ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2013-1

Mr. R. Niebuhr, Applicant v. International Monetary Fund, Respondent

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Introduction

1. On September 10, 11 and 12, 2012 and March 11 and 12, 2013, the Administrative Tribunal of the International Monetary Fund, composed for this case[1] of Judge Catherine M. O'Regan, President, and Judges Edith Brown Weiss and Francisco Orrego Vicuña, met to adjudge the Application brought against the International Monetary Fund by Mr. Richard Niebuhr, a retiree of the Fund. Applicant represented himself in the proceedings. Respondent was represented by Mr. Brian Patterson, Senior Counsel, and Ms. Juliet Johnson, Counsel, IMF Legal Department.

2. Applicant challenges the decision of the Administration Committee of the Fund's Staff Retirement Plan (SRP or Plan) denying his request for waiver of the one-year time limit following post-retirement marriage to elect a reduced pension with pension to surviving spouse pursuant to SRP Section 4.6(c). Applicant challenges both the Plan provision and its application in his individual case. Applicant contends that the one-year time limit is (i) arbitrary and inconsistent with the purpose that Respondent ascribes to it and (ii) that it discriminates impermissibly against a person such as himself who marries after contributory service has ceased vis-à-vis a Plan participant who elects a reduced pension with pension to surviving spouse before his pension becomes effective. Applicant contends in the alternative that the Administration Committee should have waived the requirement in his individual case on the ground that the Fund had not notified him of it. Additionally, Applicant alleges that the Committee's decision on his request was not taken in accordance with fair and reasonable procedures. Applicant seeks as relief approval of his application for a reduced pension with survivor pension to his spouse.

3. Respondent, for its part, maintains that the Tribunal does not have jurisdiction to decide Applicant's challenge to the regulatory decision, i.e., the one-year time limit following post-retirement marriage to make an election pursuant to SRP Section 4.6(c), because that Plan provision pre-dated the entry in force of the Tribunal's Statute and, accordingly, Article XX of the Statute bars the claim. Alternatively, addressing the merits of the claim, the Fund asserts that the contested Plan provision is a reasonable and non-discriminatory rule adopted by the Executive Board to safeguard the financial soundness of the SRP. The Fund also maintains that

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[1] Article VII, Section 4, of the Tribunal's Statute provides in part:

> The decisions of the Tribunal in a case shall be taken by a panel composed of the President and two other members designated by the President.

the Administration Committee acted properly and in accordance with fair procedures in deciding not to make any exception to the application of the rule in the circumstances of Applicant's case.

The Procedure

4. On October 19, 2011, Mr. Niebuhr filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on October 20, 2011. On October 31, 2011, pursuant to Rule IV, para. (f),[2] the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

5. Respondent filed its Answer to the Application on December 5, 2011, which was supplemented on December 6, 2011. On January 9, 2012, Applicant submitted his Reply. The Fund's Rejoinder was filed on February 10, 2012.

6. In response to Applicant's requests for production of documents and to requests by the Tribunal for additional documents and views of the parties, a series of further submissions were made to the Tribunal. These developments are elaborated below.

Applicant's requests for production of documents

7. Pursuant to Rule XVII[3] of the Tribunal's Rules of Procedure, in his Application, Applicant made three requests for production of documents, which are quoted in full below:

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[2] Rule IV, para. (f), provides:

> Under the authority of the President, the Registrar of the Tribunal shall:
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> . . .
>
> (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; . . .

[3] Rule XVII provides:

> *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

(continued)

> 1. I was told by SRP staff that the Administration Committee has granted waivers to the one-year rule from date of marriage for the survivor pension to come into effect: I ask that documents be provided indicating the number of such requests, the number of approvals of such requests, and the nature of circumstances that were used to approve or deny these requests.
>
> 2. I would like the copies of non-confidential documents and a summary prepared of confidential documents that were used in deciding my request for the Administrative Review as provided in Rule VII (3) of the Committee's Rules of Procedure. These were requested from the Secretary of the SRP but were not provided.
>
> 3. I ask for a copy of the brief provided by the Committee's legal counsel in regard to its consideration of my initial request for a waiver, dated December 9, 2010, and a summary of the Committee's discussion of this request.

(Emphasis in original.) In his Reply, Applicant additionally indicated that he sought the "confidential minute" of the Administration Committee's meeting in which it considered his request.

8. In accordance with the Tribunal's Rules of Procedure, Respondent presented its views as to whether the document requests should be granted. Respondent objected to each of the requests.

Request No. 1

9. Applicant's first request repeated an allegation he had made in his request to the Administration Committee for review of its initial decision, namely, that a Fund Human Resources Officer (HRO) had informed him in a meeting of May 31, 2011 that waivers had been granted in a number of cases in which a full year had not elapsed between the date of marriage and the date of the pensioner's death. This is a separate requirement that must be met once an election is made under SRP Section 4.6(c) for the survivor pension to come into effect; it is not the provision from which Applicant seeks a waiver. In denying Applicant's request for review,

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> infringe on the privacy of individuals. For purposes of deciding on the request, 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, 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.

the Secretary of the Administration Committee had stated that "no such cases were found based on a review of the Committee files from May 1, 1990 (when retirees first became eligible to elect a survivor pension) to present."

10. In responding to Applicant's request for production of documents before the Tribunal, Respondent asserted that "[s]taff in the Human Resources Department have diligently searched and found no case where either of the time limits under Section 4.6(c) was waived."

11. The Tribunal accepted the Fund's assertion and, on July 31, 2012, it denied Request No. 1 on the ground that Applicant had not shown that he had been denied access to requested documents. (Rule XVII, para. 1.)

Requests Nos. 2 and 3

12. Applicant's second request reasserted a request he had made on October 12, 2011 (before the filing of his Application with the Tribunal) to the Secretary of the SRP Administration Committee pursuant to Rule VII(3) of the Administration Committee's Rules of Procedure. That Rule provides: "Upon request, the Secretary of the Committee will furnish to the Requestor copies of any non-confidential documents and a summary, prepared by the Secretary, of confidential evidence that it considered in making its decision."

13. Applicant sought "copies of non-confidential documents and a summary prepared of confidential documents that were used in deciding my request for the Administrative Review notified me on July 28, 2011." (Email from Applicant to Secretary of the SRP Administration Committee, October 12, 2011.) On October 31, 2011 (before the filing of the Fund's Answer with the Tribunal), the Secretary of the SRP Administration Committee replied to Applicant as follows:

> [T]here was only one document, a memorandum to the Administration Committee, used in deciding your request for the Administrative Review, other than the documentation you provided to me and the Staff Retirement Plan. The memorandum, which is a confidential document, referred to your request for the Administrative Review and noted the basis on which the Committee could make its decision. This information and the reason for the denial of your request were summarized in my July 27 email message to you.
>
> Likewise, when the Committee originally considered your request, there was another confidential memorandum that referred to the materials you provided and noted the basis for the Committee to make its decision. This information was summarized in my February 16 email message to you.

(Email from Secretary of SRP Administration Committee to Applicant, October 31, 2011.)

14. In objecting to Applicant's request for production of documents before the Tribunal, the Fund asserted that the documents used by the Administration Committee in deciding Applicant's request were "confidential documents and the substance thereof was previously summarized in the Secretary's prior memoranda to the Applicant."

15. In his Reply, Applicant challenged the policy of the Committee (embodied in its Rule VII(3)) to maintain the confidentiality of documents used in deciding requests under the SRP. Applicant contended: "[A]ppeals procedures should be transparent and appellants should have full access to the materials used and opportunities to comment on the nature of any errors in the materials. There is no reason for this minute to be withheld from me, the appellant, as I believe [the HRD representative]'s heads-up was given undue weight in the Committee's deliberations."

16. As to Applicant's request for a "brief provided by the Committee's legal counsel" relating to the consideration of his initial request to the Committee, the Fund responded as follows:

> There is no such legal memorandum to the Administration Committee, and any communications from legal counsel to the Committee or to Fund staff, whether written or oral, constitute work product that is privileged from disclosure. The Committee's discussion is memorialized in a confidential minute. The substance thereof was previously summarized in the Secretary's February 17, 2011 memorandum to the Applicant . . . .

In his Reply, Applicant again challenged the confidentiality of the Administration Committee's proceedings and requested the "confidential minute" of the Administration Committee's meeting in which it considered his request.

17. On July 31, 2012, following consideration of the views of the parties on Requests Nos. 2 and 3, the Tribunal asked that Respondent transmit to the Tribunal for its *in camera* review, pursuant to Rule XVII, para. 2, the two confidential memoranda referred to in the email communication of October 31, 2011 from the Secretary of the SRP Administration Committee. Rule XVII, para. 2, of the Tribunal's Rules of Procedure provides that "[f]or purposes of deciding on the request, the Tribunal may examine *in camera* the documents requested."

18. On August 14, 2012, following its *in camera* review of the requested documents, the Tribunal decided that the memoranda of February 2, 2011 and July 7, 2011 (and their attachments) from the Secretary of the SRP Administration Committee to the Committee's Members relating to its decisions on Applicant's initial request and his request for review should be produced to Applicant.

19. On August 23, 2012, the Tribunal reached the same decision, following *in camera* review, as to the Administration Committee's minutes relating to Applicant's initial request. (The Tribunal accepted the Fund's statement that the Committee's decision on Applicant's request for review had been taken without a meeting, on a lapse-of-time basis, there having been no objection to the Secretary's recommendation as set out in the Memorandum of July 7, 2011.)

20. In reaching its decisions that Respondent produce to Applicant the requested documents, the Tribunal considered that Respondent's only ground for seeking to protect the memoranda and minutes from disclosure to Applicant was that the Administration Committee had deemed them "confidential."[4] The Tribunal's *in camera* examination revealed that the documents were relevant to the issues of the case in documenting the bases for the Committee's decisions and were relevant to Applicant's claims of bias in that process. The Tribunal also considered that in a number of other cases in which the dispute before the Tribunal had arisen through the channel of review provided by the Administration Committee of the SRP, similar memoranda and minutes were part of the record before the Tribunal, having been produced voluntarily by the Fund, and had proven valuable to the consideration of the case.[5] The Fund had not offered any basis for treating such documentation differently in the circumstances of the instant case.

21. Applicant was given an opportunity to submit his Comments on these documents, which he did on September 4, 2012. Those Comments were later transmitted to Respondent for its response.

