

**International Monetary Fund
Administrative Tribunal**

Reports

**Volume V
2006**

**International Monetary Fund
Washington, D.C.
2009**

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ADMINISTRATIVE TRIBUNAL
2006

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Former President, International Court of Justice

Associate Judge Nisuke Ando

Emeritus Professor, Faculty of Law, Kyoto University

Director, Kyoto Human Rights Research Institute

Member and Former Chairperson, Human Rights Committee under ICCPR

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

President, International Labour Organisation Administrative Tribunal

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Member of the Appellate Body, World Trade Organization

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Emeritus Professor, University of Buenos Aires School of Law

President, Organization of American States Administrative Tribunal

Judge, International Labour Organisation Administrative Tribunal

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PREFACE

Volume V of *International Monetary Fund Administrative Tribunal Reports* contains the Judgments of the International Monetary Fund Administrative Tribunal rendered during the year 2006. 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: 2006." A detailed topical Index of the Judgments 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: 2006

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 2006, with Judge Stephen M. Schwebel serving as the Tribunal’s President, Judges Nisuke Ando and Michel Gentot as Associate Judges, and Judges Georges Abi-Saab

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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).

and Agustín Gordillo as Alternate Judges.⁷ During 2006, the Tribunal rendered six Judgments. This review highlights some of the most significant issues, both substantive and procedural, addressed by the IMFAT during the year.⁸

The Law Applied by the Administrative Tribunal

The case of *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006) was the second to reach the Administrative Tribunal arising under the provision of the Fund's Staff Retirement Plan ("SRP" or "Plan") that authorizes the IMF, pursuant to prescribed procedures, to give effect to orders for family support and division of marital property issued by domestic courts. Ms. "M" and her mother Dr. "M" contested the Fund's decisions to deny their requests to give

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 (2006) 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)
Emeritus Professor, Faculty of Law, Kyoto University
Director, Kyoto Human Rights Research Institute
Member and Former Chairperson, Human Rights Committee under ICCPR;
- Associate Judge Michel Gentot (France)
Former President of the Judicial Chamber, Conseil d'Etat, France
President, International Labour Organisation Administrative Tribunal;
- Alternate Judge Georges Abi-Saab (Egypt)
Emeritus Professor of International Law,
Graduate Institute of International Studies, Geneva
Member of the Appellate Body, World Trade Organization;
- Alternate Judge Agustín Gordillo (Argentina)
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); 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); and Goldman, "Developments in the Jurisprudence of the International Monetary Fund Administrative Tribunal: 2005," in *International Monetary Fund Administrative Tribunal Reports*, Vol. IV, 2005, pp. 1-20 (2009).

effect under the Plan to a series of child support orders issued by German courts by deducting support payments for Ms. "M" from the pension payments of Mr. "N", a retired participant in the SRP.

The Application of Ms. "M" and Dr. "M" presented the Tribunal with a number of novel issues. First, as Dr. "M" and Mr. "N" had never been married to one another, the Applicants challenged as discriminatory the denial of their initial request on the ground that it had been based on a provision of the SRP, subsequently revised, that effectively precluded requests by or on behalf of children born out of wedlock. Second, none of the court orders at issue specified that the support payments for Ms. "M" be drawn from Mr. "N"'s IMF pension benefits, a fact that the Fund maintained barred their being given effect pursuant to the SRP. Resolution of these issues required the Tribunal to consider the relationship between the internal law of the Fund, principles of international human rights, and the domestic law of member states under which orders for family support arise in the first instance.

Universally Accepted Principles of Human Rights as a Constraint on the Fund's Discretionary Authority

Article III of the Tribunal's Statute provides in part: "In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." The Report of the Executive Board recommending the Statute's adoption to the IMF Board of Governors elaborates that the internal law of the Fund includes both formal, or written, sources and "unwritten sources." Among the unwritten sources of the Fund's internal law are "certain general principles of international administrative law, such as the right to be heard . . . [which] 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."⁹ Drawing upon elements of its earlier jurisprudence, the IMFAT in *Ms. "M" and Dr. "M"* invoked "universally accepted principles of human rights" as a constraint on the Fund's discretionary authority and concluded that the earlier version of the pension Plan provision—limiting child support orders that could be given effect under the SRP to those aris-

⁹Report 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"), pp. 17–18.

ing from a “marital relationship”—should not be allowed to debar the Applicants’ initial request.¹⁰

The Tribunal had first recognized in its 2002 Judgment in *Mr. “R”* (a case challenging the differential treatment in respect of particular employment benefits of Resident Representatives and overseas Office Directors) 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.”¹¹ In 2005, in its Judgment in *Mr. “F”*, the Tribunal distinguished a general principle of equality of treatment, such as had been at issue in earlier cases, from a principle of nondiscrimination implicating “universally accepted principles of human rights.”¹²

In *Mr. “F”*, the Applicant contended that he had been the object of religious hostility in contravention of the Fund’s Discrimination Policy. In raising a claim of religious discrimination in the workplace, Mr. “F” challenged a form of discrimination expressly addressed by the Fund’s written law. Nonetheless, the Tribunal commented in its Judgment in that case that such discrimination was “prohibited by the Fund’s internal law . . . as well as by universally accepted principles of human rights.”¹³ The Tribunal’s recognition of universal principles of human rights, as a component of general principles of international law encompassed by the Fund’s internal law, was essential to its 2006 Judgment in *Ms. “M” and Dr. “M”*, in which the Tribunal was presented with a claim of a type of discrimination not expressly addressed by the written law of the Fund.

In *Ms. “M” and Dr. “M”*, the IMFAT observed that while the “express provisions of the Fund’s nondiscrimination law do not refer to discrimination on the ground of birth,” that omission was “readily explained by the

¹⁰The Tribunal noted that the question was not one of retroactive application of the revised Plan provision but rather the validity of the prior Plan provision, in light of the Applicants’ contention that it represented impermissible discrimination. *Ms. “M” and Dr. “M”*, para. 112.

¹¹*Mr. “R”*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 30.

¹²*Mr. “F”*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 81 (“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).”)

¹³*Id.*, para. 81.

fact that such discrimination, which is typically directed at children, does not ordinarily arise in the context of employment law.” The Fund’s written law, noted the Tribunal, necessarily sets out a principle of nondiscrimination within the context of the employment relationship.¹⁴ Nonetheless, in the view of the Tribunal, the pertinence of principles of human rights to practices of the Fund was reflected in the Fund’s written law, for example, by Rule N-2 of the Rules and Regulations of the International Monetary Fund and subsequent policies prohibiting discrimination on the basis of characteristics “such as age, creed, ethnicity, gender, nationality, race, or sexual orientation.”¹⁵

Having observed that the written law of the Fund reflected a principle of nondiscrimination on the basis of universally recognized human rights, the IMFAT was able to conclude in *Ms. “M” and Dr. “M”* that the challenged SRP provision was “fundamentally defective as it failed to make adequate provisions for children born out of wedlock, a failure that was *incompatible with the international standards of nondiscrimination that the Fund itself professes*.”¹⁶ In the words of the Tribunal, the Fund’s apparent failure to take into consideration the effect of the “marital relationship” requirement of SRP Section 11.3 on children born out of wedlock was “not compatible with contemporary standards of human rights, standards which obtained in 1999, as they do in 2006.”¹⁷ The Tribunal cited Article 25 of the Universal Declaration of Human Rights (1948) and observed that “. . . other international administrative tribunals have applied universally accepted principles of human rights as a constraint on discretionary authority.”¹⁸

The case of *Ms. “M” and Dr. “M”* was singular in presenting a challenge to a “regulatory decision” of the Fund, albeit one that later had been revised to remove the offending provision,¹⁹ on the ground that it violated an inter-

¹⁴*Ms. “M” and Dr. “M”*, para. 126.

¹⁵*Id.*, para. 126, quoting Fund’s Discrimination Policy (July 3, 2003) (emphasis supplied by Tribunal).

¹⁶*Id.*, para. 132 (emphasis supplied).

¹⁷*Id.*, para. 132.

¹⁸*Id.*, paras. 133, 125. Article 25 of the Universal Declaration of Human Rights (1948) provides: “All children, whether born in or out of wedlock, shall enjoy the same social protection.”

¹⁹In December 2001, the Staff Retirement Plan was amended to authorize payment of a portion of a Fund retiree’s pension for child support “. . . pursuant to a legal obligation arising from a marital relationship or pursuant to a legal obligation to make child support payments” (emphasis supplied), thereby abolishing the requirement that the court order “aris[e] from a marital relationship.” *Id.*, paras. 121–122. “The benefit payable shall not exceed: . . . when payable to a child or children or their parents or guardians, 16⅔ percent of the benefit payable to

nationally recognized human right. The IMFAT acknowledged the tension between the deference that it has held is required in reviewing regulatory decisions of the Fund²⁰ and the scrutiny necessitated by a challenge to a decision of the Fund as allegedly violating internationally accepted principles of human rights:

SRP Section 11.3 was recommended by the Pension Committee and approved by the Executive Board of the Fund. . . . Thus, the Tribunal is mindful of the deference required in deciding whether the “marital relationship” requirement, formerly incorporated into Section 11.3, was valid under the internal law of the Fund. At the same time, however, the Tribunal also notes that it has been called upon to review the Executive Board’s discretionary authority in the light of a claim that the contested Plan provision, a “regulatory” decision of the Fund, as well as its application in the individual case of Applicants Ms. “M” and Dr. “M”, violated a universally recognized human right. The very nature of this grave complaint requires a greater degree of scrutiny over the Fund’s exercise of its discretion.²¹

While the Fund maintained that the “marital relationship” requirement of Section 11.3 was a reasonable exercise of the Executive Board’s discretion in defining the conditions under which the Plan would give effect to support orders, the Tribunal concluded otherwise:

[T]he disparate—and discriminatory—effect with respect to children born out of wedlock followed directly from the intended classification by marital status and by treating child support awards as incidental to a dissolution of marriage and payment of spousal support. Hence, the rationale proffered by Respondent in support of the policy of preferential treatment of spouses does not appear to support the resulting disparity in the treatment of children.²²

In the view of the Tribunal, “[t]he governing consideration is that the child is innocent of the marital—or non-marital—relationship of his or her

the participant or retired participant whenever the court ordered obligation is for support of his child or children. . . .” *Id.*, note 43.

²⁰*Id.*, para. 116: “This deference is at its height when the Tribunal reviews regulatory decisions, as contrasted with individual decisions, especially policy decisions taken by the Fund’s Executive Board.” See generally *Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment 2003-1 (September 30, 2003), para. 105.

²¹*Id.*, para. 117. Similarly, the Tribunal had characterized Mr. “F”’s claim of discriminatory treatment based on his religious affiliation as a “serious charge that may be subject to particular scrutiny by the Tribunal.” *Mr. “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).

²²*Ms. “M” and Dr. “M”*, para. 130.

parents and, as an innocent human being, is entitled to the human right of being free from impermissible discrimination.”²³ Accordingly, the Tribunal held that the language of the earlier iteration of SRP Section 11.3 did not debar the Applicants’ request that court orders relating to the period prior to the provision’s revision be given effect under the SRP.

The “Public Policy” of the Forum

While Ms. “M”’s and Dr. “M”’s challenge to the “marital relationship” requirement of the former Section 11.3 resulted in the IMFAT’s application of “universally accepted principles of human rights” as an unwritten source of the Fund’s internal law, a second issue, namely, that none of the court orders that the Applicants sought to have given effect specified that the support payments for Ms. “M” be drawn from Mr. “N”’s IMF pension benefits, led the Tribunal to look to the “public policy” of its forum to resolve a potential conflict in the treatment of staff and dependents from differing legal systems.

The Tribunal characterized as a “principal—and difficult—question” presented by the case of *Ms. “M” and Dr. “M”* whether, as the Fund maintained, in enacting SRP Section 11.3 as an exception to the anti-alienation provision of the Plan, the Fund’s Executive Board had limited the authority to give effect to domestic relations orders to those orders for family support and division of marital property that expressly specified that an alternate payee was to receive pension benefits otherwise payable to the Plan participant. “Alternatively,” asked the Tribunal, “might SRP Section 11.3 admit of a broader interpretation than that urged by the Fund, in view of the language of its text, the underlying policies of the Fund, the multinational character of the IMF (and its staff and their dependents), and the circumstances of the instant case?”²⁴ The Tribunal concluded that it did.

The Tribunal observed that in enacting Section 11.3 the Fund was motivated by a problem that arose most often in the U.S. jurisdictions surrounding the Fund’s Washington, D.C. headquarters. While the Fund maintained that the Plan provision had been drafted with the intent of creating a voluntary exception to the IMF Staff Retirement Plan’s anti-alienation rule that would be “akin” to the “QDRO” [“Qualified Domestic Relations Order”] exception found in U.S. law applicable to private employer pension plans, the Tribunal emphasized that such an interpretation “. . . raise[d] an issue

²³*Id.*

²⁴*Id.*, para. 139.

of treatment of Fund staff and their dependents in diverse legal systems.” In the view of the Tribunal: “The rights of the child born out of wedlock who is raised in a foreign jurisdiction should not turn on the particularities of the law of the District of Columbia, Maryland or Virginia. The Fund is a universal organization that in its operation must give due weight to legal principles and procedures of a variety of jurisdictions.”²⁵ This was so, said the Tribunal, even “assuming that there are jurisdictions (Germany purportedly being one of them) that would not issue an order expressly awarding support from pension benefits.”²⁶

In interpreting the Plan provision, the Tribunal emphasized that the text of Section 11.3 did not clearly state any requirement that a support order refer specifically to the Fund’s Staff Retirement Plan.²⁷ In the view of the IMFAT, the interpretation urged by the Fund was neither a necessary one, “[n]or, in the light of the essential purpose of the 1999 amendment to Section 11.3, an appropriate one.”²⁸ While acknowledging that the legislative history lent support to the Fund’s position that Section 11.3 had been drafted as an exception to the general prohibition against alienation of Plan benefits, the Tribunal, drawing upon its earlier Judgment in *Mr. “P” (No. 2)*, identified in that same provision a “competing policy of ‘encourag[ing] enforcement of orders for family support and division of marital property.’”²⁹ “This competing interest,” held the Tribunal, “counsels a more inclusive interpretation that takes into consideration the effect on spouses and children seeking to obtain court-ordered support.”³⁰

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

[W]hile the immediate purpose of the adoption of Section 11.3 may have been to remove a particular impediment to the enforceability of family support orders arising from courts in the United States, the larger purpose of the amendment was just as clearly to give effect to a more general policy, under what the Tribunal has termed the “public policy of its forum,”

²⁵*Id.*, para. 155.

²⁶*Id.*, para. 154.

²⁷*Id.*, paras. 146, 152, and 156.

²⁸*Id.*, para. 147.

²⁹*Id.*, para. 140, quoting *Mr. “P” (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), para. 151.

³⁰*Id.*, para. 140.

i.e. “. . . to encourage enforcement of orders for family support and division of marital property.”³¹

. . . In upholding Applicants’ challenge, the Tribunal responds to the policy of its forum, namely, the internal law of the Fund, which favors enforcement of family support orders wherever they originate and however drafted.³²

The Tribunal accordingly held that Section 11.3 does not necessarily exclude from its reach court orders that do not expressly provide that payment be made from a retiree’s Fund pension benefits: “Rather, the text and history of that Plan provision permit the conclusion, in the circumstances of Applicants’ case, that Section 11.3 may be interpreted more broadly to permit giving effect to support orders that lack such an express direction.”³³ In the view of the Tribunal: “What is important is that an alternate payee submit a valid court order entitling the applicant to support arising out of a marital or parental relationship. The precise terms in which the obligation for support is cast are not dispositive.”³⁴

Having determined that “there are circumstances, as in the present case, under which the Fund may give effect under Section 11.3 to support orders that do not specify that the support is to be drawn from pension benefits,”³⁵ the Tribunal turned to the question of whether the Applicants’ requests

³¹*Id.*, para. 143, quoting *Mr. “P” (No. 2)*, paras. 151, 156. The Tribunal noted that in *Mr. “P” (No. 2)* it had identified in some detail the policies underlying the decision to permit dependents of SRP participants to request that support orders be given effect through the pension Plan. See *Ms. “M” and Dr. “M”*, paras. 141–142.

³²*Id.*, para. 155, citing *Mr. “P” (No. 2)*, paras. 151, 156. The Tribunal additionally observed that national courts may be reluctant to issue orders that specify payment of spousal or child support from the IMF Staff Retirement Plan precisely because they are aware of the Fund’s immunity from legal process. “That consideration,” held the Tribunal, “provides further reason not to require national courts specifically to engage the question of payment out of the SRP.” *Id.*, para. 157.

³³*Id.*, para. 158.

³⁴*Id.*, para. 156.

³⁵*Id.*, para. 160. The Tribunal held:

[T]he SRP Administration Committee, and this Tribunal, are entitled to weigh factors such as the foreign residence of the child and her guardian, the Applicants’ asserted and apparent difficulty or inability in obtaining a court order in Germany that in terms specifies what a QDRO specifies, the difficulty or inability of the Applicants to move effectively against other assets of the retiree, and the bad faith and questionable tactics displayed by the retiree in evading his elementary paternal responsibilities. These factors support giving effect in this case to German court orders that do not expressly require that support payments be made from the retiree’s Fund pension.

Id., para. 155.

should be denied—as the Fund maintained they should—pursuant to the SRP Administration Committee’s Rules under Section 11.3, on the ground that a *bona fide* dispute existed as to the efficacy, finality, or meaning of the court orders that Ms. “M” and Dr. “M” sought to have given effect. Examining each of the orders and the respective arguments of the Applicants and of Mr. “N” (who had set out his views in the earlier proceedings of the SRP Administration Committee), the Tribunal concluded that the dispute that existed between the parties as to the validity of the court orders, including as to the paternity of Mr. “N” and his assertion that the law of his domicile governed any support obligation, was not *bona fide*. Accordingly, the Tribunal ordered that the German support orders be given effect pursuant to the terms of Section 11.3 of the Fund’s Staff Retirement Plan.³⁶

Challenges to the Exercise of Managerial Discretion: Staff Appointments

Several of the Applications decided by the Administrative Tribunal during 2006 required the IMFAT to consider challenges to the exercise of the Fund’s managerial discretion in respect of staff appointments. In *Ms. “T”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-2 (June 7, 2006), and *Ms. “U”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-3 (June 7, 2006), the Tribunal sustained the Fund’s decisions not to convert the Applicants’ fixed-term appointments to appointments of indefinite duration. In *Mr. “O”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), the IMFAT examined the reach of the Fund’s discretionary authority to formulate the terms of reemployment of a former staff member who, as required by Fund rules, had resigned from the staff of the Fund to take up employment with the IMF Executive Board. These decisions are elaborated below.

Non-Conversion of Fixed-Term Appointments

In *Ms. “T”* and *Ms. “U”*, the Applicants contended that the decisions not to convert their fixed-term appointments to staff positions of indefinite duration had failed to take account of all of the relevant evidence and were arbitrary, capricious, and an abuse of discretion. Both *Ms. “T”* and *Ms. “U”* additionally contended that the contested decisions were marked by procedural irregularities and represented discrimination on the basis of race

³⁶*Id.*, paras. 174–224 and Decision.

and nationality. The Fund, for its part, maintained that the non-conversion decisions were taken in the reasonable exercise of managerial discretion, carried out consistently with the Fund's internal law, and supported by the relevant evidence.

The cases of *Ms. "T"* and *Ms. "U"* required the Tribunal to interpret and apply the Fund's Guidelines for Fixed-Term Appointments (1995). The Tribunal commented that, as it was the Fund's policy to hire virtually all new staff on a fixed-term basis preliminary to their attaining appointments of indefinite duration, the significance of the requirement that the conversion decision be taken consistently with legal norms could not be overstated. The Guidelines set three criteria for conversion: (a) performance during the fixed term, (b) potential for a career with the Fund, and (c) the staffing needs of the organization.³⁷

The Guidelines further provide for performance assessments at prescribed intervals during the fixed term and impose obligations on both the fixed-term appointee and supervisors. On an exceptional basis, a fixed-term appointment may be extended, as it was once in the case of *Ms. "T"* and twice in the case of *Ms. "U"*, for an additional period of development and testing. The Guidelines make clear that the Fund's obligation does not go beyond the initial term. They require a "clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual."³⁸

The IMFAT in *Ms. "T"* and *Ms. "U"* emphasized that the decision whether to convert a fixed-term appointment is essentially a "performance-based decision," citing the Commentary on the Tribunal's Statute that "the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility."³⁹ The Tribunal also distinguished the discretion at issue in the conversion of fixed-term appointments from that exercised by management in the separation of a staff member for unsatisfactory performance: "A fixed-term appointee has no entitlement to the continuation of his employment beyond the term of the appointment, and the burden of proof rests squarely with the applicant in challenging a decision not to convert his fixed-term appointment to regular staff."⁴⁰

³⁷*Ms. "T"*, para. 32; *Ms. "U"*, para. 32.

³⁸Guidelines for Fixed-Term Appointments (1995). See *Ms. "T"*, paras. 32–35; *Ms. "U"*, paras. 32–35.

³⁹Report of the Executive Board, p. 19, quoted in *Ms. "T"*, para. 36, and *Ms. "U"*, para. 36.

⁴⁰*Ms. "T"*, para. 37; *Ms. "U"*, para. 37. By contrast, a staff member who already has attained an appointment of indefinite duration is presumed to continue in the Fund's employment; in

While emphasizing that “. . . it is within the purview of the Fund’s discretionary authority to decide upon a staff member’s suitability for conversion to an appointment of indefinite duration,” the Tribunal likewise recognized that such discretion is “necessarily constrained by principles of fairness, in particular adequate opportunity to demonstrate satisfactory performance and suitability for career employment.” Such opportunity encompasses that the appointee be evaluated periodically, given adequate warning of performance deficiencies, and allowed a reasonable opportunity to remedy any such deficiencies. These principles, noted the Tribunal, are recognized both in the Fund’s Guidelines and in the jurisprudence of other international administrative tribunals.⁴¹

The Tribunal examined the facts presented by the cases of *Ms. “T”* and *Ms. “U”* in light of the governing standards. In each case, the Tribunal concluded that the Fund had fairly taken account of the relevant evidence in determining that the Applicant’s performance fell short of the “clearly positive assessment” required for conversion under the Fund’s Guidelines. Even following the extension of the fixed-term appointments to provide additional opportunities for development and testing, in each case, the Applicant’s “progress remained insufficient and . . . potential for a Fund career unproven in the judgment of those properly charged with making the conversion decision.”⁴² Underscoring its standard of review, the Tribunal concluded that “[w]hen managers take such a decision, as the evidence shows they have in this case, with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.”⁴³

The Tribunal in *Ms. “T”* and *Ms. “U”* additionally rejected as unsubstantiated the Applicants’ claims that the decisions not to convert their fixed-term appointments were affected by discrimination on the basis of race or nationality.⁴⁴ Neither did it find any irregularity of procedure or “career mismanagement” in respect of the non-conversion of *Ms. “T”*’s or *Ms. “U”*’s fixed-term appointment.⁴⁵ The Applications accordingly were denied.

the case of dismissal for unsatisfactory performance, the burden rests with the Fund. *Ms. “T”*, note 11; *Ms. “U”*, note 13.

⁴¹*Ms. “T”*, para. 38; *Ms. “U”*, para. 38.

⁴²*Ms. “T”*, para. 53; *see also Ms. “U”*, para. 53.

⁴³*Id.*

⁴⁴*Ms. “T”*, paras. 49–50; *Ms. “U”*, para. 50.

⁴⁵*Ms. “T”*, para. 45; *Ms. “U”*, para. 49.

Return to Fund Employment Following Service as Advisor to an Executive Director

While Ms. "T" and Ms. "U" challenged a relatively routine instance of the Fund's exercise of managerial discretion—the decision whether to convert a fixed-term appointment to one of indefinite duration—the case presented by Mr. "O" arose from a more unusual set of circumstances. The Fund's regulations require that for a staff member to take up an appointment with the IMF Executive Board as Advisor to an Executive Director, he must resign from the staff of the Fund. General Administrative Order (GAO) No. 16 likewise governs the terms by which the individual may return to the Fund's staff following such service. The controversy presented in *Mr. "O"* centered on the Fund's authority to vary the terms of such reemployment, as well as the question of whether the Applicant had agreed to the variations.

Mr. "O" maintained that the terms upon which he had resigned to take up the position of Advisor to an Executive Director, and the Fund's regulations, entitled him to return to Fund employment as a regular staff member with an appointment of indefinite duration. Upon completion of his service with the Executive Board, however, Mr. "O" was reappointed to the Fund on a series of "hybrid" appointments, affording some of the benefits of staff employment, for example, participation in the Staff Retirement Plan, but providing for a limited term rather than for an appointment of indefinite duration. Following several extensions, Mr. "O"'s employment with the Fund was allowed to expire, and he challenged his separation from service.

A question posed to the Tribunal in *Mr. "O"* was whether there had been a meeting of the minds between the Applicant and the Fund as to the terms of the reemployment guarantee with which Mr. "O" had resigned from the staff to take up service with the Executive Board. Had the Applicant agreed to the terms of which he complained before the Administrative Tribunal?

The Tribunal emphasized that the provisions governing the mandatory resignation and possible subsequent reemployment of staff who serve as Advisors to Executive Directors indicate that a staff member who so resigns has no assured right to resume employment as a member of the Fund's staff.⁴⁶ Citing performance concerns leading up to the Applicant's decision to accept appointment as an Advisor to an Executive Director, the Fund maintained that its written communication to Mr. "O" of May 1995 had memorialized an agreement with him that any reemployment following

⁴⁶*Mr. "O"*, para. 76.

Executive Board service would terminate at the end of February 2000, that is, at Applicant's 55th birthday, when he would become eligible for a Fund pension.

The Tribunal noted that the Applicant's contrasting interpretation, namely, that the May 1995 communication was to record the period during which the Fund would hold open a guarantee of reemployment, was consistent with the Fund's assertion that staff members normally are given an unconditional guarantee of reemployment upon resignation for Executive Board service and, equally, with the requirement of GAO No. 16 that the period during which such understanding applies is to be determined by the Fund and recorded in writing before the staff member's resignation. The Tribunal additionally observed that the May 1995 communication had made no provision for the Applicant to sign his agreement to it.⁴⁷

Nonetheless, after reviewing the evidence, the Tribunal found that the record revealed no objection by Mr. "O" at the time, or for years thereafter, to the Fund's statement in the letter of May 1995 that the terms were "agreed." The Tribunal concluded that Mr. "O" "did acquiesce in the Fund's position affording him a limited, rather than indefinite, reentry,"⁴⁸ with the result that "for years the Applicant received the benefits of the arrangements fashioned by the Fund, while at a late stage he repudiated the burdens."⁴⁹

Moreover, in the view of the Tribunal, it was within the Fund's discretionary authority to undertake such an arrangement for a staff member's return from service as an Advisor to an Executive Director that was of limited duration, while at the same time carrying some of the benefits of staff employment. The Tribunal summarized its conclusions as follows:

[The Fund] would have done well to have more clearly established the assent of Applicant to the 1995 arrangements at the time they were made. Its coincident description of his status as a "regular" appointee and a "fixed-term" appointee, if understandable in the circumstances, seems confused. Nevertheless, in light of the foregoing analysis, the Tribunal has arrived at the conclusion that the contentions of Applicant challenging reentry for only a limited term are not well-founded. The arrangements of 1995 do not squarely comport with the provisions of GAO No. 16, but in the view of the Tribunal, it was open to the Fund to vary those provisions for the benefit of a staff member provided that he agreed to or acquiesced in those variations. While the record is not free from doubt, on balance the

⁴⁷*Id.*, paras. 82-83.

⁴⁸*Id.*, paras. 83, 85.

⁴⁹*Id.*, para. 97.

Tribunal concludes that Mr. "O" did assent to the 1995 arrangements by his acceptance of their benefits and failure to question the content of those arrangements until he had exhausted those benefits.⁵⁰

Admissibility of Applications

Of the six Judgments issued by the Administrative Tribunal in 2006, four required that it resolve challenges to the admissibility of Applications. In *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), the Tribunal granted the Respondent's Motion for Summary Dismissal on the basis that Ms. "AA" had failed to initiate administrative review procedures in a timely manner. By contrast, in *Mr. "O"* and in *Ms. "M" and Dr. "M"*, the Tribunal concluded that "exceptional circumstances" excused the Applicants' delay in seeking administrative review and proceeded to render Judgments on the merits. The latter case additionally raised the issue of waiver of the Tribunal's statute of limitations, a question also resolved in favor of the Applicants. In *Baker et al., Applicants v. International Monetary Fund, Respondent (Dismissal of the Applications as Moot)*, IMFAT Judgment No. 2006-4 (June 7, 2006), the Tribunal granted a motion by the Fund to dismiss the Applications as having been rendered moot by intervening events.

Timely Exhaustion of Administrative Review

Essential to the admissibility of an Application before the IMFAT is that the Applicant has exhausted all available channels of administrative review prior to invoking the judicial remedy of the Tribunal. The rationale for this statutory requirement, which underscores the IMFAT's role as the forum of last resort for the resolution of employment disputes within the IMF, is to allow opportunities for settlement of the dispute and to create a record in the event of later adjudication.⁵¹

A recurring question presented in the Tribunal's jurisprudence is whether an Applicant has met the exhaustion requirement of Article V⁵² of the Stat-

⁵⁰*Id.*

⁵¹*Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66.

⁵²Article V (1) of the Statute 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.

ute when the Fund's Grievance Committee has dismissed the complaint on the ground that the Applicant failed to invoke in a timely manner the administrative review procedures anterior to the Grievance Committee's review. In its 2001 Judgment in *Estate of Mr. "D"*, the Tribunal held that such a decision of the Grievance Committee is "relevant to but not necessarily dispositive of" the question of whether the Applicant has met the exhaustion of remedies requirement of the Tribunal's Statute and that the Tribunal may examine independently the "presence and impact of exceptional circumstances" at anterior stages of the dispute resolution process, including the "extent and nature of the delay" in the light of the "purposes intended to be served" by the exhaustion requirement.⁵³ In 2006, the Tribunal reaffirmed these principles in *Ms. "AA"*⁵⁴ and *Mr. "O"*,⁵⁵ and, in *Ms. "M" and Dr. "M"*, it extended them to a case arising through the channel of review provided by the Administration Committee of the Staff Retirement Plan.⁵⁶

When Is the Applicant on Notice of the Contested Administrative Act?

In order to assess whether an Applicant has initiated administrative review procedures on a timely basis, the Administrative Tribunal may be required to determine when the Applicant was on notice that he had been adversely affected by an administrative act of the Fund. The Tribunal grappled with this question in both *Ms. "AA"* and *Mr. "O"*, with differing results.

Ms. "AA", like *Ms. "T"* and *Ms. "U"*, challenged the decision not to convert her fixed-term appointment to a position of indefinite duration. Additionally, *Ms. "AA"* maintained that she had been the object of harassment and a hostile work environment in contravention of the Fund's internal law and that the alleged harassment unfairly affected her work performance and the appraisal thereof, resulting in the non-conversion of her appointment.

It was not disputed that *Ms. "AA"* had not initiated administrative review of the decision not to convert her fixed-term appointment, or of the "related decisions, actions and inactions" of her supervisors allegedly subjecting her to harassment and a hostile work environment, until more than two years following the non-conversion decision and almost 20 months after the conclusion of her employment with the Fund. *Ms. "AA"* sought to invoke a "discovery rule" to excuse her delay, maintaining that only after leaving the Fund did she become aware that the harassment that she allegedly had

⁵³*Estate of Mr. "D"*, paras. 91, 102–103, 108.

⁵⁴*Ms. "AA"*, paras. 30–32, 42.

⁵⁵*Mr. "O"*, paras. 48–49, 67.

⁵⁶*Ms. "M" and Dr. "M"*, paras. 94–100, 106.

experienced was part of a “pattern or practice” in her work unit, when her successor allegedly alerted her that she and others in the division believed that they were experiencing harassment. Ms. “AA” maintained that her Application was admissible on the ground that she had requested administrative review within six months of the date on which she contended she had acquired knowledge of all of the elements of her claim.⁵⁷

Reviewing the record of the case, the Tribunal concluded that “even if a ‘discovery rule’ were to be applied, the facts as presented by Ms. “AA” simply do not bear out her assertion that she did not have knowledge of the elements of her claim until January 2005.” “To the contrary,” observed the Tribunal, “Applicant’s assertions in her pleadings before this Tribunal reveal that ‘. . . she knew in late 2003 of the fact that she was being harassed and that her performance appraisals did not reflect her true performance.’” Furthermore, the Applicant maintained that during her employment she had made “pleas of assistance” to Fund officials, including her Senior Personnel Manager, the Ombudsperson, and the Health Services Unit, “. . . for the stress she was suffering from because she was wrongly being blamed for poor performance by her supervisors”⁵⁸

In the view of the Tribunal, the facts known by Ms. “AA” within the prescribed period for initiating administrative review were sufficient to make out a claim of harassment under the internal law of the Fund.⁵⁹ The Tribunal accordingly concluded that the Applicant had not established “exceptional circumstances” to excuse her substantial delay in instituting a request for review, pursuant to the Fund’s internal recourse procedures:

What is significant for purposes of deciding the Motion for Summary Dismissal is when Applicant was on notice of an administrative act of the Fund adversely affecting her. . . . Ms. “AA” knew at the time of the non-conversion of her appointment that she had been adversely affected by an administrative act of the Fund. It is not necessary in every case to show a “pattern or practice” in order to bring a complaint of harassment under the Fund’s regulations. It follows that the Tribunal cannot sustain Applicant’s assertion that she was prevented until January 2005 from knowing the essential elements of her cause of action.⁶⁰

Notably, the Administrative Tribunal, in granting the Fund’s Motion for Summary Dismissal in the case of Ms. “AA”, left open as a “possibility which

⁵⁷Ms. “AA”, paras. 20, 33–35.

⁵⁸*Id.*, para. 38.

⁵⁹*Id.*, para. 39.

⁶⁰*Id.*, para. 40.

should not be excluded” that a “discovery rule” might, in a case presenting different facts, be applied to establish “exceptional circumstances” to excuse delay in initiating administrative review procedures.⁶¹

The question of when a staff member is on notice of an administrative act of the Fund adversely affecting him also was at issue in the case of *Mr. “O”*. The Fund maintained that Mr. “O” was on notice in 1995 of the conditions placed on his return to the staff following service as Advisor to an Executive Director and that, accordingly, he should have requested review within six months of that notice. The Applicant, for his part, contended that he was not required to initiate administrative review until the conclusion of his final reappointment with the Fund in 2003.

For purposes of deciding the admissibility of the Application, the Tribunal concluded that the terms of the Fund’s May 1995 communication to Mr. “O” had not precluded the possibility that the Applicant’s employment with the Fund subsequent to his service with the Executive Board might be extended beyond February 2000. Indeed, by a series of decisions, the Fund had extended the duration of the Applicant’s reemployment into September 2003. Recognizing that the 1995 act had set in motion a series of acts, the Tribunal considered “. . . whether acts subsequent to the 1995 act may be considered separate ‘administrative acts’ subject to challenge in the Administrative Tribunal,” and concluded that they may:

While the 1995 act made possible subsequent acts, it did not necessarily determine them. . . . The decision of October 30, 2002 did adversely affect Applicant because it resulted directly in the termination of his Fund employment, an event that was not necessarily required by terms of the 1995 guarantee.⁶²

The Tribunal additionally observed that within six months following the Applicant’s reemployment with the Fund in 1999, that is, within the time period during which he would have been required to initiate administrative review procedures, Mr. “O” was offered an extension of his appointment. Additional extensions followed. The Tribunal cited as well the “undeniable ambiguity” of the reappointment letters and Personnel Action forms, which characterized Mr. “O”’s employment at once as “regular” and as “fixed-term.”⁶³

⁶¹*Id.*, para. 38.

⁶²*Mr. “O”*, para. 56.

⁶³*Id.*, paras. 58–59.

Exceptional Circumstances

Treating the October 30, 2002 “final extension” of Mr. “O”’s appointment as the contested administrative act, the Tribunal considered whether the Applicant had initiated timely administrative review of that decision for purposes of satisfying the exhaustion of remedies requirement of Article V of the Tribunal’s Statute. It was not disputed that the Applicant had not followed the procedures set out in the Fund’s rules, that is, GAO No. 31, but rather had sought redress by directing correspondence to the Fund’s Managing Director.

The Tribunal confirmed that “[s]taff members ordinarily are held to a knowledge of the organization’s administrative review procedures . . . , and it is highly desirable that these procedures exclusively be followed.”⁶⁴ In the unusual circumstances presented by Mr. “O”’s case, however, the Tribunal held that the particular response of the Fund to the Applicant’s complaint permitted the conclusion that Mr. “O” had satisfied the exhaustion requirement:

[W]hen a staff member brings his complaint to the highest levels of Fund management and when management elects to review that complaint rather than advising the staff member that his complaint either should be reviewed through prescribed channels or is untimely, the Tribunal is of the view that that election by management exceptionally stands in lieu of seeking administrative review pursuant to the procedures of GAO No. 31.⁶⁵

The Tribunal observed that the language of management’s responses to Mr. “O” suggested that it “regarded Applicant’s letters . . . as requests for review of the contested decisions and reacted accordingly.”⁶⁶ The Tribunal noted that “. . . in previous cases [it] has taken account of the effect of the Fund’s communications to a staff member in assessing his actions in seeking further review.”⁶⁷ Moreover, “. . . the Deputy Managing Director’s investigations of Applicant’s complaint may be said to have served the functional purposes of administrative review.”⁶⁸ The Tribunal cited its earlier jurisprudence for the principle that “exceptional circumstances” may be

⁶⁴*Id.*, para. 65.

⁶⁵*Id.*

⁶⁶*Id.*, para. 66.

⁶⁷*Id.*, citing *Mr. “R” (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004), para. 43, and *Mr. “X”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1994-1 (August 31, 1994), para. 26.

⁶⁸*Mr. “O”, para. 67.*

found where the Fund “has on several occasions reviewed the claim, creating opportunities for resolution of the dispute and building an evidentiary record”⁶⁹

Waiver of Statute of Limitations

The functional purposes of administrative review and the role of the Fund’s communications to potential Applicants also supported the Tribunal’s conclusion in *Ms. “M” and Dr. “M”* that the Applicants had met the exhaustion of remedies requirement of Article V and had established “exceptional circumstances” justifying waiver of the Tribunal’s statute of limitations pursuant to Article VI.⁷⁰ While the Fund had framed the issue of admissibility of the Applicants’ challenges to the denials of their 1999 and 2002 requests solely in terms of the question of the waiver of the Tribunal’s statute of limitations, the IMFAT observed that “. . . there is room to question whether any administrative review was offered by the Administration Committee or exhausted by Applicants in respect of their 1999 and 2002 requests.” In the view of the Tribunal, “responsibility for that course of events should not be borne by Applicants.”⁷¹

Invoking the purposes of administrative review and the value of the record of the underlying review procedures to the Tribunal’s decision making,⁷² the Tribunal observed that “[i]n the context of this case, . . . Mr. “N” has had a full measure of opportunity to present his views, providing opportunities for settlement of the dispute and building an evidentiary record.”⁷³ While the Fund had summarily denied the Applicants’ initial requests rather than referring them for review by the Administration Com-

⁶⁹*Id.*, para. 67, quoting *Estate of Mr. “D”*, para. 125.

⁷⁰Article VI of the Tribunal’s Statute provides in pertinent part:

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.

. . .

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.

. . .

⁷¹*Ms. “M” and Dr. “M”*, para. 95.

⁷²See generally *Ms. “Y”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42.

⁷³*Ms. “M” and Dr. “M”*, para. 98.

mittee of the Staff Retirement Plan,⁷⁴ the Tribunal had the benefit of the extensive record of the proceedings of the Committee as to Ms. “M”’s and Dr. “M”’s later (2003) request, including the submissions of Mr. “N”. Accordingly, the Tribunal concluded that the Applicants’ challenges to the denial of their 1999 and 2002 requests were not debarred on the ground of failure to exhaust channels of administrative review as prescribed by Article V of the Statute.⁷⁵

As to the issue of waiver of the statute of limitations, while the IMFAT in *Ms. “AA”*⁷⁶ and *Mr. “O”*⁷⁷ confirmed that staff members ordinarily are held to a knowledge of internal review procedures, in *Ms. “M” and Dr. “M”* the Tribunal considered the case of non-staff members contesting the denial of requests under Section 11.3 of the Staff Retirement Plan.⁷⁸ Such Applicants, concluded the Tribunal, could not be assumed to have known the recourse procedures of the Fund. The Tribunal reaffirmed that “[i]n deciding questions of admissibility, this Tribunal repeatedly has ‘. . . taken account of the effect of the Fund’s communications to a staff member in assessing his actions in seeking further review.’”⁷⁹ In 1999 and 2002, the Fund had provided to the Applicants no information as to recourse procedures. The Tribunal concluded that, in the absence of notice by the Fund, the Applicants should not have been expected to know the Fund’s procedures for bringing a challenge in the Administrative Tribunal. Accordingly, the Tribunal held that “exceptional circumstances” justified waiver of the time limits prescribed under Article VI of its Statute.⁸⁰

⁷⁴In 1999 and 2002, the Legal Representative and the Secretary of the Administration Committee, respectively, made threshold assessments that the Applicants’ requests did not meet the minimum criteria for giving effect to support orders under SRP Section 11.3, and, accordingly, the Administration Committee itself did not proceed to consider the requests in accordance with the procedures set out in its Rules. *Id.*, para. 96.

⁷⁵*Id.*, paras. 96–100. The Tribunal noted that “. . . the documentation and argumentation presented to the Administration Committee in 2003 related also to the two earlier requests, and Respondent itself notes that many of Mr. “N”’s detailed objections to Applicants’ 2003 request are directly applicable to the consideration of the merits of the two earlier requests.” *Id.*, para. 98.

⁷⁶*Ms. “AA”*, para. 41 and note 12.

⁷⁷*Mr. “O”*, para. 65.

⁷⁸The jurisdiction *ratione personæ* of the IMFAT extends to “an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.” (Statute, Article II (1) (b).) The Tribunal has held that it has jurisdiction to consider an Application by a non-staff member who contests the denial of his request under SRP Section 11.3. See *Ms. “M” and Dr. “M”*, note 1; *Mr. “P” (No. 2)*, paras. 48–65.

⁷⁹*Ms. “M” and Dr. “M”*, para. 107, citing *Mr. “O”*, para. 66 and cases cited therein.

⁸⁰*Id.*, para. 108.

The IMFAT additionally observed that the availability of recourse to the Tribunal initially may have appeared uncertain not only to the Applicants but also to the Fund, which claimed to have held a good faith belief that the Tribunal did not have jurisdiction *ratione personæ* over non-staff members adversely affected by a decision on a SRP Section 11.3 request until it learned otherwise through the Tribunal's 2001 decision in *Mr. "P" (No. 2)*. In respect of the denial of Applicants' 2002 request, however, the Tribunal commented: "[F]ollowing [the Tribunal's] 2001 decisions in *Mr. "P" (No. 2)* and *Estate of Mr. "D"*, Respondent was on notice (1) that Applicants had standing to bring an Application to the Administrative Tribunal, and (2) Respondent was obliged to inform them of that avenue of recourse."⁸¹

Accordingly, the Tribunal concluded, on the following grounds, that Ms. "M" and Dr. "M" had met the requirements of both Article V and Article VI of the Statute:

First, Applicants are non-staff members and could not be expected to know the recourse procedures of the Fund. Second, Applicants' conduct does not demonstrate casual disregard of legal requirements but rather prompt attention to such requirements where notified. Third, the availability in this case of internal recourse procedures appeared to be uncertain both to the Fund and the Applicants, a problem compounded by the summary procedures with which the Fund responded to the 1999 and 2002 requests. Fourth, there is no evidence that Applicants knowingly relinquished their right to Tribunal review in favor of an alternative legislative remedy, a remedy which in any case proved incomplete.⁸²

Mootness of Applications

Additionally during 2006, the Tribunal had occasion to dismiss as moot the Applications brought by seven staff members challenging a "regulatory decision" of the Fund amending the system of staff compensation. In 2005, the Tribunal had denied a Motion for Summary Dismissal of the Applications, concluding that the staff members had been "adversely affected" by the contested decision within the meaning of Article II⁸³ of the Statute, on the ground that the decision had "some present effect" on the Applicants'

⁸¹*Id.*, para. 110.

⁸²*Id.*, para. 111.

⁸³Article II 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;

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."⁸⁴

On April 14, 2006, however, the IMF Executive Board took another decision in respect of the compensation of the staff of the Fund that differed from the decision of January 24, 2005 and, by its terms, "supersede[d]" it. The Fund filed a Motion for Dismissal of the Applications as Moot.⁸⁵

The Tribunal observed that ". . . the January 24, 2005 decision of the Executive Board that is the object of Applicants' challenge has been superseded by virtue of the adoption of a comprehensive new system of compensation approved by the Executive Board on April 14, 2006." Accordingly, concluded the IMFAT, ". . . the holding of this Tribunal that the January 2005 decision could have effects in 2006 no longer obtains. The contested decision no longer has any 'present effect.'" Accordingly, the Tribunal dismissed the Applications as moot.⁸⁶

Conclusion

During the year 2006, the IMF Administrative Tribunal continued to build upon principles set out in its earlier jurisprudence. In *Ms. "M" and Dr. "M"*, the Tribunal applied "universally accepted principles of human rights" as an unwritten source of the Fund's internal law. The Tribunal concluded that such principles operate as a constraint on the Fund's discretionary authority, even in a case in which the right at issue—freedom from discrimination on the ground of birth out of wedlock—was not expressly included in the Fund's written law. The Tribunal accordingly held that an earlier iteration of the Staff Retirement Plan, subsequently amended to remove the offending provision, did not debar the Applicants' claims for the period during which the provision had governed.

The Tribunal in *Ms. "M" and Dr. "M"* additionally recognized, in interpreting terms of the Staff Retirement Plan, that the Fund as a global organi-

⁸⁴*Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005), para. 21.

⁸⁵*Baker et al., Applicants v. International Monetary Fund, Respondent (Dismissal of the Applications as Moot)*, IMFAT Judgment No. 2006-4 (June 7, 2006), paras. 4, 11.

⁸⁶*Id.*, para. 22 and Decision. Following dismissal of the *Baker* case, five staff members filed Applications challenging the April 14, 2006 decision of the IMF Executive Board. The Tribunal decided those Applications on the merits. See *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007).

zation must give due weight to legal principles and procedures of a variety of jurisdictions. Resolving a potential conflict in the treatment of Fund staff and dependents from differing legal systems, the IMFAT invoked the “public policy” of its forum and rejected a narrow interpretation of the pertinent Plan provision, thereby permitting the giving effect thereunder to court orders for child support that did not specify that the support payments be drawn from the retiree’s IMF pension benefits.

The IMFAT during 2006 also considered challenges to the exercise of managerial discretion in respect of staff appointments. In *Ms. “T”* and *Ms. “U”*, the Tribunal confirmed the Fund’s broad authority to take performance-based decisions as to the conversion of fixed-term appointments, subject to the requirements of fair appraisal and opportunity to remedy perceived performance deficiencies that are imposed by the internal law of the Fund and supported by general principles of international administrative law. In *Mr. “O”*, the Tribunal examined the reach of the Fund’s discretionary authority to formulate terms of reemployment of a former staff member who, as required by Fund rules, resigned from the staff to take up employment with the IMF Executive Board. The Tribunal concluded that the Fund had not abused its discretion when it conditioned the Applicant’s reemployment on his acceptance of an appointment of limited duration and the evidence showed that the former staff member assented to such arrangement.

During 2006, the Tribunal also weighed challenges to the admissibility of Applications. In *Ms. “AA”*, the Tribunal rejected the Applicant’s contention that “exceptional circumstances” excused her failure to initiate timely administrative review on the ground that she did not have knowledge of the elements of her claim until after the period had passed for initiating review procedures. While not rejecting the possibility of applying a “discovery rule” in assessing admissibility, the Tribunal found on the facts that the Applicant had knowledge of her claim within the prescribed period for invoking administrative review. In *Mr. “O”*, the Tribunal also considered the question of when the Applicant had knowledge of an administrative act adversely affecting him, identifying a series of acts that the Applicant might have challenged. Taking account of the purposes of the requirement to exhaust channels of administrative review, as well as the Fund’s communications to Mr. “O”, the Tribunal held that “exceptional circumstances” permitted the conclusion that the Applicant had satisfied the exhaustion requirement. Similar considerations supported a conclusion of “exceptional circumstances,” as to both exhaustion of administrative review and waiver of the Tribunal’s statute of limitations, in the case of *Ms. “M”* and *Dr. “M”*, in which non-staff members challenged the denial of their requests under Sec-

tion 11.3 of the Staff Retirement Plan. Finally, the Tribunal's 2006 Judgment in *Baker et al.*, a case in which intervening events rendered moot the "present effect" upon the Applicants of the contested administrative act, underscored the significance of the "adversely affecting" requirement of Article II of the Statute as an essential condition for the justiciability of an Application.

JUDGMENTS
(Nos. 2006-1 to 2006-6)

JUDGMENT NO. 2006-1

***Mr. "O", Applicant v. International
Monetary Fund, Respondent***
(February 15, 2006)

Introduction

1. On February 13, 14 and 15, 2006, 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. "O", a former staff member of the Fund.

2. Applicant contests the terms of his reemployment with the IMF following service with its Executive Board (1995–1999) and his subsequent separation from service with the Fund in 2003. In Applicant's view, the terms upon which he resigned to take up the position of Advisor to an Executive Director, as well as applicable Fund regulations, entitled him to return to the Fund on the same basis upon which previously he had been employed, i.e. as a regular staff member with an appointment of indefinite duration. Applicant alleges that instead the Fund acted arbitrarily to convert his employment status to that of an appointee with a term of limited duration, while at the same time referring to his appointment as a "regular appointment." Following several extensions, Applicant's appointment was allowed to expire without, he contends, the proper procedures required for separation from service. Applicant additionally maintains that his career with the Fund and the termination of his employment were impermissibly affected by racial discrimination.

3. Respondent, for its part, contends that the Administrative Tribunal does not have jurisdiction over the Application, on the ground that Applicant failed to exhaust channels of administrative review in a timely manner. Alternatively, maintains the Fund, if jurisdiction obtains, the Application should be denied on the merits because the contested decision, which, in the

Fund's view, was to condition Mr. "O"'s return to the staff following service as Advisor to an Executive Director upon his taking up an appointment of limited duration, was a reasonable act of managerial discretion. Additionally, Respondent urges the Tribunal to deny as untimely and not supported by the record Applicant's claims that his Fund career and separation from service were impermissibly affected by racial discrimination.

The Procedure

4. On August 5, 2004, Mr. "O" 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 his 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

5. The Application was transmitted to Respondent on August 20, 2004. On August 26, 2004, pursuant to Rule XIV, para. 4,² the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Mr. "O"'s Application on October 4, 2004. On November 9, 2004, Applicant submitted his Reply. The Fund's Rejoinder was filed on December 9, 2004. On January 25, 2006, Applicant submitted a statement of his legal costs, for

¹Rule VII, as framed in the version of the Rules of Procedure that apply to Applications filed prior to January 1, 2005, 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:

"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."

which he had requested reimbursement in the Application. Pursuant to his authority under Rule XXI, para. 3,³ the President directed that the statement be transmitted to the Fund for its observations, which were submitted on February 13, 2006.

Requests for Production of Documents

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

1. All Executive Board documents establishing the rights of Executive Directors' staff to continued employment with the Fund, including, but not limited to, relevant parts of the Handbook on Executive Board Administrative Matters and the documents EB/CAM/86/29 and EB/CAM/86/38 (6/30/86);
2. Documents relating to Applicant's long-term career assessments in 1986 and 1989 other than those at Annex 8, B 065 and B 073;
3. Applicant's Personnel Action Form dated August 1, 2000;
4. Applicant's pension record for the years 1999 to 2003;
5. Documents setting forth the terms and conditions for participating in the Discrimination Review Exercise;
6. Applicant's Confidential Personnel file.

7. In accordance with Rule XVII⁴ of the Tribunal's Rules of Procedure, Respondent had the opportunity to present its views. With the filing of

³Rule XXI, para. 3 provides:

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

4

"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

the Answer, the Fund satisfied Requests 3, 5, and 6, either by attaching the responsive documents or by providing them separately to the Applicant. Requests 1, 2 and 4 remained, either wholly or partially, in dispute. On February 13, 2006, the Tribunal took the following decisions on Applicant's requests for production of documents.

8. As to Request 1, Respondent partially satisfied the request by providing as an attachment to the Answer excerpts from the Handbook on Executive Board Administrative Matters that relate to the employment of both Advisors and Assistants to Executive Directors. It objected, however, to Applicant's request for Executive Board documents EB/CAM/86/29 and EB/CAM/86/38, asserting that these documents are irrelevant to the case as they relate only to the employment of Secretarial and Clerical Assistants to Executive Directors. Such Assistants do have the right to resume regular employment status upon expiration of appointment with the Executive Board, while Advisors do not. The Tribunal is not of the view that the documents relating solely to the employment of Assistants are relevant to the issues of the case. Accordingly, the Fund's objection to the disputed portion of Request 1 is sustained.

9. As to Request 2, for documents "relating to" Applicant's long-term career assessments of 1986 and 1989 (which assessments are attached to the Application), Respondent objects on grounds of relevancy. Respondent additionally contends that Applicant has no right of access to background documents used by HRD in the preparation of the long-term career assessments, citing Staff Bulletin No. 85/09 (Access to Personnel Files). The Tribunal concludes that the responsive documents are not relevant to the issues of the case, and the request accordingly is denied.

10. As to Request 4, for Applicant's "pension record for the years 1999 to 2003," Respondent objects on the grounds of relevancy and additionally contends that the request is "overly vague." The Tribunal concludes that the request shall be denied on the ground that the responsive documents are not relevant to the issues of the case.

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."

Request for Oral Proceedings

11. In his Application, Applicant requested oral proceedings⁵ on the ground that because the Grievance Committee dismissed his grievance as untimely, a full evidentiary hearing on the merits of the case has not been held. The Fund responds that the Grievance Committee hearing on its Motion to Dismiss gave Applicant an opportunity to testify on factual matters and his counsel an opportunity to present oral argument. In addition, Respondent maintains that the "written record of this case is extraordinarily clear and complete" and that there is nothing to be gained from the Tribunal's hearing witness testimony.

12. In accordance with Rule XIII of the Tribunal's Rules of Procedure, "[o]ral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case."⁶ The principal benefit of

⁵Applicant requested, alternatively, that the Tribunal issue an order providing for Applicant to take the depositions of relevant witnesses. There is no foundation in the Tribunal's Rules for such a procedure.

⁶Rule XIII provides in full:

"Oral Proceedings

1. Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them.
2. At a time specified by the Tribunal, before the commencement of oral proceedings, each party shall inform the Registrar and, through him, the other parties, of the names and description of any witnesses and experts whom the party desires to be heard, indicating the points to which the evidence is to refer. The Tribunal may also call witnesses and experts.
3. The Tribunal shall decide on any application for the hearing of witnesses or experts and shall determine, in consultation with the parties or their counsel, the sequence of oral proceedings. Where a witness is not in a position to appear before the Tribunal, the Tribunal may decide that the witness shall reply in writing to the questions of the parties. The parties shall, however, retain the right to comment on any such written reply.
4. The parties or their counsel may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.
5. Each witness shall make the following declaration before giving evidence:
'I solemnly declare upon my honor and conscience that my testimony shall be the truth, the whole truth and nothing but the truth.'
6. Each expert shall make the following declaration before giving evidence:
'I solemnly declare upon my honor and conscience that my testimony will be in accordance with my sincere belief.'
7. The Tribunal may disregard evidence which it considers irrelevant, frivolous, or lacking in probative value.
8. The Tribunal may limit oral testimony where it considers the written documentation adequate.
9. The President is empowered to issue such orders and decide such matters as are

holding such proceedings in this case would have been to receive testimony from Fund witnesses (in particular, a former Deputy Managing Director and a former Chief of the Staff Development Division) as to the negotiating history of whatever agreement was reached with Mr. "O" at the time of his resignation from the staff to serve as Advisor to an Executive Director, memorialized in the letter of May 4, 1995 (*see infra*).

