# ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

# JUDGMENT No. 2021-4

**Mr. T. Elkjaer, Applicant v. International Monetary Fund, Respondent**
**Mr. G. El-Masry, Applicant v. International Monetary Fund, Respondent**
**Ms. M. Rossignol, Applicant v. International Monetary Fund, Respondent**
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INTRODUCTION

1. On September 22, October 25 and 27, 2021, the Administrative Tribunal of the International Monetary Fund, composed for this case, pursuant to Article VII, Section 4 of the Tribunal's Statute, of Judge Catherine M. O'Regan, President, and Judges Edith Brown Weiss and Deborah Thomas-Felix, met to adjudge the Applications brought against the International Monetary Fund by Mr. Thomas Elkjaer, Mr. Gamal El-Masry, Ms. Martine Rossignol, and Mr. Tobias Roy, staff members of the Fund and principals of the Staff Association Committee (SAC). Applicants were represented in the proceedings by Mr. Ryan Griffin, James & Hoffman, P.C. Respondent was represented on the written pleadings by Ms. Melissa Su Thomas, Deputy Unit Chief, and Mr. Cassandro Joseney, Counsel, in the Administrative Law Unit of the IMF Legal Department. Mr. Brian Patterson, IMF Assistant General Counsel, along with Ms. Thomas, appeared on behalf of Respondent in the oral proceedings.

2. In light of the COVID-19 pandemic, consequent restrictions on travel, and the Fund's work-from-home directive, the Tribunal decided to hold its session "by electronic means," that is, by videoconference coordinated by the Tribunal's Registry, in accordance with amended Article XI[1] of the Statute. The associated Commentary on the Statute,[2] p. 34, recognizes that "[w]hile in-person sessions at the Fund's headquarters are the norm, there may be circumstances where such a session is impracticable or not suited to the case."

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[1] Statute, Article XI provides:

> The Tribunal shall ordinarily hold its sessions at the Fund's headquarters. The Tribunal may decide to hold a session at another location or by electronic means, taking into account the need for fairness and efficiency in the conduct of proceedings. The Tribunal shall fix the dates of its sessions in accordance with its Rules of Procedure.

[2] 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 Reports of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009 and 2020).

3. In identical Applications, Applicants contest the decision of the Fund's Executive Board, effective May 1, 2020, authorizing the Managing Director to raise the FY2021 contribution rate for participants in the Fund's Medical Benefits Plan (MBP or Plan) by 3.6 percent, a percentage exceeding the increase in the structural salary scale (2.7 percent) for the same period. Applicants contend that by setting the increase in the FY2021 MBP contribution rate above the increase in the structural salary scale, the decision violated a formal commitment or consistent and established practice of the Fund that the structural salary increase serve as a ceiling on any increase in MBP contribution rates. Applicants submit that the FY2021 MBP contribution rate decision violated the Fund's obligation to maintain a "rules-based" compensation and benefits system as a "fundamental and essential" condition of employment. Alternatively, Applicants argue that Management and the Executive Board abused their discretion in taking the FY2021 MBP contribution rate decision by failing to consider relevant facts, to explore alternative options or to engage in meaningful consultation with key stakeholders, including SAC. Applicants accordingly allege that the decision was taken in a procedurally flawed and poorly reasoned manner.

4. Applicants seek as relief: (a) annulment of the challenged FY2021 MBP contribution rate increase decision; (b) an order that the Fund notify all MBP participants of such annulment; and (c) legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4 of the Statute, if it concludes that the Applications are well-founded in whole or in part.

5. Respondent, for its part, maintains that the MBP Plan Document and applicable rules authorize the Fund to amend unilaterally the MBP contribution rate, based on its assessment of the Plan's funding needs. The Fund submits that it did not, through either formal commitment or consistent and established practice, constrain its discretionary authority to revise contribution rates as may be warranted in the view of the Executive Board. The Fund maintains that the Executive Board decision, effective May 1, 2020, to increase the contribution rate by 3.6 percent (which was the percentage of the aggregate salary increase, calculated under the Fund's revised compensation framework) was a proper exercise of discretion, rationally designed to ensure that the MBP remain "financially robust" to meet projected liabilities and to smooth contribution rates to avoid unexpected budgetary pressures on both MBP participants and the Fund.

6. Representatives of the IMF Retirees Association (IMFRA) requested and were granted the opportunity to communicate views to the Tribunal as Amicus Curiae in support of the Applications. The Amicus Curiae submits that the contested decision to increase the FY2021 MBP contribution rate at a greater percentage than the structural salary increase wrongfully violated an established Fund rule. Additionally, the Amicus Curiae contends that the Fund failed to engage in substantive consultation with IMFRA prior to taking the decision, in contravention of the usual process afforded in respect of policy decisions affecting the MBP.

PROCEDURE

7. On July 29, 2020, Applicants filed identical Applications with the Administrative Tribunal. The Applications were transmitted to Respondent on July 31, 2020. On August 3, 2020, pursuant to Rule IV, para. (f) of the Tribunal's Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Applications.

8. On September 14, 2020, Respondent filed a consolidated Answer to the Applications.

A. IMF Retirees Association (IMFRA) representatives' request to communicate views as Amicus Curiae

9. On the same day that Respondent filed its Answer, four Board members of the IMF Retirees Association (IMFRA) filed an "Amicus Memorandum" with the Tribunal, seeking to communicate views in support of the Applications, in accordance with Rule XV[3] (Amicus Curiae) of the Tribunal's Rules of Procedure. The IMFRA representatives asserted that Fund retirees and their dependents comprise a little more than half of all MBP participants and that the Fund has traditionally provided for formal IMFRA representation on various committees and working groups relating to medical benefits issues.

10. The regular pleadings in the case were suspended to decide the question whether the IMFRA representatives would be permitted to communicate views as Amicus Curiae, a question on which the Tribunal sought the views of the parties.

11. This is only the second case in which the Tribunal has received an amicus curiae application. *See Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), paras. 15-20 (granting SAC's application to communicate views as amicus curiae (under earlier version of Rule XV) in relation to alleged "systemic issues" in SRP Administration Committee procedures in taking disability retirement decisions).

12. In the instant case, both Applicants and Respondent supported granting the IMFRA representatives' request to communicate views as Amicus Curiae and indicated that they did not object to affording it access to the parties' pleadings for that purpose. Accordingly, on October 5, 2020, the Tribunal, having considered the submissions of the parties, decided to grant the IMFRA representatives' request to communicate views as Amicus Curiae, as well as to permit it access to the Applications and Answer. The Amicus Curiae was invited to supplement its Amicus Memorandum in light of those pleadings, an invitation it declined.

13. The exchange of regular pleadings accordingly resumed. In accordance with Rule XV, Applicants and Respondent were given the opportunity to comment on the Amicus Memorandum in their Reply and Rejoinder, respectively. These were filed on November 23, 2020, and December 23, 2020.

14. Consistent with its earlier decision to afford access to the Applications and Answer, the Tribunal provided the Amicus Curiae with the Reply and Rejoinder and invited it to file an

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[3] Rule XV (Amicus Curiae) provides:

> The Tribunal may, at its discretion, permit any person or persons, including the duly authorized representatives of the Staff Association, to communicate views to the Tribunal as *amici curiae*. The Tribunal may permit an *amicus curiae* access to the pleadings of the parties. The Tribunal shall enable the parties to submit timely observations on an *amicus* brief.

additional submission, which it did on February 8, 2021. The Amicus Curiae's additional submission was transmitted to Applicants and Respondent for their information.

B. Applicants' request for production of documents

15. Pursuant to Rule XVII[4] of the Tribunal's Rules of Procedure, Applicants made the following request for production of documents: for all documents, "including email threads, notes of meetings or telephone conferences, memoranda, and correspondence," relating to "management's decision to propose in EBAP/20/32 that the Executive Board approve an increase in Medical Benefits Plan contribution rates for FY2021 at the level of the aggregate staff salary increase instead of the salary scale increase."

