and the TGS

Advisor for Language Services. By way of explanation, the notice stated: "In its ongoing effort to adjust available resources to changing requirements, Language Services has reviewed its current and future needs in the area of word processing, desk top publishing, proofreading, and translation editorial and coordination services." The notification additionally referred Mr. "F" to a Human Resources Officer ". . . regarding reassignment assistance, training, career counseling, outplacement assistance and other benefits the Fund can offer you in this connection."

37. Administrative arrangements in connection with the abolition of Mr. "F"'s position were confirmed by letter of January 16, 2002. These arrangements included, pursuant to GAO No. 16, a six-month reassignment period of November 1, 2001–April 30, 2002, and, in the event that efforts to identify a reassignment during the period were not successful, an extended notice period of 120 days, followed by the maximum 22.5 months of separation leave at full pay based upon Applicant's years of service. It has not been disputed that these benefits were received by Mr. "F" and that he was separated from service effective July 31, 2004.

The Channels of Administrative Review

38. On February 21, 2002, pursuant to GAO No. 31, Rev. 3 (November 1, 1995), Section 6.02, Applicant through counsel sought administrative review by his department head, i.e. the Director of TGS. This request was later transferred to the Human Resources Director. (*See* Section 6.04.)¹⁰

¹⁰*See* GAO No. 31, Rev. 3 (November 1, 1995):

"Section 6. Administrative Review

...

6.02 *Grievances Concerning a Staff Member's Work or Career.* With respect to decisions that pertain to a staff member's work or career in the Fund, the staff member shall first submit a request for review in writing to his or her Department Head or other official designated by the Department Head for this purpose, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. Except as provided in Section 6.02.1, the request must be submitted within six months after the challenged decision was made or communicated to the staff member, whichever is later. The Department Head, or his or her designee, shall have 15 days in which to respond in writing to the request for review.

...

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

39. Alleging that the abolition of position was the culmination of a history of religious discrimination, Applicant requested review of the abolition decision itself and surrounding issues of discrimination, retaliation and harassment. Following several exchanges with Applicant and his counsel, on April 11, 2002, the Human Resources Department confirmed by letter to Applicant and his counsel arrangements to carry out the review on “two tracks,” with the “technical” aspects of the abolition to be considered internally by HRD and the charges of discrimination, retaliation and harassment to be investigated by an outside consultant engaged for that purpose. The terms of reference for the consultant were attached to that letter.

40. Applicant cooperated in providing information to the consultant and later, after the exhaustion of the administrative review process, he and his counsel met with the consultant to discuss the findings. A copy of the consultant’s Report, however, was not provided to Applicant. This Report became the subject of a request for production of documents in both the Grievance Committee and the Administrative Tribunal.¹¹ Applicant also has contended that he was “lull[ed] . . . into an inactive pursuit of his Grievance,” while the Respondent prepared its defense for litigation, and that the investigation was not objective because the consultant had sought regular employment with the Fund.

41. Having considered the circumstances and terms of the consultant’s appointment, as well as the consultant’s Report, the Tribunal concludes that Applicant sustained no prejudice in these respects.

42. On August 8, 2002, the Director of Human Resources rendered her decision marking the exhaustion of the administrative review process anterior to the Grievance Committee proceedings. In a detailed opinion, relying on the findings of both the internal investigation and the consultant’s investigation, the HRD Director concluded a) that TGS acted properly and fully within the rules of the Fund in deciding to abolish Mr. “F”’s position and separate him from service, and b) that neither these decisions nor Mr. “F”’s career with the Fund were adversely affected by discrimination, harassment, or retaliation.

43. Applicant filed his Grievance with the Fund’s Grievance Committee on October 3, 2002. The Committee issued its Recommendation and Report on July 31, 2003, recommending denial of the Grievance on the basis that Mr. “F”

applicable, has been received or the deadline for a response has passed, whichever is earlier.”

¹¹See *supra* Requests for Production of Documents.

had "... been unable to show a nexus between the alleged religious intolerance displayed by [former colleagues] and the TGS reorganization, which resulted in the abolition of his position," and "... has been unable to prove that the decision to abolish his position was arbitrary, capricious or discriminatory, or procedurally defective in a manner which substantially affected the outcome." By letter of August 26, 2003, the Deputy Managing Director notified Applicant that Fund management had accepted the Committee's recommendation.

44. On November 20, 2003, Mr. "F" filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

45. The principal arguments presented by Applicant in his Application and Reply may be summarized as follows.

1. The decision to abolish Applicant's position and terminate his employment was motivated by discrimination on religious grounds and was the culmination of a history of discrimination. The abolition was improperly motivated to resolve personnel problems grounded in religious intolerance.
2. During his career with the Fund, Applicant experienced a hostile and discriminatory work environment in which co-workers of the majority religion resented Applicant's authority in the unit. Religious symbols were placed in the workplace as a deliberate provocation to Applicant, while his own religious expression was not tolerated.
3. Applicant repeatedly brought the issue of religious prejudice and harassment to the attention of management, but management failed to investigate the allegations.
4. Applicant suffered mentally and physically due to management's conduct.
5. Applicant's functions were not actually abolished but were redistributed to two positions at levels A6 and A7. The redundancy did not arise from any skills mismatch, abolition of functions, or budget reduction.

6. Applicant's position embraced functions beyond that of a TCA, and there was no material difference between the old and new positions. The TP/PA and TPA positions required skills that Applicant used as TCA and back-up TPA. He was more than qualified to perform either of these functions.
7. It was not credible that the remaining TCAs in the Division could perform Applicant's former duties without having a knowledge of "Language 1."
8. Applicant's performance was not at issue, as he always performed at a fully satisfactory level.
9. Respondent failed to give Applicant appropriate advance notice of the abolition of his position when he could have raised relevant issues about his continued employment.
10. No genuine efforts were made to find an alternative position in the Fund for Applicant. Nor was Applicant offered, or given an opportunity to compete for, either the TP/PA or TPA position.
11. Applicant seeks as relief rescission of the abolition decision or a "directed settlement protecting his economic security on the basis of a pension equal to what he would have had at normal retirement age" and such other relief as may be adjudged.

Respondent's principal contentions

46. The principal arguments presented by Respondent in its Answer and Rejoinder may be summarized as follows.

1. The decisions to abolish Applicant's position and other positions within Language Services were taken for legitimate, business-related reasons, to consolidate functions so as to redeploy positions to other areas of the department where increased staffing was needed.
2. Applicant's Section traditionally had an insufficient amount of work to justify a full-time TCA position.
3. Applicant's TCA duties, which were mainly administrative and did not require language skills other than English, were genuinely reassigned to the two other TCAs who had come from the "Language 2" side of the merged "Languages 1 & 2" Division.

4. There were material differences between Mr. "F"'s abolished TCA position and the new TP/PA position in the Section. That position does not involve the administrative tasks of the TCA but does require the proofreading and editing responsibilities of the abolished TEO position, along with desk top publishing skills as a primary responsibility and not just as a back-up.
5. Applicant lacked the qualifications required to perform the functions of the new TP/PA position in his Section.
6. Applicant has failed to show that religious discrimination adversely affected his career or played any role in the decision to abolish his position.
7. The impact of the abolition decisions did not fall disproportionately on a single religious group. There is no demonstrable link between any alleged prejudices of Mr. "F"'s co-workers and the TGS senior managers who were responsible for the abolition decisions. No witness corroborated Applicant's belief that he was the target of religious discrimination.
8. The weight of the evidence shows that, while there may have been isolated instances over more than twenty years in which some of Applicant's colleagues alluded to his religion in derogatory terms, the supervisors who became aware of these incidents dealt with them appropriately, and Applicant's career did not suffer any consequences as a result of religious bias.
9. Applicant contributed to problems with colleagues and these were work-related.
10. Applicant has failed to show that the process undertaken in abolishing his position or separating him from the Fund was procedurally flawed. The process was consistent with applicable rules.
11. The Fund fully satisfied its obligations under GAO No. 16 to make efforts to assist Applicant in finding alternative employment, but Applicant did not seriously pursue the assistance offered. Applicant passed up the opportunity to compete for the TP/PA position and to attempt to demonstrate, through the normal selection process, that he had stronger qualifications than the individual selected. Applicant was not qualified for the TPA position that was vacated and filled by an external candidate;

the Fund was under no duty to invite him to apply for a position for which he was clearly unqualified.

Consideration of the Issues of the Case

Did Respondent abuse its discretion in abolishing Applicant's position?

47. The case of Mr. "F" is the first brought to the IMFAT in which an Applicant directly contests the lawfulness of an abolition of position.¹²

48. That the abolition of a post is an individual decision taken in the exercise of managerial discretion and subject to review only for abuse of that discretion is well recognized in international administrative jurisprudence:

"The decision to declare a position redundant under the applicable Staff Rules is an exercise of discretion by the Bank. The Tribunal will not review such a decision unless it constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of fair and reasonable procedures."

Fidel v. IBRD, WBAT Decision No. 302 (2003), para. 23. See also *In re Mr. J. C.*, ILOAT Judgment No. 139 (1969), Consideration 1:

"The decision to suppress a post lies within the Director-General's discretion. It follows that the Tribunal will not interfere with such a decision unless it is tainted by procedural irregularities or by illegality or is based on incorrect facts, or unless essential facts have not been taken into consideration, or again, unless conclusions which are clearly false have been drawn from the documents in the dossier."

49. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the IMFAT consistently has invoked the standard set forth in the Commentary on the Statute 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,

¹²In *Ms. "Y" (No. 2)*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal considered a challenge to conclusions under the Discrimination Review Exercise (DRE) in which the applicant had contested the abolition of her position, along with other actions, as discriminatory. Given the limited scope of review available in the Tribunal for challenges to decisions arising from the DRE, the Tribunal did not consider directly the lawfulness of the abolition of position in that case.

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 Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 20, 2003), para. 106 (summarizing IMFAT's jurisprudence relating to standard of review). At the same time, the Tribunal has observed that some of the factors subsumed in the standard of review contemplate stricter scrutiny on the part of the Tribunal than do others. (*Ms. "J"*, para. 107.)

50. Accordingly, the following sections consider: 1) whether the decision to abolish Applicant's position was based on an error of law or fact, i.e. whether it was taken consistently with the requirements of GAO No. 16; 2) whether the decision was improperly motivated so as to vitiate an otherwise lawful decision; 3) whether the decision was discriminatory because of Applicant's religion, a serious charge that may be subject to particular scrutiny by the Tribunal; 4) whether Applicant was subjected to a hostile work environment during his career with the Fund; and 5) whether the abolition decision was carried out in violation of fair and reasonable procedures.

1. Was the abolition of Applicant's position taken consistently with the requirements of GAO No. 16?

51. Abolition of position in the IMF is governed by GAO No. 16, Rev. 5 (August 8, 1990), Section 13, which provides:

"Section 13. Reduction in Strength, Abolition of Position or Change in Job Requirements

13.01 *General.* A staff member may be separated in the event of the abolition of his position, when the position is redesigned to meet institutional needs and the incumbent is no longer qualified to meet its requirements or when a reduction in strength is required. In the event of a reduction of staff positions in the Fund, efforts shall be made to reassign staff members consistent with their qualifications and the requirements of the Fund. In reassigning staff members, consideration shall be given to their performance record, seniority, and length of service. In the event that a staff member's position is abolished, or the position is redesigned to meet institutional needs and he is no longer qualified to meet its requirements, efforts shall be made over a period of not less than six months to reassign him to another position consistent with his qualifications and the requirements of the Fund. During this period, the Fund shall also provide the staff member with appropriate training if such training will facilitate his placement in an alternate position. If all efforts to identify a reassignment fail, his appointment shall be terminated.

13.02 *Notice*. A staff member separated under the provisions of Section 13.01 shall be entitled to 60 calendar days' notice. However, the Director of Administration may extend this period up to 120 calendar days in order to allow the staff member a reasonable time, before his separation, to settle his affairs. The Director of Administration may also excuse a staff member from reporting for duty during part or all of the period of notice and place the staff member on administrative leave with pay during this period.

13.03 *Resettlement Benefits*. A staff member who is separated under the provisions of Section 13.01 shall be eligible for resettlement benefits. However, the minimum period of service required as specified in General Administrative Order No. 8 (Relocation Benefits and Separation Grant) shall not apply in such a case.

13.04 *Payment from Separation Benefits Fund*. A staff member separated under the provisions of Section 13.01 shall be granted a separation payment from the Separation Benefits Fund in accordance with the provisions of Section 4.06."

Therefore the essential requirements for a lawful abolition of position are that the position has been abolished or redesigned to meet institutional needs and the incumbent is no longer qualified to meet its requirements.

a. Was Applicant's position abolished or redesigned to meet institutional needs?

52. International administrative jurisprudence suggests that the test for whether a position has been abolished or redesigned to meet institutional needs is whether there are material differences between the old position and the new:

"The question thus arises in this case whether the new positions that were created were in fact different from the one previously occupied by the Applicant or whether, on the other hand, they were in fact essentially the same."

Arellano (No. 2) v. IBRD, WBAT Decision No. 161 (1997), para. 32. Later, in the same decision, the Tribunal on the basis of its finding of sufficient difference between the abolished position and the newly created position, states that:

"The Tribunal concludes that the two positions were sufficiently different to justify the classification of the action in relation to the original position as an 'abolition' of a post rather than as a reduction."

(Para. 35.) The emphasis here appears to be on sufficient difference between the original position and the newly created one. In *Brannigan v. IBRD*, WBAT Decision No. 165 (1997), the Tribunal considered what kinds of "material

difference" should there be between the post declared redundant and the new position. It also deliberated upon the issue of "significant change" in functions between the abolished post and the newly created post:

"23. On the assumption that the purported abolition of a position can properly be justified in the interests of efficient administration, the question still remains whether it has been truly abolished so as to warrant the application of Staff Rule 7.01, paragraph 8.02(b). This is a matter of comparing the 'old' position with any relevant 'new' position. To demonstrate the abolition of a position it is not enough that there may be some differences between the old and new positions; the differences must be ones of substance. The Tribunal has emphasized in this respect the need for the Bank to show a clear material difference between the new position and the position that was made redundant (*Fabara-Núñez*, Decision No. 101 [1991], para. 44; *Arellano*, Decision No. 161 [1997], para. 33).

24. In the present case, EXT was indeed subject to a process of reorganization in order to provide a new approach to media relations and to adjust to the introduction of new technologies. This reorganization entailed a number of changes, including the mutually agreed separation of some existing staff members and the recruitment of some new ones. However, in the judgment of the Tribunal, the changes that were effected in the Applicant's position were not material.

25. If the substantive work of the Senior Public Information Officer position originally held by the Applicant before redundancy is compared with the new position of External Affairs Counsellor, or even with some of the other positions that became available, a striking similarity can be noted. Many of the responsibilities are substantially the same, particularly as to the requirements of contact and liaison with the media. Although the Bank emphasizes the need in the new position for familiarity with new broadcasting technologies, particularly in the television field, it does not explain how this familiarity necessarily extends beyond the requirements of the Applicant's position that he deal with television and radio broadcasters and journalists.

26. Nor is the Tribunal persuaded that the transfer of certain functions to other staff positions materially altered the position previously held by the Applicant. Much of the Respondent's justification of the 'abolition' of the Applicant's position relates to the transfer to Paris of the production of the Daily Development News. However, this particular change does not appear to be significant for several reasons: this assignment had only recently been added to the Applicant's usual duties as an ad hoc task; part of the production of this service remained in Washington; and the Applicant had devoted only a limited proportion of his time to that task. The addition of a foreign language ability to the new position in connec-

tion with the production of the Daily Development News does not appear to be an element which significantly changed the content of the position held by the Applicant. Similarly, the elimination of the responsibility to liaise with the Vice President and the reassignment to others of specific minor tasks did not change the essence of the work of the Senior Public Information Officer.”

53. The question therefore arises whether there were material differences between Mr. “F”'s duties as TCA and those of the position of TP/PA that was introduced in the “Language 1” Section following its restructuring.

54. As described in his Annual Performance Review for the period 1/1/2000 to 12/31/2000, the final full year in which he served in that position before his separation, Applicant as TCA was responsible for receipt and distribution of job requests to staff members of the Section, monitoring and follow up with outside contractors, dispatch of finished jobs after completing relevant entries in the database, producing statistical reports, making available word count statistics of the staff members for budgetary purposes, collecting and submitting attendance information on a daily basis, collecting time reports from the Section staff members, verifying them and submitting them to the Section Chief and ensuring availability of adequate supplies for the Section. Applicant also provided transcription support for important documents such as the World Economic Outlook (“WEO”) as part of his text processing duties. It is a matter of factual dispute how much of Applicant’s duties as TCA involved back-up text processing responsibilities. Some supervisors reported that in the TCA position in the “Language 1” Section, a significant portion of the Applicant’s work involved text processing duties. The senior economist held that Applicant’s work concerning desk top publishing was impressive and that he was the main player in the successful in-house production of two large pieces of publications using such techniques.

55. The position of Text Processing/Proofreading Assistant (“TP/PA”) in the Section was a newly created one consequent to the restructuring of the Language Services. As per the Vacancy Announcement for this position in 2002, the TP/PA was required to possess considerable desk top publishing skills, particularly in connection with the in-house production of the “Language 1” version of the WEO. The TP/PA was expected to type, transcribe, and format a wide variety of technical and specialized “Language 1” documents and publications, and perform the full range of desk top publishing functions. Among the position’s functions are proofreading and editing of final translated documents and publications against drafts or the original in

the source language to verify that they conform to "Language 1" spelling, syntax and grammatical practice, and also that the translations are complete and consistent in language and format.

56. Performance of these functions required the incumbent to have "Language 1" as a mother tongue along with an excellent command of English and, preferably some other languages. The incumbent was also expected to be proficient in the use of Quark Xpress, familiar with the Fund's style and form for producing the documents, and able to keep abreast of technical innovations in office automation. State-of-the-art skills in desk top publishing were essential. The incumbent should be able to train and supervise Text Processing Assistants ("TPAs").

57. The Text Processing Assistant ("TPA") position, following the restructuring, was one grade below the TP/PA position. The Vacancy Announcement for this post in the year 2002 shows that the occupant of this post was required to work under the supervision of the Text Processing/Proofreading Assistant ("TP/PA") and the guidance of the Section Chief. The incumbent was required to prepare "Language 1" documents in final form (including tabular material, equations, and charts), which did not require formal proofreading, in accordance with the Fund's and the Section's style and formatting standards. Like the TP/PA, he too was expected to perform a wide range of desk top publishing functions with full proficiency. The TPA also was expected to be fully familiar with the state of the art in desk top publishing and the Fund's style and practice, and was expected to check the accuracy of the language, grammar, spelling, and consistency in text and tables.

58. The "Languages 1 & 2" Division Chief described the work of the TCA as essentially a data management job with a high communications content. He stated that the TCA is the central point for the receipt of all jobs, the distribution within the Division of the jobs, and finally the dispatch electronically to all the requesters. The Division Chief described the job of the TPA as a purely text processing job; however, the TPA has to be thoroughly conversant with the latest technologies and the desk top publishing programs. According to the Division Chief, the newly created Text Processing and Proofreading Assistant's job involved desk top publishing as well as an additional language element of proofreading in the target language, "Language 1". The incumbent was expected to possess a very good command of the target language especially its workings and usage. The incumbent was also required to have a good grasp of the grammar, spelling, punctuation and usage, to the extent that the TP/PA could even correct errors in the translation.

59. In the light of the evidence set out in the foregoing paragraphs, the Tribunal concludes that the TP/PA position involved responsibilities materially different from, and more demanding than, those that Applicant performed as TCA. They particularly required an excellent aptitude in the use of English not possessed by Applicant.

60. The following decisions of other international administrative tribunals bear on the question of whether the restructuring in question was a legitimate exercise of managerial discretion or one designed solely to abolish the position of the Applicant. The ILOAT laid out the conditions for a valid restructuring exercise when it stated that:

“ . . . Admittedly, precedent has it that international organizations can undertake restructuring where it is necessary to achieve greater effectiveness, or indeed to make savings, and can therefore regroup certain functions and make staff reductions. But any job abolitions arising out of such a policy must be justified by real needs, and not be immediately followed by the creation of equivalent posts. . . . ”

In re Mrs. A.M.I., ILOAT Judgment No. 2156 (2002), Consideration 8. Also pertinent is the ruling of the WBAT in *Njovens v. IBRD*, WBAT Decision No. 294 (2003):

“18. The next question to be addressed by the Tribunal is whether the reorganization of INT was a genuine exercise of managerial discretion, or a pretext to terminate the Applicant. The Tribunal is satisfied that the reorganization was properly motivated, as evidenced, for example, by the memorandum . . . explaining in detail the reorganization envisaged.

19. This memorandum proposed a complete reorganization of that Department and its restructuring in connection with the Ethics Office

20. . . . There is no basis for a finding that the Bank undertook a major reorganization just to terminate the Applicant, who could in any event have been terminated through non-confirmation had performance been the problem.”

61. In considering whether the abolition of Mr. “F”'s TCA position was taken to meet institutional needs, it is appropriate to examine the merit of the rationale set forth by Respondent for the structural changes made in Language Services. The reasons given by the Fund include: redeployment of positions to areas of Language Services with a growing need for increased staffing; alignment of positions within the newly formed “Languages 1 & 2” Division parallel to those in other Language Divisions; economies of scale achieved by reducing the number of TCAs following the merger of the smaller Language Sections into pre-existing Divisions; insufficient TCA

responsibilities attached to the "Language 1" Section to occupy a TCA full-time. It is significant that reduction of TCA positions was a feature even of the January 2001 restructuring plan in which it was proposed to combine three small Language Sections into one Division, in which it was noted that "economies of scale would be achieved at the level of the TCA." Under the January 2001 plan, it could not have been expected that the TCA, a support level position, would have capability in three unrelated languages. The plan was designed to be budget neutral, with abolished positions redeployed to areas facing increased workload.

62. The Tribunal considers that the reasons advanced by the Fund in justification for the structural changes made in Language Services are credible and sufficient to justify abolition of the position of Mr. "F".

b. Did the Fund act reasonably in concluding that Applicant was not qualified to meet the requirements of the redesigned position?

63. The second prong of the test for a lawful abolition of position taken in accordance with GAO No. 16, Section 13 is that the Applicant is not qualified to meet the requirements of the redesigned position.

64. The TGS Assistant Director testified before the Grievance Committee that, in the newly created Division after the merger, the TCA was "a sort of traffic cop for the translation flow" which required the performance of a key function of communication. The incumbent had to communicate with the outside world and possess a good ability for oral and written communication in English. Knowledge of "Language 1" was not crucial to discharge the functions of the job but would be an added advantage. He maintained that even though Mr. "F" had earlier worked as a TCA in the Section, he did not possess the right communication skills to be able to handle the work in a large and complex Division involving many different languages coming in and going out. The job of the TCA had become more demanding since work pressure was increasing, and deadlines were becoming shorter, and it was felt that Mr. "F" would not be able to meet the requirements for the job.

65. This testimony was supported by the TGS Advisor in charge of Language Services who testified that the decision to abolish the TCA position in the "Language 1" Section and retain the other TCAs in the Division was taken because the combined Division was a very big Division involving a number of different languages, multiple contacts with free-lancers and requesters, and interaction with translators in a much more complex way than just in the "Language 1" Section. The view was that Applicant had difficulty in communicating with requesters in English. In a larger Division,

the interaction would be more complex, a challenge that it was felt Applicant would not be able to handle. The Fund maintains that all of the Applicant's principal TCA duties (rather than only minor tasks) were reassigned to other, existing staff members including the two TCAs from the Division.

66. So far as the job of Text Processing and Proofreading Assistant ("TP/PA") was concerned, the TGS Assistant Director testified that it was an intermediate position between the transcriber/typing position and a position in the editorial and proofreading career streams. The TP/PA position involved a considerable amount of skills in desk top publishing, composition and very strong skills in proofreading. The TGS Assistant Director stated that both the Applicant and the staff member who was selected for the TP/PA position had been given extensive training in desk top publishing. In order to find the best candidate for the newly created TP/PA position, the TGS Assistant Director conducted a test for Applicant and the other staff member using a previous version of the World Economic Outlook so as to judge the skills of the two. The TGS Assistant Director found that Applicant gave him just one page out of a number of pages that he was expected to produce, whereas the other staff member produced something that was not perfect, but was a sufficient indication of his capabilities in the area to show that he could handle the work in that area. The Fund management therefore took the decision to place the other staff member in the TP/PA position. The TGS Assistant Director also states that the persons who were running the "Language 1" Section, such as the "Languages 1 & 2" Division Chief and the TGS Advisor in charge of Language Services, found that the other staff member had made significant progress in the area of desk top publishing and favored his retention.

67. Applicant contends that there was no real abolition of post, but merely a marginal redefining of two existing positions, and that the work handled by the newly created positions was previously being performed by Applicant. Applicant observes that he previously produced major "Language 1" documents through desk top publishing, i.e. preparation of "camera ready" copy for printing. He had received congratulatory memoranda from an earlier supervisor, the Director of the BLS, and an Executive Director's Office for the first desk top publication of the WEO. That supervisor even praised the resourcefulness and efforts of Applicant before the Grievance Committee in the desk top publication of the WEO. The senior economist testified that Applicant had shown to his satisfaction that he could prepare the WEO for desk top publishing, which the senior economist shared with the BLS Deputy Director who appreciated the effort. Applicant alleges that the official who organized the test for the WEO desk top publication had no

competence in desk top publishing and the competition was not credible. Applicant alleges that the Division Chief, who knew little or nothing about Applicant's competencies and performance, relied upon the counsel of the acting Section Chief who, he alleges, was prejudiced against Applicant's interests because of Mr. "F"'s religion.

68. The Fund, for its part, submitted that the main duties of a TCA were administrative and did not require language skills other than English. There is, the Fund maintained, no evidence that language skills other than English were an essential component of the position. The Fund contends that the new combined Division following the restructuring was working "excellently" under the new arrangements, in which the functions of TCA had been successfully reassigned to two other TCAs in the "Languages 1 & 2" Division who came from the "Language 2" side of the Division.

69. In the Fund's view, Applicant lacked the skills and experience to perform the proofreading and editing duties of the new TP/PA position, such as "an excellent command of English," proficiency "in the use of Quark Xpress," and ability to prepare documents in final form "in accordance with IMF norms and style and format guidelines for publications." The Fund also submits that it relied upon the written appraisal of the computer systems officer who worked with Applicant and judged that Applicant did not have the required expertise to handle desk top publishing assignments. The Fund contends that Applicant had not shown any evidence about his proofreading skills and admitted that his English skills were not strong. The Fund relies upon the testimony of an earlier supervisor to say that the version of the WEO that Applicant produced while working under him in 1991 did not require the kind of sophisticated software and hardware that is currently required for desk top publishing and that it was this latest kind of technology in which Applicant had been found lacking. The Fund seeks to discount the senior economist's testimony praising Applicant's desk top publishing skills by saying that his testimony has been contradicted by other witnesses and by the written appraisal of the computer systems officer.

70. In light of the record before the Tribunal, the Tribunal concludes that the position of the Fund in finding that the Applicant was not qualified for the redesigned position is persuasive. In this regard the Tribunal has borne in mind the Commentary on the Statute with respect to managerial discretion:

"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 determina-

tion of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.”

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

2. Was the abolition of Applicant’s position improperly motivated?

71. In the case of *Jassal v. IBRD*, WBAT Decision No. 100 (1991), para. 31, the Tribunal cautioned:

“ . . . In such a case, a finding of redundancy must turn upon a conclusion that the content of the position was so defined as to render its previous occupant no longer qualified to discharge its responsibilities. Unsatisfactory performance by a staff member in his or her position prior to the Reorganization cannot alone furnish a basis for terminating service with the Bank on the ground of redundancy. To do so would be an improper use of the Reorganization procedures in order to avoid the protections otherwise afforded by the Bank’s governing documents – Staff Rule 7.01 in particular – for termination of employment, and would therefore constitute *détournement de pouvoir*, subject to reversal by the Tribunal.”

72. In the case of *Harou v. IBRD*, WBAT Decision No. 273 (2002), para. 37, the Tribunal while dealing with redundancy stated:

“ . . . Care is needed in such an exercise since the redundancy provisions may not be used to deal with unsatisfactory performance.”

Similarly, in the case of *Marchesini v. IBRD*, WBAT Decision No. 260 (2002), para 54, the Tribunal stated that:

“However, careful examination of the Guidelines shows that managers are thereby advised to resort to redundancy only as ‘the last option’ and are reminded that ‘the redundancy route is not a substitute for managing performance.’ . . . ”

In the case of *Taborga v. IBRD*, WBAT Decision No. 297 (2003), para 42, the Tribunal reiterated and cautioned that:

“ . . . As the Tribunal has found in the past, the redundancy provisions must not be used to deal with unsatisfactory performance, but this does not mean that the performance or skills of a staff member may not be taken into account when deciding who should be rendered redundant in the context of a redundancy procedure under Staff Rule 7.01, paras. 8.02(d) and 8.03. . . . ”

Also relevant is the case of *del Campo v. IBRD*, WBAT Decision No. 292 (2003), para. 56, wherein the Tribunal repeated that:

"... Redundancy is not a tool that may be used to deal with unsatisfactory performance; and if one were in a situation of examining unsatisfactory performance as a ground for severance, any 'allegations' must be the subject of an adversarial debate between the parties."

In an important decision connected with the issue of performance evaluation and its effect on declaration of redundancy, the WBAT in *Njovens v. IBRD*, WBAT Decision No. 294 (2003), explained:

"38. In cases where the staff member is being evaluated with respect to performance problems and then is suddenly made redundant under paragraph 8.02(b), the requirements of fairness and reasonableness become even more stringent, as the possible confusion between one alternative and the other is likely to raise doubts in the staff member's mind and justifies a heightened level of scrutiny on the part of the Tribunal in assessing the validity of the redundancy.

39. In this case, as noted in paragraph 34 above, the Bank did not fully live up to its obligations toward the Applicant with respect to his performance evaluation as a probationer. This failure of due process was compounded by the complete absence of advance warning with respect to the Applicant's redundancy. While this last aspect does not affect the genuineness of the reorganization, it inflicted compensable damage on the Applicant."

Recently in the case of *del Campo v. IBRD*, WBAT Decision No. 292 (2003), the Tribunal laid out certain vital parameters for declaration of a valid redundancy:

"49. On the other hand, the implementation of the Staff Rules dealing with redundancy must be effected with strict observance of fair and transparent procedures lest managers pay no more than lip-service to the required standards; 'prerogatives of discretion must be exercised exclusively for legitimate and genuine managerial considerations in "the interests of efficient administration."' (*Yoon (No. 2)*, Decision No. 248 [2001], para. 28.)

50. When a redundancy is decided under para. 8.02(d), the issue is not whether the Applicant is performing satisfactorily. It may well be that every person in the 'type' or 'level' of position targeted for reduction is more than able to fulfill his or her job requirements. The issue is whether the basis upon which a particular individual is chosen for redundancy is legitimate.

51. Any notion that a complainant could resist redundancy on the basis of his good performance would imply that if he were correct on that account the Bank could not make him redundant. That is obviously not so. If he is one of several persons in the relevant category, a reversal of his redundancy

would imply that the correct decision should have been to declare someone else redundant – even if that other person was also performing satisfactorily. In other words, the reference in para. 8.03 to ‘performance’ as a factor to be taken into account when making the selection does not address the issue of whether an individual’s performance has been satisfactory or not in the sense of a minimum required standard, but whether an individual is *relatively* more likely to contribute to the Bank’s effective operations. If there are two absolutely first-class performers in a relevant grade, the Bank may nevertheless have to face the unpleasant choice of deciding whose loss would be *relatively* less disruptive of effective operations.

52. Thus, while unsatisfactory performance alone cannot furnish a basis for terminating service on the ground of redundancy (because such a termination would not be properly classifiable as a redundancy), ‘performance or skill’ may be taken into account when deciding who should be retained; *see Hoezoo*, Decision No. 181 [1997], at para. 6. As the Tribunal held in *Jassal*, Decision No. 100 [1991], at para. 37, the Bank’s assessment of a staff member’s performance and qualifications is an important exercise of its managerial discretion, and the Tribunal will review such an assessment only for *abuse* of discretion.”

(Emphasis in original.) The Fund’s position in this case appears to be akin to that in *Denning v. IBRD*, WBAT Decision No. 168 (1997), para. 27, when the Tribunal observed:

“. . . the extent of the Applicant’s skills was indeed considered by the Respondent, not to justify the redundancy on these grounds but, on the contrary, to consider whether she could be kept in the new structure of the Division. . . . ”

73. Applicant has alleged an improper motive on the part of the Fund management in abolishing his position, namely, the objective of overcoming personnel problems. International administrative tribunals have found improper motive on the part of international organizations to be an abuse of discretion. The general principle guiding international administrative tribunals regarding improper motive is that there must exist a causal link between the alleged irregular motive and the decision that is being attacked.

74. Jurisprudence of international administrative tribunals therefore suggests that a decision could constitute an abuse if an organization exercises its discretionary power for a purpose other than that for which the power was granted. In the context of abolition of posts or redundancy, administrative tribunals have considered the abolition of positions improperly motivated if the aim of the decision was to terminate a particular person for misconduct or unsatisfactory performance.

75. Applicant argues that the true reason for restructuring was to resolve "personnel problems" grounded in religious intolerance, and that the problem of intolerance and discriminatory attitudes was resolved through elimination of Applicant's post.

76. The draft plan pertaining to restructuring states that "[t]he proposed restructuring of the language sections would offer a unique opportunity to solve some long-standing personnel problems in the ["Language 1"] Section." The same document also says that "[i]t is unlikely that any of the current incumbents in the ["Language 1"] Section would have the range of skills required for such a 'combined' TPA/DTP/proofreader position, and a new person would therefore need to be hired." The June, 21, 2001 proposal notes:

"The purpose of this note is to inform you of the efforts under way to permanently resolve the long-standing problems of the ["Language 1"] Section of the Bureau of Language Services, and to seek your approval for a plan of action involving this Section and other small language service units as part of the restructuring of TGS.

...

... Against this background, we believe that the Section needs to be rebuilt without those staff members who have been at the heart of its continuous problems for many years under different supervisors."