13. As appears below in the Tribunal's disposition of the merits of the claim of the Applicant, the Tribunal, in the light of its examination of the written record, including the proceedings before the Grievance Committee, has reached a decision on the merits. It has been able to do so without oral hearings because it has found the record—despite its ambiguities—to be sufficiently clear. Accordingly, oral proceedings are not "necessary for the disposition of the case." (Rule XIII, para. 1.) That conclusion is reinforced by the fact that, in the Grievance Committee's proceedings, Applicant had the opportunity to set out his understanding of the facts in dispute.

The Factual Background of the Case

14. 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.

15. Applicant began his career with the Fund on July 12, 1982 as an Economist at grade H (equivalent to A13) in "Department 1."⁷ In January 1988, Mr. "O" transferred to "Department 2," also at Grade A13. In 1995, Applicant resigned from the staff of the Fund to take up the position of Advisor to an Executive Director. The terms upon which Applicant resigned and of his subsequent reemployment with the Fund in 1999, and his ultimate separation from service, form the basis of the dispute in this case.

16. At the center of the controversy is a letter of May 4, 1995 to Applicant from the Chief of the Staff Development Division (SDD), Human Resources Department (HRD), which provides in pertinent part:

"As agreed in your recent conversation with [a Deputy Managing Director], upon completion of your assignment as Advisor to Executive Director, the Fund will guarantee your reappointment to the staff until the

necessary for the orderly disposition of cases, including ruling on objections raised concerning the examination of witnesses or the introduction of documentary evidence."

⁷In 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.

end of February, 2000. In addition, it is understood that, irrespective of when your assignment as Advisor to Executive Director ends, every effort will be made at that time to place you in a suitable Resident Representative assignment. Your reappointment to the staff will be at a salary level reflecting your current salary plus an adjustment for the period you have served in [the Executive Director]'s office."

In dispute is the meaning of the phrase "will guarantee your reappointment to the staff until the end of February, 2000." In Applicant's view, this provision was meant to record the period during which the Fund would hold open the guarantee of reemployment. The Fund, for its part, maintains that the provision set a terminal date for any period of reemployment with the Fund following Mr. "O"'s service with the Executive Board.

17. In 1999, Applicant concluded his service as Advisor to an Executive Director and returned to the staff of the Fund. The terms of this reemployment were set out in a letter of July 14, 1999 from the Chief, Recruitment Division, HRD, which referred to the letter of May 4, 1995:

"It is a pleasure to offer you a regular appointment with the International Monetary Fund as an Economist in ["Department 2"], Grade A13 Your reappointment to the Fund staff is from July 1, 1999 to February 29, 2000, as outlined in [the Chief, Staff Development Division]'s memorandum to you dated May 4, 1995.

. . .

As a staff member on regular appointment with the International Monetary Fund, you will be subject to present and future administrative regulations for the governance of such staff."

18. Applicant accepted this appointment by his signature on August 17, 1999 to a form stating that the acceptance was "subject to the conditions set forth in [the] offer of appointment dated July 14, 1999." The associated Personnel Action form shows the words "Fixed-term appointment to Feb. 29, 2000" struck out to say "Regular" appointment, with effective date of July 1, 1999.

19. As summarized below, Applicant's appointment was extended on five subsequent occasions, apparently without a break in service.

20. On March 8, 2000, Applicant was offered "an extension of your regular appointment . . . through May 31, 2000," at the same grade and within the same Department. Applicant signed his acceptance on the following day. The associated Personnel Action form indicates that the term "fixed-term" had been struck out and replaced by "Regular," so as to read "Extension of Regular appointment," with effective date of March 1, 2000.

21. By letter of June 1, 2000, Applicant again was offered and accepted "an extension of your regular appointment . . . through July 31, 2000," continuing in "Department 2" at Grade 13. The associated Personnel Action form states "Extension of fixed-term appointment," effective June 1, 2000.

22. Once again, on July 21, 2000, Applicant received an "extension of [his] regular appointment," this time through September 15, 2000. He indicated his acceptance by signature on July 27, 2000. The Personnel Action form states the type of action as "Extension of Fixed Term Appointment," effective August 1, 2000.

23. On August 15, 2000, Applicant was offered (and later accepted) "an extension of your appointment through September 13, 2002" for the purpose of assuming the position of Resident Representative and transferring to "Department 1." This letter of appointment incorporated conditions set out in an attachment from the HRD Director. The attachment was ". . . to clarify the conditions under which [Applicant's] fixed-term staff appointment is being extended . . ." These conditions included Mr. "O"'s "working to high professional standards," and specified that "any shortcomings in work performance or behavior on your part which are inconsistent with the Fund's Code of Conduct will result in the prompt termination of your resident representative assignment . . . [and] your staff appointment will also be terminated . . ." In an earlier Memorandum to Files, the "Department 1" Deputy Director noted that a similar caution had been conveyed to Mr. "O" orally with the news of his appointment to the Resident Representative post. The Deputy Director recorded: "Mr. ['O'] indicated that he was aware that there is some suspicion with regard to his performance record but he believed he was up to the challenge . . ."

24. In August 2002, as the expiration of Mr. "O"'s Resident Representative appointment approached, Applicant met with the SDD Chief, who, in a follow-up email communication to the Applicant, summarized the Fund's view as to the circumstances of Applicant's reemployment following his service with the Executive Board:

" . . . the main intent [of the Resident Representative appointment] was to fulfill the agreement, made when you left the staff to take up your previous post in the Executive Director's office, to try and find a resident representative position for you at the conclusion of your term in the ED's office. As you will recall, when you left the staff to join [the Executive Director]'s office in May 1995, it was agreed with . . . , then Deputy Managing Director, that your reappointment to the staff would be guaranteed through February 2000, at which point you would become eligible for a Fund pen-

sion. As noted above, it was further agreed that efforts would be made to place you in a Resident Representative assignment when you returned to the staff. At the time you returned to the staff in July 1999, there were no suitable Resident Representative assignments available (I recall that you applied for a few) and none had materialized by the end-date of your appointment (February 2000). To provide you with some more time to find an assignment your department, ["Department 2"], extended your appointment three times until, [o]n September 16, 2000, you took up your current assignment in At that time, the appointment was extended for an additional two years (through September 15, 2002) expressly for the purpose of taking up this Resident Representative assignment

. . . it is important that we are all clear as to the background to your current appointment and the fact that it is of a fixed-term duration; originally in the form of a guarantee to carry you to a pension and subsequently extended for the purpose of taking up your current assignment. In this connection, as I mentioned to you in our meeting, HRD would have no objection to a further extension of your appointment if ["Department 1"] wished to extend your current assignment. Similarly, if you were to obtain a new assignment, HRD would not be opposed to extending your appointment for the duration of that assignment. However, as I reiterated to you, in the absence of either of these occurrences, your appointment will end on September 15, as scheduled.

Please let me know if you have any questions on this."

(Emphasis in original.) There is no indication in the record before the Tribunal that Applicant did raise question about the foregoing portrayal of the nature of his appointment, particularly that it was "of a fixed-term duration" scheduled to end on September 15, 2002. Later that day, Applicant wrote to the Deputy Director of "Department 1" to request a "**final** extension of [his Resident Representative] assignment through June 2003," noting "I hope that at that point I will have found a suitable arrangement for my future career plans." (Emphasis in original.)

25. On October 30, 2002, Applicant received from the Deputy Director of the Human Resources Department a "final extension" of his employment with the Fund, to coincide with a third year of service as Resident Representative:

"Management has approved the extension of your resident representative assignment in . . . for a third year, through September 9, 2003. In this connection, a final extension to your staff appointment is being made through September 9, 2003."

This communication was followed on November 21, 2002 by a letter informing Applicant that “your appointment with the International Monetary Fund will be extended through September 9, 2003.” Applicant declined, however, to sign the letter, which would have confirmed the appointment, and instead embarked upon correspondence addressed to the Managing Director, challenging his employment status and his treatment at the Fund.

26. Thus, on November 24, 2002, Applicant directed a letter to the Fund’s Managing Director⁸ identifying the “points at issue” as “(1) my career development and (2) my current employment status with the Fund.” Applicant contended that he had remained in an entry-level position since his initial appointment to the Fund in 1982 and that HRD staff “. . . have constantly subjected me to a discriminatory and humiliating treatment . . . I have reasons to believe that the main thing some HRD staff members have against me is my racial origin.” Applicant went on to assert:

“Another arbitrary decision taken by some HRD staff members was to transform my regular employment status into a ‘Fixed term appointment’. When I was appointed an ‘Advisor to Executive Director’ in 1995, the Administration Department sent me a letter transforming my regular employment status into a ‘Fixed term’ appointment without my consent. This was not in line with arrangements which are usually made between the Fund and staff members who are appointed to the Executive Board. Some HRD staff members have alleged that the decision to transform my employment conditions reflected the terms of an agreement between [the former Deputy Managing Director] and me. This is far from the truth as there was no legal basis for that decision and I am not aware that such a change in employment status has ever occurred with another staff member simply because she/he was joining the Executive Board.”

Applicant further questioned “. . . why HRD sent me a letter recently stipulating that my current third-year assignment as Resident Representative in . . . is my ‘final staff appointment with the Fund.’” Accordingly, Applicant requested that Fund management “. . . investigate and correct these mistakes by (1) **reinstating my regular employment status** and (2) **determining the grade**, which would be today commensurate with my academic background and professional experience.” (Emphasis in original.) Applicant further asserted that he had requested review under the Discrimination Review

⁸The letter indicates that Applicant copied it to the Deputy Managing Directors, the Director of his Department, and the Director of HRD. A copy stamped “Received Dec. 4, 2002, Director, HRD” is included in the record before the Administrative Tribunal, annotated by one of the Deputy Managing Directors to the HRD Director to “[p]lease comment.”

Exercise (DRE)⁹ in the 1990s but that the request had not been "granted at the time because I was still an 'Advisor to an Executive Director,'" and that "[s]ince then, there has never been a follow-up."

27. The Deputy Managing Director responded on January 17, 2003, stating that "management has carefully reviewed your case" and found no evidence of discrimination by HRD and that Applicant's performance did not support promotion to the next grade. As to Applicant's employment status, the Deputy Managing Director concluded:

"Moreover, the decision to offer you a reemployment guarantee on a fixed-term basis was warranted since your performance was considered unsatisfactory and in need of improvement, and your department had decided to place you on probation. In these circumstances, the Deputy Managing Director at the time, . . . , considered that the reemployment guarantee that is usually given to a staff member resigning to transfer to an Advisor position in an Executive Director's office should be for a fixed-term period and not open-ended."

28. Approximately two months later, on March 10, 2003, Applicant again wrote to the Managing Director.¹⁰ Applicant disputed that the former Deputy Managing Director ever had proposed to him that his return to the staff be on a fixed-term basis. Rather, according to Mr. "O", the former Deputy Managing Director had stated that "it would be advisable for me to return to the staff before my 55th birthday, i.e. February 2000 in order to resume my career and avoid some adjustment difficulties." Accordingly, concluded Applicant:

"[t]he decision to transform my employment status was taken by HRD not by [the former Deputy Managing Director]. When I returned to staff in July 1999, I was surprised to learn from HRD that I had become a fixed-term employee and was expected to leave the Fund by end February 2000."

29. Additionally, Applicant contended:

"Hitherto, I was not aware that ["Department 2"] had decided to put me on probation in the framework of the 1994 APR. Representatives of ["Department 2"] and/or HRD have never discussed my 1994 APR with me. Nobody indicated to me that I was to be put on probation and what was expected of me during the period of that probation. In fact I was never given a write-up of my APR for that year until this day."

⁹See generally Ms. "Z", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), paras. 19-30.

¹⁰Applicant again copied the Deputy Managing Directors, the Director of his Department, and the Director of HRD on the correspondence.

(Emphasis in original.) Applicant again requested Fund management “to conduct a thorough review of my case.”

30. The Deputy Managing Director responded on April 15, 2003 to Applicant’s “request for a further review of [his] employment status.” Having “thoroughly reviewed the facts of the case and . . . perused the related documentation,” management concluded that had Mr. “O” remained in “Department 2,” his performance would have been rated 4 (unsatisfactory) and he would have been placed on probation. As Applicant had resigned in May 1995 to assume the position of Advisor to an Executive Director, the 1994 annual performance review was not completed. Furthermore, concluded the Deputy Managing Director:

“. . . in the circumstances, [the former Deputy Managing Director] instructed HRD that your reappointment to the staff should not be unconditional but should be guaranteed only until February 2000. [The former Deputy Managing Director] also instructed that efforts should be made to find a resident representative post for you at the end of your assignment as Advisor to the Executive Director. These two elements were reflected in [the SDD Chief]’s letter to you of May 4, 1995, which was cleared by, and copied to, [the former Deputy Managing Director]. Both of these elements of your reemployment on the staff have been implemented and management finds no justification for overturning [the former Deputy Managing Director]’s original decision and changing your employment status.”

31. Finally, the Deputy Managing Director warned Applicant that if he did not sign the extension of appointment that had been offered in fall 2002 he would be separated from the staff.

32. On April 29, 2003, Applicant directed a third letter to the Managing Director.¹¹ Applicant disputed the appraisal of his performance for 1994, asserting that his rating “could not have been unsatisfactory,” alleging bias in the process and that “. . . it is not surprising for me to learn that my 1994 APR exercise was not completed, leaving ample room for its manipulation.” Furthermore, Applicant contested his final letter of appointment of October 30, 2002:

“I have been asked to ‘sign a letter of appointment’ in order to justify my current assignment as IMF Resident Representative in If I were to sign that letter, it would amount to confirming an arbitrary change in my employment status, which had no legal basis and could not be justified by

¹¹Once again, Applicant copied the Deputy Managing Directors, the Director of his Department, and the Director of HRD on the correspondence.

any performance argument. My signature on that letter would also be tantamount to accepting the terms of the attached letter, **which was sent to me by HRD on October 30, 2002**. In that regard, it would be very helpful to know who instructed HRD to send me a letter implying that my current assignment was 'a final extension to your staff appointment'. If indeed a decision was already taken in October 2002 to separate me from the staff after my current assignment, what is the relevance of my signature on the 'letter of appointment'?"

(Emphasis in original.) Following this exchange, Applicant's letter of appointment for his "final extension" remained unsigned.

33. On July 2, 2003, Applicant was advised by HRD that as he had refused to sign the letter of appointment he should make arrangements to vacate his Resident Representative post and that the effective date of his separation would be August 1, 2003. Applicant responded July 15, 2003, contending that his 1999 letter of appointment upon return from service with the Executive Board evidenced that he had a "regular appointment" with the Fund "the extension of which is at issue." Applicant questioned "[s]ince there are no predetermined time limits on and no extensions are required for regular appointments, why is an extension required in my case?" Applicant furthermore requested, for logistical reasons, that he be permitted to defer his return to Washington, D.C. until the first week of September.

34. The HRD Director responded on July 29, 2003, offering to extend the appointment through September 9, 2003 if Mr. "O" returned the signed letter of appointment by the following day. Mr. "O" then signed the appointment letter which bears a signature date of August 1, 2003.

The Channels of Administrative Review

35. Among the issues for consideration is whether Applicant has met the requirement of Article V, Section 1 of the Tribunal's Statute by exhausting on a timely basis all available channels of administrative review.¹² As described *supra*, beginning on November 24, 2002, Applicant addressed communications to the Managing Director contesting his employment status and other matters relating to his career with the Fund.

36. On August 4, 2003, Applicant responded to the HRD Director's July 29, 2003 memorandum, stating that "[t]his is to indicate that **I am appealing**

¹²See *infra* Consideration of the Issues of the Case; A. Admissibility of Applicant's Allegations Relating to Separation from Service.

the decision to separate me from the Fund against my will.” Applicant contended:

“ . . . the terms and conditions of my employment as specified in the **letter of my appointment dated July 14, 1999**, are not in line with Fund employment policies [and] therefore are discriminatory. Because of that a legal interpretation of that **appointment letter** by an Administrative Review or the **Grievance Committee** is necessary.”

(Emphasis in original.) Applicant further alleged that his “career development was unrelated to [his] qualifications and experience, [and] therefore was also discriminatory.”

37. Thereafter, on November 21, 2003, Applicant’s counsel directed a “Request for Administrative Review and Provisional Relief” to the HRD Director, maintaining that Applicant had retained counsel to assist him in a dispute over his “ . . . employment status, his summary dismissal from the Fund, invasion of his privacy and other administrative actions that constitute discrimination against him on racial grounds.” The request additionally sought, as provisional relief, administrative leave status so that Mr. “O” could settle visa and other matters relating to his separation from service with the Fund.

38. The Director of HRD responded on December 12, 2003, authorizing a period of unpaid administrative leave from September 10 through December 31, 2003 (which was later extended through February 27, 2004) and informing counsel that Mr. “O” would become eligible to begin receiving his Fund pension as of January 1, 2004. As to the request for administrative review, the HRD Director cited deficiencies in the request, noting that “[w]e are prepared to undertake such a review, but we will first require more complete and concrete information on the decisions in dispute.” Applicant’s counsel responded December 16, 2003, again seeking administrative review of Mr. “O”’s alleged wrongful termination, which he contended was part of a history of discrimination. On December 22, 2003, the HRD Director agreed that HRD would undertake the review.

39. On March 19, 2004, the Director of HRD communicated to Applicant the results of her administrative review. At the same time, she reserved the Fund’s right to challenge the jurisdiction of the Grievance Committee on the ground that the request for review had been untimely:

“I will begin by stating that because the decision you challenge was made and communicated to you years ago, and in light of the fact that you received the results of a management review of this decision in early 2003,

I do not consider your request for Administrative Review to be timely. I have decided to undertake a review of your case nevertheless, but you should be aware that the Fund reserves the right to challenge on these grounds the jurisdiction of the Grievance Committee over this claim, should you decide to pursue a grievance."

As for the substance of the complaint, the HRD Director concluded that Mr. "O"'s interpretation of the May 4, 1995 letter was incorrect, that Applicant's signature to the July 14, 1999 reemployment letter, as well as subsequent extensions thereof, made unambiguous his acceptance of a limited term of employment, and that the October 30, 2002 "final extension" letter put Applicant "undeniably on notice" that his Fund employment would terminate on September 9, 2003. The HRD Director accordingly concluded that Applicant's rights as a Fund staff member had not been violated. The administrative review did not address Applicant's contentions of discrimination.

40. On April 14, 2004, Mr. "O" filed a Grievance with the Fund's Grievance Committee, contesting "an arbitrary decision by HRD to terminate my employment despite my satisfactory performance during 1999-2003 and discriminatory impact of decisions affecting my career." The Fund responded to the Grievance with a Motion to Dismiss, contending that Mr. "O" had failed to exhaust in a timely manner the administrative remedies antecedent to Grievance Committee review, as required by GAO No. 31.

41. Following an exchange of briefs and oral argument on the Motion, at which Applicant was present and offered his account of disputed events, the Grievance Committee on June 30, 2004 issued an Order granting the Fund's Motion to Dismiss and recording the Committee's findings and conclusions on the issue presented by the Motion. The Committee found that Applicant agreed to the limited term of any future reemployment with the Fund at the time he resigned in 1995. Furthermore, concluded the Grievance Committee, even if the "final extension" letter of October 30, 2002 represented the decision point at issue, Mr. "O" waited more than a year until November 21, 2003 before initiating formal administrative review pursuant to GAO No. 31. Additionally, the Grievance Committee held that the "day for day" extension of time provided for in Section 6.07¹³ of GAO No. 31 is intended

¹³GAO No. 31, Section 6.07 provides:

"6.07 *Time Limits*. A staff member shall be required to exhaust the applicable channels of administrative review within the required time limits before submitting a grievance to the Grievance Committee. The time limits prescribed in Sections 6.02, 6.03, 6.04 and 6.06 shall be extended, day for day, for each day that the grievant is working on Fund business outside Washington D.C. or is in recognized leave status, except for

to cover staff who are on mission or in a recognized leave status and was therefore inapplicable to Mr. "O", who was serving in an assigned duty station overseas during the period in question. The Committee additionally held that Applicant's broad claim of discriminatory treatment likewise was untimely.

42. On August 5, 2004, Mr. "O" filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

Admissibility

43. The principal arguments presented by Applicant in his Application and Reply in respect of the admissibility of the Application may be summarized as follows.

1. Until Respondent acted on the claim that Applicant's status was that of a fixed-term employee, there was no basis for a grievance; it is the fact of actual termination of the staff member which set in motion the grievance. Applicant sought administrative review within six months of that act and therefore his claim is timely.
2. The earliest that Applicant could have known that the Fund was terminating his appointment as a fixed-term appointment was October 30, 2002 when the Fund communicated "a final extension to your staff appointment is being made through September 9, 2003."
3. Applicant was overseas serving in his Resident Representative assignment when he received the October 30, 2002 notice that the Fund would be terminating his appointment effective September 9, 2003. He was, accordingly, "working on Fund business outside Washington, D.C." until September 9, 2003 and, pursuant to GAO No. 31, Section 6.07, is entitled to a 314 day suspension of time for seeking administrative review.
4. Applicant's claim of discrimination is also timely as it involves a continuing harm.

administrative leave and separation leave."

Merits

44. The principal arguments presented by Applicant in his Application and Reply in respect of the merits of the Application may be summarized as follows.

1. The language of the May 4, 1995 letter was unambiguous in guaranteeing Applicant reappointment to the Fund staff as long as he returned to staff status by the end of February, 2000. It did not condition reappointment upon retirement at age 55.
2. Applicant accepted the position of Advisor to an Executive Director only because the Fund guaranteed that he could return to a regular staff appointment at the conclusion of that service. Applicant had expressed concern about resigning without a guarantee of reappointment.
3. The Deputy Managing Director's instruction to the SDD Chief was not communicated to Applicant and there was no meeting of the minds. The letter of May 4, 1995 may have deliberately concealed the writer's intent so as to induce Applicant to move to the Executive Board.
4. The Fund did not have discretion pursuant to GAO No. 16 to impose a fixed-term appointment upon Applicant's return to the Fund. Reappointment to the staff without a break in service means reappointment as regular staff and not on a fixed term, unless specified. Staff who have a reentry guarantee fall under the staff rule and are entitled to its benefits.
5. Pursuant to GAO No. 3, Rev. 5, there are only two types of appointments, regular and fixed-term, and all appointments shall be made in writing. There are no Fund rules that allow for "hybrid" appointments.
6. When the Fund terminated Applicant on September 9, 2003 under the rationale that his fixed-term appointment had expired, the Fund separated a regular staff member in violation of GAO No. 16. Termination of Applicant's employment without due process and appropriate severance payment was an abuse of power.
7. If no position was available for Applicant following the completion of his Resident Representative assignment, the Fund should have invoked its rules governing redundancy.

8. The issue of Applicant's troubled career in "Department 2" must be viewed in the context of his discrimination claim. The possibility of probation was never communicated to Applicant. His evaluations during his service on the Board and on his return as Resident Representative were fully satisfactory.
9. Applicant's lack of career progression and his treatment at the Fund were impermissibly affected by racial discrimination. Applicant was treated in a disparate manner; guarantees of reemployment after Board service are typically provided on an unqualified basis.
10. Applicant seeks as relief:
 - a. a finding by the Tribunal that Applicant's separation from service was taken in violation of Fund regulations;
 - b. rescission of the separation from service and reinstatement of Applicant to the staff with retroactive compensation and benefits;
 - c. damages of two years' net salary for mental and emotional suffering resulting from the Fund's arbitrary actions and discrimination; and
 - d. legal costs.

Respondent's principal contentions

Admissibility

45. The principal arguments presented by Respondent in its Answer and Rejoinder in respect of the admissibility of the Application may be summarized as follows.

1. Applicant understood and accepted in 1995 that the guarantee of reemployment with the Fund following his service as Advisor to an Executive Director was conditional upon his concluding that reemployment by the end of February 2000. Accordingly, Applicant's November 21, 2003 request for administrative review was filed more than eight years after he was first notified of the contested decision.
2. Upon his reemployment with the Fund in July 1999, Applicant accepted without objection the limited term of his reappointment.

Applicant accepted without objection a series of extensions of his appointment, each of which was made with a fixed end date.

3. Applicant does not dispute that he was on notice as of November 2002 of the final termination date of his Fund employment; however, he did not seek administrative review until a year later.
4. The day-for-day extension provision of GAO No. 31, Section 6.07 is not applicable to excuse Applicant's failure to initiate administrative review while serving away from Washington, D.C. as a Fund Resident Representative.
5. The mere expiration of an appointment whose end-date had earlier been determined does not constitute a new decision.
6. Applicant's contentions of discrimination are also untimely.

Merits

46. The principal arguments presented by Respondent in its Answer and Rejoinder in respect of the merits of the Application may be summarized as follows.

1. The Fund's regulations do not require that it offer a reemployment guarantee, conditional or otherwise, to a staff member who resigns to serve as Advisor to an Executive Director.
2. The events leading up to Applicant's resignation to serve as Advisor to an Executive Director demonstrate that the Fund reasonably rejected Applicant's request for an unconditional reemployment guarantee for reasons directly relating to his performance history and instead offered a guarantee of reemployment to the staff for a fixed duration, just long enough to bridge him to a Fund pension when he reached age 55 in February 2000.
3. The decision to offer reemployment for a limited duration was not contrary to any Fund rule and was well within management's unilateral prerogative.
4. The Fund exercised its discretion reasonably, and indeed generously, in the case of Applicant.
5. The creation of a "hybrid" appointment, limited in duration but with the benefits applicable to regular employment, was an accommodation that was entirely to Applicant's advantage.

6. Applicant knew or should have known that his performance was less than satisfactory.
7. Applicant's contention that discriminatory treatment impeded his Fund career is controverted by the record.

Consideration of the Issues of the Case

A. Admissibility of Applicant's Allegations Relating to Separation from Service

47. The Tribunal must consider at the outset Respondent's challenge to the admissibility of the Application on the ground that Applicant allegedly failed to exhaust channels of administrative review in a timely manner, and, accordingly, has not satisfied the exhaustion of remedies requirement of Article V, Section 1 of the Tribunal's Statute.¹⁴ The jurisdiction *ratione materiae* of the Administrative Tribunal is limited to challenges to the legality of an "administrative act" of the Fund, defined as ". . . any individual or regulatory decision taken in the administration of the staff of the Fund."¹⁵ Accordingly, to resolve Respondent's challenge to the admissibility of the Application, the Tribunal must determine (a) what is the "administrative act" (or "acts") at issue before the Administrative Tribunal, and (b) when did he initiate administrative review of that act (or acts). In addition, the Tribunal may consider whether there are exceptional circumstances that may excuse any delay in Applicant's seeking administrative review. *See Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 102.

48. The Tribunal takes note of the Grievance Committee's decision that Mr. "O"'s Grievance was barred from consideration by that body on the ground that Applicant failed to initiate in a timely manner the administrative review procedures of GAO No. 31 prerequisite to the Grievance Committee's review.¹⁶ In *Estate of Mr. "D"*, para. 91, the Tribunal held that such a determination of the Grievance Committee is "relevant to but not necessarily dispositive of" the question of whether an applicant has exhausted

¹⁴Article 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."

¹⁵Statute, Article II, Sections 1 and 2.

¹⁶*See supra* The Channels of Administrative Review.

channels of administrative review, as required by Article V, Section 1 of the Statute, for purposes of bringing an Application before the Administrative Tribunal. While the Grievance Committee rules upon its own jurisdiction for purposes of proceeding with a grievance, the Administrative Tribunal, in adjudging a challenge to the Tribunal's jurisdiction, necessarily decides for itself whether channels of administrative review have been exhausted (*Id.*, para. 85):

" . . . the recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to debar them. If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse."

(*Id.*, para. 102.)

49. Accordingly, the Tribunal has held that it has the authority to consider the "presence and impact of exceptional circumstances" at anterior stages of the dispute resolution process. (*Id.*) In evaluating factors that may excuse failure to initiate administrative review on a timely basis, the Tribunal shall consider ". . . the extent and nature of the delay, as well as the purposes intended to be served by the requirement for exhaustion of administrative remedies." (*Id.*, para. 108.)

50. At the same time, the Tribunal in *Estate of Mr. "D"* affirmed the importance of timely pursuit of administrative review:

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

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

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

(*Id.*, para. 95.) The Tribunal cautioned, ". . . in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal processes, such requirements should not be lightly dispensed with and 'exceptional circumstances' should not easily be found. Applicants having knowledge of internal review requirements may not simply choose to ignore

them" (*Id.*, para. 104.) See also Ms. "Y" (No. 2), *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), para. 40.

1. What is the contested "administrative act"? Was there more than one "administrative act" by which Applicant was "adversely affected"?

51. To assess whether Applicant has met the exhaustion of remedies requirement of Article V, Section 1, the Administrative Tribunal first must identify what administrative act (or acts) are being challenged. In Respondent's view, ". . . the decision at issue in this case is the decision initially establishing that Applicant was serving on an appointment with a fixed end-date—a decision the Fund maintains took place in 1995, but that even Applicant acknowledges took place no later than October of 2002." By contrast, Applicant identifies the contested decision as his "[s]eparation from service on September 9, 2003, at the initiative of the Fund," and "[i]llegal conversion of Appointment from 'regular' to 'fixed term' carried out in violation of fair and due process and notified to Applicant without explanation in a document dated November 21, 2002."

52. The question accordingly is posed whether there was more than one "administrative act" that "adversely affected" Applicant under Article II of the Statute, namely: (1) the 1995 decision of the Fund to guarantee reemployment only through February 2000; and (2) the "final extension" of Applicant's appointment, notified to him October 30, 2002 and expiring September 9, 2003.

53. Even if the disputed language of the May 4, 1995 letter, i.e. ". . . the Fund will guarantee your reappointment to the staff until the end of February, 2000," is read, as Respondent argues, not to refer to the period during which it would hold open the opportunity to return to Fund employment but rather to denote the duration of the reemployment that was guaranteed, it was simply that—a "guarantee." The text is open to the interpretation that reemployment with the Fund was guaranteed up to a particular date, but not necessarily limited to that period.

54. Accordingly, while the Fund maintains that what it granted in 1995 was a guarantee of a period of employment to end at a date certain, i.e. end of February, 2000, the text itself does not preclude the possibility that Mr. "O"'s employment might be extended past that date. Indeed, the Fund acted on a series of occasions to extend the duration of Applicant's reem-

ployment beyond the guaranteed date of February 2000, for approximately two and one-half years, into September 2003.

55. As to the 1995 decision, it may be said that Applicant was "adversely affected" because that decision altered the situation that otherwise would have obtained if he had returned to service under the terms which, as the Fund acknowledges, are normally afforded members of the staff who resign to take up the position of Advisor to an Executive Director. The Fund's 1995 guarantee of reemployment had "some present effect" on Applicant's position and, accordingly, he was "adversely affected" thereby. *See Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005), paras. 19-21 (while the Applicants had not suffered negative financial consequences in 2005, the contested decision of the Executive Board, by widening the range of discretion to be exercised in setting staff salaries, opened the possibility for negative financial consequences through the application of that decision in future years, a possibility that had not existed prior to that decision; Applicants were therefore "adversely affected" under Article II of the Statute).

56. As contemplated in *Baker*, in the present case the 1995 act set in motion a series of acts, any one of which Applicant might have challenged, culminating in the action of October 30, 2002, when the final extension of appointment was made. The appointment of July 14, 1999 is significant because it marks the time when reemployment with the Fund was first realized. While the 1995 act made possible subsequent acts, it did not necessarily determine them. Accordingly, the question arises whether acts subsequent to the 1995 act may be considered separate "administrative acts" subject to challenge in the Administrative Tribunal. The Tribunal concludes that they may. The decision of October 30, 2002 did adversely affect Applicant because it resulted directly in the termination of his Fund employment, an event that was not necessarily required by terms of the 1995 guarantee.

2. Did Applicant's 1999 letter of reemployment with the Fund (and the five subsequent extensions thereof) put Applicant on notice of the Fund's decision to return him to Fund employment for a limited rather than an indefinite period?

57. Even if it were accepted that Applicant was not on notice in 1995 of an administrative act of the Fund adversely affecting him, the question arises whether such notice arose with his first letter of reemployment with the Fund of July 14, 1999.

58. It may be noted that Applicant signed his acceptance of the 1999 reappointment on August 17, 1999, the terms of which appear above at para. 17, and which specify that “[y]our reappointment to the Fund staff is from July 1, 1999 to February 29, 2000” Less than 6 months later, i.e. within the period during which Applicant would have been required to initiate administrative review pursuant to GAO No. 31, Applicant was offered an extension of his appointment with effect from March 1, 2000.

59. Applicant contends that the reappointment letters were ambiguous in their purport, often using the term “regular appointment” while at the same time designating a termination date for the appointment. Respondent has explained that the term “regular appointment” was used for administrative purposes to indicate to Human Resources personnel that Mr. “O” was to continue to receive such staff benefits as participation in the Staff Retirement Plan and home leave, even though the appointment was for a fixed duration, creating a “hybrid” appointment. The undeniable ambiguity of the reappointment letters and Personnel Action forms characterizing Mr. “O”’s employment both as “regular” and as “fixed-term” gives rise to the question whether Applicant was justified at the time of those appointments in not challenging their fixed-term provision.

60. It should, nonetheless, be noted that in his March 10, 2003 communication to the Managing Director, Mr. “O” asserted that “[w]hen I returned to staff in July 1999, I was surprised to learn from HRD that I had become a fixed-term employee and was expected to leave the Fund by end February 2000.” Whatever Mr. “O”’s surprise, this statement by Mr. “O” demonstrates his recognition of the position of the Fund that, in July 1999, an employment term of limited duration, a term that was to expire by the end of February 2000, governed.

3. Treating the October 30, 2002 “final extension” of Applicant’s appointment as the contested administrative act, did Applicant initiate timely administrative review of that decision for purposes of Article V, Section 1 of the Tribunal’s Statute?

61. In any event, the Tribunal has concluded above, para. 56, that the decision of October 30, 2002 to offer Mr. “O” a final extension of his appointment with the Fund was a separate administrative act adversely affecting Applicant which he may, accordingly, challenge in the Administrative Tribunal. Respondent, however, maintains that even if the October 30, 2002 letter offering Applicant a “final extension” were the decision at issue, Applicant failed to initiate timely administrative review of that decision because his

formal request for administrative review was not submitted to the Director of Human Resources until November 21, 2003.

62. On August 4, 2003, Applicant responded to the HRD Director's July 29, 2003 memorandum, stating that "[t]his is to indicate that **I am appealing the decision to separate me from the Fund against my will.**" Applicant contended:

"... the terms and conditions of my employment as specified in the **letter of my appointment dated July 14, 1999**, are not in line with Fund employment policies [and] therefore are discriminatory. Because of that a legal interpretation of that **appointment letter** by an Administrative Review or the **Grievance Committee** is necessary."

(Emphasis in original.) Applicant further alleged that his "career development was unrelated to [his] qualifications and experience, [and] therefore was also discriminatory."

63. The Tribunal will address below whether exceptional circumstances, i.e. either Applicant's pursuit of his complaint through the Managing Director or Applicant's posting at an overseas duty station, excused the failure to file a formal request for administrative review with the Director of Human Resources within six months of October 30, 2002.

a. Did Applicant initiate timely administrative review on November 24, 2002 by addressing his complaint to the Fund's Managing Director?

64. Respondent asserts: "That Applicant pursued his complaint to the Managing Director and not through the proper avenues set forth in the staff rules offers him no special status. Staff members must be held to awareness of the staff rules, and must file their claims through proper channels in a timely manner." Furthermore, Respondent characterizes Applicant's correspondence with the Managing Director as requests for reconsideration of the contested decision(s), rather than requests for administrative review, invoking the Tribunal's decision in *Mr. "X", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1994-1 (August 31, 1994).

65. Staff members ordinarily are held to a knowledge of the organization's administrative review procedures, *Estate of Mr. "D"*, para. 120, and it is highly desirable that these procedures exclusively be followed. However, when a staff member brings his complaint to the highest levels of Fund management and when management elects to review that complaint rather than advising the staff member that his complaint either should be reviewed

through prescribed channels or is untimely, the Tribunal is of the view that that election by management exceptionally stands in lieu of seeking administrative review pursuant to the procedures of GAO No. 31.

66. The language of the Deputy Managing Director's responses of January 17, 2003 and April 15, 2003 suggests that management regarded Applicant's letters of November 24, 2002 and March 10, 2003 as requests for review of the contested decisions and reacted accordingly: "Management has thoroughly reviewed the facts of the case and has perused the related documentation." The Tribunal in previous cases has taken account of the effect of the Fund's communications to a staff member in assessing his actions in seeking further review. *See Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2004-1 (December 10, 2004), para. 43* ("While it may be also contended that Applicant's eliciting a further decision from the Fund should not be permitted to defeat a defense of *res judicata*, it is notable that . . . the Fund reacted to Mr. "R"'s April 2002 request as if it were distinct from the request disposed of by the Administrative Tribunal only one month earlier. These actions may have led Mr. "R" to believe that HRD was open to considering his interpretation of the policy and later to pursue his claim through the channels of administrative review culminating in its present consideration by the Tribunal.") *Compare Mr. "X"*, para. 26 ("Nor did the Fund give the Applicant reason to believe that the decision at issue was open to reconsideration or adjustment; on the contrary, he was officially informed by the Fund that the decision was 'a final disposition of the matter and it will not be reopened.'")

67. Furthermore, the Deputy Managing Director's investigations of Applicant's complaint may be said to have served the functional purposes of administrative review. Among the factors taken into account in finding exceptional circumstances in *Estate of Mr. "D"* was that ". . . the Fund has on several occasions reviewed the claim, creating opportunities for resolution of the dispute and building an evidentiary record." (Para. 125.)

b. The effect of Applicant's overseas assignment

68. Applicant contends that the "day for day" extension of time provided by GAO No. 31, Section 6.07 to staff members "working on Fund business outside Washington, D.C." should apply to extend until September 9, 2003 the period during which Applicant was permitted to contest the October 30, 2002 decision, as he was serving overseas during the period as a Fund Resident Representative. The Grievance Committee expressly rejected this interpretation of GAO No. 31, Section 6.07 for purposes of proceeding

with Mr. "O"'s Grievance, holding that the provision was ". . . intended to cover staff who are on mission or in a recognized leave status," rather than a staff member such as Mr. "O" serving in an assigned duty station overseas. The question accordingly is whether Applicant's assignment to a duty station outside of Washington, D.C. for the duration of the period October 30, 2002 to September 9, 2003 created an additional "exceptional circumstance" excusing the delay in his filing a formal request for administrative review.

69. GAO No. 31, Section 6.07 provides that:

" . . . The time limits prescribed in Sections 6.02, 6.03, 6.04 and 6.06 shall be extended, day for day, for each day that the grievant is working on Fund business outside Washington D.C. or is in recognized leave status, except for administrative leave and separation leave."

70. In the view of the Tribunal, the provision for extension "day for day" for each day that the Grievant is working on Fund business outside Washington D.C. is meant to cover the frequent absences from Headquarters of Fund personnel on missions overseas of limited duration. It is not a provision that is directed to the case of a Fund official who is stationed abroad, as was Mr. "O". Unlike a traveling official stationed in Washington whose office, files, etc. remain at Headquarters, an official who is in resident status abroad has his office facilities at hand. There is no persuasive reason why such officials cannot exhaust prescribed channels of administrative review within the required time limits. At the same time, as just noted, Applicant's August 4, 2003 letter to the HRD Director stated that "I am appealing the decision to separate me from the Fund against my will," and advised "I would like to return to Washington as soon as possible to organize my legal defense." There is room for the conclusion that this memorandum initiated a request for administrative review pursuant to GAO No. 31 before Mr. "O"'s counsel in Washington submitted a formal request for administrative review on November 21, 2003.

71. Nevertheless, because Mr. "O" launched his appeal by way of letters to the Managing Director just one month after the October 30, 2002 issuance of a final extension of his appointment, the Tribunal concludes that the claim of Mr. "O" is not time-barred.

B. Admissibility of Applicant's Allegations of Discrimination

72. Respondent additionally challenges the admissibility of Applicant's allegations of discrimination, which, like Mr. "O"'s other claims, it urges the

Tribunal to dismiss as untimely. Applicant, for his part, maintains that the discrimination he alleges represents a “continuing harm.”

73. In *Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), the Tribunal reviewed allegations that a former staff member had been subjected to incidents of religious hostility and workplace harassment over the course of his career. Citing the Fund’s Discrimination Policy, the Tribunal considered “. . . 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.’” (*Id.*, para. 90.) As the Tribunal recently observed, in *Mr. “F”* it “. . . took cognizance of a pattern of conduct where separate administrative review had not been undertaken as to each individual act.” *Ms. “W”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 120. In the case of *Mr. “F”*, the ultimate act of alleged discrimination had been subject to timely administrative review.¹⁷

74. As the Tribunal has concluded that Mr. “O”’s complaint that he was impermissibly separated from service with the Fund, an act he challenged in part as a culminating act of discrimination, is not time-barred, it may, on the basis of *Mr. “F”*, likewise consider whether Applicant has put forth evidence that would sustain a claim that he has been the object of discriminatory treatment in his career with the Fund.

75. In this regard, it should be noted that Applicant in his communications of 2002 and 2003 to the Managing Director, in his formal request for administrative review to the Director of Human Resources, and in his Grievance, expressly raised the issue of discrimination, along with the issue of his employment status and separation from service. For example, in Mr. “O”’s November 21, 2003 request for administrative review, he alleged that the decisions taken in his case appeared to be “the culmination of a long history of discrimination against him.” The Deputy Managing Director made express findings as to Applicant’s contentions of discrimination.

¹⁷In *Mr. “F”*, the Tribunal upheld as a reasonable exercise of the Fund’s discretion the decision contested by Applicant as the ultimate act of discrimination, i.e. the abolition of his position. At the same time, it sustained Mr. “F”’s claim that he had been the object of religious intolerance and workplace harassment to which Respondent had failed to take effective measures in response and awarded relief on that ground.

C. Merits of Applicant's Allegations Relating to Separation from Service

76. The Fund's regulation GAO No. 16, Rev. 5 (July 10, 1990), Section 6, requires that for a staff member to serve as an Advisor to an Executive Director, he must resign from the staff of the Fund for the duration of that service. When such resignation is made "with a written understanding with the Fund that at the conclusion of his service with the Executive Board he will be reappointed to the staff without a break in service," (Section 6.04), then additional provisions apply. These provisions include that "[t]he period during which an understanding regarding reappointment to the staff applies shall be determined by the Fund and recorded in writing before the staff member's resignation." (Section 6.04.2.) Persons thereby returning to the staff of the Fund without a break in service receive service credit and accrued benefits that have been held in abeyance during the period of Executive Board service. (*Id.*) In the case in which the former staff member is not reappointed to the staff of the Fund, he is entitled to separation benefits at the conclusion of his service with the Executive Board. (Section 6.04.3.) The applicable provisions provide in full:

"Section 6. *Mandatory Resignation*

...

6.04 *Service with the Fund's Executive Board.* A staff member who takes up the position of Executive Director, Alternate Executive Director, or Advisor to Executive Director, shall resign from the staff. When a staff member resigns to take up a position as Advisor to Executive Director with a written understanding with the Fund that at the conclusion of his service with the Executive Board he will be reappointed to the staff without a break in service, the additional arrangements set forth in Subsections 6.04.1-6.04.3 below shall apply.

6.04.1 *Effective Dates.* In order to avoid a break in service and to preserve the continuity of the staff member's benefits, his resignation from the staff will be effective at the close of business on the calendar day preceding the day on which he assumes his new position with the Executive Board. The staff member's subsequent reappointment to the staff, if applicable, will be effective at the opening of business on the calendar day following the last day of his service with the Executive Board.

6.04.2 *Continuation of Service.* The period during which an understanding regarding reappointment to the staff applies shall be determined by the Fund and recorded in writing before the staff member's resignation. This period may subsequently be extended. During the period of service with

the Executive Board, the service credit and accrued benefits which are not available to his new position will be held in abeyance until his return to the staff. If, after the termination of his service with the Executive Board, the individual is reappointed to the staff without a break in service, the service credit and accrued benefits which have been held in abeyance shall be restored to his account. The period during which he occupied the position with the Executive Board shall be counted as applicable service for the purpose of determining entitlements for benefits which are available both to the service with the Executive Board and the staff. A staff member who resigns and is reappointed in this manner shall not be eligible for any resettlement benefits or the separation grant.

6.04.3 *Separation Benefits at the Conclusion of Service with the Executive Board.* If a former staff member who had resigned to take up a position with the Executive Board is not reappointed to the staff upon the conclusion of such service, he shall be paid the separation grant earned while on the staff, and an amount in lieu of his accrued annual leave outstanding on the date of his resignation from the staff (subject to a maximum of 60 days). The amounts of these benefits shall be calculated on the basis of his salary as of his last day on duty as a staff member. Eligibility for resettlement benefits shall be subject to regulations and procedures governing members of the Executive Board.

...”

These provisions indicate that a staff member who resigns from the Fund’s staff to serve as an Advisor to an Executive Director has no assured right of reappointment to the staff; he may not be reappointed even if normally he is.

1. Was there a meeting of the minds between Applicant and the Fund as to the terms of the reemployment guarantee with which Applicant resigned from the staff of the Fund to assume the position of Advisor to an Executive Director, i.e. did Applicant agree to the terms of which he now complains?

77. According to Respondent, the letter of May 4, 1995 memorialized an agreement between the Fund and Applicant that any reemployment of Mr. “O” following his service with the Executive Board would terminate at the end of February 2000, at which time Applicant would reach his 55th birthday and, thereby, become eligible for a Fund pension.

78. In support of Respondent’s interpretation, it offers the following account of the events upon which it contends the letter of May 4, 1995 was predicated. On April 25, 1995, the Chief of the Staff Development Division

wrote to the then Deputy Managing Director seeking his views as to how to respond to a request from Mr. "O" for an unconditional guarantee of reemployment to the staff, in light of Mr. "O"'s performance over the preceding three years and the view of "Department 2" that ". . . there was little option but to place Mr. ["O"] on probation."¹⁸ The SDD Chief advised the Deputy Managing Director:

"On February 10, 1995, I sent you a memorandum (copy attached) summarizing the performance difficulties experienced by Mr. ["O"] during his Fund career, and particularly his recent years in ["Department 2"]. Since then, we have received a copy of his 1994 performance report which describes his performance as 'generally unsatisfactory' and details a number of specific problems including analytical shortcomings, inaccuracies, poor drafting, and missed deadlines. I discussed the report with [the Senior Personnel Manager] who, on the basis of this and the previous two years' performance assessments, felt that there was little option but to place Mr. ["O"] on probation.

Recently, however, Mr. ["O"] has been offered the position of Advisor in [an Executive Director]'s office; a Board notification has been issued appointing Mr. ["O"] to the position effective May 1, 1995. In talking with Mr. ["O"] he has made it clear that, despite the considerably higher salary, he will accept the position only if he is provided with an unconditional guarantee of reemployment on the staff. He envisages serving as an Advisor to Executive Director for three or four years (he has a letter from [the Executive Director] proposing an 18-month term, renewable for another 18 months) and then returning to [his home country] to assume a senior government post. However, in case these plans do not materialize, he wishes to remain in Fund employment for another seven years by which time he feels that his personal and financial circumstances will allow him to retire. He is currently 50 years old and has 13 years of Fund service.

Normally, a staff member resigning to take up an Advisor position in an Executive Director's office receives a formal guarantee of reemployment in the department in which he or she is working at the time of resignation.

¹⁸It is a matter of factual dispute as to whether Applicant was on notice that his 1994 Annual Performance Review might result in probation for unsatisfactory performance and, accordingly, whether such fact might have entered into his consideration of the prospects for employment with the Executive Director and his later return to employment with the Fund. The Deputy Managing Director, in his review of Applicant's complaint, concluded that the 1994 performance review had not been completed for Applicant because of his then impending move to the Executive Board position. Applicant contends that he did not see the APR; his supervisor, in remarks noted on the form, asserts that she discussed the review with Mr. "O" who was disappointed by the evaluation.

In this case, however, given Mr. ["O"]'s performance record, ["Department 2"] is not prepared to provide this reemployment guarantee."

The SDD Chief therefore proposed two options to the Deputy Managing Director: (a) informing Mr. "O" that, on the basis of his performance, he cannot be provided with a reemployment guarantee; or (b) providing a reemployment guarantee that would leave unspecified the department to which he would return.

79. The Deputy Managing Director, however, rejected both options, responding:

"We should *not* give an unconditional guarantee. We should say that if Mr. ["O"] takes the ED Office position, he can return to the staff but *must* retire at the age of 55. If he does not take up the ED Office position, we should tell him that he will be put on probation now—or whatever is the appropriate time."

(Emphasis in original.) The following day, the SDD Chief replied, endorsing the Deputy Managing Director's comments as offering a "fair and reasonable approach." He further reported that "[t]he initial reaction from Mr. ["O"] is to remain in ["Department 2"] if he cannot be guaranteed reemployment until the age of 57, rather than 55." A few days later, the SDD Chief issued the May 4, 1995 letter to Mr. "O".

80. Since Mr. "O" was contemporaneously reported to have given an initial reaction to the apparently conveyed position of the Deputy Managing Director, there is room to doubt his subsequent contention that he was not then informed of the Fund's position. Applicant nevertheless contends that these exchanges between the SDD Chief and the Deputy Managing Director, purporting to demonstrate the intent of the Fund in issuing the letter of May 4, 1995, never were communicated to him and do not comport with his understanding of the events leading up to his departure to serve as Advisor to an Executive Director. At the Grievance Committee proceedings on the Fund's Motion to Dismiss, Applicant offered his own account of the events leading up to the issuance of the disputed letter.

81. According to Mr. "O", he called upon the Deputy Managing Director sometime between April 28 and 30, 1995 because he had been told that "no department is ready to give me the guarantee of re-entry and so forth." The Deputy Managing Director, according to Applicant, told him that "only the Fund can guarantee you" because his Senior Personnel Manager (SPM) did not want Mr. "O" to return to "Department 2." Furthermore, Applicant asserted:

" . . . [the Deputy Managing Director] told me but the Fund can guarantee you re-entry . . . , provided you come back before you reach the age of 55. After which the Fund . . . will be in no obligation to accept.

He never discussed the type of employment, the type, whether it would be fixed or regular, whatever. It was understood that I come back . . . as a regular."

A similar account provided by Applicant in his March 10, 2003 letter to the Managing Director also noted "During the meeting, [the Deputy Managing Director] . . . expressed full support for my transfer to the Executive Board in order to broaden my experience."

82. It may be observed that Applicant's interpretation of the disputed provision of the May 4, 1995 letter, i.e. that it was to record that the period during which the Fund would hold open the guarantee of reemployment following service with the Executive Board would terminate at the end of February 2000, is consistent with the Fund's assertion that normally staff members are given an unconditional guarantee of reemployment when resigning for Executive Board service and, equally, with the requirement of GAO No. 16, Section 6.04.02 that "[t]he period during which an understanding regarding reappointment to the staff applies shall be determined by the Fund and recorded in writing before the staff member's resignation."

83. The Tribunal observes that while the May 4, 1995 letter opens by stating "*As agreed* in your recent conversation with [a Deputy Managing Director] . . ." (emphasis supplied), it does not, on its face, bear any evidence of an agreement of the parties to its terms. It is signed only by the administration of the Fund without any apparent provision for signature by Applicant. At the same time, the record shows no objection at the time or for years thereafter by Mr. "O" to the Fund's statement that the arrangements described were agreed.

84. A further question arises. Do the letters of appointment of July 14, 1999 and subsequent dates, to which Applicant did affix his signature, bar Applicant from challenging the limited terms of those appointments? In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), the Tribunal rejected the Fund's contention that the terms and conditions in a letter of appointment are explicitly accepted by the staff member and not open to challenge:

"11. The Respondent argues that terms and conditions in a letter of appointment, such as grade and salary, are explicitly accepted by the staff member; that initial terms do not involve the exercise of unilateral authority

by the Fund; that therefore, these terms and conditions are presumptively binding upon the staff member who accepted them, absent a showing that they are blatantly mistaken (e.g., arithmetical or typographical error) or contrary to a mandatory rule of the Fund (e.g., a salary below the range associated with the grade of the position), or that their acceptance was induced by fraud or misrepresentation.

12. The Tribunal sustains the Fund's position on this question as a matter of presumption; 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. The Fund and an applicant for a position in the Fund are not in an equal negotiating position; e.g., as this case shows, the Fund is in possession of relevant information not within the knowledge of an applicant. Accordingly, 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.

13. Moreover, precisely what Mr. D'Aoust did accept may be open to question. When the then Director of Administration considered Mr. D'Aoust's request for a revision of his grade and salary, he found that there had occurred in the process of Mr. D'Aoust's appointment events that possibly created a certain degree of misunderstanding and confusion in his mind concerning 'the exact status of the job.' . . . From these facts the Tribunal deduces that there is room for doubt as to whether there was a true meeting of the minds regarding the nature of the job at the time Mr. D'Aoust accepted his position. If there were not such a meeting of minds, Mr. D'Aoust cannot be treated to his detriment as if there were. . . ."

85. Nevertheless, on the facts of this case, as the record reveals them to be, the Tribunal concludes, for reasons elaborated below, that actually Mr. "O" did acquiesce in the Fund's position affording him a limited, rather than indefinite, reentry.

2. In view of GAO No. 16, Section 6, was it permissible for the Fund to offer Applicant the arrangements of 1995?

86. Applicant contends that conditioning his return to service on taking up a limited term appointment was inconsistent with the internal law of the Fund, in particular, GAO No. 16, Section 6, which governs the mandatory resignation of and subsequent reemployment of staff who serve as Advisors to Executive Directors. Respondent, for its part, maintains that it is within its

"unilateral prerogative" to make such an offer. Respondent observes that it is not required to offer any guarantee, conditional or unconditional, in such circumstances. Applicant counters that while no guarantee is required, any guarantee of return to employment with the Fund must be consistent with the terms of GAO No. 16, Section 6, which contemplate that the staff member will resume a regular appointment of indefinite duration.

87. Applicant furthermore contends that the Fund's devising of a "hybrid" appointment for Mr. "O", i.e. of limited duration and with no process or benefits attached to separation but retaining such employment benefits of regular staff appointments as participation in the Staff Retirement Plan, runs counter to GAO No. 3, Rev. 5 (1989). GAO No. 3, Rev. 5 provided¹⁹ for two kinds of staff appointments, "fixed term" and "regular": "Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members." (Section 3.01.) Respondent, for its part, contends that Applicant cannot complain about an arrangement which, it maintains, was entirely to his advantage.

88. The question then arises whether, when a staff member resigns to serve as an Advisor to an Executive Director, it is within the discretion of the Fund to conclude an arrangement for the staff member's return that is of limited duration. Is it within the discretion of the Fund under such circumstances to create an appointment of fixed duration but carrying such benefits of staff employment as home leave and participation in the Staff Retirement Plan? In the view of the Tribunal, the answer to these questions is affirmative for the reasons indicated below.

3. Did the Fund exercise its discretion reasonably in concluding arrangements with Mr. "O" in 1995?

89. Respondent maintains that the Fund exercised its discretion reasonably, indeed generously, in the case of Mr. "O" when it conditioned his return to the staff on taking up an appointment of limited duration, in view of his performance record.

90. Respondent maintains: "In effect, the Fund had worked out an agreed separation with Applicant in 1995, and the terms of this reappointment were crafted to carry out to the fullest extent possible the spirit of the agreement. It is difficult to see how the exercise of flexibility by management, to a staff member's personal advantage, can be characterized as an 'illegal act' by the very staff member who benefited from that flexibility."

¹⁹GAO No. 3 was again revised in 2003.

91. GAO No. 16, by its terms, “. . . sets forth the policies and administrative procedures governing the separation of staff members from the Fund,” (Section 1.01) and provides that “[t]he separation of a staff member from the Fund may take place in one of the following ways: (a) voluntary resignation, including early retirement (Section 5); (b) mandatory resignation to take up a position with the Executive Board of the Fund, with the World Bank, and acceptance of a position of a political nature (Section 6); (c) abandonment of position (Section 7); (d) expiration of fixed-term appointment (Section 8); (e) expiration of probationary period (Section 9); (f) mandatory and extended retirement (Section 10); (g) separation for medical reasons (Section 11); (h) death of a staff member (Section 12); (i) separation upon abolition of the staff member’s position, change in job requirements, or when a reduction in strength is required (Section 13); (j) separation for unsatisfactory performance (Section 14); and (k) separation for misconduct (Section 15).” (Section 3.01.) A variety of procedures and benefits apply, depending on the reason for separation.