16. The Fund opposes Applicants' document request on the following grounds. First, the Fund maintains that Applicants have failed to state a rationale for their request, contrary to the requirement of Rule XVII, para. 1, and have thereby denied the Fund a meaningful opportunity to respond. Second, the Fund submits that, in the context of answering the Applications, it has provided "all documents relevant to the Board's consideration of the proposed contribution increase." The Fund objects to a request for documents beyond those relevant to the Board's consideration, on the basis that "[w]hatever internal deliberations may have occurred within management, or between HRD and related departments in formulating the proposal to the Board, is not relevant to an assessment of whether the Board reached a legitimate decision, having regard to all relevant information before it." In the Fund's view, Applicants have not explained how the deliberative process among staff and Management, and documentation thereof, is relevant to any material issue of the case. The Fund asserts that Management's report to the Executive Board in EBAP/20/32 "reflects the final proposal, and was the basis of the Board's

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[4] Rule XVII (Production of Documents) provides:

> 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.
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> 2. The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of deciding on the request, the Tribunal may examine *in camera* the documents requested.
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> 3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order.

consideration and decision." Third, the Fund maintains that granting Applicants' document request would represent a "significant intrusion upon the deliberative process" that underpins Management's proposals to the Board. The confidentiality of these deliberations, says the Fund, promotes candor in that process and to require production of their content could have a "chilling effect" going forward. Fourth, the Fund asserts that it would be improper for the Applicants, who are SAC representatives, to use litigation before the Tribunal to obtain information to which they ordinarily are not privy and which they did not consider to be necessary at the relevant time. Fifth, the Fund notes that the "request potentially encompasses numerous e-mails, meetings and/or teleconferences, and is so broad as to be unduly burdensome" in terms of Rule XVII, para. 2. Applicants did not respond to these objections by the Respondent. Notably, they did not clarify the reasons for their request.

17. The Tribunal notes that an Applicant seeking the disclosure of documents is obliged in terms of Rule XVII to provide "a statement of the Applicant's reasons supporting production" of the documents requested. The provision of reasons for the request assists the Tribunal to determine whether the documents sought are "irrelevant," "unduly burdensome" or "would infringe on the privacy of individuals" (Rule XVII, para 2). As Applicants neither provided any reasons for their request for documents, nor specified any particular documents that they sought, the Tribunal's ability to assess whether the request should be granted is impaired.

18. The Tribunal's jurisprudence reveals that the consultative process undertaken by Fund Management in formulating a recommendation to the Executive Board has, at times, been part of the record before the Tribunal where an applicant seeks to impugn a decision of the Executive Board and that process has been relevant to the issues in the case. In *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007), para. 97, the record of the decision-making process supported the Tribunal's finding that the contested decision ". . . reflect[ed] consultation with all pertinent stakeholders, the Board's drawing upon the information before it in taking its decision, and the compromises that characterize a legislative process." *See also Ms. D. Pyne, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-2 (November 14, 2011), paras. 131-138.

19. In this case, as will become evident below, the documents relevant to the process of consultation by Management with the SAC form part of the record and are relevant to the issues in the case. Applicants did not point to any other documents they consider relevant to the issues that may be in the possession of the Fund. Instead, they have asked for "[a]ll documents relating to management's decision to propose in EBAP/20/32 that the Executive Board approve an increase in Medical Benefits Plan contribution rates for FY2021 at the level of the aggregate staff salary increase instead of the salary scale increase." This broad request may well, as the Fund argues, be unduly burdensome. Of greater importance, however, is the fact that Applicants failed to provide the reasons for their request, despite the Fund, in its Answer, pertinently drawing Applicants' attention to the provisions of Rule XVII, para. 1. In the circumstances, the Tribunal concludes that Applicants' request for the production of documents does not comply with the terms of Rule XVII and on this ground should be denied.

C. Applicants' motions to supplement the factual record

20. Following the closure of the regular pleadings, on March 22, 2021 and April 7, 2021, Applicants, invoking Rule XI (Additional Pleadings)[5] of the Tribunal's Rules of Procedure, filed two Motions seeking to supplement the factual record with documents attached to those Motions. Respondent was afforded the opportunity to submit its Views as to whether the Motions should be granted, which it did on April 19, 2021. Applicants' Response to the Fund's Views was filed on April 30, 2021.

21. Applicants' first Motion is to include in the factual record an actuarial report entitled "April 30, 2020 Medical Benefits Plan (MBP) Liabilities," issued February 19, 2021. The report reviews the finances of the MBP as at the end of FY2020 and shows that the Plan ended the year with cash reserves of $95.5 million. This projection is $5.7 million more than the projection made in March 2020, which informed the impugned decision. The April 30, 2020 report also shows that, on the basis of the reserves as at the end of FY2020, the reserves of the MBP are not projected to be depleted fully until FY2026. Applicants acknowledge that the April 30, 2020 report was not available when they filed their pleadings and submit that the report will enable the Tribunal to "more fully evaluate the parties' respective positions."

22. Applicants' second Motion is to include in the factual record an excerpt from Annex VIII (Assumptions Underlying the FY22 Budget) to a Board Paper EBAP/21/11, FY2022-FY2024 Medium-Term Budget, which Fund Management submitted to the Executive Board on March 26, 2021. The relevant excerpt reads as follows:

> 4. **Medical Benefits Plan (MBP):** During the period beginning with the MBP reforms in 2008 and FY 20, contributions to the MBP were indexed to the structural change in the pay scale. In FY 21, MBP contributions were aligned to the new single salary increase implemented as a result of the CCBR [Comprehensive Compensation and Benefits Review] reforms. For FY 22, the

[5] Rule XI (Additional Pleadings) provides:

> 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.
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> 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.

> proposal envisages that premium contribution rates will again be adjusted with the single salary increase.

23. Applicants argue that this excerpt is relevant to the issues in this matter, because one of the disputes between the parties is whether the Fund engaged in a consistent practice between FY2008 and FY2020 of capping annual MBP contribution rate increases at the level of annual adjustments to the Fund's salary structure. Applicants contend that this was a longstanding practice, whereas the Fund disputes it. Applicants argue that the excerpt to the Board paper that they seek to have admitted speaks directly to this dispute.

24. The Fund opposes both Motions to supplement the record, first, on the basis that the information contained in the two documents was not and could not have been available to the Board when it decided to increase the MBP contribution rates in April 2020, and secondly that Applicants have failed to make out an exceptional case as contemplated by Rule XI that would warrant the admission of the documents. Both documents are already in the possession of both parties.

25. The Tribunal will proceed on the basis that these documents have been admitted to the record, without deciding whether they should be so admitted. As will appear from later in this Judgment, the two documents, even if admitted to the record, would not materially support Applicants' case.

D. Oral proceedings

26. Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII, para. 1, of the Rules of Procedure provides that such proceedings shall be held ". . . if . . . the Tribunal deems such proceedings useful." The Tribunal has observed that when it revised its Rules of Procedure in 2004, changing the standard for holding oral proceedings from "necessary" to "useful" and adding a provision permitting the Tribunal to limit oral proceedings to the oral arguments of parties' counsel, it did so with a view towards making the possibility of holding oral proceedings more likely, while underscoring the value of conducting such proceedings for purposes of addressing questions of law. *Mr. "KK", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-2 (September 21, 2016), para. 36.

27. In each of the prior cases in which the Tribunal has held oral proceedings, it did so in response to the request of a party. In this case, neither party requested oral proceedings. Nonetheless, having reviewed the written pleadings and the record of the case, the Tribunal decided that oral proceedings, limited to the oral arguments of parties' counsel, would be useful to the Tribunal's decision-making process. The parties were so notified on September 23, 2021.

28. In advising the parties of its decision to convene oral proceedings, the Tribunal invited their views as to how the Tribunal might implement the requirement of Article XII of the Statute and Rule XIII, para. 1, of the Rules of Procedure that: "Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private." In each of the cases in which the Tribunal previously had conducted oral proceedings, those proceedings were "held in private" because the Tribunal had taken a decision

(either finally or provisionally) to grant the applicant's request for anonymity under Rule XXII. In this case, there was no request for anonymity, and the issues raised in the Applications affected the staff of the Fund as a whole.

29. At the same time, the Tribunal had taken a decision to hold its session by videoconference, in accordance with amended Article XI of the Statute.[6] Accordingly, the Tribunal was required to interpret the requirement that oral proceedings be "open to all interested persons" in the context of Article XI's authority to conduct a session ". . . by electronic means, taking into account the need for fairness and efficiency in the conduct of proceedings."

30. On October 18, 2021, having considered the submissions of the parties, the Tribunal took a decision on the Conduct of the Oral Proceedings. The Tribunal decided that all Fund staff and retirees would be invited as "interested persons" to view the virtual proceedings in real time through the videoconferencing platform, given the nature of the case, which challenged a "regulatory decision" affecting staff and retirees generally. Those persons were not permitted to speak or otherwise intervene in the hearing, and they undertook not to make any video or audio recordings of any part of the proceedings. The Tribunal itself retained an official audio-video recording of the proceedings, and the Registrar announced that staff and retirees could access the recording upon request while complying with the same restrictions on personal recording.

31. In addition to making the oral proceedings "open to all interested persons" as described above, the Tribunal invited the presence of representatives of the parties and of the Amicus Curiae. Accordingly, each of the Applicants, as well as the SAC legal counsellor, were present on Applicants' side. For the Respondent, two officials of the Fund's Human Resources Department (HRD) attended. The four IMFRA Board members who had made submissions as Amicus Curiae were also present. None of these individuals was permitted to address the Tribunal directly, a role reserved exclusively to Applicants' and Respondent's designated counsel.