Tribunal's requests for additional documents and views of the parties

22. On July 31, 2012, the Tribunal issued a Request for Information to Respondent, seeking:

> Any Executive Board documents (including Executive Board minutes and Executive Board papers) relating to the Board's decision to impose a one-year limit following post-retirement marriage for election of a reduced pension with pension to surviving spouse pursuant to Section 4.6(c) of the Staff Retirement Plan.

On August 9, 2012, Respondent provided the requested documents, which were transmitted to Applicant for his Comments. Applicant's Comments on both sets of documents were filed on September 4, 2012 and provided to Respondent for its information.

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[4] Rule VI(4) of the Administration Committee's Rules of Procedure provides: "The deliberations of the Committee shall be treated as confidential. Unless the Committee decides otherwise, the minutes of its deliberations shall be confidential and shall not be made available to the Requestor or any other party."

[5] *See Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003) (disability retirement request pursuant to SRP Section 4.3), paras. 62, 64 (Secretary's memoranda to Committee members), paras. 45, 65-67 (Committee's minutes); *Ms. "K", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-2 (September 30, 2003) (disability retirement request), para. 34 (Secretary's memorandum to Committee members), paras. 19-20, 35 (Committee's minutes); *Ms. "CC", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-6 (November 16, 2007) (disability retirement request), paras. 63, 68 (Committee's minutes); *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006) (giving effect to child support orders from retiree's pension payments pursuant to SRP Section 11.3), paras. 72, 78 (Secretary's memoranda to Committee members), para. 79 (Committee's minutes).

23. At the conclusion of the Tribunal's September 2012 session, the Tribunal deemed it necessary to seek additional information and views from the parties in order to reach a Judgment in the case. Accordingly, pursuant to Rule XI[6] and Rule XVII, para. 3,[7] of its Rules of Procedure, the Tribunal requested the following additional submissions of the parties.

24. First, on September 12, 2012, the Tribunal requested the Fund's Comment on Applicant's submission of September 4, 2012, along with:

> any information and documentation relevant to the decision (and its rationale), taken initially by the SRP Administration Committee in preparing the "legal text" of SRP Section 4.6(c) and later adopted by the IMF Executive Board, to remove the requirement that the "election must be made at least twelve months in advance of the date of death, except as may be authorized otherwise by the Administration Committee of the Plan"[8] and to substitute the requirements that the election be made "within one year following [post-retirement] marriage" and "shall not be effective if the retired participant dies within one year following the marriage or

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[6] Rule XI provides:

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.

[7] Rule XVII, para. 3 provides*:*

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.

[8] *See* "Proposed Changes in the Staff Retirement Plan – Modification and Amendment of the Plan and Arrangements for Implementation," EBAP/90/95, April 11, 1990, attaching paper of the same title, prepared by the Fund's Administration Department, p. 10; "Decision Adopting Modifications in the Staff Retirement Plan," EBAP/90/95, Supp. 1 (April 19, 1990), p. 4.

> registration of the domestic partnership, except that the Administration Committee may, for good cause, decide to waive the latter requirement."[9]

The Fund's response was filed on September 24, 2012.

25. Second, on September 25, 2012, the Tribunal made a further request of Respondent for "any Executive Board documents (including Executive Board minutes and Executive Board papers) relating to any amendments to SRP Section 4.6(c) following its April 30, 1991 enactment." These were provided to the Tribunal on October 5, 2012.

26. Third, on October 22, 2012, the Tribunal requested that both parties submit simultaneous Additional Briefs on the question of whether, in the light of the facts and documentation of the case and the Tribunal's jurisprudence, Article XX[10] of the Tribunal's Statute deprives the Tribunal of jurisdiction to consider Applicant's challenge to the regulatory decision at issue in the case, i.e., that an election under SRP Section 4.6(c) be made within one year following post-retirement marriage. The parties Additional Briefs were filed on November 6 and 7, 2012.

27. Fourth, on December 10, 2012, the Tribunal issued a request to Respondent to produce the "Memorandum to Pensioners and Beneficiaries Under the SRP dated June 27, 1990," which was referenced in one of the earlier documentary submissions of the Fund. The Fund produced this document on December 17, 2012, and it was transmitted to Applicant for his information.

Applicant's request for oral proceedings

28. In his Application, Applicant requested oral proceedings, pursuant to Rule XIII.[11] Article XII of the Tribunal's Statute provides: "The Tribunal shall decide in each case whether oral

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[9] *See* "Staff Retirement Plan – Proposed Amendments," memorandum from Pension Committee's Secretary to Members of the Pension Committee, attaching memorandum of the same title from Chairman of the Administration Committee to Chairman of the Pension Committee," RP/CP/91/5 (April 12, 1991, as corrected April 22, 1991), pp. 12-13; s*ee also* EBAP/91/98 (April 23, 1991), pp.12-13; Minutes, EBM/91/64 (May 3, 1991), p. 35 (adopting text).

[10] Article XX provides in pertinent part:

> 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.

[11] Rule XIII provides:

> *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

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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."

29. With effect for all Applications filed after December 31, 2004, Rule XIII, para. 1, of the Tribunal's Rules of Procedure provides that 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

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> 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, 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.

present its views pursuant to Rules VII-X, the Tribunal deems such proceedings *useful*." (Emphasis added.) Previously, that paragraph had provided for such proceedings ". . . if the Tribunal decides that such proceedings are *necessary* for the disposition of the case." (Tribunal's Rules of Procedure (1994).) (Emphasis added.) The revision was made with a view towards making the possibility of holding oral proceedings more likely.

30. In March 2012, the Tribunal, meeting in plenary session, recognized the advantages of holding oral proceedings to the consideration of cases, especially when an applicant has requested them. In recent Judgments, when deciding not to hold oral proceedings in the absence of a request (in accordance with Article XII of the Statute, which requires that a decision on the question must be taken "in each case"), the Tribunal has underscored as "significant" the fact that the applicant had not requested such proceedings. *See, e.g., Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), paras. 30-32.

31. In the instant case, Applicant requested oral proceedings. Applicant stated that he sought oral proceedings "so that documents requested in [his Application] may be utilized." Respondent opposed Applicant's request, maintaining that ". . . oral proceedings would not be useful in this case, because there is no need for witness testimony given that no material facts are in dispute." In the Fund's view, the "decision of the Administration Committee of the Staff Retirement Plan contested by the Applicant flowed directly from the proper application of the regulatory decision of the Executive Board in adopting Section 4.6(c) of the Plan," and the written pleadings and documentary record provided an "ample basis" for the Tribunal to take a decision in the case. In his Reply, Applicant reasserted that a number of "factual matters are in dispute" in the case. Neither party addressed the question of whether oral proceedings would be useful for the purpose of consideration of the legal questions at issue, an approach contemplated by paragraph 6 of the Rule.

32. In deciding Applicant's request for oral proceedings, the Tribunal considered as well that oral proceedings were not an element of the underlying administrative review process[12] that Applicant was required to exhaust, under Article VI of the Statute, before bringing his dispute to the Administrative Tribunal. In cases in which the dispute has arisen through the channel of administrative review provided by the Fund's Grievance Committee, this Tribunal consistently has indicated that having the benefit of the record of those proceedings supported its decisions not to hold oral proceedings at the stage of dispute resolution provided by the Tribunal. *See, e.g., Sachdev*, paras. 30-32.

33. On August 24, 2012, the Tribunal granted Applicant's request for oral proceedings. In accordance with Rule XIII, para. 6, the Tribunal decided to limit those proceedings to the oral arguments of the parties on the ground that it considered the written evidentiary record of the

[12] Rule VI (1) of the SRP Administration Committee's Rules of Procedure provides in part: "In considering a Request, the Committee may rely on written submissions or it may decide to convene an oral hearing, and decide who may attend such hearing."

case to be adequate. On August 27, 2012, Applicant, however, withdrew his request and oral proceedings were not held.

The Factual Background of the Case

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

Reduced and survivor pensions pursuant to SRP Section 4.6

35. The SRP is a contributory defined benefit pension plan established in 1948 by decision of the IMF Executive Board and amended on various occasions thereafter.

36. SRP Sections 4.6(a) and (b) provide Plan participants the option to elect—before the pension becomes effective—to receive the value of the pension (which is fixed as of the pension's effective date)[13] in the form of a reduced life annuity to the pensioner plus a survivor annuity paid to any designated beneficiary commencing upon the pensioner's death. This optional benefit, also known as a joint and survivor annuity (JSA), has been available since the Plan's inception. Election of a JSA under SRP Sections 4.6(a) or (b) may be made for the benefit of any person and may be revoked or changed up until the date when the pension becomes effective, at which time it becomes irrevocable.

37. Additionally, a Plan participant who marries on or before the last day of contributory service receives automatically, pursuant to a separate provision (SRP Section 4.9), a survivor pension for the benefit of that spouse in the event that the pensioner dies first. This benefit is funded by the Plan and, unlike the options offered under SRP Section 4.6, does not entail reduction of the participant's life annuity.

38. In April 1990, as part of comprehensive revisions to the SRP, the Executive Board adopted an amendment, the purpose of which was to offer to Plan participants who marry after their last day of contributory service the option of electing a JSA for the benefit of such spouse. Approximately one year later, in April 1991, that amendment was included as SRP Section 4.6(c). The text of the 1991 enactment incorporates a requirement that an election under SRP Section 4.6(c) must be made within one year following the post-retirement marriage, a requirement that was not stated in the 1990 enactment. It is that requirement—and the denial of his request for its waiver in the circumstances of his case—that Applicant challenges before the Tribunal. Additionally, an election under Section 4.6(c) shall not be effective if the retired participant dies within one year following the marriage or registration of the domestic partnership, "except that the Administration Committee may, for good cause, decide to waive the latter requirement."

[13] The value of the defined benefit pension is calculated according to formulae set out in SRP Sections 4.1 and 4.2, taking account of the retiree's highest average pay, years of Fund service, and age as of the effective date of the pension. (An annual cost-of-living supplement is added pursuant to SRP Section 4.11.)

