

**ADMINISTRATIVE TRIBUNAL  
OF THE  
INTERNATIONAL MONETARY FUND**

*Judgment No. 2023-1*

*January 30, 2023*

*Elkjaer et al. (No. 2), Applicants v. International Monetary Fund,  
Respondent*

**Office of the Registrar**

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Mr. T. Elkjaer, Applicant v. International Monetary Fund, Respondent  
Mr. G. El-Masry, Applicant v. International Monetary Fund, Respondent  
Ms. L. Li, Applicant v. International Monetary Fund, Respondent  
Ms. M. Rossignol, Applicant v. International Monetary Fund, Respondent  
Ms. H. Shi, Applicant v. International Monetary Fund, Respondent

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### INTRODUCTION

1. The Administrative Tribunal of the International Monetary Fund (“Tribunal”), composed for this case, pursuant to Article VII, Section 4 of the Tribunal’s Statute, of Judge Nassib G. Ziadé, President, and Judges Edith Brown Weiss and Andrew K.C. Nyirenda, has decided the Applications brought against the International Monetary Fund (“Respondent” or “Fund”) by Mr. Thomas Elkjaer, Mr. Gamal El-Masry, Ms. Linchun Li, Ms. Martine Rossignol, and Ms. Haiyan Shi, current or then current staff members and current or former 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. Juliet Johnson, Senior Counsel, and Mr. Yongqing Liu, Counsel, in the Administrative Law Unit of the IMF Legal Department. Mr. Brian Patterson, IMF Assistant General Counsel, along with Ms. Johnson and Mr. Liu, appeared on behalf of Respondent in the oral proceedings.

2. Applicants contest the FY2022 staff compensation decision approved by the Fund’s Executive Board (“Executive Board” or “Board”) on April 21, 2021, with effect from May 1, 2021. (The decision was implemented retroactively on July 1, 2021.) The Applications have been filed pursuant to Article VI, Section 2, of the Tribunal’s Statute, which permits a direct challenge to a “regulatory decision” of the Fund within three months of the later of the announcement or effective date of the decision.

3. In identical Applications, Applicants contend that, in taking the FY2022 staff compensation decision, the Fund misapplied rules intended to safeguard staff salaries against erosion relative to market-based adjustments to the Fund’s overall salary structure, under a framework adopted in 2019 that decoupled adjustments to the payline from total salary increases. This “safeguard mechanism” was designed to ensure that, on average, staff salaries remain within a range of 98-102 percent of the market-adjusted pay-grade midpoints. This determination is made by calculating the “comparatio,” which is the average of salaries for each pay grade relative to its midpoint, weighted by the number of staff members at each pay grade. Under the safeguard mechanism, if average salaries fall below the 98 percent threshold (or above the 102 percent ceiling), the Fund is to make an assessment as to whether salaries remain competitive in the market. Based on that assessment, the Fund may adjust the total salary increase.

4. Applicants allege that the Fund misapplied the safeguard mechanism rules by: (a) utilizing salary data that terminated prior to the end of the financial year,<sup>1</sup> so that it did not reflect annual wage erosion for the full financial year; and (b) applying a 2.8 percent average total salary increase, which was the salary increase applicable to Grades A1-B3 staff members but did not take account of the 1.8 percent salary increase applicable to Grades B4-B5 staff members. Applicants assert that these alleged errors likely had a material effect on the outcome of the comparatio calculation, leading to a lower total salary increase than that to which staff members were entitled.

5. Applicants further contend that the FY2022 staff compensation decision failed to comply with the rules-based compensation system and that the Fund lacked authority to disregard or modify the safeguard mechanism procedures formally adopted by the Board in 2019. In the alternative, Applicants submit that even if the Fund had discretion in implementing the safeguard mechanism, it abused that discretion by failing to consider the very facts it had adopted in 2019 as the relevant benchmarks and by applying the safeguard mechanism in a manner that conflicted with its essential purpose.

6. Applicants seek as relief an order requiring the Fund: (a) to rerun the comparatio analysis mandated by the 2019 salary erosion safeguard mechanism (i) using salary data as of April 30, 2021, and (ii) accounting for the actual proposed total salary increases for FY2022, including the smaller increase for staff in Grades B4-B5, and to notify all staff members of both the data used and the results; (b) to comply with the additional steps required under the safeguard mechanism to the extent the resulting comparatio falls below the safeguard threshold of 98 percent, and to notify all staff members of the evidence and analysis needed under these additional steps; and (c) to the extent that such steps result in augmentation of the previously approved total salary increase, to notify all staff members of the additional total salary increase and the basis for this change. Applicants also seek 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.

7. Respondent, for its part, maintains that the FY2022 staff compensation decision was taken in accordance with the governing rules, including in the implementation of the safeguard mechanism. The Fund further submits that the FY2022 staff compensation decision represents a lawful exercise of the Board's discretionary authority. That decision, asserts the Fund, was based on an appropriate consideration of all relevant facts, reasonably related to the objectives it was intended to achieve, and not improperly motivated. Furthermore, Respondent states that the Board, in taking the contested decision, had the benefit of the views of both Management and SAC concerning implementation of the same elements of the safeguard mechanism that Applicants now challenge before the Tribunal.

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<sup>1</sup> Consistent with the usage of the parties and the documentation of the case, the Tribunal in this Judgment will use the terms "financial year" and "fiscal year" interchangeably.

## PROCEDURE

8. On August 2, 2021, Applicants filed identical Applications with the Tribunal. The Applications were transmitted to Respondent on August 3, 2021. On August 13, 2021, 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.

9. On September 17, 2021, Respondent filed a consolidated Answer to the Applications. On November 5, 2021, Applicants submitted their Reply.<sup>2</sup> The Fund's Rejoinder was filed on December 8, 2021.