32. The Tribunal additionally took a novel decision concerning disclosure of written pleadings in the context of open oral hearings. It has been the Tribunal's consistent practice to maintain the confidentiality of all written pleadings before it, a practice to which it continues to adhere. Nonetheless, on an exceptional basis, in connection with holding oral proceedings "open to all interested persons" in a case challenging a "regulatory decision" of the Fund, the Tribunal granted Applicants' request (to which Respondent did not object) to provide staff and retirees with access to the written pleadings of Applicants and Respondent, along with the written submissions of the Amicus Curiae, which also consented to their disclosure.

33. Oral proceedings in the case were held by videoconference on October 25, 2021. Approximately 250 Fund staff and retirees viewed some or all of the proceedings. Additional staff members and retirees have been able to access the recording of the proceedings by request to the Registrar.

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[6] *See supra* INTRODUCTION.

FACTUAL BACKGROUND

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

A. Background

35. The Fund's MBP is a self-funded (and self-insured) insurance plan, providing medical benefits to eligible staff, retirees, and their dependents. Administration of the MBP is outsourced. The MBP is financed by contributions both from the Fund (and the Retired Staff Benefits Investment Account (RSBIA) in the case of retirees) and from Plan participants, in a three-to-one ratio. (MBP Plan Document, January 1, 2011, Section 6.1 (Contributions).) Unlike insured medical benefits plans that use their proceeds to purchase commercial insurance coverage to satisfy their obligations, MBP claims, benefits and related charges represent the legal and contractual liability of the Fund, which provides for its obligations through the Plan.

36. As to the financing of the Plan, Section 6.1 (Contributions) of the Plan provides: "The Employer is responsible annually for determining contribution rates on the basis of Claims experience and negotiating administrative expenses with the Claims Administrator, Case Management Reviewer, and other service providers." The Executive Board has, since 1994, required Management to review the finances of the MBP annually to determine the appropriate scale of contributions. On the basis of these annual reviews, the Executive Board has adjusted the target reserve levels of the MBP. Given that the MBP is self-funded, the reserves provide the basis for settling claims should the Plan be terminated and also provide "a liquidity cushion" against variations in the flows of contributions and medical expenditures, while also enabling a smoother transition in contribution increases should the MBP's outflows exceed its inflows.

37. The Fund has engaged a consultant and actuary on an annual basis, to advise on trends in the healthcare market and to forecast the expenses of the MBP in the near, medium and long-terms. In addition to the annual review of the finances of the MBP, a more detailed examination of the MBP is typically conducted every four or five years. The Fund has ordinarily convened a task force to assist with this process, comprising representatives of the Fund, as well as representatives of the SAC and the IMFRA. Amongst other things, the task force advises Management on the formulation of proposals to the Board following the review.

38. The text of the MBP explicitly reserves the Fund's right to change aspects of the Plan. Section 6.1 (Contributions) of the Plan provides that: "The Employer reserves the right to change the cost-sharing ratio between the Employer and Participants; to set monthly Participant contributions at a level that will, taken together with the Employer's contribution, cover the costs of financing the Plan; and to make other changes to the contribution schedule that are deemed necessary." More generally, Section 9.3 (Plan Amendment, Suspension, or Termination) of the Plan provides in part: "The Employer intends to continue the Plan indefinitely, but it assumes no contractual obligation to do so. The Employer may amend, suspend, or terminate the Plan in whole or in part at any time."

B. 2008 new MBP funding framework adopted by the Executive Board

39. In 2008, following a review of the MBP, the Executive Board adopted a new funding framework for the MBP. The controversy in this case may be traced to that framework, which Applicants contend established a rule that they allege was violated by the contested Executive Board decision that came into effect on May 1, 2020.

40. In 2008, the MBP was being funded on a pay-as-you-go basis, which resulted in volatility in contribution rates, according to the Fund. In presenting its proposals to the Executive Board, Management of the Fund suggested that although there was merit in adjusting contributions to keep Plan income in step with annual expenditures, it would be "prudent to ensure that contribution increases are smoothed." (Medical Benefits Plan – Review and Proposed Further Reform, July 11, 2008 (EBAP/08/73), p. 8.) Management thus proposed a new framework for funding the MBP aimed at "[s]moothing rate increases and prefunding by pre-announcing annual adjustments in line with the structural increases in staff salaries at a minimum." (*Id.*)

41. On July 18, 2008, SAC and IMFRA reacted to the Board paper that Management had prepared (EBAP/08/73) by addressing their views directly to the Executive Board. (*See* IMF Staff and Retirees Associations, "Note to Executive Directors on Further Reform of the Medical Benefits Plan," July 18, 2008.) Although agreeing with proposed improvements to the MBP, SAC and IMFRA urged that the contribution increase proposed for September 1, 2008, be delayed until May 1, 2009, because the MBP was "currently holding a large surplus and is expected to remain in surplus for some time." SAC and IMFRA further noted: "As borne out in the paper . . . , however, contributions will have to rise over time. We support the need for future contribution increases in line with structural adjustments, but such an increase can be safely delayed until next May since costs from the proposed MBP improvements could be financed with existing MBP reserves."

42. On July 25, 2008, the Board accepted Management's proposals and also resolved, in a conditioned delegation of its authority, to authorize the Managing Director to implement Plan design reforms. The Managing Director was "authorized to increase the Plan contribution rates, effective May 1 each year, by the percentage structural increase to staff compensation that is incorporated into the administrative budget for that financial year." (Executive Board Decision No. 14149 – (08/69), adopted July 25, 2008.) ("2008 Board Decision.")

43. On April 10, 2009, Staff Bulletin 09/3 announced to the staff of the Fund that "[i]n July 2008, the Executive Board approved a program of automatic annual contribution increases to partially prefund the Plan over the medium term and to help limit the need for large, precipitous increases." The Staff Bulletin stated: "This approach has the effect of smoothing MBP contribution rate increases through pre-announced annual adjustments in line with the average structural increase in staff salaries, at a minimum."

C. 2017 five-year review and FY 2018 reduction in contribution rates

44. In 2016, a task force was appointed, which included SAC and IMFRA representatives, to conduct a review of the overall operation of the MBP. The recommendations of the task force were reported in "Medical Benefits Plan – Review of Finances and Coverage," April 19, 2017

(EBAP/17/32). In December 2016, the reserves of the MBP stood at $115.6 million, which constituted 140 percent of the annualized projected costs. The target reserve level proposed by the consulting actuary was $13.6 million. The review assessed what the benchmark for the reserve should be if short-term volatility were to be mitigated and contribution rates were to be stabilized. In the light of the substantial reserves then held, the task force recommended a one-time 7 percent reduction in contribution rates and established a medium-term target for reserves, to be equal to 40 percent of the following year's projected expenses. The task force also recommended that should the MBP reserves fall below 50 percent of the following year's projected expenses, an early review should be launched (the "trigger mechanism"). The Executive Board accepted both the task force recommendation of a one-time reduction in contribution rates of 7 percent for FY2018 and that the target level for reserves should be calculated on the basis of 40 percent of the following year's projected expenses. The Board did not expressly accept the proposal of an early review in the event of the reserves falling below 50 percent of the following year's projected expenses.

D. FY2019 and FY2020

45. In FY2019 and FY2020, MBP contribution rates were increased in line with the structural salary increases. Although the Managing Director had been authorized to decide the contribution rates by the Executive Board decision in 2008, in each of these years, the decision on the increase in contribution rates was taken by the Executive Board.

E. Comprehensive Compensation and Benefits Review (CCBR), with effect from May 1, 2020

46. Effective May 1, 2020, following the Executive Board's adoption of revised rules for the staff compensation system in December 2019, the Fund adopted a new approach to the administration of annual salary increases. It de-linked the annual adjustment to the salary structure from the annual salary increase paid to staff and introduced a single, aggregate annual salary increase based on an indexation formula comprising both public and private sector indices. (2020 Review of Staff Compensation, EBAP/20/28 (March 17, 2020), p. 21.)

47. This approach reflects the principle that the Fund's compensation system is comparator-based. This principle seeks to ensure the achievement of the Fund's objective of being highly competitive in recruiting and retaining "diverse, multinational staff that meet the highest standards of quality and professionalism." (*Id.*, p. 24.)

48. The Fund also reaffirmed the principle that its staff compensation scheme is rules-based. According to the Fund, "[t]he rules-based system ensures implementation of annual salary structure adjustments (to the payline) and salary increases paid to staff based on reviews conducted within an agreed framework, which provides transparency to the process. As in the past, the rules-based system continues to provide some scope for management and the Executive Board to exercise judgment, within defined parameters, in setting salary levels." (*Id.*, p. 4.)