77. The question accordingly arises whether the real purpose for restructuring was to resolve long-standing personnel problems of the Section rather than to achieve institutional efficiency. In his Grievance Committee testimony, the TGS Assistant Director testified as to solving the "problems":

"... incidentally, that was something we were going to achieve, but it was not the purpose of the reorganization, it was not to deal with personnel issues in that manner."

78. Does the fact that the Fund saw the restructuring not only as justified by the several considerations set out in paragraph 61 above but as carrying the further advantage of overcoming the Section's notorious personnel conflicts deprive the restructuring of its legitimacy? In *In re Mr. J. C.*, ILOAT Judgment No. 139 (1969), Considerations 1 and 2, the ILOAT considered the question of dual motives:

"The suppression of a post is not tainted by such abuse when it is designed to have a lasting effect in the interest of the service and at the same time terminates the appointment of a staff member whose services were unsatisfactory. It is true that the desire to terminate the contract of an unsatisfactory staff member is not in itself a ground for suppressing his post; that

would mean depriving the staff member concerned of the legal remedies to which he is entitled, or at least, by disguising the true reasons for his termination, would make it difficult for him to defend his interests. If, however, the result of a suppression of post is to effect a permanent saving, it is not irregular simply because it also has the effect of removing an official.

...

The above-mentioned facts show that the complainant's differences with his chiefs were the root cause of the suppression of his post. Such a measure might never have been even considered if the complainant's conduct had always been above criticism. It does not, however, follow that this is a case of abuse of discretionary power. On the contrary, trial of the arrangement for several months showed the expediency of distributing the complainant's duties among other staff members. This arrangement has continued ever since, and it has not proved necessary to appoint another staff member, this being explained, in particular, by the fact that the complainant's duties partly overlapped with those of one of his chiefs. It follows that in the case at issue the suppression of post was based on two grounds, one related to the person of the complainant, and the other to the interests of the service. It is clear from the preceding consideration that this second ground is sufficient to justify the decision taken in the circumstances of the case."

79. The Fund management has clearly stated on several occasions that the restructuring of Language Services was motivated by a desire to enhance the efficiency of the TGS Department as a whole. In the view of the Tribunal, the evidence available, including the communications among the management personnel responsible for abolishing Applicant's position, while supporting the Fund's stated reasons for the restructuring, also demonstrates that the Fund saw in the restructuring the means of overcoming the personnel conflicts that had plagued the "Language 1" Section. In the view of the Tribunal, this additional desideratum does not deprive this exercise of the Fund's managerial discretion of its legitimacy.

3. Was the abolition of Applicant's position discriminatory?

80. Applicant's principal contention in this case is that the abolition of his position as TCA in the "Language 1" Section was not a lawful abolition to meet institutional needs but rather was the result of religious discrimination. This contention is closely related to Mr. "F"'s claim (considered below) that during his career with the Fund he was subjected to a hostile work environment arising out of religious harassment. The Fund responds that Mr. "F" has failed to show any nexus between alleged religious prejudice among col-

leagues and the decision to abolish his position. Applicant counters that the decision was rooted in religious hostility he experienced within his Section.

81. Applicant's case is the first in which the IMFAT has been called upon to address an allegation that a staff member's career has been adversely affected by religious prejudice, a source of discrimination prohibited by the Fund's internal law¹³ as well as by universally accepted principles of human rights. Other applicants have alleged discrimination of a distinctly different and less serious type, i.e. that a classification scheme relating to Fund salary or benefits unfairly favored one category of staff members over another. See *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996) (economist v. non-economist staff); *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002) (overseas Office Directors v. Resident Representatives); *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002) (Legal Permanent Residents v. G-4 visa holders). In *Mr. "R"*, the Tribunal established that ". . . the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization." (Para. 30.)

82. Discrimination on religious grounds is prohibited by the internal law of the Fund,¹⁴ having been first set forth in the N Rules.¹⁵ Rule N-2 provides:

"N-2. Subject to Rule N-1 above, the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, creed, or nationality.

Adopted as N-1 September 25, 1946, amended June 22, 1979."

¹³In *Ms. "Y" (No. 2)*, the Tribunal was confronted with a gender discrimination claim only indirectly in reviewing conclusions under the Discrimination Review Exercise (DRE). In *Ms. "S", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1995-1 (May 5, 1995), an application that included a claim of gender discrimination was found to be outside the Tribunal's jurisdiction *ratione temporis*, as the complained of acts occurred prior to the effective date of its Statute.

¹⁴Article III of the Tribunal's Statute provides *inter alia*: "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."

¹⁵The "N Rules" represent the section of the Rules and Regulations of the International Monetary Fund dedicated to "Staff Regulations." By their terms, the Fund's Rules and Regulations supplement the Articles of Agreement and By-Laws adopted by the Board of Governors. See Rule A-1.

83. Having recognized from its inception the importance to a global institution of maintaining a nondiscriminatory workplace, the Fund in recent years has taken additional steps evidencing the significance which it attaches to this matter.¹⁶

84. On July 3, 2003, the Fund's Managing Director transmitted to the members of the staff a policy designed by its terms to "consolidate in one document the policies and safeguards in place" with respect to discrimination. It begins by defining discrimination within the context of the Fund:

"In the Fund, discrimination should be understood to refer to differences in the treatment of individuals or groups of employees where the differentiation is not based on the Fund's institutional needs and:

- is made on the basis of personal characteristics such as age, creed, ethnicity, gender, nationality, race, or sexual orientation;
- is unrelated to an employee's work-related capabilities, qualifications and experience—this may include factors such as disabilities or medical conditions that do not prevent the employee from performing her or his duties;
- is irrelevant to the application of Fund policies; and
- has an adverse impact on the individual's employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment.

Discrimination can occur in various ways, including but not limited to the following:

...

- creating or allowing a biased work environment that interferes with an individual's work performance or otherwise adversely affects employment or career opportunities;

...

Discrimination can be manifested in different ways, for example, by a **single decision** that adversely affects an individual or through a **pattern** of words, behaviors, action, or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumula-

¹⁶See, e.g., "Steps to Achieve Greater Diversity and Address Discrimination Among the Fund's Staff" (June 1, 1995); Fund's Advisory Group on Discrimination, "Discrimination in the Fund" (December 1995); "Measures to Promote Staff Diversity and Address Discrimination" (July 26, 1996). For a discussion of the Discrimination Review Exercise (DRE), see Ms. "Y" (No. 2), paras. 14-19.

tive effect of which is to deprive the individual of fair and impartial treatment.

While the former may be readily identified (e.g., a decision not to convert a fixed-term appointment, a denial of a promotion), the latter may be less obvious, as there is no specific act or decision at issue. Nevertheless, the failure to provide fair and impartial treatment, even if through inaction, can have harmful effects on an employee's career."

(Discrimination Policy, July 3, 2003, p. 4.) (Emphasis in original.)

85. Applicant testified during the Grievance Committee's proceedings to a number of incidents that he perceived as representing religious hostility. Two co-workers, he reported, told him directly that if he did not convert to their religion they would make his life in the Section "miserable." He also testified that these same staff members refused to take direction from Applicant in the course of their work.

86. Other allegations relate to the display of "religious symbols." Mr. "F" testified that his own religious expression was not tolerated in the Section. He contends that he was told to remove from his work area a verse from a holy text and also was told to remove a religious symbol from his office key ring. Mr. "F" alleges that staff members of the majority religious group displayed posters depicting their own holy sites with the purpose of provoking him. The senior economist later testified that it was during his period in the Section that the allegedly provocative posters were placed and that he had encouraged the decoration of the Section to reflect the flavor of the region of the world which it represented. He then noticed that the decorations reflected the majority religion and he therefore insisted that additional posters be placed to represent other religious groups. At the same time, the senior economist before the Grievance Committee testified that he did not observe "any religious discrimination" against Mr. "F".

87. Applicant explained what he saw as the link between religious hostility of co-workers and the abolition of his position, saying that ". . . they create problems for me as something usual to keep question mark on me about how they get the front office or Administration to fire me."

88. Applicant maintains that over the years he reported religious hostility to supervisors, as well as to the Ombudsperson and the counselor at the Health Services Department. The Division Chief testified that in the early 1990's Mr. "F" had reported that he felt he was the object of religious intolerance. The senior economist testified that Mr. "F" had spoken to him about his perception of religious hostility. According to the senior economist, an

incident also took place in which two staff members “. . . came to my office one day, and actually it left a bad taste in my mouth, they said something about [Mr. “F”] and they say he is [his religion], something like that. And I said that I don’t care about it and I will not tolerate this. . . . I made it 100 percent clear that I’m not going to tolerate this.” The senior economist also distributed to members of the Section copies of the Fund’s Code of Conduct.

89. In Respondent’s view, “. . . the weight of the evidence shows that, while there may have been a couple of isolated instances over more than twenty years when some of Applicant’s colleagues alluded to his religion in derogatory terms, the supervisors who became aware of these incidents dealt with them appropriately and Applicant’s career suffered no consequences as a result of any alleged religious bias.”

90. Two questions arise. The first is: Was the decision to abolish the post motivated by religious discrimination? In the view of the Tribunal, the answer is decidedly negative. There is no evidence that those who took the decision to abolish Mr. “F”’s position were so motivated. The second question is whether Applicant has shown that he has been subjected to a “. . . pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.” (Discrimination Policy, July 3, 2003, p. 4.) This question will be answered at the end of the next section.

4. Was Applicant subjected to a hostile work environment?

91. Accordingly, a further question is whether, though it has been concluded that Applicant did not experience discrimination on the basis of his religion in the abolition of his position, Mr. “F” nonetheless was subjected to a hostile work environment in contravention of the Fund’s internal law. It is important to recall that while discrimination and harassment are closely related under the law of the Fund inasmuch as harassment on the basis of specified characteristics may amount to discrimination on such grounds, at the same time the Fund’s prohibition on harassment provides more broadly:

“Harassment is any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment.”

(Policy on Harassment, January 1995; Staff Bulletin No. 99/15 Harassment—Policy and Guidance to Staff, June 18, 1999.)

92. The Policy on Harassment also describes intimidation:

"4. **Intimidation** includes physical or verbal abuse; behavior directed at isolating or humiliating an individual or a group, or at preventing them from engaging in normal activities. Behaviors that might constitute intimidation include, *inter alia*:

- degrading public tirades by a supervisor or colleague;
- deliberate insults related to a person's personal or professional competence;
- threatening or insulting comments, whether oral or written—including by e-mail;
- deliberate desecration of religious and/or national symbols; and
- malicious and unsubstantiated complaints of misconduct, including harassment, against other employees."

93. The Fund's Discrimination Policy, p. 5, explains that harassment can manifest itself as a form of discrimination:

"**Harassment, unfair treatment, abuse of power, and favoritism** are also separate from discrimination, but they can all become discriminatory if they develop into a pattern and systematically address certain individuals or groups of individuals and have an impact on employees' performance, development, career opportunities, and career progress."

94. In 1998, the Fund introduced the Code of Conduct which provides *inter alia*:

"Courtesy and respect

14. You should treat your colleagues, whether supervisors, peers, or subordinates, with courtesy and respect, without harassment, or physical or verbal abuse. You should at all times avoid behavior at the workplace that, although not rising to the level of harassment or abuse, may nonetheless create an atmosphere of hostility or intimidation.

Diversity

15. In view of the international character of the Fund and the value that the Fund attaches to diversity, you are expected to act with tolerance, sensitivity, respect, and impartiality toward other persons' cultures and backgrounds."

95. The Policy on Harassment likewise emphasizes the importance of tolerance to be exercised by staff members in their behavior towards one another:

"9. In the multicultural environment of the Fund, there is clearly room for one person to be offended by actions that might not be offensive to another person. Therefore, it is important for all staff members to exercise tolerance, sensitivity, and respect in their interactions with others. It is also important for all staff to be familiar with what constitutes harassment and the Fund's policies concerning the conduct of staff members. One important element to consider is that the definition of harassment concerns not only a person's intent in engaging in certain conduct, but also the effect of that conduct on others. Therefore, if a specific action by one person is reasonably perceived as offensive or intimidating by another, that action might be seen as harassment, whether intended or not."

96. Staff members who believe they have been subjected to discrimination are further advised:

"It is important that employees have reasonable grounds supported by documents and other evidence, which may include witnesses, before making a complaint of discrimination. Employees should not use discrimination allegations to address other concerns or disagreements. The Fund will protect an employee against retaliation for raising a discrimination case, but if an inquiry demonstrates that the accusations are frivolous or malicious, this may be grounds for disciplinary measures."

(Discrimination Policy, July 3, 2003, p. 7.)

97. The relevant policies also speak to the responsibilities of supervisors. In matters of harassment, the Fund's policy states: "The Fund strives for a harassment-free environment, and supervisors are expected to support this objective, including stopping harassment in the areas under their supervision." (Policy on Harassment, para. 18.) Similarly, the Fund's Code of Conduct specifies:

"Conflict resolution

19. Managers have a responsibility to make themselves available to staff members who may wish to raise concerns in confidence and to deal with such situations in an impartial and sensitive manner. Managers should endeavor to create an atmosphere in which staff feel free to use, without fear of reprisal, the existing institutional channels for conflict resolution, [footnote omitted] and to express concerns about situations which are, or have the potential to be, conflictive."

98. There is evidence that conduct in the "Language 1" Section did not meet the standards set forth in the Code of Conduct, and that the Fund's supervisors did not take effective measures to correct that problem. At the same time, in September 1995, Mr. "F"'s conduct during discussion

of his mid-year review of performance was recorded as being marked by an "adversarial attitude, aggressive tone, and personal attacks [that] were not inconsistent with his record." In a follow-up memorandum copied to Mr. "F", a BLS official observed: "It was essential for him to recognize that he also shared responsibility for the atmosphere of animosity which had prevailed in the past and seriously disturbed the operation of the Section, and that maintaining such an attitude would rekindle previous tensions." In November 2000, Mr. "F" was advised by the TGS Advisor for Language Services: ". . . as discussed with you on two occasions recently, I would urge you to control your tendency to easily get worked up and show anger in your conversations with [colleagues]." Moreover, Applicant was warned, ". . . such an attitude, including raising your voice and becoming verbally aggressive . . . is not acceptable conduct in the Fund, and any such conduct in the future would result in disciplinary action against you."

99. Nonetheless, there is also reason to believe that Mr. "F" was uniquely vulnerable on account of his religious affiliation, a vulnerability perhaps magnified by his coordinating responsibilities. As one of his supervisors commented: "In a proper environment, things should have worked well, yes. The environment was not proper in the ["Language 1"] Section, I agree."

100. Finally, the Tribunal is obliged to address the question of whether Mr. "F" was subjected to a hostile work environment during his career with the Fund, which the Fund did not take adequate measures to rectify. Having reviewed the admittedly contradictory and uneven evidence as to whether Mr. "F" was a victim of religious discrimination and harassment on the part of certain of his colleagues, the Tribunal concludes as follows. As noted above, the decision to abolish the position of Mr. "F" was not motivated by religious discrimination of any of the decision makers. Nevertheless, the evidence predominantly sustains the conclusion that the Section in which Mr. "F" worked suffered from an atmosphere of religious bigotry and malign personal relations among certain of its members, and that he in particular suffered accordingly. There is no evidence in the record that Fund supervisors took effective action to deal with that unacceptable situation. They did appoint the senior economist who appears to have made some effort to rebuke expressions of religious hostility but the atmosphere of hostility persisted after his departure. Moreover, there is ground to conclude that Applicant suffered from harassment in the workplace, as that concept is defined in the Fund's Policy on Harassment, though there is also evidence that he may have contributed to the malign atmosphere in the Section by his own behavior.

101. Accordingly, there is evidence in the record that Mr. "F" felt, and had reason to feel, that he was the object of hostility on the part of certain of his colleagues because his religion was different from theirs. The senior economist assigned by the Fund to investigate and resolve the personnel problems plaguing the "Language 1" Section reported religiously intolerant remarks made to him which he refuted and criticized when they were made. But there is no other evidence that the supervisors of the Section concerned moved vigorously, or indeed moved at all, to investigate Mr. "F"'s complaints of religious hostility or to discipline staff members found to be the source of such hostility. The senior economist was appointed to survey, and recommend corrective measures in respect of, the personnel problems of the "Language 1" Section. But that of itself is not enough to absolve the Fund of responsibility for not addressing Mr. "F"'s complaints of religious hostility. Moreover, there is also evidence that an atmosphere of religious animosity was tantamount to harassment that adversely affected the work performance and perhaps health of Mr. "F". Harassment also appears to have had origins not of a religious kind. The deportment of Mr. "F" himself was at times offensive, combative and excessive but, on the evidence in the record, not such as to excuse the behavior of which he was the victim.

5. Was the abolition of Applicant's position, and his consequent separation from service, taken in accordance with fair and reasonable procedures?

a. Was Applicant given adequate notice of the abolition of his position?

102. GAO No. 16, Section 13.02 provides:

"Section 13. Reduction in Strength, Abolition of Position or Change in Job Requirements

...

13.02 *Notice.* A staff member separated under the provisions of Section 13.01 shall be entitled to 60 calendar days' notice. However, the Director of Administration may extend this period up to 120 calendar days in order to allow the staff member a reasonable time, before his separation, to settle his affairs. The Director of Administration may also excuse a staff member from reporting for duty during part or all of the period of notice and place the staff member on administrative leave with pay during this period."

It should be noted that the foregoing provision addresses the period of notice once a stage of separation has been reached. It does not, at any rate expressly,

address when a staff member whose position is to be abolished is entitled to a specific notice period in advance of abolition. Applicant contends that the Fund violated GAO No. 16 “. . . when it failed to give Applicant warning about the redundancy decision before the decision was taken, i.e. at a time when he could have raised relevant issues about his continued employment.” It is recalled that Applicant was informed of the abolition of his position effective November 1, 2001 during a meeting on October 24, 2001, followed on the next day by written confirmation. The Fund has responded that it fully satisfied its obligations under GAO No. 16 in providing Applicant with the required notice, and that Applicant has failed to demonstrate that the process followed in abolishing his position and separating him from the Fund was deficient. In the Fund’s view, the 60-day (or extended 120-day) “notice” period does not begin to run until the six-month reassignment period has expired. Accordingly, the period functions as notice of the separation from service rather than of the abolition of position. The procedures followed by the Fund in the case of Mr. “F” are consistent with this interpretation of Section 13.02, and Mr. “F” was granted the maximum extended notice period of 120 days. Moreover, the Fund delayed informing Mr. “F” of the decision to abolish his position for a few months while he was recovering from what was diagnosed to be work-related stress disorder.¹⁷

103. The notice requirements for separation from service under GAO No. 16 as a result of “Reduction in Strength, Abolition of Position or Change in Job Requirements” (Section 13) may be distinguished from the notice requirements when the separation is the result of unsatisfactory performance (Section 14) or misconduct (Section 15 and GAO No. 33, Section 10) where an opportunity is afforded the staff member to rebut evidence against him.

104. In the case of *Garcia-Mujica v. IBRD*, WBAT Decision No. 192 (1998), paras. 18-20, the WBAT concluded:

“. . . While the approach followed does not invalidate the reorganization or the objective evaluation of the Applicant’s skills, it resulted in a situation where he was deprived of an adequate opportunity to defend himself against the managers’ complaints because no information was provided to him on a timely basis.

. . . the Applicant was only informed orally of the possibility of redundancy in the meeting held on March 26, 1996. Although Staff Rule 7.01 does not provide for a specific advance warning about the issuance of a

¹⁷See *supra* The Factual Background of the Case.

notice of redundancy, a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work. In this case, such guarantee was not complied with in a satisfactory manner since, as explained above, a number of matters that could affect his career were known to the managers as early as October 1995.

As a result, the Applicant was declared redundant on very short notice. . . . While an administrative review can follow, as indeed was the case here, it is important for a staff member to be able to make his views known before a final decision affecting him is adopted.”

105. In the case of *Njovens v. IBRD*, WBAT Decision No. 294 (2003), paras. 37, 39, the WBAT made clear:

“ . . . However, fairness and reasonableness dictate that, as stated in *Garcia-Mujica*, adequate information should be provided to the concerned staff member with ‘all possible anticipation.’ This is particularly so when the Bank is aware of the likelihood of redundancy substantially in advance of it being decided upon and implemented.

. . . .

. . . This failure of due process was compounded by the complete absence of advance warning with respect to the Applicant’s redundancy. While this last aspect does not affect the genuineness of the reorganization, it inflicted compensable damage on the Applicant.”

106. While the Fund’s interpretation of the Section 13.02 of GAO No. 16 is not unreasonable, the Tribunal’s view is that the fair and transparent procedures that govern or should govern the operations of the Fund require that a staff member whose position is abolished be given reasonable notice of that prospect. The staff member should be in a position when such a decision first is conveyed to him to set out any reasons that he or she may have to contest the propriety or equity of the abolition decision.¹⁸ The summary notice given to Mr. “F” in this case was hardly adequate for that purpose. Thus, on this ground, the Tribunal concludes that the Fund did not follow fair and reasonable procedures.

¹⁸The IMF Administrative Tribunal consistently has applied notice and hearing as essential principles of international administrative law. See, e.g., *Ms. “C”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 37; *Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), paras. 116-128; *Mr. “P” (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), para. 152.

b. Did Respondent make the requisite efforts to reassign Applicant to another position consistent with his qualifications and the requirements of the Fund?

107. GAO No. 16, Section 13.01 provides in pertinent part:

"In the event that a staff member's position is abolished, or the position is redesigned to meet institutional needs and he is no longer qualified to meet its requirements, efforts shall be made over a period of not less than six months to reassign him to another position consistent with his qualifications and the requirements of the Fund. During this period, the Fund shall also provide the staff member with appropriate training if such training will facilitate his placement in an alternate position. If all efforts to identify a reassignment fail, his appointment shall be terminated."¹⁹

108. Applicant alleges that insufficient efforts were made by the Fund to find him an alternative position. For its part, Respondent contends that Applicant did not seriously pursue any of the positions in the Fund or the testing, training, or outplacement assistance offered, and that ". . . the duty to assist a staff member during the reassignment period is precisely that—a duty to *assist*; the staff member has the prime responsibility to seek out opportunities, pursue training to enhance his skills in order to bring them in line with the requirements of available positions, and to take the tests that are prerequisite for the positions [footnote omitted]."

109. Applicant alleges that the Human Resources Officer responsible for counseling staff members whose positions had been abolished met with Applicant and his wife only twice during the six-month period after Applicant was delivered the notice of abolition of his position. During the first meeting, Applicant was informed of the separation process and the placement agency choices available to him. During the second meeting details were reviewed about Applicant's separation. Applicant asserts that it was only once during the six-month period that the Human Resources Officer informed him regarding an opening, for which French language skills were required. Applicant decided that the position would not fit his own set of skills.

¹⁹Efforts at reassignment are also required in cases of reduction in strength:

"In the event of a reduction of staff positions in the Fund, efforts shall be made to reassign staff members consistent with their qualifications and the requirements of the Fund. In reassigning staff members, consideration shall be given to their performance record, seniority, and length of service."

GAO No. 16, Section 13.01.

110. However, the Human Resources Officer's testimony before the Grievance Committee was that she met with Applicant and his wife three or four times and spoke with them over the telephone several more times over the subsequent six months, including an intervention on Applicant's behalf regarding a job opportunity at the IMF Institute, drawing Applicant's attention to a vacant data management assistant's position in TGS, and helping Applicant to obtain a certification of his "Language 1" typing skills for an outside opportunity. In the Fund's view, the prime responsibility for seeking out reassignment opportunities lies with the staff member whose position has been abolished. In Applicant's case, he had to periodically review the Fund's job vacancy listing as well as vacancies outside the Fund and bring to the Human Resources Officer's attention any position in which he was interested so that she could assist him through her contact with the hiring department.

111. The Fund maintains that Applicant made little effort during the six-month job search period to actively seek out other employment possibilities within the Fund or outside. He neither took any of the tests that would have qualified him for numerous vacancies in the secretarial career stream, nor did he pursue any training opportunities. Applicant also failed to take advantage of the outplacement service that was available to him at the Fund's expense. He dropped out of an English skills course that would have been essential for most of the vacancies in the Fund even though he had been assured that the Fund would reimburse for that course.

112. The Fund claims that it is under no duty to invite Applicant to apply to positions for which he is clearly unqualified. Also, the Fund states that for several years it has posted all job vacancies on its internal website, to which all staff members have access. Accordingly, staff members interested in reassignment opportunities can easily obtain the most current list of vacancies. The Fund argues that Applicant never expressed any interest in remaining in the Section and being considered for either the TP/PA position or the TPA position which was at a level lower than the position he had held. During Applicant's meetings with the Human Resources Officer, he expressed optimism about pursuit of other possibilities such as opening a business. Applicant never communicated to the Fund that he would have applied for either the TP/PA or TPA position if he had been invited to do so. The Fund maintains that it fully satisfied its obligations under GAO No. 16 to make efforts to find an alternative position for Applicant.

113. The ILOAT in its decision in the case of *In re Gracia de Muñiz*, ILOAT Decision No. 269 (1976), Consideration 2, referred to a general principle of

law that requires international organizations to make efforts to find alternate employment for staff declared redundant:

"Moreover, there is a general principle whereby an organization may not terminate the appointment of a staff member whose post has been abolished, at least if he holds an appointment of indeterminate duration, without first taking suitable steps to find him alternative employment."

114. In the case of *Arellano (No. 2) v. IBRD*, WBAT Decision No. 161 (1997), para. 42, the WBAT clarified:

"The obligation of the Respondent, in this respect, is not to reassign staff members whose employment was declared redundant under Staff Rule 7.01 but to try genuinely to find such staff members alternative positions for which they are qualified. It is an obligation to make an effort; it is not an obligation to ensure the success of such effort."

115. The WBAT in the case of *Marchesini v. IBRD*, WBAT Decision No. 260 (2002), paras. 45-46, considered:

"The question, therefore, is whether the Bank fulfilled its obligation and actively and in good faith assisted the Applicant in his effort to seek reassignment. . . .

The record shows that the Bank tried actively to assist the Applicant in seeking another position within the Bank Group by providing access to the Job Search Center and the Job Posting System, and through the services of the Applicant's Human Resources Officer, but that the search was not fruitful and the Applicant was not offered a position. Although the Applicant attributes this unfortunate result to what he considers as only a sporadic, reactive and half-hearted effort by the Human Resources Officer, the record does not substantiate such a finding. To the contrary, it shows that the Human Resources Officer actively tried to arrange several interviews for the Applicant, before and after he left for home leave. She even submitted some applications for him when he was not available to submit them. That the Applicant's search, with the assistance of the Bank's management, was not successful is attributable in part to the fact that he was seeking reassignment when the job market was tight."

116. The ILOAT in its decision in the case of *In re Mr. S. S.*, ILOAT Decision No. 2294 (2004), Consideration 9, cautioned against presumptive and arbitrary decisions not to offer vacant posts to redundant staff members without first making appropriate inquiries about their suitability for those posts. The Tribunal stated:

"Those provisions do not authorise the Secretary General to decide arbitrarily that there is no post for which he considers the official concerned

has the requisite qualifications. Rather, they require him to undertake appropriate enquiries in order to identify vacant posts, or posts falling vacant within a certain time, depending on the circumstances, and to explain, if such posts exist, the reasons why the official concerned is not suitable to perform adequately the duties attached to those posts.

The Secretary General should have terminated the complainant's appointment, therefore, only after completing all appropriate enquiries."

117. The jurisprudence of administrative tribunals accordingly indicates that international organizations must make genuine, serious, and proactive efforts in reassignment of their employees whose positions have been abolished. A further complaint of Applicant is that the Fund failed to make appropriate efforts to reassign Applicant to another position for which he was qualified. The evidence on this question is not clear-cut. On the one hand, the efforts made by the Fund to identify another position for Mr. "F" may not have been energetic or pro-active. On the other hand, Mr. "F" himself appears to have shown little initiative in finding another position in the Fund. Apparently, he did not apply to fill the TPA position in the "Language 1" Section after the TP/PA position was filled by its incumbent. The Tribunal concludes that there is fault to be borne by both parties for a failure to energetically pursue such possibilities as there may have been to identify a position for Applicant after the abolition of his position. But it does not feel justified in awarding compensation to Applicant on this count.

Remedies

118. Article XIV, Section 1 of the Statute provides:

"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."

119. In his Application, Mr. "F" seeks as relief ". . . rescission of the redundancy decision or a directed settlement protecting his economic security on the basis of a pension equal to what he would have had at normal retirement age," as well as "such other relief as may be adjudged."

120. The Tribunal has concluded that Applicant has not met his burden of showing abuse of discretion in the decision to abolish his position and therefore this decision is sustained. However, this Tribunal has concluded elsewhere that it ". . . has authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless

to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision." *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44. In that case, the Tribunal awarded the applicant the sum equivalent to six months salary for irregularities of process in the non-conversion of a fixed-term appointment. There is also ample authority in the jurisprudence of other international administrative tribunals for such relief. In *Jakub v. IBRD*, WBAT Decision No. 321 (2004), para. 76, the WBAT, while upholding the decision to abolish the applicant's position against a claim of age discrimination, nonetheless granted six months salary as compensation for failure to give the applicant an opportunity to compete for a position in his department for which it found he was entitled to be considered.

121. Since the Tribunal has concluded that Mr. "F" was the object of expression of religious intolerance and was subjected to a hostile work environment, the question arises as to the measure of compensation that may be awarded because of that finding. In the view of the Tribunal the relevant jurisprudence establishes that, as demonstrated in cases of procedural irregularity, relief may be awarded for intangible injury. In *Chhabra v. IBRD*, WBAT Decision No. 139 (1994), para. 57, the WBAT, awarding \$50,000 in compensation for "mismanagement of the Applicant's career," explained:

"... although no particular decision of the Respondent is to be quashed, the Respondent's behavior towards the Applicant from the Reorganization onwards, taken as a whole, constitutes mismanagement of the Applicant's career. It reveals errors of judgment which taken together amount to unreasonableness and arbitrariness. Such behavior falls short of the standards of treatment required of the Bank under the Principles of Staff Employment."

122. Since it has been decided that the decision of the Fund that entailed restructuring of the "Language 1" Section and the Department of which that Section is part was not improper insofar as it affected the Applicant, Mr. "F" is not entitled to relief on this count. The Tribunal, however, has concluded that Mr. "F" is entitled to financial compensation on two grounds: first, that the Fund did not take effective measures to deal either with the religious intolerance in the "Language 1" Section directed at Mr. "F" or the harassment by certain of his former colleagues of the Section that was visited upon him; and second, the Fund failed to give him reasonable notice of abolition of his position. In the view of the Tribunal, on these two counts, Mr. "F" is entitled to compensation as set forth below.

Costs

123. Pursuant to Article XIV, Section 4 of the Statute, costs may be awarded to an applicant who is successful either in whole or in part:

“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.”

As the Tribunal has found grounds upon which relief may be granted to Mr. “F”, reasonable legal costs may be awarded as well. In the case of Ms. “C”, the IMFAT awarded only a proportion of the costs claimed “[g]iven the limited degree to which Applicant was successful in comparison with her total claims, that is, that she prevailed not on her main claim but only on a related claim. . . .” IMFAT Order No. 1998-1, *Assessment of compensable legal costs pursuant to Judgment No. 1997-1* (December 18, 1998).

124. In his plea for costs, Mr. “F” seeks “. . . payment on an exceptional basis of his legal costs for his representation during the investigation, for the presentation of his grievance and his Application to the Tribunal.” The Fund has responded that there is no authority for the request for costs “on an exceptional basis.” Presumably, the Fund refers to the request for costs incurred during the administrative review process. In light of the IMFAT’s jurisprudence, however, a request for costs deriving from representation in proceedings antecedent to the Tribunal’s review has been found to be within the scope of the Tribunal’s remedial authority:

“The phrase ‘legal representation’ in para. ‘Third’ of the Decision in Judgment No. 1997-1 embraces Applicant’s representation in the administrative review that she had to exhaust pursuant to Article V of the Statute prior to the filing of an Application with the Tribunal, as well as the proceedings before the Tribunal.”

IMFAT Order No. 1997-1, *Interpretation of Judgment No. 1997-1* (December 22, 1997). Accordingly, Mr. “F”’s request for costs will be considered on the same basis following the further submissions of the parties.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

1. The abolition of the post of Mr. "F", in the context of the reorganization of the Fund's Department of Technology and General Services, was an act of managerial discretion, whose conception and implementation do not provide cause for reconsideration by the Tribunal on grounds of abuse of right or otherwise.
2. Mr. "F" is entitled to financial compensation for the Fund's failures
 - a) to take effective measures in response to the religious intolerance and workplace harassment of which Mr. "F" was an object; and
 - b) to give him reasonable notice of the abolition of his post.
3. Consequently, Mr. "F" is awarded the sum of \$100,000.
4. The Fund shall pay Applicant the reasonable costs of his legal representation, in an amount to be assessed by the Tribunal following the further submissions of the parties.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
March 18, 2005

JUDGMENT NO. 2005-2

***Ms. "W", Applicant v. International
Monetary Fund, Respondent***
(November 17, 2005)

Introduction

1. On July 28 and 29, 2005, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Michel Gentot and Agustín Gordillo, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "W", a staff member of the Fund.

2. Ms. "W" contests the decision of the former Director of Administration approving the conclusions of a review team constituted under the Discrimination Review Exercise (DRE), a special, one-time inquiry into cases of alleged discrimination that was initiated by the Fund in the late 1990s. Applicant contended in the DRE that her salary and grade level were adversely affected by gender discrimination and sought as remedies both a pay increase and a promotion. The DRE review team, following its investigation, concluded that Applicant had not been discriminated against in her career with the Fund. At the same time, however, it found that circumstances of Ms. "W"'s initial departmental assignment may have hampered her career progression and that, at various points in her career, "skill deficits" may have been "magnified." Ratifying the DRE team's conclusion that there had been no discrimination in Applicant's case but that, nonetheless, some remedial action was in order, the Director of Administration approved a within-grade salary increase and career development assistance to strengthen Applicant's ability to compete for positions at the next grade level, but denied Applicant's request for promotion.