92. The Applicant observes that he could not have been separated for unsatisfactory performance because such separation is governed by the terms of GAO No. 16 which were not followed. In the case of separation for unsatisfactory performance, a staff member is entitled to a probationary period of at least six months before a decision is taken to separate him. In such case, “[t]he staff member shall be informed in writing of the specific areas in which he is required to improve. If, at the end of the probationary period, the Department Head determines, in consultation with the Director of Administration, that the staff member has continued to perform unsatisfactorily, his employment shall be terminated.” (Section 14.02.) In addition, a staff member separated for unsatisfactory performance is entitled to a 30-day notice period. (Section 14.04.)²⁰

93. However, the Administrative Tribunal has recognized the validity of settlement and release agreements like the one considered in *Mr. “V”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999). In that case, the applicant and the Fund had entered into an agreement providing for Mr. “V”’s early retirement and settling all claims he may have had against the Fund arising up to that

²⁰At the discretion of the Director of Human Resources, if a staff member appeals his separation under Section 13 (Reduction in Strength, Abolition of Position or Change in Job Requirements), Section 14 (Unsatisfactory Performance) or Section 15 (Misconduct), the notice period may be extended. (Section 17.01.)

date.²¹ The Tribunal recognized "... the importance both to staff members and to the Fund of enforcing negotiated settlement and release agreements ... in which a staff member receives special compensation or benefits upon separation from service in exchange for the release of claims against the organization." (Para. 78.) Moreover, concluded the Tribunal, "[i]n enforcing such agreements, international administrative tribunals have looked for ... evidence of individualized bargaining and the exchange of consideration as indications that the agreement was entered into freely and reflected a real balancing and resolution of interests between the parties." (Para. 79.) Are such indicia present in the case of Mr. "O"?

94. In this case, the weight of the evidence indicates that in 1995 the Fund decided that, while approving the Applicant's resignation for purposes of serving as Advisor to an Executive Director, it would not agree to take back Applicant as a staff member regularly appointed, as is the norm. It did not so agree because the work performance of Applicant over a number of years was evaluated as being in the lowest percentiles of staff performance. At the same time, the Fund was sensitive to the desirability of the Applicant's attaining a pensionable extent of service. Moreover, the Fund supported the Applicant's search for a position as a Resident Representative. How that support coheres with the Fund's evaluation of Applicant's abilities is unclear.

95. What is clear, however, is the intent of the Fund in making the 1995 arrangements as evidenced, in particular, by the memorandum to the Deputy Managing Director of April 25, 1995, quoted above at para. 78, and the handwritten comments thereon of the Deputy Managing Director. What is less clear is whether Applicant accepted these arrangements. However, on balance, the Tribunal is satisfied that the weight of the evidence shows that Applicant did understand, accept, and effectively agree to the terms of the Fund as laid down in 1995. There is no record of any protest of those terms by Applicant in 1995 or for many years thereafter. In 1999, Applicant received a letter of the Fund expressly relying upon its interpretation of the 1995 arrangements. Mr. "O" took no exception to that reliance. Moreover, Applicant stated in a letter of November 24, 2002 to the Managing Director: "When I was appointed an 'Advisor to Executive Director' in 1995, the Administration Department sent me a letter transforming my regular employment status into a 'Fixed term' appointment without my consent."

²¹In his Application before the Administrative Tribunal, Mr. "V" contended that the Fund had violated terms of the agreement; the Tribunal denied the applicant's claims.

That statement indicates the Applicant's appreciation of what the Fund intended by its 1995 letter.

96. In 2003, the Applicant acknowledged that he was surprised in 1999 to learn that his status at the Fund had mutated into an appointment of limited duration. Mr. "O" asserted in a communication of March 10, 2003 to the Managing Director: "When I returned to staff in July 1999, I was surprised to learn from HRD that I had become a fixed-term employee and was expected to leave the Fund by end February 2000." Whatever Mr. "O"'s surprise, this statement by Mr. "O" demonstrates again his recognition of the position of the Fund, that, in July 1999, an employment term of limited duration, a term that was to expire by the end of February 2000, governed.

97. In the event, Applicant, with the support of the Fund, did serve an appointment as Resident Representative, an appointment that lasted for 3 years. It was only late in that period that Applicant protested the 1995 arrangements, claiming that he had never agreed to them and sought administrative review, recourse to the Grievance Committee and finally recourse to this Tribunal. The result is that for years the Applicant received the benefits of the arrangements fashioned by the Fund, while at a late stage he repudiated the burdens. The Fund's approach to ensuring the pension of the Applicant was proper, and its support of his appointment as Resident Representative in the circumstances may be seen as indulgent; certainly, it evidences no actionable discrimination. It is true that the handling of the matter leaves the Fund's administration open to criticism. It would have done well to have more clearly established the assent of Applicant to the 1995 arrangements at the time they were made. Its coincident description of his status as a "regular" appointee and a "fixed-term" appointee, if understandable in the circumstances, seems confused. Nevertheless, in light of the foregoing analysis, the Tribunal has arrived at the conclusion that the contentions of Applicant challenging reentry for only a limited term are not well-founded. The arrangements of 1995 do not squarely comport with the provisions of GAO No. 16, but in the view of the Tribunal, it was open to the Fund to vary those provisions for the benefit of a staff member provided that he agreed to or acquiesced in those variations. While the record is not free from doubt, on balance the Tribunal concludes that Mr. "O" did assent to the 1995 arrangements by his acceptance of their benefits and failure to question the content of those arrangements until he had exhausted those benefits.

D. Merits of Applicant's Allegations of Discrimination

98. In addition to the contentions considered above, Applicant alleges that his career with the Fund has been adversely affected by impermissible discrimination on the basis of his race. Applicant cites a lack of career progression, observing that in twenty years he did not advance from Grade 13 at which he entered. In addition, Mr. "O" maintains that he has been the object of incidents of discrimination that "merit investigation." Finally, Applicant alleges that the terms upon which his reemployment with the Fund was conditioned and his ultimate separation from service represent disparate treatment and further evidence of discrimination.²²

99. The Fund responds that the contention that discriminatory treatment impeded Applicant's career is controverted by his performance record.

100. In the view of the Tribunal, Applicant has not shown that his Fund career, or its termination, was affected by racial discrimination. The exiguous evidence advanced by Applicant is insufficient to support that claim. The fact that he was not promoted in the course of his service is not of itself probative of discrimination.

²²Applicant additionally maintains that he sought review of discrimination claims pursuant to the Discrimination Review Exercise (DRE) initiated by the Fund beginning in 1996, see generally *Ms. "Z", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), paras. 19-30, but that his request for review was denied because he was at that time not a staff member, as he was serving with the Executive Director's office. Respondent asserts that it has no record of any request by Mr. "O" for DRE review, but that in any event it is correct that the DRE was intended for then current staff members only.

Decision

FOR THESE REASONS

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

The Application of Mr. "O" 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.
February 15, 2006

JUDGMENT NO. 2006-2

***Ms. "T", Applicant v. International
Monetary Fund, Respondent***
(June 7, 2006)

Introduction

1. On February 13, 14 and 15, 2006, 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. "T", a former staff member of the Fund. It gave final consideration to its Judgment and adopted it on June 7, 2006.

2. Applicant contests the decision of the Fund not to convert her fixed-term appointment to a regular staff position. Applicant contends that the decision failed to take account of all of the relevant evidence and therefore was arbitrary, capricious and an abuse of discretion. Additionally, Applicant maintains that the non-conversion decision was marked by procedural irregularities, that the Fund had created an expectation of conversion and "mismanaged" her career, and that the decision not to convert her appointment represented discrimination on the basis of race and nationality.

3. Respondent, for its part, maintains that the decision not to convert Applicant's fixed-term appointment to a regular staff position was a reasonable exercise of managerial discretion, carried out consistently with the Fund's internal law and supported by the relevant evidence. In the Fund's view, Applicant, despite regular feedback and monitoring, failed to achieve the level of performance and potential for a Fund career required for conversion to regular staff. The Fund denies that the non-conversion decision was affected by either procedural irregularities or discrimination.

The Procedure

4. On April 13, 2004, Ms. "T" filed her Application with the Administrative Tribunal. In accordance with the Tribunal's Rules of Procedure, the

Application was transmitted to Respondent on April 15, 2004, and on April 19, 2004, pursuant to Rule XIV, para. 4¹ of the Rules of Procedure, the Registrar issued a summary of the Application within the Fund. On June 1, 2004, Respondent filed its Answer to Ms. "T"'s Application. Applicant submitted her Reply on July 2, 2004. The Fund's Rejoinder was filed on August 5, 2004. On January 25, 2006, Applicant submitted a statement of her legal costs, for which she had requested reimbursement in the Application. Pursuant to his authority under Rule XXI, para. 3,² the President directed that the statement be transmitted to the Fund for its observations, which were submitted on February 13, 2006.

5. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.³ The Tribunal had the benefit of a transcript of oral hearings before the Grievance Committee at which Applicant and other witnesses 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

6. In her Application, Ms. "T" made the following requests for production of documents:

1. Any and all documents relating to performance standards for Fund Staff Assistants from 1999 until the date of Applicant's separation;
2. Any and all documents evidencing any actions by Respondent to share with Applicant any of the documents produced in response to point 1 above;

¹Rule XIV provides in part:

"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."

²Rule XXI, para. 3 provides:

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

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."

3. Any and all documents relating to managerial responsibilities for the professional development of subordinates including but not limited to training materials for managers or supervisors, guidelines and manuals, and documents relating to the monitoring of fixed-term appointed staff;
4. Any and all documents relating to or evidencing any action Respondent may have taken as it relates to developing Applicant's skills for a career with the Fund;
5. Any and all documents that describe the differences or similarities between the functions/responsibilities of a member of the Secretarial Support Group and the functions/responsibilities of a Staff Assistant;
6. Any and all documents relating to the diversity (e.g., race, nationality, gender) of ["Department 1"]⁴ from 1999 until the date of Applicant's separation; and
7. Any and all communications regarding Applicant among ["Department 1"] personnel including but not limited to specified persons.

In accordance with Rule XVII⁵ of the Tribunal's Rules of Procedure, Respondent was provided the opportunity to present its observations on the matter, as both parties exchanged views in their subsequent pleadings as to

⁴In accordance with the Administrative Tribunal's policy on protection of privacy, adopted in 1997, the departments and divisions of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal's Judgment.

⁵Rule XVII provides:

"Production of Documents

1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.
2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.
3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment.
4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

whether the document requests should be granted. Following consideration of the views of the parties, the Administrative Tribunal, meeting in session, decided on December 7, 2005 to deny each of these requests on the following grounds.

7. As to Requests 1, 2, 4, 5, 6, and 7, the Fund responded that all responsive documents were provided to Applicant during the Grievance proceedings. Applicant proffered no evidence to suggest that the Fund had in its possession additional responsive documents. Accordingly, these requests were denied on the basis that Applicant had not shown that she had been denied access to documents by the Fund. (Rule XVII, para. 1.) *See Ms. "W", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 14.*

8. As to Request 3, for "[a]ny and all documents relating to managerial responsibilities for the professional development of subordinates . . ." Respondent partially satisfied the Request while objecting to the Request insofar as it sought guidance materials for managers relating specifically to performance issues of regular staff members. The Fund contended that such documents are not relevant to assessing the legality of a decision concerning the conversion of a fixed-term staff member. The Tribunal sustains the Fund's objection that such documents are not relevant to the issues of the case of Ms. "T".

The Factual Background of the Case

9. The relevant factual background may be summarized as follows. Additional factual elements will be included in the consideration of the issues of the case.

10. Applicant was first employed by the Fund beginning in July 1997 as a contractual employee⁶ to serve as a Staff Assistant in the Secretarial Support Group (SSG). Following two years in that capacity, Applicant was appointed as a fixed-term staff member at the end of September 1999, in accordance with GAO No. 3, Rev. 6 (May 1, 1989) (Employment of Staff Members), which governed during the period of her employment.⁷

⁶Contractual employees are distinguished, under the Fund's internal law, from staff members. *See generally Mr. "A", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-1 (August 12, 1999).*

⁷GAO No. 3, Rev. 6 provided for two types of staff appointments, regular and fixed-term: "Section 3. *Types of Appointments*

11. Applicant's letter of fixed-term appointment explained that the appointment was for a two-year period commencing on October 5, 1999 and would be probationary for the first six months. The letter advised Ms. "T" that, as a staff member on fixed-term appointment, she would be subject to the Guidelines for Fixed-Term Appointments (1995), which were enclosed with the correspondence.

12. Applicant was appointed to serve as a Staff Assistant in "Department 1" and was initially assigned to work in "Division i" of that Department, in which she functioned as one of two Assistants. Three months after Ms. "T"'s

3.01 *Regular Appointments.* Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members.

3.02 *Fixed-term Appointments.* Fixed-term appointments shall be appointments for a specified period of time. Persons holding fixed-term appointments shall be designated as fixed-term staff members."

GAO No. 3, Rev. 6 was superseded by GAO No. 3, Rev. 7 (May 1, 2003), which provides for fixed-term appointments as follows:

"3.02 *Types of Staff Appointments*

3.02.1 *Open-ended appointments*

...

3.02.1.2 Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment. Persons holding fixed-term appointments shall be designated as fixed-term staff members.

3.02.1.3 If fixed-term staff members meet the performance requirements, demonstrate potential for a career at the Fund, and meet the Fund's staffing requirement, their appointment may be converted from fixed-term to open-ended status at the expiration of the fixed-term appointment. Persons holding open-ended appointments shall be designated as regular staff members.

3.02.1.4 Staff recruited to fill senior level positions (Grades B3-B5) shall receive three- to five-year fixed-term staff appointments. After completion of the initial fixed-term appointment, these appointments may be renewed without limit for fixed-term periods up to five years up to mandatory retirement age, or converted to open-ended appointments.

3.02.1.5 Staff who rejoin the Fund may, at the discretion of the Fund, be offered an open-ended appointment without first having to complete successfully a fixed-term appointment, provided that they were regular staff at the time they separated from the Fund. This provision shall not apply to former staff members who are appointed to B3-B5 positions.

3.02.2 *Limited-term appointments*

..."

The present Application is governed by GAO No. 3, Rev. 6 and the Guidelines for Fixed-Term Appointments (August 1995), *see infra*.

beginning that assignment, the Administrative Officer (AO) of the Department alerted the Division Chief that the Administrative Assistant had given Applicant a “not very good evaluation of the past three months. We need to meet and discuss this issue and then meet with [Ms. “T”] to keep her informed.” The following month, in February 2000, Ms. “T” was transferred to “Division ii.” At the conclusion of her assignment with “Division i,” the Chief of that Division and the AO held a feedback session with Ms. “T”, the substance of which was recorded in a memorandum of January 12, 2001 from the “Division i” Chief to the “Division ii” Chief in conjunction with the preparation of Applicant’s Anniversary Annual Performance Report (*see infra*). The “Division i” Chief reported that he had conveyed to Ms. “T” in February 2000 a number of points regarding shortcomings in her technological skills and work methods. He further reported that, in response, Applicant had noted that she found the Administrative Assistant to be “too busy and uncooperative” to provide the guidance Ms. “T” required as a newcomer to the Department and Division, and that she looked forward to the transfer to “Division ii,” which “seemed to be a less pressurized environment.”

13. At the conclusion of the standard six-month probationary period, the Administrative Officer queried the Division Chief of “Division ii” as to whether Ms. “T” should be confirmed. The Division Chief advised by email of April 4, 2000:

“[The Administrative Assistant of “Division ii”] confirmed that [Ms. “T”] was a slow worker, and a slow learner. However, her attitude is positive, she is trying, and she is making progress. [The Administrative Assistant of “Division ii”] is hopeful that she will pull through. Based on this, perhaps we should go ahead and confirm, and see how it works out. I find her helpful and good in the division.”

On June 23, 2000, the Administrative Officer reported to the Human Resources Department (HRD) that “Department 1” was “. . . pleased with Ms. [“T”]’s performance and would like her appointment to be confirmed.” On that same date, Applicant was informed by HRD that she had successfully completed the probationary period.

14. In August 2000, the Chief of “Division ii” took up a new assignment within the Fund, and the Division Chief under whom Ms. “T” formerly had served in “Division i” became the new Chief of “Division ii.” Applicant’s Anniversary Annual Performance Report (Anniversary APR), covering the period October 7, 1999–October 7, 2000, was signed by and included comments from both Division Chiefs who had supervised Ms. “T” during the first year of her two-year fixed-term appointment. With respect to Appli-

cant's initial assignment in "Division i," the Division Chief observed: ". . . despite her previous Fund experience, she appeared to lack the knowledge of standard Fund procedures and technical know-how usually expected of assistants." As for her subsequent work in "Division ii," the initial Chief of that Division noted: ". . . she did make an effort to improve her performance . . . [n]evertheless, there remained scope for improving the speed and quality of her work."

15. Applicant's Performance Plan, as recorded in the Anniversary APR, was to "improve technical skills" through training and division work and to "show greater initiative" by taking full responsibility during the Administrative Assistant's absence in January/February. In addition, the Performance Plan referenced an attached listing of eleven areas for development, which included both technological and work management objectives. These included, for example, the "[n]eed to improve technological skills—particularly more complex documents, boxes, Excel tables, and charts," and to "[a]ttend to routine work without delay and without having to be reminded (e.g., filing, mail, BRS, mission leave schedule, weekly list)."

16. In summarizing the Anniversary APR discussion of January 19, 2001, in which both Division Chiefs and the Administrative Officer participated with Ms. "T", the initial "Division ii" Chief ". . . reiterated that the improvement in Ms. ["T"]'s performance over the last year indicated potential to reach the level necessary for satisfactory performance, but this needed to be clearly demonstrated in the coming months before a decision on conversion of her contract could be reached."

17. For her part, Ms. "T" recorded above her signature of March 9, 2001 on the Anniversary APR that she was ". . . shocked that my performance had been [rated] at a low level. It was the first time, since February 2000, that anyone told me that I was not performing at the level of an assistant of my grade." Memoranda of early 2001 reflect that Applicant conveyed a similar reaction to the Senior Personnel Manager (SPM) of the Department following the January Anniversary APR discussions. On January 31, 2001, the SPM reported to both Division Chiefs and the AO that Ms. "T" had visited her office, contending that she had received inadequate feedback from supervisors and alleging that such treatment was the result of discrimination. The SPM took exception to these allegations and offered to see how areas identified for improvement could be communicated more clearly to Applicant.

18. According to a Memorandum for Files of February 16, 2001 from the "Division ii" Administrative Assistant, a follow-up meeting was held in which the SPM reviewed with Ms. "T" the Performance Plan, including thir-

teen points for development, and noted as well that feedback was given “on an ongoing basis,” for example, when Ms. “T” was told to follow through on assignments. The SPM communicated to Ms. “T” the possibility of extending the period of her fixed-term by six months, transferring her to another Division and providing as a mentor an officer of the Human Resources Department with whom Applicant had had a favorable working relationship during her earlier period of contractual service with the Fund. Each of these proposals was later implemented.

19. Applicant further conveyed her concerns regarding the appraisal of her performance to the Department Head, who recorded above his signature of March 2, 2000 to the Anniversary APR the Department’s decision to extend Applicant’s appointment by six months:

“Ms. [“T”] has expressed to me her concerns regarding her performance assessment. I have reassured her that [the Department] remains committed to giving her a fair chance through a fair process. Reflecting that commitment of the department, it has been agreed to extend her fixed-term appointment by six months, in order to provide her with an opportunity to demonstrate that she meets the requisite standards to become a regular staff member in the department. The outcome will, however, depend on her performance and her efforts to address the areas identified for improvement.”

Accordingly, an Expiration of Fixed-Term Appointment form was signed on March 9, 2001, formalizing the extension of Applicant’s appointment through April 3, 2002 and referencing the assessment of Ms. “T”’s performance as set out in the Anniversary APR:

“In the case of an extension, please explain reasons and, when applicable, what aspects of performance will be monitored and how the staff member will be assisted in meeting the requirements.

Please see attached first anniversary APR and memo enumerating areas for development.

The division chief, admin assistant and AO will meet with Ms. [“T”] every month to provide her feedback on areas requiring attention.

Ms. . . . of SDD [Staff Development Division of HRD] will be her mentor during the next six months and will be kept informed of her progress.

A decision will be made at the end of September whether to convert Ms. [“T”] or let her term expire.”

20. In March 2001, Applicant transferred to “Division iii” of the Department, which according to the testimony of the SPM was to provide Applicant

with a "supportive environment." The Deputy Chief of "Division iii" had provided a favorable review of Applicant's performance on a mission he had headed while Applicant was still assigned to "Division ii" in November 2000. In a Memorandum of February 8, 2001 to the AO, he described Ms. "T"'s mission performance as follows:

"Ms. ["T"]'s overall performance on the mission was very good The mission was very busy She organized her work well, pushing others also to meet deadlines, and everything went smoothly Minutes, tables, matrices, and the concluding statement were all typed/ revised/ distributed well.

I found her original drafts of minutes to be reasonably accurate, and she was at pains to check with me, or other members of the team, when there was any problem"

Upon Ms. "T"'s arrival in "Division iii," the Administrative Assistant for the Division, by Memorandum of March 8, 2001, provided Applicant with a detailed listing of duties and responsibilities.

21. Meanwhile, a regular Annual Performance Report (APR), covering the remaining months of calendar year 2000, i.e. October–December, which had not been encompassed by the Anniversary APR, was prepared. The APR referenced Applicant's positive performance on mission and attached the Deputy Division Chief's memorandum. The APR further noted: "Ms. ["T"] needs to carry over this positive performance to her work at headquarters, which was discussed at length in her anniversary APR and, subsequently with [the SPM]." The APR was signed on May 2, 2001 by the "Division ii" Chief and on June 4, 2001 by the "Division iii" Chief. Ms. "T"'s performance was rated "3" on a rating scale of 1–4, signed by the Department Head on May 7, 2001.

22. On April 24, 2001, the "Division iii" Chief met with Ms. "T" and the AO to consider Applicant's performance since her joining the Division in early March. In a Memorandum to Files, the Division Chief recorded areas of strength, as well as the following areas for further development:

- "Improve familiarity with Fund procedures (e.g., how to handle Board documents).
- Greater attention to detail (e.g., when proofreading documents and inputting data into tables).
- Frequently touch base with colleagues to check that there is a clear understanding of what tasks are expected and when."

Less than a week later, the mentor assigned from the Staff Development Division recorded that she had met with Ms. "T", who reviewed with her elements of the discussion with the Division Chief. The mentor also offered advice to Ms. "T" at that time regarding communication skills. Later contacts between the mentor and Applicant are recorded for May (when Applicant emailed ". . . I think we can do without the discussion for the moment") and July 2001.

23. The "Division iii" Chief held a subsequent meeting with Ms. "T" on June 22, 2001 and recorded, by Memorandum for Files of the same date, that he had advised Ms. "T" of "some areas for further improvement or development:

- Further enhance understanding and awareness of Fund procedures and practice. This would help Ms. ["T"] prioritize tasks according to their urgency rather than when they were assigned (an example was the [country] staff statement).
- Similarly, Ms. ["T"] was encouraged to communicate with colleagues in order to ensure that there was a clear understanding on how the workflow should be prioritized."

24. Thereafter, on September 12, 2001, as the date approached for a decision on Applicant's conversion, i.e. six months in advance of the revised (April 3, 2002) termination date of Applicant's fixed-term, the Deputy Division Chief who earlier had reported favorably on Applicant's mission performance of November 2000 prepared an overall assessment of Ms. "T"'s performance in "Division iii," which read in part:

"My general assessment, based on the period since March is that [Ms. "T"]'s performance has been below average for her grade, despite clear efforts to improve in areas earlier identified as requiring action. . . . I did not have complete confidence that critical matters in her charge . . . would be done without very close and intense supervision For someone who has been working in the Fund for quite a considerable time, familiarity with correct Fund procedures was not assured, though she did make noticeable efforts to ask and to think ahead [Her performance is] not low enough to warrant formal action for a regular employee but inconsistent with sufficient confidence to either employ for the first time or convert from a contractual [i.e. fixed-term] status."

25. On September 20, 2001, the Division Chief, Deputy Division Chief and Administrative Assistant met with Ms. "T" to review her performance over the preceding six months. While identifying some positive elements of Applicant's work performance, the Division Chief in a Memorandum for

Files that followed, emphasized that, based upon the views of a number of colleagues, there remained "important areas" for further development, including in the comprehensiveness of correction of typographical errors and knowledge of Fund procedures. By way of her own Memorandum for Files of September 27, 2001, Applicant brought to the attention of the SPM, the Division Chief and the Department Head her response to the alleged deficiencies in performance.

26. The Division Chief testified to a meeting in which senior management of the Department, including its Director, Deputy Director and the SPM took part, in which the Division Chief's views on Applicant's possible conversion were invited. Thereafter, on October 5, 2001, the SPM notified Ms. "T" of the decision not to convert her appointment. On the Expiration of Fixed-Term Appointment form of October 4, 2001, the SPM recorded:

"Overall performance and particular strengths/weaknesses:

Ms. ["T"]'s performance has been mixed. In the APR exercise that was completed in February 2001, concerns had been raised about her lack of knowledge of standard Fund procedures, her technical know-how, and the pace of work. There has been some improvement in her performance during the subsequent six-month assignment, and she consistently demonstrated a pleasant demeanor, a dedication to day-to-day task, and responsiveness to feedback. At the same time, however, her performance in other areas was less even, including with regard to attention to detail, pace of work, and her facility to manage the work of major projects.

Potential for the longer term:

Although Ms. ["T"] has demonstrated a number of strengths in important areas, her overall aptitude for work in an operational department remains in doubt and, notwithstanding an extended period of employment, Ms. ["T"] has not demonstrated a clear potential for operating at a higher level in the future."

The Channels of Administrative Review

27. Following the notification on October 5, 2001 of the decision not to convert her fixed-term appointment, Applicant sought administrative review pursuant to GAO No. 31. Applicant's Grievance was filed on July 16, 2002. The Grievance Committee considered Ms. "T"'s complaint in the usual manner, on the basis of oral hearings and the briefs of the parties. On December 19, 2003, the Committee issued its Recommendation and Report, recommending denial of Applicant's Grievance on the ground that Applicant

had not shown that the non-conversion decision was arbitrary, capricious, discriminatory or procedurally defective in a manner that substantially affected the outcome. The Committee's recommendation was accepted by Fund management on January 13, 2004.

28. On April 13, 2004, Applicant filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment failed to consider all of the evidence and therefore was arbitrary and capricious.
2. The non-conversion decision was affected by procedural irregularities.
3. The Fund created an expectation that Applicant's fixed-term appointment would be converted to regular staff and "misman-aged" Applicant's career.
4. The non-conversion decision was discriminatory on the basis of Applicant's race and nationality.
5. Applicant seeks as relief:
 - a. reinstatement with a fair opportunity to demonstrate suitability for conversion to regular staff;
 - b. reasonable monetary damages; and
 - c. legal costs.

Respondent's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment to regular staff was taken in the reasonable exercise of managerial discretion and consistently with the applicable Guidelines for Fixed-Term Appointments.

2. The non-conversion decision was based on a proper assessment of Applicant's performance and potential for continued employment with the Fund, and did not fail to take account of any material facts.
3. Applicant was given regular feedback and monitoring, along with ample opportunities to improve her performance but nonetheless did not attain the level required for conversion to regular staff.
4. Applicant has not shown that the non-conversion decision was affected by procedural irregularities, that the Fund created an expectation of conversion, or that it "mismanaged" Applicant's career.
5. Applicant has not shown that the non-conversion decision was affected by discrimination on the basis of race or nationality.

Consideration of the Issues of the Case

Conversion of Fixed-Term Appointments

31. The case of Ms. "T", and another decided this day of Ms. "U", are the second and third in which the Administrative Tribunal has considered a challenge brought by a former staff member to the non-conversion of a fixed-term appointment. In an earlier Judgment, *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), the Tribunal sustained the non-conversion decision while at the same time concluding that irregularities in the non-conversion process gave rise to a compensable claim.⁸

⁸Ms. "C" contended that the non-conversion of her appointment was improperly motivated by retaliation for allegations she had made of sexual harassment. The Tribunal found no merit to the claim that the non-conversion decision was so motivated. Moreover, the Tribunal sustained as a reasonable exercise of the Fund's managerial discretion the decision not to convert the appointment, noting that the evidence showed a pattern of deficiencies in interpersonal skills, which reservations had been conveyed to Ms. "C" in her first performance reviews. *Ms. "C"*, paras. 38, 41.

At the same time, the Tribunal held in *Ms. "C"* that procedural irregularities did affect the non-conversion decision and that these permitted the applicant to prevail, not wholly, but in part:

"Two irregularities stand out. First, when Ms. "C" was accorded an extension of a year and transferred to ADM, she should have been given to understand (a) precisely why she was not converted to permanent status at the end of two years and (b) what steps should be taken by her to correct her perceived problems in interpersonal relations.

32. It has been, and remains, the Fund's policy to hire virtually all new staff on a fixed-term basis preliminary to their attaining an appointment of indefinite duration,⁹ and therefore the significance of the conversion process and the requirement that it be carried out consistently with legal norms cannot be overstated. For appointments commencing prior to December 2002, the Fund's Guidelines for Fixed-Term Appointments (August 1995) govern.¹⁰ These Guidelines, with which Ms. "T" was provided at the time of her appointment, are intended by their terms ". . . to ensure that staff on fixed-term appointments gain an accurate understanding of the meaning of their fixed-term status and a realistic view of their prospects of being converted to a 'regular' (indefinite) appointment upon expiration of their fixed term." (Guidelines, p. 1.) The Guidelines inform appointees that "[t]he Fund's legal obligation does *not* go beyond the initial term . . ." (emphasis in original) and set out three criteria for conversion, i.e. (a) performance during the fixed-term, (b) potential for a career with the Fund, and (c) the staffing needs of the organization:

". . . the conversion decision depends in large part on the departmental assessment of the staff member's performance during the fixed-term appointment and the related judgment about the individual's potential for a successful career with the Fund. There must be a clearly positive assessment for taking the important step of committing the Fund to providing a

Neither appears to have been done. Second, at the dispositive session of 29 March 1995, where Mr. "B"'s earlier highly positive appraisal was peremptorily overturned, Ms. "C" was confronted not by her critics nor by specific and rebuttable incidents of their criticism. That in particular was a lapse in due process."

Ms. "C", para. 41. For the procedural irregularities that affected the non-conversion decision, the Tribunal awarded Ms. "C" compensation in the sum equivalent to six months of salary. Ms. "C", Decision, para. Second.

⁹See Guidelines for Fixed-Term Appointments (1995) ("It is the Fund's *current policy to maintain a large proportion of its staff on an indefinite basis*, through 'regular' staff appointments. Initially, however, virtually all new staff are hired on a fixed-term basis for two or three years (a period of five years can be considered in exceptional circumstances regarding senior staff)" (emphasis in original) and GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.2 ("Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment.")

¹⁰A revised fixed-term monitoring process became effective on December 2, 2002 (and was further updated as of January 1, 2005), applicable to fixed-term staff members appointed on or after that date, providing more specific monitoring requirements. The criteria for conversion, however, remain unchanged, i.e. that the staff member meets the performance requirements established for the position, that the staff member demonstrates potential for a career in the Fund, and that the conversion decision is consistent with the Fund's staffing needs. These same criteria are given effect in GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.3, *see supra* note 7. It is the 1995 Guidelines that govern the instant case.

career opportunity for the individual. However, the short- and long-term staffing needs of the Fund are of paramount importance in this process."

(*Id.*)

33. With respect to the monitoring and decision-making process, the Guidelines impose obligations on both the fixed-term appointee and supervisors:

"The mutual objective during the fixed-term appointment is to enable the staff member to perform at full capacity as quickly as possible, not just to maximize the contribution to the Fund's work but also to provide an opportunity for the staff member to demonstrate potential for the future. Both the staff member and the supervisor(s) concerned have obligations in this respect.

The supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s). The staff in the Recruitment Division also stand ready to assist upon request, should the staff member or the supervisor find this necessary."

(Guidelines, pp. 1-2.)

34. Under the Guidelines, checkpoints for performance assessment are provided at six, twelve and eighteen months after appointment. In the case of Grade A1-A8 staff, the first six months normally constitute a formal probationary period. At the time of the 12-month assessment, the ". . . prospects for conversion should be discussed . . . , and this discussion should be reflected in the write-up, but no commitment can be made at this early stage. The complete assessment is reviewed by the Recruitment Division, and issues are raised with the staff member and the department as appropriate." (Guidelines, p. 2.)

35. The formal decision as to conversion is to be taken eighteen months following the date of appointment. The Guidelines provide that, on an exceptional basis, a fixed-term appointment may be extended, as it was in the case of Ms. "T", to allow for an additional period of testing:

"As an exception, if a department finds that it has inadequate information upon which to base a final decision about a fixed-term appointee's conversion to regular staff, the department may request a one-time extension of the appointment for up to one year. A staff member receiving such an extension should not take the extended affiliation with the Fund as any kind of indication, in itself, regarding the prospects for eventual conversion."

(*Id.*)

Did Respondent abuse its discretion in deciding not to convert Applicant's fixed-term appointment to a regular staff appointment?

36. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary on the Statute which provides:

“. . . 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.) As this Tribunal observed in summarizing its jurisprudence with respect to standards of review, the decision whether to convert a fixed-term appointee is essentially a “performance-based decision.” *Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 108. “Noting evidence in the record of performance deficiencies, the Tribunal [in *Ms. “C”*] deferred to management’s assessment . . .” that the applicant had not met the standard of performance required for conversion of her appointment to regular staff. *Ms. “J”, para. 108*. The Tribunal further cited the following excerpt from the Commentary on the Statute:

“This principle [of deference to managerial discretion] is particularly significant with respect to decisions which involve an assessment of an employee’s qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.[footnote omitted]’ (Report of the Executive Board, p. 19.)”

Ms. “J”, note 27. See also Mr. “F”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 70 (citing the same provision while finding “persuasive” the Fund’s position that Mr. “F” was not qualified for the position that had been redesigned following the abolition of his post). In the context of conversion of fixed-term appointments, the World Bank Administrative Tribunal (WBAT) has observed: “. . . the Tribunal will not substitute its own judgment for that of the Respondent on the staff member’s suitability for permanent employment.” *Salle v. International Bank for Reconstruction and Development*, WBAT Decision No. 10 (1982), para. 30.

37. Moreover, the discretion at issue in the conversion of fixed-term appointments is necessarily distinct from that exercised by management in the separation of a staff member for unsatisfactory performance. Accordingly, ". . . the concept of unsatisfactory performance as used in respect of probation is wider than the same concept used with respect to a confirmed staff member." *McNeill v. International Bank for Reconstruction and Development*, WBAT Decision No. 157 (1977), para. 34. The Fund's Guidelines emphasize that "[t]here must be a clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual."¹¹ A fixed-term appointee has no entitlement to the continuation of his employment beyond the term of the appointment, and the burden of proof rests squarely with the applicant in challenging a decision not to convert his fixed-term appointment to regular staff. Ms. "C", para. 21.

38. While it is within the purview of the Fund's discretionary authority to decide upon a staff member's suitability for conversion to an appointment of indefinite duration, that discretion is necessarily constrained by principles of fairness, in particular adequate opportunity to demonstrate satisfactory performance and suitability for career employment. *See McNeill*, para. 44 ("While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met.") Such opportunity should indicate that the decision ". . . has not been based on a performance which has manifestly not benefitted from adequate supervision and guidance" (*Salle*, para. 32), that the appointee has been evaluated periodically, and that he has been given adequate warning of performance deficiencies and a reasonable opportunity to remedy them. These principles are recognized in both the Fund's Guidelines and the jurisprudence of international administrative tribunals.

39. Accordingly, the following questions arise. Was the non-conversion of Ms. "T"'s appointment taken consistently with the Fund's internal law and general principles of international administrative law governing conversion of fixed-term appointments? Did Applicant's supervisors provide Ms. "T" with appropriate monitoring and feedback? Was the non-conversion of Ms.

¹¹By contrast, a staff member who already has attained an appointment of indefinite duration is presumed to continue in the Fund's employment in the absence of a showing of unsatisfactory performance, consistent with the requirements of GAO No. 16. The Fund observes in its pleadings in this case that in cases of dismissal for unsatisfactory performance the burden rests with the Fund.

“T”’s fixed-term appointment affected by procedural irregularities that give rise to a compensable claim?

40. The Tribunal initially addresses Applicant’s contention that the Fund created an “expectation” of conversion, i.e. that “. . . over the course of her two-year appointment, the Fund consistently acted in a manner to cause Applicant to believe that she would be converted,” in particular by providing positive feedback and including her on mission assignments. For the following reasons, the Tribunal finds no merit to this contention.

41. The record indicates, as stated on Applicant’s Expiration of Fixed-Term Appointment form of October 4, 2001, that Ms. “T”’s performance was perceived by her supervisors as “mixed.” At various points, positive elements of her work performance were noted; nonetheless, the overall level of Applicant’s performance was assessed as below the norm required for conversion. Accordingly, the periodic appraisals, both formal and informal, of Applicant’s performance demonstrated—or should have demonstrated—to Ms. “T” that the Fund retained doubts about the prospects of her conversion to an appointment of indefinite duration. These cautions were communicated to Ms. “T” perhaps most clearly at the time of the extension of her appointment, which was taken “. . . in order to provide her with an opportunity to demonstrate that she meets the requisite standards to become a regular staff member in the department. *The outcome will, however, depend on her performance and her efforts to address the areas identified for improvement.*” (Anniversary APR.) (Emphasis supplied.) That Applicant’s fixed-term appointment was extended for a further period of development and testing should have signaled continued lack of demonstrated fitness for conversion of her appointment:

“Neither does the fact that the probationary period is extended give any decisive indication as to the likelihood of ultimate confirmation. Although continuation beyond the normal probationary period demonstrates that the staff member’s performance is not so substandard as to justify immediate termination, it ought properly to alert him to the fact that up to that date his performance has not warranted the immediate grant of a permanent appointment and that a satisfactory level of performance must be achieved before confirmation becomes appropriate.”

Salle, para. 28. See also Fund’s Guidelines, p. 2, quoted *supra* para. 35. Finally, the Guidelines for Fixed-Term Appointments, with which Applicant was provided, make clear that “[t]he Fund’s legal obligation does *not* go beyond the initial term” (Guidelines, p. 1.) (Emphasis in original.)

42. As to any possible procedural irregularity in the conduct of the non-conversion process, the Tribunal notes, as set out in the Fund's Guidelines, "[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback." Among the indicia of adequate supervision is that the fixed-term appointee is ". . . exposed to the types of tasks which would have been required of him as a permanent employee and that he had been given the opportunity to benefit from [his supervisors'] guidance and comments." *Salle*, para. 33. It is recalled that Ms. "T", at the time of her Anniversary APR discussions, expressed concerns about the adequacy of feedback from supervisors. The record indicates that in response the SPM undertook efforts to clarify communications regarding performance shortcomings,¹² particularly through a follow-up meeting and thereafter through the extension of Applicant's appointment and her transfer to "Division iii." The SPM noted as well that feedback was given ". . . on an ongoing basis, for example, when [Ms. "T"] is told to follow through with e-mail requests, to attend to routine tasks such as the mail in a timely manner, or to put boxes on charts in Word documents." (Memorandum of February 16, 2001.) *See Salle*, para. 36 (" . . . supervision and guidance do not necessarily take the form of recorded conversations or otherwise specific acts or activities; they may consist as well in day to day work and contacts with supervisors and colleagues and in the exposure to the kind of tasks which the staff member would have to accomplish if his appointment were to be confirmed.")

43. Moreover, it was in recognition of the importance of providing Applicant a fuller opportunity to gain experience and receive feedback that Ms. "T"'s fixed-term appointment was extended and she was transferred to "Division iii." As the SPM described in her Grievance Committee testimony, the transfer was effected so that Ms. "T":

" . . . would have another opportunity to prove herself in a different environment and I thought that Division ["iii"] would be a supportive environment for her because she had been on mission with . . . the deputy chief of that division, and she had good working relations with the people on the mission. So I thought that by putting her in a division with people that she worked well with, . . . that should enable her to perform."

¹²As set out in the Fund's Guidelines, "[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s)." The action of Ms. "T" and her supervisors in this regard was consistent with that contemplated by the Guidelines.

In addition, upon Applicant's arrival in "Division iii," the Administrative Assistant supplied her with a detailed listing of her duties and the allocation of responsibilities between the assistants in the Division.

44. The conduct of Applicant's managers in this regard may be compared with the facts reviewed in *Ms. "C"*, in which the Tribunal found that among the failures giving rise to a compensable claim was that ". . . the Fund should have taken steps to ensure that, when transferred to ADM, and in the course of her work there, *Ms. "C"* was fully aware of her need to improve her interpersonal skills and the possibilities of so doing." *Ms. "C"*, para. 42. By contrast, *Ms. "T"* was advised on a series of occasions of performance shortcomings, as, for example, at the time of the Anniversary APR discussions of January 2001, when Applicant was provided (by way of an attached memorandum) a detailed listing of "areas for development." These included both "technological" and "work management" skills.

45. Applicant additionally maintains that the non-conversion decision was affected by procedural irregularity on the ground that the Anniversary APR, which is designed to give the fixed-term appointee an appraisal of his performance at the conclusion of the first 12 months of appointment, was not, in *Ms. "T"*'s case, completed until some 3–4 months thereafter, in January 2001. It is a matter of dispute between the parties as to what part Applicant's own actions may have played in the delay in the Anniversary APR process. The Tribunal concludes that any deficiency in this respect was overcome by the six-month extension of Applicant's appointment. *See Salle*, para. 46 (cause of six-month delay in completing performance appraisal immaterial as the applicant suffered no injury as a result, having received a six-month extension of the appointment; "[f]ar from losing time because of the belated [performance appraisal], the Applicant had more opportunity to improve his performance and to demonstrate his abilities.") The Tribunal concludes that there was no irregularity of procedure and no "career mismanagement" with respect to the non-conversion of *Ms. "T"*'s fixed-term appointment.

46. Applicant further maintains that the Fund's decision not to convert her fixed-term appointment was not substantiated and did not consider all of the evidence or weigh it fairly. This Tribunal has emphasized "[t]he importance of performance evaluation systems in avoidance of arbitrariness and discrimination . . ." *Ms. "C"*, para. 36, citing *Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992). *See also Salle*, para. 46 ("[t]he Respondent's duty to evaluate periodically the probationer's work is no doubt an important one, because it gives the staff member an opportunity

to assess from time to time his deficiencies and to improve his performance before a final decision is made on his confirmation").

47. Moreover, ". . . it is the obligation of the Respondent, when assessing the performance of staff members for a given period of review, to take into account all relevant and significant facts that existed for that period of review." *Romain (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 164 (1997), para. 19. That the Fund met this obligation in the case of Ms. "T" is evident from the record. As reviewed above,¹³ Applicant's Anniversary APR, covering the period October 7, 1999–October 7, 2000, was signed by and included comments from both Division Chiefs under whom Applicant had served during the first year of her two-year fixed-term appointment. Both Division Chiefs and the Administrative Officer participated with Ms. "T" in the Anniversary APR discussions of January 19, 2001. Likewise, the regular APR, covering the period October–December 2000, referred to Applicant's positive performance on mission and attached the Deputy Division Chief's favorable appraisal.

48. Accordingly, the Tribunal finds no merit to Applicant's contention that Respondent failed to take account of relevant evidence or did not weigh it fairly. *Compare Toivanen v. Asian Development Bank*, AsDBAT Decision No. 51 (2000), para. 50 (non-conversion decision invalid where it was ". . . based not on facts accurately gathered, but rather on unsubstantiated beliefs, and was induced by suppression and misrepresentation of material facts, as to the Applicant's past performance, her suitability for further employment, and her skills").

49. Finally, Applicant contends that the decision not to convert her fixed-term appointment was affected by discrimination on the basis of her race and nationality, a serious accusation implicating the N Rules and later adopted policies prohibiting discrimination in the Fund. *See generally Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81–84. The Tribunal observes that Applicant had voiced a perception of discrimination at the time of her disappointment with the evaluation of her performance in the Anniversary APR. The SPM accordingly looked into the matter and found no basis for the accusations, which Applicant apparently did not pursue. Ms. "T" was later said to have clarified that ". . . she had not accused anyone of discrimination but rather that the process followed for her APR led her to believe that she was being discriminated against." (Memorandum for Files of February 16, 2001.) Addition-

¹³See *supra* The Factual Background of the Case.

ally, following the non-conversion of her appointment, Applicant contended that the Deputy Chief of "Division iii," who earlier had rated her mission performance quite favorably, had directed remarks to her that she took as offensive on the basis of her nationality. Applicant's account of this incident was credibly refuted by the Deputy Division Chief in a Memorandum for Files of June 9, 2002 and in his Grievance Committee testimony. Whatever Applicant's perception of these events, the Tribunal concludes that she has not demonstrated discrimination.

50. Lastly, in her pleadings in the Administrative Tribunal, Ms. "T" asserts that members of her particular racial and nationality group were underrepresented in "Department 1" and that her departure from the Fund resulted in a "discriminatory impact" by decreasing the number of such persons in the Department. The Tribunal finds this alleged fact far from probative of discrimination,¹⁴ and concludes that Applicant has not shown that the decision not to convert her fixed-term appointment to a regular staff position was affected by discrimination on the basis of her race or nationality.

51. In sum, in light of its review of the extensive evidence of the issues of the case, the Tribunal concludes as follows. Applicant repeatedly was warned of the shortcomings in her performance and, accordingly, was not given by the Fund any "expectation" that she would be converted to regular staff. These warnings were consistent with the feedback required of supervisors by the Guidelines for Fixed-Term Appointments. Applicant's appointment was extended and she was transferred to a Division that was to provide a more favorable environment for her development. In addition, a mentor was assigned from the Staff Development Division of the Human Resources Department, although it is unclear to what extent Applicant availed herself of the assistance that the mentor offered. In connection with her extension and transfer, as well as on occasions before and after, Ms. "T" was advised of continued shortcomings in her performance.

52. While Applicant contended that her initial assignments in the Department failed to expose her to adequate opportunities for skill development and supervisory guidance, her transfers first to "Division ii" and later to "Division iii" (in conjunction with the 6-month extension of her appointment) made up for any possible deficiency in the opportunities afforded Applicant to prove her skills as a Staff Assistant. Likewise, the delay in preparation of the Anniversary APR does not rise to a compensable claim in view of the

¹⁴See Ms. "Z", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 74 (rejecting the view that statistics alone prove discrimination).

extended period Applicant was afforded in which to demonstrate fitness for regular employment. Finally, the management of Applicant's Department engaged in a collaborative process in completing her Annual Performance Reviews, taking into account the views of former supervisors when she transferred between Divisions of the Department.

53. The Tribunal concludes that while Applicant's performance was seen by supervisors as "mixed," in the end, following a 6-month extension of Ms. "T"'s appointment, her performance fell short of a "clearly positive" assessment, as required for conversion under the Fund's Guidelines and supported by international administrative jurisprudence. Accordingly, Applicant's progress remained insufficient and Ms. "T"'s potential for a Fund career unproven in the judgment of those properly charged with making the conversion decision. When managers take such a decision, as the evidence shows they have in this case, with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.

Decision

FOR THESE REASONS

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

The Application of Ms. "T" 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.
June 7, 2006

JUDGMENT NO. 2006-3

***Ms. "U", Applicant v. International
Monetary Fund, Respondent***
(June 7, 2006)

Introduction

1. On February 13, 14 and 15, 2006, 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. "U", a former staff member of the Fund. It gave final consideration to its Judgment and adopted it on June 7, 2006.

2. Applicant contests the decision of the Fund not to convert her fixed-term appointment to a regular staff position. Applicant contends that the decision failed to take account of all of the relevant evidence and therefore was arbitrary, capricious and an abuse of discretion. Additionally, Applicant maintains that the non-conversion decision was marked by procedural irregularities, that the Fund "mismanaged" her career, and that the decision not to convert her appointment represented discrimination on the basis of race and nationality.

3. Respondent, for its part, maintains that the decision not to convert Applicant's fixed-term appointment to a regular staff position was a reasonable exercise of managerial discretion, carried out consistently with the Fund's internal law and supported by the relevant evidence. In the Fund's view, Applicant, despite regular feedback and monitoring, failed to achieve the level of performance and potential for a Fund career required for conversion to regular staff. The Fund denies that the non-conversion decision was affected by either procedural irregularities or discrimination.

The Procedure

4. On May 26, 2004, Ms. "U" filed her Application with the Administrative Tribunal. In accordance with the Tribunal's Rules of Procedure, the

Application was transmitted to Respondent on June 1, 2004, and on June 4, 2004, pursuant to Rule XIV, para. 4¹ of the Rules of Procedure, the Registrar issued a summary of the Application within the Fund. On July 16, 2004, Respondent filed its Answer to Ms. "U"'s Application. Applicant submitted her Reply on August 18, 2004. The Fund's Rejoinder was filed on September 20, 2004. On January 25, 2006, Applicant submitted a statement of her legal costs, for which she had requested reimbursement in the Application. Pursuant to his authority under Rule XXI, para. 3,² the President directed that the statement be transmitted to the Fund for its observations, which were submitted on February 13, 2006.

5. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.³ The Tribunal had the benefit of a transcript of oral hearings before the Grievance Committee at which Applicant and other witnesses 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

6. In her Application, Ms. "U" made the following requests for production of documents:

1. Any and all documents relating to performance standards for Fund Staff Assistants from 1999 until the date of Applicant's separation;
2. Any and all documents evidencing any actions by Respondent to share with Applicant any of the documents produced in response to point 1 above;

¹Rule XIV provides in part:

"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."

²Rule XXI, para. 3 provides:

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

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."

3. Any and all documents relating to managerial responsibilities for the professional development of subordinates including but not limited to training materials for managers or supervisors, guidelines and manuals, the Fund's "Performance Management Handbook"; and documents relating to the monitoring of fixed-term appointed staff;
4. Any and all documents relating to or evidencing any action Respondent may have taken as it relates to developing Applicant's skills for a career with the Fund;
5. Any and all documents relating to the diversity (e.g., race, nationality, gender) of ["Department 1"]⁴ from 1999 until the date of Applicant's separation; and
6. Any and all communications regarding Applicant among ["Department 1"] personnel including but not limited to specified persons.

In accordance with Rule XVII⁵ of the Tribunal's Rules of Procedure, Respondent was provided the opportunity to present its observations on the matter, 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, the Administrative Tribunal, meeting in session,

⁴In accordance with the Administrative Tribunal's policy on protection of privacy, adopted in 1997, the departments and divisions of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal's Judgment.

⁵Rule XVII provides:

"Production of Documents

1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.
2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.
3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment.
4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

decided on December 7, 2005 to deny each of these requests on the following grounds.

7. As to Requests 1, 2, 4, 5 and 6, the Fund responded that all responsive documents were provided to Applicant during the Grievance proceedings. Applicant proffered no evidence to suggest that the Fund had in its possession additional responsive documents. Accordingly, these requests were denied on the basis that Applicant had not shown that she had been denied access to documents by the Fund. (Rule XVII, para. 1.) *See Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 14.

8. As to Request 3, for "[a]ny and all documents relating to managerial responsibilities for the professional development of subordinates . . .," Respondent partially satisfied the Request while objecting to the Request insofar as it sought guidance materials for managers relating specifically to performance issues of regular staff members. The Fund contended that such documents are not relevant to assessing the legality of a decision concerning the conversion of a fixed-term staff member. The Tribunal sustains the Fund's objection that such documents are not relevant to the issues of the case of Ms. "U".

The Factual Background of the Case

9. The relevant factual background may be summarized as follows. Additional factual elements will be included in the consideration of the issues of the case.

10. Applicant was first employed by the Fund beginning in February 1998 as a contractual employee⁶ to serve as a Staff Assistant in the Secretarial Support Group (SSG). Following two years in that capacity, Applicant was appointed as a fixed-term staff member in February 2000, in accordance with GAO No. 3, Rev. 6 (May 1, 1989) (Employment of Staff Members), which governed during the period of her employment.⁷

⁶Contractual employees are distinguished, under the Fund's internal law, from staff members. *See generally Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999).

⁷GAO No. 3, Rev. 6 provided for two types of staff appointments, regular and fixed-term:

"Section 3. *Types of Appointments*

3.01 *Regular Appointments*. Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members.

11. Applicant's letter of fixed-term appointment explained that the appointment was for a two-year period commencing on February 15, 2000 and would be probationary for the first six months. The letter advised Ms. "U" that, as a staff member on fixed-term appointment, she would be subject to the Guidelines for Fixed-Term Appointments (1995), which were enclosed with the correspondence.

12. Applicant was appointed to serve as a Staff Assistant in "Department 1," and, for the first nine months of her fixed-term, Ms. "U" worked as a "floater" within the Department. At the conclusion of the six-month probationary period, the Administrative Officer (AO) reported to the Human Resources Department (HRD) that Ms. "U" had successfully completed her probationary period with satisfactory performance: "She is conscientious in her approach to her work and has already acquired a good basic knowledge of Fund practices and procedures. Ms. ["U"] has the potential to become

3.02 *Fixed-term Appointments*. Fixed-term appointments shall be appointments for a specified period of time. Persons holding fixed-term appointments shall be designated as fixed-term staff members."

GAO No. 3, Rev. 6 was superseded by GAO No. 3, Rev. 7 (May 1, 2003), which provides for fixed-term appointments as follows:

"3.02 *Types of Staff Appointments*

3.02.1 *Open-ended appointments*

...

3.02.1.2 Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment. Persons holding fixed-term appointments shall be designated as fixed-term staff members.

3.02.1.3 If fixed-term staff members meet the performance requirements, demonstrate potential for a career at the Fund, and meet the Fund's staffing requirement, their appointment may be converted from fixed-term to open-ended status at the expiration of the fixed-term appointment. Persons holding open-ended appointments shall be designated as regular staff members.

3.02.1.4 Staff recruited to fill senior level positions (Grades B3–B5) shall receive three- to five-year fixed-term staff appointments. After completion of the initial fixed-term appointment, these appointments may be renewed without limit for fixed-term periods up to five years up to mandatory retirement age, or converted to open-ended appointments.

3.02.1.5 Staff who rejoin the Fund may, at the discretion of the Fund, be offered an open-ended appointment without first having to complete successfully a fixed-term appointment, provided that they were regular staff at the time they separated from the Fund. This provision shall not apply to former staff members who are appointed to B3–B5 positions.

3.02.2 *Limited-term appointments*

..."

The present Application is governed by GAO No. 3, Rev. 6 and the Guidelines for Fixed-Term Appointments (August 1995), *see infra*.

a good staff assistant." In a Memorandum to Files of the same date, the Administrative Officer reported that she had met with Ms. "U" to discuss her performance over the first six months, noting areas for improvement:

"We discussed areas for improvement and development during the next six months, among them: not to fear asking questions to ensure she has understood instructions correctly; to seek advice in prioritizing work at peak times; to check written work for accuracy, and to ask the senior assistant also to check such work before giving it to the supervisor."

13. After approximately nine months serving as a departmental floater, on November 1, 2000, Applicant became assigned to "Division i" of "Department 1." Applicant's Annual Performance Report (APR) for calendar year 2000, signed by the Chief of "Division i," rated her performance "2" on a rating scale of 1-4. The 2000 APR took note of and attached the mid-year performance memorandum by the Administrative Officer who earlier had supervised Ms. "U"; the Division Chief "endorse[d] this assessment on the basis of her performance in the division." Moreover, he noted: "Overall, her performance was good with some areas for improvement . . . she has the potential to become a strong staff assistant particularly if she continues to make efforts to ensure the meticulousness and accuracy of her contributions." Applicant's Performance Plan, as recorded in the APR, was to "[c]ontinue to gain greater familiarity with Fund procedures and data management" by continuing in her assignment in "Division i" and to "[c]ontinue to improve the meticulousness of the contributions" by taking an editing skills course and other courses in the preparation of Fund documents. The Reviewing Officer noted: "I encourage Ms. ["U"] to implement diligently her performance plan, so as to strengthen her performance."

14. On August 2, 2001, Applicant addressed a memorandum to the Office Manager (OM) of "Division i" regarding "My Responsibilities in [Division i]," which noted in part:

"Since the arrival of the new Administrative Assistant the workload is not as heavy anymore, so I did not get much practice in working on documents[.] I hardly get hand written memos or letters to work on. As a result, I found it difficult to get exposed to the division chief's handwriting. On my mid-year APR discussion (July 23, 2001), I also mentioned to [the Division Chief] about it and he told me that he would ask the Admin. Asst. to share the hand written work with me. However, I would like to state that I handled almost all the administrative work in the division."