49. In March 2020, the Fund approved an aggregate 2.7 percent upwards adjustment to the salary structure which adjusted the salary structure midpoints, but which did not impact individual staff salaries save in the unlikely circumstances that the adjustment placed a staff

member's salary below the minimum or above the maximum of the salary range for their grade. (*Id.*, p. 24.)

50. The Fund also approved a salary increase of 3.6 percent based on the indexation formula mentioned above. (*Id.*, p. 21.) Once the aggregate salary increase was determined, the actual salary increase for individual staff members in Grades A1 – B3 was determined using "a two-dimensional matrix comprised of performance on one dimension and position in the salary range on the other." (*Id.*, pp. 24-25.)

F. FY2021 MBP contribution rate decision

51. On March 3, 2020, HRD officials circulated to SAC and IMFRA "for [their] review, the Medical Benefits Plan and Group Life Insurance Plan—Staff Report 2020," which was to form the basis for Management's paper to the Board (EBAP/20/32), requesting comments by close of business on March 5, 2020. This report included a proposal to increase contributions to the MBP for FY2021 by 3.6 percent, based on the aggregate salary increase approved by the Fund, and not on the 2.7 percent adjustment to the salary structure also approved by the Fund. It is this proposal to base the increase in MBP contributions on the aggregate salary increase rather than the salary structure adjustment that lies at the core of the dispute in this case.

52. On March 5, 2020, the SAC Chair, one of the Applicants before the Tribunal, responded by email to the HRD officials on "four important issues raised in the paper." With regard to the "New MBP contribution schedule," the SAC Chair wrote: "First, as we commented on the compensation paper, the agreed funding formula only allows for an increase of the MBP schedule in line with the proposed structural increase (component), not the combined structure plus merit increase . . . ." A few days later, on March 9, 2020, one of the HRD officials responded: "The 2019 MBP Board paper indicated that consideration would be given to premium increases in excess of the structure salary increase if the reserve level continued to reduce more rapidly than projected. As the 2020 paper makes clear, the reserve will be depleted in FY 24 unless greater premium increases and cost-containment measures are implemented before then. Implementing a slightly higher than salary structure increase in FY 21 will help reduce the premium increases that will be required in FY 22 and subsequent years."

53. In a further exchange of March 11, 2020, the SAC Chair wrote: "Thank you very much for a fast and comprehensive response. We still have reservations. . . ." In particular, with regard to the MBP contribution schedule, he wrote: "[W]e don't see the conditions are met to invoke the trigger mechanism (as spelled out in 2017) at this stage, and premium increases should align with the change to the salary structure (the structural increase and not salary increase), as set out in the recent compensation draft paper. If the reserve-to-expense ratio warrants a trigger, then we collectively need to discuss reserves level, contribution structure and coverage." That was the final exchange between SAC and HRD on the matter before it went to the Executive Board.

54. At the same time that HRD provided the draft EBAP for SAC's review, IMFRA representatives were also offered the opportunity to comment. The record shows that although IMFRA raised a number of questions and comments to HRD, none of these addressed the proposal to set the increase in the MBP contribution rate for FY2021 above the increase in the structural salary scale.

55. Following these exchanges, on March 13, 2020, the Fund began work-from-home measures in response to the COVID-19 pandemic.

56. On March 27, 2020, Management's recommended decision, along with the supporting paper EBAP/20/32, was transmitted for Executive Directors' consideration on a lapse of time basis to expire April 2, 2020. (Memorandum from the Secretary to the Members of the Executive Board (March 27, 2020) transmitting Medical Benefits Plan—Annual Review of Finances and Proposed Changes, EBAP/20/32, for Executive Directors' consideration on a lapse of time basis to expire April 2, 2020.)

57. The Executive Summary to EBAP/20/32 noted that the MBP reserves had decreased from $102.9 million at end-April 2019 to $96.3 million at end-November 2019. It continued: "Although reserves continue to exceed the target reserve level, reserves have been decreasing at a somewhat faster pace than initially projected and are expected to reach the target reserve level by FY 2022. Plan reserves could be depleted by end FY 2024 absent actions to increase premium contributions and/or reduce plan costs." Later in the Paper, it was noted that "plan contributions have been increasing at the same rate as the annual salary structure increases, but have not kept up with annual MBP cost increases. Although this was intentional and done to gradually reduce the MBP reserve to the approved medium-term target reserve level, higher premium increases will be required in future to slow down the rate of reserve depletion." (EBAP/20/32, p. 4.)

58. With regard to the proposed contribution rate increase, the Board Paper recommended that "premium contributions for FY 2021 be adjusted in line with the new single salary increase. Although slightly higher than previous salary structure increases, raising the premium by the amount of the single salary increase this year would be prudent to help maintain the targeted path for reserve depletion, as set out in 2017, and avoid having to impose potentially higher and abrupt increases next year to keep pace with rising healthcare costs." The Paper continued: "Further, this higher increase in premium will help delay the depletion of the reserve while the next scheduled five-year review of the plan is completed in FY 2022. Specifically, MBP premiums will be based on FY 2020 MBP premiums adjusted by the 3.6 percent increase in Fund's salaries for FY 2021. As the MBP reserve approaches the targeted reserve level set in the 2017 MBP review, premium contribution rates and medical claim costs will continue to be monitored closely. It is likely that premium contribution adjustments of greater than the salary increase will be required starting in FY 2022." (*Id.*, pp. 5-6.)

59. The decision proposed in EBAP/20/32 for the Executive Board's approval stated in pertinent part: "The Managing Director is authorized to increase the MBP contribution rates for FY 2021 for all participants . . . by 3.6 percent, based on the existing contribution schedule." That decision was approved by the Executive Board on a lapse-of-time basis on April 2, 2020, with effect from May 1, 2020. (Executive Board Decision No. A/14240-(20/35), adopted April 2, 2020.)

60. On April 15, 2020, staff were advised by a FUNDALL announcement: "Effective May 1, 2020, the Executive Board has approved an increase in the contribution rates for the Medical Benefits Plan (MBP) of 3.6 percent, in line with the average increase in Fund staff salaries. Contribution rates for the MBP were determined after a review of the plan's finances." In a posting on the Fund's intranet dated June 18, 2020, staff were advised that salary increases

would be reflected in paychecks beginning July 10 and would be retroactive to May 1, 2020. That same intranet notice referred to the new compensation framework: "As previously announced, the Executive Board approved a 2.7 percent increase in the Fund's salary structure and an adjustment in staff salaries by an average 3.6 percent for staff at grades A1 through B3 and 2.7 percent for grades B4 and B5. Beginning this fiscal year (FY2020), the Fund's two-part salary increase mechanism (structure plus merit) has been combined into a single salary increase, effective May 1, 2020. Due to the FY2020 Annual Performance Review (APR) process, staff at grades A1-B5 will receive the Board-approved single salary increase effective May 1, 2020 based only on their position in the salary grade range."

CHANNELS OF ADMINISTRATIVE REVIEW

61. Pursuant to Article VI, Section 2, of the Statute of the Administrative Tribunal, an application challenging the legality of a "regulatory decision"[7] may be filed with the Tribunal within three months of its announcement or effective date. There are no channels of administrative review to exhaust in respect of a regulatory decision being challenged directly.[8]

62. The contested Executive Board decision, setting the FY2021 MBP contribution rate, became effective May 1, 2020.

63. On July 29, 2020, Applicants timely filed their Applications with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicants' principal contentions

64. The principal arguments presented by Applicants in their Applications and Reply may be summarized as follows:

1. The FY2021 MBP contribution rate decision violates the Fund's obligation to maintain a "rules-based" compensation and benefits system as a "fundamental and essential" condition of employment.

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[7] Statute, Article II, Section 2.b., provides:

> the expression "regulatory decision" shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund.

[8] *See Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-2 (March 13, 2013), para. 32; *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-1 (January 24, 2007), para. 39; *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications),* IMFAT Judgment No. 2005-3 (December 6, 2005), para. 13.

2. The FY2021 MBP contribution rate decision violates a "formal commitment" and "longstanding practice" of the Fund that the structural salary increase serves as a ceiling on any increase in MBP contribution rates.

3. The FY2021 MBP contribution rate decision, in effectively amending a longstanding cap on the annual increase in MBP contributions, constituted an abuse of discretion, in the following ways: (a) it was adopted by the Executive Board without sufficient consideration of relevant facts or of alternative policies; and (b) it was adopted in a procedurally flawed manner, particularly insofar as the Fund failed to engage in meaningful consultation with pertinent stakeholders, notably the SAC and IMFRA.