3. In her Application before the Administrative Tribunal, Applicant contends that the DRE investigation of her case was procedurally defective and that the Director of Administration's conclusion that Ms. "W"'s career had

not been affected by gender discrimination was not supported by the evidence. Specifically, Applicant alleges that the Fund did not demonstrate that factors other than discrimination led to Applicant's allegedly slower career progression as compared with male colleagues. Additionally, Applicant maintains that the Fund has not implemented prospective career development measures approved as part of the remedial action in her case, improperly used the DRE report to influence the denial of a promotion, and has continued to discriminate against her on the basis of gender.

4. Respondent, for its part, maintains that the DRE process applied in Applicant's case was an appropriate exercise of the Fund's discretion, that Ms. "W"'s claim was reviewed impartially and in accordance with the established DRE procedures, and that the conclusions drawn by the review team and ratified by the Director of Administration were reasonably supported by the evidence. As to claims that the Fund has failed to implement fully the remedial action granted in Applicant's case, improperly used the DRE report to deny Ms. "W" a promotion, and continues to discriminate against her, Respondent asserts that Applicant has not exhausted administrative review procedures as to these contentions and therefore they are not properly before the Tribunal but that in any event they are without merit. Accordingly, Respondent urges the Tribunal to deny Ms. "W"'s Application.

The Procedure

5. On November 19, 2003, Ms. "W" 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, having been brought into compliance within the indicated period, is considered filed on the original date.¹

¹Rule 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

6. The Application was transmitted to Respondent on December 10, 2003. On January 6, 2004, pursuant to Rule XIV, para. 4,² the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Ms. “W”’s Application on January 26, 2004. On March 1, 2004, Applicant submitted her Reply. The Fund’s Rejoinder was filed on April 1, 2004.

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 Tribunal had the benefit of a transcript of oral hearings conducted by the Fund’s Grievance Committee, at which Ms. “W”, the members of the DRE review team, a former Assistant Director of the Administration Department (ADM), the Fund’s Diversity Advisor, and other persons having knowledge of Applicant’s career and the DRE process testified. 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.” *Mr. M. D’Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

Requests for Production of Documents

8. In her Application, Ms. “W” made the following requests for production of documents:

1. An unredacted copy of Notes made by the Fund staff member who served together with an external consultant to form the DRE review team;
2. Any additional documents resulting from the DRE review of Applicant’s case that were not earlier supplied to Applicant;
3. Comparator data for male senior economists; and

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. . . .”

²Rule XIV, para. 4 provides:

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

³Article 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. Data on the outcome of the DRE.

9. In accordance with Rule XVII⁴ of the Tribunal's Rules of Procedure, Respondent had the opportunity to present its observations, as both parties exchanged views in their subsequent pleadings as to whether the document requests should be granted. Following consideration of the views of the parties, including the briefs and oral arguments in the Grievance Committee that had been made part of the record before the Tribunal, the Administrative Tribunal, meeting in session, decided on July 28, 2005 to deny each of these requests on the following grounds.

Request 1 – An unredacted copy of “Notes on [Ms. “W”].”

10. This request refers to the notes created by the Fund staff member who served together with an external consultant to form the review team who investigated Applicant's complaint pursuant to the Discrimination Review Exercise (DRE). The redacted copy, which was provided to Applicant during the Grievance proceedings, omits the names of the interviewees.

11. In response to a discovery request during the Grievance Committee proceedings, the Fund's Legal Department disclosed to Applicant the names of nine staff members interviewed for the DRE review of Applicant's case, and a number of these persons were called as witnesses during the Grievance Committee hearings. Applicant concedes that “. . . most of the persons interviewed for [the Notes] have been identified and have testified on the

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“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.”

statements made.” Accordingly, Applicant argues that that there is no valid reason for the Fund to withhold the unredacted version of the Notes, that the claim of confidentiality is “spurious,” and that “[a]s a matter of principle, Applicant should not have had to work with redacted documents. . . .”

12. Respondent, for its part, maintains that the unredacted version of the Notes should not be disclosed because disclosure “. . . would not only contravene those assurances of confidentiality [given to persons interviewed as part of the DRE process], but would also unnecessarily increase the risk of unfettered availability of this highly sensitive document.”

13. In the view of the Tribunal, Respondent has taken an inconsistent approach to the disclosure of the identities of persons interviewed for the DRE review of Applicant’s case, and therefore its objection to the document request is not sustainable on the basis that disclosure would infringe the privacy of individuals. Nonetheless, the Tribunal denies the document request on the ground that disclosure of an unredacted version of the “Notes on [Ms. “W”]” would not be of probative value to the Applicant, given the entire record that has been available to her both during the administrative review process (including the Grievance Committee proceedings) and before the Administrative Tribunal. *See Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 15 (denying production of a disputed document in part because “. . . as similar information was found elsewhere in the record before the Tribunal, its disclosure would not have been of probative value to Applicant”).

Request 2 – Any additional documents resulting from the DRE review of Applicant’s case that were not earlier supplied to Applicant.

14. The Fund has responded that all documents pertaining to the DRE review of Applicant’s case were turned over to her counsel in response to the discovery requests in the underlying administrative review process. Applicant has not proffered any evidence suggesting that the Fund has in its possession additional responsive documents. Accordingly, this request is denied on the basis that Applicant has not shown that she has been denied access to documents by the Fund. (Rule XVII, para. 1.) *See Mr. “F”, para. 9* (denying two document requests on the ground that “. . . Applicant had not shown that he had been denied access to the documents by the Fund, as the Fund had responded that it had provided all documents responsive to these requests as part of the Grievance Committee’s proceedings [footnote omitted], Applicant did not dispute this response and the record before the Tribunal appeared to corroborate it”).

Request 3 – Comparator data for male senior economists.

15. Applicant has stated this request variously as “. . . comparative data for male senior economists needed to allow Applicant to show that male economists with experience, academic credentials, years of service, age, and satisfactory performance equivalent to Applicant’s have progressed to levels A15 and higher,” and “comparator data for all Fund staff . . . or, at a minimum, all male economists in the same cohort as Applicant (i.e. entered the Fund between 1980-1984) regardless of current age or grade.” Applicant maintains that the comparator data used by the Fund to determine a salary increase for Applicant in pursuance of the DRE’s recommendations unfairly denied her a promotion from Grade A14 to A15. That data encompassed only those senior economist staff at Grade A14 and in the age group 50–52.

16. In Applicant’s view, comparator data should not be limited to economists at Grade A14 because she should be permitted to use statistics to establish that she was entitled to a promotion of one grade level as a result of the DRE. The comparator group selected by the Fund in fashioning a remedy in her DRE case, contends Applicant, unfairly limited that remedy.

17. The Fund maintains that the DRE team reasonably determined on the basis of qualitative (rather than statistical) evidence that Applicant was at the appropriate grade level and that her career had not been adversely affected by gender discrimination. Therefore, statistical information was used by the Fund only to determine the amount of a salary adjustment. The DRE review team held that the adjustment was justified by its finding that Applicant’s initial departmental assignment may have hampered her career progression and that “skill deficits” may have been “magnified.”

18. Applicant’s request for additional comparator data goes to a central contention of the Application before the Administrative Tribunal, i.e. that Fund studies pre-dating the DRE showed a one-grade differential between male and female economist staff and that Applicant should have been remedied accordingly through the DRE. Therefore, Applicant seeks, as an alternative to the requested data, a stipulation that “. . . the conclusions of the Report on the Status of Women in the Fund apply to Applicant’s case, i.e. that there is a one grade anomaly for women economists in the Fund as a result of discriminatory practices and that Applicant belongs to the class discriminated against and held back unfairly.”

19. Respondent, for its part, asserts that it was a reasonable exercise of the Fund’s discretion to craft a mechanism for the review and remedy of cases of past discrimination that would rely on qualitative as well as quantitative

information. Therefore, this document request for comprehensive comparative statistical data requires the Tribunal to decide an important question for consideration in this case, i.e. whether the methods employed in the DRE review of Applicant's complaint, in particular, the way in which statistics were used, represented an abuse of discretion on the part of the Fund.⁵

20. In evaluating the document request, it is important to recall that in *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the Administrative Tribunal upheld the general contours of the DRE process as a proper exercise of the Fund's discretionary authority, observing that "[s]uch alternative procedures are, by definition and design, intended to offer a mechanism for resolution of claims distinct from those afforded by legal proceedings" (para. 49), that the "hallmark of these procedures was their flexibility," and that "... the procedures contemplated a considerable degree of latitude for the review teams in undertaking their investigation" (para. 55).⁶ It is also important to note that the Administrative Tribunal is not presented here with the question of whether statistical analysis may prove discrimination but rather whether in fashioning an alternative dispute resolution mechanism to remedy on an ad hoc basis cases of past discrimination, the Fund could reasonably conclude that qualitative as well as quantitative considerations should be taken into account.

21. Respondent has presented evidence that, in developing the DRE, it deliberated upon the appropriate role of statistical evidence and concluded, after seeking the assessment of expert reviewers,⁷ that the aggregate analysis prepared on behalf of the Working Group on the Status of Women in the Fund could not demonstrate conclusively whether discrimination had occurred in the individual case. The Chair of the Working Group endorsed the view that such analysis cannot be applied in a "mechanical way" to remedy salary and grade disparities. Accordingly, the Administrative Tribunal concludes that Respondent's decision to base the DRE review of individual cases, including that of Ms. "W", upon qualitative as well as statistical factors was not arbitrary, capricious or discriminatory.⁸

⁵See *infra* Consideration of the Issues of the Case; Procedural Allegations; The methodology applied by the DRE team in Applicant's case.

⁶See *infra* Legal Framework for the Administrative Tribunal's Review of DRE Cases.

⁷See *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 63 (upholding exercise of managerial discretion that was "deliberate" and made after "extended consideration").

⁸The questions of whether Respondent reasonably applied such qualitative considerations in shaping the remedies granted Applicant in the DRE review of her case by (1) concluding that promotion to the next grade level was not warranted, and (2) determining the extent of

22. Finally, the Tribunal observes that the World Bank Administrative Tribunal (WBAT) when presented directly with the question of whether statistics alone could demonstrate discrimination, has twice concluded in the negative. See *Sebastian (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 57 (1988), para. 34 ("Discrimination against the Applicant cannot be proven by the mere presentation of general statistics purporting to show that as a class the women employees of the Bank are not treated as well as male employees") and *Nunberg v. International Bank for Reconstruction and Development*, WBAT Decision No. 245 (2001).

23. In *Nunberg*, the WBAT rejected the complaint of a staff member who sought to use individual regression analysis to show that she should have received a larger salary increase than that granted pursuant to a salary review initiated as the result of a Bank-wide study of gender differentials in salary and promotion. In the proceedings before the WBAT, the applicant requested that the Bank produce data necessary to perform an individual regression analysis. The WBAT convened oral hearings in the case to consider the extent to which an individual regression analysis of the Applicant's salary progression, as compared to other methodologies, would provide evidence of gender discrimination. (Para. 24.)

24. Following the consideration of competing expert opinions, the WBAT in *Nunberg* concluded that ". . . it appears to the Tribunal that the regression analysis sought by the Applicant could be no more than a step in a complex process. . . . the outcome of that exercise could not determine finally what salary was fair and equitable for her personally." (Para. 54.) Accordingly, the WBAT held that is was ". . . unable to find that the Bank's refusal to provide the material for a regression analysis was inconsistent with the principles of fairness and equity," (para. 56) and dismissed the application on the grounds that ". . . the Tribunal has been unable to make a specific finding of discrimination affecting the Applicant individually, after the 5% adjustment decided by the Bank, as neither the evidence specific to her situation nor the studies carried out by the Bank supports such a finding and there is no compelling case for applying the methodology proposed by her." (Para. 58.)

the salary adjustment awarded are considered *infra* at Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant's case; The remedy granted Applicant through the DRE process.

25. In its October 2, 2002 Order in Ms. “W”’s case, the Fund’s Grievance Committee concluded: “. . . the statistical regression analysis sought by Grievant is not relevant to establish discrimination in Grievant’s individual case,” and that the Committee “. . . agrees with the Fund that ‘the DRE was based on the reasonable conclusion that statistical analysis did not provide a sufficient or appropriate basis for making findings and fashioning remedies in individual cases.’”

26. On the basis of the Administrative Tribunal’s conclusion (*supra*, para. 21) that Respondent’s decision to base the DRE review of individual cases, including that of Ms. “W”, upon qualitative as well as statistical factors was not arbitrary, capricious or discriminatory, Applicant’s request for comparator data is denied, as the requested information is not relevant to the questions at issue in the case.

Request 4 – Data on the outcome of the DRE.

27. Applicant’s final document request is for “. . . the correctly tabulated outcome of the DRE exercise for all 67 cases examined. . . . to demonstrate that there was disparate treatment of women in the DRE compared to men who were promoted at a rate of 95 percent. . . .” Applicant has created her own tabulation of outcomes, which differs from those compiled in the “Report of the Consultants on the Discrimination Review.”⁹

28. For the reasons set forth under Request 3, such data on DRE outcomes would neither prove conclusively that the DRE process in general was discriminatory nor that the process as applied in Applicant’s case was discriminatory. The Grievance Committee drew the same conclusion in its Order of October 2, 2002.

29. This document request is accordingly denied on the ground that the requested information is not relevant to the questions at issue in the case.

The Factual Background of the Case

30. The relevant factual background, some of which is disputed between the parties, may be summarized as follows.

⁹*See infra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

Ms. "W"'s Career with the Fund

31. Applicant began her career with the Fund on February 1, 1982 as an Economist at grade G (equivalent to A12) in "Department 1,"¹⁰ one of the Fund's Functional (as distinct from Area) departments. Ms. "W" was employed in mid-career with a master's degree in economics and expertise in an area relevant to the work of that department. In 1986, she was promoted to Grade A13. In 1989, Ms. "W" transferred to one of the Fund's Area departments "Department 2," where she remained until 1992 when she moved to another Functional department "Department 3." During her tenure in "Department 3," Ms. "W" was promoted in 1995 to the position of Senior Economist at Grade A14. In 2000, Ms. "W" transferred to a second Area department "Department 4," and in 2004 she took up the post of a Fund Resident Representative, while continuing as a Senior Economist at Grade A14.

32. During her career with the Fund, Applicant has been active in a variety of staff advocacy roles. Applicant served as a member of the Working Group on the Status of Women (*see infra*), for which she received praise from its Chair, particularly for her work in supervising the statistical analysis performed by outside consultants.

The Discrimination Review Exercise (DRE)

33. The Discrimination Review Exercise (DRE) was an exceptional, one-time inquiry into cases of alleged discrimination, whenever originating, as long as they were brought to the attention of the Director of Administration during a specific, but narrow time frame, between August 28 and September 30, 1996. The DRE was initiated by the Fund to investigate and remedy, through an alternative dispute resolution mechanism, instances of past discrimination that had adversely affected the careers of Fund staff.

34. The DRE sprung from a series of studies undertaken by the Fund, following the 1992 Survey of Staff Views, to examine on both a statistical and a qualitative basis the question of possible discrimination within the Fund.¹¹

¹⁰In accordance with the Administrative Tribunal's policy on protection of privacy, adopted in 1997, the departments of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal's Judgment.

¹¹Employment discrimination in the Fund is prohibited by Rule N-2 of the Rules and Regulations of the International Monetary Fund:

"N-2. Subject to Rule N-1 above, the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against

In May 1994, the Working Group on the Status of Women in the Fund released its Report "Equity and Excellence," addressing issues of gender equality. In July 1995, this work was complemented by Pelerei, "Discrimination in the Fund: A Study of the Nature, Extent, and Cause of Discrimination on the Basis of Race, Nationality, Religion and Age," a study commissioned by the Fund's Advisory Group on Discrimination.

35. Shortly thereafter, the Managing Director issued to the staff the report "Discrimination in the Fund" (December 1995), prepared by the Chairman of the Fund's Advisory Group on Discrimination, Mr. A. Mohammed. That report cited the benefits of instituting an alternative dispute resolution procedure to address cases of alleged discrimination:

"It could be argued that there are appeal channels already in place, such as the Grievance Committee and the Administrative Tribunal. These tend to involve rather elaborate legal procedures; what is being suggested here is a much simpler *ad hoc* forum for settling discrimination complaints that rankle staff who are reluctant to invoke the existing procedures for fear of inviting reprisals if they fail at what tends to be regarded as adversarial proceedings against their current, or recent, supervisors."

"Discrimination in the Fund" (December 1995), p. 34, note 1.

36. In a Memorandum to Staff in early 1996, the Managing Director noted:

"The report contains proposals for addressing the concerns of those staff who feel that they have been discriminated against, typically on grounds of race, either in terms of promotion or salary. It suggests that we might appoint an independent panel, perhaps with expert assistance from outside the Fund, to examine these cases on a confidential basis and reach conclusions as to whether the perceptions of discrimination, in career progression or in salary levels, are warranted by the facts."

(Memorandum from the Managing Director to Members of the Staff, February 9, 1996, "The Report of the Consultant on Discrimination.") In July of that year, the Managing Director again addressed the issue of the effect of possible past discrimination on the careers of current Fund staff:

any person because of sex, race, creed, or nationality. *Adopted as N-1 September 25, 1946, amended June 22, 1979.*"

For more recent steps taken by the Fund to address discrimination, see Mr. "F", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81-84.

"A difficult question remains: cases where discrimination may have adversely affected the careers of Fund staff in the past. One message that has come through quite clearly from Mr. Mohammed's work is that there are some staff who consider that they have been discriminated against to the detriment of their careers. Questions of past discrimination must be addressed, and even where these staff could have availed themselves of the Fund's grievance procedures I believe the onus is on us."

(Memorandum from the Managing Director to Members of the Staff, July 26, 1996, "Measures to Promote Staff Diversity and Address Discrimination.")

37. The framework for an ad hoc review of individual cases of alleged discrimination was announced on August 28, 1996 in a Memorandum to Staff from the Director of Administration, "Review of Individual Discrimination Cases," setting forth several avenues for the identification of cases for review, including a provision for self-identification by those individuals who believed their careers had been adversely affected by discrimination. As to how the review process would actually work, the Memorandum advised:

"The way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination. In coordinating these reviews, the Administration Department will draw on the input of subordinates, peers, and supervisors. The career record will be reviewed and those undertaking the reviews may meet with the individual employees under consideration, at the initiative of the reviewer or the employee. Where warranted, the aim will generally be to suggest remedial actions that are prospective and constructive, including assignments, mobility, training, promotions, and salary adjustments."

38. Additional information regarding the DRE process was communicated to staff on January 13, 1997 in a further Memorandum from the Director of Administration to Members of the Staff, titled "Procedures for Review of Individual Discrimination Cases." The staff was informed that the review of individual discrimination cases would be carried out by external consultants assisted by Fund staff. The role and qualifications of the consultants were described as follows:

"The review of individual discrimination cases will be carried out by external consultants [footnote omitted] assisted by a small number of Fund staff from both within and outside the Administration Department. The consultants selected for this project have a mixture of backgrounds with expertise covering discrimination, diversity, arbitration, and media-

tion. The consultants also have extensive experience in working with both public and private sector organizations.”

39. As to the role of the Diversity Advisor with respect to the DRE, the Memorandum stated:

“Although the Special Advisor on Diversity was involved in counseling individual staff members regarding their initial submissions for a review, she will not be involved in the actual reviews of individual cases. She will be focusing on the departmental diversity plans and other systemic efforts contained in the Managing Director’s action plan.”

40. The procedures and aims of the review were set forth in the January 13, 1997 Memorandum to Staff as follows:

“The team of consultants and staff, working in pairs, will review the background of each individual discrimination case, meet with the individuals concerned as well as others familiar with their circumstances, and make recommendations. In cases where remedial action is warranted, the aim will generally be to suggest actions that are prospective and fall within the Fund’s existing personnel policies, including reassignments, training and other development initiatives, promotions, and salary adjustments. An initial meeting will be held with each employee requesting a review to obtain background information, to discuss current and former staff members (subordinates, peers, and/or supervisor) who might be contacted by members of the review group to obtain additional information, and to identify the types of forward-looking remedies that may be considered appropriate if it is concluded that past discrimination has adversely affected the employee’s career. . . .

. . . Every effort will be made to carry out this review in as discrete and sensitive a manner as possible. While feedback sessions will be undertaken with each concerned employee to inform him or her of the outcome of this review, in those cases where discrimination has been identified, this review will not be an end in itself, but just a beginning of a process for identifying opportunities. At the end of the review process, every effort will be made to utilize the lessons learned from past discrimination cases to help further strengthen the Fund’s policies and practices to prevent discrimination in the future.”

41. Following the conclusion of the DRE process, the Fund issued the “Report of the Consultants on the Discrimination Review” (“Consultants’ Report”), in which the consultants summarized the methodology and outcomes of the review. Some 70 cases had been reviewed, approximately 70 percent of which alleged discrimination primarily on grounds of race or

nationality, 20 percent on grounds of gender, and the remaining 10 percent on grounds of age or religion. *Id.*, p. 5.

42. The Consultants' Report describes the role and methods of the consultants and Fund officials in carrying out investigations and arriving at remedial action:

"II. METHODOLOGY

Review of the individual discrimination cases was conducted by five review teams, each including one outside consultant and one Fund staff member. [footnote omitted] Each of the cases submitted under the discrimination review exercise was assigned to one of the five teams. The five teams, the Fund's Special Advisor on Diversity, and the Director of ADM formed a committee which met on a regular basis to discuss the policies and procedures of the discrimination review process. To ensure consistency in the exercise, review teams presented selected individual cases to the full committee for evaluation.

Individual reviews consisted of (1) an initial interview with the applicant; (2) interviews with others having knowledge of the applicant's Fund career ('contacts' limited to those authorized by applicants) including, supervisors, subordinates, peers, and others; (3) statistical analysis, where required; and (4) a feedback interview with the applicant. During the course of the review, the teams conducted approximately 600 contact interviews.

All initial interviews were conducted by both team members (i.e., outside consultant and Fund staff representative) except where applicants requested private meetings with the outside consultant. Many contact interviews were conducted by one team member, rather than both. Fund team members interviewed some contacts privately. However, all such interviews were with 'secondary contacts' (i.e., contacts having important but not pivotal information regarding cases). Where Fund staff's findings were potentially determinative, the outside consultants conducted follow-up interviews with contacts. The teams advised contacts to respect the confidential nature of the process and informed them that feedback would be given to applicants in aggregate form to preserve anonymity in the process. Following the interviews with applicants and contacts, and a review of all relevant documentation, the teams reported their findings and conclusions to each applicant. Once again, final interviews were conducted by both team members except in cases where applicants requested a private meeting with the outside consultant.

Although the teams attempted to reach consensus on a case-by-case basis, the outside consultants made final determinations regarding the merit of

claims presented. The outside consultants also suggested remedial action on a case-by-case basis. However, remedies were limited by the decision taken at the outset of the exercise to provide remedies that were both prospective and, to the extent possible, within the framework of the Fund's existing personnel policies. Some of these limiting factors included: (1) promotion opportunities; (2) applicants' current competitiveness for job openings; (3) budgetary constraints; (4) time-in-grade requirements; and (5) the promotion procedures of the review committees. . . ."

Id., pp. 4–5.

43. As for the outcome of the review, the consultants reported that the DRE review teams had made recommendations for 67 of the 70 cases filed. Indications of "unfair or uneven treatment" had been identified in approximately half of these. The table appended to the Report divides the outcomes between those in which "Indications of Unfair or Uneven Treatment" were found and those in which no such indications were found; there is no category titled "discrimination." The Report explains that only in a "small number of cases" was there "clear evidence of discrimination":

"The discrimination review exercise was not designed to prove the presence or absence of discrimination to a high legal standard. The indications of unfair or uneven treatment varied a good deal as regards the amount and clarity of evidence available. In a small number of cases—mainly involving starting salaries or salaries on transfer to a different career stream—there was clear evidence of discrimination. In the majority of cases, however, the judgments made by the review teams were far more subjective based, at times, on sketchy evidence sometimes going back as much as 20–25 years. **In arriving at their judgments, the review teams were influenced by a desire, where possible, to give the staff member the benefit of the doubt.**"

Id., p. 6. (Emphasis in original.) As to the distribution of outcomes among different groups of staff, the Report concluded:

"The indicators of unfair or uneven treatment were related to primary factors roughly proportional to the overall distribution of candidates, with 77 percent of the candidates for whom unfair treatment was found linked primarily to race/nationality, 20 percent to gender, and 3 percent to age. While these were the primary factors, in many cases age was also an important secondary factor that limited advancement in the later stages of a career that may have been hampered at an early stage by nationality, race, and/or gender considerations."

Id., p. 6.

44. With respect to the use of promotion as a remedy, the consultants reported:

"In 17 of these 35 candidates for whom there was an indication of unfair or uneven treatment, the primary remedial outcome of the review was a promotion. In some of these 17 cases, the staff member was already in the process of obtaining a sought after promotion during the course of the discrimination review exercise and there was no support or intervention from management or ADM to help bring about the promotion. In other cases, such promotions took place largely as a result of internal market forces but with some support provided by management or the ADM. In yet other of these 17 cases, the promotion came about as a direct result of a specific decision taken by management and/or ADM outside the framework of the normal internal market."

Id., pp. 6–7. As for the remedy of within-grade salary adjustment, the Report noted:

"In another 15 of the 35 cases in which some indications of uneven or unfair treatment were identified, a within-grade-salary adjustment averaging 6.2 percent was the primary remedial action. In many of these 32 cases in which a promotion and/or within-grade-salary adjustment was a primary outcome of the exercise, the staff members also received (and in a number of cases are continuing to receive) support in the form of training, reassignments, coaching, and mentoring. In three cases in which unfair or uneven treatment was identified, the remedial action did not involve a promotion or a within-grade-salary adjustment, but did include this type of career development support."

Id., p. 7. The consultants further reported that in 10 of the 32 cases in which no indication of unfair or uneven treatment was found, some form of supportive action such as training or reassignment nonetheless was being provided as an outcome of the review. *Id.*, p. 7.

45. Finally, the Consultants' Report provided data on DRE outcomes analyzed by gender:

"The discrimination cases of 37 men and 30 women were reviewed, and the proportion of candidates for whom indications of unfair or uneven treatment was identified was roughly equal for both (53 percent of the women and 49 percent of the men). The proportion of men and women for whom a promotion was an outcome of this exercise was also comparable, although a larger proportion of women (27 percent) received within grade salary adjustments than men (19 percent), and the average size of the adjustment was larger for women (6.6 percent) than men (5.7 percent).

This reflected the fact that a relatively low starting salary for women accounted for a number of the cases of unfair treatment identified.”

Id., p. 7. The table accompanying the Report indicates that promotion was the primary remedy for 23 percent of women and for 27 percent of men.

The Application of the DRE to the Case of Ms. “W”

46. In response to the Director of Administration’s August 28, 1996 Memorandum to Staff, Applicant on September 24, 1996, requested review under the DRE on the ground that, based upon statistical evidence, her Fund career had been adversely affected by gender discrimination:

“I base my request on the statistical results of the report of the Working Group on the Status of Women. . . . After accounting for differences in qualifications, the regression measures a statistically significant adverse treatment of women economists compared to men, equal to 3.4 percent of women’s salaries on average. . . .

. . . Substituting my data into the regression . . . indicates that I should have earned \$91,992 in 1993 had I been treated the same as the average performing male economist in the Fund. In terms of quality and breadth of assignments undertaken, my performance reports (of which you have copies) indicate a work effort at least as good as the average performing male. On the same basis, separate ordered probit regressions indicate that I should have been graded at A15 that year.

. . .

. . . it should be noted that my individual pay and grade anomalies relate principally to treatment in the two departments where I was initially assigned in the Fund. . . . Following a move to the . . . Department (my third assignment), some of my anomaly has subsequently been corrected. . . . Nevertheless, anomalies of 1 grade and \$11,000 still remain. . . .

In summary, women economists in the Fund show a statistically significant adverse pay and grade treatment as compared to male economists in the Fund. I am a member of this disadvantaged group. In addition, computations in my individual case after adjusting for a recent promotion indicate that I am paid \$11,000, and one grade, less than the average performing male economist. Therefore I am requesting a review of discrimination and correction in my case.”

47. Pursuant to the DRE procedures, the review of Applicant’s case was conducted by a review team appointed by the Fund, consisting of an outside consultant (“external team member”) and an official of the Administration

Department ("internal or Fund team member"). The team held its initial meeting with Ms. "W" on May 14, 1997, at which Applicant emphasized that her claim was grounded on an alleged statistical disparity between her own salary and grade level and those of male economists. Ms. "W" testified during the Grievance Committee proceedings:

"I submitted my DRE case not just for my own individual self, . . . I was still very much acting as an advocate for women's issues in the Fund. . . .

So when I had my initial interview, I told [the external team member] – and [the Diversity Advisor] was a witness and [the Fund team member] was a witness—that my own individual case is pretty much substantiated by the written request. I had a written request and . . . I made a case for measuring discrimination in my individual case by substituting myself into a regression. And I thought that the written request to be considered was self-explanatory."

The Fund review team member recalled that the most significant thing about the initial meeting with Ms. "W" was Applicant's request that a regression analysis be run "in order to resolve her case." The Fund team member, according to her Grievance Committee testimony, explained to Ms. "W" that it was

". . . not consistent with the way we had handled all of the other cases and we wanted, again, to be consistent. The review was mostly qualitative in which we asked a lot of questions, talked to people and collected data. So we explained that we weren't going to use that mechanism to address her case."

48. The Fund team member compiled Notes of the team's review of Applicant's DRE claim. These Notes reflect a review of both the "paper record," i.e. Applicant's Annual Performance Reports (APRs) and her 1988 Long-Term Performance Assessment (LTPA), as well as interviews with supervisors and other Fund staff familiar with Applicant's career.

49. Following its investigation of Applicant's case, the DRE review team summarized its methods, findings, and recommendations in its confidential case report. The review team explained that in view of the nature of Ms. "W"'s complaint, the methodology it applied in her case was to assume that the Fund's pre-DRE statistical studies had established a "rebuttable presumption" of discrimination:

"Ms. ["W"] argued to the Team that it should base its review in her case largely on the basis of regression analyses. In reviewing Ms. ["W"]'s career, the Team made the beginning assumption that the Pelerei Study and the work of the Working Group established a rebuttable presumption of discrimination. To review Ms. ["W"]'s claim of discrimination, the Team had

to determine if there were reasons other than discrimination for her career trajectory at the Fund.”

The team found that “. . . while both the paper record and discussions with contacts indicated some problems with Ms. [“W”]’s performance, there also are indications that she was treated differently from her male colleagues.” In particular, the team noted that in the first Division to which she was assigned, Ms. “W” was “not given prime assignments.” Moreover, “Department 1” was, in the estimation of the review team, “. . . known at the time as not having a good record for promoting women. . . .” *Id.*

50. Despite identifying a difference in treatment between Applicant and male colleagues, the review team nonetheless concluded that Applicant had not experienced “discrimination” in her Fund career. This determination was based primarily on the team’s identification of a “skill deficit” that it held rebutted the statistical presumption of discrimination:

“It is in Ms. [“W”]’s early [“Department 1”] APRs [Annual Performance Reports], and discussions with contacts regarding this early period of Ms. [“W”]’s career that the Team encountered what has been described as the ‘forest for the trees’ problem. Two of Ms. [“W”]’s strengths are her strong quantitative bent and expertise with computers. Combined, those strengths were also noted by contacts and in her APRs as leading to generating mountains of data rather than on sharp analysis. Her excellent computer skills and hard working nature often have resulted in her providing answers to questions with a mountain of data without a corresponding focus on the ‘big picture.’”

Id., p. 3. Notably, the review team emphasized that this particular “skill deficit” had been encountered in the “early period” of Ms. “W”’s career and had ameliorated over time:

“Fortunately, Ms. [“W”]’s tendency to attack problems by throwing all available data [at them] appears to have attenuated since her transfer to [“Department 3”]. There is no mention of this issue in any of the APRs since Ms. [“W”]’s transfer to [“Department 3”], nor was it mentioned in interviews with contacts who are keen observers of Ms. [“W”]’s recent career.”

Id.

51. In other comments in its report, the review team noted that during her assignment in “Department 2,” Applicant was “. . . viewed as possessing limited analytical skills” and “. . . not view[ed] . . . as competitive with her peers with respect of the breadth of skill required for Area Department work.” By contrast, in “Department 3,” her most recent assignment as of the

time of the DRE, Ms. "W" was regarded as demonstrating strong analysis in her comments on papers: "Her work has been as good as 90% of the other Senior Economists in the Fund. She appears to have overcome at least some of the analytical shortcomings some saw in her work in the first years of her Fund career." The review team also noted that Applicant was seen as ". . . an extremely hard worker and an excellent team player." *Id.*

52. Finally, the DRE review team summed up its conclusions as to Applicant's case:

"The Team did not conclude that Ms. ["W"] had been discriminated against in her career. Until her most recent assignment, however, she appears not to have received the benefit of any doubts, and her skills deficits appear to have been magnified rather than minimized. Her time in ["Department 1"] hampered the early years of her Fund career. On the other hand, Ms. ["W"] does appear to have some skill deficits, and they are sufficient to overcome the presumption that she had been discriminated against. The Team noted that Ms. ["W"] appears to have overcome the major impediments to her continued progression at the Fund—a failure to distinguish important data from the less important, and a weakness in analytic ability. The Team also noted that in her current assignment she has been given some supervisory responsibilities—an important skill if she's to progress further in the Fund."

Id., pp. 3-4. On the basis of its findings, the review team recommended: 1) a one-time salary increase of 6.5 percent, representing ". . . the difference in salary between Ms. ["W"]'s current salary and the average salary of economists in the 50-52 year old range"; and 2) ". . . that she be provided with supervisory responsibilities to assess her management skills, and other assignments to develop and assess her writing skills." The team noted that Ms. "W"'s career ". . . appears to be on track for further progress," and that "[i]f she did well, Ms. ["W"] was encouraged to apply for A15 vacancies in ["Department 3"] and elsewhere with support from ADM [Administration] for her applications." *Id.*, p. 4.

53. On April 21, 1998, the review team held a final meeting with Ms. "W" to report its findings and recommendations. The discussion in that meeting is a matter of dispute between the parties. According to Applicant, among the recommendations was the alleged statement of the external team member that Applicant should be promoted to Grade A15 within one year's time.¹²

¹²See *infra* Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant's case; The remedy granted Applicant through the DRE process.