15. Eighteen months following the commencement of Applicant's fixed-term appointment, in keeping with the checkpoints set out in the Guidelines

for Fixed-Term Appointments,⁸ the Senior Personnel Manager (SPM) of Applicant's Department prepared the Expiration of Fixed-Term Appointment form, reflecting his decision to extend the appointment for 6 months beyond its February 14, 2002 scheduled expiration date rather than either to convert Applicant's appointment to regular staff or to let the appointment expire at the conclusion of the two-year term. (The form is dated August 15, 2001 and signed by the SPM on September 10, 2001.)

16. The Expiration of Fixed-Term Appointment form of August 15, 2001 recorded the assessment of Applicant's performance and the rationale for the 6-month extension as follows:

"Overall performance and particular strengths/weaknesses:

Ms. ["U"] has the potential to become a good staff assistant. She is reliable, cooperative and has a flexible attitude. A particular weakness is a continuing lack of accuracy in her typewritten work from heavily edited drafts—a core competency for staff assistants. Two other areas for improvement and development are to take the initiative in asking questions to ensure she has understood instructions correctly and to seek advice in prioritizing work at busy times.

In the case of an extension, please explain reasons and, when applicable, what aspects of performance will be monitored and how the staff member will be assisted in meeting the requirements.

Ms. ["U"] is being transferred to another division where she will be one of two assistants, instead of one of three. In this situation she will have daily opportunities to hone her editing and proofing skills. She is applying for Editing Skills I course, and studying at the SDC. The OM will monitor improvement in her accuracy and other areas monthly with the Division Chief/Admin. Assistant."

17. Accordingly, on September 10, 2001, Ms. "U" was transferred to "Division ii" and placed under the close supervision of the Senior Administrative Assistant to hone her skills. In two Notes to Files of November 2001, the Office Manager of "Division ii" reported that both the Senior Administrative Assistant and an economist had observed that Applicant was making progress.

18. In February 2002, as Applicant's 2001 Annual Performance Report was being prepared and the 6-month point in advance of the revised (August 14, 2002) termination date of Applicant's fixed-term approached, the decision

⁸See *infra* Consideration of the Issues of the Case; Conversion of Fixed-Term Appointments.

was made to seek an additional 6-month extension of Ms. "U"'s appointment. In his memorandum of March 13, 2002 to HRD, the SPM of Applicant's Department explained:

"Although she has not been learning the skills quickly enough to justify a conversion now, Ms. ["U"] is keen and anxious to improve her skills. Consequently, ["Department 1"] in coordination with SDD [the Staff Development Division, HRD] designed a development plan, because both the Department and SDD considers she has potential. Implementation of the development plan, the assistance she received from her colleagues in the Division together with her efforts, has resulted in considerable improvement of Ms. ["U"]'s skills and performance. Also, very recently, because of a departmental reorganization, she is now in Division ["iii"]⁹ where she can continue to be closely supervised and coached. However, six months is not an adequate period to evaluate and judge her improvement."

19. The request for extension of Applicant's fixed-term through February 14, 2003 was approved and efforts continued to monitor her performance.

20. In her Annual Performance Report for calendar year 2001, Applicant was rated "3", and the Overall Assessment stated:

"In working closely with the administrative assistant in the division, she is becoming more familiar with the Fund's working practices and software. . . . Ms. ["U"] has not yet performed strongly enough to justify conversion to regular staff at this time and will need to show significant improvement at the end of the extension period."

The Division Chief additionally noted that, in view of the extension of her appointment into February 2003, another formal evaluation of Ms. "U"'s performance would be made in September 2002. As Development Objectives, Applicant was to "[g]ain speed and accuracy in incorporating comments on drafts[,] [p]ay particular attention to proofreading [and] [g]ain increased familiarity with the preparation of Fund documents," by continuing to work closely with the Senior Administrative Assistant and completing specified training courses. In Applicant's comments on the APR, she noted that, while disappointed by the rating, she ". . . appreciate[d] the willingness of [her] manager to provide regular feedback."

21. On June 18, 2002, a Human Resources Officer (HRO) from the Staff Development Division (SDD) of HRD held an additional performance discussion with Applicant "(i) to discuss her work performance as described in

⁹ As a result of a departmental reorganization, Applicant, along with the Senior Administrative Assistant and Division Chief, had been reassigned from "Division ii" to "Division iii."

the APR and the corresponding performance action plan, and most importantly, (ii) to ascertain her understanding of her weaknesses and the steps identified for her to improve." In a Memorandum for Files of July 3, 2002, the HRO concluded:

"A brief report by [the mission chief] on Ms. ["U"]'s current performance indicated her strong effort in improving her performance with visible results. Ms. ["U"] has been able to cope with a heavy workload and has successfully completed her tasks on time. The monitoring of her performance by her supervisors will continue.

I assured Ms. ["U"] of my availability to provide any appropriate form of assistance in order for her to further improve her performance. I also informed her of the possibility that her current status as a fixed-term staff will not be converted to regular if her performance continues to suffer."

22. On June 11, 2002, the Assistant to the Senior Personnel Manager (ASPM) reiterated the performance concerns of the Department and plans for assistance in an email communication to Applicant:

"I consider that there are two major issues that you need to focus in order to develop your performance.

1. Improve the speed of your work together with accuracy, and
2. Improve your communication with your supervisors and colleagues and feel comfortable and willing to ask any questions if unsure of your assignment.

As you know we have worked out a training program together with you and the SDD training expert. You should complete attending the courses by the end of July and I would like to hear your comments about the courses and how effective will they be in your performance development.

Since it has been one month from the date which the results of APR were communicated to you, would you please let me know your evaluation of your performance in the last month. i.e. improvements, areas that you need to work on. What were your assignments and how would you assess your accomplishment? And the last is how we could assist you further."

23. Meanwhile, on the advice of HRD, the Senior Administrative Assistant maintained a daily log from June 3–July 12, 2002, describing in detail the specific efforts at coaching that she engaged in with Ms. "U". In a cover memorandum of July 12, 2002 addressed to the ASPM and copied to the Division Chief and OM, the Senior Administrative Assistant observed: "In my view, she is making progress. Her work requires less intervention, and she now seems to have a clearer understanding of what is expected of her and how to handle her various tasks."

24. A month later, the ASPM recorded meetings of August 12, 2002 with the Division Chief, the Senior Administrative Assistant, and Ms. "U" to assess Applicant's performance during July 2002. On August 27, 2002, the Division Chief completed a Quarterly Performance Review, noting that Applicant's "communications skills have improved considerably," but, nonetheless, the following concerns remained:

"While she is becoming more aware of the Fund's office practice and document preparation procedures, the speed with which she completes her assignments often falls short of the Fund's standards. Ms. ["U"] must also pay greater attention to details and accuracy in performing even relatively small tasks, such as photocopying and preparing leave slips. In addition, Ms. ["U"] does not, on a sufficiently regular basis, fully incorporate comments received from economists into revised texts and proofread documents before they are sent from the division."

25. In late August, the SPM convened a meeting of the Division Chief, the alternate SPM, the ASPM, the OM, and mission chief. The preceding day, the ASPM had circulated to the participants Applicant's APRs and other documentation relating to her performance. According to the SPM's Grievance Committee testimony:

"That meeting was quite lengthy and I spent a good bit of time questioning people on that judgment and asking in more detail questions about whether the performance improvement really did or did not meet the qualifications, what were the real shortcomings, what were the prospects that this could be overcome, looking at the history of the performance from the beginning—"

The SPM further testified that there was unanimity on the question of non-conversion. The ASPM, for her part, recalled that the decision was a "collective" one:

"So the division chief just took the case at the table and he said she's barely adequate, her performance, and given the training that she has received and all the attention that she has received, she was not very attentive to the details and he recommended, but left it to the management, so it was a collective decision."

26. On September 6, 2002, the SPM notified Applicant of the decision not to convert her appointment. On the Expiration of Fixed-Term Appointment form of the same date, the SPM recorded:

"Overall performance and particular strengths/weaknesses:

While Ms. ["U"]'s performance has shown improvement in the last 6 months, it continues to be just below the level expected of a staff assistant

at Grade A5. In spite of her positive attitude and willingness to develop and improve, training received and close supervision according to her performance plan, the quality and timeliness of her work falls short of standards. She is not being attentive to details, the work continues to have many inaccuracies, has not become adequately familiar with Fund style with respect to correspondence and drafts, still needs close supervision, and cannot substitute adequately for higher level assistants.

Potential for the longer term:

Given the weaknesses referred to above, we do not believe that Ms. ["U"] has long term career prospects in the Fund. Despite all the efforts of both parties, the improvement of her performance has not been sufficient to meet the Fund standards for an A5 staff assistant, and even if she eventually may be able to perform at that level, we judge that she would not be able to advance beyond that level."

The Channels of Administrative Review

27. Following the September 6, 2002 decision not to convert her fixed-term appointment, Applicant sought administrative review pursuant to GAO No. 31. Applicant's Grievance was filed on February 4, 2003. The Grievance Committee considered Ms. "U"'s complaint in the usual manner, on the basis of oral hearings and the briefs of the parties. On February 9, 2004, the Committee issued its Recommendation and Report, recommending denial of Applicant's Grievance on the ground that Applicant had not shown that the non-conversion decision was arbitrary, capricious, discriminatory or procedurally defective in a manner that substantially affected the outcome. The Committee's recommendation was accepted by Fund management on March 2, 2004.

28. On May 26, 2004, Applicant filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment failed to consider all of the evidence and therefore was arbitrary and capricious.
2. The non-conversion decision was affected by procedural irregularities.

3. The Fund "mismanaged" Applicant's career.
4. The non-conversion decision was discriminatory on the basis of Applicant's race and nationality.
5. Applicant seeks as relief:
 - a. reinstatement with a fair opportunity to demonstrate suitability for conversion to regular staff;
 - b. compensatory and moral damages in the amount of three years net salary; and
 - c. legal costs.

Respondent's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment to regular staff was taken in the reasonable exercise of managerial discretion and consistently with the applicable Guidelines for Fixed-Term Appointments.
2. The non-conversion decision was based on a proper assessment of Applicant's performance and potential for continued employment with the Fund, and did not fail to take account of any material facts.
3. Applicant was given regular feedback and monitoring, as well as ample opportunities to improve her performance, but nonetheless did not attain the level required for conversion to regular staff.
4. Applicant has not shown that the non-conversion decision was affected by procedural irregularities or that the Fund "mismanaged" her career.
5. Applicant has not shown that the non-conversion decision was affected by discrimination on the basis of race or nationality.

Consideration of the Issues of the Case

Conversion of Fixed-Term Appointments

31. The case of Ms. "U", and another decided this day of Ms. "T", are the second and third in which the Administrative Tribunal has considered a challenge brought by a former staff member to the non-conversion of a

fixed-term appointment. In an earlier Judgment, *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), the Tribunal sustained the non-conversion decision while at the same time concluding that irregularities in the non-conversion process gave rise to a compensable claim.¹⁰

32. It has been, and remains, the Fund's policy to hire virtually all new staff on a fixed-term basis preliminary to their attaining an appointment of indefinite duration,¹¹ and therefore the significance of the conversion process and the requirement that it be carried out consistently with legal norms cannot be overstated. For appointments commencing prior to December 2002, the Fund's Guidelines for Fixed-Term Appointments (August 1995) govern.¹² These Guidelines, with which Ms. "U" was provided at the time

¹⁰Ms. "C" contended that the non-conversion of her appointment was improperly motivated by retaliation for allegations she had made of sexual harassment. The Tribunal found no merit to the claim that the non-conversion decision was so motivated. Moreover, the Tribunal sustained as a reasonable exercise of the Fund's managerial discretion the decision not to convert the appointment, noting that the evidence showed a pattern of deficiencies in interpersonal skills, which reservations had been conveyed to Ms. "C" in her first performance reviews. *Ms. "C"*, paras. 38, 41.

At the same time, the Tribunal held in *Ms. "C"* that procedural irregularities did affect the non-conversion decision and that these permitted the applicant to prevail, not wholly, but in part:

"Two irregularities stand out. First, when Ms. "C" was accorded an extension of a year and transferred to ADM, she should have been given to understand (a) precisely why she was not converted to permanent status at the end of two years and (b) what steps should be taken by her to correct her perceived problems in interpersonal relations. Neither appears to have been done. Second, at the dispositive session of 29 March 1995, where Mr. "B"'s earlier highly positive appraisal was peremptorily overturned, Ms. "C" was confronted not by her critics nor by specific and rebuttable incidents of their criticism. That in particular was a lapse in due process."

Ms. "C", para. 41. For the procedural irregularities that affected the non-conversion decision, the Tribunal awarded Ms. "C" compensation in the sum equivalent to six months of salary. *Ms. "C"*, Decision, para. Second.

¹¹See Guidelines for Fixed-Term Appointments (1995) ("It is the Fund's *current policy to maintain a large proportion of its staff on an indefinite basis*, through 'regular' staff appointments. Initially, however, virtually all new staff are hired on a fixed-term basis for two or three years (a period of five years can be considered in exceptional circumstances regarding senior staff)" (emphasis in original) and GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.2 ("Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment.")

¹²A revised fixed-term monitoring process became effective on December 2, 2002 (and was further updated as of January 1, 2005), applicable to fixed-term staff members appointed on or after that date, providing more specific monitoring requirements. The criteria for conversion, however, remain unchanged, i.e. that the staff member meets the performance requirements established for the position, that the staff member demonstrates potential for a career in the

of her appointment, are intended by their terms "... to ensure that staff on fixed-term appointments gain an accurate understanding of the meaning of their fixed-term status and a realistic view of their prospects of being converted to a 'regular' (indefinite) appointment upon expiration of their fixed term." (Guidelines, p. 1.) The Guidelines inform appointees that "[t]he Fund's legal obligation does *not* go beyond the initial term . . ." (emphasis in original) and set out three criteria for conversion, i.e. (a) performance during the fixed-term, (b) potential for a career with the Fund, and (c) the staffing needs of the organization:

"... the conversion decision depends in large part on the departmental assessment of the staff member's performance during the fixed-term appointment and the related judgment about the individual's potential for a successful career with the Fund. There must be a clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual. However, the short- and long-term staffing needs of the Fund are of paramount importance in this process."

(*Id.*)

33. With respect to the monitoring and decision-making process, the Guidelines impose obligations on both the fixed-term appointee and supervisors:

"The mutual objective during the fixed-term appointment is to enable the staff member to perform at full capacity as quickly as possible, not just to maximize the contribution to the Fund's work but also to provide an opportunity for the staff member to demonstrate potential for the future. Both the staff member and the supervisor(s) concerned have obligations in this respect.

The supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s). The staff in the Recruitment Division also stand ready to assist upon request, should the staff member or the supervisor find this necessary."

(Guidelines, pp. 1-2.)

34. Under the Guidelines, checkpoints for performance assessment are provided at six, twelve and eighteen months after appointment. In the case

Fund, and that the conversion decision is consistent with the Fund's staffing needs. These same criteria are given effect in GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.3, *see supra* note 7. It is the 1995 Guidelines that govern the instant case.

of Grade A1–A8 staff, the first six months normally constitute a formal probationary period. At the time of the 12-month assessment, the “. . . prospects for conversion should be discussed . . . , and this discussion should be reflected in the write-up, but no commitment can be made at this early stage. The complete assessment is reviewed by the Recruitment Division, and issues are raised with the staff member and the department as appropriate.” (Guidelines, p. 2.)

35. The formal decision as to conversion is to be taken eighteen months following the date of appointment. The Guidelines provide that, on an exceptional basis, a fixed-term appointment may be extended, as it was twice in the case of Ms. “U”, to allow for an additional period of testing:

“As an exception, if a department finds that it has inadequate information upon which to base a final decision about a fixed-term appointee’s conversion to regular staff, the department may request a one-time extension of the appointment for up to one year. A staff member receiving such an extension should not take the extended affiliation with the Fund as any kind of indication, in itself, regarding the prospects for eventual conversion.”

(*Id.*)

Did Respondent abuse its discretion in deciding not to convert Applicant’s fixed-term appointment to a regular staff appointment?

36. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary on the Statute which provides:

“. . . 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.) As this Tribunal observed in summarizing its jurisprudence with respect to standards of review, the decision whether to convert a fixed-term appointee is essentially a “performance-based decision.” *Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 108. “Noting evidence in the record of performance deficiencies, the Tribunal [in *Ms. “C”*]

deferred to management's assessment . . ." that the applicant had not met the standard of performance required for conversion of her appointment to regular staff. Ms. "J", para. 108. The Tribunal further cited the following excerpt from the Commentary on the Statute:

"This principle [of deference to managerial discretion] is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.[footnote omitted]' (Report of the Executive Board, p. 19.)"

Ms. "J", note 27. See also Mr. "F", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 70 (citing the same provision while finding "persuasive" the Fund's position that Mr. "F" was not qualified for the position that had been redesigned following the abolition of his post). In the context of conversion of fixed-term appointments, the World Bank Administrative Tribunal (WBAT) has observed: ". . . the Tribunal will not substitute its own judgment for that of the Respondent on the staff member's suitability for permanent employment." *Salle v. International Bank for Reconstruction and Development*, WBAT Decision No. 10 (1982), para. 30.

37. Moreover, the discretion at issue in the conversion of fixed-term appointments is necessarily distinct from that exercised by management in the separation of a staff member for unsatisfactory performance. Accordingly, ". . . the concept of unsatisfactory performance as used in respect of probation is wider than the same concept used with respect to a confirmed staff member." *McNeill v. International Bank for Reconstruction and Development*, WBAT Decision No. 157 (1977), para. 34. The Fund's Guidelines emphasize that "[t]here must be a clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual."¹³ A fixed-term appointee has no entitlement to the continuation of his employment beyond the term of the appointment, and the burden of proof rests squarely with the applicant in challenging a decision not to convert his fixed-term appointment to regular staff. Ms. "C", para. 21.

¹³By contrast, a staff member who already has attained an appointment of indefinite duration is presumed to continue in the Fund's employment in the absence of a showing of unsatisfactory performance, consistent with the requirements of GAO No. 16. The Fund observes in its pleadings in this case that in cases of dismissal for unsatisfactory performance the burden rests with the Fund.

38. While it is within the purview of the Fund's discretionary authority to decide upon a staff member's suitability for conversion to an appointment of indefinite duration, that discretion is necessarily constrained by principles of fairness, in particular adequate opportunity to demonstrate satisfactory performance and suitability for career employment. *See McNeill*, para. 44 ("While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met.") Such opportunity should indicate that the decision "... has not been based on a performance which has manifestly not benefitted from adequate supervision and guidance" (*Salle*, para. 32), that the appointee has been evaluated periodically, and that he has been given adequate warning of performance deficiencies and a reasonable opportunity to remedy them. These principles are recognized in both the Fund's Guidelines and the jurisprudence of international administrative tribunals.

39. Accordingly, the following questions arise. Was the non-conversion of Ms. "U"'s appointment taken consistently with the Fund's internal law and general principles of international administrative law governing conversion of fixed-term appointments? Did Applicant's supervisors provide Ms. "U" with appropriate monitoring and feedback? Was the non-conversion of Ms. "U"'s fixed-term appointment affected by procedural irregularities that give rise to a compensable claim?

40. The record indicates that Ms. "U"'s performance as perceived by her supervisors over time was mixed. At various points, effort and improvement were noted, while the overall level of Applicant's performance was assessed as below the norm required for conversion. Fluctuation in the assessment of a fixed-term appointee's performance, such as was recorded in the case of Ms. "U", does not, of itself, serve as an indication of any irregularity of process:¹⁴

"It is also of the essence of probation that the evaluation of the probationer's suitability for Bank employment may be subject to changes during his

¹⁴Such fluctuations in perceptions of Applicant's performance are to be contrasted with the facts of Ms. "C", in which the Tribunal concluded irregularities marked the process of conversion in part because aspects of the appraisal of Ms. "C"'s performance as assessed in her APR were "... sharply reversed by her supervisor and the reviewing officer a month later." (Para. 40.) *Compare Ms. "C" with McNeill*, para. 47 ("The record also shows that the Applicant was advised very early of the deficiencies in his communication skills. . . . The Tribunal cannot accept, therefore, the Applicant's view that the warnings given to him by Ms. X on the occasion of his interim evaluation came, so to speak, out of the blue and that his attention had previously never been drawn to any shortcoming or deficiency.")

period of probation. Favourable appraisals at one stage of this period do not dictate confirmation of employment, any more than unfavourable ones necessarily lead to termination of employment."

Salle, para. 28.

41. What is significant is that in the case of Ms. "U" cautionary evaluations repeatedly were communicated. At the same time, Ms. "U"'s supervisors reasonably offered encouragement at signs of improvement, most particularly by extending for two 6-month intervals the opportunity for Applicant to demonstrate her suitability for a career with the Fund. It is noted that the second 6-month extension of Applicant's fixed-term was effected on the ground that "[a]lthough she has not been learning the skills quickly enough to justify a conversion now, Ms. ["U"] is keen and anxious to improve her skills." (SPM's Memorandum to HRD of March 13, 2002.)

42. The periodic appraisals, both formal and informal, of Applicant's performance nonetheless demonstrated—or should have demonstrated—to Ms. "U" that the Fund retained doubts about the prospects of her conversion to an appointment of indefinite duration. *See, e.g.*, 2001 Annual Performance Report (Ms. "U" ". . . will need to show significant improvement at the end of the extension period" to justify conversion). That Applicant's fixed-term appointment was extended for a further period of development and testing should have signaled continued lack of demonstrated fitness for conversion of her appointment:

"Neither does the fact that the probationary period is extended give any decisive indication as to the likelihood of ultimate confirmation. Although continuation beyond the normal probationary period demonstrates that the staff member's performance is not so substandard as to justify immediate termination, it ought properly to alert him to the fact that up to that date his performance has not warranted the immediate grant of a permanent appointment and that a satisfactory level of performance must be achieved before confirmation becomes appropriate."

Salle, para. 28. *See also* Fund's Guidelines, p. 2, quoted *supra* para. 35.

43. Moreover, at intervals throughout Ms. "U"'s employment, she was provided with clear indications of the areas of required improvement, as well as assistance in meeting these goals, most particularly through transfer to a Division in which she would have both additional opportunities to apply and develop her skills and the close supervision of an experienced senior assistant. The conduct of Applicant's managers in this regard may be compared with the facts reviewed in *Ms. "C"*, in which the Tribunal found that among the failures giving rise to a compensable claim was that

“. . . the Fund should have taken steps to ensure that, when transferred to ADM, and in the course of her work there, Ms. “C” was fully aware of her need to improve her interpersonal skills and the possibilities of so doing.” Ms. “C”, para. 42. By contrast, Ms. “U” was advised on a series of occasions of shortcomings in the speed and accuracy of her work and aspects of her communication skills. The documentation of her first 6-month extension and transfer to “Division ii” noted:

“A particular weakness is a continuing lack of accuracy in her typewritten work from heavily edited drafts—a core competency for staff assistants. Two other areas for improvement and development are to take the initiative in asking questions to ensure she has understood instructions correctly and to seek advice in prioritizing work at busy times.”

(Expiration of Fixed-Term Appointment Form of August 15, 2001.)

44. As set out in the Fund’s Guidelines, “[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback.” Among the indicia of adequate supervision is that the fixed-term appointee is “. . . exposed to the types of tasks which would have been required of him as a permanent employee and that he had been given the opportunity to benefit from [his supervisors’] guidance and comments.” *Salle*, para. 33.

45. It is recalled that Ms. “U”, while assigned to “Division i,” alerted the Office Manager that she did not believe that she was being provided in that assignment with adequate opportunities to develop her skills as a Fund staff assistant.¹⁵ The record indicates that it was in recognition of the importance of providing Applicant a fuller opportunity to gain exposure to the skills that would be required for a career with the Fund, that Ms. “U”’s fixed-term appointment was extended and she was transferred to “Division ii,” in which she was to have “daily opportunities to hone her editing and proofing skills.” (Expiration of Fixed-Term Appointment Form of August 15, 2001.) As the WBAT has recognized, “. . . supervision and guidance do not necessarily take the form of recorded conversations or otherwise specific acts or activities; they may consist as well in day to day work and contacts with supervisors and colleagues and in the exposure to the kind of tasks

¹⁵As set out in the Fund’s Guidelines, “[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s).” The action of Ms. “U” and her supervisors in this regard was consistent with that contemplated by the Guidelines.

which the staff member would have to accomplish if his appointment were to be confirmed." *Salle*, para. 36.

46. Applicant contends that the Fund already had made up its mind not to convert Applicant's appointment and did not consider all of the evidence, and that even if all of the evidence was considered management failed to weigh it appropriately and ultimately drew an unsubstantiated conclusion. For the following reasons, the Tribunal cannot sustain Applicant's contention.

47. This Tribunal has emphasized "[t]he importance of performance evaluation systems in avoidance of arbitrariness and discrimination . . .," Ms. "C", para. 36, citing *Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992). See also *Salle*, para. 46 ("[t]he Respondent's duty to evaluate periodically the probationer's work is no doubt an important one, because it gives the staff member an opportunity to assess from time to time his deficiencies and to improve his performance before a final decision is made on his confirmation").

48. Moreover, ". . . it is the obligation of the Respondent, when assessing the performance of staff members for a given period of review, to take into account all relevant and significant facts that existed for that period of review." *Romain (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 164 (1997), para. 19. That the Fund met this obligation in the case of Ms. "U" is evident from the record. As reviewed above,¹⁶ the Chief of "Division i" in completing the 2000 APR expressly took note of and attached to the APR the mid-year performance memorandum prepared by the Administrative Officer who supervised Ms "U" during the period in which she had served as a Departmental "floater." Similarly, the "Division ii" Chief testified to a collaborative process in preparing Applicant's 2001 APR, by which he solicited input from the earlier Division Chief under whom Applicant had served during a portion of the relevant appraisal period. Finally, the Chief of "Division ii" testified to his direct observations of Ms. "U"'s performance:

"There were some improvements in communications, improvements in talking with economists, in reaching out. In terms of the problem with accuracy and paying attention to details and so on, quite frankly, I was quite disappointed. In both my direct experience in getting those memos up to management and again, also the production of the . . . staff report

¹⁶See *supra* The Factual Background of the Case.

last year, there was just an inordinate amount of mistakes that ended up in the final document. That was disconcerting.”

49. Accordingly, the Tribunal finds no merit to Applicant’s contention that Respondent failed to take account of relevant evidence or that the SPM could not reasonably have reached the decision not to convert Ms. “U”’s appointment. The Tribunal concludes that there was no irregularity of procedure and no “career mismanagement” with respect to the non-conversion of Ms. “U”’s fixed-term appointment. *Compare Toivanen v. Asian Development Bank*, AsDBAT Decision No. 51 (2000), para. 50 (non-conversion decision invalid where it was “. . . based not on facts accurately gathered, but rather on unsubstantiated beliefs, and was induced by suppression and misrepresentation of material facts, as to the Applicant’s past performance, her suitability for further employment, and her skills”).

50. Finally, Applicant contends that the decision not to convert her fixed-term appointment was affected by discrimination on the basis of her race and nationality, a serious accusation implicating the N Rules and later adopted policies prohibiting discrimination in the Fund. *See generally Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81–84. Ms. “U”, however, advances no specific allegations in support of this claim, still less proof of discrimination, asserting that her departure from the Fund resulted in a “discriminatory impact” by decreasing the number of persons in her Department of her racial background. The Tribunal finds this alleged fact far from probative of discrimination,¹⁷ and concludes that Applicant has not shown that the decision not to convert her fixed-term appointment to a regular staff position was affected by discrimination on the basis of her race or nationality.

51. In sum, in light of its review of the extensive evidence of the issues of the case, the Tribunal concludes as follows. Applicant repeatedly was warned of the shortcomings in her performance. These warnings were consistent with the feedback required of supervisors by the Guidelines for Fixed-Term Appointments. Applicant was assigned to an experienced Senior Administrative Assistant who, as one of her principal responsibilities, engaged in detailed monitoring and coaching of Applicant’s performance. In addition, the management of Applicant’s Department sought and received the guidance of the Staff Development Division of the Human Resources Department, which provided additional assistance in seeking to

¹⁷See Ms. “Z”, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 74 (rejecting the view that statistics alone prove discrimination).

advance Ms. "U"'s skills so that she might attain a degree of performance and promise for future Fund assignments that would justify her conversion to regular staff. In connection with her extension and transfer, and on a number of occasions before and after, Ms. "U" was advised of continued shortcomings in her performance, perhaps most critically in respect of the accuracy of her typewritten work, which was cited by her supervisors as a core competency for staff assistants.

52. While Applicant contended that her initial assignments in the Department failed to expose her to adequate opportunities for skill development, her transfer to "Division ii" and assignment with the Senior Administrative Assistant made up for any possible deficiency in the opportunities afforded Applicant to prove her skills as a Staff Assistant. Finally, the management of Applicant's Department engaged in a collaborative process in completing her Annual Performance Reviews, taking into account the views of former supervisors when she transferred between Divisions of the Department.

53. The Tribunal concludes that while, at various points, Applicant was seen by supervisors as making progress, in the end (following two extension periods) this progress remained, in their view, insufficient and Ms. "U"'s potential for a Fund career unproven in the judgment of those properly charged with making the conversion decision. When managers take such a decision, as the evidence shows they have in this case, with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.

Decision

FOR THESE REASONS

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

The Application of Ms. "U" 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.
June 7, 2006

JUDGMENT NO. 2006-4

*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*
(Dismissal of the Applications as Moot)
(June 7, 2006)

Introduction

1. On June 7, 2006, 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 a Motion for Dismissal of the Applications as Moot 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 compensation of the staff of the Fund.

3. On December 6, 2005, the Administrative Tribunal denied a Motion by the Fund for Summary Dismissal of the Applications, in *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005), concluding that the Applications were not “clearly inadmissible” under Rule XII¹ and rejecting the Fund’s contention that Applicants had failed to meet the threshold 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. With the denial of the Motion for Summary Dismissal, the pleadings resumed on the merits.

4. On April 14, 2006, the IMF Executive Board took another decision in respect of the compensation of the staff of the Fund that differs from the decision of January 24, 2005. On April 17, 2006, Respondent filed the pending Motion for Dismissal of the Applications as Moot.

5. Upon the filing of the Motion for the Dismissal of the Applications as Moot, the pleadings on the merits were suspended. Accordingly, at this stage, the case before the Tribunal is limited to the question of the mootness of the pending Applications.

¹Rule 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.
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.”

The Procedure

6. Applicants filed their Applications with the Administrative Tribunal on April 25, 2005. The procedure leading up to the first *Baker* Judgment is detailed therein at paras. 4–6. Following issuance of that decision, the Fund’s Answer on the merits was filed on January 23, 2006,² followed by Applicants’ Reply on March 21, 2006.³ Following supplementation in accordance with the requirements of Rule IX, para. 5,⁴ the Reply was transmitted to Respondent on March 31, 2006.

7. On April 17, 2006, Respondent filed a Motion for Dismissal of the Applications as Moot. The Motion was supplemented on April 18, 2006, in accordance with the requirements of Rule XII, para. 3, and transmitted to Applicants on the following day. Applicants responded on May 25, 2006 with an Objection to the Motion, which was transmitted to the Fund.

8. In accordance with Rule XII, para. 2, upon the filing of the Motion for Dismissal of the Applications as Moot, the exchange of pleadings on the merits was suspended. Accordingly, the instant consideration of the case is confined to the question of the alleged mootness of the Applications.

The Factual Background of the Case

9. The factual background of the case preceding the filing of the Applications is set out in the earlier *Baker* Judgment as follows.

“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 2005, when the foregoing systems had been in

²Respondent was accorded forty-five days from notification of the denial of the Motion for Summary Dismissal in which to file its Answer, consistent with Rule VIII, para. 1, as the filing of the Motion had suspended the exchange of pleadings on the merits.

³On February 15, 2006, Applicants were granted an extension of time for filing of the Reply, pursuant to Rule XXI, para. 2.

⁴Rule IX, para. 5 provides:

“If the Applicant seeks costs pursuant to Article XIV, Section 4 of the Statute, the amount and any supporting documentation shall be included.”

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.”

10. The decision contested in the Applications, adopted by the Executive Board on January 24, 2005, is set out below:

“STAFF COMPENSATION SYSTEM AMENDMENTS

1. In addition to the circumstances in which such an evaluation is already required, an evaluation of international competitiveness shall also be conducted in all cases where the structural salary increase indicated by the U.S. comparator market would position the Fund’s payline 10 percent to 20 percent above the payline indicated by the combined French/German comparator market.

2. The purpose of the evaluation specified in paragraph 1 above is to allow a determination of whether any adjustment to the structural salary increase indicated by the U.S. comparator market is warranted, and the nature and the extent of such adjustment. In conducting this evaluation, factors bearing on the international competitiveness of Fund salaries will be taken into account, including the level of the indicated Fund payline relative to its position within a 10-20 percent margin above the payline indicated by the combined French/German comparator market, recent recruitment and retention experience, and exchange rate and tax developments.

3. In any case where it is deemed appropriate to apply a downward adjustment to the structural increase indicated by the U.S. comparator market that would position the Fund’s payline at less than 20 percent above the payline indicated by the combined French/German comparator market, the resulting Fund payline cannot be less than the higher of (a) a level equal to 10 percent above the payline indicated by the combined French/German comparator market, and (b) a level resulting from a percentage structural salary increase at least equal to the percentage increase in the Washington metropolitan area CPI for the 12-month period ending the preceding January. (EBAP/05/9, Sup. 1, 1/21/05)

Adopted January 24, 2005”

11. Subsequently, on April 14, 2006, the IMF Executive Board took another decision in respect of the staff compensation, which by its express terms “. . . supersedes all previous decisions concerning the staff compensation system.” The decision adopts paragraphs 4–52 of EBAP/06/38 (March 31, 2006), the introductory paragraphs of which provide as follows:

“II. PRINCIPAL PROVISIONS OF THE REVISED STAFF COMPENSATION SYSTEM

4. This section sets out the proposed provisions of the revised compensation system. Under the revised system, the annual compensation reviews will be conducted, and the annual adjustments to the salary structure will be made, on the basis of a three-year review cycle: (i) in the first year of each cycle, comparator-based reviews will take into account full comparisons of compensation levels in the designated comparator markets for Grades A9-B2 and A1-A8 and other relevant considerations, including, in the case of Grades A9-B2, the assessment of international competitiveness; and (ii) in the intervening years, the structural adjustments will be based on an index of private and public sector salary increases in the United States. Taking into account each year’s approved adjustment to the salary structure, resources will be allocated annually for individual, performance-related merit increases.

5. Although the new compensation system will include features that are similar to the existing system, some of these features require modification given the fact that they will be operating within a different overall framework. For example, there will be new level comparisons between each Fund grade and the corresponding compensation rate in comparator markets and the possibility of grade-by-grade adjustments; and the evaluation of international competitiveness will take place in the context of a broader comparator market review.

6. It is intended that the provisions set out below would become effective upon their approval by the Executive Board. They would govern the 2006 and subsequent annual compensation reviews.”

The question on which the Tribunal must now pass is whether the controversy brought before it by the pending Applications remains justiciable following this latter decision of April 14, 2006.

Summary of Parties’ Principal Contentions

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

Respondent’s contentions on mootness

1. The Applications have been rendered moot by the adoption of a comprehensive new compensation system by the decision of the Executive Board on April 14, 2006, a decision that expressly “. . .

supersedes all previous decisions concerning the staff compensation system.”

2. Applicants’ pleadings on the merits demonstrate that the gravamen of their challenge relates to the specific context in which the January 24, 2005 decision was taken.
3. The only relief sought by Applicants, rescission of the January 24, 2005 decision, had been realized before that decision had had a tangible effect on the compensation of Applicants. No other form of remedy would be appropriate, and adjudication of the case would have no legal value.
4. The new Executive Board decision of April 14, 2006 fundamentally revises the compensation system; it does not involve the re-enactment of the same decision without any change in substance.
5. Although the new compensation system contains elements of discretion regarding the extent to which the Executive Board may make downward adjustments that are similar to those introduced in January 2005, these elements will operate in a different context and, as a result, have been modified.
6. Although the element of discretion regarding downward adjustments has been incorporated in the new system, there are clear distinctions between the old and new systems and the manner in which the Executive Board’s discretion will operate. Accordingly, the fact that the new system includes a similar—but not identical—feature allowing the exercise of discretion should not be misconstrued as essentially re-enacting the challenged decision.

Applicants’ contentions on mootness

1. Although the April 14, 2006 decision to amend the compensation system states that the new decision “. . . supersedes all previous decisions concerning the staff compensation system,” the Executive Board continues to reserve to itself the element of discretion that the Applicants have challenged through their Applications.
2. Applicants’ challenge to the January 24, 2005 decision goes directly to the issue of the exercise by the Executive Board of its discretion with regard to amendments to the rules-based compensation system that would render that system an “ad hoc” system rather than a “rules-based” one. Therefore, the issue of whether or not that deci-

sion should be rescinded is not the only matter to be decided or the sole relief to be granted by the Tribunal.

3. A determination by the Tribunal that the January 24, 2005 decision was invalid would have legal value, as it would set the limits on the Executive Board's discretion to amend arbitrarily the compensation system and prevent the Executive Board from exercising discretion in a manner that is inconsistent with a rules-based compensation system.
4. The discretion of the Board regarding downward adjustments is preserved in the new system and thus the possibility of a re-occurrence of the Executive Board's action could reasonably be expected to be repeated.
5. There exists in the new system the very element of discretion that existed in the old system, the exercise of which could cause the same nature of harm feared by the Applicants—the erosion of their salaries to a level that is undercompetitive. The dispute in the instant case is therefore clearly not devoid of purpose.
6. The Applications should not be dismissed as moot because the case meets the three prong test for review on the basis that the matter is “capable of repetition yet evading review”:
 - a. there is a reasonable expectation that the same Applicants could be subjected to the same action again;
 - b. if the issue were to arise again it is likely to evade review because of the time it would take to obtain a decision from the Tribunal; and
 - c. there is a reasonable expectation that the Executive Board could exercise discretion in a similar manner in the future.

Consideration of the Issues

Preliminary Issue

13. Applicants raise a preliminary issue as to Respondent's interpretation of Rule XII (Summary Dismissal) to permit a Motion to Dismiss at this juncture in the case. In Applicants' view, the pending Motion “. . . does not demonstrate good faith and is . . . a further dilatory measure that causes them considerable damage.” (Applicants' Objection, p. 1.)

14. Rule XII, as Respondent correctly notes in its Motion, was adopted pursuant to Article X, Section 2(d) of the Tribunal's Statute, which provides that the Rules of Procedure shall include a provision concerning "summary dismissal of applications without disposition on the merits." As stated in Rule I, para. 2(b), the Rules are subject to the provisions of the Tribunal's Statute.⁵

15. In the Tribunal's view, Respondent's Motion is not baseless, particularly as the intervening Executive Board decision by its terms states that it ". . . supersedes all previous decisions concerning the staff compensation system." Accordingly, the Tribunal does not consider that the Motion fails to demonstrate good faith or is otherwise inappropriate.

16. That the April 14, 2006 decision by its terms "supersedes" all previous staff compensation decisions of the Executive Board is, of course, not the end of the matter, for Applicants likewise raise a substantial objection to Respondent's contention that the Applications are now moot. That issue is considered below.

Did the Executive Board's April 14, 2006 Decision render Moot the pending Applications?

17. The principal issue for decision by the Administrative Tribunal at the present stage of the proceedings is whether, as Respondent contends, the Executive Board's April 14, 2006 decision renders moot the pending Applications. Pertinent to resolution of this question is the determination of whether the recent Executive Board decision essentially re-enacts that element of the contested decision of January 24, 2005 by which Applicants contended they were "adversely affected."

18. In the earlier *Baker* Judgment, the Administrative Tribunal concluded that Applicants were "adversely affected" for purposes of maintaining their Applications pursuant to Article II, Section 1(a) of the Statute on the ground that the contested decision had "some present effect" on the Applicants' position (although for the reasons elaborated above it had no financial impact in the 2005 compensation round) and that "[t]hat 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

⁵While the further paragraphs of Rule XII contemplate the filing of a Motion for Summary Dismissal before the filing of an Answer on the merits, paragraph 1 of the Rule provides more generally that ". . . the Tribunal may, on its own initiative or upon a motion by the Fund, decide to dismiss the application if it is clearly inadmissible."

Board, will be applied in 2006.” (Para. 21.) The dispositive portion of that Judgment is reproduced below:

“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, 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.’”

19. One question now before the Tribunal is whether the “adverse affect” identified by the Tribunal in the earlier *Baker* Judgment, i.e. the widening of the Executive Board’s discretion that might result in a downward adjustment in staff compensation, is retained by the newly adopted decision of the Executive Board. Respondent maintains that although the new compensation system contains elements of discretion regarding the extent to which the Executive Board may make downward adjustments that are “similar to” those introduced in January 2005, these elements will operate in a different context and, as a result, have been modified:

“Although the element of discretion regarding downward adjustments has been incorporated in the new system, there are clear distinctions between the old and new systems and the manner in which the Executive Board’s discretion will operate Thus, the fact that the new system includes a similar—but not identical—feature allowing the exercise of discretion should not be misconstrued as essentially reenacting the challenged decision.”

(Respondent’s Motion, pp. 6-7.)

20. Applicants, for their part, maintain that their challenge to the January 24, 2005 decision goes directly to the issue of the exercise by the Executive Board of its discretion with regard to amendment to the “rules-based” compensation system and that the issue of whether or not the decision should be rescinded is not the only matter to be decided or the only relief to be granted:

“A determination by the Tribunal that the January 2005 decision was invalid would have legal value as it would set the limits of the Board’s

discretion in again arbitrarily amending the compensation system and prevent the Board from exercising discretion in a manner that is inconsistent with a rules based compensation system.”

(Applicants’ Objection, p. 4.)

21. The Tribunal accepts the contention of Applicants that both the January 2005 and April 2006 decisions of the Executive Board contain and sustain provisions that afford the Fund a wider discretion in respect of salary adjustments of the staff.

22. At the same time, the January 24, 2005 decision of the Executive Board that is the object of Applicants’ challenge has been superseded by virtue of the adoption of a comprehensive new system of compensation approved by the Executive Board on April 14, 2006. Accordingly, the holding of this Tribunal that the January 2005 decision could have effects in 2006 no longer obtains. The contested decision no longer has any “present effect.” *See Baker*, para. 21. “[T]he only relief sought in the Applications—rescission of the January 2005 decision—has essentially already occurred . . .” (in the words of the Fund’s Motion for Dismissal of the Applications as Moot at page 2). The Tribunal cannot quash a decision that has already been rescinded. Moreover, Applicants challenged “the particular set of circumstances” in which the January 2005 decision was taken—circumstances which no longer obtain. The Tribunal sees no point in addressing the question of whether the Executive Board had the authority to amend the rules at the time that it did and in the terms that it did when, at a subsequent time, and in different terms, the Executive Board once again revised the governing rules on staff compensation. Insofar as the April 2006 scheme maintains elements of discretion regarding the extent to which the Executive Board may make downward adjustments in staff compensation, Applicants and other staff members retain their right to bring fresh Applications challenging that scheme.

23. It should be added that, were the Tribunal to deny the Motion to Dismiss, only a single further pleading would be filed on the merits of the Applicants’ case, that of the Respondent’s Rejoinder. The views of Applicants on the April 14, 2006 compensation system would not have been put before the Tribunal, which would be confined to adjudicating elements of a superseded compensation scheme. In the Tribunal’s view, the interests of staff as well as management would be better served if the Tribunal were to be required to consider not a superseded scheme but the 2006 system actually in force. That the Tribunal is prepared to do as expeditiously as its Rules permit.

24. Applicants argue that, if the issue of the discretion of the Executive Board in respect of compensation adjustments were to arise again, that issue is “likely to evade review because of the time it would take to obtain a decision from the Tribunal.” That argument is not persuasive. The issue of Executive Board discretion in this sphere is not evanescent and the Board’s adoption of different systems of compensation adjustments is infrequent. There is no plausible reason to conclude that, because of acceptance of Respondent’s Motion to Dismiss, Applicants will not have their day in court should they choose to seek it.

25. The Tribunal accordingly has reached the following conclusions. First, it is clear from the pleadings of the Fund that the January 2005 decision has been superseded. Second, it follows that the compensation system that was thus adopted is no longer in force and therefore could not be invalidated by any decision of this Tribunal. Third, insofar as the April 2006 compensation scheme retains discretionary elements of the January 2005 system to which Applicants object, those elements as they now have been re-fashioned and in the context of the new compensation scheme, may best be contested in distinct proceedings. Fourth, if the Motion is not denied and proceedings on the merits were to resume, the only pleading that would remain would be the Fund’s Rejoinder, which would not be an attractive procedural posture to engage the current issues. Fifth, the Tribunal sees no merit in the contention of Applicants that, if the Fund’s Motion is granted, the Fund will be able to evade review of the April 2006 scheme. Applicants or others similarly situated, as the Fund recognizes in its pleadings, retain the right to bring a case in this Tribunal in respect of the April 2006 decision and in particular with respect to the discretionary element found both in the January 2005 and April 2006 renderings.

Costs

26. The provision of the Statute, Article XIV, Section 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,”

does not contemplate an award of costs in the absence of a decision on the merits of an Application. However, Applicants did prevail in respect of the denial of the Fund’s earlier Motion for Summary Dismissal. *Baker et*

al., Applicants v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-3 (December 6, 2005). Accordingly, and in view of the exceptional character of the case which is of importance to the staff as a whole, costs are awarded to Applicants insofar as they relate to the earlier phase of the proceedings, i.e. for the fees incurred in preparing their Objection to that earlier Motion, in the sum of \$4,200.

Decision

FOR THESE REASONS

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

1. The Motion for Dismissal of the Applications as Moot is granted.
2. The Fund shall pay Applicants the reasonable costs of their legal representation incurred in the preparation of their successful Objection to the Fund's earlier Motion for Summary Dismissal in the sum of \$4,200.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
June 7, 2006

JUDGMENT NO. 2006-5

***Ms. "AA", Applicant v. International
Monetary Fund, Respondent
(Admissibility of the Application)
(November 27, 2006)***

Introduction

1. On November 27, 2006, 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 Motion for Summary Dismissal of the case brought against the International Monetary Fund by Ms. "AA", a former staff member of the Fund.

2. Applicant contests the decision not to convert her fixed-term appointment to a regular staff position. Applicant further maintains that, during her employment, she was subjected to harassment and a hostile work environment in contravention of the Fund's internal law. In Applicant's view, the alleged harassment unfairly affected her work performance and the appraisal thereof, resulting in the non-conversion of her fixed-term appointment.

3. The Fund's Grievance Committee dismissed Applicant's Grievance on the ground that she had failed to pursue on a timely basis the administrative review process prerequisite to the filing of the Grievance.

4. The Fund has responded to the Application in the Administrative Tribunal with a Motion for Summary Dismissal, contending that Applicant has not met the requirement of Article V of the Tribunal's Statute that all available channels of administrative review must be exhausted before an application is filed with the Administrative Tribunal. Applicant maintains that exceptional circumstances excuse her delay in initiating administrative review, contending that only after leaving the employment of the Fund did she become aware that the harassment of which she now complains was part of a pattern and practice in her work unit.

5. A Motion for Summary Dismissal suspends the period for answering the 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 Application.

The Procedure

6. On February 27, 2006, Ms. "AA" filed her Application with the Administrative Tribunal. The Application was transmitted to Respondent on March 1, 2006. On March 9, 2006, pursuant to Rule IV, para. (f),¹ the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

7. On March 31, 2006, pursuant to Rule XII² of the Tribunal's Rules of Procedure, Respondent filed a Motion for Summary Dismissal of the Application. The Motion was transmitted to Applicant on the same day. On April

¹Rule 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; . . ."

²Rule 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.
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."

26, 2006, pursuant to Rule XII, para. 5, Applicant filed an Objection to the Motion, which was later transmitted to the Fund for its information. On April 27, 2006, the President of the Administrative Tribunal, pursuant to Rule XXI, para. 3,³ requested that Respondent present its views on Applicant's requests for (a) anonymity, and (b) oral proceedings (insofar as the request reflected a request for oral proceedings on the issue of admissibility).⁴ Respondent's views were submitted on May 12, 2006 and transmitted to Applicant for her information.

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.

Request for Anonymity

9. In her Application, Ms. "AA" has requested anonymity pursuant to Rule VII, para. 2(j)⁵ and Rule XXII, and the Fund has presented its views in accordance with Rule VIII, para. 5⁶ and Rule XXII. Applicant seeks anonymity on the ground that she allegedly was the victim of "egregious behavior, harassment and a hostile work environment" by Fund supervisors and ". . . if the remedy of reinstatement is granted, the Applicant will face possible retribution and/or retaliation in the Fund." The Fund has responded to the request for anonymity as follows: ". . . while strongly objecting to

³Rule XXI, para. 3 provides:

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

⁴Had Respondent filed an Answer on the merits, it would have been required, pursuant to Rule VIII, para. 5, to respond therein to Applicant's requests (made in her Application) for anonymity, for oral proceedings and for production of documents. Consideration of only the requests for anonymity and for oral proceedings (which Applicant sought on the issue of admissibility) was deemed necessary to the disposition of the Motion for Summary Dismissal. Accordingly, Respondent's views on the requests for documents, which would be included in its Answer on the merits if the Motion were to be denied, were not sought at this stage of the proceedings.

⁵Rule VII, para. 2(j) provides:

"An application instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:

...

(j) any request for anonymity as provided by Rule XXII below."

⁶Rule VIII, para 5 provides:

"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."

Applicant's statements regarding the reasons for her request for anonymity, the Fund has no objection to the request for anonymity itself."

10. Applicant's request for anonymity is the first that the Tribunal has been called upon to decide pursuant to Rule XXII, which was adopted by the Tribunal, along with other revisions to its Rules of Procedure, with effect with respect to all applications filed after December 31, 2004. Rule XXII provides in its entirety:

"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."

The adoption of Rule XXII effectively revised a policy earlier instituted by the Tribunal of designating the names of persons by acronyms.⁷

11. The Tribunal notes at the outset that the formulation of Applicant's request suggests that she may desire anonymity only in the event that she were to succeed on the merits of her case and reinstatement were effected as a remedy. As the Tribunal decides below to dismiss the Application as inadmissible, Applicant's professed concern regarding reprisal upon reinstatement cannot provide a basis for a grant of anonymity. Nonetheless, in view of the lack of clarity as to whether Applicant seeks anonymity irrespective of

⁷See Ms. "B", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), note 1; "Decision on the protection of privacy and method of publication" (December 23, 1997). On June 8, 2006, the Administrative Tribunal issued a "Revised Decision on the protection of privacy and method of publication," superseding the 1997 Decision in view of the amendment of the Rules of Procedure. The Revised Decision retains the policy that "[t]he departments and divisions of the Fund shall be referred to by numerals unless specification is desirable for the comprehensibility of the Judgment or Order." Additionally, the Revised Decision provides, when a Judgment or Order is placed on the Fund's external website, that "... for the name of an Applicant (or Intervenor) initials may be substituted."

the outcome of the case and the pending Motion, the Tribunal will consider whether Applicant has met the requirement of Rule XXII, para. 4 that ". . . good cause has been shown for protecting the privacy of an individual."

12. The Fund's submission stating that it "has no objection" to Applicant's request raises the question whether the Tribunal may grant a request for anonymity pursuant to Rule XXII solely on the basis of the consent of the parties, i.e. without a showing of "good cause." For the following reasons, the Tribunal concludes that it may not.

13. Implicit in the text of Rule XXII is that a party—whether an Applicant, Intervenor, or the Fund—that seeks that a name not be made public carries the burden of showing good cause. That the burden rests with the party seeking anonymity is confirmed by the fact that Rule XXII operates as an exception to the general rule of making public the names of parties to a judicial proceeding. With the adoption of Rule XXII, the IMFAT sought to bring its practice into conformity with that generally observed, including the practice of other international administrative tribunals.

14. As the Asian Development Bank Administrative Tribunal ("AsDBAT") has commented:

" . . . the Tribunal holds that the disclosure of the names of parties and the relevant facts in its Decision must be the rule, and confidentiality the exception. The publication of allegations and findings would in every case cause some loss, damage or prejudice to the party affected, and that would not be sufficient to claim confidentiality: the burden lay on the Applicant to establish the likelihood of serious loss, damage or prejudice. That is not the case here, having regard to the Tribunal's findings and decision."

Toivanen v. Asian Development Bank, AsDBAT Decision No. 51 (2000), para. 60 (rejecting request for anonymity in case of non-conversion of fixed-term appointment). International administrative tribunals generally have granted anonymity only in cases such as those involving alleged misconduct, *see, e.g., N v. International Bank for Reconstruction and Development*, WBAT Decision No. 356 (2006), para. 1 (applying "seriously prejudicial" standard) and *Ms. C v. Asian Development Bank*, AsDBAT Decision No. 58 (2003), para. 1, or matters of personal privacy such as health, *see, e.g., A v. International Bank for Reconstruction and Development*, WBAT Decision No. 182 (1997), or family relations, *see, e.g., E v. International Bank for Reconstruction and Development*, WBAT Decision No. 325 (2004), para. 1.

15. These considerations notwithstanding, if the name of the Applicant in this case were to be made known, her allegations against her supervisors

would be given a measure of currency. These allegations have not been considered by the Tribunal, since the Application is found to be inadmissible. Accordingly, while not for the reason assigned by the Applicant, but in order to protect her supervisors from allegations that have not been tested, the Tribunal deems it appropriate to treat the name of the Applicant anonymously.

Request for Oral Proceedings

16. Pursuant to Rule XIII, para. 1, as amended in 2004, the Administrative Tribunal may hold oral proceedings “. . . if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views . . . , the Tribunal deems such proceedings useful.”

17. Applicant has requested oral proceedings for the purpose of establishing through testimony the truth of the facts she alleges in support of her theory that her request for review is timely. Respondent, for its part, maintains that there is no disputed issue of fact for the Tribunal to rule upon as to the question of admissibility, and that oral proceedings are therefore not warranted.

18. The Tribunal concludes that it is able to decide the question of admissibility on the basis of the pleadings and the documentary evidence alone. As set out below, the Tribunal decides that, even accepting the content of the telephone communication to Applicant from her successor as alleged by Applicant, Ms. “AA”’s argument that she has met the requirements of Article V, Section 1 is unconvincing.

The Factual Background of the Case

19. The relevant factual background may be summarized as follows. Applicant was employed as a staff member of the Fund on a two-year fixed-term appointment from September 17, 2001 through September 16, 2003, during which time she served at Grade A9 in a position initially designated as a Deputy Section Chief and later reclassified. On March 20, 2003, Applicant’s fixed-term appointment was not converted, on the ground of inadequate performance. Accordingly, upon the expiration of her appointment, Applicant left the employment of the Fund.⁸

⁸For a discussion of the law governing conversion of fixed-term appointments, see Ms. “T”, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-2 (June 7, 2006) and Ms. “U”, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-3 (June 7, 2006).

20. In January 2005, according to Applicant's account, she received a telephone call from the staff member who succeeded her in her position and served under the same supervisors. That staff member, maintains Applicant, communicated to Ms. "AA" that she and others in her division were experiencing harassment.

The Channels of Administrative Review

21. The issue posed by this case is whether Applicant has fulfilled the exhaustion of remedies requirement of Article V of the Tribunal's Statute. It is not disputed that Applicant did not initiate administrative review procedures within the six-month time period following either the non-conversion decision or the conclusion of her employment with the Fund. On the basis that Applicant failed to make her request for review within the time limits prescribed by GAO No. 31, the Fund declined to undertake an administrative review of Applicant's complaint.⁹ Following is an account of the steps taken by Applicant to seek administrative review, leading to her Application in the Tribunal.

22. By letter of May 4, 2005, Applicant, through counsel, addressed a "Request for Review of [her] Appointment Expiration" to the Fund's First Deputy Managing Director. The request asserted that "[a]lthough the expiration of appointment decision was made some time ago, Ms. "AA" has recently learned that the reason for the performance shortcomings attributed to her by her supervisors was pre-textual, and that the true reason for her performance difficulties was the hostile work environment which existed in that division" Applicant further contended that she had been subjected to treatment violative of the Fund's Policy on Harassment, "[s]pecifically, there was a pattern and practice of isolation, manipulation and intimidation by supervisors as well as subordinates" Accordingly, Ms. "AA" sought administrative review of the "latent injury" that she suffered as a result of the decision not to extend or convert her fixed-term appointment, maintaining that ". . . she did not know that [the non-conversion decision]

⁹The circumstances of Applicant's case accordingly differ from those presented in *Mr. "O", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), para. 65, in which the Tribunal concluded that ". . . when a staff member brings his complaint to the highest levels of Fund management and when management elects to review that complaint rather than advising the staff member that his complaint either should be reviewed through prescribed channels or is untimely, the Tribunal is of the view that that election by management exceptionally stands in lieu of seeking administrative review pursuant to the procedures of GAO No. 31." (Emphasis supplied.)

was unjustified until facts were recently brought to her attention showing this to be the case.”