4. Applicants seek as relief:

    a. annulment of the May 1, 2020, MBP contribution rate increase decision, pursuant to Article XIV, Section 3, of the Statute of the Tribunal;

    b. an order that the Fund notify all MBP participants of such annulment; and

    c. legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4 of the Statute, if it concludes that the Applications are well-founded in whole or in part.

B. Respondent's principal contentions

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

1. The rate of increase of MBP contributions is not a fundamental term of staff employment and therefore is not insulated from unilateral amendment by the Fund.

2. The MBP Plan Document authorizes the Fund to amend unilaterally the MBP contribution rates, based on its assessment of the Plan's funding needs.

3. The Fund did not, either through formal commitment or through consistent and established practice, constrain its discretionary authority to revise the contribution rates as warranted in the judgment of the Executive Board.

4. The FY2021 MBP contribution rate decision was a proper exercise of discretion, designed to ensure that the MBP remain financially robust to meet projected liabilities and to smooth contribution rates over time.

C. Views of the Amicus Curiae

66. The principal views presented by the Amicus Curiae in its Amicus Memorandum and its Additional Submission, may be summarized as follows:

1. The decision to increase the FY2021 MBP contribution rate at a greater percentage than the structural salary increase violated an established Fund rule.

2. With regard to the FY2021 MBP contribution rate decision, the Fund failed to engage in prior substantive consultation with IMFRA, in contravention of the usual process afforded in respect of policy decisions affecting the MBP.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

67. 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.[9]

A. MBP Plan Document (January 1, 2011)

(1) Section 6.1

68. Section 6.1 (Contributions) provides in part:

> . . . .
>
> The Employer is responsible annually for determining contribution rates on the basis of Claims experience and negotiating administrative expenses with the Claims Administrator, Case Management Reviewer, and other service providers.
>
> . . . .
>
> The Employer reserves the right to change the cost-sharing ratio between the Employer and Participants; to set monthly Participant contributions at a level that will, taken together with the Employer's contribution, cover the costs of financing the Plan; and to make other changes to the contribution schedule that are deemed necessary.
>
> . . . .

(2) Section 9.3

69. Section 9.3 (Plan Amendment, Suspension, or Termination) provides in part:

> The Employer intends to continue the Plan indefinitely, but it assumes no contractual obligation to do so. The Employer may

[9] The Tribunal's practice is to reproduce the relevant provisions of the Fund's internal law that governed the issues of the case. The Fund's internal law changes over time and the provisions reproduced herein are not necessarily those in force as of the time of this Judgment.

> amend, suspend, or terminate the Plan in whole or in part at any time. . . .

B. 2008 Board Decision

70. The 2008 Board Decision provides in pertinent part:

> . . . .
>
> 2. The Managing Director is authorized to implement funding reforms to the Plan as set out in paragraphs 18–21 of EBAP/08/73. Specifically,
>
> . . . .
>
> > b. The Managing Director is authorized to increase the Plan contribution rates, effective May 1 each year, by the percentage structural increase to staff compensation that is incorporated into the administrative budget for that financial year.
>
> Decision No. 14149-(08/69), adopted July 25, 2008.

CONSIDERATION OF THE ISSUES

71. The Applications present the following principal questions for decision by the Administrative Tribunal: (a) Did the Executive Board's decision to increase the FY2021 MBP contribution rate by a percentage exceeding the annual adjustment upwards to the Fund's structural salary scale violate a "fundamental and essential" condition of Applicants' employment? (b) If the FY2021 MBP contribution rate decision did not violate a "fundamental and essential" condition of Applicants' employment, did that decision constitute an abuse of the Fund's discretionary authority to amend terms and conditions of employment?

A. Did the Executive Board's decision to increase the FY2021 MBP contribution rate by a percentage exceeding the annual adjustment upwards to the Fund's structural salary scale violate a "fundamental and essential" condition of Applicants' employment?

72. Applicants argue that the Fund has contravened a "fundamental and essential" condition of employment. They submit (relying on *Daseking-Frank et al.*, para. 71) that this Tribunal has "recognized that one fundamental and essential element of staff employment is the Fund's 'rules-based' compensation and benefits system." They further argue that in determining the FY2021 MBP annual rate increase, the Fund violated a "formal commitment" and/or "longstanding practice" to cap increases to MBP contributions at the percentage annual adjustment of the Fund's salary scale. According to Applicants, when the Fund did so, it abandoned "altogether a rules-based decision-making process with respect to this issue."

73. In *Daseking-Frank et al.*, para. 59, this Tribunal endorsed the distinction drawn by the World Bank Administrative Tribunal's (WBAT)'s seminal Decision in *de Merode,* WBAT Decision No. 1 (1981) between "fundamental and essential" conditions of employment, which cannot be unilaterally amended by the organization, and those terms and conditions that can be amended, subject to the proper exercise of discretionary authority.

74. Applicants submit that "both the Medical Benefits Plan generally and the Fund's 'rules-based' system for administering this core benefit of Fund employment constitute 'fundamental and essential' elements of staff members' employment." There is no suggestion in this case that the Fund intends to disestablish the MBP and accordingly the question of whether the MBP constitutes a "fundamental and essential" term of staff members' employment does not arise. The Tribunal will therefore not consider that question further.

75. Applicants' core argument is that when the Fund determined the FY2021 contribution rate increase, it abandoned the rules-based approach to the question that it had previously followed. Applicants submit that:

> In sum, the FY2021 contribution rate increase decision does not merely violate the Fund's longstanding rate increase ceiling, but abandons altogether a rules-based decision-making process with respect to this issue. If this decision is allowed to stand, it would not only give management and the Board essentially unfettered discretion to make *ad hoc* rate increase decisions from year to year, but also to do so regardless of commitments to the contrary made to the SAC and other key stakeholders in the context of a full review of Plan finances.

76. Accordingly, in Applicants' view, the FY2021 MBP contribution rate decision constituted ". . . an unlawful amendment to a fundamental and essential element of Fund employment."

77. Respondent, for its part, maintains that the Fund may unilaterally amend the MBP contribution rates and that the rate of increase of MBP contributions is not a "fundamental and essential" term of employment insulated from unilateral amendment.

78. Applicants thus submit that the Executive Board, when making the FY2021 MBP annual contribution rate increase decision, departed from an established rule or longstanding practice that the contribution rate increase would not exceed the annual salary structure adjustment. In making this submission, Applicants rely on the Commentary on the Statute of the Tribunal which states:

> The Fund, like all international organizations, has reserved to itself broad powers to alter the terms and conditions of employment on a prospective basis. . . . However, an important limitation on the exercise of this authority would be where the Fund has obligated itself, either through a formal commitment or through a consistent and established practice, not to amend that element of

> employment. . . . Moreover, even where the organization has voluntarily undertaken such a commitment, subsequent developments, such as urgent and unavoidable financial imbalances, may authorize certain adjustments if they are reasonably justified.

Commentary on the Statute, p.18.

79. In departing from the alleged "formal commitment" or "longstanding practice," Applicants argue, the Fund abandoned its principled commitment to a rules-based approach to compensation, a commitment which Applicants argue is a "fundamental and essential" term of employment at the Fund.

(1) Did the Fund establish a rule, by longstanding practice or formal commitment, that capped annual increases in the MBP contribution rate at the percentage annual adjustment to the structural salary scale?

80. Applicants contend that the Fund's formal commitment to cap MBP contributions at the rate of the structural salary adjustment was enunciated initially in the 2008 Board decision reforming the MBP financing framework. As set out at para. 42 above, that decision granted the Managing Director discretion to increase MBP contribution rates on an annual basis ". . . by the percentage structural increase to staff compensation that is incorporated into the administrative budget for that financial year."

81. Applicants further argue that the annual MBP contribution rate increases that followed the 2008 decision constitute evidence of the fact that the Fund had established, by longstanding practice, a rule that MBP contribution rate increases could not exceed the percentage structural adjustment to staff compensation in the relevant year. They note that in 2009, 2010, 2011, 2012, 2013, 2014 and 2015, the annual MBP contribution rate increases matched the percentage adjustment to the structural salary scale (at 4.2 percent, 3.3 percent, 2.6 percent, 1.5 percent, 0 percent, 1.5 percent, and 2.1 percent, respectively).

82. From 2016, Applicants acknowledge that the picture changed. As noted above, by 2016, the MBP reserves had grown to 140 percent of the projected annual expenditures of the MBP, and the Executive Board decided that there would be no MBP contribution rate increases that year, although the salary structure was adjusted by an increase of 2.4 percent. Again in 2017, the Executive Board determined there would be no increase in the MBP contribution rate, although the salary structure was adjusted by an increase of 2.3 percent.