54. By memorandum to Applicant of May 21, 1998, the Director of Administration affirmed the review team's conclusions and recommendations:

"The remedial action approved in your case will include a 6.5 percent salary adjustment within your current Grade A14 . . . effective May 1, 1998.

As indicated in my earlier note to the staff-at-large, in cases where it appears there may have been unfair or uneven treatment, the review will not be an end in itself, but just the beginning of a process for identifying opportunities. In your case, efforts will be made to identify assignments for you that further develop and assess your analytical, writing, and supervisory skills. The objective will be to help strengthen your ability to compete for positions at the Grade 15 level.

. . . Although no evidence of discrimination was found in your case, the team responsible for carrying out the review concluded that your initial assignment in the . . . Division may have slowed your career and that, at different points in your career, skill deficits may have been magnified."

It is the May 21, 1998 decision of the Director of Administration that is contested in the Administrative Tribunal.

The Channels of Administrative Review

55. Ms. "W" initially filed a Grievance with the Fund's Grievance Committee on May 15, 1998. She was thereafter advised by the Director of Administration that administrative review procedures had not been exhausted, and on May 21, 1998, the ADM Director issued to Ms. "W" her memorandum approving the review team's recommendations.

56. According to a chronology prepared by Applicant, she again filed a Grievance on July 20, 1998 and was subsequently advised by the Grievance Committee Chair that she would need to invoke additional administrative review procedures under GAO No. 31. Following further exchanges with the Fund's administration, a final Grievance was filed December 30, 1998.¹³

¹³The course of events that unfolded in the case of Ms. "W" reflects the uncertainty that existed as to the relationship between the DRE process and the administrative review procedures of GAO No. 31. On December 18, 1998, the Administrative Tribunal in *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 40, ruled that the Director of Administration's decision ratifying the recommendations of a DRE review team was a decision "taken directly" within the meaning of GAO No. 31, Rev. 3 (Grievance Committee), Section 6.06; such decisions may be contested in the Grievance Committee without additional review.

In *Ms. "Y"*, the Tribunal summarily dismissed the Application on the ground that, because Ms. "Y" had not taken her complaint contesting the results of the DRE to the Fund's Griev-

57. After an unsuccessful period of voluntary mediation pursuant to a plan designed to expedite resolution of the DRE cases, Applicant's Grievance was considered by the Grievance Committee in the usual manner, on the basis of oral hearings and briefs of the parties. The Grievance Committee issued its Recommendation and Report on July 2, 2003. The Committee found that the DRE review team's investigation appeared to have been ". . . thorough and in keeping with the procedures set forth [for the DRE process]," and that the team members had testified ". . . credibly and in detail that Grievant's pace of advancement at the Fund was not based on discrimination on account of gender, but on her own shortcomings." Accordingly, the Grievance Committee concluded ". . . with respect to the review team's major finding in this case, that Grievant was not discriminated against on the basis of her gender, and it cannot be said that the review team was arbitrary, capricious or discriminatory in making this finding." Additionally, the Committee concluded that the method of arriving at the remedy of a 6.5 percent salary adjustment also appeared to have been "reasonably based."

58. The Committee's recommendation, which included an *ex gratia* payment for legal fees, was accepted by Fund management on July 15, 2003. The Grievance Committee, however, later increased the amount it recommended for the *ex gratia* payment. Management's acceptance of this further recommendation was received by Applicant on August 20, 2003. The Fund agreed to accept this latter notification, which constituted management's final determination as to the relief Applicant would be provided at the conclusion of the Grievance process, as the decision triggering the three month statute of limitations for purposes of Article VI¹⁴ of the Statute of the Administrative Tribunal.

ance Committee, she had not exhausted the channels of administrative review prerequisite to the Tribunal's consideration of her case, as required by Article V of the Tribunal's Statute. Recognizing the procedural uncertainties presented, the Tribunal concluded ". . . 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 possibility." Following the Grievance Committee's review, the case of Ms. "Y" returned to the Administrative Tribunal for adjudication. See *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), considered *infra* at Legal Framework for the Administrative Tribunal's Review of DRE Cases.

¹⁴Article VI, Section 1 provides:

"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."

59. On November 19, 2003, Ms. "W" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

60. The principal arguments presented by Applicant in her Application and Reply may be summarized as follows.

1. The DRE lacked due process protections and, as applied in the case of Ms. "W", procedural defects had a material effect on the outcome of the review. The review team members were not qualified for their responsibilities. Members of the Fund staff who were involved in the review of Applicant's claim were affected by conflicts of interest, and the role of the outside consultant was unduly constrained by these officials.
2. The DRE review of Applicant's case must be held to the standard adopted by the review team, i.e. that earlier Fund studies such as that of the Working Group on the Status of Women established a "rebuttable presumption" of discrimination as to Applicant.
3. Using accepted statistical methods, Applicant has shown that she has been paid and graded at a lower level than the average male economist in the Fund, despite better-than-average performance. The DRE review of Applicant's case failed to establish that factors other than discrimination resulted in Applicant's slower career progression.
4. Additionally, the DRE review team expressly found that there had been disparate treatment between Ms. "W" and her male colleagues.
5. The claim of a skills deficit was without merit and was contradicted by the written record. Applicant has been praised for her hard work, initiative, in-depth analysis and policy work, and exceptional quantitative skills.
6. There was a clear bias in the review team's approach, which did not focus on the elements of discrimination but rather on factors to rebut the apparent discrimination. The review team improperly relied upon oral assessments that contradicted the written record of Appli-

cant's performance. The review team thereby wrongly characterized Applicant as having a "forest-for-the-trees" problem, distorting the review of her case and leading to the unsupported conclusion that performance factors explained the disparity in Applicant's grade and salary vis-à-vis male economists.

7. The Director of Administration took a decision to ratify the review team's findings on the basis of incorrect information and analysis. The conclusions of the DRE team were not "reasonably supported by evidence."
8. Applicant's career was adversely affected by discrimination and the Tribunal has jurisdiction to make such a finding.
9. Respondent used a biased statistical analysis, based on an inappropriate group of comparators, to determine the remedy for Applicant as a result of the DRE process. At the same time, Respondent refused to provide statistical information requested by Applicant. The proper use of statistics would have allowed Applicant to establish that she should have received a promotion as well as a salary adjustment as a remedy.
10. An offer of possible promotion to Grade A15 within one year was made orally to Applicant by the outside consultant but apparently was reversed by the Administration Department.
11. The remedy implemented in Applicant's case was consistent with a pattern in which the outcome of the DRE process benefited male complainants to a greater extent than female complainants.
12. Apart from implementing the pay adjustment resulting from the DRE exercise, Respondent has taken no action on the prospective career measures awarded as part of the remedy in Ms. "W"'s case and continues to discriminate against her on the basis of her gender.
13. Respondent improperly used the report of the DRE review team to influence the denial of a promotion for which Applicant applied in her Department.
14. Applicant seeks as relief:
 - a. findings by the Tribunal that (i) the DRE team failed to reach correct conclusions on the evidence and the Fund's decision rejecting a finding of discrimination was not properly founded, (ii) the DRE investigation violated Applicant's right

- to due process, and (iii) Applicant's career prospects were damaged by the improper use of the DRE team's report;
- b. promotion to Grade A15, retroactive to 1998;
 - c. compensation, retroactive to 1993, for pay disparity vis-à-vis comparably situated economists, and a "step-up" pay increase as of May 1, 2003;
 - d. damages of one year's net salary for unfair procedures;
 - e. assistance to improve Applicant's "career trajectory"; and
 - f. legal costs.

Respondent's principal contentions

61. The principal arguments presented by Respondent in its Answer and Rejoinder may be summarized as follows.

1. The procedures followed in the DRE review of Applicant's claim were consistent with the procedures established for the DRE and upheld by the Tribunal in *Ms. "Y" (No. 2)*.
2. The Fund properly exercised its discretion in appointing the members of the DRE review team, who were qualified to conduct the review. Fund officials involved in the DRE process were not affected by any conflict of interest with regard to Applicant's case. Neither was the Administration Department's role in the DRE process improper, but rather contributed to making the DRE a fair and reasonable exercise.
3. There was no evidence of any bias in the review team's approach to investigating Applicant's claim or of any institutional bias against Applicant.
4. The DRE review team's conclusions were reasonably based on its review of Applicant's claim.
5. The review team's finding of skills deficits rebutted the presumption of discrimination. The "forest-for-the-trees" problem, i.e. strong quantitative and computer skills but a comparative need to develop analytical skills, was consistently noted by the review team in both the written record of Applicant's performance and in the team's interviews.

6. The review team's finding that the early years of Applicant's Fund career had been hampered because she had not been given the benefit of any doubts and her skills deficits appeared to have been magnified rather than minimized, also was substantiated.
7. Applicant did not present any probative evidence that her early career at the Fund had been adversely affected by gender discrimination. The review team appropriately concluded that her career had been hampered instead by poor management.
8. Applicant did not raise with the DRE review team any act of alleged discrimination that could have been investigated, and she did not establish that any actions or decisions of the Fund were discriminatory.
9. The Fund's approach to the use of statistics in the DRE review of Applicant's claim was not arbitrary, capricious or discriminatory. The DRE was based on the reasonable conclusion that statistical analysis did not provide a sufficient or appropriate basis for making findings and fashioning remedies in individual cases of alleged discrimination. The review team did give some weight to statistics in concluding that the report of the Working Group on the Status of Women created a "rebuttable presumption" of discrimination. However, the team correctly determined that Applicant's individual claim needed to be reviewed in light of the actual facts of her career history.
10. In light of the lack of evidence of gender discrimination in Applicant's case and the view that she needed to develop further the skills essential for higher grades, the DRE review team reasonably concluded that Applicant was at the appropriate grade level.
11. The remedy of a 6.5 percent salary adjustment was reasonably based on the review team's investigation of Applicant's case. Applicant's salary was properly compared with that of other senior economists of her grade and age range. Also consistent with the team's review and DRE procedures was the recommendation that Applicant be given assignments to develop and assess her skills to strengthen her ability to compete for higher level positions.
12. Applicant's argument that the remedy recommended in her case reflected a pattern whereby the DRE itself was discriminatory against women is not credible and is not supported by any evidence.

13. Applicant has not shown that any recommendation was ever made as part of the DRE process that she be promoted to Grade A15 within one year. In any event, such a recommendation would have been inconsistent with Fund policies and therefore at odds with the DRE guidelines.
14. Applicant has not exhausted administrative review procedures as to her claims that the Fund has failed to follow through on the DRE recommendations and continues to discriminate against her on the basis of gender; therefore, these claims are not properly before the Tribunal. In any event, the claims are unfounded, as Applicant has been given assignments to enhance her competitiveness for higher grade positions and the DRE report was not improperly used to influence decisions against promotion within her Department.

Legal Framework for the Administrative Tribunal's Review of DRE Cases

62. The case of Ms. "W" and another to be decided subsequently of Ms. "Z" are the last cases arising from the Discrimination Review Exercise (DRE) to be presented for review by the Administrative Tribunal. In an earlier Judgment, *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal established the framework for its review of such cases.

63. In *Ms. "Y" (No. 2)*, the applicant sought *de novo* review by the Tribunal of the merits of her underlying claims of discrimination, which she contended were not fully and fairly examined under the DRE process. Respondent maintained that review of the underlying claims by the Administrative Tribunal was not appropriate because Ms. "Y" had failed to raise these claims on a timely basis under the administrative review procedures of GAO No. 31. Respondent accordingly contended that review in the Administrative Tribunal was to be limited to challenges to the fairness of the conduct of the DRE process itself.

64. The Tribunal concluded that a limited measure of review was to be undertaken by the Tribunal, explaining its reasoning as follows. At the time the DRE was implemented, the Fund had announced to the staff that the alternative dispute resolution mechanism did not confer any new rights, nor replicate or replace the Fund's grievance procedure. Ms. "Y" had taken no steps to contest the abolition of her position, or any other decision of the Fund that she alleged was discriminatory, through the formal channels of

review provided under GAO No. 31 for staff to challenge adverse personnel decisions. The Tribunal therefore rejected the view that because Ms. "Y"'s allegations of discrimination had been subject to the DRE, they could be reviewed by the Tribunal in the same manner as if they had been pursued on a timely basis through the formal administrative review procedures. Citing the value of timely, formal administrative review to the reliability of later adjudication by the Administrative Tribunal, the Tribunal emphasized that the DRE procedures were, ". . . by definition and design, intended to offer a mechanism for resolution of allegations of discrimination distinct from those afforded by legal proceedings" (para. 49) and that the depth of the Tribunal's review was limited in part by the nature of the record of the DRE proceedings before it (para. 65).¹⁵

65. In addition, in holding that review of Ms. "Y"'s underlying discrimination claims had been foreclosed because the mandatory time periods for invoking prior steps prescribed by GAO No. 31 had expired, the Administrative Tribunal made clear that the only decision that could be subject to review by the Grievance Committee, and thereafter by the Administrative Tribunal, was the decision of the Director of Administration affirming the DRE review team's conclusions. Accordingly, the Administrative Tribunal rejected the view that because the applicant's allegations of discrimination had been subject to the DRE, they could be reviewed by the Tribunal *as if* they had been pursued on a timely basis through GAO No. 31. (Para. 39.)

66. At the same time, however, the Tribunal concluded that, as Ms. "Y" had challenged the Director of Administration's decision upholding the DRE team's conclusion that her career was not adversely affected by discrimination, ". . . examination of that conclusion necessarily entails some consideration of whether the Applicant's career did suffer discrimination." (Para. 41.) The Tribunal continued: "That consideration may be distinguished, however, from the *de novo* examination by the Tribunal of the underlying claims that Applicant seeks." (Para. 41.) The same standard shall be applied in the present case.¹⁶

¹⁵See also Ms. "J", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 110, observing that in Ms. "Y" (No. 2) the Administrative Tribunal had ". . . underscored the limited measure of its review of the informal discrimination review process" in light of the nature of the decision-making process under review.

¹⁶The standard of review invoked by the Administrative Tribunal in reviewing the limited number of cases arising under the unique circumstances of the DRE procedure therefore differs from that applied when a contention of discrimination is brought to the Tribunal through the usual channels of administrative review pursuant to GAO No. 31. See Mr. "F", note 13.

67. In addition to challenging the “individual decision” in her case, aspects of Ms. “Y”’s Application appeared to impugn the DRE process more generally by asserting that the DRE lacked many of the attributes of a formal legal proceeding such as a written record. In response to these contentions, the Tribunal in *Ms. “Y” (No. 2)* upheld as a lawful exercise of the Fund’s discretionary authority the decision to implement as part of its human resources functions a means to remedy, during a narrow time frame, instances of past discrimination that reached beyond statutory time bars and had not previously been raised through the formal administrative review procedures. The Tribunal concluded that the DRE

“. . . was a good faith effort on the part of the Fund, perhaps unprecedented among international organizations, to resolve lingering allegations of past discrimination and to remedy the adverse effects of discrimination on the careers of aggrieved staff members. . . . The DRE was undertaken as a result of reasoned consideration by the Fund’s administration, based on recommendations made in an extensive study ‘Discrimination in the Fund’ (December 1995), suggesting that a procedure alternative to formal adjudication would facilitate the resolution of longstanding complaints.”

(Para. 48.) The Administrative Tribunal in *Ms. “Y” (No. 2)* furthermore concluded that the procedures adopted for the DRE, for example, confidentiality and lack of a written record, appeared to have been rationally related to its purposes and that, accordingly, the implementation of the DRE was a proper exercise of the Fund’s managerial discretion. (Paras. 49, 52.)

68. Finally, the Tribunal in *Ms. “Y” (No. 2)* subjected to review for abuse of discretion the conduct of the DRE process as applied in Ms. “Y”’s case, citing the standard set forth in the Commentary on the Tribunal’s Statute:

“. . . with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.”

(Report of the Executive Board, p. 19.) The Tribunal considered: a) whether the procedures applied by the DRE review team in Ms. “Y”’s case were consistent with the procedures established for the DRE and with those applied by the DRE teams in other cases; b) whether the conclusions of the DRE team in Ms. “Y”’s case, and their ratification by the Director of Administration, were reasonably supported by evidence; and c) whether the investigation of Ms. “Y”’s claims was tainted by any bias. After examining the evidence, the Tribunal held “. . . first, that the proceedings of the DRE in respect of

Ms. "Y"'s claims were regular, appropriate and unexceptionable and, second, that there is no ground for questioning the conclusion of the DRE that the Applicant's career disposition was unaffected by discrimination." (Para. 80.) The Application of Ms. "Y" was accordingly denied.

Consideration of the Issues of the Case

69. Applying the framework developed in *Ms. "Y" (No. 2)*, the Tribunal now considers the contentions presented by Ms. "W". These contentions may be outlined as follows: 1) procedural allegations; 2) sustainability of the DRE's findings and conclusions as to discrimination and remedy; and 3) implementation of remedial action pursuant to the DRE, alleged improper use of the DRE report, and contentions of continuing discrimination.

Procedural Allegations

70. Applicant contends that the DRE review of her case was affected by a series of deficiencies inconsistent with the procedures established for the DRE and with the fair resolution of her complaint. In particular, Applicant challenges: a) the composition of the review team and the respective roles performed by its internal and external members; b) the influence of the Administration Department and its Assistant Director; c) the role exercised by the Fund's Diversity Advisor; d) alleged institutional bias against Applicant; and e) the methodology applied by the DRE review team in Applicant's case, specifically the means of applying a "rebuttable presumption" of discrimination and reliance on qualitative as well as statistical evidence. These contentions are reviewed below.

Composition of review team and roles of its internal and external members

71. Applicant contends that the DRE review team members were not qualified for their responsibilities, that some Fund officials who were involved in the review of Applicant's claim were affected by bias (*see infra*), and that the role of the external team member was improperly constrained by these officials. Respondent denies these charges.

72. Ms. "W" challenges the role and qualifications of the respective team members. In particular, she maintains that the external team member was not expert in problems of discrimination and that he did not play the lead role contemplated in the memoranda on the DRE. The Tribunal however finds that the external team member's qualifications—as a person seasoned

in mediation and alternative dispute resolution, including experience in the mediation of employment discrimination cases—met those prescribed for the consultants as announced in the Memorandum to Staff of January 13, 1997.¹⁷ That Memorandum stated that the outside consultants were to have “. . . a mixture of backgrounds with expertise covering discrimination, diversity, arbitration and mediation.” Additionally, the qualifications of the internal team member, who had significant human resources experience within the Fund, likewise were consistent with those contemplated by the DRE.

73. Evidence that the external team member did not play the role provided for in the DRE memoranda is similarly lacking. The applicable Memorandum provided: “The review of individual cases will be carried out by external consultants [footnote omitted] assisted by a small number of Fund staff from both within and outside the Administration Department.” Both team members testified that they worked together, dividing the list of interviewees and coming together to discuss the case as a whole. The external team member conceded that while at first he had been skeptical of the partnership arrangement between the consultants and Fund staff he came to believe that it was “a very smart decision” to pair the external member with “someone who understood how the Fund works.” As to the particular working relationship between them, the external member testified, “[w]e tried to do everything by consensus”; the two “worked as a team,” “talked things through” and together drafted their report.

74. The practices described by the review team members in Ms. “W”’s case are consistent with those summarized in the Consultants’ Report prepared at the conclusion of the entire Discrimination Review Exercise.¹⁸ That Report stated that all initial and final interviews with complainants were conducted by both members of the review team, while many contact interviews were conducted by a single team member. The Report additionally noted that “[a]lthough the teams attempted to reach consensus on a case-by-case basis, the outside consultants made final determinations regarding the

¹⁷In Ms. “Y” (No. 2), para. 55, the Tribunal observed that in reviewing a decision for abuse of discretion, “[i]nternational administrative tribunals have emphasized the importance of observance by an organization of its procedural rules. . .” citing *Mr. M. D’Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 23, and considered whether the procedures applied to the DRE review of Ms. “Y”’s claim were consistent with the procedures set forth for the DRE. As described *supra*, the procedures under which the DRE would operate were set forth in Memoranda to Staff of August 28, 1996 and January 13, 1997.

¹⁸See *supra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

merit of claims presented." This statement must be understood in the overall context of the DRE, in which the ultimate decisions were taken by the Director of Administration on the basis of the review teams' recommendations.¹⁹ In any event, the Fund team member in Applicant's case acknowledged in her testimony before the Grievance Committee the authority of the external team member in this regard; both team members, however, emphasized that in the case of Ms. "W" they formed a consensus as to the merits of the complaint.

75. Accordingly, in the view of the Tribunal, there was no evidence that the role performed by the external team member was improperly constrained by Fund officials. Moreover, the working relationship between the two team members, as well their interactions with the Administration Department, which oversaw the exercise, *see infra*, were fully consistent with the procedures set out for the DRE.

Influence of the Administration Department and its Assistant Director

76. Applicant contends that the Administration Department and its Assistant Director exercised an inappropriate role in the review of her DRE complaint.

77. In *Ms. "Y" (No. 2)*, the Administrative Tribunal established that a measure of the procedural fairness accorded in an individual DRE case is consistency with the procedures applied by the DRE teams in other cases. (Paras. 54-55.) Considerable testimony emerged in the case of Ms. "W" as to efforts to ensure consistency of the DRE process across the 70 cases reviewed. The former Assistant Director of Administration in particular testified as to his dual role of serving as a member of one of the five review teams (not the team assigned to Ms. "W"'s case) and of assisting the Director of Administration in coordinating the overall review:

"In that capacity, I also I think assisted the Director of Administration in trying to ensure some quality control and consistency in the exercise, that is to try to the extent possible to ensure that each of the five review teams were approaching the exercise and in particular, approaching possible remedies that were coming out of the exercise in a way that was consistent across the 70 or so individual cases."

¹⁹*See infra* Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant's case; The remedy granted Applicant through the DRE process.

According to the ADM Assistant Director, the five review teams, the Director of Administration and the Diversity Advisor met as a group before beginning the review of individual cases to consider procedures and methodology. Additionally, they met to discuss a sample (15–20) of the 70 cases “. . . so that the review team could benefit from the broader views of the full team and so that other teams could benefit through . . . cross fertilization.” This practice is also described in the Consultants’ Report.²⁰

78. Both of the team members assigned to review Ms. “W”’s complaint indicated in their testimony that the process of cross-checking was employed in Applicant’s case. In the words of the external member:

“We wanted as much consistency as we could have just on the way we were doing things and how we were drawing conclusions. And the only way to do that . . . is to meet periodically and talk. . . .

. . .

. . . we’d talk about a case at the point that the team had come to its conclusion about a recommendation, we’d talk it through and try to answer questions from other team members about how we drew that conclusion and what that might lead to.

. . .

The kind of consistency that we were trying to achieve was sort of a general consistency in how we were approaching things and how we were reaching conclusions.”

79. Ms. “W” questions the procedures followed by the DRE team and alleges that the former Assistant Director of Administration exerted undue influence over it. The Tribunal finds that the procedures followed were consistent with those of other teams, that those procedures were reasonable, and that the measure of involvement of the Administration Department was appropriate. Indeed, the record supports the view that ADM and its Assistant Director helped to assure that the procedures applied to Ms. “W”’s case were consistent with those set forth for the DRE and applied by the review teams in other cases.

Role of the Fund’s Diversity Advisor

80. Ms. “W” further observes that the Diversity Advisor took a role in the review of her case even though the Diversity Advisor was not in a posi-

²⁰See *supra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

tion to evaluate Applicant's work performance. In her testimony before the Grievance Committee, the Diversity Advisor conceded that she had not observed Ms. "W"'s interactions with co-workers in Applicant's departmental work environment but had gained impressions of Ms. "W" in exchanges relating to the Report of the Working Group on the Status of Women in the Fund and the implementation of the DRE.

81. It is not clear to the Tribunal on whose invitation the Diversity Advisor was treated as a "contact." Ms. "W" alleges that the Diversity Advisor asked to sit in on her sessions as an "observer" to learn more about the DRE process in general and that Ms. "W" was not aware that she would also be an interviewee in Applicant's case. When interviewed, and when she testified in the Grievance Committee, the Diversity Advisor characterized Ms. "W"'s insistence on the probative force of statistics as "aggressive." Additionally, her views supported the perception that Ms. "W"'s analytical abilities did not match her statistical strengths. Applicant, for her part, attributed the Diversity Advisor's perceptions to a difference in their respective roles with respect to the DRE.

82. The Tribunal recalls that the January 1997 Memorandum to Staff on the DRE procedures stated that the Diversity Advisor ". . . will not be involved in the actual reviews of individual cases." Accordingly, there is ground for questioning whether the Diversity Advisor should have been interviewed as a contact. But her role does not appear to have had a decisive influence on the disposition of Ms. "W"'s case, as her critical characterizations were consistent with those of some other contacts.

Alleged institutional bias against Applicant

83. Ms. "W" also alleges that her history of having taken an outspoken staff advocacy role had a prejudicial effect on the evaluation of her complaint in the DRE process. Applicant testified in particular to having developed, in her view, an adversarial relationship vis-à-vis the Assistant Director of Administration through her role in representing staff members on a separate matter. The ADM Assistant Director, by contrast, testified that he had a high regard for Applicant's work on behalf of the staff and that his prior experience with her did not create "any bias one way or another."

84. In the Tribunal's view, no evidence in support of Applicant's speculation of bias in the DRE process emerged. Indeed, it was firmly denied by witnesses of the Respondent. The Fund team member knew Ms. "W" to be "active and outspoken" but "personally admired her for it" and did not recall anyone referring to Ms. "W" as an "activist." The Tribunal concludes

that Applicant did not establish that her staff advocacy activities resulted in any institutional bias that adversely affected the review of her DRE complaint.

The methodology applied by the DRE review team in Applicant's case

85. Ms. "W" advances two complaints in respect of the methodology adopted by the review team in her case. First, while she agrees that there was a "rebuttable presumption" of discrimination, she challenges the propriety of the effort to find elements of rebuttal, i.e. deficiencies in her performance that might explain her rate of promotion, contending that the manner in which this method was employed prejudiced the outcome of the review. Second, she maintains that statistical evidence suffices to establish that her Fund career was adversely affected by discrimination.

86. Applicant alleges bias in the approach taken by the review team, which she contends led it to focus not on elements of discrimination but on factors to rebut apparent discrimination, thereby distorting the review of her case. Applicant maintains that the DRE inquiry was prejudiced by the review team's effort to ferret out possible skill deficits to seek to explain any career disparity between Ms. "W" and male economists. In Applicant's view, evidence of unfair procedure is found in discrepancies between her written performance record and the reports of some of the interviews carried out by the team. Accordingly, Ms. "W" contends that the DRE process in her case led the review team wrongfully to characterize her as having a "forest-for-the-trees" problem in an effort to rebut the apparent disparity in her grade and salary vis-à-vis male economists.

87. The sustainability of the DRE's findings in Applicant's case is taken up in the following section. Whether the review team's application of a "rebuttable presumption" of discrimination amounts to a failure of fair procedure will now be considered. It is essential to recall, as the Tribunal observed in *Ms. "Y" (No. 2)*, that "[t]he hallmark of [the DRE] procedures was their flexibility. . . . [h]ence, the procedures contemplated a considerable degree of latitude for the review teams in undertaking their investigation" (Para. 55). As stated in the Memorandum to Staff from the Director of Administration, "Review of Individual Discrimination Cases," August 28, 1996, "[t]he way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination."

88. Accordingly, the Tribunal takes note of the fact that Ms. "W" proffered to the DRE team no specific instances or acts of discrimination from which her Fund career had suffered. It was therefore understandable that the DRE team sought to find out whether there were other impedimenta to her career. The Tribunal concludes that the decision to proceed in this manner was within the leeway provided review teams under the procedures governing the review process, and there is no evidence that this particular methodology prejudiced the outcome of the review of Applicant's case.

89. Finally, as for Ms. "W"'s complaint that statistics alone established her case of discrimination, for reasons earlier stated, the Tribunal cannot sustain the position of Ms. "W" that the review team subjected her complaint to unfair procedures by looking beyond statistical evidence in assessing her career advancement. The Tribunal has concluded *supra*, para. 21,²¹ that Respondent's decision to base the DRE review of individual cases, including that of Ms. "W", upon qualitative as well as statistical factors was not arbitrary, capricious or discriminatory. (See also Ms. "Y" (No. 2), paras. 42-52, upholding the implementation of the DRE and its essential procedures as a valid "regulatory decision.")

90. In sum, as to Applicant's procedural allegations, the Tribunal concludes that the procedures applied by the Fund in the DRE review of Ms. "W"'s case were reasonable, appropriate and consistent with the DRE procedures and with the fair resolution of Applicant's claim.

Sustainability of the findings and conclusions of the DRE review of Applicant's case

91. Having concluded that the procedures applied to the DRE review of Applicant's discrimination claim were fair and regular, the Tribunal turns to the sustainability of the review team's findings and conclusions, as ratified by the Director of Administration in her decision of May 21, 1998.

92. In Ms. "Y" (No. 2), para. 63, this Tribunal recognized, in the context of review of DRE cases, 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. Accordingly, the Tribunal concluded that it ". . . must satisfy itself that the contested decision is reasonably supported

²¹See *supra* Requests for Production of Documents.

by evidence gathered by the DRE team.” Ms. “Y” (No. 2), para. 66.²² In this case, Applicant challenges the sustainability of the two principal outcomes of the DRE review of her claim, i.e. the finding that her Fund career was not adversely affected by discrimination and the determination of a remedy for unfair or uneven treatment.

The finding of non-discrimination

93. Applicant maintains that the DRE review of her case failed to establish that factors other than discrimination resulted in Applicant’s allegedly slower career progression, and, in addition, that the DRE review team expressly found that there had been disparate treatment between Ms. “W” and her male colleagues. Therefore, alleges Ms. “W”, the conclusion of the DRE review team as ratified by the Director of Administration that Applicant’s Fund career was not adversely affected by discrimination cannot be sustained.

94. As both parties accepted the proposition that, on the basis of earlier statistical studies of Fund employment, it was appropriate for the review team in Ms. “W”’s case to proceed from a “rebuttable presumption” of discrimination, the dispute as to the sustainability of the DRE’s findings and conclusions concerns itself in part with whether the Fund indeed rebutted that presumption.

95. In testimony before the Grievance Committee, the Fund team member summarized the review team’s findings:

“... the consistent themes in terms of Ms. [“W”]’s strengths were that she had exceptionally good quantitative skills, computer programming skills and data management skills and she had a tendency to rely too much on an enormous amount of data. But her area of weakness was her inability to analyze the data effectively in a systematic manner and to focus on the salient points and the critical points and finally, to basically connect those with the big picture.

²²As the Tribunal observed in Ms. “Y” (No. 2), para. 64, a decision may be set aside if it ‘... rested on an error of fact or of law, or if some essential fact was overlooked . . . or if clearly mistaken conclusions were drawn from the evidence.’ (*In re Durand-Smet* (No. 4), ILOAT Judgment No. 2040 (2000), para. 5.) Review is also limited by the admonition that ‘. . . tribunals . . . will not substitute their judgment for that of the competent organs. . . .’ (Report of the Executive Board, p. 17.) As the World Bank Administrative Tribunal has recognized, ‘. . . in matters involving the exercise of discretion by the Bank, the Tribunal is not charged with the task of re-examining the substance of the Bank’s decision with a view to substituting the Tribunal’s decision for the Bank’s.’ (*Pierre de Raet v. IBRD*, WBAT Decision No. 85 (1989), para. 56.)”

So in essence, in my very first interview, what I discovered was the forest-for-the-trees problem and this was consistent in I think all but one of my interviews."

The external team member's testimony was that "things were mixed," with some deficits and some strengths, but that the "notion that there were some deficits" led the team to conclude that the presumption of discrimination had been overcome.

96. The Tribunal observes that the review team's report presented the "forest-for-the-trees" problem as limited and one that had been largely overcome. The report emphasized that the "skill deficit" had been encountered in the "early period" of Ms. "W"'s career with the Fund and had "attenuated" since her transfer to "Department 3" (her most recent assignment as of the time of the DRE), noting that she had overcome at least some of the analytical shortcomings and that the issue was ". . . not mentioned in interviews with contacts who are keen observers of Ms. ["W"]'s recent career." In addition, the review team noted that Ms. "W" ". . . appears not to have received the benefit of any doubts, and her skills deficits appear to have been magnified rather than minimized."

97. Respondent maintains that the "forest-for-the-trees" problem was consistently noted by the review team in both the written record of the Applicant's performance and in the team's interviews. Applicant vigorously disputes this contention. In the view of the Tribunal, the conclusion reached by the DRE review team and ratified by the Director of Administration that factors other than discrimination affected Ms. "W"'s career progression is sustainable. Evidence of whether, in fact, Ms. "W", especially earlier in her career, manifested inadequate analytical skill—in contrast to her undoubted quantitative strength—is mixed. It is not generally sustained by her Annual Performance Reports. It finds some, but not consistent, support in the interviews conducted by the DRE team.

98. What may be more significant in Applicant's failure to achieve promotion from Grade A14 to Grade A15 is the fact that a large proportion of the economists in Grade A14 are not promoted to Grade A15. Competition for Grade A15 positions is considerable. For an economist not to succeed in a few applications for promotion to Grade A15 is hardly evidence of discrimination; it is rather evidence of competition. *Cf. Nunberg*, para. 44 ("The argument that she was a strong performer, but had salary increases mainly in the satisfactory range, is inconclusive to show discrimination without other data relevant to salary determination, such as peer comparisons and budgetary constraints.") According to Respondent's pleadings in this case, more than half of Fund

economists hold Ph.D. degrees, a credential which Applicant does not possess. In addition, a “bottleneck” affects professional staff at the A14 level because the number of A15 positions in each economic department normally cannot exceed the number of divisions plus one. The Diversity Advisor emphasized in her testimony before the Grievance Committee that the number of A15 positions is extremely limited and only a few staff are promoted to that grade. Accordingly, the fact of non-advancement is not proof of discrimination.

99. Applicant further maintains that the DRE finding of non-discrimination is not sustainable because the review team made an express finding of disparate treatment. She notes that the review team reported differences in treatment of Ms. “W” based on gender, in particular, as stated in its report, that there were “. . . indications that she was treated differently from her male colleagues,” and that in her first assignment she was “not given prime assignments” in a Department that in the team’s view was “. . . known at the time as not having a good record for promoting women”

100. Respondent in its pleadings before the Tribunal contends that Applicant has not presented any probative evidence that her early career at the Fund had been adversely affected by gender discrimination and that the review team appropriately concluded that her career had been hampered instead by poor management. The Tribunal observes, however, that the Fund team member in her Grievance Committee testimony acknowledged the review team’s concern that the Department to which Applicant initially was assigned had a record of not promoting women.