39. Election of the JSA option under Sections 4.6(a) and (b) differs in a number of respects from election under Section 4.6(c). A Plan participant or retired participant who exercises the option under Sections 4.6(a) and (b) to elect a JSA before the pension's effective date may do so for the benefit of any "person nominated by him by written designation duly witnessed and filed with the Administration Committee when he elected the option." In contrast, a retired participant who elects a JSA under Section 4.6(c) is limited in the designation of a beneficiary to a spouse (or registered domestic partner) and that marriage (or domestic partnership) must have commenced after contributory service ceased. An election pursuant to SRP Sections 4.6(a) and (b) may be revoked or changed up until the date when the pension becomes effective and then becomes irrevocable. An election pursuant to SRP Section 4.6(c), which applies to retired Plan participants, is irrevocable.

History of SRP Section 4.6(c) and the one-year time limit that Applicant contests

40. SRP Section 4.6(c) was adopted as part of a comprehensive review and revision of the Plan. Permitting a participant who marries following retirement to elect a reduced pension with pension to a surviving spouse was to enlarge the availability of dependent benefits, especially to ". . . expand the circumstances in which survivor benefits would be paid so that the dependents of staff and all retirees would be eligible on the same basis." ("Interim Report [of the Pension Committee] to the Executive Board on Proposed Changes in the Staff Retirement Plan," EBAP/89/296 (December 13, 1989), p. 29.) A related amendment, adopted at the same time as Section 4.6(c), removed age and length-of-service requirements for payment of survivor benefits to spouses pursuant to Section 4.9. (Children's benefits under Section 4.10 were also expanded.)

41. The legislative history of Section 4.6(c) indicates that the benefit proposed for a spouse married following retirement was to be ". . . subject to administrative safeguards (such as a one-year waiting period to guard against 'deathbed marriages'); and, in securing coverage for a spouse married after retirement, the pension of the retiree would be subject to actuarial reductions, reflecting differences in the life expectancy of the retiree and spouse and the cost of the benefits." (*Id.*) The Interim Report of the Pension Committee to the Executive Board further noted: "Thus, these changes are not expected to have a material impact on Plan costs." (*Id.*) The Pension Committee's proposal made no mention of a time limit following post-retirement marriage for election of the benefit.

42. In a meeting of April 16, 1990, the Executive Board "accepted the modifications in the Staff Retirement Plan proposed by the management." The Decision was circulated for adoption on a lapse-of-time basis, with the modifications to come into effect as of May 1, 1990. ("Decision Adopting Modifications in the Staff Retirement Plan," EBAP/90/95, Supp. 1 (April 19, 1990), cover memorandum.) Minutes of April 23, 1990 confirm this Decision. (EBM/90/64, p. 6.)

43. There is no language in the Executive Board's Decision of April 1990 providing for a one-year time limit following post-retirement marriage for making an election pursuant to Section 4.6(c). In the documentation of the April 1990 Executive Board Decision, as in the proposal from the Pension Committee of December 1989, the expansion of survivor spouse

benefits to take account of spouses married following retirement is clearly distinguished from the benefits available to a spouse married to a participant as of the last day of contributory service:

> Section 4.9(c) shall be further modified so that such pensions shall be paid when the participant is survived by (a) a spouse who was married to the participant or retired participant on the last day of his contributory service, or, (b) *at the election of the participant, a spouse who was married to the participant or retired participant after the last day of his contributory service. In the case of (b), the election must be made at least twelve months in advance of the date of death, except as may be authorized otherwise by the Administration Committee of the Plan, and the pension of the participant making this election shall be subject to actuarial reduction in accordance with the current provisions of Section 4.6 of the SRP.*

("Proposed Changes in the Staff Retirement Plan – Modification and Amendment of the Plan and Arrangements for Implementation," EBAP/90/95, April 11, 1990), attaching paper of the same title, prepared by the Fund's Administration Department [now known as HRD], p. 10) (emphases added); ("Decision Adopting Modifications in the Staff Retirement Plan," EBAP/90/95, Supp. 1 (April 19, 1990), pp. 3-4.)

44. On April 23, 1990, Staff Bulletin No. 90/10 (Modifications to the Staff Retirement Plan) (April 23, 1990) announced that the Executive Board had adopted revisions to the SRP that "will become effective on May 1, 1990." Among the revisions noted in that Staff Bulletin was the new JSA option, which was summarized as follows:

> Eligibility for survivor benefits is also extended, on an optional basis, to a spouse married after retirement, and to children born after retirement. This will, however, be subject to certain administrative safeguards. The pensions of retirees who choose to provide these benefits will also be reduced on an actuarial basis to reflect the value of the survivor benefits.

(Staff Bulletin No. 90/10, p. 5.)

45. Approximately two months later, on June 27, 1990, the Fund's Director of Administration issued a "Memorandum to Pensioners and Beneficiaries Under the Staff Retirement Plan" notifying them *inter alia* of the new Plan provision permitting election of a JSA for the benefit of a spouse married after retirement:

> It is now possible for a retiree who has married after the last day of his or her contributory service with the Fund to elect that his or her pension be reduced so as to provide a survivor's pension to the spouse. The Administration Committee has adopted the attached rules regulating the election of this option. For marriages that take

> place after July 1, 1990 there are two basic rules: *(i) the retiree must elect the reduced pension no later than one year after the date of the marriage;* and (ii) the election of the participant, and the reduction of the pension, will enter into effect one year after the date of the election. This latter rule means that if the retiree dies before the election enters into effect, no pension will be paid to the surviving spouse.
>
> A transitional rule has been adopted for retirees who may have married after their retirement but before July 1, 1990. They will have until January 1, 1991 to elect to receive a reduced pension, and the election will go into effect six months after the election or twelve months after the date of the marriage, whichever is the later.
>
> The precise timing of when elections enter into effect is provided in the attached rules, and the reduction in the pension will be determined by the actuarial factors under Section 4.6 of the Plan at the time the election is made.

("Memorandum to Pensioners and Beneficiaries Under the Staff Retirement Plan," pp. 1-2.) (Emphasis added.) This Memorandum provides the first mention in the documentation in the record before the Tribunal of the one-year time limit that Applicant contests.

46. A full year following its adoption of the Decision effective May 1, 1990, the Executive Board enacted the actual text of the revised SRP. (*See* "Staff Retirement Plan – Proposed Amendments," memorandum from Pension Committee's Secretary to Members of the Pension Committee, attaching memorandum of the same title from Chairman of the Administration Committee to Chairman of the Pension Committee," RP/CP/91/5 (April 12, 1991, as corrected April 22, 1991).) Respondent explains, and the documentation confirms, that what the Fund describes as the "legal text" of Section 4.6(c) essentially codified rules that had been adopted by the Administration Committee during the intervening year. Among these rules was the requirement that an election under Section 4.6(c) must be made within one-year following post-retirement marriage.

47. The documentation transmitted in April 1991, first from the Administration Committee to the Pension Committee, and then to the Executive Board for its final adoption, includes the new requirement as follows:

> *In accordance with the provisions of rules adopted by the Administration Committee,* a retiree who marries after the last day of contributory service who wishes to elect to receive a reduced pension in order to provide a survivor's pension to his spouse must make the election not later than twelve months after the date of the marriage.

(*Id.*, p. 12.) (Emphases added.) The same paper subsequently was transmitted to the Executive Board by the [Fund] Secretary. (EBAP/91/98 (April 23, 1991), *see* p. 12, repeating the same language.) At the same time, the "legal text" also changed the requirement that the "election must be made at least twelve months in advance of the date of death, except as may be authorized otherwise by the Administration Committee of the Plan" to "election . . . shall not be effective if the retired participant dies within one year following the marriage, except that the Administration Committee may, for good cause, waive the latter requirement." The Executive Board adopted the text of the amended SRP on April 30, 1991, on a lapse-of-time basis. (*See* Minutes, EBM/91/64 (May 3, 1991), p. 35.)

48. SRP Section 4.6(c), as adopted by the Executive Board on April 30, 1991, provided as follows:

> (c) Any retired participant who marries after his contributory service has ceased may elect, irrevocably, by written notice filed with the Administration Committee by January 1, 1991 or within one year following such marriage, if later, to reduce his own pension in accordance with this Section 4.6 and paragraph 2 of Schedule D in order to provide a survivor's pension following his death to the spouse, in such amount as shall be designated in the notice, subject to the limits of subsection (e) below; provided that an election of a pension for a spouse under this subsection (d) shall not be effective if the retired participant dies within one year following the marriage, except that the Administration Committee may, for good cause, decide to waive the latter requirement.

(EBAP/91/98, April 23, 1991, p. 13; Minutes, EBM/91/64 (May 3, 1991), p. 35.) That text governed until the Plan's amendment in 2007.

49. Staff Bulletin No. 91/12 (Amendments to the Staff Retirement Plan) (May 9, 1991) notified staff that the 1991 amendments had been formally incorporated into the Plan. In December 1992, the Fund issued the full SRP document, which reflected those amendments.

2007 amendments to SRP

50. On November 19, 2007, the Executive Board adopted further amendments to the SRP. These amendments were undertaken as part of a larger initiative to broaden the definition of family relationships for purposes of the Fund's human resources policies. (*See* EBM/07/102, Minutes of Executive Board Meeting, November 21, 2007.) The 2007 revisions to the SRP and to human resources policies included four components, summarized as follows in a cover Memorandum to the Members of the Executive Board from the [Fund] Secretary, transmitting the staff paper:

> The proposed changes are as follows: (a) *amendments to the Staff Retirement Plan (SRP) that would extend survivor benefits to the qualified domestic partner of Plan participants on the same basis*

> *as to a married participant's spouse,* and to the natural or adopted children of such a domestic partner on the same basis as to the child of a married participant's spouse; (b) a procedural change that would provide an alternative basis—formal recognition under applicable national or local laws—for staff members to qualify their domestic partners for purposes of the Fund's personnel policies and benefit programs; (c) the application of an updated interpretation of the terms "spouse" and "marriage" for purposes of the Fund's human resources policies and benefit programs, including the SRP; and (d) the extension of eligibility for the equivalent of the Spouse and Child Allowances to staff members with a qualified domestic partner, spouse as more broadly defined, or a child of such partner/spouse.

(EBAP/07/170, "Family Status and Extension of Domestic Partner Benefits," November 8, 2007.) (Emphasis added.)

51. The 2007 amendments to the SRP revised the terms of numerous Sections of the Plan,[14] including Section 4.6(c). These changes were to ". . . substantially complete the process initiated in 2000 of providing comparable benefits to staff in traditional and non-traditional family relationships." (EBAP/07/170, "Family Status and Extension of Domestic Partner Benefits," November 8, 2007, cover memorandum.)