83. In 2017, the five-yearly task force review of the MBP recommended that there be a one-time 7 percent reduction in contribution rates in FY2018, a recommendation that was adopted by the Executive Board (which also approved a 3 percent adjustment to the salary scale for that year). The task force forecast that over the following five years, reserves would decline gradually as projected expenses were predicted to outpace the expected adjustment to the salary structure. The task force recommended that the MBP reserves should be stabilized at approximately 40 percent of projected annual expenditures.

84. In FY2019 and FY2020, the MBP contribution rate increases once again matched the percentage adjustment to the Fund's salary scales (at 2.2 percent and 2.7 percent respectively).

85. Applicants also point to the second document that they sought to have admitted to the record (see above, para. 22). It is an excerpt from an Annex (Annex VIII -- Assumptions Underlying the FY22 Budget) to a Board Paper EBAP/21/11, FY2022-FY2024 Medium-Term Budget, which Fund Management submitted to the Executive Board on March 26, 2021. The excerpt reads, in relevant part, as follows:

> 4. **Medical Benefits Plan (MBP):** During the period beginning with the MBP reforms in 2008 and FY 20, contributions to the MBP were indexed to the structural change in the pay scale.

Applicants argue that this excerpt supports their argument that there was a longstanding practice between FY2009 and FY2020 of capping annual MBP contribution rate increases at the level of annual increases in the Fund's salary structure.

86. Applicants contend further that given that since 2008 the Fund had never announced an increase to MBP contribution rates that exceeded the percentage adjustment to the Fund's salary scale, "the Fund has specifically obligated itself through both 'formal commitment' and 'consistent and established practice' to a rules-based approach to setting and adjusting Plan contribution rates." The "formal commitment" and "consistent and established practice" was that the MBP contribution rate would not be increased in a given year at a rate that exceeded the percentage adjustment to the Fund's salary structure in that year.

87. In response, the Fund argues that the MBP expressly sets out the Fund's authority unilaterally to amend the terms of the Plan, including the right to determine contributions. The Fund relies on MBP Section 6.1 (Contributions), which states: "The Employer reserves the right to change the cost-sharing ratio between the Employer and Participants; to set monthly Participant contributions at a level that will, taken together with the Employer's contribution, cover the costs of financing the Plan; and to make other changes to the contribution schedule that are deemed necessary."

88. The Fund also points to the fact that the Board Paper relevant to the Executive Board's decision to adopt a new funding framework for the MBP in 2008, expressly stated that the new framework was aimed at "smoothing rate increases and prefunding by pre-announcing annual adjustments in line with the structural increase of salaries *at a minimum*." (EBAP/08/73, p. 8.) (Emphasis added.) This document, the Fund argues, contradicts Applicants' suggestion that the Fund in 2008 adopted a "formal commitment" not to determine a rate of increase for MBP contributions that exceeded the percentage of the annual adjustment to the salary scale.

89. With regard to the practice relating to increases in MBP contribution rates between 2008 and 2020, the Fund argues that the record does not demonstrate a consistent practice, noting that in FY2016, FY2017 and FY2018, MBP contribution rates did not match the percentage adjustment to the Fund's salary structure. In addition, the Fund argues that even if a consistent practice had been established, that would not itself lead to the conclusion that the Executive

Board had forfeited its discretion to determine the increase in MBP contribution rates on a different basis.

90. In the view of the Tribunal, the 2008 Board decision should be understood to constitute a delegation of the Executive Board's authority to the Managing Director to increase MBP contribution rates annually. The delegation was a limited one, as it authorized the Managing Director to increase MBP contribution rates only by the percentage structural adjustment to staff compensation incorporated into the administrative budget for the relevant financial year. There is nothing in the decision of the Executive Board in 2008 that suggests that the Executive Board intended to constrain its own authority to determine contribution rate increases in a manner not based on the percentage structural adjustment to staff compensation in the relevant year. Applicants' argument that the 2008 limited delegation to the Managing Director relating to contribution rate increases constitutes a "formal commitment" by the Executive Board to constrain its own authority with regard to determining MBP contribution rate increases cannot therefore hold.

91. The question that next arises is whether the Fund has through its practice since 2008 established a "consistent and established practice" in terms of which it is obligated not to increase MBP contribution rates by an amount exceeding the annual percentage adjustment of the salary structure of the Fund.

92. This Tribunal has accepted that the '"practice of an organization may . . . , in certain circumstances, become part of the conditions of employment. . . . The integration of practice into the conditions of employment must . . . be limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation…."' *Daseking-Frank et al.*, para. 56, quoting *de Merode*, para. 23. *See also* Commentary on the Statute, p. 18 ("[T]he administrative practice of the organization may, in certain circumstances, give rise to legal rights and obligations."); and *Ms. "B", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), para. 37.

93. In *Ms. D. Hanna*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-1 (March 11, 2015), para. 50, the Tribunal had occasion to summarize its jurisprudence relating to the role of administrative practice as a source of law. The Tribunal referred to the Commentary on the Statute, which explains that the internal law of the Fund consists of both "written . . . and unwritten sources" and that the ". . . administrative practice of the organization may, in certain circumstances, give rise to legal rights and obligations." Commentary on the Statute, pp. 17-18. Crucially, as noted in *Hanna*, the "Tribunal has observed that the integration of practice into the conditions of employment is '"limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation.'" *Daseking-Frank et al.,* paras. 56-57, quoting *de Merode*, para. 23. Additionally, the Tribunal has held that it ". . . will be rare that the Tribunal will find a legal obligation to have arisen from past practice where that obligation would prevent the Fund from acting in accordance with best human resources practices." *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), para. 83.

94. The Tribunal also observes that its jurisprudence relating to the potential law-creating effect of administrative practice is distinct from the inquiry whether an element of the Fund's

internal law might constitute a "fundamental and essential" condition of employment. The first question to be considered is whether a practice has become part of the Fund's internal law. If it has, then the second question is whether that particular element of the Fund's law is a "fundamental and essential" condition of employment that may not be unilaterally amended by the Fund. Such "fundamental and essential" conditions of employment are rare. In *Daseking-Frank et al.*, paras. 69-75, the Tribunal said that the fact that the compensation system was to be "rules-based" and based on "international competitiveness" (implemented through a comparator-based system) was indeed a "fundamental and essential" condition not subject to unilateral amendment, but the particular formula for achieving a comparator-based compensation system was open to amendment by the Fund, subject to the usual tests for abuse of discretion.

95. In the view of the Tribunal, although it is clear from the record that in most years between 2008 and 2020, increases in MBP contribution rates matched the annual adjustment to the Fund's salary structure, there is no evidence on the record to suggest that the Fund considered itself to be legally obliged to cap increases to the MBP contribution rate in that way. Indeed, the Board Paper that underpinned the Executive Board's decision to adopt a new funding framework for the MBP in 2008, expressly stated that the new framework would pre-announce annual adjustments to the MBP contribution rate in line with the structural increase of salaries "at a minimum," not as a ceiling.

96. Moreover, in the view of the Tribunal, there are important reasons why the Fund needs to preserve its discretion with regard to the adjustment of MBP contributions. Given the volatility both of healthcare costs and healthcare risks, as the emergence of the COVID-19 pandemic sharply illustrates, the Fund needs to be able to review and adjust contributions to the MBP appropriately to ensure its viability. The terms of the Plan afford the Fund that authority. Although the Fund has not increased the MBP contribution rates at a rate higher than the percentage annual adjustment to the salary scale over the last decade, that it has not done so, does not mean that it is legally obliged not to do so.

97. The Tribunal concludes that in the absence of any evidence on the record to establish that the practice in relation to MBP contribution increases between 2008 and 2020 reflected a legal obligation acknowledged by the Fund, the Fund did not establish a rule, by "formal commitment" or "long-standing practice" that annual increases to the MBP contribution rate may not exceed the percentage annual adjustment to the structural salary scale in the relevant year.

(2) Does the conclusion that the Fund has not established a rule that annual increases to the MBP contribution rate may not exceed the percentage annual adjustment to the structural salary scale in the relevant year mean that the Fund's compensation system is not rules-based?

98. It will be recalled that Applicants contend that the Fund had established a rule that annual increases to the MBP contribution rate may not exceed the percentage annual adjustment to the structural salary scale in the relevant year and further contend that in departing from that rule in FY2021, the consequence was that the Fund had breached a "fundamental and essential" condition of employment, namely that the staff compensation scheme be rules-based.

99. The Fund disputes that it breached a "fundamental and essential" condition of employment, arguing that the adjustment of the MBP contribution rates was authorized by the terms of the Plan and did not violate an essential term of employment.