101. Finally, in assessing the sustainability of the DRE’s finding of non-discrimination in Ms. “W”’s case, it is appropriate to consider how Applicant fared in the DRE process as compared with other complainants, as well as to understand the particular terminology employed in the DRE. As reported in the Consultants’ Report compiled at the conclusion of the Discrimination Review Exercise, “indications of unfair or uneven treatment” were found in approximately half of the cases reviewed. Ms. “W”’s was apparently one of these cases. Hence, while the DRE did not conclude that Applicant’s career had been affected by “discrimination,” it appears to have found that she experienced “unfair or uneven treatment” warranting remedial action within the parameters of the Discrimination Review Exercise. It is well in this regard to recall that the table reporting DRE outcomes did not include a category titled “discrimination” and noted that only in a “small number of cases” was there “clear evidence of discrimination.” The reluctance to ascribe “discrimination” to very many of the cases is, in turn, explained in the Consultants’ Report on the ground that “the discrimination review exercise was not designed to

prove the presence or absence of discrimination to a high legal standard" in recognition of the evidentiary limitations of the exercise. What is significant, therefore, is that Applicant was awarded a remedy through the DRE process, although in her case, as in most others in which some remedial action was granted, no specific finding of "discrimination" was made.

102. Accordingly, the Tribunal is able to sustain the conclusion of non-discrimination in the case of Ms. "W" on the following basis. First, relief was awarded to Applicant for "unfair or uneven treatment." In granting Applicant a remedy through the DRE process, it may be said that the Director of Administration gave weight to the finding of the review team that there were indications that in her early Fund career Ms. "W" was treated differently from male colleagues and skill deficits were unfairly magnified. Second, the DRE by its nature and terms was not designed to determine "discrimination" to a legal standard. Finally, the Tribunal is mindful of the limited depth of its review of cases arising through the DRE²³ and holds that it was not arbitrary or capricious for the Fund to conclude as a result of the DRE review of Ms. "W"'s complaint that her career was not adversely affected by discrimination.

The remedy granted Applicant through the DRE process

103. Applicant disputes the adequacy of the remedy awarded her as a result of the DRE process, i.e. a 6.5 percent salary adjustment and career development assistance. Applicant maintains that this remedy was inadequate primarily because it did not include the promotion to which she claimed she was entitled on the basis of the statistical analysis included in her request for DRE review.

104. Applicant contends that the external team member in the feedback meeting with her had indicated that a promotion of one grade level within one year would be part of the remedial action in her case. It is a matter of factual dispute as to whether the team member so indicated. Ms. "W" has testified that he did and puts forward as support her handwritten notes of the meeting. The team member, by contrast, testified that he did not recall

²³As the Tribunal held in Ms. "Y" (No. 2), para. 41:

"At the same time, since the Applicant challenges the . . . decision of the Director of Administration upholding the conclusion of the DRE that the Applicant's career was not adversely affected by discrimination, examination of that conclusion necessarily entails some consideration of whether the Applicant's career did suffer discrimination. That consideration may be distinguished, however, from the *de novo* examination by the Tribunal of the underlying claims. . . ."

whether or not he had made such a recommendation. What is essential to consider, however, is, irrespective of whether such recommendation was proposed by the external team member, was there any abuse of discretion on the part of the Fund, i.e. in the decision of the Director of Administration, in selecting the remedy that was selected.

105. The Consultants' Report prepared at the conclusion of the Discrimination Review Exercise indicated that the outside consultants "suggested" remedial action on a case-by-case basis, but that remedies were limited by a number of factors (*see infra*). The external consultant in Ms. "W"'s case noted that determination of a remedy was subject to the cross-checking process among the larger group of review members, as earlier described.²⁴ Moreover, as emphasized by the ADM Assistant Director, ". . . in the end, the director of Administration was the person taking decisions, the consultants were advisory, so . . . [the Director of Administration] would have been able to have overruled a recommendation."

106. A significant constraint on the award of remedies pursuant to the DRE was that they were to fall within the confines of the Fund's human resources policies. The Memorandum of January 13, 1997 announcing the parameters of the DRE to the staff stated: "In cases where remedial action is warranted, the aim will generally be to suggest actions that are prospective and fall within the Fund's existing personnel policies, including reassignments, training and other development initiatives, promotions and salary adjustments." (*See also* Consultants' Report, pp. 4-5.) The ADM Assistant Director likewise confirmed that the most important guidance given to the review teams with respect to remedies was that they ". . . fall within the framework of the human resources policy that existed in the Fund. . . ." In his view, these policies ". . . precluded making a recommendation that someone be . . . promoted outright from A14 to A15" because the new position would involve different job content. Such promotions, he testified, were to be distinguished from "career progression" promotions, which could be taken as a result of the DRE. According to the ADM Assistant Director, "[w]hen promotions involved changes in job content . . . titled positions, supervisory positions, the director of Administration did not make any such decision to effect a promotion as a result of a recommendation made by the review team under the DRE."²⁵

²⁴*See supra* Consideration of the Issues of the Case; Procedural Allegations; Influence of the Administration Department and its Assistant Director.

²⁵*Cf. Ms. "Y" (No. 2)*, para 69 (noting as to Ms. "Y"'s complaint of discrimination in the grading of her position that the review team found a "clear demarcation" between A11 and

107. The Consultants' Report also identified additional factors that might affect the recommendation of remedies in particular cases, including, ". . . (1) promotion opportunities; (2) applicants' current competitiveness for job openings; (3) budgetary constraints; (4) time-in-grade requirements; and (5) the promotion procedures of the review committees." (p. 5.) The limited opportunities for promotion to A15 have earlier been considered.²⁶ Moreover, in Applicant's case, the review team seems to have drawn the conclusion that Ms. "W" was not, at the time of the review, competitive for an A15 position because further skill development and assessment were required. Accordingly, the review team determined not to recommend an outright promotion and the Director of Administration concurred with that recommendation. The team recommended rather that Applicant ". . . be provided with supervisory responsibilities to assess her management skills, and other assignments to develop and assess her writing skills. If she did well, Ms. ["W"] was encouraged to apply for A15 vacancies in ["Department 3"] and elsewhere with support from ADM for her applications."²⁷

108. It may also be recalled that, in summarizing the outcomes of the DRE exercise, the Consultants' Report highlighted that in relatively few cases was outright promotion prescribed as a remedial action:

"In 17 of these 35 candidates for whom there was an indication of unfair or uneven treatment, the primary remedial outcome of the review was a promotion. In some of these 17 cases, the staff member was already in the process of obtaining a sought after promotion during the course of the discrimination review exercise and there was no support or intervention from management or ADM to help bring about the promotion. In other cases, such promotions took place largely as a result of internal market forces but with some support provided by management or the ADM. In yet other of these 17 cases, the promotion came about as a direct result of a specific decision taken by management and/or ADM outside the framework of the normal internal market."

Id., pp. 6–7.

A12 in the editorial stream, supporting the view that the grading of Ms. "Y"'s position had not been adversely affected by discrimination).

²⁶See *supra* Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant's case; The finding of non-discrimination.

²⁷Ms. "W" does not challenge the appropriateness of the remedy of career development assistance; however, she does contend that Respondent has failed to implement such remedial action. See *infra* Consideration of the Issues of the Case; Implementation of remedial action pursuant to the DRE, alleged improper use of the DRE report, and contentions of continuing discrimination.

109. The Tribunal concludes that the evidence does not show that Ms. "W" was ever promised promotion as a remedy in the DRE process. Even if, as she alleges, promotion within one year was suggested by the external team member, it was well within the discretion of the Administration Department to decline to accept that recommendation. Nor would it have been arbitrary or capricious to do so in light of prevailing personnel policies and the relative scarcity of Grade A15 economist positions within the Fund.

110. As to the extent of the salary adjustment, the Tribunal concludes that this too was rationally based. As explained in its report, the review team recommended a one-time salary increase of 6.5 percent, representing ". . . the difference in salary between Ms. ["W"]'s current salary and the average salary of economists in the 50-52 year old range," and this recommendation was adopted by the Director of Administration. Applicant, who had sought a greater salary increase in her request for DRE review, has challenged the Fund's selection of comparators, alleging that the appropriate use of statistics would establish that she was entitled to promotion as well as salary adjustment. The Tribunal has ruled against Ms. "W"'s argument insofar as it relates to promotion. (*See supra*, para. 21.) As to the extent of salary adjustment, the DRE team members, having determined on the basis of qualitative evidence that Applicant was not entitled to a promotion, reasonably drew comparators for the purpose of reviewing salary levels from within Ms. "W"'s grade of A14.

111. Additionally, the Tribunal observes that by taking age as a proxy for experience, an approach which testimony suggested had been used in other DRE cases, Respondent afforded Ms. "W" the benefit of the doubt with respect to the salary adjustment. As stated in the transmittal note from the Assistant Director of Administration:

"Among the non-discriminatory reasons why [Ms. "W"]'s salary is below the norm of her age group are that [Ms. "W"] was 29 when she started to study economics and had fewer years of relevant work experience than most who join at 35. In terms of total years of relevant work experience, [Ms. "W"] compares more closely with those in a 46-47 year old age group where her salary is much closer to the norm."

Furthermore, the data reveal that for the majority of the 50-52 year-old A14 senior economists, a Ph.D. is recorded as the highest degree attained whereas Applicant's highest degree is a master's degree. It is also notable that the A14 senior economists span a considerable range of ages, from 33 to 64. In view of all of the foregoing factors, the Tribunal concludes that the determination of the salary adjustment was not arbitrary or capricious.

112. Finally, Applicant also has asserted that the remedy in her case was consistent with a pattern of gender discrimination in the outcome of the DRE exercise generally, contending that remedies disproportionately benefited male complainants. No support emerged for this contention, which was vigorously disputed by the review team members. Moreover, the Tribunal, for reasons earlier stated (*supra*, para. 28), has held that DRE outcomes would not be probative of discrimination in the DRE process in general or as applied in Applicant's case.

113. The remedy of a salary adjustment and career development assistance, but not promotion, has been challenged by Ms. "W" as not supported by the evidence and as inadequate. The Tribunal concludes that the Fund, having reasonably found, pursuant to the procedures afforded by the DRE, that Applicant's career was not adversely affected by discrimination but that her initial assignment may have hampered her career progression and that skill deficits may have been magnified, made a sustainable decision in the reasonable exercise of its managerial discretion to grant Applicant a remedy of a 6.5 percent salary adjustment and career assistance to strengthen her ability to compete for positions at the next grade level but to deny Applicant's request for promotion.

Implementation of remedial action pursuant to the DRE, alleged improper use of the DRE report, and contentions of continuing discrimination

114. In addition to challenging the procedures undertaken in the review of her DRE complaint and the sustainability of the review team's conclusions, Applicant further alleges that the Fund has failed to implement the career development measures that were part of the remedial action prescribed in her case, improperly used the DRE report to deny her a promotion, and continues to discriminate against Applicant on the basis of her gender. Respondent contests the admissibility of these claims before the Administrative Tribunal and asserts that these contentions, in any event, are without merit.

Admissibility

115. The Fund maintains that because each of these latter complaints arose following Ms. "W"'s initiation of administrative review of the May 21, 1998 decision of the Director of Administration they are not ripe for consideration by the Administrative Tribunal. Applicant counters that these allegations

are “intimately related” to her challenge to the DRE decision and are therefore cognizable by the Tribunal in this case.

116. The IMFAT on a number of occasions has emphasized the importance of the requirement of Article V²⁸ of the Statute that an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review. As explained in the Commentary on the Statute, “. . . the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate.” (Report of the Executive Board, p. 23.) See *Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 82. As the Tribunal observed in *Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66, “[t]he requirement for exhaustion of remedies serves the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.” See also *Ms. “Y”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42 (“. . . it is the view of the Tribunal that exhaustion of the remedies provided by the Grievance Committee, where they exist, is statutorily required . . . 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.”)

117. Likewise, the Administrative Tribunal has looked to what decision or decisions have been the subject of prior administrative review in determining the administrative act(s) to be subjected to the Tribunal’s consideration. See *Ms. “Y” (No. 2)*, para. 36; *Ms. “J”*, para. 84. In *Ms. “J”*, the Tribunal rejected the argument that an applicant could raise before the Administrative Tribunal contentions relating to her medical separation from the Fund where the only exhaustion of administrative review undertaken by the applicant was of a decision under the Staff Retirement Plan to deny her request for disability retirement. While the applicant in that case claimed that the two matters were closely allied, the Fund pointed out that the two involved separate decision makers and separate channels of administrative review; the applicant had taken none of the steps required for review of

²⁸Article V, Section 1 provides:

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

the medical separation claim pursuant to GAO No. 31. While the Tribunal in *Ms. "J"* expressed "some sympathy" for the applicant's argument given the "intersecting nature" of her various claims, it observed that "[t]he fact remains that Ms. "J" did not attempt to exhaust her remedies in the Grievance Committee." "Moreover, and in any event," the Tribunal concluded, "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 Tribunal confined its consideration in *Ms. "J"* to the challenge to the Staff Retirement Plan's decision on disability retirement. (Para. 89.)

118. The case of Ms. "W" requires the Tribunal to consider whether Applicant has met the requirements of Article V in challenging before the Administrative Tribunal matters related to the implementation of the May 21, 1998 decision of the Director of Administration that arose following her initiation of administrative review of that decision. The Tribunal considers the following factors to be determinative. Applicant's additional contentions, i.e. that the Fund failed to implement fully the remedial action granted under the DRE process and improperly used the review team's report to influence the denial of a promotion, arose in the unique circumstance of the pendency of a complex review procedure, including voluntary mediation, designed to achieve a final resolution of the DRE complaints. This procedure ensued after Applicant lodged her Grievance with the Fund's Grievance Committee.²⁹ Moreover, the Grievance Committee, during its subsequent hearings in Ms. "W"'s case, admitted testimony as to the allegations that she now seeks to raise before the Tribunal, allegations that were closely related to but nonetheless postdated the Grievance. The Tribunal accordingly has the benefit of this evidentiary record and the parties have had the opportunity to settle their claims, thereby fulfilling policies underlying the requirement for exhaustion of administrative review.

119. For the foregoing reasons, the Tribunal finds no difficulty in now passing upon Applicant's further allegations as to the implementation of the remedy and the use of the DRE report insofar as they are a) closely linked with the challenge to the DRE decision itself and b) have been given some measure of review in the context of a procedure intended to give finality to longstanding claims.

²⁹See *supra* The Channels of Administrative Review.

120. As for Applicant's more generalized allegation of "continuing" discrimination, however, the Tribunal concludes that it is not admissible, and, in any event, that Applicant has put forward no evidence to support it. The Tribunal observes that in *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), it reviewed allegations that an applicant had been subjected to incidents of religious hostility over the course of his career and, citing the Fund's Discrimination Policy, posed the legal question as ". . . whether Applicant has shown that he has been subjected to a 'pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.'" (Discrimination Policy, July 3, 2003, p. 4)." (Para 90.) The Tribunal in *Mr. "F"* accordingly took cognizance of a pattern of conduct where separate administrative review had not been undertaken as to each individual act. The case of *Mr. "F"* may be distinguished, however, from the present case because the discriminatory conduct alleged by Mr. "F" had taken place prior to, rather than following, the initiation of administrative review procedures under GAO No. 31.

121. Moreover, in view of the conclusion in *Ms. "Y" (No. 2)*, para. 39, that the scope of the Tribunal's review of DRE cases is limited and that the Tribunal may not examine underlying contentions of discrimination raised in the DRE *as if* they had been pursued through the steps required under GAO No. 31 (*see supra*, para. 65), there can be no ground for the Tribunal to find jurisdiction to review, as part of a challenge to a DRE decision, discrimination claims arising after the conclusion of the DRE process, based upon any theory of "continuing" discrimination. As the Tribunal observed in *Ms. "Y" (No. 2)*, ". . . while the Fund as part of its human resource functions may have created an alternative dispute resolution mechanism to remedy instances of past discrimination stretching beyond statutory bars and not previously raised through administrative review, the Administrative Tribunal, as a judicial body, remains controlled by its Statute." (*Ms. "Y" (No. 2)*, para. 40.) Accordingly, the Administrative Tribunal will not consider the generalized allegation of Ms. "W" that she continues to be subjected to gender discrimination.

Implementation of remedial action and alleged improper use of DRE report

122. As earlier noted, remedial action in Applicant's case encompassed two components, a salary adjustment and career development assistance. It is not disputed that the 6.5 salary increase was implemented. Applicant does

dispute, however, that career development assistance, as set out in the Director of Administration's decision letter of May 21, 1998, has been effected. That decision provided in part:

"As indicated in my earlier note to the staff-at-large, in cases where it appears there may have been unfair or uneven treatment, the review will not be an end in itself but just the beginning of a process for identifying opportunities. In your case, efforts will be made to identify assignments for you that further develop and assess your analytical, writing, and supervisory skills. The objective will be to help strengthen your ability to compete for positions at the Grade A15 level."

In Applicant's view:

"I have never had – since the final interview, I have never had one call or one conversation whatsoever on follow-up on the results of the DRE. My personal feeling is that [the] Administration Department has done the opposite; that is, by giving things like the DRE summary to my SPM, they have had the opposite effect of really hurting my career."

123. In his testimony before the Grievance Committee, the Assistant Director of Administration characterized the nature of career development assistance resulting from the DRE as driven primarily by market forces:

". . . I think we were hoping in the Human Resources Department that in cases like Ms. ["W"]'s, where the review team had made the recommendation that it did, that the Human Resources Department and the staff member's department would help support . . . those market forces.

I mean to give you an example of that, I recall making some phone calls to departments, encouraging them to interview staff who had applied for vacancies at the A15 level, maybe at the A9 level for a support staff member with a similar recommendation. . . . So there was some effort to try to influence the market, but the market forces were still the predominant ones."

124. As to the particular case of Ms. "W", the Assistant Director of ADM testified to a discussion with the front office in "Department 3" that was ". . . focused on the issue of implementing one of the recommendations of the review team, which was to give Ms. ["W"] . . . an opportunity to compete for positions at the A15 level in ["Department 3"] and giving her assignments that might support that process of her being assessed and reviewed and putting her perhaps in a more favorable position to compete for senior level positions in ["Department 3"]." He reported that the front office was ". . . very positive about wanting to give Ms. ["W"] . . . every opportunity to compete." He did not recall any specific vacancy for which Ms. "W" may have applied.

125. The Senior Personnel Manager (SPM) of "Department 3" testified to having been told that Ms. "W" should be given an opportunity to demonstrate her abilities. The SPM recalled Ms. "W"'s having applied for two A15 positions, one in 1999 and one in 2000. For the first position, the SPM testified, Applicant "was judged not to have proven sufficient analytical skills for the A15 level." The second position was filled by another woman in the Department. The SPM further testified that Applicant was given "stretch" assignments, such as policy work and mission opportunities to broaden her experience, and that Ms. "W"'s move to "Department 4" ". . . was seen as giving her the opportunity to further demonstrate her skills . . ."

126. As to Ms. "W"'s allegation that the Fund has failed to implement fully the remedial action accorded her, the record indicates that Ms. "W" has been given assignments, such as mission assignments as well as her current Resident Representative post, in which she can demonstrate her analytical capacities and managerial aptitude. The Tribunal therefore declines to accept the contention that Applicant has not received the career development assistance contemplated by the DRE remedy.

127. Finally, Applicant contends that the Fund improperly used the report of the DRE review team to influence the denial of a promotion for which she applied in her then Department. It is not disputed that in September 1999 a copy of the review team's report was transmitted by an Administration Department official to the Senior Personnel Manager. Applicant maintains that the report is inherently prejudicial in emphasizing the "skill deficits" that the DRE review team concluded had rebutted the statistical presumption of discrimination and that its contents influenced the judgment of the SPM.

128. As the Tribunal earlier has observed, *supra* para. 96, the review team's report presented the "forest-for-the-trees" problem as limited and one that had been largely overcome. Moreover, the SPM testified that the report was not shared with others and denied that it carried any weight in the SPM's own assessment of Applicant's competencies. Instead the SPM cited concerns independent of those reflected in the DRE report as to whether Applicant at the time demonstrated readiness for advancement to Grade A15. For example, the SPM testified to a mission assessment that suggested that Applicant's skills would benefit from more exposure to analytical policy work.

129. The Tribunal accordingly finds that Applicant has not established that the DRE report was used to deny her a promotion. It is not proven that disclosure of the report to the Senior Personnel Manager of Applicant's department was the factor or even a factor in Applicant's failure to be granted a promotion. The competition governing promotion to Grade A15

has been set out above, *see supra* para. 98. As the Tribunal has observed, for an economist not to succeed in a few applications for promotion to Grade A15 is hardly evidence of discrimination. Nor is it evidence of failure on the part of the Fund to carry out career development assistance granted as a result of the Discrimination Review Exercise, assistance which is subject to "market forces." Additionally, it is of more than incidental interest that in the case of one of the applications Ms. "W" made to an A15 post, the successful candidate was a woman. In any event, Ms. "W" appears currently to enjoy the confidence of the Fund's administration to discharge increased responsibilities, as indicated by her appointment as a Resident Representative.

130. For the foregoing reasons, the Tribunal concludes that Applicant has not succeeded on her claims that the Fund has failed to implement the career development assistance granted as a remedy in the DRE or that it has used the DRE report to influence negatively Ms. "W"'s prospects of advancement in her Fund career.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

The Application of Ms. "W" is denied.

Stephen M. Schwebel, President
Michel Gentot, Associate Judge
Agustín Gordillo, Associate Judge

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
November 17, 2005

JUDGMENT NO. 2005-3

*Elizabeth A. Baker, Applicant v. International
Monetary Fund, Respondent*
*Gamal Zaki El-Masry, Applicant v. International
Monetary Fund, Respondent*
*Atish Rex Ghosh, Applicant v. International
Monetary Fund, Respondent*
*Meral Karasulu, Applicant v. International
Monetary Fund, Respondent*
*Marco Pani, Applicant v. International
Monetary Fund, Respondent*
*Carlos E. Piñerúa, Applicant v. International
Monetary Fund, Respondent*
*Binta B. Terrier, Applicant v. International
Monetary Fund, Respondent*
(Admissibility of the Applications)
(December 6, 2005)

Introduction

1. On December 5 and 6, 2005, 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 matter pending in the case brought against the International Monetary Fund by seven of its staff members.

2. Applicants, in identical Applications, contest as arbitrary and an abuse of discretion the IMF Executive Board's January 24, 2005 decision expanding the range of discretion that it may exercise in setting the annual staff compensation. The Fund has responded to the Applications with a Motion for

Summary Dismissal, contending that Applicants have not met the requirement of Article II, Section 1(a) of the Tribunal's Statute that a staff member may only challenge the legality of an administrative act "adversely affecting" him.

3. A Motion for Summary Dismissal suspends the period for answering an application until the Motion is acted on by the Tribunal. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Applications.

The Procedure

4. On April 25, 2005, Applicants filed seven identical Applications with the Administrative Tribunal. On May 6, 2005, the Tribunal denied Applicants' requests, included with their Applications, for waiver of the statute of limitations to file amended Applications.¹

5. The Applications were transmitted to Respondent on May 6, 2005. As the Applications raised identical issues of law and fact, Respondent was invited to file a single Answer to the seven Applications. On May 10, 2005, pursuant to Rule IV, para. (f),² the Registrar circulated within the Fund a notice summarizing the issues raised in the Applications.

6. On June 8, 2005, pursuant to Rule XII³ of the Tribunal's Rules of Procedure, Respondent filed a Motion for Summary Dismissal of the Applications.

¹The Tribunal concluded that Applicants had not met the requirements of Article VI, Section 3: "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."

²Rule IV, para. (f) provides:

"Under the authority of the President, the Registrar of the Tribunal shall:

...

(f) upon the transmittal of an application to the Fund, unless the President decides otherwise, circulate within the Fund a notice summarizing the issues raised in the application, without disclosing the name of the Applicant, in order to inform the Fund community of proceedings pending before the Tribunal; . . ."

³Rule XII provides:

"Summary Dismissal

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.

2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.

The Motion was transmitted to each Applicant on the following day. On July 12, 2005, pursuant to Rule XII, para. 5, Applicants filed a joint Objection to the Motion, which was transmitted to the Fund for its information.

7. The Tribunal decided that oral proceedings,⁴ which neither party had requested on the Motion for Summary Dismissal, would not be held as they were not deemed useful to the disposition of the Motion.

8. Pursuant to Rule XII, para. 2, the filing of a Motion for Summary Dismissal suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. Accordingly, the present consideration of the case is confined to the issue of its admissibility.

The Factual Background of the Case

9. As a result of lengthy consideration by the Joint Fund and Bank Committee of Executive Directors on Compensation, the Fund and the World Bank in 1989 adopted a revised compensation system for their staffs. During 1998-2000, the Fund's compensation system was extensively reviewed in order to further the staffing objectives and requirements of the Fund and to ensure that the Fund's salaries remained appropriately related to markets in which it competes for staff. In the light of recommendations from management, the Executive Board annually has decided on the adjustment needed to align the Fund's salary structure with the comparator markets. In January

3. The complete text of any document referred to in the motion shall be attached in accordance with the rules established for the answer in Rule VIII. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the motion. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the motion.

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

5. The Applicant may file with the Registrar an objection to the motion within thirty days from the date on which the motion is received by him.

6. The complete text of any document referred to in the objection shall be attached in accordance with the rules established for the reply in Rule IX. The requirements of Rule VII, Paragraph 4, 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 to the Fund.

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

⁴Article 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 deems such proceedings useful."

2005, when the foregoing systems had been in effect for 16 years, the Executive Board decided to modify the compensation system once again. It is the modification adopted in January 2005 that has given rise to the Applications now before the Tribunal.

10. The Executive Board's decision was announced to the staff the following day by email message of the Director of Human Resources:

“. . . After considering a number of options, the Executive Board decided to amend the current salary-setting system. . . .

The amendments approved by the Executive Board have the effect of expanding the circumstances under which management and the Executive Board can exercise discretion in setting this year's annual salary increase. Executive Directors favoring greater scope for discretion have expressed the concern that in recent years the annual salary increases indicated by the U.S. market have been larger than needed to maintain the international competitiveness of Fund salaries, and that the discretion the Board has exercised in limiting salary increases should be preserved this year.

The change agreed by the Executive Board today makes it possible for judgment on the size of the structural increase to be exercised when the payline for the Fund falls within the 10-20 percent testing range for international competitiveness, as well as when it falls outside the testing range. However, the extent of such discretion within the testing range is constrained—unlike the discretion that has been available outside the range—and must continue to be based on an evaluation of the factors bearing on the international competitiveness of Fund salaries. Moreover, no consideration has yet been given to whether or how such discretion would be exercised in determining the salary increase for this year; those decisions will be taken up by Executive Directors during the annual salary review in March.”

11. Following the Executive Board's January 24, 2005 decision, the Managing Director announced to the staff of the Fund that two errors had been discovered in the comparator data utilized in the 2004 compensation review. The correction of these errors had the effect of placing the 2004 U.S.-indicated increase within the testing range. As a result, on March 30, 2005, the Executive Board approved a supplementary increase in the Fund's salary structure of two percentage points, with effect from May 1, 2004.

12. This retroactive adjustment, in turn, placed the Fund's 2004 salary structure two percentage points higher relative to the U.S. comparator, which increased the base for the 2005 market comparison, thereby lowering the amount of increase indicated by the U.S. market for 2005. Accordingly,

the structural increase actually called for by the amended compensation system, as approved in the 2005 compensation round, did not differ from the increase that would have been called for under the system existing prior to its January 2005 amendment.

The Channels of Administrative Review

13. Pursuant to Article VI, Section 2⁵ of the Statute of the Administrative Tribunal, an application challenging the legality of a “regulatory decision” may be filed with the Tribunal within three months of its announcement or effective date. There are no channels of administrative review to exhaust in respect of regulatory decisions being challenged directly.

14. The contested decision of the Executive Board was announced to the staff on January 25, 2005. On April 25, 2005, Applicants filed their Applications with the Administrative Tribunal.

Summary of Parties’ Principal Contentions

15. The parties’ principal arguments as presented by Applicants in their Applications and Objection to the Motion and by Respondent in its Motion for Summary Dismissal may be summarized as follows.

Applicants’ contentions on the merits

1. The Executive Board’s decision of January 24, 2005 fails to comply with the Fund’s “rules-based” compensation system and is therefore contrary to the internal law of the Fund, which has been established by the Fund’s past practices, creating legitimate expectations on the part of the staff.
2. The decision is contrary to general principles of international administrative law and infringes upon Applicants’ terms and conditions of employment.

⁵Article VI, Section 2 provides:

“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. The decision is not based on objective analysis and fails to support the international competitiveness of staff salaries as required by the Fund's Articles of Agreement.
4. Accordingly, the Executive Board's decision of January 24, 2005 is arbitrary and an abuse of discretion.

Respondent's contentions on admissibility

1. The challenged Executive Board decision of January 24, 2005, which allowed for the exercise of greater discretion in taking the subsequent decision regarding the structural salary adjustment for 2005, had no adverse financial consequences for the Applicants in the 2005 compensation review.
2. Applicants have not shown any other adverse effect flowing from the decision. Any other alleged effects are abstract and hypothetical and conflate the issue of adverse effect with the merits of Applicants' case.
3. Accordingly, Applicants have failed to establish any foreseeable and definite adverse effect resulting from the contested decision, as required for admissibility under the Statute.

Applicants' contentions on admissibility

1. A basic distinction may be drawn between individual and regulatory decisions of the Fund with regard to their respective "adverse effects." Regulatory decisions relate to the balance of interests between Management and the staff. The widening of the discretionary powers of Management affects this balance and opens the door for more specific decisions affecting the rights of the staff.
2. It is clear that the Executive Board's intention in amending the compensation system was to lower the amount of increase indicated by the U.S. market in 2005 to a level that would not have been permissible prior to the January 2005 amendment. That Applicants suffered no actual adverse financial consequences in the 2005 compensation exercise was solely a result of a quirk of circumstance, i.e. discovery of data errors in the 2004 exercise.
3. Accordingly, the contested decision gives rise to foreseeable and definite adverse effects, relating to Applicants' individual legal

situations, as Applicants' terms and conditions of employment have been affected by the widening of the Executive Board's discretion to set the annual compensation for Fund staff.

Consideration of the Issues

16. By the grant of authority given by its Statute, the IMFAT is vested with jurisdiction to review two types of "administrative acts" of the Fund, "individual decisions" and "regulatory decisions" of the Fund. Respondent rightly points out that an applicant to the Tribunal must meet the statutory requirement of being "adversely affected" by the contested decision, irrespective of whether that decision is challenged in the context of a challenge to an "individual decision" or to a "regulatory decision."

17. In *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 61, the Tribunal held that the "intendment of [the "adversely affected"] requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy":

"In analyzing Respondent's contention that Ms. "G"'s Application falls outside the scope of the Tribunal's jurisdiction *ratione materiae*, it is instructive to consult the Commentary adopted by the Executive Board in adopting the Tribunal's Statute. With respect to the requirement that an applicant be 'adversely affected' by an administrative act of the Fund, the Commentary observes as follows:

' . . . a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.'

(Report of the Executive Board, p. 13.) A question is whether the intendment of this requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy. Answering that question affirmatively, it is clear that the Applicant is adversely affected, because her claim is not hypothetical nor is the response that she seeks to her claim merely advisory."

The Tribunal accordingly held that Ms. "G" had standing to challenge the regulatory decision of the Fund's Executive Board (in the context of an individual decision not to make exceptions in her case), a decision to deny to staff in her visa status the class of employment benefits known as "expatriate benefits." The injury alleged by Ms. "G" was that she was unfairly denied benefits for which she would have been eligible had her visa status differed.

18. The Fund bases its Motion for Summary Dismissal of the Applications on the provision of the Statute empowering the Tribunal to pass judgment on any application by a member of the staff challenging the legality of an administrative act “adversely affecting” him⁶ (*supra*, Respondent’s contentions on admissibility). It maintains that:

“... there is a threshold issue whether the Applications provide a reasonable basis that the Applicants have been ‘adversely affected’ within the meaning of the Statute.”

19. In the view of the Tribunal, the facts permit the Applicants to surmount this threshold. The Executive Board of the Fund, in January 2005, took a decision that widens the range of discretion that it may exercise in setting staff salaries. Application of that decision in 2005 did not have adverse financial consequences for the compensation of staff members for the reasons explained above. Nevertheless, the decision of the Executive Board was adopted and remains in force. It will be applied in 2006 to affect the compensation of staff members, unless the Executive Board decides otherwise.

20. In the view of the Tribunal, the widening of the Fund’s discretion to adjust the compensation of staff members of the Fund permits the Applications to cross the threshold of admissibility. That threshold is not steep, because, by the terms of Rule XII of the Rules of Procedure, an application may be summarily dismissed only “if it is clearly inadmissible.” As has been established by the Administrative Tribunal of the ILO, an international civil servant need not await the realization of the institution’s adverse decision to seek a remedy in respect of it; an application is receivable in such circumstances to challenge a regulatory decision affecting the individual’s rights if the organization’s rules allow such a direct challenge. As the Fund’s Motion for Summary Dismissal recalls, the Executive Board, in considering the draft of the Tribunal’s Statute, considered in particular the *Ayoub* (No. 2) case, in which the ILOAT ruled on the Applicants’ challenge to an amendment to pension regulations before the application of the decision in the individual cases, as it was already certain that the Applicants would be adversely affected if the amendment stood, although they might not retire for many years. (*Ayoub* (No. 2), ILOAT Judgment No. 986 (1989).) Similarly,

⁶Article II, Section 1(a) provides:

“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;”

the ILO Administrative Tribunal in the case of *Aelvoet (No. 6) and others*, ILOAT Judgment No. 1712 (1998), Consideration 10, held:

“As the Tribunal has said before, there may be a cause of action even if there is no present injury: time may go by before the impugned decision causes actual injury. The necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant’s position.”