10. On June 22 and 24, and August 11, 2022, the parties responded to the Tribunal's requests for their views as to whether oral proceedings should be held, the conduct of those proceedings, and whether the parties' written pleadings should be made accessible to the staff of the Fund on an exceptional basis.

11. On August 10, 2022, the Tribunal invited the parties' additional comments on Applicants' requests for production of documents, in the light of pertinent developments arising following the exchange of the regular pleadings. Those additional comments were submitted on August 16 and 17, 2022. Following the oral proceedings on August 29, 2022, the Tribunal sought the written views of Applicants and Respondent as to the possible admission to the record of an additional annex. The parties' views were filed on September 7, 2022.

12. On September 2, 2022, Applicants submitted their supplemental request for costs, to which the Fund responded on September 13, 2022.

### A. Applicants' Requests for production of documents and the Admissibility of additional annexes

13. Pursuant to Rule XVII<sup>3</sup> of the Tribunal's Rules of Procedure, in their Applications, Applicants made two requests for the production of documents. Respondent in its Answer opposed

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<sup>2</sup> On October 9, 2021, pursuant to the authority provided by Rule VIII (1) of the Tribunal's Rules of Procedure, the President of the Tribunal granted Applicants' request, made with the Fund's consent, for extension of time to file their Reply.

<sup>3</sup> 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.

(continued)

both requests. In their Reply, Applicants made six supplemental document requests, which Respondent opposed in its Rejoinder.

14. In response to the Tribunal's invitation of August 10, 2022, the parties submitted simultaneous additional comments on Applicants' requests for production of documents in the light of the July 29, 2022, filing of applications with the Tribunal by three of the same Applicants (along with three additional staff members) challenging the Fund's FY2023 staff compensation decision. On August 19, 2022, having considered the additional comments, the Tribunal notified the parties of Decisions (some of which were provisional) on Applicants' Requests for Production of Documents.

15. On November 14, 2022, following the oral proceedings in the case and the further submissions of the parties, the Tribunal notified the parties of its Further Decisions on Applicant's Requests for Production of Documents and Admissibility of Additional Annexes. In view of those Further Decisions, the Tribunal concluded that the record of the case was complete. These developments are elaborated below.

(1) Document Request No. 1

16. Applicants' Document Request No. 1 seeks: "All emails or other documents relating to the Fund's decision as reflected in Board Paper EBAP/21/7 . . . , paragraph 17, footnote 12, to use then-current salary data (from approximately March 1, 2021) instead of end-fiscal year salary data in the comparatio calculation required by the safeguard mechanism." Respondent opposed the request, disputing that there had been a "decision" as Applicants assert. Respondent additionally stated that it had already produced any documents relating to the use of March 1 data, save for those it deemed protected by attorney-client privilege.

17. On August 19, 2022, the Tribunal notified the parties that it had provisionally denied Applicants' Document Request No. 1, on the basis of Respondent's assertion that no responsive documents exist. On a similar ruling, *see Mr. "RR", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021- 2 (December 24, 2021), para. 12 (Tribunal may deny request for documents on the ground that the applicant has not shown that he has been "denied access" (Rule XVII (1)) to the requested documents). At the same time, the Tribunal stated that it remained open to Applicants in the oral proceedings to (a) proffer evidence that such

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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.

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.

documentation does exist and (b) elaborate how such documentation would be relevant to the issues of the case.

18. On November 14, 2022, the Tribunal, observing that Applicants had not exercised the opportunity to present further argumentation on the Request at the oral proceedings, notified the parties that its earlier provisional denial of Applicants' Document Request No. 1 had become permanent.

(2) Document Request No. 2 and Admission of Annex 6 of the newly filed applications

19. Applicants' Document Request No. 2 seeks: "A document reflecting the comparatio calculation for the 2021 Review of Staff Compensation run using fiscal year-end salary data as of April 30, 2021." Respondent objected to Applicants' Document Request No. 2, asserting that it is the same as one of the requests for relief that Applicants seek in their Applications, and that to grant the Request would be tantamount to awarding relief in the absence of a decision on the merits of the case.

20. The Tribunal's consideration of Applicants' Document Request No. 2 was informed by developments arising subsequent to the exchange of the regular pleadings. As noted above, at the Tribunal's invitation, the parties filed, on August 16 and 17, 2022, additional comments on Applicants' requests for the production of documents, in the light of applications that had been newly filed with the Tribunal challenging the Fund's FY2023 compensation decision. In their additional comments, Applicants requested that Annex 6 of the newly filed applications be admitted to the record of the instant case. That Annex is an email communication of March 5, 2022, from an HRD official to the lead Applicant in both cases, showing the result of calculating the comparatio using salary data as of April 30, 2021. Respondent, for its part, acknowledged the existence of the document and asserted that it rendered moot Applicants' Document Request No. 2. At the same time, Respondent requested that the Tribunal not take account of the content of the document, on the ground that it had not been available to the Board at the time it took the FY2022 staff compensation decision challenged in the instant case.

21. On August 19, 2022, the Tribunal notified the parties that it had decided to admit to the record of the instant case Annex 6 of the newly filed applications. At the same time, it dismissed Applicants' Document Request No. 2 because it had become moot. The Tribunal additionally invited the parties to present arguments at the oral proceedings as to whether the Tribunal should take account of the content of the document and, if so, what significance it had for the Tribunal's decision in this case.

22. At the oral proceedings, Respondent continued to assert that the document's content should not be considered by the Tribunal because it had not been before the Board in taking the challenged decision. Applicants, for their part, argued that the document is relevant to the issues of the case



because it shows that using salary data as of April 30, 2021, results in a comparatio of 97.99.<sup>4</sup> That figure differs from the 98.1 figure (just above the safeguard mechanism floor), based on earlier data, on which the Board relied in taking the FY2022 staff compensation decision.