100. The Tribunal notes that the Fund has asserted that, at least since 1979, its staff compensation system is rules-based. In the recent 2020 Review of Staff Compensation, that commitment was repeated in the following manner:

> **The Fund's compensation system is rules-based.** The system relies on clearly defined comparator markets, formulae for aggregating market data, and governance procedures that provide the basis for decisions on salary adjustments. The rules-based system ensures implementation of annual salary structure adjustments (to the payline) and salary increases paid to staff based on reviews conducted within an agreed framework, which provides transparency to the process. As in the past, the rules-based system continues to provide some scope for management and the Executive Board to exercise judgment, within defined parameters, in setting salary levels.

(2020 Review of Staff Compensation, EBAP/20/28 (March 17, 2020), pp. 4-5.) *See also Daseking-Frank et al.*, para. 71.

101. It is apparent from this paragraph that the primary focus of the rules-based system of compensation is the determination of salary scale adjustments and salary increases. Salary rates are the central element of a staff compensation scheme, but there are other benefits that flow from employment at the Fund, such as participation in the MBP, which may also be understood to fall within the Fund's staff compensation scheme. The Tribunal accepts, for the purposes of this Judgment, that the Fund's commitment to a rules-based compensation scheme applies to other employment benefits as well. The Tribunal also notes that the Fund's explanation of its rules-based system provides that it contains "some scope for management and the Executive Board to exercise judgment within defined parameters, in setting salary levels."

102. The Tribunal notes that the terms of the Plan set out the rules governing the Plan in considerable detail. Those rules determine who will be eligible to join the Plan, as well as the benefits that will be provided to the participants. In most respects, therefore, the administration of the MBP is subject to rules set out in the Plan. Yet, the Plan also affords some scope to the Fund to exercise judgment in relation to the Plan, notably, in this case, in relation to determining the annual rate of increase in MBP contributions.

103. The fact that the Plan confers some discretion upon Management is not impermissible. In *Daseking-Frank et.al.,* para. 88, this Tribunal held that "provision for the exercise of discretion within a system does not invalidate the system, and that the exercise of that discretion within its governing parameters leads to solutions no less legally valid than another," citing *Von Stauffenberg, Ganuelas and Leach v. The World Bank,* WBAT Decision No. 38 (1987) para. 95; *Sebastian (No. 2) v IBRD,* WBAT Decision No. 57 (1988).

104. The Tribunal is of the view that it may be neither possible nor desirable to exclude the exercise of all discretion in the determination of staff benefits, but it also observes that the exercise of discretion by the Fund is always subject to the principles of the Fund's law that govern the exercise of discretion, to which this Judgment will shortly turn. The exercise of discretion by the Management of the Fund is therefore substantially constrained by established legal principles. Accordingly, it cannot be said that the Plan confers a discretion upon the Fund in relation to the determination of contribution rates to the Plan that results in the Plan no longer being rules-based.

105. The issue in this case concerns the determination of the annual increase in MBP contribution rates. The Plan makes clear that the Fund has the authority to determine those rates. In exercising that authority, the Fund will be bound by the principles that govern the exercise of discretion. Given that the Fund has not constrained its discretionary authority by adopting a rule that caps annual increases in the MBP contribution rate at the percentage annual adjustment to the Fund's salary scale, the exercise of the Fund's discretion to determine contribution rates does not violate the Fund's established principle that its staff compensation scheme be rules-based.

(3) Did the Fund violate a "fundamental and essential" condition of employment by allegedly failing to engage in meaningful consultation with key stakeholders in relation to the increase in the MBP contribution rate for FY2021?

106. Applicants also argue that the Fund violated a "fundamental and essential" condition of employment by allegedly failing to engage in meaningful consultation with key stakeholders, including SAC and IMFRA. In the view of the Tribunal, this argument conflates the issue of prohibition of unilateral amendment of "fundamental and essential" conditions of employment with the obligation to take discretionary decisions in accordance with fair procedures. The Tribunal will consider below the question of whether the Fund abused its discretion by failing to consult meaningfully with the key stakeholders.[10]

107. The Tribunal accordingly concludes that the Executive Board's decision to increase the FY2021 MBP contribution rate by a percentage exceeding the annual adjustment upwards to the Fund's structural salary scale did not violate a "fundamental and essential" condition of Applicants' employment.

B. Having concluded that the FY2021 MBP contribution rate increase decision did not violate a "fundamental and essential" condition of Applicants' employment, did that decision constitute an abuse of the Fund's discretionary authority to amend terms and conditions of employment?

108. In the instant case, as in the case of *Daseking-Frank et al.,* the Tribunal is presented with the question whether a decision of the Executive Board relating to staff compensation and benefits transgressed the '"broad, although not unlimited, power of the organization to amend the

[10] *See infra* Was the FY2021 MBP contribution rate decision taken in accordance with fair and reasonable procedures, including meaningful consultation with key stakeholders?

terms and conditions of employment.'" *Daseking-Frank et al.,* para. 44, quoting Commentary on the Statute, p. 17.

109. What constraints apply to the amendment of non-fundamental and essential terms and conditions of employment? This Tribunal has adopted the test articulated by the WBAT in *de Merode*, para. 47, for abuse of discretion in adopting changes to the non-fundamental terms and conditions of employment:

> The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and of technical competence.' Changes [to non-fundamental elements of the conditions of employment] must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal.

*See, e.g., Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT No. Judgment 2015-3 (December 29, 2015), para. 362.

110. Applicants advance the following arguments in asserting that that the Fund's approach to determining the FY2021 annual increase in MBP contribution rates constituted an abuse of discretion: (a) the Fund failed to base its decision on an appropriate consideration of the relevant facts, including exploring alternative options; and (b) the Fund failed to engage in meaningful consultation with the SAC and IMFRA before determining the annual increase in MBP contribution rates. Each of these questions will be considered in turn.

(1) Was the FY2021 MBP contribution rate decision based on an appropriate consideration of the relevant facts?

111. Applicants contend that the challenged decision was taken "without any apparent consideration of relevant facts, including reserve levels that remain well above the previously agreed-to target [and] without exploring alternative options, such as reviewing benefits coverage or making adjustments to the tiered contribution schedule . . . ." Applicants argue that Management should have given consideration to alternative policy changes, benefits coverage, cost savings in other areas, or even a change in the reserve target, "all of which were in fact part of the discussion during the 2017 Plan review . . . that might have achieved the same desired result."

112. The Board Paper recommending the FY2020 increase to MBP contributions supported the proposal as follows: "Although slightly higher than previous salary structure increases, raising the premium by the amount of the single salary increase this year would be prudent to help maintain the targeted path for reserve depletion, as set out in 2017, and avoid having to impose potentially higher and abrupt increases next year to keep pace with rising healthcare costs." The Paper continued: "Further, this higher increase in premium will help delay the depletion of the reserve while the next scheduled five-year review of the plan is completed in FY2022. Specifically, MBP premiums will be based on FY2020 MBP premiums adjusted by the 3.6 percent increase in Fund's salaries for FY2021. As the MBP reserve approaches the targeted reserve level set in the 2017 MBP review, premium contribution rates and medical claim costs will continue to be monitored closely. It is likely that premium contribution adjustments of greater than the salary increase will be required starting in FY2022." (EBAP/20/32, pp. 5-6.)

113. The Fund points to the fact that the actuarial report it received following an actuarial review of the MBP in 2019 projected that reserves would continue to decline in future years and be entirely depleted by FY2024, at which stage an additional contribution of $34.9 million would be required with increasing amounts in successive years. (MBP Liabilities report of the Actuary, dated December 6, 2019.) It is clear that the recommendation in the Board paper was motivated, at least in part, by the findings in the 2019 actuarial report.

114. As recorded above, Applicants sought to supplement the record by inclusion of a more recent assessment of the financial viability of the Plan, the actuarial report dated April 30, 2020, which contains an assessment of the liabilities of the MBP. This report shows that the Plan ended FY2020 with cash reserves of $95.5 million, $5.7 million more than projected in March 2020. Like the 2019 actuarial report, the report also notes the overall decline in MBP reserves but it projects that the MBP reserves will only be fully depleted by FY2026. The Tribunal notes that in assessing whether the Executive Board properly considered relevant facts when it took its decision to increase the MBP contribution rates in April 2020, it could not have had access to this report. Its failure to consider it, therefore, cannot be faulted.

115. In addition, the Tribunal notes that although the April 30, 2020 report reflects that reserve levels were higher in April 2020 than had previously been projected, the report also concludes that annual outflows from the MBP exceeded inflows (from contributions) to the MBP starting in year FY2018, which led to a decline in the MBP reserves. The report also noted that the MBP reserves would in due course be inadequate to support liabilities and steps would need to be taken to address the issue.