23. The First Deputy Managing Director referred Applicant’s request to the Director of the Department of Human Resources (HRD). By letter of May 27, 2005, HRD provided Applicant’s counsel the opportunity to supplement the request for review with an explanation of what “new facts” had come to Ms. “AA”’s attention and how they were relevant to her complaint, noting that the Fund would take such information into account in deciding “. . . whether an administrative review is permitted under GAO No. 31.”

24. Applicant’s counsel responded on June 14, 2005, alleging that more than a year after Ms. “AA” had left the employment of the Fund her successor alerted her that she and others in the division were experiencing harassment. Applicant’s counsel cited examples that he termed “eerily similar” to what Ms. “AA” had experienced:

“Accordingly, from what Ms. [“AA”] has recently learned from other staff members, it has come to her attention that the decision on her performance, and hence the decision not to extend or convert her employment contract, was completely arbitrary and did not reflect her true performance while she was at the Fund. This gave Ms. [“AA”] new facts which show a history of arbitrary performance determinations being used to mask what has now become systemic deliberate egregious behavior on the part of supervisors in that division who are engaging in a pattern or practice of harassment, intimidation, and a hostile work environment that unreasonably interferes with work in violation of the Fund’s personnel policies”

Accordingly, Applicant sought administrative review of the non-conversion decision “. . . which she did not know was unjustified until these facts were brought to her attention.”

25. By letter of July 15, 2005, the HRD Director responded that the facts alleged by Ms. “AA” did not provide a basis for undertaking administrative review of her “belated challenge,” concluding that “[w]hile the ‘new information’ that has recently come to her attention about the alleged experiences of another staff member may explain her motivation in bringing the complaint now, it cannot explain her failure to do so previously.”

26. Thereafter, on August 5, 2005, Applicant filed a Grievance with the Fund’s Grievance Committee. Following an exchange of written submissions by the parties on the question of admissibility, by order of December 20, 2005, the Grievance Committee dismissed the Grievance as untimely on the grounds that Ms. “AA” “. . . knew or should have known the staff rules

applicable to the dispute resolution process during her Fund employment [and] . . . by her own admission, 'knew in late 2003 of the fact that she was being harassed and that her performance appraisals did not reflect her true performance.'"

27. On February 27, 2006, Ms. "AA" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

28. The parties' principal arguments as presented by Applicant in her Application and Objection to the Motion and by Respondent in its Motion for Summary Dismissal may be summarized as follows.

Applicant's contentions on the merits

1. Applicant was subjected to harassment and a hostile work environment in contravention of Fund rules.
2. The decision not to convert Applicant's fixed-term appointment to regular staff was impermissibly affected by this harassment.
3. Specifically, the harassment and hostile work environment to which Applicant was subjected unfairly affected both her work performance and the appraisal thereof. The assessment of Applicant's performance did not reflect her true performance.
4. Applicant seeks as relief:
 - a. rescission of the non-conversion decision;
 - b. reinstatement and appointment as a regular staff member with retroactive pay and benefits;
 - c. moral and punitive damages; and
 - d. attorneys' fees and costs.

Respondent's contentions on admissibility

1. Applicant failed to challenge the non-conversion decision or any aspect of her treatment by supervisors within the time limits prescribed by GAO No. 31, and, therefore, her Application in the Tribunal is inadmissible.
2. Applicant's claim of "exceptional circumstances" to excuse her delay in initiating administrative review is without merit.

3. Neither the “discovery rule” nor “equitable tolling” excuse Applicant’s delay. Her complaint involves facts that by their nature would have been known to Applicant at the time they occurred. Moreover, the record demonstrates that during the term of her Fund employment Applicant believed that her negative performance reviews were unjustified.
4. Information concerning the experience of other staff members might be relevant to Applicant’s claims but was not essential to them.
5. As a Fund staff member, Applicant must be presumed to have had knowledge of the rules governing the dispute resolution process.

Applicant’s contentions on admissibility

1. Applicant’s request for administrative review was timely under the “discovery rule” because it was made within six months of when Applicant learned of all of the facts essential to support her claims.
2. Applicant did not discover, and could not have discovered, until after she left the Fund, all of the essential elements of her claim because not until January 2005, upon learning of another staff member’s experience, did Applicant know that she had been subjected to a pattern or practice of impermissible conduct.
3. Additionally, the doctrine of “equitable tolling” applies because Applicant, despite all due diligence, was unable to obtain earlier than January 2005 the essential facts bearing on the existence of her claim.
4. Applicant was not given notice of the applicable recourse procedures at the time of the non-conversion of her appointment.

Consideration of the Admissibility of the Application

29. The Tribunal has before it but one question on the Motion for Summary Dismissal, namely whether Applicant has met the requirements of Article V, Section 1 of the Tribunal’s Statute, which 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.”

30. The Tribunal takes note of the Grievance Committee’s decision that Ms. “AA”’s Grievance was barred from consideration by that body on the ground that she failed to initiate in a timely manner the administrative

review procedures of GAO No. 31 prerequisite to the Grievance Committee's review. In *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 91, the Tribunal held that such a determination of the Grievance Committee is "relevant to but not necessarily dispositive of" the question of whether an applicant has exhausted channels of administrative review, as required by Article V, Section 1 of the Statute, for purposes of bringing an Application before the Administrative Tribunal. While the Grievance Committee rules upon its own jurisdiction for purposes of proceeding with a grievance, the Administrative Tribunal, in adjudging a challenge to the Tribunal's jurisdiction, necessarily decides for itself whether channels of administrative review have been exhausted. *Estate of Mr. "D"*, para. 85.

31. The Tribunal has observed that

" . . . the recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to debar them. If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse."

Estate of Mr. "D", para. 102. Accordingly, the Tribunal has held that it has the authority to consider the "presence and impact of exceptional circumstances" at anterior stages of the dispute resolution process. *Id.*

32. In evaluating factors that may excuse failure to initiate timely administrative review, the Tribunal has considered ". . . the extent and nature of the delay, as well as the purposes intended to be served by the requirement for exhaustion of administrative remedies." *Estate of Mr. "D"*, para. 108. These purposes include ". . . providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication." *Id.*, para. 66. Moreover, "[t]he timeliness of the review process is directly linked to the purposes of the review:

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

Id., para. 95, quoting *Alcartado*, AsDBAT Decision No. 41 (1998), para. 12. The Tribunal has emphasized that, ". . . in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal pro-

cesses, such requirements should not be lightly dispensed with and ‘exceptional circumstances’ should not easily be found.” *Id.*, para. 104; *see also Mr. “O”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), paras. 48-50.

33. It is not disputed that Applicant did not initiate administrative review of the decision not to convert her fixed-term appointment, or of the “related decisions, actions and inactions” of her supervisors allegedly subjecting her to harassment and a hostile work environment, until more than two years following the non-conversion decision and almost twenty months after the conclusion of her employment with the Fund.

34. As Applicant acknowledges, GAO No. 31, Rev. 3, Section 6.02, requires that a request for administrative review of a decision concerning a staff member’s work or career must be made “. . . within six months after the challenged decision was made or communicated to the staff member” Invoking the “discovery rule” and the principle of “equitable tolling,”¹⁰ Applicant maintains that her Application is admissible because she requested administrative review within six months of the date on which she maintains she acquired knowledge of all of the elements of her claim, specifically, that the treatment she experienced was part of a “pattern or practice” of conduct in violation of the Fund’s rules.

35. In Ms. “AA”’s view, “. . . it was not until January of 2005 that the Applicant learned all of the essential elements necessary for her to know that the treatment she was subjected to was not due to a performance deficiency on her part, but was in fact a pattern of behavior which she and others in [her department], including her successor, had experienced which were repeated and therefore constituted a violation of the Fund’s Harassment Policy.” Applicant cites paragraph 10 of that policy, which provides:

“Another important element to consider is the extent to which the conduct interferes with the working environment. Mildly offensive comments or behaviors can rise to the level of harassment if they are repeated or become pervasive. At the same time, a single incident will be considered harassment if it is so severe that it poisons the overall working environment.”

Staff Bulletin No. 99/15 (June 18, 1999) (Harassment—Policy and Guidance to Staff), Attachment, para. 10. In Applicant’s view, the meaning of the cited provision is that an “essential element” of a claim of harassment, “. . . where a single incident is not sufficiently severe, is behavior that ‘rise[s] to the level

¹⁰Applicant cites 51 Am. Jur. 2d 174, 179 (2000) for these doctrines.

of harassment if they are repeated or become pervasive' It is this pattern or practice of repeated or pervasive behavior by the Applicant's supervisors which the discovery rule applies to, because the Applicant thought the behavior she was subjected to was due to her poor performance, as her supervisors told her it was."

36. Applicant urges the Tribunal to apply the "discovery rule" as among the generally recognized principles of international administrative law concerning judicial review of administrative acts¹¹ and cites in support Article XVI of the Statute of the IMFAT. Article XVI provides that: "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 statutory provision, however, which supplies a narrow exception to the rule of finality of judgments, is entirely inapposite to the question of excusing delay in the initiation of a claim.

37. In *In re Saunders*, ILOAT Judgment No. 1466 (1996), Consideration 5, the International Labour Organisation Administrative Tribunal held irreceivable a complaint seeking to impugn an applicant's non-selection for appointments in 1990 and 1991. The applicant maintained that he had not initiated the internal recourse procedures of the employing organization within the prescribed time limits because it was not until 1994 that he learned that the Appointment and Promotion Board had been improperly constituted. The ILOAT concluded:

"Precedent has it that a time limit is a matter of objective fact and begins to run when a decision is notified. If that were not so, whatever considerations of equity there might be, there could be no certainty in legal relations between the parties, and such certainty is the whole purpose of time limits: The only exceptions that the Tribunal has allowed are where the complainant has been prevented by *vis major* from learning of the decision (see Judgment 21: *in re Bernstein*) and where the defendant has misled him or withheld some document from him in breach of good faith (see Judgment 752)."

¹¹See Article III of the Tribunal's Statute, which provides in part: "In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts."

See also In re Schulz, ILOAT Judgment No. 575 (1983), Consideration 2 (“No doubt the complainant did not notice until March 1982 the inequality of treatment which she pleads. But according to Article 108 (3) of the Service Regulations the time limit for filing the appeal in this case began at the date on which the impugned decision was notified to her, not at the later date on which she became aware of the alleged inequality.”)

38. The Administrative Tribunal, in ruling on the Motion in Ms. “AA”’s case, is not called upon to decide whether a “discovery rule” may ever be applied to establish “exceptional circumstances” under the Tribunal’s jurisprudence; that is a possibility which should not be excluded. Rather, the question is whether such a principle supports a finding of “exceptional circumstances” on the facts of the present case. The Tribunal concludes that it does not. For even if a “discovery rule” were to be applied, the facts as presented by Ms. “AA” simply do not bear out her assertion that she did not have knowledge of the elements of her claim until January 2005. To the contrary, Applicant’s assertions in her pleadings before this Tribunal reveal that “. . . she knew in late 2003 of the fact that she was being harassed and that her performance appraisals did not reflect her true performance.” Furthermore, Applicant maintains that during her employment she made “pleas of assistance” to Fund officials, including her Senior Personnel Manager, the Ombudsperson, and the Health Services Unit, “. . . for the stress she was suffering from because she was wrongly being blamed for poor performance by her supervisors”

39. This knowledge was sufficient for Applicant to make out a claim of harassment under the internal law of the Fund. While Applicant maintains that a “pattern or practice” is an “essential element” of a cause of action under the Fund’s personnel policy governing harassment, the Tribunal notes the definition of harassment provided in the Fund’s policy, at para. 3: “Harassment is any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment.”

40. What is significant for purposes of deciding the Motion for Summary Dismissal is when Applicant was on notice of an administrative act of the Fund adversely affecting her. *See, e.g., Mr. “O”*, para. 57. Ms. “AA” knew at the time of the non-conversion of her appointment that she had been adversely affected by an administrative act of the Fund. It is not necessary in every case to show a “pattern or practice” in order to bring a complaint of harassment under the Fund’s regulations. It follows that the Tribunal cannot sustain Applicant’s assertion that she was prevented until January 2005 from knowing the essential elements of her cause of action.

41. Finally, Applicant, citing the principle of "equitable tolling," maintains that her delay in initiating administrative review should be excused on the ground that the Fund did not give Applicant notice of review procedures, as the decision set out on the Expiration of Fixed-Term Appointment form provided no notification to Applicant of the possibilities of recourse through the Fund's dispute resolution system. The Tribunal has ruled, however, that, as a general rule, lack of individual notification of review procedures does not excuse failure to comply with such procedures, *Estate of Mr. "D"*, para. 120, and finds nothing in the circumstances of this case of a fixed-term staff member to support an exception to that rule.¹²

42. The Tribunal concludes, taking account of the asserted reasons for Applicant's delay, and in light of the purposes favoring the prompt initiation of administrative review, *see Estate of Mr. "D"*, para. 108, that Ms. "AA" has not established "exceptional circumstances" to excuse her substantial delay in instituting a request for review pursuant to the Fund's internal recourse procedures. Accordingly, Applicant has not met the exhaustion of remedies requirement of Article V, Section 1 of the Tribunal's Statute. The Application is therefore "clearly inadmissible" (Rule XII) and is summarily dismissed.

¹²The case is to be distinguished from that in which the Tribunal has found "exceptional circumstances" in respect of notice of review procedures to a non-staff member applicant. *See Estate of Mr. "D"*, para. 128 (daughter and executrix of the estate of a non-staff member enrollee in the Fund's medical benefits plan).

Decision

FOR THESE REASONS

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

The Motion for Summary Dismissal of the Application is granted.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
November 27, 2006

JUDGMENT NO. 2006-6

Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent
(November 29, 2006)

Introduction

1. On June 8 and 9 and November 27, 28 and 29, 2006, 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. "M" and her mother Dr. "M", non-staff members of the Fund.¹

¹The Tribunal's jurisdiction *ratione personæ* over Applicants is not disputed. The Tribunal has held that non-staff members asserting rights under Fund benefit plans are within the Tribunal's jurisdiction *ratione personæ* pursuant to Article II, Section 1(b) of the Statute, which provides:

"1. The Tribunal shall be competent to pass judgment upon any application:

...

b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant."

See Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application), IMFAT Judgment No. 2001-1 (March 30, 2001), paras. 58–63; *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), paras. 51–65. In the present case, Applicants made requests under SRP Section 11.3, which confers on a child of a Fund retiree (or a parent acting on behalf of the child) a right to request that the Administration Committee give effect to a court order awarding child support by deducting payments from the SRP pension benefits of the Fund retiree. Therefore, the Tribunal is open to Applicants for the purpose of challenging the adverse decisions of the Administration Committee with respect to their requests. *See Mr. "P" (No. 2)*, paras. 7, 48–65. Although in *Mr. "P" (No. 2)* the former spouse sought access to the Tribunal as an applicant for intervention, the Tribunal's ruling on that issue is applicable to those seeking to initiate proceedings by filing an application with the Tribunal. *See Rule XIV, para. 1* ("Any person to whom the Tribunal is open under Article II, Section 1 of the Statute . . ." may apply to intervene.) Additionally, Applicant Ms. "M" has designated Applicant Dr. "M" as her representative and counsel, pursuant to Rule VII, para. 1 of the Administrative Tribunal's Rules of Procedure.

Applicants contest the Fund's decisions denying requests of 1999 (renewed in 2002, in light of a change in the applicable Fund policy) and 2003 to give effect under Section 11.3 of the Staff Retirement Plan ("SRP" or "Plan") to a series of child support orders issued by German courts² by deducting the support payments for Ms. "M" from the SRP pension benefits of Mr. "N", a retired participant in the Plan.

2. Applicants challenge the denial of their first, i.e. 1999, request on the ground that it was based on a provision of SRP Section 11.3, subsequently revised, that effectively precluded requests under Section 11.3 by or on behalf of children born out of wedlock. Applicants maintain that the denial of their 1999 request on the basis of that provision represented impermissible discrimination. Applicants contend that exceptional circumstances justify their failure to seek timely review by the Administrative Tribunal of the denial of their 1999 request and urge the Tribunal to waive its statute of limitations to consider their claim.

3. As to the denial of their second, i.e. 2002, request, which was to reinstate the 1999 request in view of the amendment of Section 11.3 to encompass support orders for children born out of wedlock, Applicants contend that Rule 9 of the Rules of the Administration Committee under Section 11.3³ of the Staff Retirement Plan, upon which that denial was, in part, based, is unreasonably interpreted to prohibit payment of past-due child support from future pension benefits. Applicants further maintain that the child support orders of 1991, 1994, and 1995 that form the bases for their 1999 and 2002 requests satisfied all of the requirements set forth in Section 11.3 and the applicable Administration Committee Rules.

4. Applicants challenge the denial of their third, i.e. 2003, request on the ground that the Administration Committee erred in concluding that a *bona fide* dispute existed as to the efficacy, finality, or meaning of the 2003 court order underlying that request, which provided for maintenance for Ms. "M" after reaching the age of majority.

5. Applicants further contend, as to their requests to give effect to each of the court orders at issue, that Section 11.3 does not require that a court

²In the context of these requests, it appears that Applicants also brought to the attention of the Fund orders of the District of Columbia courts of August 5, 1999 and April 30, 2002. See *infra* The Factual Background of the Case; Proceedings in the Administration Committee of the Staff Retirement Plan.

³Unless otherwise specified, all references herein to the Rules of the Administration Committee under Section 11.3 are to the 1999 version of those Rules, as notified to the staff by Staff Bulletin No. 99/12 (June 9, 1999).

order underlying a request either expressly direct payment from the retiree's pension benefits or require the retiree to make such a direction. Finally, Applicants assert that the Fund has committed "grave legal and factual errors" in responding to their requests.

6. Respondent, for its part, maintains, as to the denial of the 1999 request, that Applicants have failed to show exceptional circumstances to justify waiver of the statute of limitations. Moreover, even if the Tribunal were to reach the merits of the 1999 request, Respondent contends, the "marital relationship" requirement on which its denial was based is dispositive. Additionally, in the Fund's view, had the 1999 request been reviewed on the merits by the Administration Committee, it also properly would have been denied because the court orders underlying the request suffered from defects of efficacy, finality, or meaning.

7. With respect in particular to Applicants' 2002 request, Respondent contends that the policy of providing only for "prospective payments" under Section 11.3, i.e. giving effect to orders for ongoing support but not for payment of "judgment debts," is reasonable and appropriate.

8. As to Applicants' 2003 request, Respondent maintains that the SRP Administration Committee correctly concluded that there existed a *bona fide* dispute as to the efficacy, finality, or meaning of the underlying court order.

9. Moreover, Respondent contends that Section 11.3 requires that the court order underlying a request either expressly direct payment from a Fund retiree's pension or order the retiree to direct the Administration Committee to pay a portion of his Fund pension to the alternate payee. Respondent accordingly maintains that all of Applicants' requests could be denied on the basis of that requirement alone. Additionally, Respondent asserts that Applicants failed to provide the Administration Committee with relevant documents in the course of its consideration of their requests.

The Procedure

10. On May 18, 2004, Ms. "M" and Dr. "M" filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicants that the Application did not fulfill the requirements of paras. 2(c) and 2(d) of that Rule. Accordingly, Applicants were 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.⁴

11. The Application was transmitted to Respondent on June 1, 2004. On June 21, 2004, pursuant to Rule XIV, para. 4,⁵ the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Ms. "M"'s and Dr. "M"'s Application on July 30, 2004. On November 2, 2004, Applicants submitted their Reply. The Fund's Rejoinder was filed on December 3, 2004.

12. On June 15, 2004, the President of the Administrative Tribunal, pursuant to his authority under Rule XXI, paras. 2 and 3⁶ of the Rules of Procedure, suspended the pleadings and requested the views of the parties on the question of whether Mr. "N" should be invited to participate as an Intervenor under Rule XIV⁷ of the Rules of Procedure and Article X, Section

⁴Rule VII provides in pertinent part:

"Applications

...

2. . . . Each application shall contain:

...

(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 results 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. . . ."

⁵Rule 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."

⁶Rule XXI provides in pertinent part:

"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."

⁷Rule XIV provides:

"Intervention

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

2. The rules regarding the preparation and submission of applications specified above

2(b)⁸ of the Statute. Applicants responded on June 17, 2004, stating that they were not opposed to Mr. "N"'s intervention, unless it would make the proceedings more complicated, lengthier or costlier. On June 23, 2004, the Fund communicated to the Tribunal that it was strongly of the view that Mr. "N" should be invited to participate as an Intervenor to afford the Tribunal the full benefit of his views on the issues of the case.

13. In *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), the Administrative Tribunal granted a request for intervention by an ex-spouse of a Fund retiree whose request under Section 11.3 to give effect to a court order granting her a share of the Applicant's pension benefits had been denied by the Administration Committee. In that case, it was the retiree who was the Applicant in the Tribunal because the Administration Committee, in concluding that there was a *bona fide* dispute as to the meaning, efficacy, or finality of the court order, had exercised its discretion pursuant to its Rules to withhold the disputed amount from Mr. "P"'s pension payments, prompting him to challenge the decision before the Tribunal. When his ex-spouse applied to participate as an Intervenor, the Tribunal granted her application for intervention on the ground that she was, ". . . for purposes of Article II, Section 1 of the Tribunal's Statute, a beneficiary under a Fund benefit plan, for purposes of challenging the legality of the Administration Committee's Decision on her Request to give effect to the [court] order." *Mr. "P" (No. 2)*, para. 65.

14. In the present case, unlike in *Mr. "P" (No. 2)*, there has been no escrowing of pension payments, and, therefore, the retiree has not been aggrieved. Nonetheless, the President of the Administrative Tribunal, hav-

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."

⁸Article X, Section 2(b) provides:

"2. . . . The Rules of Procedure shall include provisions concerning:

. . .

b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment;"

ing considered the views of the parties and in consultation with the Associate Judges of the Tribunal, decided to invite Mr. "N" to participate as an Intervenor in this case. While such an invitation to intervene was not at the time provided for expressly by the Tribunal's Rules of Procedure,⁹ the decision was taken in the interest of providing all interested persons a reasonable opportunity to be heard, and was based on the conclusion that Mr. "N" met the two statutory prerequisites for intervention, i.e. he is a person to whom the Tribunal is open under Article II, Section 1 of the Statute and he has a right that may be affected by the Judgment to be given by the Tribunal.¹⁰ (Article X, Section 2(b); Rule XIV, para. 1.) By Memorandum of July 15, 2004, the parties were informed of the decision to invite Mr. "N"'s intervention and its rationale.

15. On August 23, 2004, the Tribunal, after ascertaining from the Fund the address at which Mr. "N" had been notified of the SRP Administration Committee's final decision of February 25, 2004, invited Mr. "N" to participate in these proceedings as an Intervenor and provided him with copies of Ms. "M"'s and Dr. "M"'s Application and the Fund's Answer. His submission was due September 22, 2004. Mr. "N" did not file a submission, and, on September 27, 2004, he informed the Registrar by telephone that he declined the invitation to do so.¹¹ The Registrar so notified the parties by letter of September 29, 2004.

⁹The Rules of Procedure subsequently have been amended, with effect with respect to all applications filed after December 31, 2004, to include the following provision:

"RULE XIV
Intervention

. . .

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."

¹⁰The parties also were informed that Applicants' concern that the intervention might make the proceedings lengthier and costlier did not provide a basis for denying Mr. "N" an opportunity to participate as an Intervenor. See Ms. "G", *Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 35 (rejecting the view that the Tribunal would have discretion to deny an application for intervention on the basis that the intervention would pose additional burdens on the applicant as a litigant).

¹¹At that time, Mr. "N" indicated to the Registrar that he might decide to submit a request under Rule XV to permit him to communicate views to the Tribunal as an *amicus curiae*. Mr.

16. On September 29, 2004, the President of the Administrative Tribunal, pursuant to his authority under Rule XVII, paras. 3 and 4¹² of the Rules of Procedure, issued a Request for Information to Applicants to provide specified documents referenced in the pleadings and to identify and indicate the current status of any pending litigation relating to any family support obligations of Mr. "N" to Applicants, to explain its relevance to the proceedings before the Tribunal, and to advise the Tribunal on an ongoing basis of any changes in the status of such litigation or any new litigation relevant to this Request for Information.¹³ Applicants responded with a series of submissions beginning in late 2004 through August of 2006.

17. On February 21, 2006, the President of the Administrative Tribunal issued to Respondent a Request for Information to submit a model court order as referenced in its pleadings and, if it differed, the model court order currently provided to requesters under SRP Section 11.3. Respondent replied on March 3, 2006.¹⁴

18. Also on February 21, 2006, the President of the Administrative Tribunal, pursuant to his authority under Rule XI¹⁵ of the Rules of Procedure,

"N" did not submit such a request.

¹²Rule XVII provides in pertinent part:

"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."

¹³In subsequent correspondence, the Registrar reminded Applicants of this continuing obligation.

¹⁴In addition, by letter of March 6, 2006 (and a follow-up letter of March 15, 2006), the Tribunal asked Applicants to indicate whether the Fund had provided them with such a model court order. On March 16, 2006, Dr. "M" replied that she was "not aware" of such a model order, but was unable to state with certainty that the Fund never provided it to her. Subsequently, on March 31, 2006, Dr. "M" wrote to the Tribunal that she "cannot remember having ever received or even seen" the model order submitted by Respondent on March 3, 2006.

¹⁵Rule 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."

issued a Request to Applicants and Respondent to file simultaneous Additional Statements, by which the parties were afforded the opportunity to comment on any relevant litigation or other developments that had followed the closure of the regular pleadings. Additional Statements were submitted by Applicants and Respondent on March 14 and March 21, 2006, respectively.

19. On June 12, 2006, the President of the Administrative Tribunal issued an additional Request for Information to Applicants to provide an official translation of a November 18, 2005 order earlier submitted by Applicants relating to the scheduling of a hearing by the Local Court in Frankfurt on the Main for November 10, 2006, to identify to the Tribunal the nature of that hearing, the question(s) to be considered by the court at that time, and when the decision on these matters was expected to be rendered. Applicants replied on June 22, 2006.¹⁶ On November 20, 2006, the President of the Tribunal issued a final Request for Information to the Fund, which responded on November 22, 2006.

20. 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.¹⁷ The Tribunal had the benefit of the submissions made by Applicants and by Mr. "N" in the underlying consideration by the SRP Administration Committee of Applicants' 2003 request, as well as the minutes of the Administration Committee in respect of its 2004 Decision on Review.

The Factual Background of the Case

21. The relevant factual background may be summarized as follows. Additional factual elements will be included in the consideration of the issues of the case.

Overview

22. Mr. "N", a former staff member of the Fund and a national of Finland, began receiving pension benefits from the Staff Retirement Plan in 1998. Applicant Dr. "M", who is not and never has been a staff member of

¹⁶Applicants subsequently informed the Tribunal that the hearing had been postponed until January 30, 2007, as service on Mr. "N" had not been effected.

¹⁷Article 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."

the Fund,¹⁸ is a national and resident of Germany. Dr. "M" maintains that Mr. "N" is the father of her daughter, Applicant Ms. "M", who was born in Washington, D.C. on January 9, 1984, when, according to Dr. "M", she and Mr. "N" were living together. Since 1986, Applicants have resided in Germany and apart from Mr. "N". In the ensuing years, Dr. "M" has sought to obtain child support payments for Ms. "M" from Mr. "N", resulting in this case before the IMF Administrative Tribunal.

23. In 1991, 1994, and 1995, Applicants obtained orders from a German court requiring Mr. "N" to pay child support until Ms. "M" reached the age of majority on January 9, 2002. On January 20, 2003, Applicants obtained an order from a second German court concerning Ms. "M"'s entitlement to maintenance from Mr. "N" after reaching the age of majority, based upon her status as a dependent student. The 2003 Order appears to have been issued pending the resolution of a lawsuit concerning the same entitlement. According to Applicants, a hearing in that latter case has been scheduled for January 30, 2007.

24. Applicants sought recognition and enforcement of the German Orders of 1991, 1994, and 1995 in both Washington, D.C. and Finland. By decisions of July 16 and August 5, 1999, the Superior Court of the District of Columbia recognized these German Orders and ordered that they be enforced.¹⁹ As a result of the Washington, D.C. proceedings, Applicants received partial payment of the amount due before the "apparent abscondance" of Mr. "N" from the court's jurisdiction.²⁰ On April 30, 2002, the D.C. Superior Court calculated the outstanding amount owed by Mr. "N" and designated Dr. "M" as the appropriate payee.

25. On the basis of the April 30, 2002 Superior Court Order, Applicants filed a Motion in the same court for a Qualified Domestic Relations Order ("QDRO")²¹ against Mr. "N"'s Fund pension benefits. The Motion was denied on the ground of the Fund's immunity from judicial process, a decision that was sustained by the D.C. Court of Appeals.

26. On June 21, 2006, during the pendency of these proceedings in the Administrative Tribunal, the D.C. Superior Court, on remand from the D.C. Court of Appeals and upon consideration of additional evidence, affirmed its earlier denial of a QDRO against the Fund, but issued a QDRO against

¹⁸See *supra* note 1.

¹⁹Several additional orders of the D.C. Superior Court followed, rejecting Mr. "N"'s objections to the enforcement. See *infra*.

²⁰See D.C. Superior Court Order of June 21, 2006.

²¹See *infra* Consideration of the Issues of the Case.

Mr. "N", ordering him to direct the Administration Committee to pay past-due child support obligations to Ms. "M" from his future Fund pension payments. This Order was brought to the Tribunal's attention by letter of Dr. "M" dated June 26, 2006, in response to a Request for Information by the Tribunal to Applicants to keep it informed of developments in the litigation. The Fund, in response to a Request for Information of November 20, 2006, has informed the Tribunal that, as of November 22, 2006, it has received neither a direction from Mr. "N" nor a request from Applicants in respect of the June 21, 2006 Order.

27. While judicial proceedings were ongoing in Washington, D.C., Applicants also obtained a decision from the Supreme Court of Finland on May 25, 2001, which ordered enforcement in Finland of the German Order of 1994. Enforcement was stayed, however, as a result of a challenge filed by Mr. "N". Applicants assert that Mr. "N"'s objection was denied on December 14, 2004, but they maintain that execution against Mr. "N"'s property in Finland is not possible because it is encumbered.

28. As detailed below, in addition to their enforcement efforts in the courts of Washington, D.C. and Finland, Applicants made three requests (in 1999, 2002, and 2003) to the Administration Committee of the Fund's Staff Retirement Plan to give effect to the various German child support orders.²² The denials of these requests form the bases for the Application in the Administrative Tribunal. The first two requests, made in 1999 and 2002, were to give effect to the German Orders of 1991, 1994, and 1995. A third request was made in 2003 on the basis of the 2003 German Order. The relevant judicial proceedings, as well as Applicants' efforts to give effect to the German court orders through the Fund's Staff Retirement Plan are described below.

Judicial Proceedings

Judicial Proceedings in Germany

The 1991, 1994, and 1995 German Orders for support of Ms. "M" before reaching the age of majority

²²In the context of these requests, it appears that Applicants also brought to the attention of the Fund orders of the District of Columbia courts of August 5, 1999 and April 30, 2002. See *infra* The Factual Background of the Case; Proceedings in the Administration Committee of the Staff Retirement Plan.

29. In 1991, Dr. "M" brought civil proceedings against Mr. "N" in the Local Court of Darmstadt, Germany, for child support for the period from Ms. "M"'s birth until she reached age eighteen. In a document issued by the Magistrate of the Municipality of Darmstadt, dated January 14, 1991, Mr. "N" acknowledged paternity of Ms. "M":

"I acknowledge that I am the father of the illegitimate child [Ms. "M"], born 9 January 1984 in Washington . . . mother: [Dr. "M"].

I know that the acknowledgment is irrevocable . . ."²³

30. Mr. "N" was summoned but did not appear in the Darmstadt Court, and Ms. "M" was awarded two default judgments dated March 14, 1991 and July 20, 1994. By the terms of the 1991 Order:

- "1. Defendant is ordered to make payment to plaintiff, care of the respective legal representative, from the day of birth of 1984-01-09 until the attaining of the age of 18 years, of the regular child support according to normal requirement monthly in advance, the arrears immediately.
2. The costs of the procedure are awarded against defendant.
3. The judgment is provisionally enforceable."

31. The 1994 Order supplemented by 200 percent the support awarded by the 1991 Order. Like the 1991 Order, the 1994 Order is in the form of a default judgment, noting that "[i]t is established that the respondent was duly summoned to appear in court . . . and that he is absent without a valid excuse." The 1994 Order provides:

"I. In alteration of the Judgment of the Local Court (Amtsgericht) of Darmstadt dated 14 March 1991 . . . the respondent is sentenced to pay the plaintiff the regular support plus a supplement of 200 per cent of the regular requirement from the day of birth, i.e. 9 January 1984, and until completion of the age of 18, this support being payable to the hands of the respective representative at law, on a monthly basis and in advance, arrears being payable at once.

II. The respondent shall bear the costs of the procedure.

III. The Judgment is provisionally enforceable."

32. On February 23, 1995, as Mr. "N" had not complied with the earlier default judgments, the following "attachment order"²⁴ was issued:

²³The record before the Administrative Tribunal includes certified English translations of this document and the German court orders that Applicants seek to have given effect.

²⁴This description is derived from the D.C. Court of Appeals' Order of December 8, 2005.

“Enforceable Copy

COURT ORDER

...

The regular support which the respondent shall pay the child on a monthly basis and in advance is fixed as follows:

DM 753.- - from 9 January 1984 till 8 January 1992

DM 912.- - from 9 January 1992 till 30 June 1992

DM 1059.- - from 1 July 1992 till 8 January 1998

DM 1254.- - from 9 January 1998 till 8 January 2004

...

Reasons:

Pursuant to provisionally enforceable Judgment of the local Court (Amtsgericht) of Darmstadt dated 20 July 1994 – . . . – the respondent is under the obligation to pay the child the regular support in the amount of the regular requirement plus a supplement of 200 per cent of the regular requirement.

...

The above official copy is issued for the petitioner child for the purpose of forcible execution.

An official copy of the Court Order was served upon the respondent by mail on 23 February 1995. Forcible execution may start two weeks after this day at the earliest.”

33. According to the calculations of the D.C. Superior Court, reflected in its Order of April 30, 2002, *see infra*, the total amount owed by Mr. “N” pursuant to the 1991, 1994, and 1995 German Orders was equivalent to U.S. \$71,905.81 (excluding interest, counsel fees and costs) for the period from Ms. “M”’s birth until the age of majority. None of these German court orders makes reference to Mr. “N”’s Fund pension benefits.

34. On May 22, 2002, the Darmstadt Regional Court denied Mr. “N”’s appeal of a 2001 German child support order that appears to have been based on the March 14, 1991 default judgment. The court rejected Mr. “N”’s various objections, stating *inter alia*: Mr. “N” had proper notice of the 1991 judgment; he offered no valid justification for filing his appeal several years late; his pleas of procedural irregularities were made in bad faith; and his objection to paternity was irrelevant, as he had, without explanation, not disputed his acknowledgement of paternity until the appeal.

The 2003 German Order for the maintenance of Ms. "M" after reaching the age of majority

35. Following Ms. "M"'s attaining the age of eighteen, the age of majority, Applicants filed suit against Mr. "N" in the Local Court of Frankfurt on the Main, Germany, seeking maintenance of €847,25 monthly from May 1, 2002, as well as €3,389,00 in arrears for the period from January 1 through April 30, 2002. Ms. "M"'s claim for maintenance after her eighteenth birthday was based on her continuing status as a dependent student.²⁵

36. On January 20, 2003, the Frankfurt Court issued an Order, which is the basis for Applicants' third request to the Administration Committee. This Order describes Ms. "M" as the illegitimate child of Mr. "N", states that she had reached the age of majority on January 9, 2002, and orders, on an interim basis, the payment of maintenance of €227,03 monthly from April 30, 2002, based on Ms. "M"'s substantiated representation that she would be continuing to attend school. The Order also states that with the July 20, 1994 Order of the Darmstadt Local Court, the maintenance of Ms. "M" before reaching age eighteen had been "finally judged."

37. The 2003 Order provides:

"The following interim order is herewith given:

Defendant shall be obligated to pay to petitioner every month . . . a maintenance sum of 227,03 Euro as of 2002-04-30.

The wider petition shall be dismissed.

The costs of this procedure are part of the costs in the main case.

Reasons:

Petitioner is the illegitimate child of defendant, born on 1984-01-09.

With sentence of the Local Court at Darmstadt on 1994-07-20 the maintenance for petitioner until reaching the age of 18 has been finally judged Petitioner has reached the age of majority on 2002-01-09.

Maintenance shall be paid to petitioner by means of an interim order amounting to 227,03 Euro monthly effective from filing the petition (Section 644 Code of Civil Procedure).

²⁵The record contains a minor inconsistency: Dr. "M" has indicated that this lawsuit seeks *inter alia* the arrears from January 1, 2002, while Ms. "M" did not turn eighteen until January 9, 2002. This appears to be a mistake by Dr. "M", as she later indicated that this claim is for support from January 9, 2002. The January 20, 2003 German Order suggests the same conclusion.

Petitioner of age has substantiated that she will continue to go to school—probably until June 2004—and that she has no personal income.

She has also substantiated that defendant disposes of a net income of 15,000.00–17,000.00 US-Dollars, and her mother of net 7,216,51 Euro monthly.

In the procedure of an interim order, only the minimum maintenance can be secured which is shown in the Dusseldorf list with 311,00 Euro. Since both parents have to contribute to the maintenance for petitioner of age, and since according to the substantiated affirmation by petitioner, a share of defendant of 73 percent is resulting, the maintenance to be paid by defendant amounts to 227,03 Euro monthly.”

(Emphasis in original.) Like the earlier orders of the Darmstadt Local Court for support until the age of majority, the 2003 Order of the Frankfurt Local Court makes no reference to Mr. “N”’s Fund pension benefits.

38. Dr. “M” asserts that it has not been possible to effect service of the complaint on Mr. “N” because he has frustrated attempts “to serve him with documents” in Finland and Washington, D.C.²⁶ An “Affidavit of Non-service” states that service was attempted on Mr. “N” at his Washington, D.C. address on June 30, 2003.²⁷ Dr. “M” indicated to the SRP Administration Committee, on reconsideration of her 2003 request, that the documents being served were the “new court decisions . . . referring to child support for [Ms. “M”] from the age of 18”; however, the affidavit does not identify the document(s) being served. The November 5, 2004 minutes of a session of the Frankfurt Local Court,²⁸ bearing the same case number, state that service on Mr. “N” at his Finnish address had not been effected and that a new court hearing was ordered.

39. Dr. “M” subsequently submitted to the Tribunal a decision of November 18, 2005 pertaining to the same case, concluding that “[t]he realization of a hearing in conciliation proceedings shall be dropped . . . because conciliation proceedings appear as a hopeless venture.” By the same decision,

²⁶However, in a submission made in the D.C. Superior Court dated July 25, 2002, Dr. “M” stated: “[Mr. “N”’s] obligation to pay child support continues even though [Ms. “M”] . . . has reached majority; in June, Defendant was served with the summons of a new child support proceeding by the Court of Frankfurt.” While it appears that Dr. “M” was referring to the aforementioned lawsuit, Applicants represented to the Tribunal that no service has been effected with respect to this lawsuit and the evidence discussed below indicates the same.

²⁷The document cites the following reasons for failure to effect service: “Not found. Female occupant stated subject not known at address.”

²⁸Dr. “M” submitted an unofficial English translation.

Mr. "N" was summoned to appear at a hearing of the Frankfurt Court to be held on November 10, 2006. Dr. "M" described this proceeding as

" . . . the regular hearing concerning the complaint filed on April 26, 2003 demanding support of Mr. ["N"] in the amount of €847,25 per month beginning May 1, 2002. It is the general, regular hearing about the matter. After the hearing, a judgment can be rendered. . . . However, this applies only if Mr. ["N"] can be successfully served on his [Washington, D.C.] address."

More recently, Dr. "M" informed the Administrative Tribunal that the hearing has been postponed until January 30, 2007 as a result of inability to effect service on Mr. "N".

Judicial Proceedings in the United States_

U.S. litigation seeking enforcement of the German Orders of 1991, 1994, and 1995

40. In 1997, Dr. "M" initiated proceedings in the Family Division of the Superior Court of the District of Columbia seeking enforcement of the German Orders of 1991, 1994, and 1995.²⁹ Her request initially was denied by a Hearing Commissioner on March 13, 1998 on the grounds that (1) the D.C. Superior Court lacked jurisdiction over Mr. "N" (who the court determined was a resident and domiciliary of Finland) under the Uniform Interstate Family Support Act ("UIFSA") and the D.C. long-arm statute; and (2) the German court's personal jurisdiction was doubtful.

41. On July 16, 1999, the D.C. Superior Court reversed the Hearing Commissioner's decision, rejecting the two statutory defenses raised to the registration and enforcement of the support orders, i.e. lack of personal jurisdiction of the issuing German court and of the D.C. Superior Court. The Superior Court concluded as follows:

"[The Hearing] Commissioner . . . stated that he doubted that the Republic of Germany had any basis for personal jurisdiction over the respondent. To the extent the trial court based its ruling of dismissal on this section [D.C. Code § 30-346.7 (a)(1)], this Court concludes this was error as it is plainly wrong and without evidence to support it. First, respondent never claimed at trial that the issuing tribunal lacked personal jurisdiction over him. Indeed, respondent specifically testified that he had not made any attempts to challenge the support Order in Germany because he had

²⁹The claim was filed on Applicants' behalf by the German Institute for Guardianship on December 4, 1997.

no ties there and the enforcement matter was brought in the District of Columbia As such, respondent has waived this defense. Second, there is simply nothing in the record to support the contention that the German courts lacked the jurisdiction to issue the Order at hand. Thus, this Court concludes that the trial court erred in rendering its decision on this basis.”³⁰

The D.C. Superior Court further concluded that it had personal jurisdiction over Mr. “N”.³¹ Accordingly, on August 5, 1999, the D.C. Superior Court recognized the German Orders and ordered their enforcement.³²

42. In December 1999, a writ of attachment was served on the Bank-Fund Staff Federal Credit Union to garnish Mr. “N”’s bank account, which Applicants acknowledge yielded \$37,607.53 in partial satisfaction of the amount due. Thereafter, in December 2001, the D.C. Superior Court held Mr. “N” in contempt of court for failing to pay the remaining obligation and issued a warrant for his incarceration. Mr. “N” was not incarcerated at that time, however. The court set a payment schedule and withheld Mr. “N”’s passport. After he made a single payment of \$10,000, the court granted Mr. “N”’s request for his passport in order to travel abroad on business. Mr. “N” failed to appear at the subsequent hearings and another warrant was issued in March of 2002.³³

43. On April 30, 2002, the D.C. Superior Court ordered that the total amount of child support owed pursuant to the German Orders of 1991, 1994, and 1995 (calculated at U.S. \$71,905.81³⁴) be paid by Mr. “N” and disbursed “as [Dr. “M”] shall direct.” The order stated that, contrary to Mr. “N”’s conten-

³⁰As noted above, Mr. “N” subsequently appealed the German Orders, but his appeal was denied on May 22, 2002 as untimely.

³¹This holding was based on the findings that: (1) neither “continuing exclusive jurisdiction,” nor residency in D.C. is required to enforce a support order under UIFSA; and (2) the D.C. court has jurisdiction under UIFSA’s long-arm provision, since Mr. “N” was personally served with notice within D.C., and, alternatively, Mr. “N” had significant contacts with D.C. that establish jurisdiction under both UIFSA and D.C.’s general long-arm statutes.

³²Some decisions of the D.C. Superior Court and D.C. Court of Appeals appear to treat the complaint of the German Institute of Guardianship filed in 1997 (which initiated this registration of the German Orders in the U.S.) as the registered order. Thus, any references to a German order of 1997 are essentially references to the German Orders of 1991, 1994, and 1995 that underlie the child support obligation asserted in the 1997 complaint. This confusion is explained in the D.C. Superior Court Order of August 12, 2003.

³³Mr. “N”’s counsel proffered that Mr. “N”’s passport had expired and he was unable to renew it due to the fact that he owed outstanding child support to Dr. “M”.

³⁴This amount was arrived at by subtracting the amounts obtained from Mr. “N” from the total amount of \$122,513.34 owed by Mr. “N” under the German Orders of 1991, 1994, and 1995.

tion, Ms. "M", rather than the German authorities, was the appropriate payee for the child support awarded.³⁵ On November 25, 2002, the Superior Court further ordered Mr. "N" to pay an additional \$30,137.63 in attorneys' fees and costs and \$27,904.81 in interest plus 4% per annum on the outstanding award.

44. Mr. "N" undertook several rounds of appeal with respect to the writ of attachment issued against his bank account in Washington, D.C., culminating in a denial of his objections by the D.C. Court of Appeals on December 8, 2005. The Court of Appeals affirmed the Superior Court's Order of August 12, 2003 directing Mr. "N" to pay the support arrears in full. The Court of Appeals upheld the trial court's determination that Mr. "N"'s contentions that the German court lacked personal jurisdiction and Dr. "M" lacked standing to enforce the judgments were barred because of his failure to appeal from the D.C. Superior Court's July 16, 1999 Order that had decided these issues. The Court of Appeals also rejected Mr. "N"'s challenge to the D.C. Superior Court's subject matter jurisdiction, as well as his contentions that the matter should be removed to a U.S. federal court or to a court in Finland. Over the years, the D.C. courts have characterized Mr. "N"'s numerous motions challenging the various orders of the D.C. Superior Court in this matter as "repetitive," "baseless," "frivolous," and "abusive."

45. The Fund asserts that of the District of Columbia court orders considered above, Dr. "M" provided only one to the SRP Administration Committee as part of its consideration of Applicants' requests, i.e. the D.C. Superior Court Order of August 5, 1999, which appears to have been submitted with her first request. However, as explained below, on May 2, 2002, Dr. "M" apparently forwarded to the Secretary of the Administration Committee another order issued by the D.C. Superior Court, which appears to have been the Order of April 30, 2002.

U.S. litigation seeking a Qualified Domestic Relations Order ("QDRO")

46. On the basis of the foregoing orders, on June 28, 2002, Dr. "M" initiated a separate effort through the District of Columbia courts to obtain

³⁵The court relied on the documentation submitted by Dr. "M", in which the relevant German authorities indicated that "they are not to receive any of the funds now on deposit with the court or to be deposited in compliance with the German Orders" and that Dr. "M" was authorized by these agencies to collect from Mr. "N" any sums paid by those agencies to her in child support. The court added that "any issue as to whether the funds should be paid to German government agencies as reimbursement would be an issue between those agencies and [Ms. "M"]."

a Qualified Domestic Relations Order “for enforcement of child support arrears as stated in the Order of this Court of April 30, 2002 (\$71,905.81).” The proposed order submitted to the court by Dr. “M” stated that it was “intended to be a Qualified Domestic Relations Order for enforcement of child support arrears pursuant to the domestic relations law of the District of Columbia.” The proposed order is similar but not identical to the model order provided by the Fund to requesters under SRP Section 11.3. It is a matter of factual dispute as to whether Dr. “M” was provided by the Fund with its model order or whether, as she contends, she submitted the motion on the advice of an acquaintance.

47. On September 30, 2003, the D.C. Superior Court denied Dr. “M”’s motion for a QDRO on the ground that the Fund is immune from garnishment proceedings.³⁶ On December 8, 2005, the D.C. Court of Appeals affirmed,³⁷ without prejudice to reconsideration by the Superior Court in light of additional documentation submitted by Dr. “M” for the first time on appeal.

48. According to Respondent, the Superior Court thereafter requested that the Fund make an appearance at a hearing on reconsideration to provide its views on the question of the immunities of the Fund and the SRP. Instead, the Fund responded to the request by providing the court with an aide-mémoire, stating its views on the question of immunity and the scope of Section 11.3 with respect to past-due child support. The Fund additionally noted: “The IMFAT is the proper forum for resolving [Ms. “M”]’s complaint about the scope of Section 11.3 of the SRP, because only the IMFAT has jurisdiction to grant a remedy to [Ms. “M”] as against the SRP or the IMF.”

49. On June 21, 2006, the D.C. Superior Court issued a “Memorandum and Order Denying Petitioner’s Motion for Reconsideration of Proposed QDR Order *Against the IMF*” (emphasis supplied), affirming its previous decision concerning immunity of the IMF and the SRP. At the same time, the Court issued a “Qualified Domestic Relations Order *Directed to [Mr. “N”]*” (emphasis supplied), which appears to be based on the Model Qualified Domestic Relations Order (described below) that the IMF provides to requesters under SRP Section 11.3. The June 21, 2006 Superior Court Order provides in pertinent part:

³⁶Respondent asserts that Dr. “M” did not inform the Administration Committee of any proceedings relating to this motion; Mr. “N” submitted an excerpt from the September 30, 2003 Order at the time of reconsideration by the Committee of the denial of Applicants’ 2003 request.

³⁷On January 13, 2006, the D.C. Court of Appeals denied a Motion for reconsideration of this decision.

“. . . in accordance with Section 11.3 of the Plan, [Mr. "N"] as soon as may reasonably be done following the issuance of this Order, shall irrevocably direct in writing to the Secretary of the Administration Committee of the Plan that, if as and when they become payable, a portion of [his] benefits, that is 16 $\frac{2}{3}$ percent of each monthly payment, shall be paid to [Dr. "M"], the Alternate Payee, from the Plan and from the Supplemental Retirement Benefits Plan, to the extent that implementation requires payment through it, in a amount equal to \$71,905.81 in U.S. Dollars"

Accordingly, the 2006 Order of the D.C. Superior Court requires Mr. "N" to direct that past-due child support obligations to Ms. "M" be paid from his future Fund pension payments. In so deciding, the court observed that Mr. "N" ". . . has made no effort to fulfill his Court-ordered obligations to support his child. Indeed, [Mr. "N"] appears to have left the jurisdiction and is attempting to avoid the legal process of this Court by absconding from the United States."

Judicial Proceedings in Finland

50. In 1999, Dr. "M" also initiated proceedings in Finland seeking enforcement of the German Orders of 1991, 1994, and 1995. On May 25, 2001, the Supreme Court of Finland ordered that two judgments of the German Court of Darmstadt, awarding child support and legal expenses, dated July 20, 1994 and December 19, 1994, respectively, are "in force in Finland without separate confirmation" and are "ordered to be enforced."³⁸ This decision also concluded that there was no indication in the record that Ms. "M" had transferred her receivables to the German authorities. This finding was made, apparently, in response to Mr. "N"'s contention that Dr. "M" lacked standing to seek enforcement of these Orders because German Government agencies had been paying support to Ms. "M" and were, therefore, the real parties in interest.³⁹

51. Based on the decision of the Finnish Supreme Court, execution commenced against shares owned by Mr. "N" in a company in Finland, but was stayed for two weeks in December 2001 to allow Mr. "N" to file a claim contesting execution based on his assertion that he already had paid the amount due, pursuant to an order of the D.C. Superior Court of August 10, 1999.⁴⁰

³⁸The court also noted that, by order of the D.C. Superior Court of August 5, 1999, this judgment was in force in Washington, D.C.

³⁹The record reflects that Dr. "M" did not bring the decision of the Supreme Court of Finland to the attention of the Administration Committee prior to her request for reconsideration of the Committee's denial of her 2003 request.

⁴⁰This, apparently, is a reference to the August 5, 1999 Order of that court.

Subsequently, Mr. "N" filed a claim in the Turku District Court, Finland, contesting the German Orders based *inter alia* on his objections to the determination of paternity and Applicants' standing, and demanding reimbursement of certain amounts obtained by Applicants through the proceedings in Washington, D.C.⁴¹ Dr. "M" asserted before the Tribunal that Mr. "N"'s claim "has been rejected by the Local Court of Turku on December 14, 2004," but did not provide any supporting documentation.⁴²

52. Applicants maintain that although the German Orders are enforceable in Finland, execution is impossible because "the only assets owned by [Mr. "N" in Finland] are completely pledged to Nordia Bank, Finland." The Fund takes the view that "[i]t is not clear whether any execution of the German judgments has occurred in Finland." None of the orders obtained from the Finnish courts appears to refer to Mr. "N"'s Fund pension benefits.

Proceedings in the Administration Committee of the Staff Retirement Plan

53. In addition to seeking enforcement of the German support orders in the courts of the United States and Finland, Applicants made three requests, in 1999, 2002, and 2003, to the Administration Committee of the Fund's Staff Retirement Plan to have the German Orders of 1991, 1994, 1995 and 2003 given effect under Section 11.3 of the Plan.⁴³ As detailed below, each of these

⁴¹Mr. "N" was apparently referring to this lawsuit, when he stated in his January 28, 2003 fax to the Administration Committee that he had filed "a case seeking reimbursement of payments that I have made 'under pressure' in D.C."

⁴²On March 21, 2006, Respondent, in response to a Request for Information, informed the Tribunal that it had received two communications from Mr. "N" regarding litigation in Finland. Respondent states that it informed Mr. "N" that the Fund would not submit any communications to the Tribunal on his behalf, and that he should do so himself if he wished to enter this information into the Tribunal's record. The Tribunal has not received any such communications from Mr. "N".

⁴³Section 11.3 provides in full:

"11.3 Notwithstanding the provisions set forth in Section 11.1, a participant or retired participant may, pursuant to a legal obligation arising from a marital relationship or pursuant to a legal obligation to make child support payments, evidenced by an order of a court or by a settlement agreement incorporated into a court order, direct in writing to the Secretary of the Administration Committee that a benefit that would otherwise be payable to him during his life under the Plan be paid to one or more former spouses or a current spouse from whom there is a decree of legal separation, his child or children, who are under 22 years of age, or the court approved guardian of such child or children.

(a) The benefit payable shall not exceed:

(i) when payable to the spouse or former spouse, 50 percent of the portion of the

requests was denied, resulting in the present Application before the Administrative Tribunal.

participant's or retired participant's benefit that is attributable to his eligible service during the period of the couple's marriage whenever the obligation or obligations to which the court order relates are for support of the spouse or former spouse or division of marital property or both, and

(ii) when payable to a child or children or their parents or guardians, 16% percent of the benefit payable to the participant or retired participant whenever the court ordered obligation is for support of his child or children. The sum of payments to two or more children, or their parents or guardians on their behalf, shall not exceed 16% percent of the benefit payable to the participant or retired participant; such payments shall be made in equal shares unless otherwise allocated by decision of the Administration Committee pursuant to rules adopted by it.

(b) In the event that a participant or retired participant fails to submit a timely written direction in compliance with the court order to the Secretary of the Administration Committee, under such rules and conditions of acceptance as are prescribed by the Administration Committee, a spouse or former spouse or a child or children, or parents or guardians acting on their behalf, of such participant or retired participant who is a party to the court order or orders may request that the Administration Committee give effect to such court order or orders and treat the request in the same manner as if it were a direction from such participant or a retired participant. Pending the Administration Committee's consideration of such request or the resolution of a dispute between a participant or retired participant and the spouse or former spouse, or the child or child's parent or guardian, regarding payment of amounts payable under the Plan, the Administration Committee may withhold, in whole or in part, payments otherwise payable to the participant or retired participant or the spouse or former spouse, child or child's parent or guardian.

(c) A direction or accepted request or payment incident thereto shall not convey to any person an interest in the Retirement Fund of the Plan or give any elective rights under the Plan to such person. A direction or accepted request must be consistent with the provisions of the Plan, which in the event of conflict will be deemed to override the direction or accepted request. Any direction or accepted request shall be irrevocable; provided, however, that a participant or retired participant, spouse or former spouse, child or child's parent or guardian, as the case may be, may request, upon evidence satisfactory to the Administration Committee based on a court order or a provision of a settlement agreement incorporated into a court order, that he be permitted to issue a new direction or submit a new request in writing that would increase, diminish, or discontinue the payment or payments; and provided, further, that any direction or accepted request shall cease to have effect following the death of the participant or retired participant. If a beneficiary under a direction or accepted request predeceases the participant or retired participant, the payments shall not commence or if they have commenced shall thereupon cease. In the event that the payment or payments under a direction or accepted request have been diminished, discontinued or have failed to commence or have ceased, the corresponding amount of benefit payable to the participant or the retired participant shall be restored less the value of any amounts paid as withdrawal or commuted sums."