23. On November 14, 2022, the Tribunal confirmed to the parties that Applicants' Document Request No. 2 was dismissed as moot, and that Annex 6 of the newly filed applications was admitted to the record of the instant case. The Tribunal considered that the admitted document relates to a dispute that is central to the parties' respective arguments. Accordingly, the Tribunal decided that it may take account of the content of Annex 6 of the newly filed applications in considering the issues of the instant case.

(3) Supplemental Document Request No. 1

24. Applicants' Supplemental Document Request No. 1 states:

Respondent points out that management, in its responses to technical questions posed by Executive Directors, 'noted that the comparatio assessment based on data as of January 15, February 15 and March 1, 2021 led to the same result (i.e. 98.1 percent).' . . . Management did not, however, provide the Board with any calculations supporting this response. Applicants therefore request that Respondent produce all spreadsheets or other documents reflecting the referenced calculations. Such spreadsheets or other documents should be in a format: 1) that enables Applicants to determine the formulas used in these calculations; and 2) that shows the results to at least two decimal places such that Applicants can ascertain the degree to which the supposedly flat trend line is the result of rounding as opposed to the absence of wage erosion between January 15 and March 1.

25. Respondent opposed the Request in its Rejoinder, stating: "[T]he point is that the Board did not ask for such calculations, because it had no reason to doubt management's technical competence and good faith presentation of data." (Emphasis omitted.) In Respondent's view, the "Tribunal should not indulge Applicants' wish to engage in this inappropriate degree of oversight of management's work."

26. On August 19, 2022, the Tribunal notified the parties that, given Applicants' representations in their additional comments of August 17, 2022, and the Tribunal's admission to the record of the instant case of Annex 6 of the newly filed applications, it considered that Applicants had withdrawn their Supplemental Document Request No. 1.

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<sup>4</sup> The parties have clarified in their further submissions that the calculation shown in Annex 6 of the newly filed applications, although applying April 30, 2021 data, does not take account of the 1.8% salary increase applicable to Grades B4-B5 staff, but rather applies to all staff the increase of 2.8% applicable to Grades A1-B3 staff.

(4) Supplemental Document Requests Nos. 2-6

27. In its Decisions of August 19, 2022, the Tribunal reserved its disposition of Applicants' Supplemental Document Requests Nos. 2-6 until its further consideration of the merits of the case. The Tribunal advised that it was open to the parties to include in their oral arguments their views as to whether these requests should be granted. The Supplemental Requests and the Fund's responses are set out below.

(a) Supplemental Document Request No. 2

28. Applicants' Supplemental Document Request No. 2 states:

Respondent points out that management, in its responses to technical questions posed by Executive Directors, argued that 'the fact that the total salary increase [2.8 percent] is significantly above the growth in the salary structure [1.8 percent] implies that the average salaries will progress towards the grade midpoints, and not drift lower.' . . . Applicants therefore request that Respondent produce any documents or analysis on which management relied in making this statement to the Board or, to the extent that no such documents or analysis exists, to so state for the record in this case.

29. Respondent opposed the Request as follows: "This is simply a fact that if the salary grades' minima, midpoints and maxima are increased by 1.8 percent and staff salaries within these grades are increased by an average of 2.8 percent, the progression of the salaries towards the midpoint is accelerated. As with the Applicants' other requests, if the Board had difficulty understanding this mathematical concept, it could have followed up. It is not for Respondent to explain to Applicants this dynamic."

(b) Supplemental Document Request No. 3

30. Applicants' Supplemental Document Request No. 3 states:

Respondent points out that management, in its responses to technical questions posed by Executive Directors, asserted that 'staff separations that would likely affect the aggregate comparatio normally occur in the second half of the year, when a large number of staff separates to accommodate U.S. tax residence laws.' . . . Applicants therefore request that Respondent produce: 1) any documents or historical analyses of staff separations on which management relied in making this assertion to the Board or, to the extent that no such documents or analysis exists, to so state for the record in this case.

31. Respondent's opposition to the Request states in principal part:

[I]f management’s assertion appeared suspect to the Board, it could have asked for backup documentation. . . . [I]t is a reasonable assumption (even without the requested experience data) that G4 staff will, more likely than not, retire in the latter half of the year, not in March or April. Moreover, the Board had available to it the trends in the separation over several calendar years in the Recruitment and Retention paper . . . . There is thus no basis to pursue Applicants’ speculation that there could have been a rash of separations in March and April 2021, with the pandemic still wreaking havoc on the global economy and personnel mobility.

(c) Supplemental Document Request No. 4

32. Applicants’ Supplemental Document Request No. 4 states:

Closely related to Request #3, Applicants request that Respondent produce: 1) any documents or historical analyses of hiring trends by time of year made leading up to the FY2022 decision, analogous to those sought in Request #3 because, as noted above, separation and onboarding trends are both equally relevant to any wage erosion analysis; 2) any analogous documents or historical analyses of wage erosion during the final two months of fiscal years that could inform an assessment of whether there was likely to be a meaningful change in the comparatio between March 1 and April 30; and 3) data showing the number of separations and number of new hires and promotions between March 1, 2021, and April 30, 2021.