52. Accordingly, an effect of the 2007 SRP amendments upon Section 4.6(c) was to extend the requirement that election be made by written notice filed with the Administration Committee within one year following "such marriage" to require that in cases of domestic partnership the election be made within one year following the "registration of such domestic partnership with the Administration Committee." In communicating the proposed 2007 SRP amendments to the Executive Board, the staff paper highlighted the differences between the 1991 and 2007 texts of Section 4.6(c) as follows:

> (c) Any retired participant who ~~marries,~~ after his contributory service has ceased, **marries anyone other than the individual who had been the retired participant's domestic partner at the time he first began receiving benefits under the Plan, or enters into a domestic partnership** may elect, irrevocably, by written notice filed with the Administration Committee by January 1, 1991, or within one year following such marriage **or registration of such domestic partnership with the Administration Committee**, if later, to reduce his own pension in accordance with this Section 4.6 and paragraph 2 of Schedule D in order to provide a survivor's pension following his death to the

[14] These included Sections 1.1, 4.6, 4.9, 4.10, 4.12, 10.8, 11.1, 16.1 and Schedule B. (*See* EBAP/07/170, "Family Status and Extension of Domestic Partner Benefits," November 8, 2007, pp. 22-33.)

> spouse **or domestic partner**, in such amount as shall be designated in the notice, subject to the limits of subsection (d) below **and to the extent permitted by applicable law**; provided that an election of a pension for a spouse **or domestic partner** under this subsection (c) shall not be effective if the retired participant dies within one year following the marriage **or registration of the domestic partnership**, except that the Administration Committee may, for good cause, decide to waive the latter requirement.

(EBAP/07/170, "Family Status and Extension of Domestic Partner Benefits," November 8, 2007, p. 24.) (Emphasis in original.)

> Applicant's request to the Administration Committee for waiver of the one-year time limit to elect a reduced pension and pension to surviving spouse pursuant to SRP Section 4.6(c)

53. In June 1995, Applicant retired following a twenty-five year career with the Fund. His pension became effective on July 1, 1995.

54. Applicant states that he was married on November 29, 2007 in Thailand, where he and his wife reside. In May 2008, the couple traveled to Washington, D.C., at which time Applicant applied for (and later received) coverage for his wife under the Fund's Medical Benefits Plan (MBP). Applicant asserts that at the time he believed that a spouse could receive benefits under the SRP only if the marriage had taken place before retirement. (Letter from Applicant to Secretary of SRP Administration Committee, December 9, 2010.)

55. On a subsequent trip to Washington, D.C., in December 2010, Applicant initiated the process of seeking to elect a JSA pursuant to SRP Section 4.6(c). He asserts that it was during this 2010 visit to Washington that he learned of that possibility on the advice of a friend. (Letter from Applicant to Secretary of SRP Administration Committee, December 9, 2010.) On December 2, 2010, Applicant inquired by email to the Fund's "HR Center" about the possibility of "convert[ing] my pension to include my wife but at some cost to my current benefit." Applicant was provided with information about the procedures for such an election. (Email correspondence between Applicant and Human Resources Department (HRD), December 2-3, 2010.)

56. This email contact was followed on December 8, 2010 by a meeting between Applicant and an HRD representative. It was at that meeting, asserts Applicant, that he first learned that election of a JSA under Section 4.6(c) was limited to the one-year period following post-retirement marriage. According to Applicant, the HRD representative explained that the rule was to protect the SRP from losses as a result of elections made in contemplation of death. (Letter from Applicant to Secretary of SRP Administration Committee, December 9, 2010.) In a "heads up" email to the Secretary of the Administration Committee and other HRD colleagues, the HRD representative reported that he had advised Applicant that there were no exceptions to the one-year time limit but that if he wished to pursue the matter further he could do so with the

Administration Committee. (Email from HRD representative to Secretary of SRP Administration Committee, December 8, 2010.)

57. By letter of December 9, 2010 to the Secretary of the Administration Committee, Applicant requested an "exemption from a rule of the Staff Retirement Plan, which I recently learned requires that converting a pension (with a reduction in present benefit) to include a wife after retirement must be done within one year after marriage." Applicant asserted: "I believe that I should be granted an exemption from this one-year rule. Not complying with the rule reflected a lack of knowledge of the detailed rules of the SRP, compounded by living abroad"; Applicant indicated that he recently had learned from a friend of the availability of the JSA option in the case of post-retirement marriages. He noted that he was seeking the benefit for his wife under the Fund's SRP because he believed that the "SRP is better managed, and I have greater confidence in its integrity, than commercial annuities." (Letter from Applicant to Secretary of SRP Administration Committee, December 9, 2010.)

58. By letter of February 17, 2011, the Secretary of the Administration Committee communicated the Committee's decision, denying Applicant's request on the ground that there was "no provision in the Plan that would support such an exception" to the one-year time limit for electing a reduced pension with pension to surviving spouse married following retirement. The Secretary additionally noted that the time limit is published in various documents, including in the SRP Handbook and that Applicant could have investigated the possibility of SRP benefits for his spouse at the time that he enrolled her in the MBP. The Secretary also suggested that Applicant might want to consider the purchase of a commercial annuity for the benefit of his spouse. (Letter from Secretary of the SRP Administration Committee to Applicant, February 17, 2011.)

59. Thereafter, on May 31, 2011, asserts Applicant, he met with a Fund Human Resources Officer (HRO) (a different individual from the HRD representative with whom he had conferred in December 2010) who allegedly told him that waivers had been granted in a number of cases in which a full year had not elapsed between the date of marriage and the date of the pensioner's death. As explained above, this is a separate requirement that must be met once an election is made under SRP Section 4.6(c) for the survivor pension to come into effect.

The Channels of Administrative Review

60. The case before the Tribunal arises through the channel of administrative review provided by the Rules of Procedure of the SRP Administration Committee.[15] Pursuant to Rule VIII, a Requestor may submit to the Committee an application for review of its Decision within ninety days of receipt. The channel of review for a Request submitted to the Committee has been exhausted for purposes of filing an application with the Administrative Tribunal when the

[15] Decisions arising under the SRP that are within the competence of the Administration or Pension Committees of the Plan are expressly excluded from the jurisdiction of the Fund's Grievance Committee. *See* GAO No. 31, Rev. 4 (October 1, 2008), Section 4.03 (iii).

Committee has notified the Requestor of the results of its review of that Decision.[16] (Rule X of Administration Committee's Rules of Procedure.)

61. Accordingly, the Administration Committee of the SRP plays a dual role within the Fund's dispute resolution system. It is responsible for taking the "administrative act" (Statute, Article II) that may be contested before the Tribunal and it supplies the channel of review for purposes of the exhaustion of remedies requirement of Article V of the Statute when, pursuant to Rule VIII of the Committee's Rules of Procedure, it reconsiders its own Decision. *See Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 98. The extent of that reconsideration is defined by SRP Administration Committee Rule VIII, para. 2, as follows: "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."

62. On June 24, 2011, Applicant made a request to the Administration Committee for review of its decision, seeking waiver of the one-year time limit and approval of a survivor pension for his spouse "on the basis that I would pay the SRP Fund the difference between my normal pension that I have been receiving and the calculated reduced pension from the date of marriage registration for the period of time beyond the one year standard." As an alternative, he asked the Committee to agree to date the one-year period from the date of approval of his request. In his request for review, Applicant contended that the one-year time limit for election of the survivor pension was discriminatory as compared with the terms applicable to staff who marry before retirement; he suggested that this alleged inequality of treatment could be corrected by substituting a one-year period from the date of an application for the survivor pension. (Applicant's Application to SRP Administration Committee for a Review of Decision.)

63. In his request for review, Applicant also asserted: "I understand that waivers of the one-year rule for the survivor pension to come into effect have been made in the past and a waiver for the reporting rule should be granted since it is clearly discriminatory." He also maintained that he was ". . . never sent the 1997 SRP Handbook and was not given such a handbook in 1995 or information on a survivor pension when I retired." (*Id.*)

64. On July 27, 2011, the Secretary of the Administration Committee informed Applicant of the denial of his request for review. The Secretary noted that the "Committee Rules require that, in order to consider reversing a decision, an SRP participant must show there was a misrepresentation of a material fact, or offer material evidence not previously provided for the Committee's review." Applying this standard, the "Committee did not find that your request provided the grounds for granting an exception to its earlier decision." The decision on review additionally stated: "Please also note that, as a follow-up to your allegations in paragraph (f) that

[16] *See Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2001-2 (November 20, 2001), paras. 31-35, for a detailed examination of the Administration Committee's Rules relating to exhaustion of administrative review.

the Committee previously waived the one-year rule for the survivor pension to come into effect, no such cases were found based on a review of the Committee files from May 1, 1990 (when retirees first became eligible to elect a survivor pension) to present." (Email from Secretary of SRP Administration Committee to Applicant, July 27, 2011.)

65. On October 19, 2011, Mr. Niebuhr filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

66. The principal arguments presented by Applicant in his Application, Reply, and additional submissions may be summarized as follows.

1. Article XX of the Tribunal's Statute does not deprive the Tribunal of jurisdiction to decide Applicant's challenge to the regulatory decision. The one-year time limit following post-retirement marriage for election of a reduced pension with pension to surviving spouse pursuant to SRP Section 4.6(c), although initially enacted in 1991, was reaffirmed in 2007 when domestic partners were added to spouses as potential beneficiaries of a survivor pension.

2. The one-year time limit following post-retirement marriage for election of a reduced pension with pension to surviving spouse pursuant to SRP Section 4.6(c) is discriminatory, arbitrary, capricious, in violation of fair and reasonable procedures and inconsistent with the uniform treatment of SRP participants.

3. The one-year time limit unfairly discriminates against persons who marry after retirement vis-à-vis other Plan participants in electing survivor benefits for their spouses.

4. The contested time limit is arbitrary, as it does not serve the purpose of protecting the financial soundness of the Plan against elections in contemplation of death. A one-year waiting period from the date of election would meet this concern. The legislative history shows that the "legal text" of the Plan provision conflated a one-year reporting period following post-retirement marriage with a one-year waiting period following election.

5. The pension to surviving spouse is fully paid for by reduction in the retiree's pension income and is fully consistent with the financial integrity of the SRP.