Applicants' 1999 Request to the Administration Committee

54. On September 15, 1999, Dr. "M" made her first request to the Administration Committee:

"[W]ith reference to the numerous conversations and the correspondence between my lawyers and the German Foreign Office on the one hand and . . . representatives of the IMF on the other hand . . . as well as your Staff Bulletins dating May 4 and June 8, 1999 provided to me . . . by the German Embassy, I enclose herewith the following documents:

. . .

I herewith confirm and repeat my request to you to honour [the German Orders of 1991, 1994 and 1995] for child support for [Ms. "M"] . . ." ⁴⁴

Dr. "M" attached various documents, including: a certified copy of Mr. "N"'s recognition of paternity of January 14, 1991; the German Orders of 1991, 1994, and 1995; the D.C. Superior Court Order registering the German Orders pursuant to UIFSA; and Mr. "N"'s letter of October 25, 1993 to the Darmstadt Local Court, stating (with reference to the case number indicated on the 1994 and 1995 German Orders) that he objected to the legal proceedings commenced against him by Ms. "M" and that he "[did] not recognize any part of these false claims."

55. Shortly thereafter, on September 24, 1999, a member of the Fund's Legal Department, who served as the Legal Representative to the SRP Administration Committee, responded to Dr. "M"'s request as follows:

"While the court orders you presented might have been effective for the garnishment of wages if Mr. ["N"] had continued to be employed by the Fund and was receiving a salary from the Fund, they are not effective with respect to the . . . SRP or any pension payments made by the SRP. In order to fulfill the legal requirements to maintain its qualified status, the SRP has 'non-alienation' provisions that prohibit the SRP from diverting pension payments from a retiree and making payments for the debt obligations of a retiree. There are provisions in the SRP under which payments for support of a former spouse or a child may be allowed under specified circumstances, *but only when the support payments are pursuant to*

⁴⁴Dr. "M" indicated to the Committee that she was repeating an earlier request made on her behalf by the German Embassy by a letter in June of 1998. According to the Fund, this was a request to the Fund to "use its influence to convince [Mr. "N"] to meet his parental obligations as established by the German courts." However, Dr. "M" apparently does not challenge Respondent's treatment of that request in her pleadings before the Administrative Tribunal, and the record contains no evidence of any Administration Committee action on that request.

a legal obligation arising from a marital relationship evidenced by a court order or decree. (Section 11.3 of the SRP is attached). Based upon the information we have, it appears that you would not qualify as a spouse or former spouse in order to pursue your claim under the provisions of the SRP.

Therefore, under the circumstances, there would be no basis upon which the Fund could act favorably upon your request."

(Emphasis supplied.) This communication was copied to the Secretary of the Administration Committee, as well as to Mr. "N".

56. Dr. "M" responded to the Legal Representative a week later, on October 1, 1999, challenging the Fund's interpretation of Section 11.3 and the legality of the "marital relationship" requirement:

"I cannot agree with your interpretation of your internal rules which you attached to your letter [of September 24, 1999]:

. . . [T]hose court orders which were attached to [my letter of September 15, 1999] entitle **the child itself** to payment and not the mother or the father or a 'spouse'. It is therefore not 'my' claim ('your claim') which I am pursuing, but that of [Ms. "M"]. I therefore think that your internal rules [SRP Section 11.3] have to be interpreted in the way that the 'protected class' with respect to child support is the **respective child itself** . . ."

(Emphasis in original.) Dr. "M" provided a detailed analysis of the language of Section 11.3, which she contended constituted a proper interpretation of this Section.⁴⁵ She further stated:

". . . I cannot imagine any reason why the [IMF] would make a distinction between children ('designees') represented by a 'spouse or former spouse' and those represented . . . by another person or entity (e.g. natural mother or father not being a spouse, guardian etc.). A 'spouse or former spouse' may be deceased or otherwise not available. Interpreted the wrong way, your internal rules may even conflict with universally recognised human rights which prohibit discrimination by 'birth' and with the constitutions of your member and donor states which require the governments to make sure that children born 'out of wedlock' receive equal treatment to those 'born in wedlock' (see e.g. Article 6 para. 5 of the German Grundgesetz). . . .

I therefore think that [Ms. "M"], [Mr. "N"]'s daughter, is very well entitled that you honour judgements in her name under your own internal rules.

⁴⁵She also asserted that, with respect to wage garnishment orders, the Fund accepted requests from an individual having custody of the child, not only from a former spouse, citing Staff Bulletin No. 99/11 (May 4, 1999).

However, if we cannot reach an agreement in the above matter soon, the judgements will have to be enforced by the competent courts.”

57. The record contains no evidence of any further response by the Fund to Dr. “M”’s 1999 request. Thereafter, according to Respondent’s account, Dr. “M” contacted the offices of the Fund’s Executive Directors for Germany and the United States, and the former office engaged the Fund’s management in a discussion that led to the abolition of the “marital relationship” requirement for giving effect to child support orders. On December 27, 2001, the IMF Executive Board amended Section 11.3 of the Plan to authorize the Administration Committee to permit payment of a portion of a Fund retiree’s pension for child support “. . . pursuant to a legal obligation arising from a marital relationship *or pursuant to a legal obligation to make child support payments*” (emphasis supplied), effectively abolishing the distinction between a child born within a marriage or out of wedlock for purposes of Section 11.3.⁴⁶

Applicants’ 2002 Request to the Administration Committee

58. On January 31, 2002, approximately one month following the amendment of SRP Section 11.3, Dr. “M” made a second request to the Administration Committee to give effect to the identical court orders that were the subject of her 1999 request, noting the change in the Fund’s policy. On March 18, 2002, the Secretary of the Administration Committee responded, enclosing a copy of the amended Section 11.3, the applicable Rules of the Administration Committee, and a “model request” to give effect to a court order to guide Dr. “M” in the preparation of her request.

59. The model request forwarded to Dr. “M” provided in part:

“REQUEST TO GIVE EFFECT TO COURT ORDERED SUPPORT FOR A CHILD OF A PARTICIPANT BY THE PARENT OR GUARDIAN

I, [NAME], in accordance with Section 11.3 of the Staff Retirement Plan of the International Monetary Fund (the ‘Plan’) and the Rules of the Administration Committee under Section 11.3 of the Staff Retirement Plan (the ‘Rules’), and pursuant to a [DECREE OR ORDER NAME] entered by the [COURT], an authenticated copy of which is attached hereto, hereby request the Plan to treat this request as if it were a direction from [PARTICIPANT OR RETIRED PARTICIPANT] and to pay to me, as (parent or guardian) of [CHILD’S NAME] if as and when they become payable to [NAME OF PARTICIPANT OR RETIRED PARTICIPANT], a portion of the

⁴⁶See *infra* Consideration of the Issues of the Case. See also *Mr. “P”* (No. 2), paras. 69–87.

pension benefits attributable under the Plan (and under the Supplemental Retirement Benefits Plan to the extent that implementation requires payment through it) in the amount of, not to exceed 16⅔% of the benefits payable to [NAME OF PARTICIPANT OR RETIREE] for support payments to all children.

The attached court order, which is currently in effect and binding on the parties, required [PARTICIPANT OR RETIRED PARTICIPANT] to submit a direction to the Plan to give effect to the order. At least thirty (30) working days have expired since the issuance of the court order and to the best of my knowledge and belief, [PARTICIPANT OR RETIRED PARTICIPANT] has failed to submit such direction.

..."

60. While the Secretary's letter also stated that a model court order was enclosed, the record is not clear as to whether the Fund ever provided such a "model order" to Applicants.⁴⁷ (The "model order" is to be distinguished from the "model request" described above, which the parties do not dispute was provided to Dr. "M".) In response to a Request for Information from the Administrative Tribunal, Respondent submitted the model court order provided to individuals who inquire about Section 11.3 of the SRP, stating that the model order has remained unchanged since 1999. The model order provides in relevant part:

"QUALIFIED DOMESTIC RELATIONS ORDER

...

... this Order relates to, recognizes, and governs the [MARITAL PROPERTY RIGHTS OF] [ALIMONY and/or CHILD SUPPORT PAYABLE TO] [SPOUSE'S NAME], the Alternate Payee, and [HIS/HER] right to portion of the benefits of [STAFF MEMBER'S NAME], a [PARTICIPANT OR RETIRED PARTICIPANT] in the Staff Retirement Plan ('Plan') of the International Monetary Fund and its Supplemental Retirement Benefits Plan to the extent that implementation requires payment through it; . . .

⁴⁷The Fund maintains that the model order is provided to all interested parties. However, Dr. "M" maintains that she "cannot remember having ever received or even seen [the Fund's model order]," despite substantial similarities between this order and the proposed order (described above) filed by Dr. "M" with the D.C. Superior Court on June 28, 2002. Dr. "M" earlier had indicated to the Tribunal that she could not "exclude with absolute certainty that [she] did not receive any . . . 'model order' at any time in any manner." The Fund initially asserted in its pleadings before the Tribunal that the model order was provided to Applicants as referenced in the Secretary's letter, but later indicated that its file of the Secretary's correspondence to Dr. "M" does not contain a copy of the model order, and therefore Respondent is unable to confirm whether it was in fact provided to Dr. "M".

...

ORDERED, that in accordance with Section 11.3 of the Plan, the [PARTICIPANT OR RETIRED PARTICIPANT], as soon as may reasonably be done following the issuance of this Order, shall irrevocably direct in writing to the Secretary of the Administration Committee of the Plan that, if as and when they become payable, a portion of the [PARTICIPANT'S OR RETIRED PARTICIPANT'S] benefits, [including applicable costs of living supplements], shall be paid to the Alternate Payee from the Plan and [from the Supplemental Retirement Benefits Plan, to the extent that implementation requires payment through it,] in an amount equal to [DESCRIBE AMOUNT AND TYPE OF BENEFIT (specific percentage or specific amount; see Rules 3, 4, 5, 7, 8 and 9)]; [AND REFER TO THE PLAN & SUPPLEMENTAL RETIREMENT BENEFITS PLAN]; . . .

..."

61. On March 20, 2002, two days following the Secretary's correspondence with her, Dr. "M" resubmitted her request of January 31, 2002, this time using the model request and noting that the request was a "confirmation and repetition" of her September 15, 1999 request to give effect to the German Order of February 23, 1995. Additionally, as evidenced by an email trail between the Secretary and Dr. "M", it appears that on May 3, 2002, Dr. "M" forwarded to the Secretary an Order of the D.C. Superior Court, which was likely the Order of April 30, 2002, ordering that the total amount of child support owed pursuant to the German Orders of 1991, 1994, and 1995 (calculated at U.S. \$71,905.81) be paid by Mr. "N" and disbursed "as [Dr. "M"] shall direct." It is not clear from the record whether the Secretary's further email responses to Dr. "M" in 2002 related to the D.C. Order or to the German Orders on which it was based (and upon which Dr. "M" had based her March 20, 2002 request to the Administration Committee). The rationale for the Fund's decision, however, would appear to be equally applicable to either the D.C. Order or the German Orders on which that D.C. Order was predicated.

62. On May 21, 2002, the Secretary of the Administration Committee informed Dr. "M" that the "order you submitted" had been reviewed by the Fund's Legal Department and did not meet the requirements of SRP Section 11.3 for two primary reasons. First, as Ms. "M" had attained the age of eighteen by the time of the 2002 request, the order was for "past due amounts" rather than "prospective" payments. Second, the order did not meet the requirement for a "court order affecting pension payments, [as] it does not order the pensioner to direct the SRP to make payments to you on behalf of your child."

63. Dr. "M" responded to the Secretary on the following day, maintaining that Mr. "N" was "intentionally evading/delaying service of a new complaint/court order which would stipulate child support . . . 'prospectively.'" She also inquired if judgments for past-due amounts may be given effect under Section 11.3 when "the delay to enforce the respective court order has been intentionally or negligently caused by a staff member, a retiree or the administration of the IMF?"

64. The next day, May 23, 2002, the Secretary reiterated that, even if everything else were in order, the Plan would not make payments beyond the date specified in the order, and that, to his knowledge, no pension plan provides for the payment of past debts; therefore, proper recourse would be in the courts against Mr. "N"'s other assets. Moreover, the Secretary stated, referencing Section 11.3 and the Rules thereunder, that "[t]he order should specify that the participant is required to direct the Plan to make the support payments out of his future benefits."

65. Dr. "M" replied to the Administration Committee's Secretary on the following day, asserting, in respect of the "prospective payments" requirement of Rule 9 of the Rules of the Administration Committee under Section 11.3, that her first request had been made "through letter of the Embassy of the Federal Republic of Germany of June 8, 1998," and was "repeated by letter of September 15, 1999" and subsequently "renewed by letter of January 31, 2002." Dr. "M" added that she had "serious doubts" regarding the validity of Rule 9 in light of Section 11.3, international law, and German constitutional law. Dr. "M" further questioned:

"I cannot believe that it is possible that court orders have to 'specify that the participant is required to direct the Plan to make the support payments out of his future benefits': The rule you quoted (11.3) says only that the 'participant or retired participant may . . . direct in writing' and not the court order: The court order is only 'evidencing' the legal obligation to make child support payments and no more!

If the two of us (including your legal department) do not agree, what are the legal remedies for [Ms. "M"]? Is the Administrative Court of the IMF available for us? To whom are you reporting?"

66. In what appears to have been the final response by the Fund to Dr. "M"'s 2002 request, by email of June 14, 2002, the Secretary of the Administration Committee, "[a]fter further research and consultation with the Fund's Legal Department," replied:

"...

You will recall that the amendments to Section 11.3 of the Staff Retirement Plan that allow[] for payment of child support for children born out of wedlock when specified conditions are met did not take effect until December 27, 2001. The amendments were considered and adopted in light of the applicable Rules of the Administration Committee that expressly provide that 'payments pursuant to a direction or accepted request shall be prospective only' Before the effective date of the amendment, requests for payments for children born out of wedlock had no basis under the Plan and the possibility of payments for such support, if all other conditions were met, would apply only to support from the effective date of the enabling amendment forward.

You have been provided with copies of the provisions of the Plan, applicable rules and standard forms, but you have never submitted a valid request that complies with the requirements and conditions of the Plan and Rules.

According to the court order you submitted, child support was due from Mr. ["N"] until your daughter reached eighteen years of age. Since she is over eighteen years of age, there is no continuing obligation to pay child support for her and unpaid amounts for child support due in the past are debts and no longer prospective obligations to provide child support. Under Section 11.1, the Plan is prohibited from making payments to discharge the debts of a participant"

67. The record evidences no further action on Applicants' 2002 request.

Applicants' 2003 Request to the Administration Committee

68. By letter of February 6, 2003 to its Secretary, Dr. "M" initiated a third request to the Administration Committee, based on the 2003 German Order, as follows:

"I refer to my applications to the IMF of September 15, 1999 and of March 20, 2002 and enclose a new court order of the Local Court of Frankfurt/Germany against [Mr. "N"] for child support in the amount of €227,03 per month. Please honor this decision by deducting the amount from [Mr. "N"]'s pension."

69. Applicants' 2003 request initially was sent by the Secretary for review by the Fund's Legal Department, which advised that it contained the necessary elements to start the process of consideration under Section 11.3. According to the summary of events later provided in the minutes of the Administration Committee:

"The order did not specify that the amounts should be paid out of [Mr. "N"'s] pension, nor did it impose an obligation on the pensioner to

direct the payment out of his pension. Nevertheless, in the context of the history of this case, the Legal Department had advised [the Committee] that although the court order did not comply with the form of the model QDROs, it contained the necessary elements to initiate the Section 11.3 review.⁴⁸

Accordingly, pursuant to Rule 1(b)⁴⁹ of the Administration Committee's Rules under Section 11.3, on February 26, 2003, the Administration Committee transmitted Dr. "M"'s request to Mr. "N" for his comments.

70. On April 10, 2003, Mr. "N" responded to the Committee with a lengthy statement of his objections to Applicants' request to give effect to the 2003 German Order. In particular, Mr. "N" asserted that the Order was preliminary and not a final and binding order as required by the Administration Committee Rules under Section 11.3, and that the matter was the subject of active litigation in three countries. Mr. "N" further contended: he had no notice of the hearing that led to the issuance of the order; he had not been served in respect of any German proceedings; the Frankfurt Court did not have jurisdiction over him; Dr. "M" did not have standing to seek enforcement of the German Orders of 1991, 1994, and 1995;⁵⁰ and the 2003 German Order had no legal effect in Finland where he is domiciled because Applicants had not obtained recognition and enforcement of the order in Finland. Mr. "N" also asserted that he is not the father of Ms. "M", that he was disputing paternity in various ongoing legal proceedings, that under

⁴⁸This view of the Legal Department was communicated in essentially the same terms by the Secretary's Memoranda to the Committee of May 30, 2003 (concerning the initial request) and January 27, 2004 (concerning the Request for Review), as well as in the minutes of the Administrative Committee's meeting on Applicants' Request for Review.

⁴⁹Rule 1(b) of the Administration Committee Rules under Section 11.3 provides in pertinent part:

"(b) in the event that a participant or retired participant fails to submit a direction within thirty (30) working days of the issuance of a relevant court order or decree, the Administration Committee may accept a request made by the participant's or retired participant's spouse or former spouse to give effect to the relevant court order or decree and treat the request in the same manner as if it were a direction from a participant or retired participant. The Secretary of the Administration Committee will give a participant or retired participant written notice of such a request from a spouse or former spouse. The participant or retired participant will be allowed, as the Administration Committee shall specify, at least thirty (30) working days either to consent or to object to the request, giving a full written explanation for any objection. . . ."

⁵⁰Mr. "N" also contended that Dr. "M" had no capacity to file a request on behalf of Ms. "M" because Ms. "M" had reached the age of majority. In response, Dr. "M" submitted a power of attorney authorizing her to "conduct a lawsuit" and carry out other actions in connection with judicial and extra-judicial proceedings.

Finnish law he has no child support obligation with respect to Ms. “M”, and that the order is not enforceable against him in the absence of a determination of paternity by a competent Finnish court. Finally, Mr. “N” further asserted that the order did not comply with the requirements of Section 11.3 because it did not on its face impose any obligation on him “to execute and deliver papers to the Committee.”⁵¹

71. Although neither the Rules of Procedure of the Administration Committee nor the Committee’s Rules under Section 11.3 provide for a subsequent exchange of views, on May 19, 2003, Dr. “M” responded by email to Mr. “N”’s objections.⁵² She stated that Mr. “N” had never revoked his acknowledgement of paternity and would not be able to do so. She further maintained that the German Orders of 1991, 1994, and 1995 had been recognized in Finland by the Helsinki Court of Second Instance, and that the “additional [German] order of December 6, 2002/January 20, 2003 . . . is the prolongation of the previous orders in light of the fact that [Ms. “M”] is continuing school” She also indicated that the German court rejected Mr. “N”’s attempts to reopen the case in Germany. She further asserted:

“This order, even though being ‘provisional,’ is in itself ‘final’ as no legal remedies have been filed by [Mr. “N”]. The provisional order is necessary because the ‘final’ legal procedure—especially, if somebody like [Mr. “N”] is the father—may drag on for many years and the child has to be raised and/or continue her professional education in the meanwhile.”

72. On May 30, 2003, the Secretary of the Administration Committee transmitted a Memorandum to the Committee, summarizing the submissions and contentions of the parties and recommending that the request to give effect to the 2003 Order be denied:

“. . . we understand through informal consultation with a German lawyer, that the Order is in the nature of a preliminary injunction and does not grant enforceable title under German law

. . .

⁵¹Mr. “N” also submitted a number of documents, including excerpts from the record of the Helsinki Court of Appeals, an excerpt from a document issued by the Turku District Court setting a deadline for Mr. “N” to clarify a claim he apparently attempted to file against Applicants on October 13, 2002, the Paternity Act of Finland, and a certificate from the Lapland Local Register Office, stating that the Finnish Population Information System contained no record of Mr. “N”’s being the father of Ms. “M”.

⁵²The email appears to have been addressed to a staff member of the Fund’s Human Resources Department and copied to the Secretary of the Administration Committee.

There are valid questions about the finality and validity of the German Order. Based on the information supplied by the parties, there are at least two points where the criteria for a valid order have not been met. First, a question exists as to the finality of the German Order. Second, two courts are involved and claim jurisdiction. It is not clear that the Helsinki court has recognized the German Order. Consequently, the potential for a conflict in the findings of the courts exists.

Under the circumstances, it is recommended that the Committee reject [Dr. "M"]'s request because the German Order is not final and recognition of the German Order by the Helsinki Court of First Instance has not been documented."

SRP Administration Committee's Decision of June 16, 2003

73. On June 16, 2003, the Committee notified Dr. "M" (with copy to Mr. "N") that it had rejected Dr. "M"'s request to give effect to the 2003 German Order:

"The Committee has concluded that, based on the information supplied by the parties, the finality of the German Order has not been established to the Committee's satisfaction. Moreover, it appears that there are unresolved jurisdictional questions with respect to the German and Helsinki courts; and recognition of the German Order by the Helsinki Court of First Instance has not been documented.

For the above reasons, the Committee has rejected your request and the Committee will take no action on the Order until and unless the parties have resolved these points.

In addition, please note that neither the Fund nor the Committee has the authority to negotiate a lump sum settlement with Mr. ["N"] on behalf of your daughter."

The Channels of Administrative Review

74. The case of *Ms. "M" and Dr. "M"* is the second to be considered by the Administrative Tribunal involving a dispute arising under Section 11.3 of the Staff Retirement Plan. As such, it is subject to the channel of administrative review, established in 1999 by the Administration Committee of the Staff Retirement Plan, for contesting decisions of that body.⁵³

⁵³See generally *Mr. "P" (No. 2)*, paras. 31-37. Decisions arising under the SRP that are within the competence of the Administration Committee are expressly excluded from the jurisdiction of the Fund's Grievance Committee. See GAO No. 31, Section 4.03 (iii). Under Section 7.2 (b) of the SRP, the Administration Committee is charged *inter alia* with:

Rule VIII⁵⁴ of the Rules of Procedure of the SRP Administration Committee, which were notified to staff of the Fund by Staff Bulletin No. 99/17 (June 23, 1999), provides that a Requestor, or any person claiming any rights or benefits under the Plan who wishes to dispute a Decision, may file with the Administration Committee an application for review of a Decision of the Committee within ninety days of its receipt. Pursuant to Rule X,⁵⁵ the chan-

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

Two other applications arising through the channel of review provided by the SRP Administration Committee challenged the denial of requests under SRP Section 4.3 (Disability Retirement). See *Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003) and *Ms. “K”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-2 (September 30, 2003).

⁵⁴Rule VIII of the Rules of Procedure of the Administration Committee of the SRP provides:

- “1. A Requestor, or any other person claiming any rights or benefits under the Plan, who wishes to dispute a Decision may submit an Application for Review of a Decision (hereinafter ‘Application’) to the Secretary within ninety (90) days after the Requestor receives a copy of the Decision. . . .
2. The Committee may review a Decision, either in response to a timely Application or at its own initiative. The Committee may also be required to review a decision at the request of the Pension Committee in accordance with the jurisdiction of that Committee as set out in Section 7.1(c) of the Plan. The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:
 - (a) misrepresentation of a material fact;
 - (b) the availability of material evidence not previously before the Committee; or
 - (c) a disputed claim between two or more persons claiming any rights or benefits under the Plan.
3. If the Committee undertakes to review a Decision, or if it declines to review a Decision, all parties to the Decision shall be notified in writing.
4. Any review of a Decision shall be conducted in accordance with Rules IV, VI and VII. The Committee shall notify the Applicant of the results of its review within three months of the receipt of the Application by the Secretary.”

⁵⁵Rule X of the Rules of Procedure of the Administration Committee of the SRP provides in pertinent part:

“Exhaustion of Administrative Review

1. The channel of administrative review for a Request submitted to the Committee shall be deemed to have been exhausted for the purpose of filing an application with the Administrative Tribunal of the Fund when, in compliance with Article V of the

nel of review for a Request submitted to the SRP Administration Committee has been exhausted for the purpose of filing an application with the IMF Administrative Tribunal when the Committee has notified the applicant of the results of its review of that Decision.⁵⁶

75. The Tribunal notes that Applicants' 1999 and 2002 requests were both dismissed at a threshold stage, in 1999 by the Legal Representative and in 2002 by the Secretary of the Administration Committee. These requests, therefore, were not considered by the Administration Committee as a whole pursuant to the Rules and no channels of review were pursued thereafter; the admissibility of these decisions is considered below. Only the Committee's decision denying Applicants' 2003 request proceeded through the channel of administrative review constituted by the SRP Administration Committee.

Applicants' Request for Review by the SRP Administration Committee of its 2003 Decision

76. On July 28, 2003, pursuant to Rule VIII of the Rules of Procedure of the Administration Committee, Dr. "M" requested that the Committee review its Decision of June 16, 2003 and submitted the following additional documentation: the May 25, 2001 Order of the Supreme Court of Finland, stating that the 1994 German Order was "in force in Finland without separate confirmation and [is] to be enforced here"; the "protocol of unsuccessful-

Statute of the Administrative Tribunal (Statute):

- (a) three months have elapsed since an Application for review of a Decision was submitted to the Committee in accordance with Rule VIII, paragraph 1 and the results of the review have not been notified to the Applicant; or
- (b) the Committee has notified the Applicant of the results of any review of a Decision, or its decision to decline to review a Decision; or
- (c) the conditions set out in Article V, Section 3(c) of the Statute have been met."

⁵⁶The Tribunal has distinguished its role in respect of cases arising through the SRP Administration Committee from those arising through the Grievance Committee:

"... unlike the Grievance Committee, the Administration Committee of the Staff Retirement Plan plays a dual role within the Fund's dispute resolution system. It is responsible for taking the administrative act that may be contested in the Administrative Tribunal and it also supplies what is deemed a channel of review for purposes of the exhaustion of remedies requirement of Article V of the Tribunal's Statute when, pursuant to Article VIII of its Rules of Procedure, it reconsiders its own decision."

Ms. "J", *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 98. The Tribunal accordingly has observed that "... while a decision of the Grievance Committee will not be subject to direct review by the Administrative Tribunal, a decision of the SRP Administration Committee necessarily will be." Ms. "J", para. 98.

ful service of the new court decisions . . . referring to child support for [Ms. "M"] from the age of 18" at Mr. "N"'s Washington, D.C. address; and a May 22, 2002 order of the Darmstadt Regional Court, denying Mr. "N"'s appeal of an earlier judgment of the Darmstadt Local Court and ordering Mr. "N" to pay costs. In addition, Dr. "M" submitted four orders of the Frankfurt and Darmstadt Courts directing Mr. "N" to pay court costs and attorney fees,⁵⁷ and she asked the Committee to deduct these awards from Mr. "N"'s pension benefits as "child support owed for special purposes." None of the documents provided by Dr. "M" referred specifically to the 2003 German Order.

77. The record reflects that the Administration Committee notified Mr. "N" of Dr. "M"'s Request for Review and provided him with a copy of the newly submitted documentation.⁵⁸ Mr. "N" responded to Dr. "M"'s submissions with a series of memoranda in September and October 2003, along with voluminous documentation. Mr. "N" contended that, as Ms. "M" had reached majority, she could no longer make a request under Section 11.3. He also reiterated his aforementioned objections to the 2003 German Order. Mr. "N" submitted numerous documents, including: pleadings filed by Mr. "N" in the Turku Local Court, Finland, in March and October of 2002, contesting the execution of the 1994 German Order, along with related documents from the Turku Execution Office;⁵⁹ court documents and D.C. court orders related to Mr. "N"'s appeals of the writ of attachment; an excerpt from the September 30, 2003 Order of the D.C. Superior Court denying Applicants' motion for a QDRO;⁶⁰ a copy of Finnish law on Child Maintenance; and reports of diverse German child support cases.

⁵⁷Based on the case numbers, one of these orders relates to the German Order of 1991, and another relates to the German Orders of 1994 and 1995.

⁵⁸The January 27, 2004 Memorandum of the Secretary of the Administrative Committee stated that "[p]ursuant to the Committee's rules, and following a review of the documents [submitted by Dr. "M"] by the Legal Department, the Secretary notified the retired participant, [Mr. "N"], of the request for reconsideration, provided him with a copy of [Dr. "M"'s] documentation and asked that he respond within the time period prescribed by the rules."

⁵⁹Mr. "N" included a document in Finnish, which he stated represents "a certification by the Turku Court that attests to the fact that the case is under examination by the Court (*lis pendens*)."

⁶⁰The only substantive part of the order contained in this excerpt is the "Conclusion" section of the order.

SRP Administration Committee's Decision on Review

78. In a Memorandum to the Administration Committee dated January 27, 2004, the Secretary of the Committee summarized the arguments and submissions of the parties on the Request for Review. He noted that Dr. "M" did not provide evidence of Finnish courts' having recognized the 2003 German Order, and that, according to Mr. "N", this question had not yet been settled. The Secretary further noted that the "protocol of unsuccessful service" submitted by Dr. "M" did not identify precisely what document was being served. He also observed that the orders submitted by Dr. "M" awarding costs and attorney fees ordered payments of past-due amounts that could not be given effect under Section 11.3. With respect to Mr. "N"'s submissions, he stated that, while many appeared irrelevant, they did show the existence of an ongoing dispute between the parties on the child support question.

79. On February 20, 2004, the Administration Committee met to address Dr. "M"'s Request for Review. According to the minutes of that meeting, the Legal Representative reiterated the points made in the Secretary's Memorandum of January 27, 2004. The Legal Representative further distinguished the request of Ms. "M" and Dr. "M" from the case of *Mr. "P" (No. 2)*,⁶¹ suggesting that in the earlier case there had been a clear order for the Plan to pay benefits and that therefore escrowing a portion of the pension payments was appropriate, while in the present case there was no clear order directing the Plan to pay child support. In addition, the Legal Representative noted that in *Mr. "P" (No. 2)* there was a former spouse having clear standing and that the Tribunal determined that the two orders were not inconsistent, as only one dealt with the division of property. According to its minutes, the Committee agreed that a *bona fide* dispute still existed and that the parties had not adequately addressed its concerns.

80. Accordingly, by letter of February 25, 2004, the Secretary of the Administration Committee notified Dr. "M" (with copy to Mr. "N") that, upon review, the Committee sustained its decision to deny Applicants' request to give effect to the 2003 German Order:

"In its reconsideration of the matter, the Committee examined the Order and all information submitted in light of each of these criteria. The Committee noted in particular the decision from Finland that you provided, which orders enforcement against Mr. ["N"] of certain German court

⁶¹Although the minutes do not refer to this case by its name, it is clear that this was the case in question.

orders but not the Order to which you have requested the Committee give effect under Section 11.3, which postdates the Finnish decision. The Committee also noted that the Order does not require Mr. ["N"] to direct the Committee to make payments out of his pension benefits, nor does it make any mention of payment from his pension benefits, and thus, the Committee has no basis for determining that the court intended this Order to override the general rule against alienation of benefits in Section 11.1 of the Plan.

In view of the above, and considering Mr. ["N"]'s continuing objections to your request, the Committee has determined that the additional information submitted by the parties did not establish the finality and binding nature of the Order, and that a *bona fide* dispute remained regarding the efficacy and meaning of the Order.

For the above reasons, the Committee has rejected your request and consistent with the Section 11.3 rules, the Committee will take no action on the Order. You should be aware that the decision of the Committee may be appealed to the Administrative Tribunal of the International Monetary Fund within three months of the date of this letter."

81. On May 18, 2004, Applicants filed their Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicants' principal contentions

82. The principal arguments presented by Applicants in the Application, Reply, and Applicants' Additional Statement may be summarized as follows.

1. "Exceptional circumstances" justify waiver of the time limit under Article VI, Section 3 of the Tribunal's Statute to challenge the 1999 decision of the Legal Representative to the Administration Committee refusing to give effect to the German Orders of 1991, 1994, and 1995.
2. Applicants suffered gross injustice by the denial of their 1999 request, which was based on the "discriminatory" and "scandalous" marital relationship condition, later abolished after intervention by the German Ministry of Justice. Furthermore, Applicants were not informed of the possibility of challenging the decision in the Tribunal.

3. Dr. "M" had standing to bring lawsuits seeking enforcement of the German Orders of 1991, 1994, and 1995 because German authorities, having paid a small portion of the awarded support to Ms. "M", had transferred their outstanding claim against Mr. "N" to Dr. "M".
4. With respect to a Qualified Domestic Relations Order ("QDRO"), the Fund "had never informed [Dr. "M"] about a 'QDRO' nor is such a 'QDRO' mentioned in the 'rules' of the IMF which were made known to Applicants." Rather, Dr. "M" attempted to obtain a QDRO from a U.S. court on the advice of an acquaintance.
5. Rule 9 of the Rules of the Administration Committee under SRP Section 11.3, which the Committee concluded precluded it from giving effect to court judgments for past-due obligations and was the basis for the denial of Applicants' 2002 request, unreasonably favors the security of retirement savings over enforcement of child support obligations and rewards "criminal evasion" of child support. Undue hardship for the child and custodial parent results because court judgments are typically "for the collection of past due amounts" and obtaining a final judgment may take years, especially in "international" proceedings and when the defendant evades his obligations. Accordingly, the decision of the Secretary of the Administration Committee denying Applicants' 2002 request cannot be upheld.
6. As to the 2004 decision of the Administration Committee, denying Applicants' request to give effect to the 2003 German Order, the Committee erroneously assumed that a child support order of the home country of the child, to be valid and honored by the IMF, has to be recognized by the home country of the retired participant. This requirement is not in the SRP Rules and would make a timely application to the Committee nearly impossible, since recognition of foreign judgments may take several years. German court decisions need not be recognized in Finland to be valid, and any ongoing litigation in Germany, Finland and the United States should not disqualify Applicants' request.
7. The Supreme Court of Finland has held that the 1994 German Order is "in force in Finland without separate confirmation and [is] to be enforced here." This is also true with respect to the 2003 German Order, because it is "the prolongation of the previous orders" in light of the fact that Ms. "M" is attending school.

8. Mr. "N" is frustrating Dr. "M"'s attempts "to serve him with documents" in Finland and in Washington, D.C., and thus proper service has not been effected. However, notice to Mr. "N" was not required for the proceedings that resulted in the issuance of the 2003 German Order.
9. The 2003 German Order is final, as no legal remedies or appeal have been sought by Mr. "N". This Order is in the nature of an emergency injunction, which will be later replaced and modified "retroactively" by a final judgment. Such orders serve the purpose of securing child support before a final judgment is obtained, which may take many years. In the present case, the final judgment has been delayed due to Mr. "N"'s evasion of Dr. "M"'s attempts to serve him with documents. Accordingly, the Tribunal should order payments from Mr. "N"'s pension in the amount stated in the 2003 German Order (€227,03 monthly) "or whatever the Local Court of Frankfurt/Main orders in the future ('retroactively' or not)."
10. The Administration Committee erroneously assumed that pursuant to SRP Section 11.3 a child support order must expressly "direct the Committee to make payments out of [the participant's] pension benefits" or otherwise mention pension benefits. Such a requirement cannot be found in the internal rules of the Fund. Furthermore, no court in Germany would issue such an order because such a remedy does not exist in the German law, as "the laws in Germany do not permit a court decision in which the defendant is condemned to pay child support (or any other debt) out of specific assets, trusts, accounts, salaries etc."; plaintiffs in Germany may not dictate to the court how to formulate its orders; and garnishment of Mr. "N"'s pension "is excluded under German rules of civil procedure due to the immunity of the IMF."
11. The German court correctly assumed jurisdiction over Mr. "N", as his daughter is a resident of Germany.
12. Contrary to Mr. "N"'s assertion, he never revoked his acknowledgement of paternity and such a revocation would not be possible. This issue, however, "could not be examined by the IMF," since it could only be decided by the national courts.

13. The Fund's contention that Applicants can pursue Mr. "N"'s other assets has no factual basis, since Mr. "N" is almost bankrupt, his Washington, D.C. house could not be seized, his "apartment shares" seized by Applicants have already been pledged to the NORDEA-Bank of Finland, and since Mr. "N" "made sure that there were no more bank accounts to attach."
14. As evidenced by the Fund's Answer, the Fund has committed "grave legal and factual errors" and developed a bias in favor of a former staff member.
15. Applicants "expressly reserve their claim for damages for the case that the IMF-Administration has, intentionally or negligently, prevented Applicants from timely exercising their rights under the Rules of Procedure or the Statute of this Administrative Court or under any other internal rules of the IMF including the IMF-Treaty or from enforcing the child support claim against [Mr. "N"]."
16. Contrary to the Fund's suggestion, Applicants never deliberately withheld any information from the IMF; rather, the Fund has withheld information that could have been useful in Dr. "M"'s efforts to obtain child support.
17. Applicants seek as relief:

". . . all of [Ms. "M"'s] child support (past due and due in future) from her father who is able to pay these modest amounts from his pension without any difficulty:

 - a) payment from [Mr. "N"]'s pension of €227,03 per month or whatever the Local Court of Frankfurt/Main orders in the future ('retroactively' or not),
 - b) payment from [Mr. "N"]'s pension of U.S. \$71,905.81 (child support), U.S. \$30,137.63 (U.S.-attorney fees) and U.S. \$27,904.81 (interest)—in monthly installments of \$1,500."

Respondent's principal contentions

83. The principal arguments presented by Respondent in its Answer, Rejoinder, and Respondent's Additional Statement may be summarized as follows.

1. Applicants' challenge to the Fund's 1999 decision, refusing to give effect to the German Orders of 1991, 1994, and 1995, is time-barred because it was not initiated within three months of the Administration Committee's decision, as prescribed by Article VI of the Tribunal's Statute, but rather "almost 5 years later."
2. Applicants' assertions that they suffered gross injustice by the 1999 decision and that they were not informed of the possibility of review by the Tribunal do not establish "exceptional circumstances" to justify waiver of the statute of limitations under Article VI, Section 3 of the Statute.
3. If the Tribunal were to waive the time limit and consider Applicants' challenge to the Administration Committee's decision, the Tribunal also would have to review the "regulatory decision" on which that individual decision was based, i.e. the "marital relationship" requirement that was part of Section 11.3 at the time of the decision. This provision was not illegal in 1999, but rather constituted a reasonable exercise of the Executive Board's discretion.
4. Even if the Tribunal were to reach the merits, Applicants' 1999 request would have been denied because it suffered from the same defects of efficacy, finality, and meaning as the 2003 request. For example, the 1991, 1994, and 1995 German Orders do not order payment from Mr. "N"'s pension, nor could they have done so because he was not retired at the time of those orders. Thus, those orders are simply judgment debts that cannot be enforced against his pension, pursuant to Section 11.1 of the Plan.
5. The policy of allowing only prospective payments under Section 11.3 reflects the Fund's reasonable judgment that the Plan's primary purpose of providing secure pensions to retired staff "outweighs the policy of giving effect to alimony and support awards, when such awards are past-due rather than prospective, and when there are other means for enforcement through national courts, including attachment of the delinquent's other assets and even incarceration." The public interest in the collection of debts is not as strong as the interest in enforcement of awards for ongoing support. The Plan's strong anti-alienation rule is consistent with the practices of the World Bank, the United Nations Joint Staff Pension Fund, most U.S. public sector pension plans, and every U.S. private sector pension plan that is qualified under the U.S. Internal Revenue Code.

6. As to Applicants' 2003 request, the Committee properly applied the Rules under Section 11.3 in determining that submissions by Dr. "M" and Mr. "N" gave rise to a *bona fide* dispute as to the efficacy, finality, or meaning of the 2003 German Order that was the basis of Dr. "M"'s request. Applicants failed to provide a satisfactory response to Mr. "N"'s objections to the efficacy of this order, which included that (1) the German court lacked jurisdiction over him; (2) he had no notice of the hearing which led to the issuance of the order; (3) Dr. "M" lacked standing to seek child support; and (4) the order had no legal effect in Finland where he is domiciled. Similarly, Applicants did not rebut Mr. "N"'s contentions that the order was preliminary and not final and binding, and that the matter in question is the subject of ongoing litigation in three countries. Finally, Applicants did not adequately answer Mr. "N"'s assertion that the order failed to comply with the requirements of Section 11.3 because it did not direct that payments be made from his pension.
7. Dr. "M" had the burden of proof on these issues and failed to satisfy it. Although various facts undermined Mr. "N"'s credibility, the Committee "did not accept his contentions wholesale," but gave Dr. "M" a full opportunity to respond.
8. The Administration Committee, which is comprised of laypersons, does not have the expertise to decide the contested issues of German and Finnish family law and civil procedure, international conflicts of laws, and recognition of foreign judgments; nor should it engage in a quasi-judicial application of law to the facts. Furthermore, to do so would be outside the scope of its authority, in light of the expressed intent of the Executive Board. Even if the Committee were so authorized, it would be unfair for it to look behind Dr. "M"'s submissions with the purpose of refuting Mr. "N"'s assertions about German and Finnish law in the absence of a substantive response by Dr. "M".
9. Applicants have not provided the Administration Committee with any court order that explicitly orders Mr. "N" to direct the Committee to pay a portion of his Fund pension benefits to Applicants. Such an order is an essential requirement under Section 11.3, and Dr. "M"'s failure to satisfy it was, in and of itself, sufficient to justify the denial of all three requests. "Because there is no court order against [Mr. "N"'s] pension benefits, there is nothing

to which the Administration Committee can ‘give effect’ under Section 11.3(c) of the Plan.”

10. More specifically, Section 11.3 should be interpreted to require “a court order that obliges the participant to direct the Administration Committee to give effect to the order requiring payments from his pension benefits, thereby leaving no doubt that the court intended to effect a transfer of pension benefits.” Such an order is “akin” to a Qualified Domestic Relations Order under U.S. law; in particular, it must clearly indicate the court’s intention to garnish or transfer pension benefits. “Although [Dr. “M”] was provided with Section 11.3 and the Rules, as well as a copy of the model order and the form of Request to give effect to the order, which clearly set out the elements that the order should contain, including the court’s direction that payments be made out of pension benefits, she did not provide the Committee with an Order that conformed with these requirements.” It was the intent of the Executive Board that the Administration Committee, in determining whether court orders satisfy the requirements of Section 11.3, not “look behind the form of the court order” and, if there is any doubt, the Administration Committee “. . . should reject the request and maintain the anti-alienation rule.”
11. Furthermore, in the course of the litigation in three countries, no court has seen fit to issue a final order against Mr. “N”’s pension, and the Administration Committee should not overturn those judgments. Moreover, “one U.S. court specifically decided *not* to award her payment from [Mr. “N”’s] pension.”⁶²
12. Contrary to Dr. “M”’s assertion, there is no reason why the Fund’s immunity would prevent a German court from ordering Mr. “N” to direct that a portion of his Fund pension be paid to Applicants. “The Fund considers that its immunity from garnishment suits is completely irrelevant to the question of whether a QDRO should be issued against [Mr. “N”’s] pension.” The September 30, 2003 decision of the D.C. Superior Court, which denied Dr. “M”’s

⁶²As noted above, following the submission of Respondent’s pleadings, on June 21, 2006, the D.C. Superior Court issued a “Qualified Domestic Relations Order Directed to [Mr. “N”],” recognizing Dr. “M”’s “right to a portion of the benefits of [Mr. “N”] . . . in the Staff Retirement Plan . . . to the extent that implementation requires payment through it, in a amount equal to \$71,905.81 in U.S. Dollars” See *supra* The Factual Background of the Case; U.S. litigation seeking a Qualified Domestic Relations Order (“QDRO”).

motion for a QDRO "was correct, insofar as [it] concluded that the Fund, including [the SRP], is immune from garnishment suits for enforcement of judgment debts and that Section 11.3 allows the Plan to voluntarily give effect solely to *prospective* court orders for alimony and child support. Hence, it was not within the court's power to grant [Dr. "M"]'s request for a QDRO to enforce past judgment debts." (Emphasis in original.)

13. To the extent that Applicants are implying that German law prevents German courts from ordering execution of their judgment against Mr. "N"'s Fund pension, such a limitation would only confirm the correctness of the Committee's denial of their request.
14. Unlike in the case of *Mr. "P" (No. 2)*, if the Tribunal affirms the Administration Committee's decision, Dr. "M" would not be left indefinitely without a remedy, as Applicants have recourse in national courts against Mr. "N"'s other assets. Dr. "M"'s assertions that execution against such other assets is not possible is contrary to the facts and the law. In particular, Dr. "M" could move against the Washington, D.C. bank accounts into which Mr. "N"'s pension is paid and against the Washington, D.C. house that remains in the name of Mr. "N".
15. At the time that the Administration Committee was considering the three decisions in question, Dr. "M" and Mr. "N" failed to provide the Committee with a number of highly relevant documents and other information.

Consideration of the Issues of the Case

84. This case raises for the Administrative Tribunal the following principal issues: (1) are Applicants' challenges to the denials of their 1999 and 2002 requests admissible for review by the Tribunal; (2) was the "marital relationship" requirement of SRP Section 11.3, later revised, dispositive of Applicants' requests to give effect to court-ordered support for Ms. "M" relating to the period pre-dating the revision; (3) in denying Applicants' requests to give effect to each of the court orders at issue, did the Fund err in interpreting SRP Section 11.3 to require that the court order either specify that support is to be paid from the retiree's Fund pension benefits or direct the retiree to submit a direction to the Administration Committee to that effect; (4) is the Fund's interpretation of the requirements of Rule 9 of the

Administration Committee Rules under Section 11.3, to preclude giving effect to court orders for support payments that were due prior to the dates of Applicants' requests, a necessary one; (5) had the Administration Committee reviewed Applicants' 1999 and 2002 requests pursuant to its Rules under Section 11.3, should it properly have denied them on the ground that a *bona fide* dispute existed as to the efficacy, finality, or meaning of the German Orders of 1991, 1994, and 1995, and (6) as to the Applicants' 2003 request, did the Administration Committee err in concluding that a *bona fide* dispute existed as to the efficacy, finality, or meaning of the 2003 German Order, and that therefore it did not satisfy the conditions prescribed by the Rules of the Administration Committee under Section 11.3 for giving effect to a support order?

Admissibility of Applicants' Challenges to the 1999 and 2002 Decisions

85. As detailed above, Applicants made three requests to the Administration Committee of the Staff Retirement Plan, in 1999, 2002, and 2003. It is not disputed that with respect to the 2003 request (relating to post-majority support), Applicants exhausted the applicable channels of administrative review and filed a timely Application with this Tribunal.⁶³ The Tribunal must decide whether Applicants' challenges to the denials of their 1999 and 2002 requests (relating to support for Ms. "M" prior to reaching age eighteen) are likewise admissible for review by the Administrative Tribunal.

86. It is recalled that Applicants' 1999 request was rejected by a member of the Fund's Legal Department who served as the Legal Representative to the Administration Committee, on the basis that the request did not meet a threshold requirement, prescribed at that time by Section 11.3, that the court orders arise from a "marital relationship." The Legal Representative's decision was notified simultaneously to the Secretary of the Administration Committee, Dr. "M", and Mr. "N". Dr. "M" responded by letter of October 1, 1999, reiterating her request and questioning the basis for its denial. The Fund apparently offered Dr. "M" no further response.

87. Thereafter, Dr. "M" contacted the offices of the Fund's Executive Directors for Germany and the United States and the former office engaged the Fund's management in a discussion that led to the abolition of the "marital relationship" requirement. The amended SRP Section 11.3 was adopted by the IMF Executive Board on December 27, 2001.

⁶³See *supra* The Channels of Administrative Review.

88. On January 31, 2002, approximately one month following the revision of Section 11.3 and before its announcement to the staff of the Fund by Staff Bulletin No. 02/5 (February 26, 2002), Dr. "M" renewed her request to the Administration Committee in light of the change in the terms of the Plan provision. She noted on her Request form of March 20, 2002 that the 2002 request was intended as a "confirmation and repetition" of the 1999 request and that she sought to give effect to the same court orders that she had submitted with her 1999 request.⁶⁴ (Additionally, in follow-up email correspondence, Dr. "M" appears to have brought to the attention of the Secretary of the Administration Committee the April 30, 2002 Order of the D.C. Superior Court.)

89. On May 21, 2002, the Secretary of the Administration Committee denied Dr. "M"'s request on the grounds that (1) because Ms. "M" had now reached the age of eighteen (as of January 9, 2002) the court orders at issue were no longer for current or prospective support, and (2) the order was not a "court order affecting pension payments." In the days following the May 21, 2002 decision, Dr. "M" communicated through several email exchanges with the Secretary of the Administration Committee that she challenged the substance of that decision. Finally, by email of May 24, 2002, Dr. "M" expressly inquired of the Secretary about the possibility of obtaining judicial review of the decision:

"If the two of us (including your legal department) do not agree, what are the legal remedies for [Ms. "M"]? Is the Administrative Court of the IMF available to us? To whom are you reporting?"

There followed what appears to have been the final response by the Fund to Dr. "M"'s 2002 request, an email of June 14, 2002, again from the Secretary of the Administration Committee, prepared "after further research and consultation with the Fund's Legal Department," affirming the view that payments pursuant to a direction or accepted request shall be prospective only. In addition, the Secretary asserted that the recent Plan amendment would apply only to support obligations from the amendment's effective date. He offered no information about any further recourse through the Fund.

⁶⁴The renewal of Applicants' request in 2002 on the basis of a change in the applicable regulation is readily distinguishable from the circumstances that obtained in *Mr. "X", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1994-1 (August 31, 1994), in which the Tribunal held that renewal of a challenge to an earlier administrative act, which had taken place outside of the Tribunal's jurisdiction *ratione temporis*, does not confer jurisdiction to review the legality of that act.

90. Applicants concede that their challenge to the denial of the 1999 request was not timely filed with the Administrative Tribunal but maintain that “exceptional circumstances” excuse the delay.

91. With respect to the denial of the 2002 request, the question of timeliness has not been expressly raised or briefed by the parties. Respondent has asserted that only the Fund’s decisions resulting from Applicants’ 1999 and 2003 requests have been challenged in the Application. For the following reasons, the Tribunal rejects this contention. The Application, while initially identifying the 1999 and 2003 decisions as those challenged, later in reference to the 2002 decision states that “this ruling cannot be upheld.” Moreover, while Respondent in its Answer asserts “Applicants do not challenge the denial of their second [2002] request,” in its March 2006 aide-mémoire to the D.C. Superior Court, the Fund states that “[o]ne element of [Applicants’] complaint before the IMFAT is that the SRP had declined in 2002 to give effect under Section 11.3 to certain German court orders against Mr. [“N”] for child support payable until the minor child reached age 18.” The Tribunal concludes that it is clear that Applicants have placed before the Tribunal—and the Fund has responded to—a challenge to the 2002 decision, in particular with regard to the interpretation of Rule 9 (the “prospective payments” rule) of the Rules of the Administration Committee under Section 11.3.

92. As noted, with respect to the denial of the 2003 request, it is not disputed that Applicants exhausted the channels of review provided by the SRP Administration Committee and filed their Application with the Tribunal within three months of the Administration Committee’s February 25, 2004 Decision on Review. The Fund contends that the only decision properly before the Administrative Tribunal is the denial of Applicants’ 2003 request, i.e. the request to give effect to the January 20, 2003 Order of the Frankfurt Court for maintenance of Ms. “M” following her eighteenth birthday.

93. For the reasons set out below, the Tribunal concludes that Applicants’ challenges to all three of the contested decisions, denying their requests of 1999, 2002, and 2003, are admissible for review by the Tribunal.

Exhaustion of Channels of Administrative Review

94. An initial question of admissibility arises as to whether Applicants have met, in respect of the Fund’s decisions of 1999 and 2002, the requirement of Article V, Section 1 of the Tribunal’s Statute, which provides: “When the Fund has established channels of administrative review for the settle-

ment of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review."

95. The Tribunal observes that Respondent has framed the admissibility issue solely in terms of the question of the waiver of the Tribunal's statute of limitations pursuant to Article VI of the Statute (see below) and has not separately contested the admissibility of Applicants' challenges to the 1999 and 2002 decisions on the ground of any alleged failure of Applicants to meet Article V's exhaustion of remedies requirement. The Tribunal concludes that there is room to question whether any administrative review was offered by the Administration Committee or exhausted by Applicants in respect of their 1999 and 2002 requests. Nonetheless, in the view of the Tribunal, responsibility for that course of events should not be borne by Applicants. As considered below, the summary course of the denials of Applicants' initial requests has significance also for the question of whether "exceptional circumstances" have been established to overcome the time bar of Article VI.

96. In 1999 and 2002, the Legal Representative and the Secretary of the Administration Committee, respectively, made threshold assessments that Applicants' requests did not meet the minimum criteria for giving effect to support orders under SRP Section 11.3, and, accordingly, the Administration Committee itself did not proceed to consider the requests in accordance with the procedures set out in its Rules.⁶⁵ Consequently, the Committee

⁶⁵Thus, with respect to Applicants' 1999 and 2002 requests, the Fund did not follow the procedure prescribed by Rule 1(b), as the Administration Committee itself did not consider the request of the Applicants nor transmit it to Mr. "N" for his views. Rule 1(b) of the Rules of the Administration Committee under Section 11.3 provides:

"(b) In the event that a participant or retired participant fails to submit a direction within thirty (30) working days of the issuance of a relevant court order or decree, the Administration Committee may accept a request made by the participant's or retired participant's spouse or former spouse to give effect to the relevant court order or decree and treat the request in the same manner as if it were a direction from the participant or retired participant. The Secretary of the Administration Committee will give a participant or retired participant written notice of such a request from a spouse or former spouse. The participant or retired participant will be allowed, as the Administration Committee shall specify, at least thirty (30) working days either to consent or to object to the request, giving a full written explanation for any objection. The Administration Committee will make its decision on whether or not it will accept the request and treat it in the same manner as if it were a direction within forty-five (45) working days after the participant or retired participant responds or the time for a response expires. If the Administration Committee is satisfied that there is a bona fide dispute as to the application, interpretation, effectiveness, finality or validity of the court order or decree, no action shall be taken on the request unless and until the matter is resolved to the

did not consider the question of whether the orders for Ms. "M"'s support prior to reaching the age of eighteen satisfied the conditions prescribed by the Rules of the Administration Committee under Section 11.3. By contrast, in response to Applicants' 2003 request, the Legal Department advised, as recounted in a subsequent memorandum of the Secretary of the Committee, that "in the context of the history of this case" the court order at issue "contained the necessary elements to initiate the Section 11.3 review." The 2003 request was processed accordingly, and, upon denial of Applicants' Request for Review, Dr. "M" was advised of her right to review of that denial in the Administrative Tribunal.

97. This Tribunal has commented on a number of occasions on the twin purposes of administrative review as "providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication." *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66; *see also Mr. "O", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), para. 67; *Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 118.

98. Because Applicants' 1999 and 2002 requests were summarily denied by the Fund, Mr. "N" was not at that stage afforded the opportunity to respond to the requests, although he was notified of the 1999 request's denial. In the context of this case, however, Mr. "N" has had a full measure of opportunity to present his views, providing opportunities for settlement of the dispute and building an evidentiary record. The Tribunal has before it the extensive record of the proceedings in the Administration Committee on the 2003 request, including voluminous submissions by Mr. "N". *See Estate of Mr. "D"*, para. 135 ("... Respondent's concern that, without a decision on the merits in this case by the Grievance Committee, the Tribunal will lack a full evidentiary record, is misplaced. The Tribunal in this case

satisfaction of the Administration Committee. However, if the Administration Committee determines that there is no substantial reason for not giving effect to the court order or decree, it may accept the request and treat it in the same manner as if it were a direction made by the participant or retired participant under Section 11.3 of the Staff Retirement Plan. The Secretary of the Administration Committee will promptly notify in writing both parties of such determination or decision of the Committee. Any payment withheld pending the Committee's consideration of the request will be paid to the person determined by the Committee to be entitled to such payment; provided that the Administration Committee may deposit it in escrow in the Bank-Fund Staff Federal Credit Union in an interest-bearing account until such payment is made."

has the benefit of an extensive documentary record") Significantly, the documentation and argumentation presented to the Administration Committee in 2003 related also to the two earlier requests, and Respondent itself notes that many of Mr. "N"'s detailed objections to Applicants' 2003 request are directly applicable to the consideration of the merits of the two earlier requests. In Respondent's view, the 1999 request "suffered from the same defects of efficacy, finality and meaning as [Dr. "M"'s] later request."

99. It is significant that Mr. "N" had notice of the proceedings in this Tribunal and declined the opportunity offered to him to participate as an Intervenor. Mr. "N" knowingly relinquished this opportunity after being notified of the proceedings and receiving Ms. "M"'s and Dr. "M"'s Application and the Fund's Answer, which fully set out the issues of the case.