33. Respondent’s opposition to the Request states in principal part:

[T]here is no analogous time period to Fiscal Year 2021, which began shortly after the Fund’s complete lockdown due to the Covid-19 pandemic on March 13, 2020 and continued through April 30, 2021. The significant hiring to address this global crisis . . . was without precedent in the Fund’s history, rendering data on hiring trends or wage erosion in March and April of prior years irrelevant. . . . [T]he most relevant information for projecting hiring trends for March and April, was the preceding calendar year (2020), nine months of which occurred during the pandemic. This data was reported to the Board in the Recruitment and Retention paper, and the Board made express note of the 20 percent increase in hiring over CY 2019 in its Summing Up. . . . This Tribunal has noted that where, as here, the Board took ‘appropriate consideration of the relevant facts, for example, the recruitment and retention data,’ the Tribunal’s review is limited. *Daseking-Frank*, at para. 74. The Tribunal should therefore deny this supplemental request for irrelevant historical analyses and other recruitment data.

(d) Supplemental Document Request No. 5

34. Applicants’ Supplemental Document Request No. 5 states:

Respondent points to management’s representation to the Board that it did not believe a higher salary increase would be called for even if the comparatio fell below 98 percent based on the additional review factors called for in the safeguard mechanism under such circumstances. . . . [Management’s Responses to Executive Directors], at 2 (‘If the comparatio had fallen outside the test range of 98 to 102 percent, then a series of reviews would have been initiated to determine the cause . . . . [Such a] review is not necessary in the current context. Moreover, we do not see any of the above factors at play that would warrant any deviations in the system and especially, to recommend that management propose a higher salary increase.’). Applicants therefore request that Respondent produce any documents or analysis on which management relied in making the above-quoted statement to the Board or, to the extent that no such documents or analysis exists, to so state for the record in this case.

35. Respondent’s opposition to the Request states:

[I]t was self-evident in the then-current economic environment that there were no pending U.S. tax policy changes or currency exchange fluctuations, and the market indexes and surveys used by the Fund undeniably reflected the Fund’s comparator markets. The analyses on recruitment and retention have already been provided, and as discussed, the Fund’s internal staffing dynamics did not indicate a reason for adjustment. Notably, in neither of SAC’s statements to the Board did they suggest that any of these factors would support an upward adjustment. In [the] absence of any proffer by Applicants that there is any reason to delve deeper into these factors – and in light of the Board’s satisfaction with management’s response – the Tribunal should deny this request.

(e) Supplemental Document Request No. 6

36. Applicants’ Supplemental Document Request No. 6 states:

Respondent notes that management proposes a salary increase ‘based on an indexation formula that draws from widely-accepted published survey data on annual salary increases.’ . . . . In addition to being used to set the salary increase, this indexation formula is relevant to the supplemental analysis required under the safeguard rule when the salary-to-midpoint ratio falls below 98 percent. . . . [Safeguard Mechanism], para. 21 (requiring the Board to analyze, among other things, whether ‘[t]here is compelling evidence to suggest that the indexes do not represent general salary trends in the U.S. comparator market’).

Respondent relies on management’s unsupported assertion to the Board that such an analysis would not reveal any disjunct between these indices and

the comparator market trends they are meant to track. . . . Without knowing what ‘widely-accepted published survey data’ management uses to develop these indices or how they are derived from these data, however, it is not possible to test the validity of Respondent’s assertion. Applicants therefore request that Respondent produce both the raw survey data as collected on which it relied for both its FY2021 and FY2022 salary increase proposals and the indexation formula calculations into which those data were fed.

37. Respondent’s opposition to the Request states in principal part:

Applicants, as members of SAC, were extensively involved in the CCBR decision-making process, and know exactly what survey data is used . . . . Applicants’ demands for the raw data and the formula calculations to ‘test the validity’ of the results is effectively an attack on the technical competence of HRD’s professional staff, whose specialty is compensation methodologies for international organizations, and/or an insinuation that these staff or management have acted in bad faith and manipulated or falsified the results. Applicants have presented no basis for such speculations, and the Tribunal should not countenance this final attempt by applicants to engage in such microscopic examination and testing of the validity of the work of staff who are assigned these duties.

(f) Tribunal’s disposition of Supplemental Document Requests Nos. 2-6

38. On November 14, 2022, having considered the arguments of the parties and the record of the case, the Tribunal notified the parties that it had denied Applicants’ Supplemental Document Requests Nos. 2-6. Given the totality of the evidence before it and its identification of the issues, the Tribunal concluded that responses to these Requests would not be probative of the issues of the case.

(5) Admissibility of Annex 9 of the newly filed applications

39. On August 30, 2022, the Tribunal requested written comments from the parties on the question, raised in the oral proceedings, of whether Annex 9 of the newly filed applications, which is the 2022 Review of Staff Compensation (“2022 Board Paper”), EBAP/22/9 (March 21, 2022), should be admitted to the record of the instant case. The parties filed their simultaneous comments on September 7, 2022.

40. Applicants asserted that the 2022 Board Paper is relevant to the issues of the case because it: (a) shows that the Fund’s approach to determining the cut-off date for determining the comparatio does not foster predictability; (b) “confirms the inadequacy of management’s response to the Board’s technical questions as a substitute for the required supplemental competitiveness analysis by showing the depth of analysis that the safeguard rule actually requires”; and (c) “demonstrates that management continues to misreport its safeguard analysis to the Board and thus continues to deprive it of the full information needed to make compensation decisions in

compliance with the 2019 compensation framework” (referencing information available to management as of March 5, 2022, as found in Annex 6 of the newly filed applications).

41. Respondent opposed admitting Annex 9 of the newly filed applications to the record of the instant case because “nothing contained in the 2022 Board Paper bears any relevance to the issues at stake in the instant case.” In Respondent’s view, Applicants’ “contentions that the Board violated the Fund’s compensation rules and/or abused its discretion in taking the FY22 Compensation Decision must be evaluated based on the scope of the Board’s authority and the information known to the Board at the relevant time.”

42. On November 14, 2022, the Tribunal notified the parties that it had considered the arguments of the parties and the record of the case. Given the totality of the evidence before it and the issues of the case, the Tribunal decided that Annex 9 of the newly filed applications would not be admitted to the record of the instant case.