21. In the view of the Tribunal, in respect of the Applications before it, there is “some present effect.” That effect is inherent in the wider discretion that the Executive Board has assumed in respect of salary adjustments which, in the absence of further action by the Executive Board, will be applied in 2006.

22. This conclusion is supported by the Report of the Executive Board on the Statute of the Tribunal which explained the utility of affording staff the right directly to challenge regulatory decisions of the Fund:

“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.”

(Report of the Executive Board, p. 25.) The foregoing passage thus looks to resolution of a question of the legality of regulatory decisions “. . . before there has been considerable reliance on, or implementation of, the contested decision.”

23. In the light of the foregoing considerations, the Applications before the Tribunal are not “clearly inadmissible.” Accordingly, the Tribunal denies the Fund’s Motion for Summary Dismissal of the Applications.

24. As the Fund’s Motion for Summary Dismissal is denied, the exchange of pleadings pursuant to Rules VIII – X of the Tribunal’s Rules of Procedure will resume. The filing of the Motion suspended the time for answering the Applications until the Motion was acted on by the Tribunal. (Rule XII, para. 2.) Thus, in view of the denial of the Motion, the Fund’s Answer on the merits, Applicants’ Reply and the Fund’s Rejoinder will follow, according to the schedule prescribed by the Rules.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unani-
mously decides that:

The Fund's Motion for Summary Dismissal is denied.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
December 6, 2005

JUDGMENT NO. 2005-4

*Ms. "Z", Applicant v. International
Monetary Fund, Respondent*
(December 30, 2005)

Introduction

1. On December 6 and 7, 2005, 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. "Z", a staff member of the Fund.

2. Ms. "Z" contests the decision of the former Director of Administration approving the conclusions of a review team constituted under the Discrimination Review Exercise (DRE), a special, one-time inquiry into cases of alleged discrimination that was initiated by the Fund in the late 1990s. Applicant contended in the DRE that she had experienced discrimination on the basis of gender, ethnicity or national origin, and age, which had prevented her from attaining a Fund career commensurate with her qualifications and experience. The DRE review concluded that Applicant had not been discriminated against in her career with the Fund. It did find, however, that Ms. "Z" had not been adequately compensated for her use of multiple language skills in her first Fund assignment and, accordingly, Applicant was granted a within-grade salary adjustment.

3. In her Application before the Administrative Tribunal, Applicant renews her claims of discrimination and contends that the DRE investigation of her complaint was procedurally defective. Applicant maintains that the review team assigned to her case was not competent and that it failed to investigate her claims thoroughly and fairly. Additionally, Applicant alleges that she was not afforded due process by the Fund's Grievance Committee in its review of her challenge to the DRE decision.

4. Respondent, for its part, maintains that the DRE team's investigation of Ms. "Z"'s complaint was carried out impartially and in accordance with the established DRE procedures. Respondent contends that a properly constituted review team thoroughly and fairly investigated each instance of alleged discrimination and found Applicant's claims to be unsubstantiated. As to Applicant's challenge to the neutrality of the Grievance Committee's review following the DRE process, Respondent asserts that the Administrative Tribunal does not serve as an appellate body with respect to the decisions and proceedings of the Grievance Committee, and, in any event, that Applicant was afforded due process in those proceedings.

The Procedure

5. On March 10, 2004, Ms. "Z" filed an Application with the Administrative Tribunal.¹ 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, having been brought into compliance within the indicated period, is considered filed on the original date.²

¹ The Administrative Tribunal earlier had granted a two-month waiver of the statutory time limit for the filing of the Application after Ms. "Z" had brought to the Tribunal's attention exigent personal circumstances that the Tribunal concluded represented "exceptional circumstances" justifying such waiver pursuant to Article VI, Section 3 of the Statute, which provides:

"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."

² 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 April 2, 2004. On April 19, 2004, pursuant to Rule XIV, para. 4,³ the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Ms. "Z"'s Application on May 14, 2004. On June 16, 2004, Applicant submitted her Reply. The Fund's Rejoinder was filed on July 19, 2004. On July 29, 2005, in order to complete the record of the case, the Administrative Tribunal, pursuant to Rule XVII, para. 3,⁴ issued to Respondent a Request for Information as to Applicant's current employment status, and the Fund replied on August 2, 2005.

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.⁵ The Tribunal had the benefit of a transcript of oral hearings conducted by the Fund's Grievance Committee, at which Ms. "Z", the members of the DRE review team, as well as a former Assistant Director of the Administration Department (ADM) and other persons having knowledge of Applicant's career testified. 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." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

Additional Pleading

8. On February 11, 2005, Applicant transmitted to the Registrar of the Administrative Tribunal a copy of a memorandum of the same date addressed to her supervisor. That memorandum requested review by the supervisor of Ms. "Z"'s merit salary increases since 1997 and contended that these increases fell below Fund averages beginning the year following submission of her DRE complaint although she had continued to receive good performance

³Rule XIV, para. 4 provides:

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

⁴Rule XVII, para. 3 provides:

"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."

⁵Article 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."

ratings. In a cover letter to the Registrar, Applicant noted that she considered the matter raised in the memorandum to be "very relevant" to her pending Tribunal Application.

9. It was decided to treat Applicant's correspondence as a request to submit an additional pleading under Rule XI,⁶ and on February 25, 2005 the parties were advised that the President of the Administrative Tribunal had granted Applicant's request to include in the record before the Tribunal the February 11, 2005 memorandum to Applicant's supervisor. The Fund was accordingly given the opportunity to present any observations.

10. Respondent submitted its observations on March 14, 2005, urging the Tribunal to disregard Applicant's submission in its entirety on the ground that Applicant's merit increases from 1997 to 2004, which she previously had not challenged, are not relevant to the decision contested in the Administrative Tribunal, i.e. the May 29, 1998 decision of the Director of Administration upholding the recommendations of the DRE review team.

11. The Fund further maintained that it had not had the opportunity to investigate Applicant's newly raised allegations, to conduct administrative review or to take a final decision on the matter. Moreover, observed Respondent, Applicant had not raised the issue of her merit increases during the Grievance Committee's review of the DRE decision and the decisions she now seeks to contest are no longer timely for review pursuant to GAO No. 31. Therefore, contends the Fund, the issue is inadmissible before the Tribunal in view of the exhaustion of remedies requirement of Article V, Section 1⁷ of the Tribunal's Statute.

⁶Rule XI provides:

"Additional Pleadings

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

⁷Article V, Section 1 provides:

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

12. In *Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), the Tribunal considered the question of whether particular allegations of the applicant that postdated the contested DRE decision were admissible for review by the Administrative Tribunal. In that case, the Tribunal, while reiterating the importance that the IMFAT attaches to the exhaustion of remedies requirement of Article V,⁸ nonetheless concluded, in light of the particular facts of the case, that two of *Ms. "W"*'s specific post-DRE contentions were admissible:

"118. The case of *Ms. "W"* requires the Tribunal to consider whether Applicant has met the requirements of Article V in challenging before the Administrative Tribunal matters related to the implementation of the May 21, 1998 decision of the Director of Administration that arose following her initiation of administrative review of that decision. The Tribunal considers the following factors to be determinative. Applicant's additional contentions, i.e. that the Fund failed to implement fully the remedial action granted under the DRE process and improperly used the review team's report to influence the denial of a promotion, arose in the unique circumstance of the pendency of a complex review procedure, including voluntary mediation, designed to achieve a final resolution of the DRE complaints. This procedure ensued after Applicant lodged her Grievance with the Fund's Grievance Committee. [footnote omitted] Moreover, the Grievance Committee, during its subsequent hearings in *Ms. "W"*'s case, admitted testimony as to the allegations that she now seeks to raise before the Tribunal, allegations that were closely related to but nonetheless postdated the Grievance. The Tribunal accordingly has the benefit of this

⁸The IMFAT on a number of occasions has emphasized the importance of the requirement of Article V [footnote omitted] of the Statute that an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review. As explained in the Commentary on the Statute, ' . . . the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate.' (Report of the Executive Board, p. 23.) See *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 82. As the Tribunal observed in *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66, '[t]he requirement for exhaustion of remedies serves the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.' See also *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42 (' . . . it is the view of the Tribunal that exhaustion of the remedies provided by the Grievance Committee, where they exist, is statutorily required. . . . 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. "W", para. 116.

evidentiary record and the parties have had the opportunity to settle their claims, thereby fulfilling policies underlying the requirement for exhaustion of administrative review."

Accordingly, the Tribunal held admissible in Ms. "W" the applicant's further allegations as to the implementation of the remedy and the use of the DRE report ". . . insofar as they are a) closely linked with the challenge to the DRE decision itself and b) have been given some measure of review in the context of a procedure intended to give finality to longstanding claims." (Ms. "W", para. 119.)⁹

13. As for Ms. "W"'s more generalized allegation of "continuing" discrimination, however, the Tribunal concluded that it was not admissible. The Tribunal cited its holding in Ms. "Y" (No. 2), *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), para. 39, that the scope of the Tribunal's review of DRE cases is limited and that the Tribunal may not examine underlying contentions of discrimination raised in the DRE *as if* they had been pursued through the steps required under GAO No. 31.¹⁰ Accordingly, concluded the Tribunal, there can be no ground for the Tribunal to find jurisdiction to review, as part of a challenge to a DRE decision, discrimination claims arising after the conclusion of the DRE process, based upon any theory of "continuing" discrimination. (Ms. "W", para. 121.)

14. In the case of Ms. "Z", the issue raised in Applicant's Additional Pleading is neither "closely linked with the challenge to the DRE decision itself," nor has it "been given some measure of review" in the Grievance Committee. (Ms. "W", para. 119.) Although Applicant asserts in her Reply in the Administrative Tribunal a non-specific allegation that she believes her participation in the DRE ". . . has had a prejudicial effect, diminishing even further possibilities for job satisfaction in the Fund," the record reveals that she did not raise such a contention in the post-DRE administrative review procedures. Additionally, there is no link between Ms. "Z"'s newly raised claim and the contested DRE decision, in which salary was raised only as to the issue of Applicant's starting salary and only tangentially with regard to the general matter of career progression.

15. Finally, the Tribunal notes that Applicant contends in her pleadings that she allegedly experienced "recurring" discrimination, which ". . . extends from the recruitment stage to the present." For the reasons articulated in

⁹The Tribunal dismissed these two claims on the merits. (Ms. "W", para. 130.)

¹⁰See *infra* Legal Framework for the Administrative Tribunal's Review of DRE Cases.

Ms. "W", para. 121, the Tribunal cannot entertain any generalized claim that Applicant sustained post-DRE discrimination.

16. For the foregoing reasons, the Tribunal will not consider any claim relating to Ms. "Z"'s merit increases beginning in 1997, as raised in Applicant's Additional Pleading of February 11, 2005. Nor will it review any pleas that Ms. "Z" has experienced "continuing" discrimination in her Fund career or that her participation in the DRE exercise had a prejudicial effect on her post-DRE career development.¹¹

The Factual Background of the Case

17. The relevant factual background, some of which is disputed between the parties, may be summarized as follows.

Ms. "Z"'s Career with the Fund

18. Applicant began her career with the Fund on June 23, 1980 as a Secretary at Grade B (equivalent to A4) in "Department 1."¹² Ms. "Z" held a bachelor's degree in languages at the time of her hire and in 1982 attained a master's degree in education and human development. In 1982, Applicant transferred to "Department 2" and, within two months of her transfer, was promoted to Grade C (equivalent to Grade A5) as a Personnel Clerk, in which grade and position she remained until 1986 when she became a Secretary in "Department 3," also at Grade A5. During her tenure in "Department 3," Ms. "Z" was promoted to Grade A6. In 1988, Applicant returned to "Department 2" where she took up the post of Personnel Assistant (later known as Human Resources Assistant) at Grade A6. Following a period of ill health in 1990, Applicant became a Grade A6 Administrative Assistant in "Department 4." In 1992, Ms. "Z" transferred to "Department 5" as an Editorial Assistant and was promoted the following year to Grade A7. In October 2004, Applicant's position was abolished and separation procedures initiated pursuant to GAO No. 16, Section 13.¹³ Following applicable reas-

¹¹Ms. "Z"'s non-specific contention that "[t]here have been no forward-looking remedies as promised in the DRE" is taken up *infra* at Consideration of the Issues of the Case; Sustainability of the DRE review of Applicant's case; The remedy granted Applicant through the DRE process.

¹²In accordance with the Administrative Tribunal's policy on protection of privacy, adopted in 1997, the departments of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal's Judgment.

¹³GAO No. 16, Section 13 provides:

"Section 13. *Reduction in Strength, Abolition of Position or Change in Job Requirements*

signment and notice periods, Ms. "Z" will receive the maximum 22½-month separation leave period, with retirement from the Fund on August 1, 2007.

The Discrimination Review Exercise (DRE)

19. The Discrimination Review Exercise (DRE) was an exceptional, one-time inquiry into cases of alleged discrimination, whenever originating, as long as they were brought to the attention of the Director of Administration during a specific, but narrow time frame, between August 28 and September 30, 1996. The DRE was initiated by the Fund to investigate and remedy, through an alternative dispute resolution mechanism, instances of past discrimination that had adversely affected the careers of Fund staff.

20. The DRE sprung from a series of studies undertaken by the Fund, following the 1992 Survey of Staff Views, to examine on both a statistical and a qualitative basis the question of possible discrimination within the Fund.¹⁴

13.01 *General.* A staff member may be separated in the event of the abolition of his position, when the position is redesigned to meet institutional needs and the incumbent is no longer qualified to meet its requirements or when a reduction in strength is required. In the event of a reduction of staff positions in the Fund, efforts shall be made to reassign staff members consistent with their qualifications and the requirements of the Fund. In reassigning staff members, consideration shall be given to their performance record, seniority, and length of service. In the event that a staff member's position is abolished, or the position is redesigned to meet institutional needs and he is no longer qualified to meet its requirements, efforts shall be made over a period of not less than six months to reassign him to another position consistent with his qualifications and the requirements of the Fund. During this period, the Fund shall also provide the staff member with appropriate training if such training will facilitate his placement in an alternate position. If all efforts to identify a reassignment fail, his appointment shall be terminated.

13.02 *Notice.* A staff member separated under the provisions of Section 13.01 shall be entitled to 60 calendar days' notice. However, the Director of Administration may extend this period up to 120 calendar days in order to allow the staff member a reasonable time, before his separation, to settle his affairs. The Director of Administration may also excuse a staff member from reporting for duty during part or all of the period of notice and place the staff member on administrative leave with pay during this period.

13.03 *Resettlement Benefits.* A staff member who is separated under the provisions of Section 13.01 shall be eligible for resettlement benefits. However, the minimum period of service required as specified in General Administrative Order No. 8 (Relocation Benefits and Separation Grant) shall not apply in such a case.

13.04 *Payment from Separation Benefits Fund.* A staff member separated under the provisions of Section 13.01 shall be granted a separation payment from the Separation Benefits Fund in accordance with the provisions of Section 4.06."

¹⁴Employment discrimination in the Fund is prohibited by Rule N-2 of the Rules and Regulations of the International Monetary Fund:

In May 1994, the Working Group on the Status of Women in the Fund released its Report "Equity and Excellence," addressing issues of gender equality. In July 1995, this work was complemented by Pelerei, "Discrimination in the Fund: A Study of the Nature, Extent, and Cause of Discrimination on the Basis of Race, Nationality, Religion and Age," a study commissioned by the Fund's Advisory Group on Discrimination.

21. Shortly thereafter, the Managing Director issued to the staff the report "Discrimination in the Fund" (December 1995), prepared by the Chairman of the Fund's Advisory Group on Discrimination, Mr. A. Mohammed. That report cited the benefits of instituting an alternative dispute resolution procedure to address cases of alleged discrimination:

"It could be argued that there are appeal channels already in place, such as the Grievance Committee and the Administrative Tribunal. These tend to involve rather elaborate legal procedures; what is being suggested here is a much simpler *ad hoc* forum for settling discrimination complaints that rankle staff who are reluctant to invoke the existing procedures for fear of inviting reprisals if they fail at what tends to be regarded as adversarial proceedings against their current, or recent, supervisors."

"Discrimination in the Fund" (December 1995), p. 34, note 1.

22. In a Memorandum to Staff in early 1996, the Managing Director noted:

"The report contains proposals for addressing the concerns of those staff who feel that they have been discriminated against, typically on grounds of race, either in terms of promotion or salary. It suggests that we might appoint an independent panel, perhaps with expert assistance from outside the Fund, to examine these cases on a confidential basis and reach conclusions as to whether the perceptions of discrimination, in career progression or in salary levels, are warranted by the facts."

(Memorandum from the Managing Director to Members of the Staff, February 9, 1996, "The Report of the Consultant on Discrimination.") In July of that year, the Managing Director again addressed the issue of the effect of possible past discrimination on the careers of current Fund staff:

"N-2. Subject to Rule N-1 above, the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, creed, or nationality. *Adopted as N-1 September 25, 1946, amended June 22, 1979.*"

For more recent steps taken by the Fund to address discrimination, see Mr. "F", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81-84.

"A difficult question remains: cases where discrimination may have adversely affected the careers of Fund staff in the past. One message that has come through quite clearly from Mr. Mohammed's work is that there are some staff who consider that they have been discriminated against to the detriment of their careers. Questions of past discrimination must be addressed, and even where these staff could have availed themselves of the Fund's grievance procedures I believe the onus is on us."

(Memorandum from the Managing Director to Members of the Staff, July 26, 1996, "Measures to Promote Staff Diversity and Address Discrimination.")

23. The framework for an ad hoc review of individual cases of alleged discrimination was announced on August 28, 1996 in a Memorandum to Staff from the Director of Administration, "Review of Individual Discrimination Cases," setting forth several avenues for the identification of cases for review, including a provision for self-identification by those individuals who believed their careers had been adversely affected by discrimination. As to how the review process would actually work, the Memorandum advised:

"The way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination. In coordinating these reviews, the Administration Department will draw on the input of subordinates, peers, and supervisors. The career record will be reviewed and those undertaking the reviews may meet with the individual employees under consideration, at the initiative of the reviewer or the employee. Where warranted, the aim will generally be to suggest remedial actions that are prospective and constructive, including assignments, mobility, training, promotions, and salary adjustments."

24. Additional information regarding the DRE process was communicated to staff on January 13, 1997 in a further Memorandum from the Director of Administration to Members of the Staff, titled "Procedures for Review of Individual Discrimination Cases." The staff was informed that the review of individual discrimination cases would be carried out by external consultants assisted by Fund staff. The role and qualifications of the consultants were described as follows:

"The review of individual discrimination cases will be carried out by external consultants [footnote omitted] assisted by a small number of Fund staff from both within and outside the Administration Department. The consultants selected for this project have a mixture of backgrounds with expertise covering discrimination, diversity, arbitration, and mediation. The consultants also have extensive experience in working with both public and private sector organizations."

25. The procedures and aims of the review were set forth in the January 13, 1997 Memorandum to Staff as follows:

“The team of consultants and staff, working in pairs, will review the background of each individual discrimination case, meet with the individuals concerned as well as others familiar with their circumstances, and make recommendations. In cases where remedial action is warranted, the aim will generally be to suggest actions that are prospective and fall within the Fund’s existing personnel policies, including reassignments, training and other development initiatives, promotions, and salary adjustments. An initial meeting will be held with each employee requesting a review to obtain background information, to discuss current and former staff members (subordinates, peers, and/or supervisor) who might be contacted by members of the review group to obtain additional information, and to identify the types of forward-looking remedies that may be considered appropriate if it is concluded that past discrimination has adversely affected the employee’s career. . . .

. . . Every effort will be made to carry out this review in as discrete and sensitive a manner as possible. While feedback sessions will be undertaken with each concerned employee to inform him or her of the outcome of this review, in those cases where discrimination has been identified, this review will not be an end in itself, but just a beginning of a process for identifying opportunities. At the end of the review process, every effort will be made to utilize the lessons learned from past discrimination cases to help further strengthen the Fund’s policies and practices to prevent discrimination in the future.”

26. Following the conclusion of the DRE process, the Fund issued the “Report of the Consultants on the Discrimination Review” (“Consultants’ Report”), in which the consultants summarized the methodology and outcomes of the review. Some 70 cases had been reviewed, approximately 70 percent of which alleged discrimination primarily on grounds of race or nationality, 20 percent on grounds of gender, and the remaining 10 percent on grounds of age or religion. *Id.*, p. 5.

27. The Consultants’ Report describes the role and methods of the consultants and Fund officials in carrying out investigations and arriving at remedial action:

“II. METHODOLOGY

Review of the individual discrimination cases was conducted by five review teams, each including one outside consultant and one Fund staff member. [footnote omitted] Each of the cases submitted under the discrimination review exercise was assigned to one of the five teams. The five

teams, the Fund's Special Advisor on Diversity, and the Director of ADM formed a committee which met on a regular basis to discuss the policies and procedures of the discrimination review process. To ensure consistency in the exercise, review teams presented selected individual cases to the full committee for evaluation.

Individual reviews consisted of (1) an initial interview with the applicant; (2) interviews with others having knowledge of the applicant's Fund career ('contacts' limited to those authorized by applicants) including, supervisors, subordinates, peers, and others; (3) statistical analysis, where required; and (4) a feedback interview with the applicant. During the course of the review, the teams conducted approximately 600 contact interviews.

All initial interviews were conducted by both team members (i.e., outside consultant and Fund staff representative) except where applicants requested private meetings with the outside consultant. Many contact interviews were conducted by one team member, rather than both. Fund team members interviewed some contacts privately. However, all such interviews were with 'secondary contacts' (i.e., contacts having important but not pivotal information regarding cases). Where Fund staff's findings were potentially determinative, the outside consultants conducted follow-up interviews with contacts. The teams advised contacts to respect the confidential nature of the process and informed them that feedback would be given to applicants in aggregate form to preserve anonymity in the process. Following the interviews with applicants and contacts, and a review of all relevant documentation, the teams reported their findings and conclusions to each applicant. Once again, final interviews were conducted by both team members except in cases where applicants requested a private meeting with the outside consultant.

Although the teams attempted to reach consensus on a case-by-case basis, the outside consultants made final determinations regarding the merit of claims presented. The outside consultants also suggested remedial action on a case-by-case basis. However, remedies were limited by the decision taken at the outset of the exercise to provide remedies that were both prospective and, to the extent possible, within the framework of the Fund's existing personnel policies. Some of these limiting factors included: (1) promotion opportunities; (2) applicants' current competitiveness for job openings; (3) budgetary constraints; (4) time-in-grade requirements; and (5) the promotion procedures of the review committees. . . ."

Id., pp. 4-5.

28. As for the outcome of the review, the consultants reported that the DRE review teams had made recommendations for 67 of the 70 cases filed. Indications of "unfair or uneven treatment" had been identified in approxi-

mately half of these. The table appended to the Report divides the outcomes between those in which “Indications of Unfair or Uneven Treatment” were found and those in which no such indications were found; there is no category titled “discrimination.” The Report explains that only in a “small number of cases” was there “clear evidence of discrimination:”

“The discrimination review exercise was not designed to prove the presence or absence of discrimination to a high legal standard. The indications of unfair or uneven treatment varied a good deal as regards the amount and clarity of evidence available. In a small number of cases—mainly involving starting salaries or salaries on transfer to a different career stream—there was clear evidence of discrimination. In the majority of cases, however, the judgments made by the review teams were far more subjective based, at times, on sketchy evidence sometimes going back as much as 20–25 years. **In arriving at their judgments, the review teams were influenced by a desire, where possible, to give the staff member the benefit of the doubt.**”

Id., p. 6. (Emphasis in original.) As to the distribution of outcomes among different groups of staff, the Report concluded:

“The indicators of unfair or uneven treatment were related to primary factors roughly proportional to the overall distribution of candidates, with 77 percent of the candidates for whom unfair treatment was found linked primarily to race/nationality, 20 percent to gender, and 3 percent to age. While these were the primary factors, in many cases age was also an important secondary factor that limited advancement in the later stages of a career that may have been hampered at an early stage by nationality, race, and/or gender considerations.”

Id., p. 6.

29. With respect to the use of promotion as a remedy, the consultants reported:

“In 17 of these 35 candidates for whom there was an indication of unfair or uneven treatment, the primary remedial outcome of the review was a promotion. In some of these 17 cases, the staff member was already in the process of obtaining a sought after promotion during the course of the discrimination review exercise and there was no support or intervention from management or ADM to help bring about the promotion. In other cases, such promotions took place largely as a result of internal market forces but with some support provided by management or the ADM. In yet other of these 17 cases, the promotion came about as a direct result of a specific decision taken by management and/or ADM outside the framework of the normal internal market.”

Id., pp. 6–7. As for the remedy of within-grade salary adjustment, the Report noted:

“In another 15 of the 35 cases in which some indications of uneven or unfair treatment were identified, a within-grade-salary adjustment averaging 6.2 percent was the primary remedial action. In many of these 32 cases in which a promotion and/or within-grade-salary adjustment was a primary outcome of the exercise, the staff members also received (and in a number of cases are continuing to receive) support in the form of training, reassignments, coaching, and mentoring. In three cases in which unfair or uneven treatment was identified, the remedial action did not involve a promotion or a within-grade-salary adjustment, but did include this type of career development support.”

Id., p. 7. The consultants further reported that, in 10 of the 32 cases in which no indication of unfair or uneven treatment was found, some form of supportive action, such as training or reassignment, nonetheless was being provided as an outcome of the review. *Id.*, p. 7.

30. Finally, the Consultants’ Report provided data on DRE outcomes analyzed by gender:

“The discrimination cases of 37 men and 30 women were reviewed, and the proportion of candidates for whom indications of unfair or uneven treatment was identified was roughly equal for both (53 percent of the women and 49 percent of the men). The proportion of men and women for whom a promotion was an outcome of this exercise was also comparable, although a larger proportion of women (27 percent) received within grade salary adjustments than men (19 percent), and the average size of the adjustment was larger for women (6.6 percent) than men (5.7 percent). This reflected the fact that a relatively low starting salary for women accounted for a number of the cases of unfair treatment identified.”

Id., p. 7. The table accompanying the Report indicates that promotion was the primary remedy for 23 percent of women and for 27 percent of men.

The Application of the DRE to the Case of Ms. "Z"

31. In response to the Director of Administration’s August 28, 1996 Memorandum to Staff, Applicant on September 30, 1996, requested review under the DRE on the ground that her Fund career had been adversely affected by “race and gender considerations”:

“I believe my career in the Fund was adversely affected because of race and gender considerations, reinforced by the Fund’s unique culture of rewards

and punishment. I have been able to assess, in retrospect, that the exceptional treatment I have received from the Fund as a staff member goes back to the period when I joined the institution in June 1980, intensifying as I occupied positions in ["Department 2"]. From 1990, when my health was seriously affected because of unnecessarily stressful work conditions, I left my career aspirations and gradually regained a balanced life.

The fact that after sixteen years of Fund employment I have not been able to have a long-term performance assessment is quite telling in my case, because I am not one to let opportunities for career development slip by. Before I joined the Fund I had already invested a great deal of effort in a career I then seriously adapted to Fund requirements. My efforts have only been rewarded by silence from ["Department 2"] officials regarding serious career prospects. On the other hand, my work initiative and valuable skills have been blatantly misused and mistreated along different stages of my tenure in that Department."

32. Pursuant to the DRE procedures, the review of Applicant's case was conducted by a review team appointed by the Fund, consisting of an outside consultant ("external team member") and an Administrative Officer in one of the Fund's departments ("internal or Fund team member"). The team held its initial meeting with Ms. "Z" on March 12, 1997.

33. As a follow-up to her initial meeting with the review team, Ms. "Z" provided the team members with a written account detailing various incidents of alleged discrimination in her Fund career. These included: a) the setting of her initial salary at a figure allegedly lower than that quoted at the interview; b) allegedly being placed "on probation" upon transfer to "Department 2"; c) the grading of her post in "Department 2" as a result of the Fund's job grading exercise; d) her return to "Department 2," following employment with "Department 3," allegedly resulting in "demotion" rather than promotion as she had expected; e) mistreatment in the new unit of "Department 2" to which she was assigned, including alleged exclusion from meetings and being subject to "racist remarks," resulting in damage to her health; and f) non-selection for vacancies to which she had applied. Applicant further asserted in her written submission to the review team:

"I am certain that a male, or a European woman, preferably with a British accent, would never have been subjected to such a post [in "Department 2"] or be treated the way I was treated by Fund managers. They would not have been invited to join a problematic place without granting the initial support required to carry out a position of responsibility; their grade would not have been lowered; and their pleas would not have been

ignored. I am certain things would have been different for a male or an Anglo-Saxon.

...

... I am treated respectfully in ["Department 5"] and I don't consider that I am discriminated against in my current position.

...

My health is now my main priority, I am self-motivated and try to maintain my positive outlook as I do the work that the Fund allows me to undertake. This does not mean, however, that I do not carry the impact of the discrimination I have suffered. This continues to be a very real part of my life, reflected in my salary and, above all in my professional satisfaction."

34. On September 26, 1997, Applicant forwarded to the external team member additional Annual Performance Reports, which she contended "... verify my potential as a very valuable part of the staff deserving further development." She urged the review team to contact individuals whose names she earlier had provided because "I believe that it is very important that you verify the quality of work they observed through my career."

35. On October 14, 1997, following a phone conversation with the external team member, Ms. "Z" contacted the Director of Administration requesting that a new consultant be assigned to her case, as it was her view that the external team member "seems to be overwhelmed and not attending to the details of my case." Applicant further asserted that the consultant had "not contacted any of my witnesses" and would not disclose whom he had contacted. Accordingly, Applicant had concluded "... I cannot see [the external team member] as someone competent or capable of reaching a fair decision ..."

36. The Director of Administration responded on November 21, 1997, informing Applicant that the review team members had agreed to interview a wider range of contacts to obtain additional information. In view of these assurances and the fact that the team had already invested time on Ms. "Z"'s case, the ADM Director directed the team to continue its review of Applicant's case. Three days later, Applicant again sought a replacement review team, as she was "quite certain that the approach has been biased" and focused on a narrow period of her career. This request also was unsuccessful and the initial team went on to complete its review.

37. At the conclusion of its investigation, the DRE review team summarized in its confidential case report its findings and recommendations as to Appli-

cant's contentions that she had been discriminated against "based on nationality, race, gender, and age." Having reviewed a series of events that Applicant had brought to its attention and testing the allegations through interviews and review of documentation, the team identified only one irregularity:

"The only evidence of unfair treatment that the Review Team could find was that Ms. ["Z"] did not receive credit for her bilingual skills (French and Spanish) when she joined the Fund in 1980."

Having found that Ms. "Z" had used these skills extensively while assigned to "Department 1" and determining that a salary adjustment in 1991 had been insufficient to compensate her consistent with Fund policies, the review team recommended "[i]n the proactive spirit of this exercise" a 4.0 percent one-time salary adjustment effective May 1, 1998.

38. On May 7, 1998, the review team held a final meeting with Ms. "Z" to report its findings and recommendations. By memorandum to Applicant of May 21, 1998, the Director of Administration affirmed the review team's conclusions and recommendations as follows:

"... I have approved the recommendations recently made by the external consultant/staff team responsible for carrying out the ad hoc review of your individual case. The remedial action approved in your case will include a 4.0 percent one-time salary adjustment within you current grade ... effective May 1, 1998. The merit increase recommended by your department as of May 1, 1998, will be applied to this new salary. As indicated in my earlier note to the staff-at-large, in cases where it appears there may have been unfair or uneven treatment, the review will not be an end in itself, but just the beginning of a process for identifying opportunities.

...

... the fact that we are taking steps on your behalf as a result of this review does not constitute evidence of discrimination."

It is the May 29, 1998 decision of the Director of Administration that is contested in the Administrative Tribunal.

The Channels of Administrative Review

39. On November 2, 1998, Applicant sought administrative review by the Director of Administration, maintaining that "[m]y reasons for requesting to participate in the discrimination review go well beyond unremunerated language skills. . . ." Furthermore, Applicant contended that the review "... has not been an objective, impartial exercise," and that from the time she was hired

by the Fund Applicant had "... received treatment that would not be given to a male or a person with a British accent with equal qualifications and experience." In a similar vein to the charges she had presented to the review team, Ms. "Z" took the opportunity to set forth in detail elements of her career history and the manner in which she believed it had been affected by discrimination.

40. On November 16, 1998, the Director of Administration confirmed the May 29, 1998 decision. Applicant filed her Grievance on January 15, 1999.

41. After an unsuccessful period of voluntary mediation pursuant to a plan designed to expedite resolution of the DRE cases, Applicant's Grievance was considered by the Grievance Committee in the usual manner, on the basis of oral hearings and briefs of the parties. The Grievance Committee issued its Recommendation and Report on September 15, 2003. The Committee found that the investigation by the DRE review team was "procedurally sound" and that Ms. "Z" had not established that the team's findings and recommendations were arbitrary, capricious or discriminatory. Accordingly, the Committee recommended that Applicant's Grievance be denied. The Committee's recommendation, which included an *ex gratia* payment for legal fees, was accepted by Fund management.

42. On March 10, 2004, Ms. "Z" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

43. The principal arguments presented by Applicant in her Application and Reply may be summarized as follows.

1. Applicant has experienced discrimination on the basis of gender, ethnicity or national origin, and age, which has prevented her from attaining a Fund career commensurate with her qualifications and experience.
2. Applicant was not afforded fair process in the DRE review of her claims. An incompetent review team was arbitrarily assigned to her case and this defect was not remedied when Applicant complained.
3. The Administration Department and its Assistant Director, who was affected by a conflict of interest, improperly influenced the review of Applicant's case.

4. The review team failed to interview important witnesses, while staff who were not relevant were interviewed.
5. The Fund's internal studies such as the reports of the Working Group on the Status of Women in the Fund and of the Chairman of the Fund's Advisory Group on Discrimination substantiate the existence of discrimination in the Fund and should have been considered by the DRE review team in its investigation of Applicant's claims.
6. Applicant experienced discrimination in the DRE process itself, which disproportionately benefited male complainants.
7. Participation in the DRE has had a prejudicial effect, diminishing even further possibilities for Applicant's job satisfaction in the Fund.
8. Although discrimination has not been confined to one event or period of Applicant's career with the Fund, the following incidents represent discrimination:
 - a. Applicant's starting salary was set a level lower than that quoted at interviews;
 - b. Applicant was placed "on probation" after transferring to a new Division;
 - c. Applicant was not fairly graded as a result of the 1985 job grading exercise;
 - d. Applicant was denied a requested Long Term Career Assessment and was not supported in her career development;
 - e. Applicant was "practically demoted" upon her transfer to a new work unit;
 - f. Applicant experienced mistreatment, racist remarks, and lack of support from supervisors in the new unit, resulting in health problems and an end to her career ambitions;
 - g. Applicant was denied career advancement, as she was not selected for some twenty vacancies to which she applied; and
 - h. until the outcome of the DRE, Applicant was not remunerated for her use of multiple languages consistently applied on the job, although she had requested the language premium.