6. The legislative history shows that there was no policy intent on the part of the Executive Board to limit the time period in which a retiree could elect a survivor spouse benefit. The one-year time limit was introduced by the Administration Committee in preparing the "legal text" of the Plan provision. This material

distortion of the Executive Board's intent was later inadvertently adopted by the Executive Board.

7. Waivers have been made to the requirement that, for the survivor pension to become effective, one year must pass between the post-retirement marriage and the pensioner's death. As a matter of equity and uniform treatment of Plan provisions, waivers should also be available to the one-year time limit for electing the joint and survivor benefit.

8. Respondent failed to notify Applicant of the one-year time limit for electing a reduced pension with pension to surviving spouse under SRP Section 4.6(c). Applicant remained in ignorance of this time limit until after it had elapsed.

9. The Administration Committee's decision on Applicant's request for waiver of the time limit and for election of the joint and survivor benefit was affected by factual error and bias.

10. In considering Applicant's request for review of its initial decision, the Administration Committee improperly failed to take into account new evidence.

11. Applicant states his claim for relief as follows:

    > The relief I ask is that the SRP approve my application for a survivor pension. By using a date related to the Tribunal's decision to provide relief, I would obtain no financial benefit from the decision on the waiver of the one-year reporting rule. Note that I would need to live one year before the survivor benefit would be effective. Clearly the relief sought provides me with no special benefit not provided to any other SRP participant.

Respondent's principal contentions

67. The principal arguments presented by Respondent in its Answer, Rejoinder, and additional submissions may be summarized as follows.

1. Article XX precludes the Tribunal from exercising jurisdiction over Applicant's challenge to the regulatory decision because the contested rule was enacted before the entry in force of the Tribunal's Statute.

2. The one-year time limit following post-retirement marriage for election of a reduced pension with pension to surviving spouse pursuant to SRP Section 4.6(c) is a reasonable and non-discriminatory regulatory decision adopted by the Executive Board.

3. The need to protect the financial soundness of the SRP is essential because, unlike commercial insurance plans, the SRP does not make individualized assessments of risk.

4. The one-year time limit for election of a reduced pension with pension to surviving spouse under Section 4.6(c) reasonably protects the finances of the Plan from the possibility of adverse selection by retired participants, including "deathbed" elections and an "unfettered ability to place 'bets'" on the inflation and interest rate assumptions of the Plan.

5. Applicant mistakenly asserts that there is no time limit to exercise the JSA option under SRP Sections 4.6(a) and (b); a Plan participant who has a spouse or domestic partner on his last day of service must elect the option before the effective date of the pension.

6. The different time limit for exercising the option under Sections 4.6(a) and (b), in contrast to the time limit for exercising the option under Section 4.6(c), is justified by the difference in circumstances of the individuals involved. In each case, the applicable time limit is a reasonable response to the possibility of adverse selection by participants and retired participants and is linked to an objective event relevant to the particular circumstance.

7. The Fund satisfied any obligation to notify Applicant about the joint and survivor benefit and the applicable time limit for election.

8. There is no express provision for granting an exception for Plan participants who, through no fault of the Fund, failed to exercise the JSA option within one year following post-retirement marriage. It is not open to the Committee to grant individual exceptions based on a weighing of the relative costs and benefits in an individual case.

9. The Administration Committee properly and fairly applied the rule in Applicant's case. There was no factual error in the Committee's proceedings and Applicant did not submit any new evidence on review.

Relevant Provisions of the Fund's Internal Law

68. For ease of reference, the principal provisions of the Fund's internal law relevant to the consideration of the issues of the case are set out below.

SRP Section 4.6

69. SRP Section 4.6 provides participants and retired participants the option to elect—pursuant to differing terms depending upon whether the election is made before or after the pension becomes effective and whether the retired participant marries (or enters a domestic

partnership) following retirement—a reduced pension during the pensioner's lifetime and a surviving spouse's pension following the pensioner's death:

4.6 Reduced Pensions with Pension to Survivor

(a) Any participant or retired participant may, by written notice received by the Administration Committee before his pension becomes effective, elect to convert the pension otherwise payable to him, or in the case of disability retirement, the early retirement pension to which the retired participant would otherwise have been entitled (excluding any portion of his pension commuted into a lump sum under Section 15.1) into two pensions, in accordance with one of the options named below. If such notice is received by the Administration Committee at least 30 days prior to the date his pension becomes effective, the election of the option hereunder by him shall become effective on the date his pension becomes effective. If such notice is received by the Administration Committee less than 30 days before the date his pension becomes effective, the election of the option hereunder shall become effective 30 days after the date such notice is received. The amounts of the two pensions after conversion shall be determined using the actuarial assumptions in paragraph 2 of Schedule D.

Option 1. A reduced pension payable, when effective, to him during his life, and a pension, equal in amount to such reduced pension, payable after his death during the life of, and to, the person nominated by him by written designation duly witnessed and filed with the Administration Committee when he elected the option, but only if such person survives him; or

Option 2. A reduced pension payable, when effective, to him during his life, and after his death a pension payable at one half the rate of his reduced pension during the life of, and to, the person nominated by him by written designation duly witnessed and filed with the Administration Committee when he elected the option, but only if such person survives him; or

Option 3. A reduced pension payable, when effective, to him during his life, and after his death a pension payable at such rate as he shall specify, and during the life of, and to, the person nominated by him by written designation duly witnessed and filed with the Administration Committee when he elected the option, but only if such person survives him.

(b) An election of an option may be revoked or changed by a participant or a retired participant only by written notice received

by the Administration Committee before the date when his pension becomes effective, and any such change shall be treated as a revocation of the prior option and the election of a new option. If the participant or retired participant or the person designated by him dies before the date when such option becomes effective, any election of such option hereunder shall be of no effect and any benefits payable to him or on his account shall be determined and paid in all respects as if no option had been elected by him.

(c) Any retired participant who, after his contributory service has ceased, marries anyone other than the individual who had been the retired participant's domestic partner at the time he first began receiving benefits under the Plan, or enters into a domestic partnership may elect, irrevocably, by written notice filed with the Administration Committee by January 1, 1991, or within one year following such marriage or registration of such domestic partnership with the Administration Committee, if later, to reduce his own pension in accordance with this Section 4.6 and paragraph 2 of Schedule D in order to provide a survivor's pension following his death to the spouse or domestic partner, in such amount as shall be designated in the notice, subject to the limits of subsection (d) below and to the extent permitted by applicable law; provided that an election of a pension for a spouse or domestic partner under this subsection (c) shall not be effective if the retired participant dies within one year following the marriage or registration of the domestic partnership, except that the Administration Committee may, for good cause, decide to waive the latter requirement.

(d) Notwithstanding the foregoing provisions of this Section 4.6, no option may be elected thereunder that would result in either:

(i) the amount of the reduced pension payable to the retired participant being less than one half the pension that would have been payable to him if no option had been elected by him; or
(ii) the payment to the designated survivor of a pension that, together with any pension payable to such survivor pursuant to Section 4.9, would exceed the amount of the reduced pension payable to the retired participant.

(Emphasis added.)

70. SRP Section 4.6(c) is summarized as follows in the Staff Retirement Plan Handbook (1994), p. 19:

In the Event of Marriage or a Re-Marriage During Retirement

In the event of marriage or a re-marriage during retirement, you may elect to provide a survivor pension to your current spouse, if your current spouse was not married to you on the last day of service and for whom therefore a surviving spouse pension would not be payable. This election must be made within one year after marriage. This election results in a reduction in the pension based on two factors: the amount of the survivor pension elected, and the difference between the ages of yourself and your spouse. Once effective, this election is irrevocable.

SRP Section 7.2

71. SRP Section 7.2 sets out the role and responsibilities of the SRP Administration Committee:

7.2 Administration Committee

(a) The Administration Committee shall be composed of five persons, each with an alternate, appointed by the Pension Committee upon nomination by the Managing Director of the Employer, to serve at the pleasure of the Pension Committee. Each member and each alternate appointed after January 1, 1978 shall serve for a period of three years, subject to the pleasure of the Pension Committee, but may be reappointed. The Pension Committee shall designate one of the members of the Administration Committee as chairman and another as vice chairman of the Administration Committee. The alternate of any member of the Administration Committee may act and vote in his stead.

(b) The Administration Committee, subject to the supervision and control of the Pension Committee, shall be responsible for the administration of the Plan and its application to participants, former participants and persons claiming through them. Except as may be herein otherwise expressly provided, the Administration Committee shall have the exclusive right to interpret the Plan, to determine whether any person is or was a staff member, participant or retired participant, to direct the employer to make disbursements from the Retirement Fund in payment of benefits under the Plan, to determine whether any person has a right to any benefit hereunder and, if so, the amount thereof, and to determine any question arising hereunder in connection with the administration of the Plan or its application to

> any person claiming any rights or benefits hereunder, and its decision or action in respect thereof shall be conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of the Administrative Tribunal. Nothing herein shall prevent the Administration Committee, at its own discretion, from reconsidering a decision taken or from submitting a matter to the Pension Committee in accordance with subsection (c) of Section 7.1.
>
> (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.
>
> (d) The Administration Committee shall maintain accounts showing the fiscal transactions of the Plan, and shall keep in convenient form such data as may be necessary for actuarial valuations of the Plan. The Administration Committee shall prepare annually a report showing in reasonable detail the assets and liabilities of the Plan and giving a brief account of the operation of the Plan for the past year. Such report shall be submitted to the Pension Committee, and a copy shall be on file at the headquarters of the Employer, where it shall be open to inspection by any participant or retired participant.
>
> (e) In any case where it shall be necessary to determine the part of any benefit under the Plan that is provided by the contributions of a participant or of the Employer, the Administration Committee, subject to any rules or orders of the Pension Committee with respect thereto, shall make such determination in such manner as it shall deem equitable.

Rules of the SRP Administration Committee

72. Under Section 7.2(c) of the Plan, the SRP Administration Committee has adopted the following rule titled "Post-Retirement Marriages: Rules for Election of Surviving Spouse's Pension Under Section 4.6(c)" (1995):

> Elections for a reduced pension under Section 4.6(c) shall be made in writing to the Secretary of the Administration Committee. A retired participant will be required to provide a copy of a marriage certificate and a birth certificate (or other acceptable documentation) of his spouse. Elections shall enter into effect, and

> the pension be reduced, as of the first day of the thirteenth month after the month in which the marriage has occurred. The extent to which a pension may be reduced will be determined in accordance with the provisions of Section 4.6 of the Plan, including the applicable actuarial factors, that are in effect as of the first day of the thirteenth month following the month in which the marriage occurred.