#### B. Oral proceedings

43. Article XII of the Tribunal’s Statute provides that the Tribunal shall “decide in each case whether oral proceedings are warranted.” That statutory requirement must be read together with Rule XIII (1) of the Tribunal’s Rules of Procedure, which states in part: “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 . . . , the Tribunal deems such proceedings useful.” In this case, neither party made a request for a hearing. The Tribunal, however, sought the parties’ views as to whether it should hold oral proceedings and, if so, whether those proceedings should be open to all Fund staff via video link. Both parties responded that they favored the Tribunal’s holding oral proceedings and making them available to Fund staff in the manner proposed.

44. Having considered these views, the Tribunal decided that oral proceedings, limited to the oral arguments of the parties and their counsel (Rule XIII (6)<sup>5</sup> of the Tribunal’s Rules of Procedure) would be “useful” (Rule XIII (1)). In challenging the FY2022 staff compensation decision, the Applications raise important issues of consequence to Fund staff generally, and the Tribunal considered that its decision-making process would benefit from an opportunity for the parties to plead their causes orally and to respond to the questions of the Judges. The parties were so notified on July 11, 2022.

45. On August 1, 2022, the Tribunal issued a further decision concerning the conduct of the oral proceedings, including that they would be held in “hybrid” format, permitting the parties and their counsel the option of appearing either in person or virtually, in light of the public health considerations associated with the ongoing COVID-19 pandemic. The Tribunal availed itself of Article XI of its Statute, which provides that the Tribunal, “taking into account the need for fairness and efficiency in the conduct of proceedings,” may hold a session “by electronic means.” The

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<sup>5</sup> Rule XIII (6) provides: “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.”

associated Commentary on the Statute,<sup>6</sup> p. 34, recognizes that the provision “. . . enables the Tribunal to conduct hybrid sessions involving both in-person and electronic attendance.” The Tribunal found, in the circumstances of the case, that the hybrid format supported the twin goals of fairness and efficiency.

46. Additionally, after seeking the views of the parties, the Tribunal decided that the staff members of the Fund would be given access to the written pleadings in the case, on an exceptional basis, in conjunction with holding oral proceedings “open to all interested persons” (Statute, Article XII; Tribunal’s Rules of Procedure, Rule XIII (1)) in the context of a challenge to a regulatory decision of the Fund affecting staff generally.<sup>7</sup>

47. On August 22, 2022, the Tribunal issued a Procedural Order governing the protocol for the oral proceedings. On the same day, the Registrar invited the staff of the Fund by FUNDALL announcement to observe the oral proceedings via audio-visual link and to access the written pleadings in the case.

48. Oral proceedings in the case were held on August 29, 2022. The Tribunal found the oral representations of counsel helpful in elucidating the issues of the case and it refers to those representations in this Judgment.

## FACTUAL BACKGROUND

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

### A. 2019 Comprehensive Compensation and Benefits Review (“CCBR”) decision

#### (1) Overview

50. The controversy in this case arises from the application in relation to the FY2022 staff compensation decision of the “safeguard mechanism” rule adopted as part of the 2019 Comprehensive Compensation and Benefits Review (“CCBR”) decision. The CCBR was the first major revision of the Fund’s compensation and benefits system since 2006. For a description of the 2006 revision, *see generally Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007). Like the 2006 revision (known as the Employment, Compensation and Benefits Review (“ECBR”)), the Fund’s 2019 CCBR decision emerged from extensive consultation with stakeholders, including SAC. The

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<sup>6</sup> 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).

<sup>7</sup> The same approach had been taken in an earlier challenge to a regulatory decision affecting Fund staff and retirees. *See Elkjaer et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-4 (December 28, 2021), para. 32.

CCBR also engaged staff focus groups and Fund-wide townhalls. The review was carried out under the overall direction of Management, assisted by a Steering Committee comprising senior staff from across the Fund, and was supported by teams from the Human Resources Department (“HRD”), Legal Department (“LEG”) and the Office of Budget and Planning (“OBP”), along with an outside consulting firm. (Comprehensive Compensation and Benefits Review—Overview Paper, EBAP/19/88 (October 15, 2019) (“CCBR Overview Paper”), p. 5.)

51. As reported in the CCBR Overview Paper, p. 5, the Steering Committee’s review relied on the following principles: “[T]he review must be comprehensive and transparent, and the proposals rules- and comparator-based and consistent with guiding legal principles followed by the IMF’s Administrative Tribunal.” Thus, in adopting the CCBR decision, the Fund expressly reaffirmed its commitment to a system of staff compensation that is both “rules-based” and “comparator-based,” principles that the Tribunal has found to be “fundamental and essential” conditions of staff employment. *See Daseking-Frank et al.*, paras. 62-75. The CCBR Overview Paper, p. 8, commented: “The Fund’s rules- and comparator-based compensation system has been critical for attracting and retaining high-quality talent from around the world. The Fund’s approach has brought predictability, consistency, and transparency to salary decisions.” (Emphasis omitted.)

52. A key feature of the revised system of staff compensation adopted by the Board in 2019 was the decoupling of adjustments to the Fund’s salary structure (payline) from increases to staff salaries. The CCBR framework relies on one set of comparator-based calculations to establish the midpoints of the Fund’s pay grades, resulting in the “structural” increase, and a separate analysis of the salary increase budgets of comparable institutions to set the average Fund salary increase. Individual salary increases are then allocated based on the staff member’s performance and placement within the range of salaries for their grade.