9. The Fund's Grievance Committee failed to conduct its review of Applicant's Grievance in a neutral and professional manner and in accordance with due process.
10. Applicant seeks as relief:
 - a. compensation in the amount of three years' salary at highest level of Grade A-11;
 - b. administrative leave plus 30 months terminal leave;
 - c. separation lump sum in the amount of 22½ months salary;
 - d. repatriation/separation benefits;
 - e. outplacement package, including university-level courses; and
 - f. legal costs.

Respondent's principal contentions

44. The principal arguments presented by Respondent in its Answer and Rejoinder may be summarized as follows.

1. The only decision properly before the Administrative Tribunal is the decision of the Director of Administration adopting the findings and recommendations of the DRE review team. Applicant has not shown that this decision was arbitrary, capricious, discriminatory or procedurally defective.
2. The procedures followed in the DRE review of Applicant's claims were consistent with the procedures established for the DRE and upheld by the Tribunal in *Ms. "Y" (No. 2)*, as well as with the procedures applied in other DRE cases.
3. The Fund properly exercised its discretion in appointing the members of the DRE review team, who were well qualified to conduct the review.
4. The DRE team properly exercised its discretion in the selection of relevant witnesses to interview in the review of Applicant's claims.
5. The DRE review of Applicant's complaint was not affected by any conflict of interest or by any improper influence of the Administration Department or its Assistant Director.

6. The DRE process correctly concluded that there was no evidence of discrimination in Applicant's case. The DRE review team thoroughly reviewed each instance of alleged discrimination raised by Applicant and found each allegation to be unsubstantiated:
 - a. the setting of Applicant's starting salary was not improper nor the result of discrimination;
 - b. Applicant was not subjected to a discriminatory probationary period following transfer to a new Division in 1982;
 - c. Applicant has not shown that her position was "grossly under graded" as a result of the 1985 Fund-wide job grading exercise;
 - d. the Fund did not discriminatorily deny Applicant a Long Term Career Assessment or fail to give support to her career development;
 - e. Applicant was not demoted when she transferred to a new work unit in 1988;
 - f. there is no evidence that Applicant was discriminated against by her supervisor in the new unit;
 - g. Applicant has not shown that discrimination played a role in her non-selection for vacancies; and
 - h. Applicant was not discriminatorily denied compensation for use of her language skills; however, as an outcome of the DRE, Applicant was granted a salary adjustment to compensate for regular use of multiple language skills in her first Fund assignment.
7. The Administrative Tribunal does not serve as an appellate body with respect to the decisions and proceedings of the Grievance Committee.
8. Applicant was afforded due process during the Grievance Committee proceedings.

Legal Framework for the Administrative Tribunal's Review of DRE Cases

45. The case of Ms. "Z" and another recently decided of Ms. "W", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005) are the final cases arising from the Discrimination

Review Exercise (DRE) to be presented for review by the Administrative Tribunal. In an earlier Judgment, *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal established the framework for its review of such cases.

46. In *Ms. "Y" (No. 2)*, the applicant sought *de novo* review by the Tribunal of the merits of her underlying claims of discrimination, which she contended were not fully and fairly examined under the DRE process. Respondent maintained that review of the underlying claims by the Administrative Tribunal was not appropriate because Ms. "Y" had failed to raise these claims on a timely basis under the administrative review procedures of GAO No. 31. Respondent accordingly contended that review in the Administrative Tribunal was to be limited to challenges to the fairness of the conduct of the DRE process itself.

47. The Tribunal concluded that a limited measure of review was to be undertaken by the Tribunal, explaining its reasoning as follows. At the time the DRE was implemented, the Fund had announced to the staff that the alternative dispute resolution mechanism did not confer any new rights, nor replicate or replace the Fund's grievance procedure. Ms. "Y" had taken no steps to contest the abolition of her position, or any other decision of the Fund that she alleged was discriminatory, through the formal channels of review provided under GAO No. 31 for staff to challenge adverse personnel decisions. The Tribunal therefore rejected the view that because Ms. "Y"'s allegations of discrimination had been subject to the DRE, they could be reviewed by the Tribunal in the same manner as if they had been pursued on a timely basis through the formal administrative review procedures. Citing the value of timely, formal administrative review to the reliability of later adjudication by the Administrative Tribunal, the Tribunal emphasized that the DRE procedures were, ". . . by definition and design, intended to offer a mechanism for resolution of allegations of discrimination distinct from those afforded by legal proceedings" (para. 49) and that the depth of the Tribunal's review was limited in part by the nature of the record of the DRE proceedings before it (para. 65).¹⁵

48. In addition, in holding that review of Ms. "Y"'s underlying discrimination claims had been foreclosed because the mandatory time periods for invoking prior steps prescribed by GAO No. 31 had expired, the Adminis-

¹⁵See also *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 110, observing that in *Ms. "Y" (No. 2)* the Administrative Tribunal had ". . . underscored the limited measure of its review of the informal discrimination review process" in light of the nature of the decision-making process under review.

trative Tribunal made clear that the only decision that could be subject to review by the Grievance Committee, and thereafter by the Administrative Tribunal, was the decision of the Director of Administration affirming the DRE review team's conclusions. Accordingly, the Administrative Tribunal rejected the view that because the applicant's allegations of discrimination had been subject to the DRE, they could be reviewed by the Tribunal *as if* they had been pursued on a timely basis through GAO No. 31. (Para. 39.)

49. At the same time, however, the Tribunal concluded that, as Ms. "Y" had challenged the Director of Administration's decision upholding the DRE team's conclusion that her career was not adversely affected by discrimination, ". . . examination of that conclusion necessarily entails some consideration of whether the Applicant's career did suffer discrimination." (Para. 41.) The Tribunal continued: "That consideration may be distinguished, however, from the *de novo* examination by the Tribunal of the underlying claims that Applicant seeks." (Para. 41.) The same standard shall be applied in the present case.¹⁶

50. In addition to challenging the "individual decision" in her case, aspects of Ms. "Y"'s Application appeared to impugn the DRE process more generally by asserting that the DRE lacked many of the attributes of a formal legal proceeding such as a written record. In response to these contentions, the Tribunal in *Ms. "Y" (No. 2)* upheld as a lawful exercise of the Fund's discretionary authority the decision to implement as part of its human resources functions a means to remedy, during a narrow time frame, instances of past discrimination that reached beyond statutory time bars and had not previously been raised through the formal administrative review procedures. The Tribunal concluded that the DRE

" . . . was a good faith effort on the part of the Fund, perhaps unprecedented among international organizations, to resolve lingering allegations of past discrimination and to remedy the adverse effects of discrimination on the careers of aggrieved staff members. . . . The DRE was undertaken as a result of reasoned consideration by the Fund's administration, based on recommendations made in an extensive study 'Discrimination in the Fund' (December 1995), suggesting that a procedure alternative to formal adjudication would facilitate the resolution of longstanding complaints."

¹⁶The standard of review invoked by the Administrative Tribunal in reviewing the limited number of cases arising under the unique circumstances of the DRE procedure therefore differs from that applied when a contention of discrimination is brought to the Tribunal through the usual channels of administrative review pursuant to GAO No. 31. *See Mr. "F"*, note 13.

(Para. 48.) The Administrative Tribunal in *Ms. "Y"* (No. 2) furthermore concluded that the procedures adopted for the DRE, for example, confidentiality and lack of a written record, appeared to have been rationally related to its purposes and that, accordingly, the implementation of the DRE was a proper exercise of the Fund's managerial discretion. (Paras. 49, 52.)

51. Finally, the Tribunal in *Ms. "Y"* (No. 2) subjected to review for abuse of discretion the conduct of the DRE process as applied in *Ms. "Y"*'s case, citing the standard set forth in the Commentary on the Tribunal's Statute:

" . . . with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."

(Report of the Executive Board, p. 19.) The Tribunal considered: a) whether the procedures applied by the DRE review team in *Ms. "Y"*'s case were consistent with the procedures established for the DRE and with those applied by the DRE teams in other cases; b) whether the conclusions of the DRE team in *Ms. "Y"*'s case, and their ratification by the Director of Administration, were reasonably supported by evidence; and c) whether the investigation of *Ms. "Y"*'s claims was tainted by any bias. After examining the evidence, the Tribunal held ". . . first, that the proceedings of the DRE in respect of *Ms. "Y"*'s claims were regular, appropriate and unexceptionable and, second, that there is no ground for questioning the conclusion of the DRE that the Applicant's career disposition was unaffected by discrimination." (Para. 80.) The Application of *Ms. "Y"* was accordingly denied.

Consideration of the Issues of the Case

52. Applying the framework developed in *Ms. "Y"* (No. 2), the Tribunal now considers the contentions presented by *Ms. "Z"*. These contentions may be outlined as follows: 1) procedural allegations relating to the DRE review of Applicant's claims; 2) sustainability of the DRE's findings and conclusions; and 3) allegations relating to the Grievance Committee's review of *Ms. "Z"*'s challenge to the DRE decision.

Procedural Allegations relating to the DRE review of Applicant's claims

53. Applicant contends that the DRE review of her case was affected by a series of deficiencies inconsistent with the procedures established for the

DRE and with the fair resolution of her complaint. In particular, Applicant challenges: a) the composition of the review team; b) the influence of the Administration Department and its Assistant Director; and c) the methodology applied by the DRE review team in Applicant's case. These contentions are reviewed below.

54. It is also noted that Applicant challenges features of the DRE process, for example, lack of a written record of investigation, that the Tribunal previously has upheld as rationally related to the purpose of the exercise. (*See Ms. "Y" (No. 2)*, para. 49.) As considered *supra*,¹⁷ the Administrative Tribunal has ratified the general contours of the DRE process as a proper exercise of the Fund's discretionary authority, observing that "[s]uch alternative procedures are, by definition and design, intended to offer a mechanism for resolution of claims distinct from those afforded by legal proceedings." (*Ms. "Y" (No. 2)*, para. 49.) Furthermore, contrary to Ms. "Z"'s assertion that "there were no guidelines or established protocol to conduct a consistent and fair process," such guidelines were issued to the staff¹⁸ and provide a basis for the Tribunal's consideration of challenges to the fairness and consistency of the DRE procedures in individual cases. *See Ms. "Y" (No. 2)*, paras. 55-62; *Ms. "W"*, paras. 70-90.

Composition of the DRE review team

55. Applicant questions the qualifications of both review team members assigned to her case, contending that an incompetent review team was arbitrarily assigned to review her DRE complaint, and that this defect was not remedied when Applicant sought a replacement team.

56. In particular, in testimony before the Grievance Committee, Applicant expressed the view that the Fund team member was not qualified to undertake a discrimination review and that the external team member relied heavily upon the Fund team member. Furthermore, Applicant alleges that the external team member was "directed" by the Assistant ADM Director who had engaged him to take part in the DRE process. Respondent denies these charges.

57. The Tribunal finds that the external team member's qualifications, as an experienced human resources and diversity consultant who had performed internal investigations of alleged discrimination for other employ-

¹⁷*See supra* Legal Framework for the Administrative Tribunal's Review of DRE Cases.

¹⁸*See supra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

ers in addition to the Fund, met those prescribed for the consultants as announced in the Memorandum to Staff of January 13, 1997.¹⁹ That Memorandum stated that the outside consultants were to have ". . . a mixture of backgrounds with expertise covering discrimination, diversity, arbitration and mediation." Additionally, the qualifications of the internal team member, a seasoned staff member who had acquired experience with the Fund's human resource policies while serving as Administrative Officer in one of the Fund's departments, and had coursework in the field, likewise were consistent with those contemplated by the DRE.

58. Evidence that the team members did not play the roles provided for in the DRE memoranda is similarly lacking. The applicable Memorandum provided: "The review of individual cases will be carried out by external consultants [footnote omitted] assisted by a small number of Fund staff from both within and outside the Administration Department." The Fund team member testified that her ". . . role in this was to support [the external team member], it was more of a supporting role. I knew the Fund . . ." whereas the external team member, in her view, ". . . took the lead role, he was the expert in discrimination . . ." and was the principal author of the team's report. The practices described by the review team members in Ms. "Z"'s case are, furthermore, consistent with those summarized in the Consultants' Report prepared at the conclusion of the entire Discrimination Review Exercise.²⁰

59. Applicant additionally asserts that the assignment of the particular review team to her case was a further manifestation of alleged discrimination, maintaining that the team would not have been assigned to senior staff. In the Grievance Committee, Ms. "Z" charged: ". . . I was discriminated one more time because of my looks, because of my gender, because of my race, and I was given incompetent reviewers." Applicant, however, put forth no evidence of any discrimination in the assignment of the team to her case.

¹⁹In Ms. "Y" (No. 2), para. 55, the Tribunal observed that in reviewing a decision for abuse of discretion, "[i]nternational administrative tribunals have emphasized the importance of observance by an organization of its procedural rules . . ." citing *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 23, and considered whether the procedures applied to the DRE review of Ms. "Y"'s claim were consistent with the procedures set forth for the DRE. As described *supra*, the procedures under which the DRE would operate were set forth in Memoranda to Staff of August 28, 1996 and January 13, 1997.

²⁰See *supra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

60. As for the denial of Applicant's request for a replacement review team,²¹ the Tribunal finds this decision was reasonably taken and that the Fund's Administration dealt fairly in responding to Ms. "Z"'s complaint about the team by directing that it expand the range of contacts to be interviewed.

61. Accordingly, in the view of the Tribunal, there was no evidence that the qualifications of the review team members were lacking or that the role performed by the external team member was improperly influenced by Fund officials. Moreover, the working relationship between the two team members, as well their interactions with the Administration Department, which oversaw the exercise, *see infra*, were fully consistent with the procedures set out for the DRE.

Influence of the Administration Department and its Assistant Director

62. Applicant contends that the Administration Department and its Assistant Director exercised an inappropriate role in the review of her DRE complaint. More generally, Applicant alleges that the DRE was managed by the ADM officials who ". . . created the problems to begin with" and could not "assess objectively the flaws in the system to bring a solution." The Tribunal considers that this contention assails the underlying decision to undertake the DRE, and its basic framework, acts previously upheld by the Tribunal in *Ms. "Y" (No. 2)* as within the lawful exercise of the managerial discretion of the Fund.

63. As to the review of her individual case, Applicant questions the ADM Assistant Director's "close participation in the process" on grounds of alleged conflict of interest, as Ms. "Z" attributed to him broad responsibility for many of the allegedly discriminatory acts of which she viewed herself as the object. Applicant maintains in her pleadings before the Tribunal that the ADM Assistant Director was "connected with, if not responsible for" actions "blocking" her career in "Department 2," which were at the center of the DRE investigation. Moreover, she contends that he "influence[d] . . . the direction taken by the team." In her Grievance Committee testimony, Applicant amplified her view that this official, as a result of his particular role in discharging human resource policies, was ". . . very powerful and he

²¹*See supra* The Factual Background of the Case; The Application of the DRE to the Case of Ms. "Z".

is one of the factors involved in blocking people like me at the professional levels. . . ."

64. The external team member in his testimony denied any improper influence by ADM:

"Q Did you reach those conclusions or those findings independently?"

A That is correct.

Q Did you confer with [the Assistant Director of ADM] or [the ADM Director] as to what kind of recommendation you would make in Ms. ["Z"]'s case?"

A No, we did not.

Q Did you confer with anyone else, apart from [the Fund team member]?"

A It was [the Fund team member] and myself."

65. As to the alleged conflict of interest represented by the ADM Assistant Director's role in the Discrimination Review Exercise, the Tribunal concludes as follows. While Applicant attributed to the ADM Assistant Director some of the discriminatory acts she alleged in her DRE complaint, the record shows that his involvement in these events was attenuated at most, although he was interviewed as a "contact" in the DRE investigation. Moreover, the role assumed by the ADM Assistant Director in the DRE review of Applicant's claim was a limited one, consistent with his role in other DRE cases. Contrary to Ms. "Z"'s view that the ADM Assistant Director prejudiced the direction or outcome of the DRE review in a manner unfavorable to Applicant, the Tribunal finds that he intervened to take action responsive to Applicant's complaint about the conduct of the review, directing the DRE team to widen the scope of contacts interviewed. The Tribunal finds no conflict of interest in the role of the ADM Assistant Director.

66. In Ms. "Y" (No. 2), the Administrative Tribunal established that a measure of the procedural fairness accorded in an individual DRE case is consistency with the procedures applied by the DRE teams in other cases. (Paras. 54-55.) The former Assistant Director of Administration testified that, in addition to his role of serving as a member of one of the five review teams (not the team assigned to Ms. "Z"'s case), he assisted the Director of Administration in coordinating the overall review, serving as ". . . sort of a liaison between the five teams to help ensure some consistency of approach in the way they went about the reviews. . . ." According to the ADM Assistant Director, the five review teams, the Director of Administration and the Diversity Advisor met periodically to maintain this consistency of approach.

This practice is also described in the Consultants' Report.²² *See also Ms. "W"*, para. 77.

67. Ms. "Z" questions the procedures followed by the DRE team and alleges that the former Assistant Director of Administration exerted undue influence over it. The Tribunal finds that the procedures followed were consistent with those of other teams, that those procedures were reasonable, and that the measure of involvement of the Administration Department was appropriate. Indeed, the record supports the view that ADM and its Assistant Director helped to assure that the procedures applied to Ms. "Z"'s case were consistent with those set forth for the DRE and applied by the review teams in other cases.

The methodology applied by the DRE review team in Applicant's case

68. Ms. "Z" advances the following complaints in respect of the methodology adopted by the review team in her case. Applicant maintains that Fund studies such as those of the Working Group on the Status of Women and the Report of the Chairman of the Fund's Advisory Group on Discrimination "should have been considered by the review team" in its investigation of Applicant's DRE complaint. Applicant asserts that the review team "... did not look at real comparators, i.e. men with comparable qualifications and experience, which would clearly have pointed to the preferential treatment received in the Fund by males, and then by English speakers, particularly from U.K. countries." Applicant contends, furthermore, that staff who were not relevant to the investigation were interviewed while important witnesses were left out of the review of her complaint.

69. The Tribunal observes that in her Application Ms. "Z" maintains that the discrimination of which she views herself as being the object was "not related to just one event or one period" of her Fund career. Accordingly, she appears to take issue with the review team's effort to focus its investigation on the series of incidents that Applicant herself called to its attention through her communications with the team. In her Grievance Committee testimony, Applicant emphasized, as to one of these incidents, that it was "... an example of one very small piece in the whole picture." Furthermore, she perceived that the team focused on an "aberrant" period of her career during which her performance ratings dropped; this period,

²²*See supra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

however, was the one in which she alleged that she experienced the most overt discrimination.

70. The external team member explained that he viewed discrimination as "a pattern of events over time," but that it was necessary to have ". . . certain situations that I can investigate. I can't investigate the whole thing. . . ." He later reiterated, ". . . we zeroed in on specific cases, situations of discrimination, and tried to address those. We didn't take it into a broader holistic gestalt of what was going on."

71. The Tribunal observes that the approach taken in the DRE review of Ms. "Z"'s claim differed from that taken in the case of Ms. "W", in which the review team proceeded from a "rebuttable presumption" of discrimination as established by the Fund's earlier studies. In Ms. "W", the Tribunal considered that the applicant in that case had proffered to the DRE team no specific instances or acts of discrimination from which her Fund career had suffered, and therefore concluded that it was understandable that the DRE team sought to find out whether there were other impedimenta to her career. The Tribunal concluded that the decision to proceed in this manner was ". . . within the leeway provided review teams under the procedures governing the review process, and there is no evidence that this particular methodology prejudiced the outcome of the review of Applicant's case." (Ms. "W", para. 88.)²³

72. As the Tribunal commented in Ms. "Y" (No. 2), para. 55, "[t]he hallmark of [the DRE] procedures was their flexibility. . . . [h]ence, the procedures contemplated a considerable degree of latitude for the review teams in undertaking their investigation." As stated in the Memorandum to Staff from the Director of Administration, "Review of Individual Discrimination Cases," August 28, 1996, "[t]he way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination." See Ms. "W", para. 87.

73. In the present case of Ms. "Z", the Applicant did bring to the DRE team's attention a series of incidents which, in her view, evidenced dis-

²³It is to be noted that while Ms. "W" agreed that Fund studies established a "rebuttable presumption" of discrimination in her case, in the Tribunal she challenged the propriety of the effort to find elements of rebuttal. Ms. "W" maintained that the DRE inquiry was prejudiced by the review team's effort to ferret out possible skill deficits to seek to explain any career disparity between Ms. "W" and male economists. The Tribunal concluded that the review team's application of a "rebuttable presumption" of discrimination did not amount to a failure of fair procedure and that there was no evidence that the particular methodology prejudiced the outcome of the review. (Ms. "W", paras. 87-88.)

crimination in her Fund career. Accordingly, the DRE review of Ms. "Z"'s case proceeded along the same lines as that of Ms. "Y", i.e. to investigate specific claims by interviewing relevant contacts and reviewing documentation. *See Ms. "Y" (No. 2)*, paras. 68-72. The external team member further testified that he had familiarized himself with the internal Fund studies as background material to undertaking the reviews of individual cases. This approach is entirely consistent with the overall method contemplated for the DRE exercise and upheld by the Administrative Tribunal. *See Ms. "Y" (No. 2)*, paras. 42-52.

74. To the extent that Ms. "Z"'s Application suggests that statistics alone might establish discrimination in her case, the Tribunal recalls that in *Ms. "W"*, para. 21, it rejected this very contention and concluded that the Fund's decision to base the DRE review of individual cases upon qualitative as well as statistical factors was not arbitrary, capricious or discriminatory. *See also Sebastian (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 57 (1988), para. 34 ("Discrimination against the Applicant cannot be proven by the mere presentation of general statistics purporting to show that as a class the women employees of the Bank are not treated as well as male employees"); *Nunberg v. International Bank for Reconstruction and Development*, WBAT Decision No. 245 (2001), paras. 53-58; *Alexander v. Asian Development Bank*, AsDBAT Decision No. 40 (1998), para. 76 ("In regard to such general evidence presented by the Applicant in aid of her claim of gender discrimination, the Tribunal finds that although it may provide useful background for such a claim, particularly in the way it manifests the overall atmosphere within the Bank, it does not by itself suffice to prove such a claim").

75. Finally, as to Applicant's contention that the DRE review team failed to interview relevant witnesses, the Tribunal finds as follows. The team interviewed more than twenty individuals in connection with the investigation of Ms. "Z"'s claims. Applicant conceded that, following ADM's intervention, these included most of those contacts included on her original list. Moreover, the record reveals that the team took a reasoned, and not arbitrary, approach to the selection of witnesses. According to the external team member's testimony, he reviewed Ms. "Z"'s proposed contact list with her, seeking explanations as to the potential relevancy of each individual to the investigation of Applicant's DRE complaint. This approach was within discretion to be exercised by the review teams. *See also Ms. "Y" (No. 2)*, paras. 59-60 (affirming rationale of review team in selecting a sampling of witnesses, consistent with the procedures undertaken in other DRE cases).

76. In sum, as to Applicant's procedural allegations, the Tribunal concludes that the procedures applied by the Fund in the DRE review of Ms. "Z"'s case were reasonable, appropriate and consistent with the DRE procedures and with the fair resolution of Applicant's claim.

Sustainability of the findings and conclusions of the DRE review of Applicant's case

77. Having concluded that the procedures applied to the DRE review of Applicant's discrimination claim were fair and regular, the Tribunal turns to the sustainability of the review team's findings and conclusions, as ratified by the Director of Administration in her decision of May 29, 1998.

78. In *Ms. "Y" (No. 2)*, para. 63, this Tribunal recognized, in the context of its review of DRE cases, 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. Accordingly, the Tribunal concluded that it ". . . must satisfy itself that the contested decision is reasonably supported by evidence gathered by the DRE team." *Ms. "Y" (No. 2)*, para. 66.²⁴ In this case, Applicant challenges the sustainability of the principal conclusion of the DRE review of her claim, i.e. the finding that her Fund career was not adversely affected by discrimination but that she should receive a one-time salary adjustment to remedy inadequate compensation for use of multiple language skills in "Department 1."

The finding of non-discrimination

79. Applicant maintains that the conclusion of the DRE review that Applicant's Fund career was not adversely affected by discrimination cannot be sustained. The DRE review of Applicant's claim considered whether Ms. "Z" had been discriminated against based on "nationality, race, gender or age."

²⁴As the Tribunal observed in *Ms. "Y" (No. 2)*, para. 64, a decision may be set aside if it ". . . rested on an error of fact or of law, or if some essential fact was overlooked . . . or if clearly mistaken conclusions were drawn from the evidence." (*In re Durand-Smet (No. 4)*, ILOAT Judgment No. 2040 (2000), para. 5.) Review is also limited by the admonition that '. . . tribunals . . . will not substitute their judgment for that of the competent organs. . . .' (Report of the Executive Board, p. 17.) As the World Bank Administrative Tribunal has recognized, '. . . in matters involving the exercise of discretion by the Bank, the Tribunal is not charged with the task of re-examining the substance of the Bank's decision with a view to substituting the Tribunal's decision for the Bank's.' (*Pierre de Raet v. IBRD*, WBAT Decision No. 85 (1989), para. 56.)"

In her Grievance Committee testimony, Ms. "Z" explained that by "race" she referred to her national origin and the region of the world from which she came. She elaborated that the form of discrimination she alleged ". . . has something to do with my looks, my accent, . . . I don't have a British accent," and that she was accordingly disadvantaged by not fitting "a particular profile that is favored in the Fund."²⁵

80. As considered *supra*, the DRE review of Applicant's complaint proceeded by investigation of a series of incidents that Ms. "Z", in her communications with the review team, identified as manifesting discrimination. The examination of these events was summarized in the review team's report and further elucidated by Grievance Committee testimony, all of which has been made part of the record before the Tribunal. Having reviewed this record, the Tribunal concludes that the findings and recommendation of the DRE team, and their ratification by the Director of Administration, were reasonably supported by the evidence. Applicant's specific allegations are reviewed below.

Starting salary

81. Applicant contended in the DRE that her starting salary when she joined the Fund in 1980 had been set at a level lower than that quoted at the interview for her initial position. Respondent maintains that the setting of Applicant's initial salary was not improper nor the result of discrimination.

82. Applicant was not able to provide any probative evidence for her contention regarding starting salary either to the DRE team or in the Grievance Committee's proceedings. According to the review team's report, it examined entry level salaries for candidates hired in the same time period for similar positions and found no evidence of discrimination.

83. The Tribunal concludes that the review team was not arbitrary or capricious in concluding that there was insufficient evidence that Applicant had been promised a higher starting salary.²⁶

²⁵As to Applicant's charge of age discrimination, this referred to non-selection for a position allegedly on the basis that Applicant had been too young. In the Grievance Committee proceedings, Applicant conceded that the selectee was about the same age as herself. She also indicated that she believed that later in her career she may have been disadvantaged by being too old and that she had "missed that small window of opportunity."

²⁶The Tribunal notes the statement in Respondent's pleadings that "Even if there had been prior discussion of a higher salary, the appointment letter is the binding undertaking on the part of the Fund, and the Applicant, like any other prospective employee, was free to accept

Alleged probationary period upon transfer to "Department 2"

84. Applicant contended in the DRE that she was placed "on probation" upon transferring to "Department 2" in 1982. Respondent denies this charge.

85. The report of the review team concluded that the term "probation" was sometimes used loosely in the Fund to refer to the practice of "underfilling" of a position, i.e. appointing a staff member to a position at a grade lower than the advertised range until the individual was more fully seasoned in the position. It was, in the review team's assessment, this inappropriate usage of the term "probation" that caused Applicant to conclude that she experienced discrimination upon her transfer to "Department 2" in 1982.

86. The DRE review team's conclusion was corroborated by Grievance Committee testimony indicating that the term "probation" was sometimes confused with "underfilling" in the usage of some in the Fund and that Applicant had experienced "underfilling" when she moved into a new Department and career stream in 1982. The evidence further suggested that the practice was common at the time of Ms. "Z"'s transfer to "Department 2." Moreover, the Assistant ADM Director testified that it was applied ". . . across the board, to men and women equally, and to staff at the B levels, as to professional staff as to assistant level staff." No evidence emerged that Applicant's "underfilling" was the result of discrimination. Furthermore, the "underfilling" period in Applicant's case was cut short once her supervisor indicated that her performance warranted an increase in grade level; accordingly, the "underfilling" period lasted for less than two months.

87. For the foregoing reasons, the Tribunal sustains the finding of the DRE review that there was no discrimination associated with Applicant's 1982 transfer to a position in "Department 2."

Job grading exercise

88. Applicant contends that she was not fairly graded as a result of the job grading exercise undertaken by the Fund in the mid-1980s. The Fund

or reject the offer." It is recalled that in *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 12, the Tribunal held:

". . . the fact that a staff member accepts an offer that he or she is free to decline does weigh against challenge to the terms of the contract so accepted. But it is a question only of presumption. . . . while the presumption holds, the staff member nonetheless can be heard to argue contrary claims, as in this case, of misrepresentation of facts or irregularity in the process of appointment. The Tribunal concludes that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of the Fund's determination of grade and salary."

responds that Applicant has not demonstrated that her position was “grossly under graded” as a result of the exercise.

89. Grievance Committee testimony supported the view that there had been widespread dissatisfaction in the Fund with the results of the job grading exercise. This discontent led to the implementation of a special appeals procedure, of which Applicant chose not to avail herself. No evidence was proffered that Ms. “Z” had been adversely affected by the job grading exercise or that the grading of the position which she then occupied was influenced by Applicant’s gender, race, nationality or age.

90. Accordingly, the Tribunal concludes that there is no ground to conclude that Applicant experienced discrimination as a result of the job grading exercise.

Long Term Career Assessment and career development support

91. Applicant contended that she was denied a requested Long Term Career Assessment (LTCA) and, more generally, that she was not supported in her career development in the Fund. Respondent maintains that it did not discriminatorily fail to provide Applicant with an LTCA nor deny support to her career development.

92. It is not disputed that Applicant did not receive a Long Term Career Assessment. The record indicates, however, that many staff members did not receive this assessment tool, which ultimately was discontinued by the Fund. Administration Department officials testified that the LTCA did not correlate with career advancement. Moreover, Applicant did not show that the failure to undertake such an assessment in her case either was the result of discrimination or had an adverse effect on her career progression.

93. As to Ms. “Z”’s general contention that the Fund failed to give support to her career development, Applicant conceded in her Grievance Committee testimony that she had progressed some on her own initiative, but maintained that she did not have support for that progression: “. . . I did not have the support for career mobility as people with British accents do. . . . I did have some career mobility which I managed to do independently, but I did not have any support—from Administration.”

94. Applicant alleged, in particular, that her Division Chief had disagreed with her supervisor’s recommendation as to the type of training courses that might have been most beneficial to her career progression in “Department 2.” The record indicated, however, that the disagreement was one of professional judgment as to the type of skills that would be most advantageous

to Applicant's development. Moreover, Applicant had the benefit of taking numerous courses at Fund expense and testified to having "constantly been enrolled in taking courses," as evidenced by her Fund training record.

95. The testimony of former supervisors furthermore suggested that Ms. "Z" was perceived as an able and ambitious staff member who was given opportunities for career growth. For example, according to Applicant's "Department 3" supervisor, at the time Ms. "Z" left that Department to return to "Department 2," recognition of her capabilities had resulted in her taking on increased responsibilities and steps were being initiated that led, following Ms. "Z"'s transfer to "Department 2," to the upgrading of the position. Her "Department 5" supervisor likewise testified to the breadth and responsibility of the duties Applicant discharged in that Department.

96. Finally, Applicant testified that "[m]ission work was part of my Fund profile as a secretary with languages and it was a means for career development. . . ." Her testimony indicated that she had participated in 9-10 missions and had briefed other support staff to prepare them for mission travel. One of her supervisors expressly stated that Applicant had been permitted to go on missions because it was understood "as part of [Ms. "Z"]'s professional development."

97. For the foregoing reasons, the Tribunal sustains the view that Applicant did not experience discrimination with respect to support for her career development within the Fund.

Alleged "demotion" on transfer to "Department 2" in 1988

98. Applicant contended that she was "practically demoted" upon her transfer in 1988 from "Department 3" to a new work unit in "Department 2." Respondent denies that any such demotion took place.

99. The DRE team's investigation of this allegation indicated that Applicant's transfer was lateral and that there was no evidence of any promise to Ms. "Z" that she would be given an increase in grade or title. In her Application before the Tribunal, Applicant maintains that she had been "enticed" to return to "Department 2" by the prospect that a professional level position would be opening up for which she would be considered. Such opportunity never materialized for Applicant.

100. Applicant's personnel record confirms that Ms. "Z"'s grade was A6 at the time of her transfer to "Department 2" in 1988 and remained at that level following the transfer. Furthermore, the record of the Grievance Committee's proceedings does not support Applicant's contention that she was

promised a professional position in “Department 2” or that such promise would have been consistent with the Fund’s personnel practices.

101. Accordingly, the Tribunal sustains the DRE’s finding that Applicant did not experience discrimination in connection with her transfer to “Department 2” in 1988.

Alleged discriminatory treatment in new work unit

102. Applicant alleged that following her return to “Department 2” in 1988 she experienced the most “overt” discrimination in her Fund career, which she contended included “mistreatment, racist remarks, and above all, lack of support from supervisors,” resulting in health problems and an end to her career ambitions. Respondent, for its part, maintains that there is no evidence that Applicant was discriminated against by her supervisor in the new unit.

103. Applicant chronicled her perceptions of this segment of her Fund career in detail in her written communication to the DRE team, *see supra* para. 33. In her Grievance Committee testimony, Ms. “Z” conceded that during the DRE review of her complaint she had been given a full opportunity to relate to the external team member her view of her experiences in that unit. Additionally, Applicant was given the opportunity before the Grievance Committee to review the account that she had provided the team, again allowing her the opportunity to substantiate her claims.