73. The SRP Administration Committee has also adopted a "Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances" (1998):

> In the event that the Administration Committee (hereinafter "Committee") of the Staff Retirement Plan determines that a time limit prescribed for the doing of any act required under the Plan, in relation to the interest of a participant or retired participant, has not been complied with, as a result of any failure by the Employer or the Committee to notify a participant or retired participant of such time limit that the Employer or Committee is obligated to give notice of either under the Plan or pursuant to a responsibility that it has specifically undertaken, whether due to error, oversight or any other reason, and such interest has thereby been affected adversely, the Committee may, in its sole discretion, permit such act to be done and deem it to have been done within the time prescribed.

74. In 1999, the SRP Administration Committee adopted Rules of Procedure. Pertinent provisions are set out below:

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

shall be given an opportunity to review and respond to a summary of that evidence which shall be prepared by the Secretary.

3. The Requestor and any other party may be represented by counsel, each at his own expense.

4. The deliberations of the Committee shall be treated as confidential. Unless the Committee decides otherwise, the minutes of its deliberations shall be confidential and shall not be made available to the Requestor or any other party.

RULE VII
Form of Decisions

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

2. If appropriate, a Decision shall identify any additional material or information necessary for the Requestor to perfect his claim and an explanation of why such material or information is necessary.

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

RULE VIII
Review of Decisions

1. A Requestor, or any other person claiming any rights or benefits under the Plan, who wishes to dispute a Decision may submit an Application for Review of a Decision (hereinafter "Application") to the Secretary within ninety (90) days after the Requestor receives a copy of the Decision. An Application shall satisfy all of the requirements as to form set forth in Rule III and otherwise applicable to a Request. Subject to Rule X, paragraph 2, if no Application has been submitted within this period and an extension of time described in Rule IX, paragraph 2 has not been granted, the right to submit an Application shall cease.

2. The Committee may review a Decision, either in response to a timely Application or at its own initiative. The Committee may also be required to review a decision 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.

(Staff Bulletin No. 99/17 (June 23, 1999), Attachment.)

Consideration of the Issues of the Case

75. Applicant challenges the decision of the SRP Administration Committee denying his request for waiver of the one-year time limit following post-retirement marriage to elect a reduced pension with pension to surviving spouse pursuant to Section 4.6(c) of the Plan. The issues to be decided are: first, whether the Plan provision as a "regulatory decision" is invalid as arbitrary and discriminatory; and, second, whether the SRP Administration Committee erred in taking the "individual decision" denying Applicant's request for exception to its application in the circumstances of his case, as well as whether there were irregularities in the decision-making process of the Committee.

Admissibility of Applicant's challenge to the "regulatory decision"

76. The Tribunal must decide as a threshold question whether Article XX of the Statute precludes its consideration of Applicant's challenge to the "regulatory decision"[17] at issue in this case, i.e., the requirement of SRP Section 4.6(c) that election of a JSA for the benefit of a spouse married after retirement be made within one year following that marriage.

77. Article XX limits the Tribunal's jurisdiction *ratione temporis* to review of administrative acts taken after the entry in force of the Tribunal's Statute. Article XX, Section 1, provides:

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[17] Article II, Section 2.b., defines "regulatory decision" as "any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund."

> 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.

78. In accordance with Article VI, Section 2,[18] of the Tribunal's Statute, an applicant may challenge a "regulatory decision" of the Fund either directly within three months of its announcement or effective date, or at any time as part of a challenge to an admissible "individual decision" taken pursuant to such "regulatory decision." It is not disputed that Applicant filed his Application within three months of the exhaustion of administrative review of the "individual decision"[19] denying his request to elect a JSA pursuant to SRP Section 4.6(c) and for waiver of the one-year time limit following post-retirement marriage for making such election. Article VI, Section 2, is, however, subject to the constraint of Article XX:

> While Article VI, Section 2 of the Statute provides that "the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision," that general proviso is subject to the *lex specialis* of Article XX. The specific governs the general.

Ms. "S", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1995-1 (May 5, 1995), para. 22, citing Commentary[20] on the Statute, p. 25 ("[A] staff member could contest the denial of a benefit in his particular case on the grounds that the regulation on which

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[18] Article VI, Section 2, provides:

> 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.

[19] Article VI, Section 1, provides:

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

[20] The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009).

the denial was based was illegal, without regard to the date on which the regulation was enacted, subject to the provisions of Article XX"); *see also Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 68; *Mr. S. Ding, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2009-1 (March 17, 2009), para. 37. Accordingly, the question for the Tribunal is whether the "regulatory decision" challenged by Applicant was taken before October 15, 1992.

79. The Fund asserts that the one-year time limit contested by Applicant was enacted by the Executive Board on April 30, 1991 and, accordingly, Article XX precludes his challenge to it. Applicant, for his part, maintains that Article XX does not deprive the Tribunal of jurisdiction to decide his challenge to the regulatory decision because although the one-year time limit following post-retirement marriage for election of a JSA pursuant to SRP Section 4.6(c) was initially enacted in 1991, it was reaffirmed by the Executive Board in 2007 when domestic partners were added to spouses as potential beneficiaries under that Plan provision.

80. The Tribunal has rendered four Judgments interpreting Article XX. In its first two Judgments, *Mr. "X", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1994-1 (August 31, 1994) and *Ms. "S"*, the Tribunal granted the Fund's motions for summary dismissal on the basis of the time bar of Article XX. In each of those cases, the Tribunal rejected arguments that jurisdiction could be conferred upon the Tribunal because past administrative acts may continue to have effect in the period of the Tribunal's competence.

81. In *Mr. "X"*, the dispute between the applicant and the Fund concerned the duration of his pensionable period of service and the resultant amount of his pension payments. The jurisdictional question under Article XX required the Tribunal to identify the contested "administrative act" (in the sense of Article II[21]) and to pinpoint when it took place.

82. The Tribunal concluded that it was the determination in 1986 (before the Tribunal's jurisdiction) of the period of Mr. "X"'s pensionable service rather than the calculation and disbursement of his pension payments beginning in 1993 (after the entry in force of the Statute) that constituted the contested "administrative act":

> The calculation of Mr. "X"'s pension in 1993 was a purely arithmetical act governed by the decision of 1986 as to the extent of his pensionable service. As was repeatedly made clear to the Applicant in response to his inquiries about his pension options, the variable that remained to be factored in was the effect of cost-of-living increases. Otherwise his pension had been determined by the 1986 disposition. *The fact that that decision of 1986 produces consequences for Mr. "X" now can have no effect upon the extent of the jurisdiction of the Tribunal; if it were otherwise, then the*

[21] Article II, Section 1.a., provides: "The Tribunal shall be competent to pass judgment upon any application . . . by a member of the staff challenging the legality of an administrative act adversely affecting him . . . ." "Administrative act" in turn is defined as "any individual or regulatory decision taken in the administration of the staff of the Fund." (Article II, Section 2.a.)

> *limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts may well be felt for years after the date when the Tribunal's Statute came into force.* Equally, the Applicant's claim that the 1986 decision was open to reconsideration does not mean that it was not taken when it was taken. 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." Continued discontent with the results of an administrative act and eventual renewal of a challenge to its legality cannot put in question the fact that the act was taken, and taken when it was taken.

Mr. "X", para. 26. (Emphasis added.)

83. In *Ms. "S"*, the Tribunal expanded on the principles developed in *Mr. "X"*, in the circumstances of a challenge to a "regulatory decision" and its application in the applicant's individual case. Ms. "S" challenged as discriminatory on the basis of gender a provision of the SRP that excluded part-time contractual service from the prior contractual service that could be credited retroactively under the Plan.

84. As in *Mr. "X"*, the Tribunal in *Ms. "S"* sought to resolve the question of ". . . when the administrative act whose legality is challenged or whose illegality is asserted was taken for the purposes of its jurisdiction as provided in the Statute." *Ms. "S"*, para. 18. The Tribunal rejected the view that the more recent denial by the SRP Administration Committee of the applicant's requests for exception to the rule or for its retroactive amendment brought her challenge to the "regulatory decision" within the Tribunal's jurisdiction *ratione temporis*:

> Both the 1974 amendment to the Staff Retirement Plan and the 1991 revision of it pre-dated the establishment of the Tribunal. It follows that, pursuant to Article XX, Section 1 of the Statute, the Applicant's complaint, in so far as it challenges the legality of an element of those provisions, is time barred. The denial of requests for exceptional application or amendment of a "pre-existing" provision equally cannot confer jurisdiction on the Tribunal it otherwise lacks, nor can a refusal to refer a request for amendment to the Pension Committee do so. That a current complaint about a rule which came into force before October 15, 1992 is not sufficient to give rise to jurisdiction which otherwise is absent follows from the principle that formed the basis of the Tribunal's judgment in the case of *Mr. "X" v. International Monetary Fund*. That principle governs in respect of assertions of the illegality of pre-existing rules. It also governs requests for changes in pre-existing rules and requests for exceptions to their application.

Ms. "S", para. 21.

85. In *Ms. "G"*, the Tribunal again considered the admissibility of a challenge to the denial of a request for exception to a "regulatory decision" that the Fund contended pre-dated the Tribunal's jurisdiction. Ms. "G" contested the policy, adopted by the Executive Board, governing eligibility for expatriate benefits. That policy afforded such benefits only to staff members holding G-4 visa status. The applicant, who instead held Lawful Permanent Resident (LPR) status, sought exception to a 2002 decision of the Executive Board that permitted a staff member with LPR status to relinquish that visa status and convert to G-4 status to acquire eligibility for expatriate benefits, a choice that conferred certain disadvantages with respect to a potential future return to LPR status. The applicant sought, and was denied, an exception to the policy to allow her to receive expatriate benefits while continuing to maintain her LPR visa status. The Fund asserted that Article XX barred Ms. "G"'s complaint because "in essence" the rule that she challenged was the "visa test" for expatriate benefits, which had been in effect since 1985. *Ms. "G",* para. 64.