53. With regard to changes to the payline, under the framework adopted in 2019, market competitiveness is reviewed annually on a three-year cycle. In Year 1, the midpoints at Grades A1-A8 and A9-B2 are compared to market salary data for the United States for relevant jobs. For Grades A9-B2, international competitiveness is also assessed in relation to comparator markets in France, Germany, and Japan. As to Grades B3-B5, the most senior levels of the Fund pay grades, the midpoints are set using an interpolation between the B2 midpoint and the salary of the Deputy Managing Directors “[s]ince market data are not obtained for grades B3-B5 and the payline at these levels is constrained by management salaries.” (Comprehensive Compensation and Benefits Review—Revised Proposed Decision, EBAP/19/104, Supp. 1, December 16, 2019, para. 23.) In Years 2 and 3, the salary structure adjustment is made uniformly across all Grade levels A1-B5, based on an indexation formula reflecting pertinent salary data for particular public and private entities in the United States.

54. The CCBR Overview Paper, p. 12, additionally observed that decoupling of adjustments to the Fund’s payline from increases to staff salaries brought “important changes to the Board’s involvement in compensation and budget decisions”:

The Board would be asked to approve a single salary increase that would be aligned to the increases in annual salary budgets of the Fund’s market comparators. This would be a departure from current practice, where the



Board only approves a structure increase. Based on the results of the safeguard mechanism and the international competitiveness test, Management could propose an adjustment to the single salary increase for the Board's approval. The Board approved increase would then be distributed to staff based on the position of their salary in the grade pay range of the salary structure and their performance. Any changes to the payline would also be proposed to the Board for its approval.

(*Id.*, p. 13.) Accordingly, in placing in the hands of the Board authority to approve the single salary increase, the CCBR represented a departure from past practice whereby the Board had approved the structural increase to the payline and HRD later approved salary increases on the basis of end-of fiscal year data that determined the budget for those increases.

## (2) Safeguard Mechanism

55. In decoupling adjustments to the payline from the total salary increase for Fund staff, the Board also adopted, as part of the 2019 CCBR decision, a “safeguard mechanism,” which is intended “to ensure that average salaries continue to track the midpoints well and maintain the current international competitiveness test.” (CCBR Overview Paper, p. 12.) (Emphasis omitted.) In summary, the safeguard mechanism tests whether average staff salaries remain within a range of 98-102 percent of the market-adjusted pay-grade midpoints, based upon calculation of the “comparatio,” that is, the average of salaries for each pay grade relative to its midpoint, weighted by the number of staff members at each pay grade. If average salaries fall below the 98 percent threshold, the Fund is then to apply a four-factor test to assess whether salaries remain competitive in the market. If that test is not met, the Board would be expected to adjust the salary increase.

56. As set out in the 2019 CCBR decision, the “safeguard mechanism,” provides in its entirety:

### *Safeguard Mechanism*

**20. The annual compensation proposal will seek to ensure that aggregate Fund salaries remain aligned with the U.S. comparator market.** The following safeguard mechanism will assess whether the salary increase indicated by the indexation formula leaves aggregate salaries below a comparatio<sup>[Footnote 10]</sup> of 98 or above a comparatio of 102 percent of the market. The comparatio assessment will be conducted annually and will comprise three steps:

- **Step 1.** Determine the ratio of average salaries at the end of the financial year to the midpoints at the end of the previous financial year. This will determine the end-year comparatio.
- **Step 2.** Determine the ratio of average salaries at the end of the financial year to the new midpoints after adjustment of the salary structure.

- **Step 3.** Determine if the salary increase indicated by the market is sufficient to maintain or restore a comparatio in the range of 98–102 percent. If that increase would allow a comparatio in the indicated range, then management would recommend the full increase indicated by the indexation formula and that increase would be approved by the Board, subject to the international competitiveness test in year 1 of the review cycle. If that increase would not allow a comparatio in the range, then based on the considerations listed in paragraph 21, management would propose an adjustment to the salary increase as warranted to bring the comparatio into the range.

**21. Given the intention that aggregate Fund salaries should remain aligned with the comparator market, if the salary increase indicated by the indexation formula would not allow a comparatio in the indicated range, then an adjustment to the salary increase would be expected to be approved to bring the comparatio back into the range, if the Board is of the view that:**

- There is compelling evidence to suggest that the indexes do not represent general salary trends in the U.S. comparator market;
- Changes in U.S. tax policy make it likely that there will be significant increases or decreases in net salaries at the Fund at the time of the next review;
- Movements in the euro- or yen-dollar exchange rate create significant competitiveness problems or advantages for staff recruitment and/or retention that warrant remedial action prior to the next review; or
- The Fund’s recent recruitment and retention experience point to the need for an upward or downward adjustment to the salary increase indicated by the indexation formula.

**22. In year 1 of the review cycle, when there is a full review of the salary structure midpoints, the international competitiveness test would work in tandem with the safeguard mechanism.** Any downward adjustment to the payline based on the international competitiveness test has the effect of raising the average salaries relative to the adjusted payline (the comparatio), and any upward adjustment to the payline lowers the comparatio. A downward adjustment to the payline based on international competitiveness would only be permitted to the extent it does not raise the comparatio above 102 percent. If the comparatio exceeds 102 percent before a downward adjustment to the payline, then management may propose a lower salary increase. Conversely, if an upward adjustment to the payline would lower

the comparatio below 98 percent, then the proposed salary increase may be supplemented.

*Footnote 10: The comparatio measures actual salary relative to the salary range midpoints. When used for aggregate salaries, a comparatio of 100 indicates that average actual salaries are equal to the average of the midpoints—that is, average salaries are at the market.*

(Comprehensive Compensation and Benefits Review—Revised Proposed Decision, EBAP/19/104, Supp. 1, December 16, 2019, paras. 20-22.)