100. In view of the foregoing, the Tribunal concludes that Applicants' challenges to the denial of their 1999 and 2002 requests are not debarred on the ground of failure to exhaust channels of administrative review as prescribed by Article V, Section 1 of the Statute. Accordingly, the Tribunal now turns to the question of whether Applicants have established "exceptional circumstances" to overcome the time bar imposed by Article VI.

Waiver of Statute of Limitations

101. Article VI of the Statute of the Administrative Tribunal provides in pertinent part:

"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 pre-scribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.

..."

102. The question arises whether, as Applicants maintain, “exceptional circumstances” justify waiver of the statute of limitations in respect of the challenges to the 1999 and 2002 decisions. The Commentary on the Statute states in reference to Article VI, Section 3:

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

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

103. The Application of Ms. “M” and Dr. “M” is the first in which the Tribunal is presented with a request for waiver of the statute of limitations in the context of a substantial delay—more than four years—between the contested decision and its challenge in the Administrative Tribunal. In *Ms. “Z”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), note 1, the Tribunal granted a two-month waiver of the statutory time limit for the filing of the Application after Ms. “Z” brought to the Tribunal’s attention, prior to the filing of her Application, “exigent personal circumstances” that the Tribunal concluded met the requirements of Article VI, Section 3 of the Statute.⁶⁶

104. Applicants Ms. “M” and Dr. “M” advance two principal arguments in support of their claim of exceptional circumstances: (1) that they suffered “gross injustice” by the 1999 decision denying their request on the basis of the “marital relationship” requirement of Section 11.3 then in force; and (2) that they were not informed by the Fund of the possibility of recourse to the Administrative Tribunal. Respondent counters that it has no obligation to notify a potential applicant of the right to review in the Tribunal, and, moreover, that Dr. “M” was a sophisticated applicant who made a knowing decision to forgo the option of Tribunal review, lobbying instead for a legislative remedy to the “marital relationship” requirement through amend-

⁶⁶In *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005), para. 4, the Tribunal rejected requests by Applicants, filed along with their Applications, for waiver of the statute of limitations to file amended Applications.

ment of SRP Section 11.3 by the Fund's Executive Board.⁶⁷ Additionally, the Fund maintains that in 1999, prior to the Tribunal's 2001 Judgment in *Mr. "P" (No. 2)*, it operated under a good faith belief that the Administrative Tribunal did not have jurisdiction *ratione personæ* over persons such as the Applicants in this case, i.e. non-staff members adversely affected by a decision on a Section 11.3 request. Respondent further maintains that Applicants have not suffered "gross injustice" because they have had available to them other avenues of relief, namely to seek enforcement of the support orders against assets of Mr. "N" other than his Fund pension benefits.

105. In the absence of any evidence thereof in the record, the Tribunal is unwilling to impute to Applicants a knowing relinquishment of their right to judicial review of their claim. Respondent maintains that Dr. "M" "... had access to the inner workings of the Fund and to Fund officials at the highest levels including Executive Directors." The Tribunal rejected a somewhat similar contention in *Estate of Mr. "D"*, para. 119, in which the Fund urged that although the applicant was a non-staff member she was "... a highly educated and adept claimant who did not make a reasonable effort to inform herself of the Fund's administrative procedures."

106. The Tribunal repeatedly has emphasized the importance of adherence to time limits in legal processes, stating that such requirements should not be lightly dispensed with and "exceptional circumstances" should not easily be found. *Estate of Mr. "D"*, para. 104 (finding an implied "exceptional circumstances" exception in Article V analogous to that explicitly stated in Article VI); see also *Mr. "O"*, para. 50. With respect to the exhaustion of remedies requirement of Article V, the Tribunal has commented that applicants having knowledge of internal review requirements may not simply choose to ignore them, and their "own casual treatment of the relevant legal requirements" does not excuse delay. *Estate of Mr. "D"*, para. 104, citing *Hans Agerschou v. International Bank for Reconstruction and Development*, WBAT Decision No. 114 (1992), para. 45. A plea of exceptional circumstances (with respect to Article V) must be evaluated in light of the extent and nature of the delay, as well as the underlying purposes of the procedural requirements. *Estate of Mr. "D"*, para. 108; *Mr. "O"*, paras. 48-49.

107. The Tribunal has observed that while, as a general rule, lack of individual notification of review procedures does not excuse failure to comply with such procedures, *Estate of Mr. "D"*, para. 120, it also has held that in some

⁶⁷The Tribunal notes that this remedy was incomplete in view of the decisions by the Administration Committee on Applicants' subsequent requests.

circumstances the Fund has an obligation to provide timely and sufficient notice of review procedures:

“The Tribunal concludes that, in this case, it was incumbent on the Fund to inform Ms. “D”—who could not be assumed to know—of the specifics of the further recourse open to her. . . . The Fund, in this case of exchanges with a non-staff member, could easily and should routinely have informed Ms. “D” of her options, as by attaching to its denial of coverage the text of GAO No. 31 and information on recourse to the Administrative Tribunal. The Fund had no reason to presume that Ms. “D” had knowledge of, or should be charged with knowledge of, recourse procedures to which it made not the slightest allusion; on the contrary, the Fund gave the impression to Ms. “D” that, with the report of the external medical examiner, she had reached the end of the road.”

Estate of Mr. “D”, para. 128. In reaching this conclusion, the Tribunal considered a number of factors that may give rise to this obligation. In particular, the Tribunal held that because the applicant was not and had never been a staff member of the Fund she could not be assumed to have had access to the information on dispute resolution disseminated to staff members. Similarly, in 1999 as well as in 2002, the Fund provided no information on the recourse procedures to the Applicants⁶⁸ in this case, who are non-staff members of the Fund. In deciding questions of admissibility, this Tribunal repeatedly has “. . . taken account of the effect of the Fund’s communications to a staff member in assessing his actions in seeking further review.” *Mr. “O”*, para. 66, and cases cited therein.

108. Based on the foregoing analysis, the Tribunal concludes that, in the circumstances of this case, in the absence of notice by the Fund, Applicants should not have been expected to know the Fund’s procedures for bringing a challenge in the Tribunal. Accordingly, the Tribunal finds that there are “exceptional circumstances” justifying waiver of the time limits prescribed under Article VI of its Statute.

109. As the Tribunal has found “exceptional circumstances” in this case of non-staff members challenging a decision on a request under Section 11.3, a request that was summarily dismissed and did not go through the full channels of review provided by the Administration Committee, it need not address whether, as Applicants maintain, “gross injustice,” i.e. the alleged

⁶⁸It is clear and undisputed that Dr. “M” conducted on behalf of Ms. “M” (who was a minor child until January 9, 2002) all communications with Respondent associated with Applicants’ three requests. Thus, the issue of notice need not be considered separately with respect to Ms. “M”.

gravity of the injury, may form a further basis for waiver of the statute of limitations.

110. The Tribunal does observe, however, that the alleged injustice of which Applicants complain, i.e. discrimination in the Plan's provision against children born out of wedlock, was of a nature that implicates a "regulatory decision"⁶⁹ of the Fund. This fact further weighs in favor of finding "exceptional circumstances." Accordingly, Dr. "M" may reasonably have believed that a legislative solution was her only recourse, especially when the Fund failed to respond to her express inquiry as to the availability of judicial review. Indeed, the Fund has contended in its pleadings before the Tribunal that it apparently shared the view that she did not have recourse to the Tribunal, as it claims to have held a "good faith belief" that the Tribunal did not have jurisdiction *ratione personæ* over Dr. "M" until it learned otherwise through the Tribunal's 2001 decision in *Mr. "P"* (No. 2). Accordingly, that it was a rational response of Applicants in 1999 to seek a legislative remedy to amend the offending Plan provision does not imply that they knew, or should have known, of the possibility of judicial review in the Administrative Tribunal.⁷⁰ Moreover, in respect of the denial of Applicants' 2002 request, the Tribunal notes that, following its 2001 decisions in *Mr. "P"* (No. 2) and *Estate of Mr. "D"*, Respondent was on notice (1) that Applicants had standing to bring an Application to the Administrative Tribunal, and (2) Respondent was obliged to inform them of that avenue of recourse.

111. For the following reasons the Tribunal concludes that Applicants have met the requirements of Articles V and VI of the Statute. First, Applicants are non-staff members and could not be expected to know the recourse procedures of the Fund. Second, Applicants' conduct does not demonstrate casual disregard of legal requirements but rather prompt attention to such requirements where notified. Third, the availability in this case of internal recourse procedures appeared to be uncertain both to the Fund and the Applicants, a problem compounded by the summary procedures with

⁶⁹Article II, Section 2.b. provides:

"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."

⁷⁰*Compare Mendaro v. International Bank for Reconstruction and Development*, WBAT Decision No. 26 (1985), paras. 32-33 (rejecting plea of "exceptional circumstances" and finding that applicant had made "conscious choice" to pursue complaint in U.S. courts even after she had been informed by the Bank of the creation of the Tribunal and that it would be the exclusive forum to hear her claims).

which the Fund responded to the 1999 and 2002 requests. Fourth, there is no evidence that Applicants knowingly relinquished their right to Tribunal review in favor of an alternative legislative remedy, a remedy which in any case proved incomplete.

Was the “marital relationship” requirement of SRP Section 11.3, later revised, dispositive of Applicants’ requests to give effect to court-ordered support for Ms. “M” relating to the period pre-dating the revision?

112. Having concluded that Applicants’ challenge to the denial of their 1999 request is admissible for review, the Tribunal now turns to the question of whether the “marital relationship” requirement of Section 11.3, which governed that denial, is dispositive of Applicants’ requests to give effect to court-ordered support for Ms. “M” relating to the period pre-dating its revision on December 27, 2001. The Tribunal notes that the question is not one of retroactive application of the revised Plan provision but rather of the validity of the prior Plan provision, in light of Applicants’ contention that it represented impermissible discrimination.

113. Applicants’ 1999 request was denied by the Legal Representative to the SRP Administration Committee on the ground that the court orders did not “aris[e] from a marital relationship” as required by the terms of Section 11.3 in effect at that time. (SRP Section 11.3 (1999 Revision).) *See Mr. “P” (No. 2)*, paras. 74, 83-84; Staff Bulletin No. 99/12 (June 9, 1999) and Attachment. Applicants contest the legality of the “marital relationship” requirement as evincing impermissible discrimination against children born out of wedlock.

114. In her October 1, 1999 response to the Legal Representative’s decision, Dr. “M” asserted:

“. . . the German Orders entitle **the child itself** to payment and not the mother or the father or a ‘spouse’. . . . I therefore think that your internal rules [SRP Section 11.3] have to be interpreted in the way that the ‘protected class’ with respect to child support is the **respective child itself** Therefore, there can be no doubt that the child itself and not a ‘spouse or former spouse’ must be the beneficiary of your rules with respect to child support and that every person duly representing the child, including guardians, persons having custody as well as ‘spouses or former spouses’ under certain circumstances, . . . but also the child itself, may rightfully make a ‘request.’

. . . I cannot imagine any reason why the [IMF] would make a distinction between children (‘designees’) represented by a ‘spouse or former spouse’

and those represented . . . by another person or entity (e.g. natural mother or father not being a spouse, guardian etc.) Interpreted the wrong way, your internal rules may even conflict with universally recognised human rights which prohibit discrimination by 'birth' and with the constitutions of your member and donor states which require the governments to make sure that children born 'out of wedlock' receive equal treatment to those 'born in wedlock' (see e.g. Article 6 para. 5 of the German Grundgesetz)."

(Emphasis in original.)

115. Respondent, for its part, maintains that the "marital relationship" requirement of Section 11.3, which obtained until its 2001 amendment, was a reasonable exercise of the Executive Board's discretion in defining the conditions under which the Plan would give effect to support orders. The Fund contends that the provision implemented a legitimate and reasonable classification scheme that differentiated between spouses (or former spouses) of Fund retirees and all other persons seeking enforcement of court orders against the Fund retiree's pension benefits.

116. The Tribunal has recognized that "[t]he management of the Fund necessarily enjoys a managerial and administrative discretion which is subject only to limited review by this Tribunal." *Mr. "R", Applicant, International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 65. This deference is at its height when the Tribunal reviews regulatory decisions, as contrasted with individual decisions, especially policy decisions taken by the Fund's Executive Board. *See, e.g., Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 80 (reviewing Executive Board's decision on expatriate benefits); *see generally Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 105. With respect to the Tribunal's competence to review the Fund's regulatory decisions, the Commentary on the Statute states:

"As applied to the review of regulatory decisions, the case law of administrative tribunals in general demonstrates that although there exists a competence to review regulatory decisions, the scope of that review is quite narrow. There are broad and well-recognized principles protecting the exercise of authority by the decision-making organs of an institution from interference by a judicial body. The Fund tribunal would have to respect those principles in reviewing the legality of regulatory decisions."

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

117. SRP Section 11.3 was recommended by the Pension Committee and approved by the Executive Board of the Fund. (Staff Bulletin No. 95/4, (March 16, 1995).) Thus, the Tribunal is mindful of the deference required in deciding whether the “marital relationship” requirement, formerly incorporated into Section 11.3, was valid under the internal law of the Fund. At the same time, however, the Tribunal also notes that it has been called upon to review the Executive Board’s discretionary authority in the light of a claim that the contested Plan provision, a “regulatory” decision of the Fund, as well as its application in the individual case of Applicants Ms. “M” and Dr. “M”, violated a universally recognized human right. The very nature of this grave complaint requires a greater degree of scrutiny over the Fund’s exercise of its discretion.

118. A review of the history of the relevant provision of the Plan will initially be instructive. As the IMF’s immunities protect both the organization and its retirement fund from judicial process, the Fund in the last decade has taken alternative steps to provide mechanisms for giving effect to domestic relations orders, while at the same time preserving its immunities. *Mr. “P” (No. 2)*, para. 74. In 1995, the IMF took an initial step toward revising its policy with respect to giving effect to domestic relations orders by amending Section 11.3 of the SRP to authorize the SRP Administration Committee, under specified conditions, to give effect to such orders upon a voluntary direction of the retired participant. *See* Staff Bulletin No. 95/4 (March 16, 1995). The 1995 amendment also incorporated a marital relationship requirement, inasmuch as directions could be made only “to satisfy the marital obligations of a divorce or legal separation.”

119. On May 26, 1999, the Executive Board approved a further amendment to Section 11.3 of the SRP, announced to the Fund staff by Staff Bulletin No. 99/12 (June 9, 1999), which “authoriz[ed] the Administration Committee of the SRP, under prescribed conditions, to approve a request from a spouse or former spouse of a participant to give effect to a court order requiring that spouse or child support payments be made from the SRP benefits otherwise payable to the retired participant.” *See Mr. “P” (No. 2)*, paras. 83-84. It is this version of SRP Section 11.3 that governed Applicants’ 1999 request and its denial by the Legal Representative to the Administration Committee. The 1999 amendment had expanded the reach of the 1995 revision by authorizing the SRP Administration Committee to give effect to an applicable domestic relations order not solely upon the voluntary direction of the Plan participant but, alternatively, upon the request of the affected spouse or former spouse.

120. The amended Section 11.3 stated in relevant part:

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

(SRP Section 11.3 (1999 Revision).) (Emphasis supplied.)

121. On December 27, 2001, the Fund's Executive Board adopted an amendment to Section 11.3 of the Plan that authorized the Administration Committee, under certain conditions, to give effect to a court order for child support, regardless of whether a child is born within a marriage or out of wedlock. These changes were announced by Staff Bulletin No. 02/5 (February 26, 2002), which noted that the new amendment was designed to ". . . place on an equal footing the treatment of children born in and out of wedlock by separating payments for child support from those for spousal support." The Staff Bulletin further acknowledged that, under the pre-existing provision, "[c]hild support payments had to be included in payments that were to be made to (former) spouses and were, therefore, linked to the marital relationship. This requirement effectively precluded payment from SRP benefits of court-ordered child support to children born out of wedlock."

122. Accordingly, the current Section 11.3 provides in relevant part:⁷¹

"11.3 Notwithstanding the provisions set forth in Section 11.1, a participant or retired participant may, pursuant to a legal obligation arising from a marital relationship *or pursuant to a legal obligation to make child support payments*, evidenced by an order of a court or by a settlement agreement incorporated into a court order, direct in writing to the Secretary of the

⁷¹For the full text of Section 11.3, see note 43, *supra*.

Administration Committee that a benefit that would otherwise be payable to him during his life under the Plan be paid to one or more former spouses or a current spouse from whom there is a decree of legal separation, his child or children, who are under 22 years of age, or the court approved guardian of such child or children.

...

(b) In the event that a participant or retired participant fails to submit a timely direction in compliance with the court order to the Secretary of the Administration Committee, under such rules and conditions of acceptance as are prescribed by the Administration Committee, a spouse or former spouse or a child or children, or parents or guardians acting on their behalf, of such participant or retired participant who is a party to the court order or orders may request that the Administration Committee give effect to such court order or orders and treat the request in the same manner as if it were a direction from such participant or a retired participant. . . ."

(SRP Section 11.3 (2001 Revision).) (Emphasis supplied.)

123. It may be observed that the formal, or written, law of the Fund (discussed *infra*) expressly addresses the issue of discrimination only with reference to the Fund's regulatory and individual decisions affecting members of the Fund's staff. The internal law of the Fund, however, "includes both formal, or written, sources . . . and unwritten sources." (Report of the Executive Board, pp. 17-18.) In particular, Article III of the Tribunal's Statute provides *inter alia* that "[i]n deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." In commenting on this provision, the Commentary on the Statute elaborates that such principles "are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund." (Report of the Executive Board, p. 18.) Applicants invoke a concept of universal human rights in support of their argument that the "marital relationship" requirement resulted in impermissible discrimination between children born within a marriage and those born out of wedlock.

124. In *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), this Tribunal recognized a distinction between a general principle of equality of treatment and a principle of nondiscrimination that implicates "universally accepted principles of human rights":

"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 law [footnote omitted] 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)."

Mr. "F", para. 81.

125. Similarly, other international administrative tribunals have applied universally accepted principles of human rights as a constraint on discretionary authority. In *In re Mr. I. M. B.*, ILOAT Judgment No. 2120 (2002), Consideration 10, the International Labour Organisation Administrative Tribunal, citing "general principles of law and those which govern the international civil service, as well as international instruments on human rights," held that a staff regulation improperly discriminated between candidates for appointment based on their marital status and family relationship. In so holding, the ILOAT asserted:

"The principles of Article 26 of the International Covenant on Civil and Political Rights (1966), although not strictly binding on the Agency are relevant. That article provides that:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

See also *Bernstein v. International Bank for Reconstruction and Development*, WBAT Decision No. 309 (2004), para. 36 (citing "recognized international standards" relating to discrimination on the basis of pregnancy and childbirth).

126. The express provisions of the Fund's nondiscrimination law do not refer to discrimination on the ground of birth, an omission readily explained by the fact that such discrimination, which is typically directed at children, does not ordinarily arise in the context of employment law. The Fund's written law necessarily sets forth a principle of nondiscrimination within the context of the employment relationship. Nevertheless, the pertinence of principles of human rights to practices of the Fund is reflected in that sphere by Rule N-2 of the Fund, as well as the jurisprudence of this Tribunal. 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 Tribunal observed in *Mr. "F"*, para. 83, that the Fund has "recognized from its inception the importance to a global institution of maintaining a nondiscriminatory workplace," and in recent years has taken additional steps evidencing the significance which it attaches to the matter. Accordingly, discrimination implicating universally accepted principles of human rights is addressed in the Fund's Discrimination Policy, adopted on July 3, 2003, which was designed by its terms to "consolidate in one document the policies and safeguards in place" with respect to discrimination. This document defines discrimination within the context of the Fund as follows:

"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 Policy, July 3, 2003, p. 4.) (Emphasis supplied.)

127. In the case of *Mr. "R"*, and subsequently in *Ms. "G"*, the Tribunal has recognized:

"It is a well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization."

Mr. "R", para. 30. That nondiscrimination is essential as well to the lawful exercise of the administrative functions of the organization is emphasized by the Commentary on the IMFAT Statute:

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

(Report of the Executive Board, p. 19.) (Emphasis supplied.) Furthermore, the Administrative Tribunal has recognized that:

"Cases of alleged discrimination may arise in two distinct ways. First, a classification may expressly differentiate between two or more groups of staff members, giving rise to a charge of discrimination. Second, a policy, neutral on its face, may result in some kind of consequential differentiation between groups."

Mr. "R", para. 36.

128. The Tribunal summarized its standard for assessing classification schemes against a general principle of equal treatment as follows:

". . . the Tribunal may ask whether the decision ' . . . could . . . have been taken on the basis of facts accurately gathered and properly weighed.' (*Lindsey*, para. 12.) Second, the Tribunal must find a ' . . . rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.' (*Mould*, para. 26.) Thus, the Tribunal may consider the stated reasons for the different benefits and assess whether their allocation to the two categories of staff is rationally related to those purposes. . . ."

Mr. "R", para. 47; *see also Ms. "G"*, para. 76. It is this standard that Respondent seeks to be applied in the present case.

129. Respondent maintains that the "marital relationship" requirement constituted a reasonable exercise of the Executive Board's discretion in implementing a classification scheme that differentiated between spouses

(or former spouses) of Fund retirees and all other persons seeking enforcement of court orders against the Fund retiree's pension (including custodial parents of children born out of wedlock). As the rationale for this classification, Respondent cites the following factors. First, Respondent asserts that the 1999 amendment to Section 11.3 constituted a limited exception to the anti-alienation rule set out in Section 11.1,⁷² which serves the Plan's paramount purpose of securing retirement income for the staff members of the Plan. Indeed, Staff Bulletin No. 99/12, para. 7, emphasized that "the primary purpose of the Plan . . . [is] to provide pensions to participants" Second, Respondent asserts that preferential treatment of spouses and former spouses under Section 11.3 was justified because it is

"consistent with the policy behind all spousal rights and benefits under pension plans, which is that the spouse is presumed to have uniquely contributed to the financial security of the marital unit, through work in the home or otherwise, and thus, has a justified expectation of sharing in the participant's pension income, even after the participant's death or a divorce."

Respondent maintains that

". . . such a condition does not violate any general principles of international administrative law that are so widely accepted and well-established in different legal systems that they would be regarded as generally applicable to all decisions taken by the Fund. [Footnote omitted] Rather, preferences for married persons over the unmarried were once ubiquitous in pension schemes throughout the world, and remain the rule rather than the exception, despite instances where governments and international organizations, including the Fund, have made amendments creating limited rights in unmarried persons."

The Fund's internal documents indicate that one of the stated reasons for the enactment of Section 11.3 was, indeed, the Fund's recognition that "[p]ension rights represent a significant portion of the value of the marital estate and are subject to division in the event of a divorce." (Report from the Secretary of the Administration Committee to the Members of the Pension Committee of January 24, 1995, para. 2.) Therefore, maintains Respondent, the relevant

⁷²SRP Section 11.1 provides in pertinent part:

"No benefit under the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, seizure or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber, seize or charge the same shall be void, nor shall any such benefit be in any manner liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such benefit, except as may be specifically provided in the Plan"

Plan provisions "represent a deliberate and reasoned balancing of interests in requiring former staff members to comply with their family obligations as imposed by law, with the Plan's primary purpose of providing secure pension to retired staff." Accordingly, Respondent takes the view that any disparate effect with respect to children born out of wedlock was merely consequential to a legitimate classification based on marital status.

130. The Tribunal observes, however, that the disparate—and discriminatory—effect with respect to children born out of wedlock followed directly from the intended classification by marital status and by treating child support awards as incidental to a dissolution of marriage and payment of spousal support. Hence, the rationale proffered by Respondent in support of the policy of preferential treatment of spouses does not appear to support the resulting disparity in the treatment of children. In particular, the policy of recognizing spousal contribution to the marital unit cited by Respondent as a justification for the "marital relationship" requirement does not provide a reasonable basis for such differential treatment, as a court-ordered entitlement to child support essentially rests with the child. That child has had no say in whether or not he or she springs from a marital relationship. The governing consideration is that the child is innocent of the marital—or non-marital—relationship of his or her parents and, as an innocent human being, is entitled to the human right of being free from impermissible discrimination.

131. Additionally, this Tribunal has recognized that ". . . the care with which a reform has been studied" may be taken into account by the Tribunal in giving deference to a regulatory decision. Ms. "G", para. 77. Accordingly, in considering a challenge to a regulatory decision, the Tribunal may examine the Fund's decisionmaking process underlying the classification scheme. Mr. "R", paras. 63-64. Respondent has put forth no evidence that, in devising the applicable provisions, the Fund gave consideration to its effect on children born out of wedlock, notwithstanding the stated purpose of the 1999 amendment to address the "concerns that SRP participants could use the Fund's immunities to avoid being compelled to fulfill their legitimate spouse and child support obligations." (Staff Bulletin No. 99/12 (June 9, 1999).) (Emphasis supplied.)

132. The Administrative Tribunal does not question the Fund's motives or good faith in enacting a classification scheme that distinguishes between married and unmarried persons. It recognizes that many pension plans do so, and that many more pension plans did so; however, the Fund's apparent failure to provide consideration to the effect of this classification on children born out of wedlock is not compatible with contemporary standards of

human rights, standards which obtained in 1999, as they do in 2006. Therefore, although the Administration Committee's reliance on the regulations as they stood in 1999 was understandable, nevertheless, the Administrative Tribunal is of the view that the challenged rule was fundamentally defective as it failed to make adequate provisions for children born out of wedlock, a failure that was incompatible with the international standards of nondiscrimination that the Fund itself professes.

133. Although the diplomatic note of the U.S. Secretary of State of 1998 that stimulated international organizations based in the United States to review their regulations and revise them to preclude its current and former staff members from avoiding court orders for family support⁷³ did not address the distinction between children born in and out of wedlock, it did request that "all international organizations [located in the U.S.] voluntarily take steps to enforce court-ordered payments to divorced spouses *and dependent children*." (Emphasis supplied.) The Universal Declaration of Human Rights—adopted as long ago as 1948—is quite forthright in stating, in Article 25, that "[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection."⁷⁴ Thus, while the terms of the provision in question may have been understandable, they nevertheless cannot be sustained.

In denying Applicants' requests to give effect to each of the court orders at issue, did the Fund err in interpreting SRP Section 11.3 to require that the court order either specify that support is to be paid from the retiree's Fund pension benefits or direct the retiree to submit a direction to the Administration Committee to that effect?

134. Central to the controversy to be resolved in this case is the question of whether, as the Fund maintains, to be given effect pursuant to SRP Section 11.3⁷⁵ a court order for spousal or child support must either specify that the support payments be made from the retiree's Fund pension benefits or require the retiree to so direct the SRP. It is undisputed that none of the court orders that Applicants have sought to have given effect under the Fund's Staff Retirement Plan, i.e. neither the 1991, 1994, or 1995 German Orders relating to Ms. "M"'s support as a minor child, nor the 2003 German

⁷³See Mr. "P" (No. 2), paras. 69, 78-79.

⁷⁴Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948, available at: <http://www.un.org/Overview/rights.html>.

⁷⁵For the full text of Section 11.3, see note 43, *supra*.

Order for post-majority support, refers to Mr. "N"'s Fund pension benefits.⁷⁶ Accordingly, maintains Respondent, the Fund properly denied Applicants' requests and the denials may be sustained on that basis alone. Applicants, for their part, contend that Respondent's interpretation of SRP Section 11.3 is unreasonable and not consistent with the intent of the Plan provision.

135. It is recalled that in denying both the 2002 and 2003 requests, the Secretary of the Administration Committee expressly cited among the grounds for denial the absence of any reference by the issuing courts to Mr. "N"'s Fund pension benefits. As to the 2002 request (relating to Orders for support of Ms. "M" as a minor), the Secretary informed Dr. "M" that the Order did not ". . . meet the requirements for a court order affecting pension payments [as] it does not order the pensioner to direct the SRP to make payments to you on behalf of your child," and later confirmed the view that "[t]he order should specify that the participant is required to direct the Plan to make the support payments out of his future benefits." Similarly, in communicating the Administration Committee's February 25, 2004 Decision on Review of Applicant's 2003 Request (to give effect to the 2003 Order for support after reaching age eighteen), the Secretary explained: "The Committee also noted that the Order does not require [Mr. "N"] to direct the Committee to make payments out of his pension benefits, nor does it make any mention of payment from his pension benefits, and thus, the Committee has no basis for determining that the court intended this Order to override the general rule against alienation of benefits in Section 11.1 of the Plan." The Fund's interpretation of Section 11.3 is reflected as well in the "Model Order" and "Form of Request" provided by the Committee to interested parties.⁷⁷

136. As Respondent explains in its pleadings before the Tribunal, the IMF Staff Retirement Plan is a tax-qualified retirement plan, classified as a "governmental plan,"⁷⁸ under the U.S. Internal Revenue Code. As a "governmental plan," it is not subject to the anti-alienation provisions applicable to tax-qualified retirement plans sponsored by private employers in the United

⁷⁶Nor do the District of Columbia court Orders of August 5, 1999 and April 30, 2002 that Applicants also appear to have brought to the attention of the Fund. *See supra* The Factual Background of the Case; Proceedings in the Administration Committee of the Staff Retirement Plan.

⁷⁷*See supra* The Factual Background of the Case; Proceedings in the Administration Committee of the Staff Retirement Plan; Applicants' 2002 Request to the Administration Committee.

⁷⁸A "governmental plan" includes ". . . any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act . . ." 26 U.S.C. § 414 (d).

States.⁷⁹ Nonetheless, the IMF's Plan and many other "governmental" pension plans have adopted anti-alienation provisions that support the policy that such plans have as their primary purpose providing retirement income security to participants.⁸⁰ The anti-alienation provision of the Fund's Staff Retirement Plan provides broadly that:

"11.1 No benefit under the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, seizure or charge, . . . nor shall any such benefit be in any manner liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such benefit, except as may be specifically provided in the Plan; . . ."

137. In respect of the required anti-alienation provision of tax-qualified private employer pension plans, an exception is drawn under U.S. law for payment from a participant's benefits of child or spousal support pursuant to a Qualified Domestic Relations Order ("QDRO"). A QDRO is defined as a domestic relations order,⁸¹ made pursuant to state law,

"which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan . . ."

26 U.S.C. § 414(p)(1)(A)(i). Accordingly, under U.S. law, as to private employer plans subject to the Internal Revenue Code and the Employee Retirement Income Security Act ("ERISA"), support payments may be made from pension benefits only if the court order specifically refers to payment from pension benefits. It may be observed that these elements of U.S. law respond to a larger public policy objective, i.e. reserving favorable treatment under U.S. income tax law to income that is directed to prescribed forms of retirement savings.

138. Respondent maintains that SRP Section 11.3 was drafted with the intent of creating a voluntary exception to the IMF Staff Retirement Plan's

⁷⁹See 26 U.S.C. § 401 (a)(13).

⁸⁰Additionally, according to the 1995 Report, ". . . the Fund Plan is subject to the 'exclusive benefit' rule, a qualification requirement, set out in IRC § 401(a)(2). It is believed that Section 11.1 of the Plan was drafted as a response to the pre-ERISA qualification requirements of IRC § 401." (1995 Report, note 2.)

⁸¹Under the U.S. Internal Revenue Code, a "domestic relations order" is defined as ". . . any judgment, decree, or order (including approval of a property settlement agreement) which – (i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and (ii) is made pursuant to a State domestic relations law . . ." 26 U.S.C. § 414(p)(1)(B).

anti-alienation rule that would be "akin" to the QDRO exception found in U.S. private employer pension plans. The QDRO analogy was made explicit in the Report of the Administration Committee of 1995, recommending the adoption of Section 11.3 to the Pension Committee and ultimately to the IMF Executive Board:

"As a matter of policy, the benefits subject to a direction would be subject to limitations analogous to those set out in [U.S. Internal Revenue Code] § 414(p)(1), (3) and (4) from which they otherwise would be exempt by virtue of the status of the Plan as a governmental plan."

(1995 Report, p. 5.)

139. Accordingly, a principal—and difficult—question posed by this case is whether, as Respondent maintains, in enacting SRP Section 11.3 as an exception to Section 11.1, the Fund's Executive Board limited the Administration Committee's authority to give effect only to those domestic relations orders that by their express terms specify that an alternate payee may receive pension benefits otherwise payable to a participant in the Plan. Alternatively, might SRP Section 11.3 admit of a broader interpretation than that urged by the Fund, in view of the language of its text, the underlying policies of the Fund, the multinational character of the IMF (and its staff and their dependents), and the circumstances of the instant case? For the reasons set out below, the Tribunal concludes that in this case it does. Accordingly, the Tribunal holds that the fact that the court orders at issue do not by their terms direct that support payments be made from Mr. "N"'s Fund pension benefits does not debar their being given effect pursuant to SRP Section 11.3.

140. In assessing the reasonableness of the Fund's interpretation of Section 11.3 in this case, two competing factors require consideration. On the one hand, the provision was expressly drafted as an exception to the general prohibition against alienation of Plan benefits embodied in Section 11.1 of the Plan, which seeks to safeguard the Plan's primary purpose of providing retirement income security to staff members of the Fund. (See Report from the Secretary of the Administration Committee to the Members of the Pension Committee of January 24, 1995, para. 5 ("1995 Report"); Report from the Secretary of the Administration Committee to the Members of the Pension Committee of March 26, 1999 ("1999 Report").) In the Fund's view, the anti-alienation rule supports a restrictive interpretation of this provision. On the other hand, as this Tribunal observed in *Mr. "P"* (No. 2), para. 151, Section 11.3 and the Rules thereunder embody a competing policy of "encourag[ing] enforcement of orders for family support and division of marital property."

In adopting this provision in 1995 and expanding its reach in 1999, the Fund expressly sought to address the concern that Fund retirees might use the immunities of the SRP to avoid fulfilling their legitimate family support obligations. (1995 Report, para. 2; 1999 Report, para. 4; *see also Mr. "P" (No. 2)*, paras. 78-80, 83.) This competing interest counsels a more inclusive interpretation that takes into consideration the effect on spouses and children seeking to obtain court-ordered support.

141. In *Mr. "P" (No. 2)*, the Tribunal identified in some detail the policies underlying the decision to permit dependents of SRP participants to seek enforcement of support orders through the pension Plan. As reviewed in that decision, in July 1998, the Fund issued a Code of Conduct governing current staff members. Paragraph 8 of the Code of Conduct provides in pertinent part:

"The Fund attaches great importance to the observance of local laws by staff members, as well as the avoidance of actions that could be perceived as an abuse of the privileges and immunities conferred on the Fund and its staff, as the failure to do so would reflect adversely on the Fund. For example, staff members are expected to meet their private legal obligations to pay child support and alimony"

The Code of Conduct makes clear that failure to pay spousal or child support obligations is a violation of the Fund's standards of conduct. (Code of Conduct, p. 16.) In addition, as the Fund observed in *Mr. "P" (No. 2)*, para. 78, the 1998 Diplomatic Note of the United States Secretary of State considered the social responsibility of the organization in ". . . protecting the welfare of children and spouses who have been a part of the IMF community."

142. In announcing to the staff of the Fund the 1999 amendment of SRP Section 11.3, Staff Bulletin No. 99/12, para. 4, noted that the revision served to address the following problem:

". . . a participant subject to a court order could ignore the order and avoid its enforcement by moving outside the area where the court had jurisdiction or where its orders would be given effect. While the Fund can insist that serving staff members fulfill their personal legal obligations under the Fund's Rules and Regulations and Code of Conduct, the Fund has no comparable authority with respect to a retired participant who fails to comply with a court order."

Finally, Staff Bulletin No. 99/11, in notifying the staff that the Fund would give effect to wage garnishment and withholding orders, noted:

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

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

143. Accordingly, while the immediate purpose of the adoption of Section 11.3 may have been to remove a particular impediment to the enforceability of family support orders arising from courts in the United States, the larger purpose of the amendment was just as clearly to give effect to a more general policy, under what the Tribunal has termed the "public policy of its forum," i.e. ". . . to encourage enforcement of orders for family support and division of marital property." *Mr. "P"* (No. 2), paras. 151, 156.

144. The Tribunal notes that the legislative history of Section 11.3 lends support to the Fund's view that Section 11.3 should be narrowly construed to encompass only support orders that expressly designate payment from pension benefits. Thus, the opening paragraph of the 1999 Report states that Section 11.3(b) "would authorize the Administration Committee of the SRP, under prescribed conditions, to approve a request from a spouse or former spouse of a participant to give effect to a *court order requiring that spouse or child support payments be made from the SRP benefits payable to the participant.*" (Para. 1.) (Emphasis supplied.) The Report further states that "[t]he amendment would allow a spouse or former spouse who is a party to the court proceedings to bring a request to the Administration Committee, asking that *the court order or approved settlement agreement which requires that spouse or child support payments be made from the SRP benefits, be given effect.*" (Para. 5; see also paras. 4, 6.) (Emphasis supplied.) Likewise, the Executive Board was informed that the purpose of the 2001 amendment was to ". . . treat all children the same *when a court order provides for the payment of a part of a retiree's pension for child support, regardless of whether a child is born within a marriage or out of wedlock.*" ("Proposed Revision of SRP Section 11.3 Concerning Support Payments for Children, Including Those Born Out of Wedlock" EBAP/01/140 (December 19, 2001).) (Emphasis supplied.)

145. Similarly, in notifying the 1999 amendment to the staff of the Fund, Staff Bulletin No. 99/12 (June 9, 1999) stated: "These changes authorize the Administration Committee of the SRP, under prescribed conditions, to

approve a request from a spouse or former spouse of a participant to give effect to a *court order requiring that spouse or child support payments be made from the SRP benefits otherwise payable to the participant.* (Para. 1.) (Emphasis supplied.) *See also* para. 6 (“The changes allow a spouse or former spouse who is a party to the court proceedings to bring a request to the Administration Committee, asking that the court order or approved settlement agreement, *which requires that spouse or child support payments be made from SRP benefits, be given effect.*”) (Emphasis supplied.)

146. It is nevertheless the express language of Section 11.3 that constitutes the primary basis for its interpretation in this case. The text of the Plan provision governs. Section 11.3, as amended in 2001, provides in relevant part:

“11.3 Notwithstanding the provisions set forth in Section 11.1, a participant or retired participant *may, pursuant to a legal obligation arising from a marital relationship or pursuant to a legal obligation to make child support payments, evidenced by an order of a court or by a settlement agreement incorporated into a court order, direct in writing to the Secretary of the Administration Committee that a benefit that would otherwise be payable to him during his life under the Plan be paid to one or more former spouses or a current spouse from whom there is a decree of legal separation, his child or children, who are under 22 years of age, or the court approved guardian of such child or children.*

(a) The benefit payable shall not exceed:

...

(ii) when payable to a child or children or their parents or guardians, 16⅔ percent of the benefit payable to the participant or retired participant whenever the court ordered obligation is for support of his child or children. . . .

(b) *In the event that a participant or retired participant fails to submit a timely direction in compliance with the court order to the Secretary of the Administration Committee, under such rules and conditions of acceptance as are prescribed by the Administration Committee, a spouse or former spouse or a child or children, or parents or guardians acting on their behalf, of such participant or retired participant who is a party to the court order or orders may request that the Administration Committee give effect to such court order or orders and treat the request in the same manner as if it were a direction from such participant or a retired participant. . . .”*

(Emphasis supplied.) The first paragraph of Section 11.3, in essence, corresponds to the original version of Section 11.3, as adopted in 1995; while Section 11.3(b) was added in 1999 (and amended in 2001 to include child support obligations arising outside of a marital relationship).

147. Respondent asserts that the emphasized language of the first paragraph of Section 11.3 evidences the requirement of an order that obligates the retiree to submit a direction to the Committee,⁸² and further contends that Section 11.3(b) "maintained this requirement."⁸³ However, in the Tribunal's view, this interpretation is not a necessary one, or, in the light of the essential purpose of the 1999 amendment to Section 11.3, an appropriate one. The "legal obligation" referred to in this provision is "to make child support payments," not to submit a direction; and it is this obligation to make child support payments that must be evidenced by a court order. The word "pursuant" means only that the direction cannot be made in the absence of a court-ordered child support obligation.⁸⁴ In addition, the words "may . . . direct" suggest that directions need not be mandated by a court in all cases.

148. The Tribunal recognizes that Respondent's interpretation, nevertheless, finds support in the legislative history of Section 11.3(b). Specifically, the 1999 Report stated:

"[t]he proposed amendments to the SRP would extend the present provisions allowing participants to direct the payment of their benefits to cover situations in which the participant failed to submit *the payment direction required by a court order*. The amendments would allow a spouse or former spouse who is a party to the court proceedings to bring a request to the Administration Committee asking that the court order or approved settlement agreement *which requires that spouse or child support payments be made from SRP benefits*, be given effect. If accepted by the Committee, benefit payments from the SRP would be redirected to the spouse or former spouse as if the participant had himself or herself given *the court-ordered direction*."

⁸²The same language was also cited by the Administration Committee Secretary in an email to Dr. "M" as evidence of this requirement.

⁸³It may be noted that the issue of the proper form of a court order underlying a direction is not before the Tribunal, but is raised by Respondent in support of its interpretation of Section 11.3(b) at issue in this case.

⁸⁴Similarly, the 1995 Report stated that Section 11.3 would allow a retiree to make a direction to the Plan "*provided that . . . the direction is made to satisfy the marital obligations of a divorce . . .*" (Emphasis supplied.) A nearly identical description of Section 11.3 was provided in Staff Bulletin No. 96/9 (May 15, 1996), which announced the Administration Committee Rules under Section 11.3 adopted by that Committee.

(Emphasis supplied.) This same description of the amendment was included in Staff Bulletin No. 99/12 (June 9, 1999) that notified this amendment to the Fund staff.

149. In challenging the Fund's interpretation of Section 11.3, Applicants assert that an order of the type that the Fund maintains is required under Section 11.3 would not be issued by a German court because "the laws in Germany do not permit a court decision in which the defendant is condemned to pay child support (or any other debt) out of specific assets, trusts, accounts, salaries etc.," because German courts do not accept directions from litigants about the drafting of their orders and because garnishment of Mr. "N"'s pension "is excluded under German rules of civil procedure due to the immunity of the IMF." Respondent counters that while "[t]he Fund knows of no reason why its immunity would prevent a German court from ordering [Mr. "N"] to direct that a portion of his Fund pension be paid to [Dr. "M"]," Applicants' assertion that German law precludes awards directed at Mr. "N"'s pension only supports the denial of their request, i.e. that without an order requiring that SRP benefits be directed to an alternate payee, there is nothing to which the Administration Committee can give effect.

150. The reference in Section 11.3(b) to the retiree's failure to "submit a timely direction in compliance with the court order to the Secretary of the Administration Committee" could be seen as supporting the Fund's interpretation. Furthermore, Rule 2 of the Rules of the Administration Committee under Section 11.3 refers to an order underlying a request as "a court order or decree concerning the payment of amounts from the Staff Retirement Plan"

151. Finally, the Tribunal recalls that it itself characterized the case of *Mr. "P" (No. 2)* as ". . . aris[ing] under the Fund's revised policy, adopted in 1999, of giving effect, upon request of a spouse or former spouse of an SRP participant or retired participant, to a court order requiring that spouse or child support payments or the division of marital property be made from SRP benefits that otherwise would be payable to the participant." (Para. 69.) (Emphasis supplied.) The question did not arise in that case of whether effect could be given to a court order that did not prescribe that payments be made from Fund pension benefits. In that case, the divorce decree at issue expressly provided: ". . . the Plaintiff [Ms. "Q"] shall be entitled to a continuing share of the Defendant's [Mr. "P"'s] ongoing pension entitlement in the amount of 50% of the marital portion (56%) of all monies due the Defendant under his retirement annuity from the International Monetary Fund, plus a proportionate share of all cost of living supplements" *Mr. "P" (No. 2)*, para. 38.

152. Nevertheless, the text of Section 11.3 governs and, in the view of the Tribunal, does not preclude giving effect to an order that does not specify pension benefits. The legislative history of Section 11.3 suggests that in enacting this provision the Fund was motivated in particular by a problem that arose most often in the U.S. jurisdictions surrounding the Fund's Washington, D.C. headquarters, i.e. of Fund retirees using the Fund's immunity from process of the U.S. courts to shield themselves from spousal and child support obligations. Accordingly, the Fund understandably looked for guidance to the provisions of the U.S. law that provide for the issuance of Qualified Domestic Relations Orders ("QDROs") in private sector pension plans. In proposing the enactment of Section 11.3, the 1995 Report noted that a majority of support orders would likely originate from the courts of the District of Columbia, Maryland and Virginia, which are familiar with the U.S. law on redirection of pension payments to support obligations. In adopting Section 11.3(b), it was also noted that this provision is "similar to practices of many courts in the United States and certain other countries where a division of marital property with a spouse may include a pension" (Para. 7)

153. As noted above, the anti-alienation rule weighs in favor of limiting the scope of Section 11.3. Nonetheless, in *Mr. "P"* (No. 2), para. 151, the Tribunal observed that it may give preference to those legal systems that recognize the public policy underlying the Fund's internal law, namely "to encourage enforcement of orders for family support and division of marital property." In interpreting Section 11.3 the Fund, as a global multinational organization, must take account of the character of different legal systems. In first adopting Section 11.3, the Fund expressly noted that it would allow retirees "by a direction [to] give effect to divorce orders from courts other than those in the United States." (1995 Report, para. 8.) The requirement of the N Rules that the Fund hire on a geographically diverse basis is consistent with this approach. (Rules and Regulations of the International Monetary Fund, N-Staff Regulations, N-1.)

154. The question arises whether assuming that there are jurisdictions (Germany purportedly being one of them) that would not issue an order expressly awarding support from pension benefits, the Fund properly may interpret Section 11.3 to include this requirement. In the words of Respondent, "[b]ecause there is no court order against Mr. ['N']'s pension, there is nothing to which the Administration Committee can 'give effect' under Section 11.3(c) of the Plan." "It would be manifestly unjust and contrary to the purpose of Section 11.3 of the Plan for the Committee to purport to give effect as against Mr. ['N']'s Fund pension to German court orders which do

not require and, according to Applicants' own representations, could not have required under German law, payment of past due child support from that pension."

155. While the Fund's Executive Board sought to resolve a problem that may have arisen only in jurisdictions that had QDRO statutes, the policy adopted raises an issue of treatment of Fund staff and their dependents in diverse legal systems. The rights of the child born out of wedlock who is raised in a foreign jurisdiction should not turn on the particularities of the law of the District of Columbia, Maryland or Virginia. The Fund is a universal organization that in its operation must give due weight to legal principles and procedures of a variety of jurisdictions. The Tribunal holds that the SRP Administration Committee, and this Tribunal, are entitled to weigh factors such as the foreign residence of the child and her guardian, the Applicants' asserted and apparent difficulty or inability in obtaining a court order in Germany that in terms specifies what a QDRO specifies, the difficulty or inability of the Applicants to move effectively against other assets of the retiree, and the bad faith and questionable tactics displayed by the retiree in evading his elementary paternal responsibilities. These factors support giving effect in this case to German court orders that do not expressly require that support payments be made from the retiree's Fund pension. This holding does not detract from the right of the retiree otherwise to question the efficacy, finality or meaning of the German court orders, pursuant to the Rules of the Administration Committee under Section 11.3. Nor, of course, can the retiree's pension security be undermined because the Plan itself places a cap of 16 percent on all child support payments. In upholding Applicants' challenge, the Tribunal responds to the policy of its forum, namely, the internal law of the Fund, which favors enforcement of family support orders wherever they originate and however drafted. *See Mr. "P" (No. 2)*, paras. 151, 156.

156. Furthermore, given the fact that a requirement of an express reference to the Fund's Staff Retirement Plan is not clearly stated in Section 11.3, the Tribunal declines to read such a requirement into that provision. What is important is that an alternate payee submit a valid court order entitling the applicant to support arising out of a marital or parental relationship. The precise terms in which the obligation for support is cast are not dispositive. Thus, in the case now before the Tribunal, the fact that the Applicants submitted orders which, on their face, require the retiree to provide child support but do not refer to his pension benefits suffices for the Fund to provide benefits to Applicants drawn from the retiree's pension entitlement, assuming that the orders meet the requirements set out in the Rules of the

Administration Committee under Section 11.3. That question is considered below.

157. It should further be noted that national courts may be reluctant to issue orders that specify payment of spousal or child support from the IMF Staff Retirement Plan precisely because they are aware of the Fund's immunity from legal process. The history of this case illustrates this point in that the D.C. Superior Court initially rejected a suit brought by Applicants on the ground of the Fund's immunity.⁸⁵ That consideration provides further reason not to require national courts specifically to engage the question of payment out of the SRP.

158. Accordingly, the Tribunal holds that Section 11.3 does not necessarily exclude from its reach court orders that do not expressly provide that payment be made from a retiree's Fund pension benefits. Rather, the text and history of that Plan provision permit the conclusion, in the circumstances of Applicants' case, that Section 11.3 may be interpreted more broadly to permit giving effect to support orders that lack such an express direction.

159. As the Fund states in its aide-mémoire to the D.C. Superior Court, "[t]he IMFAT is the proper forum for resolving [Ms. "M"]'s complaint about the scope of Section 11.3 of the SRP, because only the IMFAT has jurisdiction to grant a remedy to [Ms. "M"] as against the SRP or the IMF." At the same time, the Tribunal takes notice of the D.C. Superior Court's June 21, 2006 Order. By its terms, Applicants now have obtained an order that expressly requires Mr. "N" to direct that child support obligations accruing up until Ms. "M" reached the age of eighteen be paid from his future Fund pension payments.

Is the Fund's interpretation of the requirements of Rule 9 of the Administration Committee Rules under Section 11.3, to preclude giving effect to court orders for support payments that were due prior to the dates of Applicants' requests, a necessary one?

160. The Tribunal has concluded that there are circumstances, as in the present case, under which the Fund may give effect under Section 11.3 to

⁸⁵The 1995 Report (para. 8) addressed the issue of immunity by stating that "[a]ll court orders and decrees [under Section 11.3] would be issued and directed to participants or retired participants and not to the Plan which would continue to assert its traditional immunity from them." However, this distinction (i.e. between orders directed at the Plan or the Fund and orders directed at the retiree) may not be readily apparent to individuals seeking support, their attorneys, or even the courts.

support orders that do not specify that the support is to be drawn from pension benefits. The Tribunal now addresses how the “prospective payments” rule, i.e. Rule 9 of the Rules of the Administration Committee under Section 11.3, is to operate in the case of such an order.

161. It may be recalled that, in denying Applicants’ 1999 request, the Legal Representative to the SRP Administration Committee responded to Dr. “M” as follows:

“While the court orders you presented might have been effective for the garnishment of wages if Mr. [“N”] had continued to be employed by the Fund and was receiving a salary from the Fund, they are not effective with respect to the . . . SRP or any pension payments made by the SRP. In order to fulfill the legal requirements to maintain its qualified status, the SRP has ‘non-alienation’ provisions that prohibit the SRP from diverting pension payments from a retiree and making payments for the debt obligations of a retiree.”

Similarly, in 2002, the Secretary of the Administration Committee rejected Applicants’ request in the following terms:

“According to the court order you submitted, child support was due from Mr. [“N”] until your daughter reached eighteen years of age. Since she is over eighteen years of age, there is no continuing obligation to pay child support for her and unpaid amounts for child support due in the past are debts and no longer prospective obligations to provide child support. Under Section 11.1, the Plan is prohibited from making payments to discharge the debts of a participant”

162. It may be observed that because, in Respondent’s view, orders that may be given effect under Section 11.3 must specify that support payments be made from the retiree’s pension, the prospective payments rule of the Committee’s Rules under Section 11.3 necessarily assumes the same. The Tribunal observes that the Fund’s interpretations of the two provisions are closely related and embedded in the anti-alienation principle. Indeed, the Model Order states that a portion of pension benefits may be paid to the alternate payee “if as and when they become payable” to the participant. The question arises whether the meaning of the Rule is simply that support payments must be taken from prospective pension payments even if based on a past obligation. It may be recalled that in respect of the division of marital property incident to divorce, i.e. the “marital portion” of the pension, meaning the spouses’ past contribution to the household, the spouse’s contributions during the marriage are taken into account. *See Mr. “P” (No. 2)*, para. 28.

163. Section 11.1, the anti-alienation provision of the Fund's Plan provides that no benefit under the Plan shall be . . . in any manner liable for or subject to the debts . . . of the person entitled to such benefit, except as may be specifically provided in the Plan . . ." It is important to note that Section 11.3 *is* such an exception to the prohibition of Section 11.1, as emphasized by the first line of Section 11.3, which begins: "Notwithstanding the provisions set forth in Section 11.1 . . ." Accordingly, the terms of the Plan itself do not prohibit giving effect to court orders to enforce judgment debts arising from marital or parental obligations.

164. Nonetheless, Rule 9 of the Rules of the Administration Committee under Section 11.3 provides in relevant part:

"Payments pursuant to a direction or an accepted request shall be prospective only; no payment will be made for amounts payable or due prior to the later of the date that the direction or request was received or the effective date referred to in the direction. . . ."

165. In challenging the Fund's application of Rule 9, Applicants assert that it unreasonably favors the security of retirement savings over enforcement of child support obligations and rewards "criminal evasion" of child support. Applicants maintain that undue hardship results, because court judgments are typically "for the collection of past due amounts" and obtaining a final judgment may take years, especially in "international" proceedings in which the defendant evades his obligations.

166. Respondent counters that the policy of allowing only prospective payments under Section 11.3 reflects the Fund's reasonable judgment that the Plan's primary purpose of providing secure pensions to retired staff "outweighs the policy of giving effect to alimony and support awards, when such awards are past-due rather than prospective, and when there are other means for enforcement through national courts, including attachment of the delinquent's other assets and even incarceration." The rationale cited by Respondent is that the public interest in the collection of debts is not as strong as the interest in enforcement of awards for ongoing support, nor as compelling as the anti-alienation rule that governs the Fund's, and other, pension plans. The Tribunal notes that by contrast, as to wages, the Fund's policy is to give effect to garnishment orders for past-due amounts. (Staff Bulletin No. 99/11.)

167. The Rules of the Administration Committee under SRP Section 11.3, including Rule 9, were adopted by the Administration Committee, pursu-

ant to its authority prescribed in the SRP Section 7.2 (c).⁸⁶ While the Rules of the Administration Committee under SRP Section 11.3 were adopted by that Committee,⁸⁷ and not by the Executive Board of the Fund, the prospective payment limitation was expressly stated in the Report of the Secretary of the Administration Committee of January 24, 1995, which recommended the adoption of Section 11.3 to the Pension Committee and, ultimately, to the Executive Board. This document stated that “[p]ayments pursuant to a direction made under it would be prospective only. This would be the case even if the court order or decree on which the direction is based had been obtained earlier.” (1995 Report, para. 10.)

168. The substance of Applicants’ challenge requires consideration of two competing policies that Section 11.3 and the Rules thereunder seek to balance and implement. On the one hand, as noted above, Section 11.3 was expressly drafted as an exception to the general prohibition against alienation of Plan benefits embodied in Section 11.1 of the Plan, a prohibition which seeks to safeguard and promote the Plan’s primary purpose of providing pensions to participants.⁸⁸ On the other hand, as this Tribunal has emphasized in *Mr. “P” (No. 2)*, para. 151, Section 11.3 and the Rules thereunder implement a competing policy of “encourag[ing] enforcement of orders for family support and division of marital property.” As previously stated, in adopting this provision in 1995 and expanding its reach in 1999, the Fund expressly sought to address the concern that Fund retirees could use the immunities of the SRP to evade their court-ordered family support obligations.⁸⁹ One way in which the drafters sought to balance these two competing policies was by incorporating into Section 11.3 and the Rules thereunder several provisions—including the prospective payment provision—that limit the nature and amount of payments that may be diverted. As noted earlier, the Fund’s policy of voluntarily giving effect to court orders for garnishment or withholding from Fund employees’ wages of spousal and child support allows payment of past-due amounts (although it also

⁸⁶SRP Section 7.2 (c) provides:

“(c) The Administration Committee, subject to the general authority of the Pension Committee, shall have authority to make, establish and prescribe such rules, policies, procedures and forms for the administration of the Plan, its interpretation, the exercise by individuals of rights or privileges hereunder, the disbursement of the Retirement Fund and the application of the Plan to individuals and the Employer as shall not be contrary to the provisions hereof.”

⁸⁷See Section 11.3; Staff Bulletin No. 99/12 (June 9, 1999).

⁸⁸See 1995 Report, para. 5; 1999 Report.

⁸⁹See 1995 Report, para. 2; 1999 Report, para. 4.

limits the amounts that may be so diverted⁹⁰). (See Staff Bulletin No. 99/11 (May 4, 1999); Staff Bulletin No. 99/12 (June 9, 1999), para. 2.)