116. The Tribunal observes that both actuarial reports make clear that unless changes are made to reduce the liabilities of the MBP or to increase the contributions to it, at some stage in the coming years, the reserves of the MBP will be fully depleted. The Tribunal also notes that one of the goals of the Fund in adopting its 2008 MBP funding framework was to "smooth contribution rates" to avoid abrupt and sudden increases. This goal is a legitimate one.

117. There may well have been reasonable alternatives available to the Fund when it took its decision regarding the FY2020 increase to MBP contribution rates. However, the Tribunal has long recognized that the Fund's "policy-making discretion extends to making choices between more than one reasonable alternative." *Daseking-Frank, et. al,* para. 101.

118. Moreover, the Tribunal notes that alternatives to the increase in contribution rates proposed by Applicants, such as altering the benefits coverage of the MBP or making adjustments to the tiered contribution scheme, may well have been more far-reaching and intrusive to the integrity of the scheme of the MBP than the increase in contribution rates decided by the Executive Board. In this regard, the Tribunal notes that the impact of the increase in MBP contribution rates on individual staff members was not significant. According to the Fund, the MBP contribution rate of a staff member earning $50,000 per annum increased by only approximately $2 per month as a result of the FY2021 increase in MBP contribution rates.

119. The Tribunal notes that substantive reviews of the MBP take place on a five-yearly basis. The five-yearly reviews thus present a valuable opportunity for considering significant changes to the MBP. It is likely that the 2022 review will be able to consider the proper approach to the ongoing funding of the MBP in light of developments since the last review in 2017 that have been under review in this case.

120. The Tribunal concludes that the decision taken by the Executive Board to introduce an increase in contributions to the MBP above the structural salary scale was made on the basis of the relevant facts available to it at the time and was a reasonable decision in the light of those facts. Although there were undoubtedly other courses of action open to the Fund, the Fund cannot be faulted for opting for the course that it did.

(2) Was the FY2021 MBP contribution rate decision taken in accordance with fair and reasonable procedures, including meaningful consultation with key stakeholders?

121. Applicants argue that the Fund abused its discretion in failing to engage in "meaningful consultation" with the SAC, whose members were affected by the decision. Applicants maintain that it has been the Fund's longstanding practice to make changes to the MBP funding framework in consultation with stakeholders who serve as representatives of the MBP participants who, in turn, bear a significant portion of the cost of the Plan. The submissions of the Amicus Curiae highlight the same concern in relation to the members of IMFRA.

122. The Tribunal observes that the Fund did notify both the SAC and IMFRA of its proposed recommendation to the Executive Board concerning the increase in MBP contributions for FY2021. As noted in the recital of the facts above, on March 3, 2020, HRD officials circulated to SAC and IMFRA "for [their] review, the Medical Benefit Plan and Group Life Insurance Plan—Staff Report 2020," which was to form the basis for Management's paper to the Board (EBAP/20/32), requesting comments by close of business on March 5, 2020. This report included the proposal to increase contributions to the MBP for FY2021 by 3.6 percent based on the aggregate salary increase approved by the Fund, and not on the 2.7 percent adjustment to the salary structure also approved by the Fund.

123. Two days later, on March 5, 2020, the SAC Chair, responded by email to the HRD officials. In his message, he noted that the "agreed funding formula only allows for an increase of the MBP schedule in line with the proposed structural increase (component), not the combined structure plus merit increase." A few days later, on March 9, 2020, one of the HRD officials responded: "The 2019 MBP Board paper indicated that consideration would be given to premium increases in excess of the structure salary increase if the reserve level continued to

reduce more rapidly than projected. As the 2020 paper makes clear, the reserve will be depleted in FY 24 unless greater premium increases and cost-containment measures are implemented before then. Implementing a slightly higher than salary structure increase in FY21 will help reduce the premium increases that will be required in FY22 and subsequent years." The SAC Chair responded, recording his thanks for the "comprehensive response" and noting that the SAC still had "reservations" about the recommendations. No further correspondence followed.

124. In the case of the IMFRA, although it responded to the consultation by HRD, it did not raise pertinently the question of the increase in the MBP contribution rate.

125. The case raises the question of what constitutes meaningful consultation with key stakeholders, namely, what is required when the Fund seeks to amend terms and conditions of employment. In the view of the Tribunal, all the required notice and information related to the nature, scope and effect of the amendments that are under consideration should be provided to the key stakeholders, who upon receipt, ought to provide feedback to the Fund and commence discussions on the issue, if necessary. The extent of the engagement of parties in meaningful consultative discussions on an issue will, to a large measure, be guided by the nature, scope and effects of the proposed amendments. In this regard, the instant case may be contrasted with *Daseking-Frank et al.,* in which a wide-ranging reform of the compensation system was challenged before the Tribunal; the record there established that there had been extensive engagement with stakeholders, and staff directly, in relation to that decision. Given the scope and effect of the decision in that case, extensive consultation was appropriate. In contrast, in the instant case, where the impact of the amendments on staff members was not as far-reaching, the Fund engaged the key stakeholders through correspondence. The stakeholders responded to the correspondence and there were no requests for continued dialogue and consultation on the issue. At the same time, the Tribunal observes that the turnaround time provided for comment was quite minimal, especially in the context of the disruptions associated with the onset of the COVID-19 pandemic.

126. The Tribunal concludes that the Fund's consultation with the SAC and IMFRA was adequate in the circumstances. In so concluding, the Tribunal also observes that the SAC and IMFRA could have approached the Executive Board directly to raise their concerns about the recommended increase in the MBP contribution rates. As noted above at para. 41, the SAC previously directly approached the Executive Board when it wished to inform the Board of its concerns. In *Daseking-Frank, et.al.,* the SAC also put its views to the Executive Board in the context of its consideration of the 2006 amendment of the compensation system. In the instant case, the SAC provided no explanation for why it chose not to put its concerns before the Executive Board.

127. Further, the Tribunal notes, as Applicants point out in their pleadings, the Board paper "gave no indication of the Staff Association's objections to the proposed policy change." It would have been good practice for Management to have informed the Executive Board that the SAC (and IMFRA) had been consulted on the proposals in the Board Paper and had raised concerns. Yet, the fact that Management did not do so, did not constitute a bar to the SAC and IMFRA informing the Executive Board themselves of their dissatisfaction with the recommendations. Given that the SAC and IMFRA could have approached the Board, but failed to do so, the Tribunal cannot conclude that the Fund failed to act in accordance with fair

procedures when it did not draw their concerns about the proposals to the Executive Board's attention. Responsibility for meaningful consultation rests with both sides.

128. On balance, the Tribunal concludes that the Fund did not abuse its discretion in taking the contested decision for failure to engage in meaningful consultation with key stakeholders. Although that consultation might have been more extensive, Applicants have not established that the Fund's conduct with regard to the consultations represented an abuse of discretion. The Tribunal remains concerned, however, that neither Management nor the SAC brought the issue of their disagreement to the Board's attention. When decisions come before the Board relating to staff employment, compensation and benefits, the Board's decision-making process will benefit from being fully informed of the views of all key stakeholders.

CONCLUSIONS OF THE TRIBUNAL

129. For the reasons elaborated above, the Tribunal concludes that the Fund's Executive Board did not abuse its discretion when it took the decision, effective May 1, 2020, to set the increase in the annual MBP contribution rate at 3.6 percent, that is, above the 2.7 percent increase in the Fund's structural salary scale.

130. In the view of the Tribunal, the rate of the MBP contribution increase was not insulated from unilateral amendment as a "fundamental and essential" condition of employment. Moreover, the fact that the MBP affords the Fund a discretion to determine the annual increases in MBP contributions does not constitute a violation of the Fund's principle that its staff compensation system should be rules-based. Accordingly, the Fund was authorized to vary the MBP contribution rate, subject to the ordinary restrictions on the appropriate exercise of discretionary authority.

131. Applicants have not established that the Fund had constrained its discretionary authority, either by longstanding practice or formal commitment, such that increases in the structural salary scale served as a ceiling on increases in the MBP contribution rate. The Fund accordingly had discretion to set that contribution rate, within the confines of the proper use of discretionary authority.

132. The Tribunal examined the Applicants' arguments and the evidence as a whole and concludes that the Fund did not abuse its discretion. In the view of the Tribunal, Applicants have not substantiated their assertions that the contested decision was not based on an appropriate consideration of relevant facts, or was not taken in accordance with fair and reasonable procedures, including meaningful consultation with key stakeholders. Accordingly, the Applications must be denied.

DECISION

FOR THESE REASONS

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

The Applications of Mr. T. Elkjaer, Mr. G. El-Masry, Ms. M. Rossignol, and Mr. T. Roy are denied.

Catherine M. O'Regan, President

Edith Brown Weiss, Judge

Deborah Thomas-Felix, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
December 28, 2021