#### B. FY2022 Staff Compensation Decision

57. The instant case arises from the application of the safeguard mechanism in connection with the FY2022 staff compensation decision. The multi-step process that culminated in the Board’s adoption of that decision is elaborated below.

##### (1) HRD consultation with SAC

58. The staff compensation decision for FY2022 represented Year 2 of the application of the 2019 CCBR decision. In preparation for that decision, on February 21, 2021, HRD circulated for SAC’s comment a draft Board paper, that is, the paper prepared by Management to propose to the Board the annual staff compensation decision. On March 1, 2021, SAC representatives communicated their response to HRD, in which they raised both of the issues now before the Tribunal.

59. First, as to the vintage of the salary data used for calculating the comparatio, SAC observed that the calculation had been performed using mid-February rather than end-April data, which, it asserted, resulted in a “systematic bias to underestimate the gap between average salaries and average midpoints because around 20 percent (2.5 month/12 months) of salary erosion is omitted. . . . [S]uch a systematic bias is inconsistent with the new compensation framework and does not afford staff the agreed safety of the 98-102 percent corridor . . . .” (SAC Comments on Draft 2021 Compensation Paper, March 1, 2021.)

60. Second, as to the treatment of Grades B4-B5 salaries in calculating the comparatio, SAC commented: “[I]t may be that the framework is relying on B3-B5 grades with proposed average salaries above their midpoints (see Table 5) in order to bring the staff-weighted salaries of all staff into the 98-102 percent corridor. Such an outcome would be illogical because the midpoints of the B3-B5 grades are by design not expected to align with the market . . . . Therefore, the B3-B5 comparatio is not a test of *market* alignment but rather a test of alignment to a *non-market* pay line.” (*Id.*) (Emphasis in original.)

61. In addition to taking issue with the method of calculating the comparatio, SAC observed: “Most importantly, the comparatio has fallen below the 98 percent floor for the core professional group of staff A9-B2 (over 75 percent of Fund staff head count). . . . It is therefore imperative that the comparatio is restored for this group in order to bring it comfortably within the 98-102 percent

corridor. Failure to do so would simply mean that the Fund’s actual salaries at the most important grades are out of synch with the relevant markets, a situation that the safeguard mechanism was meant to prevent.” SAC additionally requested data underlying some of the calculations in the draft paper. (*Id.*)

62. SAC’s comments on the draft Board paper prompted a follow-up meeting with HRD officials on March 8, 2021. In response to SAC’s concerns in relation to the vintage of the data, HRD presented calculations run on salary data as of January 15, February 15, and March 1, 2021. Each of these calculations resulted in a comparatio of 98.1. (HRD PowerPoint Presentation for SAC, March 8, 2021, p. 1.) As to the treatment of the different salary increase applicable to Grades B4-B5 staff, HRD’s presentation showed that “[a]pplying a 1.8 percent [increase] reduces the comparatio from 98.1 to 98.0 percent.” (*Id.*, p. 6.)

(2) Management’s transmittal of finalized Paper to the Board; SAC’s Statements; Executive Directors’ requests for clarification; Management’s Responses

63. Two weeks later, on March 23, 2021, Management transmitted to the Board the finalized 2021 Review of Staff Compensation (EBAP/21/7, March 23, 2021) (“Board Paper”). The Board Paper, which used March 1 data to calculate the comparatio, proposed (a) to increase the Fund’s payline by 1.8 percent for all grades (the structural increase) and (b) to increase staff salaries by an average of 2.8 percent.<sup>8</sup> Having run the safeguard calculation based on a proposed 1.8 percent payline adjustment and a 2.8 percent total salary increase for all staff, Management additionally proposed that the 2.8 percent total salary increase apply only to staff at Grades A1-B3, with a 1.8 percent increase for Grades B4-B5 in line with the policy goal of slowing average salary growth at these uppermost grade levels. (Board Paper, pp. 8-11.)

64. In proposing the FY2022 compensation decision, the Board Paper also reaffirmed that the Fund’s compensation system is both “comparator-based” and “rules-based.” (Board Paper, p. 3.) As to the latter, it stated:

The rules-based system ensures implementation of annual salary structure adjustments (i.e., 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 judgement, within defined parameters, in setting salary levels.

(*Id.*, pp. 3-4.)

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<sup>8</sup> The Board Paper stated: “Regarding the staff salary increase, it is important to note that 2.8 percent reflects the total staff salary increase which includes both a structure and notional merit component derived from comparator organizations.” (Board Paper, “Executive Summary.”) (Emphasis omitted.)

65. The Board Paper emphasized that de-linking the salary structure adjustment from the salary increase is a “methodological change” and represented a departure from the past practice in which the “salary structure midpoints and salary increase were intrinsically linked such that the aggregate average salary approximated the aggregate average midpoint.” The safeguard mechanism was said to “mitigate the risk” of divergence of the salary structure from staff salaries if left unchecked. (*Id.*, p. 8.)

66. In presenting the three-step safeguard mechanism analysis for purposes of the FY2022 staff compensation proposal, the Board Paper included the following footnote 12, relating to the vintage of the salary data used to calculate the comparatio:

Under the new compensation system adopted in December 2019, end-fiscal year data is to be used in the safeguard mechanism and the comparatio calculation. However, as the Fund’s budget must be approved before the end of the fiscal year (cf., *Rule J-4*) and the compensation decision is necessarily a part of that, in practice the latest available staff and salary data is used in the calculations.