169. In its June 21, 2006 Order, the D.C. Superior Court required Mr. "N" to direct 16 $\frac{2}{3}$ percent of all future SRP payments to Dr. "M" until U.S. \$71,905.81 in past due child support payments has been met. In that Court's view, the "prospective payments" provision of Rule 9 means merely that ". . . the SRP will not attempt to retrieve money that has already been paid to the Respondent [i.e. Mr. "N"] and redirect it to the beneficiary of the court order."

170. The Tribunal accordingly turns to the question of whether Rule 9 should be interpreted to bar giving effect to the 2006 QDRO issued against Mr. "N" by the D.C. Superior Court. That Order was brought to the Tribunal's attention by letter of Dr. "M" dated June 26, 2006, in response to a Request for Information by the Tribunal to Applicants to keep it informed of developments in the litigation. The 2006 Order creates an entitlement to the monies previously owed by Mr. "N" for support of Ms. "M" prior to her reaching the age of eighteen. Having previously recognized the German court orders for pre-majority support and ordered that they be given effect, and in view of Mr. "N"'s failure to comply with that D.C. court order, the D.C. Superior Court in its 2006 Order decided that his pension must be garnished "prospectively," in the sense that the monies shall be taken from *future pension payments*, at the maximum rate permitted by Section 11.3 of 16 $\frac{2}{3}$ percent.

171. While the Tribunal recognizes that there is room for another conclusion, and while it fully understands the position heretofore adopted by the Fund, the Tribunal concludes that a court order, such as the 2006 Order against Mr. "N", that expressly specifies that support payments be made from future pension payments—even if the liability for that support was incurred at some period in the past—is consistent with the requirements of Section 11.3. In the Tribunal's view, it is the better conclusion. This interpretation of the "prospective payments" rule is consonant with the anti-alienation principle embodied in the Fund's SRP because it contains an incentive for the alternate payee to exhaust first recourse against other assets. This is so because the payment of 16 $\frac{2}{3}$ percent of prospective pension benefits will normally stagger the payment of the sum due to the alternate payee over

⁹⁰"Requirements and Conditions for Giving Effect to Court Orders for Garnishment or Withholding from Wages for Spouse or Child Support," Staff Bulletin No. 99/11 (May 4, 1999), Attachment, paras. 6, 7.

a period of years. Clearly the capture of the present value of an award is more advantageous than its payment over an extended period, particularly because such payment would be terminated at the death of the retiree.

172. The Tribunal concludes that, when a court finds on the facts of the particular case it to be appropriate to order payment from future benefits of past liabilities, it is not for the Fund to look behind such a determination by the court. Nor should an alternate payee be penalized for the time required to pursue recourse against other assets and to acquire an order “akin to” a QDRO.

173. If the June 21, 2006 Order of the D.C. Superior Court had not been issued and the instant case were to be decided only on the basis of the German court orders of 1991, 1994 and 1995, the Tribunal is of the view that those orders would suffice to entitle the Applicants to require the Fund to make the requisite deductions in their favor from Mr. “N”’s future pension payments. That is so even though the German court orders do not expressly specify recourse against Mr. “N”’s pension. For the reasons indicated above, such a requirement unduly prefers form over substance. Nor, since an enforceable court order need not refer to the Staff Retirement Plan, it need not refer to the question of prospective payments. In that circumstance, however, the prospective payments rule would have operated to give effect to those Orders only from the date of Applicant’s September 15, 1999 request to the Fund. In the Tribunal’s view, a reasonable distinction may be drawn in the application of the prospective payments rule as between an order such as the 2006 QDRO that expressly specifies that support payments be drawn from future pension payments and the German Orders that require only that support be paid by the parent to the dependent child.

Had the Administration Committee reviewed Applicants’ 1999 and 2002 requests pursuant to its Rules under Section 11.3, should it properly have denied them on the ground that a bona fide dispute existed as to the efficacy, finality, or meaning of the German Orders of 1991, 1994, and 1995, and that they therefore did not satisfy the conditions prescribed for giving effect to a court order?

174. The Tribunal observes that the 2006 Order of the D.C. Superior Court has not been the subject of either a direction by Mr. “N” or a request by the Applicants. For that reason, the Tribunal proceeds to review the 1991, 1994, and 1995 German Orders—which form the basis for the 2006 D.C. Order—for consistency with the Administration Committee’s Rules for giving effect to court orders pursuant to Section 11.3.

175. As detailed above, the Fund twice rejected Applicants' requests (in 1999 and 2002) to give effect to the 1991, 1994, and 1995 German Orders relating to support of Ms. "M" before reaching the age of eighteen. Because these requests were rejected at a threshold stage by the Administration Committee's Legal Representative and Secretary, respectively, the Committee did not review these Orders for compliance with the Committee's Rules under Section 11.3 for giving effect to support orders. Having concluded that the bases for the Fund's denials of Applicants' 1999 and 2002 requests, i.e. that the orders at issue did not arise from a "marital relationship" nor did they specify payment from Mr. "N"'s pension benefits, are, on balance, unpersuasive, the Tribunal now turns to the question, of whether, as Respondent maintains, the requests nonetheless should have been denied on the ground that a *bona fide* dispute existed as to the efficacy, finality, or meaning of the orders.

176. In *Mr. "P" (No. 2)*, para. 122, the Tribunal held that its authority to resolve the underlying dispute

"... must be predicated upon a finding of error in the contested decision of the Administration Committee. If the Tribunal concludes that the Committee did not properly apply SRP Section 11.3 or the Rules thereunder, or that these regulations are themselves invalid, then the Tribunal would be authorized to invoke its remedial authority to correct the effects of the decision."

In the case of the 1999 and 2002 requests, the Tribunal finds error, not in the decision of the Administration Committee, which did not pass on these requests, but in the threshold determinations of the Fund. The Tribunal observes that it is not necessary or appropriate for it to refer the matter to the Administration Committee at this stage, however. *Cf. Estate of Mr. "D"*, para. 135 (rejecting Fund's suggestion that case be returned to Grievance Committee for review; "... Respondent's concern that, without a decision on the merits in this case by the Grievance Committee, the Tribunal will lack a full evidentiary record, is misplaced. The Tribunal in this case has the benefit of an extensive documentary record") The proper remedy is rescission of such a decision and correction of its effects. (*Mr. "P" (No. 2)*),⁹¹ paras. 123, 156; *see also* Article XIV of the Statute of the Administrative Tribunal.)

⁹¹In *Mr. "P" (No. 2)*, the Tribunal concluded that the Administration Committee erred in refusing to give effect to a Maryland divorce judgment and that this decision should be given effect under the Plan. (Paras. 145, 156.)

177. Rule 2 of the Rules of the Administration Committee under SRP Section 11.3 sets forth four substantive criteria under which a court order is accorded a presumption of validity in the absence of an objection:

“2. Unless a participant or retired participant, spouse or former spouse objects, the Administration Committee may presume that a court order or decree concerning the payment of amounts from the Staff Retirement Plan

(A) is valid by reason that:

(1) a reasonable method of notification has been employed and a reasonable opportunity to be heard has been afforded to the persons affected; and

(2) the judgment has been rendered by a court of competent jurisdiction . . . and in accordance with such requirements of the state as are necessary for the valid exercise of power by the court;

(B) is the product of fair proceedings;

(C) is final and binding on the parties; and

(D) does not conflict and is not inconsistent with any other valid court order or decree.”

In the event of an objection, the Committee will assess the adequacy of the court order by reference to the same criteria:

“If a party objects to giving effect to a court order or decree, the Administration Committee will assess its adequacy based on the criteria listed in (A) through (D) in the preceding sentence. The Administration Committee will not review the court order or decree concerning the merits of the case and will not attempt to review the judgment of the court regarding the rights or equities between the parties.”

Finally, the order will not be given effect if it fails to satisfy any of the stated criteria:

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

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

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

"(b) . . . If the Administration Committee is satisfied that there is a bona fide dispute as to the application, interpretation, effectiveness, finality or validity of the court order or decree, no action shall be taken on the request unless and until the matter is resolved to the satisfaction of the Administration Committee. . . . Any payment withheld pending the Committee's consideration of the request will be paid to the person determined by the Committee to be entitled to such payment; provided that the Administration Committee may deposit it in escrow in the Bank-Fund Staff Federal Credit Union in an interest-bearing account until such payment is made."

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

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

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

179. Respondent asserts that Applicants' 1999 request would have been denied "because it suffered from the same defects of efficacy, finality and meaning as their [2003] request," but does not elaborate on this assertion in light of the criteria prescribed in Rule 2. Rather, Respondent suggests that Mr. "N"'s objections to the 2003 German Order apply also to the German Orders of 1991, 1994, and 1995 and give rise to a *bona fide* dispute under the Administration Committee Rules.

180. As Respondent does not elaborate its position with respect to these Orders—beyond the analogy to the 2003 German Order—it is necessary to refer to the Fund's treatment of Mr. "N"'s objections to the 2003 Order, as reflected in the Administration Committee's decisions and Respondent's

pleadings.⁹² The record reflects that the Administration Committee's decision of February 25, 2004 was based on the following objections raised by Mr. "N" with respect to the 2003 German Order, which are equally applicable to the 1991, 1994, and 1995 Orders.⁹³

181. Mr. "N" raises three principal arguments: (1) he contests paternity of Ms. "M"; (2) he claims that the support orders must be recognized by the country of domicile of the retiree in order to be given effect under SRP Section 11.3; and (3) he maintains that Finnish law applies to the question of paternity and any support obligations. While Mr. "N"'s objections specific to the Orders of 1991, 1994, and 1995 formed part of the record before the Administration Committee in 2003, Respondent does not specifically address them and Mr. "N" chose not to raise them before the Tribunal. The record reflects the following relevant objections:

- Mr. "N" asserted before the Administration Committee that he has not been served in respect of any German legal proceedings.⁹⁴
- The record reflects that Mr. "N" also objected in various legal proceedings to the Darmstadt Court's jurisdiction with respect to the German Orders of 1991, 1994, and 1995.
- Mr. "N" also asserted that Ms. "M"'s child support claims have been transferred to the German authorities that had paid child support to Ms. "M", and therefore Applicants lack standing to seek their enforcement.

182. As stated in para. 177 above, review of the adequacy of a support order calls for the consideration of each of the criteria prescribed in Rule 2(A)-(D). (As application of Rule 2(A) is central to the controversy between the parties, it will be addressed lastly.) Rule 2(B) was not invoked by the Committee (or by Respondent), as the fairness of the proceedings underlying the German Orders has not been called into question.

⁹²The Administration Committee's decisions did not specify precisely which criteria or limitations prescribed in the Administration Committee Rules were implicated by each of Mr. "N"'s objections, in the view of the Committee. While some of these objections were expressly referenced in the Committee's decisions, others apparently were given weight by the Committee in reviewing Applicants' request, as evidenced by the Memoranda of the Secretary of the Committee of May 30, 2003 and January 27, 2004, and the minutes of the Committee's meeting of February 20, 2004.

⁹³The objection specific to the 2003 German Order is discussed below.

⁹⁴This objection was considered by the Committee in rendering its 2003 decision.

183. Rule 2(C) provides that only orders that are "final and binding on the parties" may be given effect under SRP Section 11.3. Respondent's assertion that the German Orders of 1991, 1994, and 1995 raised the same issue of finality as the 2003 Order is without basis. While the 2003 Order was by its terms an "interim order," the German Orders of 1991, 1994, and 1995, taken together, would appear to evidence a final and enforceable obligation.⁹⁵ Moreover, the 2003 Order states that with the July 20, 1994 Order of the Darmstadt Local Court, the maintenance of Ms. "M" before reaching age eighteen had been "finally judged."⁹⁶ It therefore appears that Respondent's assertion refers to the fact that these Orders were the subject of ongoing recognition and enforcement proceedings in Finland. However, the term "final" in Rule 2(C) refers to the conclusive nature of the order in the context of the proceedings in the issuing jurisdiction.⁹⁷ Because several years had elapsed since the issuance of the German Orders, Mr. "N"'s failure to timely appeal such orders evidenced their final nature, and his appeal was, in fact, denied on May 22, 2002 as untimely. (*See Mr. "P" (No. 2)*, para. 144: "The finality of the Maryland Judgment is supported by the fact that no appeal has been taken and both Applicant and Intervenor have averred to the Administrative Tribunal that no litigation is pending that would bear upon its validity.")

184. In *Mr. "P" (No. 2)*, para. 144, this Tribunal clarified that, in that case, the requirement that the order be "binding on the parties" under Rule 2(C) raised the question of the court's jurisdiction, which is also addressed in Rule 2(A)(2). The Administration Committee in the case of Applicants' 2003 request apparently interpreted this requirement more broadly when it concluded that "there is also the issue of whether the order is binding on the parties in light of the position of the retiree that the German court has no jurisdiction over him, that the question of paternity is unresolved and that the matter remains under litigation in Finnish court."⁹⁸ (Minutes of the February 20, 2004 meeting of the Administration Committee, p. 3.) The

⁹⁵Thus, even though the Orders of 1991 and 1994 were by their terms "provisionally enforceable," the 1995 Order stated that it was issued for the purpose of "forceable execution," pursuant to the 1994 judgment.

⁹⁶*See* paragraphs 36-37, *supra*.

⁹⁷This interpretation finds support in the fact that the Fund's internal document, entitled "Requirements and Conditions for Giving Effect to Court Orders for Garnishment and Withholding from Wages for Spouse and Child Support," requires that the order be "final and binding on the parties *and not subject to or pending appeal.*" (Staff Bulletin No. 99/11 (May 4, 1999), p. 4.) (Emphasis supplied.)

⁹⁸The Secretary of the Administration Committee reached the same conclusion in recommending to the Committee the rejection of Applicants' 2003 Request for Review.

question of whether the Committee erred in its application of Rule 2(C) is addressed below with reference to the issues of paternity and Finnish litigation, respectively.

185. An order will satisfy the requirement of Rule 2(D), if it “does not conflict and is not inconsistent with any other valid court order or decree.”⁹⁹ The record before the Tribunal contains no evidence of a valid order that is inconsistent or in conflict with the German Orders under review, and Respondent does not claim otherwise.¹⁰⁰

186. Finally, Rule 2(A) calls for a determination whether the Order:

“(A) is valid by reason that:

(1) a reasonable method of notification has been employed and a reasonable opportunity to be heard has been afforded to the persons affected; and

(2) the judgment has been rendered by a court of competent jurisdiction . . . and in accordance with such requirements of the state as are necessary for the valid exercise of power by the court;”

The courts of Germany, Finland and Washington, D.C. rejected Mr. “N”’s objections to the validity of the German Orders. This and other evidence discussed below establishes the validity of the German Orders.

187. The record reflects that Mr. “N” asserted lack of reasonable notification and opportunity to be heard with respect to the German proceedings that led to the issuance of the German Orders. However, the German Orders of 1991 and 1994 stated that he was properly summoned to appear in these proceedings, and the 1994 Order noted that he was “absent without a valid excuse.”¹⁰¹ Furthermore, one of the documents submitted by Dr. “M” along with her 1999 request was Mr. “N”’s letter of October 25, 1993 to the Darmstadt Local Court, stating (with reference to the case number indicated on the 1994 and 1995 German Orders) that he objected to the legal proceed-

⁹⁹As this Tribunal noted in *Mr. “P” (No. 2)*, there is some ambiguity in the text of the Rule as to whether factor “D” relates to a court order or decree that formed the basis of a prior direction or accepted request under the Plan. (Para. 144.) In the present case, however, this ambiguity is immaterial, as the record contains no evidence of a valid inconsistent order.

¹⁰⁰Although the June 16, 1999 Order of the D.C. Superior Court indicates that there was an earlier decision by a Hearing Commissioner denying recognition of the German Orders on the grounds *inter alia* that the jurisdiction of the German Court was doubtful, the June 16, 1999 Order reversed this earlier decision, stating that this finding was “plainly wrong and without evidence to support it.” Thus, the Hearing Commissioner’s decision did not constitute a “valid” inconsistent order under Rule 2(D).

¹⁰¹See para. 31, *supra*.

ings commenced against him by Ms. "M" and "[did] not recognize[] any part of these false claims." This evidence undermines Mr. "N"'s claim that he had no notice of the relevant proceedings. Furthermore, by Order of May 22, 2002 the Darmstadt Regional Court rejected Mr. "N"'s appeal of the German Orders, holding that his allegations of procedural irregularities were in bad faith.

188. It is clear from the record that Mr. "N", during the enforcement proceedings in Washington, D.C., also disputed the personal jurisdiction of the Darmstadt Local Court, which issued the German Orders in question. Applicants maintain that the German courts correctly assumed jurisdiction over Mr. "N", since his daughter is a resident of Germany.

189. Aside from Mr. "N"'s assertions, the record does not indicate that there was ever a substantial question as to the German Court's personal jurisdiction, based on the evidence submitted to the Administration Committee. The record reflects that, while Mr. "N" was properly notified of the German child support proceedings, he did not appear before the German court to raise this objection and did not appeal the resulting German Orders until years later, when such appeal was no longer timely.¹⁰²

190. The D.C. Superior Court held that the German Court had personal jurisdiction over Mr. "N", stating:

"First, respondent never claimed at trial that the issuing tribunal lacked personal jurisdiction over him. Indeed, respondent specifically testified that he had not made any attempts to challenge the support Order in Germany because he had no ties there and the enforcement matter was brought in the District of Columbia. . . . As such, respondent has waived this defense. Second, there is simply nothing in the record to support the contention that the German courts lacked the jurisdiction to issue the Order at hand."

¹⁰²The May 22, 2002 Order of the Darmstadt Regional Court states:

"Despite its best intentions, the Division can no longer comprehend, when the Defendant . . . pleads . . . that it is unfair that the Defendant should find out about such a judgment only now after several years. According to the affidavit signed by the Defendant himself, he received the default judgment dated March 14, 1991.

As evidenced by the proof of dispatch . . . , the judgment was sent on May 22, 1991 with instructions about the right to appeal. . . . Moreover, . . . it should have been clear to the Defendant even without such instructions, that it would be impossible for there to be no consequences if he were to take no action for several years after receiving this judgment. . . . [The Division] considers that Defendant's plea of irregularities in the proceedings to be in bad faith."

191. Applicants' position regarding the validity of the German Orders is buttressed by the fact that the D.C. Superior Court recognized and enforced these Orders, over Mr. "N"'s objections, by Order of August 5, 1999, which was provided to the Administration Committee at the time of the 1999 request. The issuing court's lack of jurisdiction is a standard defense to recognition and enforcement of foreign judgments, generally recognized in domestic and international law.¹⁰³ Thus, although the D.C. Superior Court's Order of August 5, 1999, submitted to the Committee, did not expressly address this issue, it nevertheless demonstrated that the Orders had been recognized in another jurisdiction. Similarly, on May 25, 2001, the Supreme Court of Finland ordered the German Orders to be enforced, rejecting Mr. "N"'s objections, as did earlier the Helsinki Court of Appeals. The fact that the courts of Finland and Washington, D.C. had granted recognition to the German Orders of 1991, 1994, and 1995 over Mr. "N"'s objections constituted compelling evidence of the validity of these Orders under the Administration Committee Rules.¹⁰⁴

Did Mr. "N"'s objections on the issue of paternity give rise to a *bona fide* dispute under the Administration Committee Rules?

192. The record reflects that Mr. "N" raised two objections on the issue of paternity. First, he asserted that he is not the father of Ms. "M" and that the German courts improperly relied on his acknowledgment of paternity that he had purportedly revoked in 1991, due to its being fraudulently obtained by Dr. "M". Second, Mr. "N" argued that the Administration Committee may not give effect to an order unless the child support obligation has been

¹⁰³"Enforcement of Judgments," circular prepared by the U.S. Department of State, Bureau of Consular Affairs, available at: http://travel.state.gov/law/info/judicial/judicial_691.html; see, e.g., Article 34 of the "Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters," Official Journal of the European Communities (OJ L 12, 16.1.2001, p. 1), available at: http://europa.eu/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf.

¹⁰⁴There is no evidence that Mr. "N" has prevailed in his attempts to challenge execution proceedings in Finland and Washington, D.C. in the ensuing years. He undertook several rounds of appeal with respect to the writ of attachment issued against his bank account in Washington, D.C. pursuant to the Orders of the D.C. Superior Court, culminating in a denial of his objections by the D.C. Court of Appeals on December 8, 2005. Over the years, the D.C. courts have characterized Mr. "N"'s numerous motions challenging the various orders of the D.C. Superior Court in this matter as "repetitive," "baseless," "frivolous," and "abusive." Similarly, as detailed below, Mr. "N" resisted execution that commenced in Finland pursuant to the Order of the Supreme Court of Finland by filing a claim in the Turku District Court, asserting his objections to paternity and Applicants' standing. Dr. "M" has asserted before the Tribunal that Mr. "N"'s claim "has been rejected by the Local Court of Turku on December 14, 2004."

established under the legal standard of the retiree's country of domicile. It is clear that these objections apply to the German Orders of 1991, 1994, and 1995, as well as to the 2003 German Order.

193. The record reflects that the Administration Committee found there to be an unresolved issue in respect of Mr. "N"'s paternity. The minutes of the Committee meeting of February 20, 2004 reflect its determination that a question existed whether the 2003 German Order was "binding on the parties in light of the position of the retiree that . . . the question of paternity is unresolved and that the matter remains under litigation in Finnish court."¹⁰⁵ Similarly, Respondent maintains that the "contested issues of German and Finnish family law" raised by Mr. "N" constituted a *bona fide* dispute under the Administration Committee Rules. Applicants, for their part, assert that Mr. "N" never revoked his acknowledgement of paternity and that it would not be possible. Applicants add that this issue "could not be examined by the IMF," since it could be decided only by national courts.

194. Staff Bulletin No. 02/5, announcing the 2001 revision of Section 11.3 cautioned that the Administration Committee ". . . will not resolve disputes about parentage . . ." However, it falls to this Tribunal to resolve a question to which the Administration Committee gave undue credence. Mr. "N"'s objections to paternity are manifestly in bad faith. Along with her 1999 request, Dr. "M" submitted an acknowledgement of paternity, quoted *supra* at paragraph 29, issued on January 14, 1991 by the Magistrate of the Municipality of Darmstadt, Germany, which was signed by Mr. "N" and stated *inter alia*: "I know that the acknowledgment is irrevocable . . ." Mr. "N" was clearly aware of the legal proceedings in question, yet chose not to appear before the German Court to assert his defenses with respect to paternity; he attempted to do so years later when his appeal was no longer timely. At the same time, Mr. "N" did not submit any evidence of his alleged revocation of the acknowledgment of paternity. The certificate from the Lapland Local Register Office, stating that the Finnish Population Information System contains no record of Mr. "N"'s being the father of Ms. "M", plainly is not sufficient to raise a *bona fide* dispute.

195. While Mr. "N" has disputed his child support obligations in the courts of three countries, there is no evidence that any court has credited his objections to paternity. The May 22, 2002 Order of the Darmstadt Regional

¹⁰⁵The Secretary stated the same conclusion in recommending the rejection of Applicants' 2003 Request for Review. Respondent also asserts that based on its review of Mr. "N"'s submissions, the Legal Department had determined that they "did appear to show that the paternity issue and the enforceability of the German Orders remained in dispute."

Court expressly rejected Mr. "N"'s challenge to the determination of paternity on the grounds that:

"the dispute over paternity is in any case irrelevant after the Defendant had originally acknowledged paternity, as the claim that was first made in the appeal procedure is thus diametrically opposed to his earlier stance. As the Defendant has not cleared up this contradiction, the Division has considered this dispute to be irrelevant in the context of the free evaluation of evidence."

Furthermore, the fact that the Supreme Court of Finland and the D.C. Superior Court ordered enforcement of these Orders undermines Mr. "N"'s contention that the Orders were the result of fraud.

196. Mr. "N"'s assertion that only a support obligation imposed under the maintenance law of Finland, his asserted country of domicile, could be properly enforced against him also fails to give rise to a *bona fide* dispute under the Administration Committee Rules.¹⁰⁶ The Administration Committee unpersuasively gave weight to this objection with respect to the 2003 German Order, as Respondent does in its pleadings by asserting that "the Administration Committee, comprised of laypersons, . . . has neither the expertise to conduct its own research nor the resources to hire outside advisors to sort out these contested issues of German and Finnish family law"

197. There is no requirement under Section 11.3 and the Rules thereunder that an obligation to pay child support be established under the law of the retiree's country of domicile. Accordingly, this factor in and of itself is not material in the determination of the adequacy of an order under these Rules. *See generally* Mr. "P" (No. 2).¹⁰⁷ To the extent that Mr. "N" was challenging the choice of law applied by the German Court in deciding the issue of paternity, the Tribunal recalls its conclusion in Mr. "P" (No. 2), para. 146,

¹⁰⁶In support of this objection, Mr. "N" stated:

"[T]here is broad agreement in international law . . . to determine family relations according to the legal concept of domicile It follows that the Committee cannot set aside the legal effect of the more restrictive Finnish laws . . . that govern the disposition of my property Where the national laws and regulations conflict, the Finnish laws and regulations control any disposition by international bodies of my income, property and assets."

(Mr. "N"'s submission to the Administration Committee of April 10, 2003.)

¹⁰⁷It may also be noted that, in contrast to Mr. "P" (No. 2), where the Committee was faced with two competing divorce judgments that reflected a difference in the laws and public policy of two countries, such "conflict of laws" has not materialized in this case, as Mr. "N" did not produce any competing order.

that "[a]s no appeal has been taken, the Administrative Tribunal regards the Circuit Court decision as the prevailing statement of Maryland law under the circumstances of the case." In the present case, Mr. "N"'s appeal was rejected by the Darmstadt Regional Court by Order of May 22, 2002, which reaffirmed that the "German law on maintenance should be applied here."

198. Mr. "N"'s contentions on this issue are apparently related to his claim that a child support order may not be given effect by the Fund without being recognized by the retiree's country of domicile because it has "no effect" with respect to the retiree. There is no such requirement under the Administration Committee Rules. For all the reasons set forth, the evidence in the record does not substantiate a finding of a *bona fide* dispute as to paternity under the Administration Committee Rules. Nor does the Tribunal find substance in the contention of Mr. "N" that Dr. "M" was not authorized to seek enforcement of the German Orders because the right to collect child support from Mr. "N" pursuant to these Orders had been transferred to a German governmental agency that has paid Ms. "M" child support.

Litigation in Finland

199. As additional objections to the efficacy and binding nature of the 2003 German Order, Mr. "N" asserted that (1) the German Order must be recognized by his country of domicile, i.e. Finland, in order to be given effect under the Administration Committee Rules; and (2) that the Order is not enforceable in Finland and that this matter is the subject of ongoing litigation in Finland. For reasons detailed below, these objections did not give rise to a *bona fide* dispute and have no weight with respect to the German Orders of 1991, 1994, and 1995.

200. Mr. "N"'s objections concerning "two-country situations" were apparently given considerable weight by the Administration Committee and lack of recognition of the 2003 German Order in Finland was specifically cited as one of the grounds for the denial of Dr. "M"'s 2003 request. In recommending to the Committee the rejection of Applicants' 2003 request, the Secretary of the Administration Committee stated that "the criteria for a valid order have not been met . . . [because] two courts are involved and claim jurisdiction. It is not clear that the Helsinki court has recognized the German Order. Consequently, the potential for a conflict in the findings of the courts exists." With respect to Applicants' Request for Review, the Secretary stated that "there is question of whether the order is binding on the parties in light of the position of the retired participant that [*inter alia*] . . . the matter remains under litigation in Finnish court." Similarly, Respon-

dent asserts in its pleadings in this Tribunal that the Committee properly concluded “that a dispute existed between the parties, one which moreover apparently was in active litigation.”

201. The record reflects that at the time of their 1999 request, Applicants had a claim pending against Mr. “N” in a Finnish Court, seeking recognition and enforcement of the support obligation embodied in the German Orders of 1991, 1994, and 1995.¹⁰⁸ The evidence indicates that Mr. “N” was actively contesting this claim, and filed two appeals,¹⁰⁹ culminating in the May 25, 2001 decision of the Supreme Court of Finland, which ordered that the German Order of 1994 is “in force in Finland without separate confirmation and [is] . . . to be enforced here.”¹¹⁰ Mr. “N” subsequently filed a claim in the Turku District Court challenging the enforcement of these Orders. Dr. “M” has asserted before the Tribunal that Mr. “N”’s claim “has been rejected by the Local Court of Turku on December 14, 2004,” but did not provide any supporting documentation. On March 21, 2006, Respondent, in response to a Request for Information, informed the Tribunal that it has received two communications from Mr. “N” regarding litigation in Finland. Respondent states that Mr. “N” was informed that Respondent would not submit his communications to the Tribunal on his behalf, and that he should do so himself if he wished to enter this information into the Tribunal’s record. Mr. “N” has not communicated any information to the Tribunal. While there is some uncertainty in the record regarding the current status of litigation in Finland, for reasons stated below these proceedings do not give rise to a *bona fide* dispute under the Administration Committee Rules.

Is recognition of a support order by the retiree’s country of domicile required under Section 11.3 and the Rules thereunder?

202. Applicants maintain that the Administration Committee erroneously assumed that a child support order of the home state of the child, in order to be valid and honored by the Fund, has to be recognized by the home country of the retiree, since this requirement is not stated in the SRP rules and would make a timely request under Section 11.3 nearly impossible, given that recognition of foreign judgments may take several years. Appli-

¹⁰⁸The earliest record of these proceedings is a reference to an appeal apparently filed by Mr. “N” on January 29, 1999.

¹⁰⁹Appeals were apparently filed on January 29, 1999 and on September 11, 2000.

¹¹⁰The Court noted that by Order of the D.C. Superior Court of August 5, 1999, this judgment was in force in Washington, D.C.

cants further assert that a German court's decisions need not be recognized in Finland to be valid.

203. As Applicants correctly point out, Section 11.3 and the Rules thereunder do not, by their terms, provide that support orders must be recognized by the Fund retiree's country of domicile. The Fund's policy of giving effect to family support orders constitutes a voluntary undertaking to allow children of Fund retirees to obtain payments directly from the Plan, which is protected by the Fund's immunity from judicial process.¹¹¹ (See *Mr. "P"* (No. 2), paras. 126-31; 1995 Report, para. 8; Staff Bulletin No. 99/11 (May 4, 1999), pp. 1, 2.) As this Tribunal emphasized in *Mr. "P"* (No. 2), SRP Section 11.3 and the Rules thereunder were expressly designed to apply to retired participants who ignore family support orders and avoid their effect by moving outside the area where the court had jurisdiction or where its orders would be given effect. (Para. 153, citing Staff Bulletin No. 99/12 (June 9, 1999), p. 1.) Therefore, the Rules were intended to prevent Fund retirees from shielding themselves from support obligations imposed by the courts of competent jurisdiction. These Rules strive to encourage prompt compliance with such obligations and not to create additional obstacles to the enforcement of support orders.

204. The Fund's authority to give effect to family support orders is derived from and defined by the provisions of the internal law of the Fund, namely Section 11.3 and the Rules thereunder. As this Tribunal stated in *Mr. "P"* (No. 2), para. 156, when faced with a two-country situation, it "[did] not enforce the law of Maryland and decline to enforce the law of Egypt. Its decision rather responds to what may be termed the public policy of its forum, namely, the internal law of the Fund." In that case, the Tribunal con-

¹¹¹Section 9.1 of the Fund's Staff Retirement Plan provides that all contributions, assets, funds, and income of the Plan are the property of the IMF. This provision states:

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

(SRP Section 9.1.)

trusted the laws of Maryland that recognize family support obligations incidental to a divorce with the laws of Egypt that allow for an ex parte divorce and apparently preclude division of property after dissolution of marriage. *Id.*, paras. 151–152.

205. In the present case, the record reflects that Mr. “N” raised essentially the same objections in contesting the enforceability of the German Orders of 1991, 1994, and 1995 before the Finnish courts as he did before the Administration Committee with reference to the 2003 German Order. In reviewing Mr. “N”’s “statement of claims and their reasons,” dated March 11, 2002 (apparently filed with the Turku District Court),¹¹² the following objections could be identified: that no child support obligation exists in the absence of a paternity determination under Finnish law, that Dr. “M” was not the “owner” of these claims since they had been transferred to the German authorities, that German proceedings were “wrong” because he did not have sufficient contacts with Germany (apparently a challenge to personal jurisdiction), and that these decisions were issued “unilaterally.” Mr. “N”’s objections concerning Dr. “M”’s standing and the applicability of Finnish law are not material in this case. While objections to jurisdiction and notice are generally relevant in assessing the adequacy of support orders under the Administration Committee Rules, in light of the ample evidence of the validity of the German Orders, the fact that Mr. “N” was asserting these objections as a defense to their enforcement in Finland did not of itself give rise to a *bona fide* dispute with respect to these issues.

206. It may be observed that assigning significance to pending collateral litigation can be prejudicial to children and spouses, as it creates an incentive for protracted and possibly frivolous or contumacious litigation, which may take many years. The governing consideration is that a child support order must be issued by a court of competent jurisdiction. Recognition by the courts of the residence of a parent is not required, although, as far as the record in this case reveals, Finnish courts have not questioned the validity of the German orders.

207. In summary, while Mr. “N” disputed the legal effect of the German Orders of 1991, 1994, and 1995, this dispute was never *bona fide*, since contentions advanced by Mr. “N” are spurious. These Orders are valid and final, and Mr. “N”’s objections to paternity are manifestly in bad faith. Furthermore, the Supreme Court of Finland upheld the validity of the 1994

¹¹²As noted above, after execution commenced in Finland in 2001, Mr. “N” filed a claim in the Turku District Court, contesting execution of this Order against his assets in Finland.

German Order, and the courts of the District of Columbia also recognized the validity of the German Orders.

As to Applicants' 2003 request, did the Administration Committee err in concluding that a bona fide dispute existed as to the efficacy, finality, or meaning of the 2003 German Order and that it therefore did not satisfy the conditions prescribed by the Rules of the Administration Committee under Section 11.3 for giving effect to a court order?

208. On February 6, 2003, Applicants requested that the SRP Administration Committee give effect to the January 20, 2003 German Order against Mr. "N" to pay €227,03 monthly, which was issued pending the consideration of a claim filed by Dr. "M" against Mr. "N" in the Frankfurt Local Court, seeking €847,25 monthly for the maintenance of Ms. "M" after reaching the age of majority, based on her status as a dependent student. The 2003 Order of that Court is of interest in the following respects: (1) it is, by its terms, an "interim order"; (2) it confirms that Ms. "M" "is the illegitimate child of defendant, born on 1984-01-09"; and (3) it states that pursuant to the July 20, 1994 Order of the Darmstadt Court, "the maintenance for [Ms. "M"] until reaching the age of 18 has been finally judged." The interim Order provides that beyond that age Ms. "M" shall be paid a maintenance of €227,03 monthly effective from the date of the petition, i.e. April 30, 2002.

209. On June 16, 2003, the Administration Committee denied Applicants' request to give effect to the 2003 German Order on the grounds that "the finality of the German Order has not been established Moreover, it appears that there are unresolved jurisdictional questions with respect to the German and Helsinki courts; and recognition of the German Order by the Helsinki court of First Instance has not been documented." Following a review of this decision, on February 25, 2004, the Committee confirmed the denial, stating *inter alia*:

" . . . The Committee noted in particular the decision from Finland that you provided, which orders enforcement against Mr. ["N"] of certain German court orders but not the Order to which you have requested the Committee give effect under Section 11.3, which postdates the Finnish decision. . . .

In view of the above, and considering Mr. ["N"]'s continuing objections to your request, the Committee has determined that the additional information submitted by the parties did not establish the finality and binding

nature of the Order, and that a *bona fide* dispute remained regarding the efficacy and meaning of the Order.”

210. Respondent asserts that the Administration Committee properly concluded that, pursuant to Rule 1(c), submissions by Dr. “M” and Mr. “N” gave rise to a *bona fide* dispute as to the efficacy, finality and meaning of the 2003 German Order. In Respondent’s view, Applicants failed to provide a satisfactory response to Mr. “N”’s assertions that the Order was not effective because the German court lacked jurisdiction, proper notice was not given, and the Order had no effect in Finland; and failed to rebut Mr. “N”’s contentions that the order was not final and binding, and was the subject of ongoing litigation.

211. In the view of the Tribunal, the contentions raised by Mr. “N” in respect of the 2003 Order are essentially of the same content as those raised in respect of the 1999 and 2002 requests and are no more persuasive. There is no *bona fide* dispute as to the validity of the 2003 Order. The question of its finality is addressed below.

212. In denying Applicants’ request, the Administration Committee also considered additional objections specific to the 2003 German Order, namely, that the Frankfurt Court lacked personal jurisdiction, that Mr. “N” was not given proper notice,¹¹³ and that the Order was not final. (Secretary’s Memoranda of May 30, 2003 and January 27, 2004; Minutes of the Committee Meeting of February 20, 2004.) In reviewing the soundness of the Committee’s decision, these objections must be considered in light of the criteria set forth in Rule 2 that determine whether an order may be given effect under Section 11.3.

213. The 2003 German Order conforms to the criteria prescribed in Rules 2(B) (the court order “is the product of fair proceedings”) and (D) (the order “does not conflict and is not inconsistent with any other valid court order or decree”), since the fairness of the legal proceedings in Germany apparently was not at issue, and there was no evidence of a valid court order inconsistent with the German Order of 2003. The remaining criteria prescribed in Rule 2, which are the subject of controversy between the parties, are addressed in turn.

214. Under Rule 2(A), the order must be:

“. . . valid by reason that:

¹¹³Lack of notice was not expressly cited by the Committee in its decisions, but was noted in the Secretary’s Memorandum to the Committee of January 27, 2004.

- (1) a reasonable method of notification has been employed and a reasonable opportunity to be heard has been afforded to the persons affected"

Applicants acknowledge that Mr. "N" has not been given notice of the proceedings in question, but assert that notice to Mr. "N" was not required for the proceedings that resulted in the issuance of the 2003 provisional German Order. Mr. "N" apparently acknowledged that under the German law no notice was required with respect to these proceedings, but argued that lack of notice, nevertheless, invalidated this Order under the Administration Committee Rules.

215. The evidence before the Tribunal indicates that notice was not given to Mr. "N" with respect to the proceedings in question, but attempts were made to give Mr. "N" such notice, which were frustrated by the retiree's efforts to evade service. This fact is illustrated most graphically by the evidence establishing that when Dr. "M" attempted to serve Mr. "N" at his Washington, D.C. home, "female occupant stated subject not known at address," as indicated in the affidavit of non-service provided by Dr. "M" to the Administration Committee with her Request for Review. This conclusion is further supported by Dr. "M"'s uncontroverted assertion that her efforts to serve Mr. "N" at the Finnish address he had provided have failed, as did her attempts to establish Mr. "N"'s whereabouts in Finland through Finnish authorities and Mr. "N"'s brother. At the same time, Mr. "N"'s evasiveness and bad faith in avoiding his child support obligations are demonstrated by the determination of the Darmstadt Court that his allegations of procedural irregularities were made in bad faith, by contempt orders issued by the D.C. Superior Court, and by that Court's conclusion that Mr. "N" avoided compliance with its Orders by filing baseless motions and departing from Washington on false pretenses despite his undertaking to the Court to return to its jurisdiction.

216. The Tribunal concludes that Mr. "N"'s evasion of service was tantamount to notice. Accordingly, the Tribunal resolves that, in the present case, Applicants' efforts to provide notice to Mr. "N", coupled with Mr. "N"'s evasion of service, satisfy the requirements of "a reasonable method of notification" and "a reasonable opportunity to be heard," prescribed in Rule 2(A)(1).

217. For the support order to be valid under Rule 2(A), it must further be determined that

“(2) the judgment has been rendered by a court of competent jurisdiction . . . and in accordance with such requirements of the state as are necessary for the valid exercise of power by the court;”

The Administration Committee’s concern with respect to this requirement was expressed by the Secretary of the Committee, who stated in recommending the denial of Applicant’s request that “the criteria for a valid order have not been met . . . [because] two courts are involved and claim jurisdiction. It is not clear that the Helsinki court has recognized the German Order.” The Secretary was apparently referring to Mr. “N”’s contemporaneous claim opposing the enforcement in Finland of the German Orders of 1991, 1994, and 1995 (issued by the Darmstadt Court), pursuant to the May 25, 2001 Order of the Supreme Court of Finland.

218. The Tribunal cannot sustain the Administration Committee’s conclusion that Mr. “N”’s challenge to the Darmstadt Court’s jurisdiction—asserted as a defense to enforcement of these Orders in Finland¹¹⁴—put into question the jurisdiction of the Frankfurt Court with respect to the 2003 German Order. Proceedings in the Supreme Court of Finland provided sufficient evidence of the validity of the German Orders of 1991, 1994, and 1995, as that Court (as well as lower courts) recognized these Orders, evidently over Mr. “N”’s objections. The same can be said of the U.S. litigation leading to the recognition and enforcement of these Orders in Washington, D.C., as evidenced by the August 5, 1999, April 30, 2002, and June 21, 2006 Orders of the D.C. Superior Court.

219. The record does not reflect that a substantial question existed with respect to the personal jurisdiction of the Frankfurt Court, and Mr. “N”’s voluminous submissions provided no evidence to that effect. Mr. “N” chose not to appear before the Administrative Tribunal to assert and substantiate his objections. As Respondent acknowledges in its pleadings, Mr. “N” had “damaged his own credibility by the way he conducted himself, including threats of legal action against members of the Administration Committee if they should find for [Dr. “M”], and by the German court’s conclusion that his arguments on appeal [of the Darmstadt Court’s Orders] were made in bad faith.”

220. The record before the Tribunal reflects that Mr. “N” did not challenge the Frankfurt Court’s jurisdiction before that Court and did not appeal the 2003 German Order, but instead evaded the proper service with respect

¹¹⁴It may be noted that Mr. “N” does not appear to clearly raise a challenge to the German court’s jurisdiction, but rather to dispute the applicability of the German law on maintenance.

to the relevant proceedings. Accordingly, in the Tribunal's view, Mr. "N"'s unsubstantiated objection to the German Court's jurisdiction did not give rise a *bona fide* dispute as to the validity of the 2003 German Order.

221. In addition to the aforementioned criteria, Rule 2(C) provides that to be given effect by the Fund pursuant to Section 11.3, a support order must be "final and binding on the parties." The German Order of 2003, is by its terms an "interim order."¹¹⁵

222. Dr. "M" has argued before the Administration Committee that this Order "even though being 'provisional,' is in itself 'final'" as no legal remedy or appeal has been sought by Mr. "N". Dr. "M" further asserted that such orders serve the purpose of securing child support before a final judgment is obtained, which may take many years. Dr. "M" now maintains that this provisional order is in the nature of an emergency injunction, which—although formally final—will be later replaced and modified "retroactively" by a final judgment. Dr. "M" further asserts that the final judgment has been delayed due to Mr. "N"'s evasion of service. According to Dr. "M", the underlying lawsuit remains pending and a hearing is scheduled for January 30, 2007.

223. The Order in question confirms that Ms. "M" "is the illegitimate child of defendant, born on 1984-01-09" and states that the "[d]efendant shall be obligated to pay to petitioner every month . . . a maintenance sum of 227,03 Euro as of 2002-04-30." However, questions remain as to support due to Ms. "M" based on her status as a dependent student subsequent to attaining the age of eighteen. In particular, it is clear that this Order is provisional with respect to the Frankfurt Court's determination of the amount of support and this question is to be resolved, in the Tribunal's understanding, at a hearing that is to take place on January 30, 2007.¹¹⁶ The Tribunal is not adequately informed as to what other issues may be passed on in subsequent proceedings before the Frankfurt Court.

224. In the light of the foregoing discussion, the Tribunal accepts that the Administration Committee correctly concluded that the 2003 German Order was not a final judgment. What is clear, however, by the force of the Order, Applicants are entitled to a minimum monthly payment in Euros, the precise amount of which awaits determination by the Frankfurt Court.

¹¹⁵The Order is quoted *supra* at paragraph 37.

¹¹⁶Consequently, Applicants urge the Tribunal to order payments from Mr. "N"'s pension of the amount stated in the 2003 German Order (€227,03 monthly) "or whatever the Local Court of Frankfurt/Main orders in the future ('retroactively' or not)."

Decision

FOR THESE REASONS

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

1. A 16 $\frac{2}{3}$ percent deduction shall be made from prospective monthly pension payments to Mr. "N", which shall be paid over to the Applicants, in order to discharge the total sum owing them by reason of the Darmstadt Court Orders of 1991, 1994, and 1995, as confirmed and totalled by the Superior Court of the District of Columbia in its Orders of April 30, 2002, November 25, 2002, and June 21, 2006. That sum is \$71,905.81 plus \$27,904.81 in interest, plus interest at the prevailing rate compounded quarterly on the total sum from November 25, 2002 until the date on which each monthly pension payment is made.

2. In respect of the time period from February 6, 2003 (the date on which Applicants filed their third request with the Administration Committee) until Ms. "M" attained the age of 22 (the age limit prescribed in Section 11.3) the amount accrued by the sum of 227,03 Euros monthly under the January 20, 2003 Order of the Frankfurt Court, with interest at the prevailing rate compounded quarterly, shall be added to the total liability of Mr. "N" and paid out as prescribed in paragraph 1 of this Decision. If and when a future order of the Frankfurt Court is received by the Administration Committee, which adjusts the Euro sum due, the liability of Mr. "N" shall be altered to take account of that Order.

3. While Applicants reserve their claims for damages on the ground that the Fund intentionally or negligently prevented Applicants from timely exercising their right to child support, the Tribunal does not find it appropriate to deal with that claim because Applicants do not adequately set forth its elements.

4. Applicants have requested payment of \$30,137.63 in attorney's fees incurred in U.S. courts in pursuance of the litigation referred to in this Judgment. Since these fees were incurred not before this Tribunal but in the District of Columbia courts, the Tribunal is not authorized to make such an award. Since the Tribunal has concluded that the Application before this Tribunal is well-founded, it orders that the reasonable costs incurred by the Applicants be borne by the Fund, pursuant to Article XIV, Section 4 of the Tribunal's Statute. The Tribunal invites the Applicants to submit a statement

JUDGMENT NO. 2006-6 (Ms. "M" AND DR. "M")

of the legal costs incurred in pursuing their remedies in the Fund and before this Tribunal.

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

/s/

Stephen M. Schwebel, President

/s/

Celia Goldman, Registrar

Washington, D.C.
November 29, 2006

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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 121; p. 201.
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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 130; p. 207.
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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 174–224; pp. 224–243.
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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 134–158; pp. 208–219.

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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 141; p. 212.

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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 155, 204; pp. 218, 237–238.

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- Judgment No. 2006-2 (*Ms. "T"*), note 6; p. 72.

- Judgment No. 2006-3 (*Ms. "U"*), note 6; p. 95.

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- Judgment No. 2006-4 (*Baker et al.*) (*Dismissal of the Applications as Moot*), para. 26; pp. 127–128.

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- Judgment No. 2006-4 (*Baker et al.*) (*Dismissal of the Applications as Moot*), para. 26; pp. 127–128.

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Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), Decision; pp. 244–245.

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"DISCOVERY RULE" (*see also* EXHAUSTION OF CHANNELS OF ADMINISTRATIVE REVIEW)

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- Judgment No. 2006-5 (*Ms. "AA"*), para. 38; p. 142.

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- extent of, in conversion of fixed-term appointment (distinguished from separation of staff member for unsatisfactory performance)
 - Judgment No. 2006-2 (*Ms. "T"*), paras. 37, 53; pp. 85, 91.
 - Judgment No. 2006-3 (*Ms. "U"*), paras. 37, 53; pp. 107, 113.
 - greater degree of Tribunal's scrutiny over where contested decision allegedly violated universally recognized human right
 - Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 117; p. 200.
 - in circumstances of case, to create "hybrid" appointment of limited duration but carrying certain benefits of regular employment
 - Judgment No. 2006-1 (*Mr. "O"*), paras. 86-97; pp. 62-66.
 - "marital relationship" requirement of SRP Section 11.3 not reasonable exercise of, in its disparate effect on children born out of wedlock
 - Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 129-130; pp. 205-207.
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 - Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 125-127; pp. 203-205.
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 - Judgment No. 2006-1 (*Mr. "O"*), paras. 86-97; pp. 62-66.
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 - Judgment No. 2006-1 (*Mr. "O"*), paras. 72-75; pp. 55-56.
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 - Judgment No. 2006-1 (*Mr. "O"*), paras. 98-100; p. 67.
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 - Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 130; p. 207.
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 - Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 130; p. 207.
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 - Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 126-127; pp. 204-205.
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 - Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 124; pp. 202-203.

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Judgment No. 2006-5 (*Ms. “AA”*), para. 41; p. 143.

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- Judgment No. 2006-1 (*Mr. "O"*), para. 66; p. 54.
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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 111; pp. 197–198.
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- Judgment No. 2006-1 (*Mr. "O"*), paras. 65–67; pp. 53–54.
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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 111; pp. 197–198.
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- Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 94–100; pp. 190–193.
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- Judgment No. 2006-5 (*Ms. "AA"*), paras. 34–42; pp. 140–143.
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Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 102–111; pp. 194–198.
Article X (2b)

Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 12, 14 and note 8;
pp. 148–150.

Article X (2d)

Judgment No. 2006-4 (*Baker et al.*) (*Dismissal of the Applications as Moot*),
para. 14; p. 123.

Article XII

Judgment No. 2006-2 (*Ms. "T"*), note 3; p. 70.

Judgment No. 2006-3 (*Ms. "U"*), note 3; p. 93.

Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), note 17; p. 152.

Article XIV (4)

Judgment No. 2006-4 (*Baker et al.*) (*Dismissal of the Applications as Moot*),
para. 26; pp. 127–128.

Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), Decision; pp. 244–245.

Article XVI

Judgment No. 2006-5 (*Ms. "AA"*), para. 36; p. 141.

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“exceptional circumstances” justified waiver of, in case of non-staff members
challenging denial of SRP Section 11.3 request, where absence of notification
by Fund of review procedures

Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), para. 108; p. 196.

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Applicants as to Tribunal’s jurisdiction *ratione personæ* in circumstances of
case

Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 110–111; pp. 197–198.

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Judgment No. 2006-6 (*Ms. "M" and Dr. "M"*), paras. 105, 111; pp. 195, 197–198.

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Judgment No. 2006-5 (*Ms. "AA"*), para. 42; p. 143.

motion for, granted where Applicant did not establish “exceptional
circumstances” to excuse substantial delay in initiating administrative
review

Judgment No. 2006-5 (*Ms. "AA"*), para. 42; p. 143.

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Judgment No. 2006-4 (*Baker et al.*) (*Dismissal of the Applications as Moot*), paras.
17–25; pp. 123–127.

TIME BAR (*see also* EXHAUSTION OF CHANNELS OF ADMINISTRATIVE REVIEW; STATUTE OF
LIMITATIONS)

importance of adherence to time limits in legal processes

Judgment No. 2006-1 (*Mr. "O"*), para. 50; pp. 49–50.

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- Judgment No. 2006-5 (Ms. "AA"), para. 32; pp. 139–140.
Judgment No. 2006-6 (Ms. "M" and Dr. "M"), para. 106; p. 195.
- WEDLOCK, CHILD BORN OUT OF (*see also* CHILD SUPPORT; DISCRIMINATION; HUMAN RIGHTS; STAFF RETIREMENT PLAN (SRP))
Fund's apparent failure to give consideration to effect on of former SRP Section 11.3 not compatible with universally accepted principles of human rights
Judgment No. 2006-6 (Ms. "M" and Dr. "M"), paras. 132–133; pp. 207–208.
protected by universally accepted principles of human rights from impermissible discrimination
Judgment No. 2006-6 (Ms. "M" and Dr. "M"), para. 130; p. 207.
- WORLD BANK ADMINISTRATIVE TRIBUNAL (WBAT) JURISPRUDENCE
A v. International Bank for Reconstruction and Development, WBAT Decision No. 182 (1997)
Judgment No. 2006-5 (Ms. "AA"), para. 14; p. 133.
Agerschou v. International Bank for Reconstruction and Development, WBAT Decision No. 114 (1992)
Judgment No. 2006-6 (Ms. "M" and Dr. "M"), para. 106; p. 195.
Bernstein v. International Bank for Reconstruction and Development, WBAT Decision No. 309 (2004)
Judgment No. 2006-6 (Ms. "M" and Dr. "M"), para. 125; p. 203.
E v. International Bank for Reconstruction and Development, WBAT Decision No. 325 (2004)
Judgment No. 2006-5 (Ms. "AA"), para. 14; p. 133.
McNeill v. International Bank for Reconstruction and Development, WBAT Decision No. 157 (1977)
Judgment No. 2006-2 (Ms. "T"), paras. 37–38; p. 85.
Judgment No. 2006-3 (Ms. "U"), paras. 37–38 and note 14; pp. 107–108.
Mendaro v. International Bank for Reconstruction and Development, WBAT Decision No. 26 (1985)
Judgment No. 2006-6 (Ms. "M" and Dr. "M"), note 70; p. 197.
Mould v. International Bank for Reconstruction and Development, WBAT Decision No. 210 (1999)
Judgment No. 2006-6 (Ms. "M" and Dr. "M"), para. 128; p. 205.
N v. International Bank for Reconstruction and Development, WBAT Decision No. 356 (2006)
Judgment No. 2006-5 (Ms. "AA"), para. 14; p. 133.
Romain (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 164 (1997)
Judgment No. 2006-2 (Ms. "T"), para. 47; p. 89.
Judgment No. 2006-3 (Ms. "U"), para. 48; p. 111.
Salle v. International Bank for Reconstruction and Development, WBAT Decision No. 10 (1982)
Judgment No. 2006-2 (Ms. "T"), paras. 36, 38, 41–42, 45–46; pp. 84–89.
Judgment No. 2006-3 (Ms. "U"), paras. 36, 38, 40, 42, 44–45, 47; pp. 107–111.

APPENDIX

The following documents, previously published, are reproduced herein for the convenience of the reader. The original pagination of these documents has been retained for clarity.

Statute of the Administrative Tribunal of the International Monetary Fund

Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund

Resolution No. 48-1 Establishment of the Administrative Tribunal of the International Monetary Fund

Rules of Procedure of the Administrative Tribunal of the International Monetary Fund (1994)

Rules of Procedure of the Administrative Tribunal of the International Monetary Fund (2004)

**Administrative
Tribunal**
of the
**International
Monetary
Fund**

Statute of the Administrative Tribunal

**Report of the Executive Board to
the Board of Governors**

Resolution of the Board of Governors

International Monetary Fund
Washington D.C.
1994

Statute of the Administrative Tribunal of the International Monetary Fund

ARTICLE I

There is hereby established a tribunal of the International Monetary Fund ("the Fund"), to be known as the Administrative Tribunal of the International Monetary Fund ("the Tribunal").

ARTICLE II

1. The Tribunal shall be competent to pass judgment upon any application:
 - a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
 - b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.
2. For purposes of this Statute:
 - a. the expression "administrative act" shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;
 - b. the expression "regulatory decision" shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;
 - c. the expression "member of the staff" shall mean:
 - (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;

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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. 7.1(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.

ADMINISTRATIVE TRIBUNAL OF THE IMF

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.

ADMINISTRATIVE TRIBUNAL OF THE IMF

- (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;

ADMINISTRATIVE TRIBUNAL OF THE IMF

(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

RULES OF PROCEDURE (2004)

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.

ADMINISTRATIVE TRIBUNAL OF THE IMF

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.

ADMINISTRATIVE TRIBUNAL OF THE IMF

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,

RULES OF PROCEDURE (2004)

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-

ADMINISTRATIVE TRIBUNAL OF THE IMF

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,

RULES OF PROCEDURE (2004)

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.

ADMINISTRATIVE TRIBUNAL OF THE IMF

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

RULES OF PROCEDURE (2004)

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.

ADMINISTRATIVE TRIBUNAL OF THE IMF

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 APPLICATION*²

- 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.

ADMINISTRATIVE TRIBUNAL OF THE IMF

- 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):

RULES OF PROCEDURE (2004)

- 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]

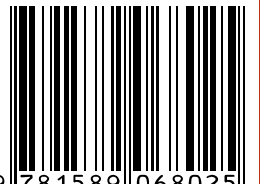
as my duly authorized representative [and counsel] to file/maintain (circle as appropriate) an application with the IMF Administrative Tribunal. [If known, give case number.] To this end, the above-named representative [and counsel]* is authorized to sign pleadings, appear before the Tribunal, and take 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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