86. In interpreting Article XX in the circumstances of the case, the Tribunal examined the decisions taken by the Fund's Executive Board subsequent to the entry in force of the Tribunal's Statute with respect to eligibility for expatriate benefits. The Tribunal noted that the rule adopted in 1985 had remained controversial and the Fund on more than one occasion thereafter (during the period of the Tribunal's jurisdiction) had undertaken to reassess that policy. In 1994, having considered several alternatives, the Executive Board decided to retain the 1985 policy. Nonetheless, following the Executive Board's 1994 reaffirmation of the "visa test," the matter returned again to its agenda in 2001. With effect from May 1, 2002, the Executive Board adopted an amendment extending benefits to current and newly appointed staff in LPR status on the condition that they relinquish that status in favor of obtaining a G-4 visa. *Id.*, paras. 47-54.

87. On the basis of its examination of the history of the Executive Board's decisions, the Tribunal concluded that "[t]he policy in dispute, first adopted in 1985, namely, to allot expatriate benefits in accordance with visa status rather than nationality, was thoroughly reconsidered and reaffirmed in 1994 and materially refashioned as of 2002." *Id.*, para. 62. The Tribunal accordingly concluded that these decisions "represented the re-consideration of the contested policy and its adaptation at the highest levels of the Fund's decision-making." The Tribunal held that "[a]s such, they represent an 'administrative act' falling within the Tribunal's jurisdiction *ratione temporis*." *Id.*, para. 72. The Tribunal's reasoning is set out below:

> It is not disputed that the Fund's Executive Board first adopted the visa test for eligibility for expatriate benefits in 1985, before the entry into force of the Tribunal's Statute. That test denies access to expatriate benefits to individuals (such as Applicant and Intervenor) who hold LPR visa status and who joined the Fund's staff after 1985. Does the subsequent action of the Executive Board with respect to that policy allow the Tribunal to exercise jurisdiction in this case?

> A review of the Executive Board's actions within the period of the Tribunal's jurisdiction, as surveyed above, shows that these actions included the reaffirmation of the visa test in 1994 and the refinement of that test by the 2002 amendment. In 1994, the Executive Board considered three options: (I) reverting to the nationality criterion; (II) adopting the "modified INTELSAT option"; or (III) retaining the 1985 policy. It chose the latter. In 2001, the Fund's Human Resources Department presented the Executive Board with a broad re-examination of the eligibility criteria, including a review of the merits of the visa test. It recommended an amendment refining the eligibility requirements in some respects but retaining as the Fund's fundamental policy that staff members holding G-4 visas are entitled to expatriate benefits and those holding LPR visa status are not. The Executive Board adopted the proposed amendment, to take effect in 2002.
>
> As indicated above, the Executive Board's reaffirmation of the eligibility requirements in 1994 and its adoption of the 2002 amendment represented the re-consideration of the contested policy and its adaptation at the highest levels of the Fund's decision-making. As such, they represent an "administrative act" falling within the Tribunal's jurisdiction *ratione temporis*. . . .

Id., paras. 70-72.

88. In concluding that Ms. "G"'s claim was admissible, the Tribunal expressly distinguished the facts of her case from those presented in *Ms. "S"*. The Tribunal observed that in the earlier case, there was "no evidence that the contested rule had been re-considered and reaffirmed in the period of the Tribunal's jurisdiction apart from the 'individual decision' resulting from Ms. "S"'s request for an exception to the generally applicable policy; no new policy was adopted in that case." *Ms. "G"*, para. 72.

89. Most recently, in *Ding*, the Tribunal revisited the question of the operation of Article XX in respect of "regulatory decisions" allegedly pre-dating the Tribunal's jurisdiction. In that Judgment, the Tribunal reaffirmed its earlier holding in *Ms. "G"* that ". . . reconsideration, reaffirmation, and refinement by the Fund's Executive Board of a decision pre-dating the Tribunal's competence may give the Tribunal jurisdiction, even where the applicant remains disadvantaged by the rule in the same manner as before the regulation's reaffirmation." *Ding*, para. 42. Based upon an examination of the facts of Mr. Ding's case, however, the Tribunal concluded that his complaint was barred by Article XX.

90. In *Ding*, the applicant challenged the Fund's policy governing age eligibility for children's Education Allowances and its application in his individual case. He contended that the policy impermissibly discriminated in the case of a child, such as his own, whose birthday falls outside of the academic year, resulting in one less year of eligibility for Education Allowances than in respect of a child whose birthday falls within the academic year.

91. To decide the question of the admissibility of the application under Article XX, the Tribunal in *Ding* compared the text of the pre-existing (1985) rule, which pre-dated the entry in force of the Tribunal's Statute, with the text of the (2000) rule under which the applicant's complaint had arisen. The Tribunal concluded that "in substance and in effect" the current rule was the same as that which pre-dated the Tribunal's jurisdiction and accordingly held the applicant's claim inadmissible pursuant to Article XX. This was so even though the pertinent text of GAO No. 21 had undergone revision:

> Having considered and evaluated the respective arguments of Applicant and Respondent, the Tribunal finds that, in substance and in effect, Section 3.02 of Revision 6 (January 28, 1985) and Section 4.02 of Revision 7 (June 12, 2000) are the same. Both only permit payment of Education Allowance benefits to a child who reaches his or her 5th birthday during the academic year. Both cut off payment of the Education Allowance at the end of the academic year in which the 24th birthday is reached.

Id., para. 48. Accordingly, the Tribunal concluded:

> Since, in substance, the provisions are the same, Mr. Ding's Application is tantamount to a challenge to a rule of the Fund that pre-dates the entry into force of the Tribunal's Statute. Hence, by reason of the terms of Article XX, paragraph 1, of the Tribunal's Statute, the Tribunal is without jurisdiction to pass upon the merits of the Application.

Id.

92. The touchstone of the Tribunal's Article XX jurisprudence has been to ask ". . . when the administrative act whose legality is challenged or whose illegality is asserted was taken for the purposes of its jurisdiction as provided in the Statute." *Ms. "S"*, para. 18; *see also Mr. "X"*, para. 22. The jurisprudence further indicates that in the absence of evidence of reconsideration of the substance of the challenged policy (as was found in *Ms. "G"* in respect of the rule governing eligibility for expatriate benefits), the Tribunal will not impute reaffirmation of a regulation simply because a new text has been adopted that post-dates the commencement of the Tribunal's jurisdiction.

93. When the IMF Board of Governors adopted the Statute of the Administrative Tribunal, it did so with the understanding, common to other international organizations adopting similar statutes,[22] that the Fund would not be subject to challenge before the Tribunal for administrative acts taken before the Statute's effective date.

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[22] *See, e.g.*, Statute of the World Bank Administrative Tribunal, Article XVII; *Scott v. International Bank for Reconstruction and Development*, WBAT Decision No. 4 (1981).

94. Applying these principles to the facts of the instant case, the Tribunal observes that the only difference between Section 4.6(c) as revised in 2007 and the pre-existing version enacted in 1991 was to extend the requirement that election be made by written notice filed with the Administration Committee within one year following "such marriage" to include, in cases of domestic partnership, that the election must be made within one year following the "registration of such domestic partnership with the Administration Committee." (The distinctions between the texts of the 1991 and 2007 versions of Section 4.6(c) are highlighted at paragraph 52 above.)

95. As considered above,[23] the 2007 amendments to the SRP were part of a larger initiative to broaden the definition of family relationships for purposes of the Fund's human resources policies. The Tribunal has reviewed the legislative history of the 2007 enactment and finds in that history no evidence that the Executive Board (nor the underlying staff paper) considered the substance of the rule that Applicant contests, i.e., that election of a JSA under SRP Section SRP Section 4.6(c) must be made within one year following post-retirement marriage. The documentation supports the conclusion that, in adopting the 2007 SRP amendments—as part of a broader human resources initiative to expand benefits to domestic partners and same-sex spouses on the same basis as to married, opposite-sex partners—there was no reconsideration of the one-year rule that Applicant contests. Rather, the 2007 amendments, which affected numerous provisions of the SRP, simply broadened the application of that same requirement to encompass Plan participants in other forms of family relationships.

96. In the view of the Tribunal, the 2007 amendment of SRP Section 4.6(c) was not tantamount to a reconsideration of the Plan provision that requires that election of the JSA option be made within one-year following post-retirement marriage. That requirement was enacted on April 30, 1991 before the entry in force of the Tribunal's Statute on October 15, 1992. Accordingly, Article XX precludes the Tribunal from considering Applicant's contentions that the "regulatory decision" was arbitrary and discriminatory.

Did the SRP Administration Committee err in denying Applicant's request for waiver of the one-year rule in the circumstances of his case?

97. Having concluded that it is without jurisdiction *ratione temporis* to consider Applicant's challenge to the one-year time limit following post-retirement marriage to elect a reduced pension with pension to surviving spouse pursuant to Section 4.6(c) of the Plan, the Tribunal now turns to the question of whether, as Applicant alleges, the SRP Administration Committee erred in denying his request for waiver of that rule in the circumstances of his case.

Standard of review

98. This Tribunal has observed that, unlike the Fund's Grievance Committee, the SRP Administration Committee plays a dual role within the Fund's dispute resolution system. It is responsible for taking the "administrative act" (Statute, Article II) that may be contested in the

[23] *See supra* The Factual Background of the Case; 2007 amendments to SRP.

Administrative Tribunal and it supplies the channel of review for purposes of the exhaustion of remedies requirement of Article V[24] of the Tribunal's Statute when, in accordance with the Committee's Rules of Procedure, it reconsiders its own decision. *Ms. "J"*, para. 98. Decisions of the Administration Committee (in contrast to recommendations of the Grievance Committee) are not subject to later consideration by Fund Management. Rather, pursuant to Section 7.2 of the Plan, the authority to take individual decisions under the Staff Retirement Plan is vested exclusively in the Administration Committee subject only to direct appeal (following reconsideration by that Committee) to the Administrative Tribunal. *Id.*, para. 113. "Accordingly, while a decision of the Grievance Committee will not be subject to direct review by the Administrative Tribunal, a decision of the SRP Administration Committee necessarily will be." *Id.,* para. 98.

99. The Tribunal has recognized the "unique nature of the appellate authority," arising from Section 7.2 of the Plan and Article II, Section 1.b., of the Tribunal's Statute. *Id.*, para. 114, citing *Mr. "P" (No. 2)*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), para. 141, and its effect on the Tribunal's standard of review. SRP Section 7.2(b) provides that the Administration Committee has authority *inter alia* to "determine whether any person has a right to any benefit hereunder . . . 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." Article II, Section 1.b., of the Tribunal's Statute extends the Tribunal's jurisdiction *ratione materiæ* to any application "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."