104. In her Grievance Committee testimony, Applicant elaborated on the “harsh treatment” she alleged she had experienced. She contended that she was made to feel unwelcome when she was brought into the unit as a senior assistant and that the two other assistants received more support from their common supervisor. Ms. “Z” also alleged that she was subject to discriminatory remarks relating to the way she spoke her native language and the schools she had attended.

105. No corroboration emerged in the record for Applicant’s contention that her experience in the unit was affected by discrimination. One of the assistants whom Applicant alleged received more favorable treatment than Ms. “Z” also came from the same region of the world. In addition, while a co-worker testified that the unit’s supervisor was “not an easy person to deal with,” there was no indication that Applicant’s nationality, gender or age played a role in her interactions with the supervisor.

106. Accordingly, the Tribunal sustains the conclusion of the DRE review that Applicant’s final assignment in “Department 2” was not affected by discrimination.

Non-selection for vacancies and the issue of career progression

107. Applicant contends that she was not selected for some twenty vacancies to which she applied, and, more generally, that she failed to attain a career with the Fund commensurate with her qualifications and experience. The Fund responds that Applicant has not shown that discrimination played a role in her non-selection for vacancies and that her career progression from A4 to A7 was typical of Fund assistants.

108. The DRE review revealed no evidence that discrimination had affected Applicant's non-selection for vacancies to which Ms. "Z" had applied with the goal of advancing to professional levels within the Fund. Furthermore, a former supervisor observed in his Grievance Committee testimony that "... it was not easy to move up from a support staff position up to a paraprofessional and then to a professional position. These things happened, yes, and probably still can happen today, but it was not easy." An Administration Department official additionally indicated that the difficulty of progressing into professional grades reflected the overall caliber and credentials of Fund staff. Similarly, the ADM Assistant Director testified that "A7 is a career ending grade for a large number of assistants in the Fund."

109. The Tribunal recalls that in the recent case of Ms. "W" it also considered the contention of a staff member, an economist, that her career progression had been hindered by alleged discrimination. The Tribunal concluded: "Competition for Grade A15 positions is considerable. For an economist not to succeed in a few applications for promotion to Grade A15 is hardly evidence of discrimination; it is rather evidence of competition." (Ms. "W", para. 98.) The Tribunal likewise observes in the present case of Ms. "Z" that "... the fact of non-advancement is not proof of discrimination." (*Id.*)

110. For the foregoing reasons, the Tribunal concludes that the DRE review reasonably found that Ms. "Z"'s career progression in the Fund was not adversely affected by discrimination.

Remuneration for use of multiple language skills

111. Applicant contended that she had not been adequately remunerated for her use of multiple languages consistently applied on the job. As an outcome of the DRE, Applicant was granted a salary adjustment to compensate for regular use of multiple language skills in her first Fund assignment. Neither the review team, nor the Director of Administration in affirming its findings, concluded that the inadequate remuneration was the result of discrimination.

112. In conclusion, having reviewed the entire record of the case, the Administrative Tribunal, mindful of the limited depth of its review of cases arising through the DRE,²⁷ holds that the conclusions of the DRE team and their ratification by the Director of Administration were not arbitrary or capricious but rather were reasonably supported by the evidence. The Tribunal accordingly holds that there is no ground for questioning the conclusion of the DRE that Ms. "Z"'s Fund career was not adversely affected by discrimination.

The remedy granted Applicant through the DRE process

113. Applicant has not disputed the adequacy, or implementation, of the within-grade salary adjustment of 4.0 percent granted her as a result of the DRE process as a remedy for inadequate remuneration for use of multiple language skills in her first Fund assignment. The Tribunal finds the remedy to be reasonably based, as set out in the DRE report.

114. Applicant has made a non-specific allegation that "[t]here have been no forward-looking remedies as promised in the DRE," citing the following statement in the Director of Administration's May 29, 1998 decision letter:

"As indicated in my earlier note to the staff-at-large, in cases where it appears there may have been unfair or uneven treatment, the review will not be an end in itself, but just the beginning of a process for identifying opportunities."

The Tribunal finds no merit to Applicant's suggestion, on the basis of the above quoted statement, that she was denied implementation of any remedy resulting from the DRE review of her complaint. Rather, the cited language simply echoed the Memorandum to Staff of January 13, 1997 and did not include a specific remedy to be implemented in Ms. "Z"'s case.²⁸ Moreover,

²⁷As the Tribunal held in *Ms. "Y"* (No. 2), para. 41:

"At the same time, since the Applicant challenges the . . . decision of the Director of Administration upholding the conclusion of the DRE that the Applicant's career was not adversely affected by discrimination, examination of that conclusion necessarily entails some consideration of whether the Applicant's career did suffer discrimination. That consideration may be distinguished, however, from the *de novo* examination by the Tribunal of the underlying claims. . . ."

²⁸As such, the Director of Administration's decision in *Ms. "Z"*'s case may be contrasted with that in the case of *Ms. "W"*, in which the applicant was informed:

"As indicated in my earlier note to the staff-at-large, in cases where it appears there may have been unfair or uneven treatment, the review will not be an end in itself but just the beginning of a process for identifying opportunities. *In your case, efforts will be made to identify assignments for you that further develop and assess your analytical, writing, and supervisory skills. The objective will be to help strengthen your ability to compete for posi-*

this contention was not raised or considered in the administrative review procedures prerequisite to the filing of the Application in the Tribunal, *see supra* para. 14.

115. Finally, Applicant asserts that the remedy in her case reflected a pattern of gender discrimination in the outcome of the DRE exercise generally. Contrary to Applicant's allegation, however, the Consultants' Report prepared at the conclusion of the DRE exercise did not show that men were remedied at twice the rate of female complainants, *see supra* para. 30, nor did any other support emerge for this contention. Moreover, as the Tribunal held in Ms. "W", ". . . data on DRE outcomes would neither prove conclusively that the DRE process in general was discriminatory nor that the process as applied in Applicant's case was discriminatory." Ms. "W", para. 28 (denying request for production of documents).

116. The Tribunal concludes that the Fund, having reasonably found, pursuant to the procedures afforded by the DRE, that Applicant's career was not adversely affected by discrimination but that she had not been adequately compensated for use of language skills in her first Fund assignment, made a sustainable decision in the reasonable exercise of its managerial discretion to grant Applicant the remedy of a one-time, within-grade salary increase but no other relief.

Procedural Allegations relating to the Grievance Committee's review of Applicant's Challenge to the DRE Decision

117. Applicant challenges aspects of the review by the Fund's Grievance Committee of her challenge to the DRE decision, contending that the Committee's proceedings were not conducted in a "neutral and professional manner" or in accordance with due process. The Fund responds that the Administrative Tribunal does not serve as an appellate body with respect to the decisions and proceedings of the Grievance Committee, and, in any event, that Applicant was afforded due process in the consideration of her case by the Grievance Committee.

tions at the Grade A15 level."

Ms. "W", para. 122. (Emphasis supplied.) Accordingly, in Ms. "W", as some measure of review had been given to the claim in the Grievance Committee, the Tribunal considered whether specific career development assistance as set out in the Director of Administration's decision letter was, in fact, effected in that case. Ms. "W", paras. 118-119, 122-126. The Tribunal declined to accept the contention that Ms. "W" had not received the career development assistance contemplated by the DRE remedy. Ms. "W", para. 126.

118. Applicant's contentions raise anew the matter of the legal relationship between the Administrative Tribunal and the Grievance Committee. In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), the applicant sought review of the Grievance Committee's "decision," alleging that "substantive and procedural irregularities" were committed in the Committee's proceedings. (Para. 15.) The Tribunal concluded as follows:

"17. The Tribunal's competence is limited to judging the legality of administrative acts, which the Tribunal's Statute defines as decisions taken in the administration of the staff. [footnote omitted] By the terms of the Statute, the expression 'administrative act' embraces individual and regulatory decisions taken in the administration of the staff of the Fund. Complaints about administrative acts may be brought to the Tribunal only after the exhaustion of all existing applicable internal review procedures.[footnote omitted] The Tribunal must decide whether it is competent to entertain complaints about procedures or recommendations of the Grievance Committee. The basic function of the Committee is set forth in Section I of General Administrative Order No. 31 which governs it:

'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.'

That the Grievance Committee is not competent to take final decisions in the matters which it hears follows from Section 7.09 of the same Order:

'The Managing Director, or the Managing Director's designee, will take the final decision in the matter and will transmit the decision in writing to the grievant.'

Thus, the Grievance Committee's recommendations do not constitute 'administrative acts' in the sense of Article II, Sections 1.a. and 2.a., because the Committee is not qualified to take 'decisions'. Moreover, the Tribunal does not accept the Applicant's assertion that it functions as an appellate body from the Grievance Committee because 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. At the same time, the Tribunal may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee. The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it."

119. As to Ms. "Z"'s contentions that the Committee "blocked" her expert witness from testifying and improperly denied her request for documents, the Tribunal concludes that the Grievance Committee's decisions as to the admissibility of evidence and production of documents are not subject to review by the Administrative Tribunal. These decisions, like the final recommendation of the Grievance Committee on the merits of a grievance, are not "administrative acts" within the contemplation of Article II of the Tribunal's Statute.²⁹ Rather, they rest exclusively within the authority granted the Grievance Committee under its constitutive instrument GAO No. 31.³⁰ See also *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 131 (GAO No. 31 vests in the Grievance Committee the authority to decide upon its own jurisdiction for purposes of proceeding with a grievance).³¹

120. Additionally, because the Administrative Tribunal makes findings of fact as well as holdings of law, *D'Aoust*, para. 17, any lapse in the evidentiary record of the Grievance Committee may be rectified, for purposes of the Tribunal's consideration of the case, through the Tribunal's authority, pursuant to Article X of its Statute and Rules XVII and XIII of its Rules of Procedure, to order the production of documents, to request information and to hold oral proceedings.³² *Estate of Mr. "D"*, para. 135; see also *Mr. "V"*, para. 129 (observing 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;" the Tribunal rejected as misplaced the applicant's

²⁹That there is no judicial recourse for a complaint does not require or entitle the Tribunal to exercise its jurisdiction *ratione materiae* when that complaint lies outside the Tribunal's limited grant of jurisdictional competence. *Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999), para. 95.

³⁰GAO No. 31, Section 7.06.3 provides in part:

"The Committee shall permit the introduction of all evidence it deems helpful in reaching its findings and recommendation."

GAO No. 31, Section 7.06.4 provides in part:

"Upon the request of a party and with good cause shown, the Committee may, in its sound discretion, instruct the other party to provide to the Committee and to the opposing party documentary or other evidence."

³¹The Tribunal cited Ms. "Y", paras. 42-43 and *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para 130. At the same time, the Tribunal held that the decision of the Grievance Committee Chairman to deny jurisdiction over the grievance was not dispositive of the Tribunal's own determination of whether the Applicant had exhausted channels of administrative review as required by Article V of the Tribunal's Statute. *Estate of Mr. "D"*, para. 91.

³²The Tribunal observes that Ms. "Z" has not made any such requests in the Administrative Tribunal.

concern that the Tribunal might be “misled” by the recommendation of the Grievance Committee, which the applicant contended was grounded on an inappropriate standard of review).

121. As to Ms. “Z”’s allegations of bias and ill-treatment before the Committee, the Tribunal concludes as follows. In accordance with *D’Aoust*, para. 17, “. . . the Tribunal may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee.” In addition, “[t]he Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it.” (*Id.*) The Tribunal also has observed that “. . . recourse to the Grievance Committee [has] 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”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42. Accordingly, in view of Ms. “Z”’s allegations, the question arises whether the Tribunal finds in the record of the Grievance Committee’s proceedings in Applicant’s case any cause to discount that record in the weighing of the evidence.

122. The Administrative Tribunal has reviewed the transcripts of the very extensive Grievance Committee proceedings afforded Applicant, in which she had the active assistance of two counsel and the opportunity herself to comment and pose questions to witnesses. The Tribunal finds in the Grievance Committee’s record in this case no ground to question that it be given any less than the full measure of weight that the Tribunal ordinarily accords to those proceedings.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unani-
mously decides that:

The Application of Ms. "Z" is denied.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
December 30, 2005

ORDERS
(Nos. 2005-1 to 2005-2)

ORDER No. 2005-1

***Mr. "F", Applicant v. International
Monetary Fund, Respondent
(Assessment of compensable legal costs pursuant to
Judgment No. 2005-1)
(April 18, 2005)***

The Administrative Tribunal of the International Monetary Fund,

- having decided in *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 123-124 and Decision, para. 4, that the Fund shall pay Applicant the reasonable costs of his legal representation in accordance with Article XIV, Section 4¹ of the Tribunal's Statute, and
- having considered Applicant's statement of costs and the Fund's response,

unanimously adopts the following decision:

First: The Administrative Tribunal has reviewed the claims considered in the case of *Mr. "F"*, the relative centrality and complexity of those issues and their ultimate disposition by the Tribunal. Applicant was not successful on his principal and most complex claim, that the abolition of his position represented an abuse of discretion by the Fund. Applicant did, however, prevail on his claims that the Fund failed: a) to take effective measures in response to the religious intolerance and workplace harassment of which *Mr. "F"* was an object; and b) to give him reasonable notice of the abolition of his post. As to a claim that the Fund failed to make the requisite efforts

¹Article 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."

to reassign Applicant to another position consistent with his qualifications and the requirements of the Fund, the Tribunal decided that fault was to be borne by both parties and declined to award compensation to Applicant.

Second: Although Applicant did not succeed on his principal claim, the Administrative Tribunal considers that the record assembled and argued by Applicant's counsel in pursuit of that claim was indispensable to the Tribunal's award to Applicant of substantial relief on other substantial counts, and that accordingly the Fund should bear the great majority of Applicant's legal costs.

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 amount of \$49,833.50, i.e. seventy-five percent of the total amount submitted.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
April 18, 2005

ORDER No. 2005-2

***Mr. "F", Applicant v. International
Monetary Fund, Respondent
(Interpretation of Judgment No. 2005-1)
(December 6, 2005)***

The Administrative Tribunal of the International Monetary Fund,

- having received a request from Respondent for an interpretation of *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), and
- having considered Respondent's request and Applicant's response,

unanimously adopts the following decision:

Introduction

1. In *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), Applicant contested the decision to abolish his position, resulting in his separation from service. Applicant alleged that the decision was motivated by religious discrimination. In addition, Mr. "F" contended that during his employment he was subjected to a hostile work environment based on his religious affiliation. He maintained that the abolition of his position, which was part of a restructuring of his department, was not justified by institutional needs but rather was a pretext for removing him from his work unit. He also claimed that he was not given adequate notice of the abolition of his position nor good faith assistance in finding alternative employment.

2. The Administrative Tribunal upheld the decision to abolish Mr. "F"'s position as a reasonable exercise of the Fund's managerial discretion and found that the decision was not motivated by religious discrimination. At the same time, the Tribunal awarded Applicant compensation in the sum of \$100,000 for the Fund's failures a) to take effective measures in response

to religious intolerance and workplace harassment of which Mr. "F" was an object, and b) to give Mr. "F" reasonable notice of the abolition of his position. (*Mr. "F"*, Decision, para. 2.) It is the latter conclusion, i.e. that Applicant had not been given reasonable notice of the abolition decision that gives rise to the present action.

3. On August 10, 2005, Respondent filed a Request for Interpretation of Judgment, pursuant to Article XVII¹ of the Statute and Rule XX² of the Rules of Procedure, seeking clarification from the Tribunal of para. 106 of the Judgment, in which the Tribunal held:

"While the Fund's interpretation of the Section 13.02 of GAO No. 16 is not unreasonable, the Tribunal's view is that the fair and transparent procedures that govern or should govern the operations of the Fund require that a staff member whose position is abolished be given reasonable notice of that prospect. The staff member should be in a position when such a decision first is conveyed to him to set out any reasons that he or she may have to contest the propriety or equity of the abolition decision. [footnote omitted] The summary notice given to Mr. "F" in this case was hardly adequate for that purpose. Thus, on this ground, the Tribunal concludes that the Fund did not follow fair and reasonable procedures."

In accordance with Rule XX, para. 3, Applicant was afforded thirty days in which to present his views on the Request. Applicant's Comments were filed on September 8, 2005.

Interpretation of Judgments

4. Article XVII provides:

¹Article XVII provides:

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

²Rule XX provides:

"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."

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

5. The associated Commentary on the Statute states:

"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.[footnote omitted] 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."

(Report of the Executive Board, p. 40.)

6. The statutory authority of the IMFAT to render an interpretation of judgment is one of two narrowly drawn exceptions³ to the rule of finality of judgments as set forth in Article XIII, Section 2 of the Tribunal's Statute:

"Judgments shall be final, subject to Article XVI and Article XVII, and without appeal."

Article XIII, Section 2 ". . . codifies and applies to the judgments of the IMF Administrative Tribunal a cardinal principle of judicial review, the doctrine of *res judicata*." Mr. "R" (No. 2), *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004), para. 25. Accordingly, the provision confirms the essential authority of the IMFAT to render judgments that are final and binding on the parties.

7. Twice when presented with requests for interpretation of judgment, the IMFAT has rejected the requests, either in whole or in part, insofar as the requests infringed upon the fundamental principle of finality of judgments.

³The other exception is revision of judgment, as provided by 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."

See Interpretation of Judgment No. 1997-1 (Ms. "C", Applicant v. International Monetary Fund, Respondent), IMFAT Order No. 1997-1 (December 22, 1997) and Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent), IMFAT Order No. 1999-1 (February 26, 1999).

8. In Order No. 1999-1, the Tribunal rejected in its entirety the Fund's request that it interpret the term "jurisdiction" as used in the second paragraph of its Decision in *Ms. "Y"* to mean only jurisdiction *ratione materiae*. The request for interpretation of judgment was held to be inadmissible because the term "jurisdiction" standing alone was "neither obscure nor incomplete," as required for interpretation under Article XVII. Further, the request was rejected because ". . . 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." (Order No. 1999-1.)

9. In the request for interpretation that resulted in Order No. 1997-1, Respondent a) challenged the legality of the Judgment, in which the Tribunal had found, in part, against the Fund on the basis of procedural irregularity while upholding the contested decision, and b) sought clarification of terms relating to the fee award in *Ms. "C"*. While entertaining the latter component of the request, the Tribunal rejected the former because 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." (Order No. 1997-1.)

10. It is against this jurisprudential background that the instant request for interpretation of the Judgment in *Mr. "F"* arises.

Admissibility

11. Rule XX, para. 2 makes clear that an application for interpretation of judgment ". . . shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure or incomplete."

12. The Fund acknowledges that "[t]he operative provisions of the Judgment are clear with respect to their application in the case at hand," i.e. there is no question as to how the Judgment should be executed in the case of Mr. "F". Nonetheless, it contends that the Request for Interpretation is admissible because "[w]ith respect to future cases. . . the impact of this aspect of

the Judgment on the Fund's practices is unclear." Thus, the Fund maintains that interpretation of the Judgment by the Tribunal is appropriate so that management can ". . . formulate corrective action that is consistent with the Tribunal's views," asserting that such clarification will assist the Fund in complying with the Tribunal's ruling in subsequent cases of abolition of position, thereby avoiding possible future litigation.

13. Applicant counters that Respondent has not met the threshold requirement for requesting an interpretation of judgment, i.e. it has not identified any operative provisions of the Judgment that are "obscure or incomplete" (Article XVII; Rule XX). In Applicant's view, the request is for an "advisory opinion," applicable only to future cases. Applicant questions whether the Administrative Tribunal is the appropriate body to advise on the Fund's human resources policies, except in concrete cases.

14. In the view of the Tribunal, the Fund does not specify in what respect the operative provisions of the Judgment are "obscure or incomplete." In reaching its Judgment, the Tribunal had only to decide if the Application presented by Mr. "F" was well-founded. As far as that Application is concerned, the operative provisions of the Judgment are clear, as is admitted by the Fund. What the Fund is asking for now is to know the Tribunal's position on two issues:

"(i) the nature and purpose of the requirement of advance notice of a decision to abolish a position; and

(ii) how long a period of notice would be considered 'reasonable.'"

15. The issues have been further elaborated in the concluding part of the Fund's request:

"a. In terms of allowing the affected staff member to contest 'the propriety and equity' of the decision during this period before the decision takes effect, what are the relevant arguments that may be raised, and what are the obligations of the Fund in response? For example, if the staff member were to raise issues going to organizational development and planning, *i.e.*, the business justification for the impending abolition decision, is the Fund obliged to take these arguments into account as part of the considerations in the decision-making process? Or does the staff member's right to be heard extend only to alleged improprieties or inequities related to the Fund's assessment of his performance, skills, conduct and the like?

b. Would a minimum of 30 calendar days' advance notice of the effective date of the abolition of a position be considered reasonable by the Tribunal? Could this period be deducted from the 60-120 day notice period cur-

rently provided at the end of the redundancy process, such that the total amount of notice remains the same?"

16. The Tribunal is not an advisory body. Its powers do not go beyond the resolution of the cases brought before it by applicants. In the words of the Commentary on the Statute:

“. . . the Tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.”

(IMFAT Statute, Article II, Section 1(a), Report of the Executive Board, p. 13.)

17. In the view of the Tribunal, the Fund is seeking advice rather than interpretation. It seeks advice as to how it should apply a holding in the case of Mr. “F” that in itself is not obscure or incomplete. The rendering of such advice is not within the powers of the Tribunal.

18. Accordingly, the Tribunal concludes that the request for interpretation of the Judgment is denied.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
December 6, 2003

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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;

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- (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

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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.

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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

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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

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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.

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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.

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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.

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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.

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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-

¹The 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”).

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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.

²E.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).

³The 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. 71(d), permits the tribunal to exercise such jurisdiction.

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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-

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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

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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.

⁴For an example of how periods are calculated under this provision, see pp. 24–25 below.

⁵See, 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

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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,

⁶For 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.

⁷One 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.

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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

⁸Gretz, UNAT Judgment No. 403 (1987).

⁹E.g., *Durrant-Bell*, WBAT Reports, Dec. No. 24 (1985), at paras. 24, 25.

¹⁰See 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).

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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.

¹¹See generally S.A. de Smith, *Judicial Review of Administrative Action*, at 278-79 (4th ed. 1980).

¹²See *von Stauffenberg*, WBAT Reports, Dec. No. 38 (1987), at para. 126; *Decision No. 36*, NATO Appeals Board (1972), Collection of the Decisions (1972).

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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.

¹³Article XXIX of the Fund's Articles of Agreement.

¹⁴E.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.

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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.**

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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-

¹⁵Compare the WBAT Statute (90 days); UNAT Statute (90 days); IDBAT Statute (60 days).

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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

¹⁶Or on the next working day, if April 2 is not a working day.

¹⁷If 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.

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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-

¹⁸E.g., WBAT Statute, Article XII(4).

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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.**

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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.

¹⁹E.g., WBAT Statute, Article IV(1); IDBAT Statute, Article III(1).

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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.

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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

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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.

²⁰See also Article XVIII of the statute, discussed below.

²¹There 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."

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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.

²²Under 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-

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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

²³Other 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.

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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

²⁴The 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."

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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

²⁵A/CN.5/R.2 (Dec. 18, 1950).

²⁶E.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.

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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 tribunals²⁷ 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:

²⁷See *Lamadie*, ILOAT Judgment No. 262 (1975), at p. 7.

²⁸In *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.

²⁹There is a comparable provision in Article XII of the WBAT Statute.

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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 process³¹; it is not intended to deter an application based on a good faith argument for an extension, modification, or reversal of existing law.

³⁰The 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.

³¹Compare 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.

³²See 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.

³³The 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 FUND¹**

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;

¹These Rules entered into force on February 18, 1994 and were amended on August 31, 1994.

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- (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

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(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.

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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

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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.

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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.

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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

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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.

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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

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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.

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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.

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:

¹Separate application forms of Annexes A and B are available from the Office of the Registrar.

ADMINISTRATIVE TRIBUNAL OF THE IMF

- 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.

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.

RULES OF PROCEDURE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND¹

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;

¹The Rules of Procedure, established in accordance with Article X, Section 2 of the Statute, entered into force on February 18, 1994 and were amended on August 31, 1994. These Rules were further amended on December 9, 2004, with effect with respect to all applications filed after December 31, 2004.

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- (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 is 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;
- (f) upon the transmittal of an application to the Fund, unless the President decides otherwise, circulate within the Fund a notice summarizing the issues raised in the application, without disclosing the name of the Applicant, in order to inform the Fund community of proceedings pending before the Tribunal; and
- (g) 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. In accordance with Article VII, Section 3 of the Statute, a member of the Tribunal shall recuse himself:

RULES OF PROCEDURE (2004)

(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; 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

Representation

In accordance with Article X, Section 3 of the Statute, each party may at any time choose to be assisted by counsel or other representative, whose designation shall be notified to the Registrar.

RULE VII

Application

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

2. An application 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 counsel or other representative, if any;

(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;

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(f) a statement of the supporting facts;

(g) the relief or remedy that is being sought pursuant to Article XIV of the Statute, including (i) the amount of compensation, if any, claimed by the Applicant or the specific performance of any obligation which is requested, or both, (ii) in a case where measures other than the payment of money are sought, any exceptional circumstances that would warrant the fixing of the amount greater than three hundred percent (300%) of salary in accordance with Article XIV, Section 2, and (iii) costs as the Tribunal may award pursuant to Article XIV, Section 4;

(h) any request for production of documents as provided by Article X of the Statute and Rule XVII below;

(i) any request for oral proceedings as provided by Article XII of the Statute and Rule XIII below; and

(j) any request for anonymity as provided by Rule XXII below.

3. The Applicant shall include as attachments 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. If a document is not in English, the Applicant shall attach a certified English translation. The Applicant shall also attach a copy of any report and recommendation of the Grievance Committee in the matter.

4. (a) The application shall be signed on the last page by the Applicant or the counsel or other 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.

(b) Four additional copies of the application and its attachments shall be submitted to the Registrar.

5. An application shall include evidence that the Applicant has satisfied the requirements of Article V, and that the application is being 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 5 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time in which to make the appropriate corrections or additions. If this is done within

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the period indicated, the application shall be considered filed on the original date. Otherwise, the Registrar shall:

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

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

(c) 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 transmit a copy of the application to the Fund.

RULE VIII

Answer

1. Once an application has been transmitted by the Registrar to the Fund, the Fund shall answer the application within forty-five days of receipt 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 attachments all documents referred to in the answer in accordance with the rules established for the application in Rule VII, unless the document has been attached to the application in which case reference should be made to the attachment number.

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. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the answer.

5. The Fund shall include in the answer its views on any requests for production of documents, oral proceedings, or anonymity that the Applicant has included in the application.

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6. The Fund shall also include in the answer any of its requests, as permitted under these Rules, with respect to oral proceedings, anonymity or other matters.

RULE IX

Reply

1. The Applicant may file with the Registrar a reply to the answer within thirty days from the date on which the answer is received by him, unless, upon request, the President sets another time limit.

2. The complete text of any document referred to in the reply shall be attached in accordance with the rules established for the application in Rule VII, unless the document has been attached to an earlier pleading in which case reference should be made to the attachment number.

3. The requirements of Rule VII, Paragraph 4 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. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the reply.

5. If the Applicant seeks costs pursuant to Article XIV, Section 4 of the Statute, the amount and any supporting documentation shall be included.

6. The Applicant shall include his views on any requests that the Fund has made in its answer with respect to oral proceedings, anonymity or other matters.

RULE X

Rejoinder

1. The Fund may file with the Registrar a rejoinder to the reply within thirty days from the date on which the reply is received by it, unless, upon request, the President sets another time limit.

2. The complete text of any document referred to in the rejoinder shall be attached in accordance with the rules established for the application

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in Rule VII, unless the document has been attached to an earlier pleading in which case reference should be made to the attachment number.

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. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the rejoinder.

5. Without prejudice to Rule XI, after the rejoinder has been filed, no further pleadings shall be received.

6. The Fund shall include in the rejoinder its response to any requests for costs or other matters that the Applicant has included in the reply.

RULE XI

Additional Pleadings

1. In exceptional cases, the President may, on his own initiative, or at the request of a 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 certified translations.

2. The requirements of Rule VII, Paragraph 4, 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.

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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 attached in accordance with the rules established for the answer in Rule VIII. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the motion. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the motion.

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

5. The Applicant may file with the Registrar an objection to the motion within thirty days from the date on which the motion is received by him.

6. The complete text of any document referred to in the objection shall be attached in accordance with the rules established for the reply in Rule IX. The requirements of Rule VII, Paragraph 4, 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 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, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views pursuant to Rules VII–X, the Tribunal deems such proceedings useful. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel or representatives, and may examine them. In accordance with Article XII of the Statute, oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

2. At a time specified by the President, before the commencement of oral proceedings, each party shall inform the Registrar and, through him,

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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 or representatives, 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 or representatives may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.

(a) 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.”

(b) 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.”

5. 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.

6. The Tribunal may limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate.

RULE XIV

Intervention

1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, within thirty days of the issuance of the notice pre-

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scribed by Paragraph (f) of Rule IV (and, in exceptional circumstances, thereafter up until the closure of the written pleadings on petition to the President), 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. Rule VII, regarding the preparation and submission of an application 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. At the request of a party or on his own initiative, the President may suspend the exchange of pleadings under Rules VII-X until the admissibility of the application for intervention has been decided. Upon expiration of the thirty-day period, whether or not the parties have replied, the Tribunal shall decide whether to grant the application to intervene. If the intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party, and the schedule of pleadings shall be modified to accommodate his participation.

4. In the absence of an application for intervention, the Tribunal may invite the participation as an intervenor of any person to whom the Tribunal is open under Article II, Section 1 of the Statute and who has a right that may be affected by the judgment to be given by the Tribunal. The views of the Applicant and the Fund may be sought, in a manner consistent with Paragraph 3 of this Rule, on the question of whether an individual should be invited to intervene. If the intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party, and the schedule of pleadings shall be modified to accommodate his participation.

RULE XV

Amicus Curiae

The Tribunal may, at its discretion, permit any person or persons, including the duly authorized representatives of the Staff Association,

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to communicate views to the Tribunal as *amici curiae*. The Tribunal may permit an *amicus curiae* access to the pleadings of the parties. The Tribunal shall enable the parties to submit timely observations on an *amicus* brief.

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. For the purpose of determining whether time limits have been met, the date of dispatch (whether by postal service or courier), when accompanied by proof thereof, shall be accepted as the date of filing the same as if the filing had been effected on that date by hand delivery to the Office of the Registrar. In exceptional circumstances, filing of pleadings by means other than postal service, courier or hand may be permitted by the Registrar in consultation with the President.

RULE XVII

Production of Documents

1. The Applicant, pursuant to Rule VII, Paragraph 2(h), may 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. The request shall contain a statement of the Applicant's reasons supporting production accompanied by any documentation that bears upon the request. The Fund shall be given an opportunity to present its views on the matter to the Tribunal, pursuant to Rule VIII, Paragraph 5.

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

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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, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order.

RULE XVIII

Judgments

1. In accordance with Article XIII of the Statute, all deliberations of the Tribunal shall be confidential. 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*. The Registrar shall notify the Fund community of the judgment and any appended opinions and shall arrange for their expeditious publication.

5. In accordance with Article XVII of the Statute, clerical and arithmetical errors in the judgment may be corrected by the Tribunal.

RULE XIX

Revision of Judgments

1. In accordance with Article XVI of the Statute, 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

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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 six months 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 VII through XI shall be applied, *mutatis mutandis*, to the request for revision.

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.

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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.

RULE XXII

Anonymity

1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.

2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.

3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.

4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual.

Administrative Tribunal of the International Monetary Fund

FORM OF APPLICATION²

- 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:

¹Copies of Annexes A and B are available as separate forms from the Office of the Registrar.

²This FORM OF APPLICATION provides a format for presentation of an application. It is anticipated that additional pages will be attached setting forth in full Applicant's factual and legal arguments. Please consult Rule VII of the Administrative Tribunal's Rules of Procedure for the complete requirements for the filing of an application.

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- III. Decision being challenged, date of the decision, and the authority responsible for the decision:

- 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 (see Article XIV of the Statute), including (i) the amount of compensation, if any, claimed by Applicant or the specific performance of any obligation which is requested, or both, (ii) in a case where measures other than the payment of money are sought, any exceptional circumstances that would warrant the fixing of the amount greater than three hundred percent (300%) of salary in accordance with Article XIV, Section 2 of the Statute, and (iii) costs as the Tribunal may award pursuant to Article XIV, Section 4 of the Statute:

- VIII. Any request for production of documents (see Article X of the Statute and Rule XVII of the Rules of Procedure):

- IX. Any request for oral proceedings (see Article XII of the Statute and Rule XIII of the Rules of Procedure):

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- X. Any request for anonymity (see Rule XXII of the Rules of Procedure):
- XI. Annexes to be attached pursuant to Rule VII, para. 3 of the Tribunal's Rules of Procedure:
- “3. The Applicant shall include as attachments 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. If a document is not in English, the Applicant shall attach a certified English translation. The Applicant shall also attach a copy of any report and recommendation of the Grievance Committee in the matter.”
- XII. Any additional information that Applicant wishes to present to the Tribunal.

**Form of Appointment
of Representative (and Counsel)***

*APPOINTMENT OF REPRESENTATIVE
(AND COUNSEL)**

I, _____

do hereby designate _____
[Name]

[Address]

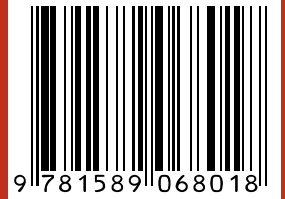
as my duly authorized representative [and counsel] to file/maintain (circle as appropriate) an application with the IMF Administrative Tribunal. [If known, give case number.] To this end, the above-named representative [and counsel]* is authorized to sign pleadings, appear before the Tribunal, and take all other necessary action in connection with the pursuance of the case on my behalf. This designation shall take effect immediately and shall remain in effect until revoked by me and the Tribunal has been so informed in writing.

Date

Signature

*Delete the brackets if your representative will also assist you as counsel. If not, delete the words "and counsel" in the caption and below.

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