100. In the context of reviewing a challenge to the denial of a request for disability retirement under Section 4.3 of the Plan, the Tribunal has observed that the ". . . process of construing the applicable terms of the Staff Retirement Plan and applying them to the facts of a particular case to determine the applicant's entitlement or not to the requested benefit more closely resembles a judicial act than one typically taken pursuant to managerial authority." *Ms. "J"*, para. 112. *See also Mr. "P" (No. 2),* paras. 144-145 (reviewing "soundness" of the Administration Committee's decision to place in escrow a portion of the applicant's pension benefits and concluding that the decision was "in error and must be rescinded"). Accordingly, in the instant case, the Tribunal will consider whether the Administration Committee erred in denying Applicant's request for waiver of the one-year rule in the circumstances of his case. It will also consider whether that decision was taken in accordance with fair and reasonable procedures. *See Ms. "J"*, para. 128 (formulating standard of review in cases arising under Section 4.3 of SRP).

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[24] Article V, Section 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.

Did the SRP Administration Committee have discretion under Section 4.6(c) to waive the one-year time limit?

101. The Tribunal observes that the memorandum of the Secretary of the Administration Committee suggests that the Committee may have believed that it had discretion to waive the one-year time limit for electing a JSA following post-retirement marriage. (Secretary's Memorandum of February 2, 2011, p. 1.) There is no authority in the text of the pertinent Plan provision for such waiver. (The issue of whether the Committee's Rules supply a basis for waiver is considered below.) The text of SRP Section 4.6(c) gives the Committee express discretion to waive ("for good cause") only the requirement that an election shall not be effective "if the retired participant dies within one year following the marriage or registration of the domestic partnership." By contrast, there is no express discretion to waive the one-year time limit following post-retirement marriage in which to make the election.

102. Applicant contests as discriminatory the distinction drawn by the Plan regarding the two requirements of Section 4.6(c): "The Fund has maintained that they have authority to waive the rule that [the] participant live one year beyond the date of marriage for the spousal pension to be effective [under] 4.6(c) but not the one-year rule for reporting the marriage. I believe that this discriminates between participants and is illegal."

103. The Fund responds as follows:

> The Administration Committee and the Pension Committee have had no occasion to determine whether, consistent with the principle of uniformity in the application of the Plan, either Committee would be authorized to extend or waive the time limits set out in the Plan in the absence of an express provision in the Plan for extension or waiver, and absent the remedial circumstances described in the . . . Rule to Permit Acts to be Performed Beyond Time Limits Under Certain Circumstances.

Respondent additionally asserts that the Administration Committee, in proposing the "legal text" of the Plan provision "considered and rejected the possibility of a rule to allow waiver of the one year limit—which is precisely the relief Applicant seeks."

104. Applicant additionally asserts that an HRD staff member informed him that waivers have been made by the Administration Committee under the express waiver provision of Section 4.6(c) relating to the requirement that one year elapse following post-retirement marriage before the election becomes effective. As noted above, in deciding Applicant's requests for production of documents, the Tribunal has accepted the Fund's assertion that "[s]taff in the Human Resources Department have diligently searched and found no case whether either of the time limits under Section 4.6(c) was waived." Applicant has provided no support for his statement that he was told otherwise by an HRD staff member. The Fund maintains that the staff member denies making such statement.

105. In the view of the Tribunal, the fact that such exception may or may not have been made under the express waiver provision is not material to the question of waiver of the time limit from which Applicant seeks exemption, i.e., the one-year limit for electing the JSA option following his post-retirement marriage. Even assuming the facts as Applicant asserts them to be, the Tribunal does not find that the Administration Committee has discriminated impermissibly against Applicant. The text of the Plan provision expressly affords the Administration Committee a discretion to grant exceptions in relation to the death of the Plan participant within one year of the marriage. It does not afford a similar discretion in respect of the provision from which Applicant seeks waiver. The question of whether there is any impermissible discrimination in the distinction drawn by Section 4.6(c) in respect of waiver is, in effect, a challenge to the "regulatory decision." The Tribunal has concluded above, on the basis of Article XX of its Statute, that it does not have jurisdiction to decide challenges to the "regulatory decision."

Do the Administration Committee Rules provide a basis for waiver?

106. Respondent has brought to the attention of the Tribunal the following provision of the Administrative Committee's Rules, titled "Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances" (1998):

> In the event that the Administration Committee (hereinafter "Committee") of the Staff Retirement Plan determines that a time limit prescribed for the doing of any act required under the Plan, in relation to the interest of a participant or retired participant, has not been complied with, as a result of any failure by the Employer or the Committee to notify a participant or retired participant of such time limit that the Employer or Committee is obligated to give notice of either under the Plan or pursuant to a responsibility that it has specifically undertaken, whether due to error, oversight or any other reason, and such interest has thereby been affected adversely, the Committee may, in its sole discretion, permit such act to be done and deem it to have been done within the time prescribed.

107. Applicant contends that the Fund should have waived the one-year time limit because it failed to give him adequate notice of the Section 4.6(c) rule. According to Applicant, the Fund never drew it to his attention and he did not become aware of the possibility of electing a JSA for the benefit of his spouse until a friend alerted him to it after the time limit had passed. Accordingly, the following question arises. Is Applicant's noncompliance with the time limit the "result of any failure by the Employer or the Committee to notify" ("Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances") him of it?

108. The Fund maintains that it met any obligation to notify Applicant about the JSA option available under SRP Section 4.6(c) and the time limit for exercising it. In particular, the Fund asserts that it published copies of the full SRP document in December 1992, December 1999 and April 2003 and that these were distributed to the desks of each currently employed Plan participant and mailed to each retired participant. In addition, the Fund states that in November

1994, it issued a "SRP Handbook," summarizing the Plan's provisions (including the one-year time limit of SRP Section 4.6(c)), which was distributed in the same manner. (*See* Affidavit of former Secretary of the SRP Administration Committee.)

109. It is not disputed that in 1993 (prior to his retirement effective July 1, 1995) Applicant attended the Fund's "Planning for Retirement Seminar." Respondent points out that Applicant has not denied that he received the full SRP document.

110. Applicant, for his part, does state that he did not receive the "SRP Handbook" of 1994 and that from August 1990 until his retirement in June 1995 he was mostly posted abroad, followed by a period of leave with pay. Applicant states that he has lived abroad since 2000.

111. Given that the Fund has shown that it provided the full SRP to Plan participants as of December 1992 and Applicant has not denied that he received such document, the Tribunal is unable to conclude that Applicant's failure to make an election under SRP Section 4.6(c) was a "result of any failure by the Employer or the Committee to notify" Applicant of the applicable time limit as specified by the "Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances." Accordingly, the Tribunal finds no error in the Administration Committee's decision to deny his request for its waiver under this Rule.

Was the SRP Administration Committee's decision on Applicant's request taken in accordance with fair and reasonable procedures?

112. Applicant alleges irregularities in the decision-making process of the Administration Committee in his case. Applicant contends that the decision denying his request for waiver was affected by material factual error and bias and that the Administration Committee failed to take into account new evidence in considering his request for review of its initial decision.

113. The Tribunal has commented previously upon the importance of fair and reasonable procedures in the Administration Committee's decision-making processes. *See Ms. "J"*, paras. 158-176 (disability retirement decision); *Ms. "K", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2003-2 (September 30, 2003), paras. 96-113 (same).

114. The Tribunal has reviewed the minutes and memoranda relating to the Administration Committee's decision-making process in Applicant's case, documents that were produced to Applicant through the discovery process pursuant to Rule XVII of the Tribunal's Rules of Procedure. It finds no evidence in the record that the process was affected by bias or material factual error.

115. Applicant additionally alleges that the Committee improperly failed to take account of new evidence in considering his request for review of its initial decision. It is recalled that the Committee is authorized to reverse a decision in cases of misrepresentation of a material fact or the availability of material evidence not previously before the Committee. (Rule VIII, para. 2, of Administration Committee's Rules of Procedure.)

116. It is not clear what new "evidence" Applicant contends that the Committee failed to consider. It appears that Applicant refers to his assertions (a) that ". . . waivers of the one-year rule for the survivor pension to come into effect have been made in the past and a waiver for the reporting rule should be granted since it is clearly discriminatory," and (b) that he was ". . . . never sent the 1997 SRP Handbook and was not given such a handbook in 1995 or information on a survivor pension when I retired." (Applicant's Application to SRP Administration Committee for a Review of Decision.)

117. The Committee's Decision on Review responded to the first assertion with the following statement: "Please also note that, as a follow-up to your allegations in paragraph (f) that the Committee previously waived the one-year rule for the survivor pension to come into effect, no such cases were found based on a review of the Committee files from May 1, 1990 (when retirees first became eligible to elect a survivor pension) to present." (Email from Secretary of SRP Administration Committee to Applicant, July 27, 2011.) With regard to Applicant's assertion that he lacked notice of the rule, the Secretary's February 2, 2011 Memorandum to the Administration Committee members took the view that "[a]lthough [Applicant] has indicated that he lacked knowledge of the time limit, the Fund's legal responsibility to notify was satisfied when the time limit was published, starting in 1991, and periodically thereafter, in the SRP document and the SRP handbook."

118. Accordingly, the Tribunal concludes that the Administration Committee did not fail to take into account Applicant's essential arguments and assertions or any material evidence that he brought to its attention in considering his request for review.

Conclusions of the Tribunal

119. In sum, the Tribunal concludes that Article XX of the Statute precludes its consideration of Applicant's challenge to the requirement of SRP Section 4.6(c) that election of a reduced pension with pension to surviving spouse must be made within one year following post-retirement marriage. As to Applicant's challenge to the individual decision denying his request for waiver of the one-year time limit in his case, the Tribunal concludes on the merits that Applicant has not shown that the Administration Committee erred in taking that decision. Accordingly, Applicant's claims fail.

Decision

FOR THESE REASONS

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

The Application of Mr. Niebuhr is denied.

Catherine M. O'Regan, President

Edith Brown Weiss, Judge

Francisco Orrego Vicuña, Judge

_____
Catherine M. O'Regan, President

_____
Celia Goldman, Registrar

Washington, D.C.
March 12, 2013