67. Following Management’s transmittal of the Paper to the Board, SAC followed with its own Statement to the Board (April 15, 2021) and Revised Statement (April 20, 2021). (Executive Board Meeting on 2021 Review of Staff Compensation, April 21, 2021, “Revised Statement by the Staff Association Committee.”) In its Revised Statement, SAC challenged Management’s implementation of the safeguard mechanism, questioning the “validity and the correctness” of the 98.1 percent comparatio figure presented in the Board Paper: “While we, at this stage, do not know what the exact comparatio number is, we can predict that once all the April 30 data of average staff wages are taken into account, it will likely be lower than 98.1 percent, possibly below 98 percent.” SAC further asserted: “The safeguard mechanism in the new compensation framework was designed to protect staff’s salary and competitiveness, but the safeguard is calculated using math that is inconsistent with the rules and spirit of the mechanism.” (*Id.*, pp. 1-3.)

68. In its Revised Statement to the Board, SAC additionally took issue with Management’s stated justification, as set out in footnote 12 of the Board Paper, for using non-end of fiscal year data: “The paper seems to suggest in footnote 12 that the safeguard had to be calculated in this way, in order to fulfill management’s obligations to present a budget to, and have it approved by, the Board before the beginning of the new fiscal year on May 1. But this argument does not hold water for two reasons: (i) the rules clearly state that you must use end-April data; and (ii) savings derived from the comparatio adjustment are *budget neutral* as they reflect savings that accrue within appropriated budget limits.” (*Id.*, p. 4.) (Emphasis in original.) SAC proposed to the Board that it approve a total salary increase of 3.8 percent for FY2022.

69. On April 16, 2021, twenty-three Executive Directors issued their positions on the proposed FY2022 staff compensation decision. Several requested further clarification in light of the concerns raised by SAC. As summarized by the Secretary’s Department, these concerns included “(i) that the total salary increase should be higher based on the comparatio test and inflation; (ii) the potential for wage drift and loss of competitiveness if the salary increase is not higher; and (iii) the incorrect administration of the safeguard mechanism.” (Responses to Technical Questions

Posed by Executive Directors in Advance of EBM/21/39, April 21, 2021.) (“Management’s Responses,” p. 1.)

70. As to the issue of the vintage of the data used to calculate the comparatio, Management responded to the Executive Directors’ questions as follows:

Regarding the vintage of the data, . . . it is not practical to use end-fiscal year data since the Board’s decision must be taken by the end of the fiscal year. Based on January 15, 2021 data the comparatio is estimated at 98.1; it was 98.1 based on February 15, 2021 data and 98.1 based on March 1, 2021 data, which is the data used in the staff report. *We have no reason—based on recruitment and separations data for the month of April so far—to expect the comparatio to be substantially different than a few weeks earlier.*

(*Id.*, p. 2.) (Emphasis in original.)

71. On the question of the treatment, for purposes of the comparatio, of the different salary increase for Grades B4-B5 staff, Management’s Responses, pp. 2-3, stated: “As for the use of the total salary increase (2.8 percent) in the comparatio test, this is consistent with, and required by the rules under the new compensation system. Management has some discretion over the distribution of salaries (i.e., the lower salary award to B4-B5 staff) *but staff has no discretion in the administration of the system’s rules.*” (Emphasis in original.) Management’s Responses, p. 6, further stated: “The safeguard is applied to validate the indexation formula before the measures that flatten the B4-B5 payline (i.e., 1.8 percent salary increase), because it would not be in keeping with the rules-based system if this safeguard mechanism was influenced by the margin of discretion that is applied to the B4-B5 or B3-B5 payline segments.” In a related footnote, Management stated: “As a thought experiment, the comparatio test was carried out by applying an average salary increase of 2.8 percent across grades A1-B3 and 1.8 percent for grades B4-B5. Applying the 1.8 percent increases reduces the aggregate comparatio to 98.0 percent from 98.1 percent.” (*Id.*, note 1.)

72. Management additionally stated in its Responses to Executive Directors: “If the comparatio had fallen outside the test range of 98 to 102 percent, then a series of reviews would have been initiated to determine the cause, including [the four-factor test].” The paragraph concluded: “A review is not necessary in the current context. *Moreover, we do not see any of the above factors at play that would warrant any deviations in the system and especially, to recommend that management propose a higher salary increase.*” (*Id.*, p. 2.) (Emphasis in original.)

### (3) Board Decision

73. On April 21, 2021, the Board met and unanimously approved the FY2022 staff compensation decision as proposed by Management. (Decision No. A/14313-(21/39), adopted April 21, 2021.) The Board’s decision was notified to the staff of the Fund by FUNDALL announcement on the same day. On July 1, 2021, the decision was implemented retroactive to May 1, 2021. (FUNDALL email from HRD Director, July 1, 2021.)

## DIRECT REVIEW OF REGULATORY DECISIONS

74. Pursuant to Article VI, Section 2, of the Statute of the Administrative Tribunal, an application challenging the legality of a “regulatory decision”<sup>9</sup> may be filed with the Tribunal within three months of its announcement or effective date, whichever is later. There are no channels of administrative review to exhaust in respect of a regulatory decision being challenged directly.<sup>10</sup>

75. The Fund’s Executive Board took the FY2022 staff compensation decision on April 21, 2021, with effect from May 1, 2021. (The decision was implemented retroactively on July 1, 2021.)

76. On August 2, 2021, Applicants timely filed their Applications with the Administrative Tribunal.

## SUMMARY OF PARTIES’ PRINCIPAL CONTENTIONS

### A. Applicants’ principal contentions

77. The principal arguments presented by Applicants in their written and oral pleadings may be summarized as follows:

1. In taking the FY2022 staff compensation decision, the Fund exceeded its regulatory authority by failing to apply properly the rules designed to safeguard staff salaries against erosion relative to market-based adjustments to the Fund’s overall salary structure. The Fund lacked authority to disregard or informally modify the safeguard mechanism procedures that had been formally adopted by the Board in 2019.
2. The safeguard mechanism constitutes one element of the Fund’s rules-based compensation system, which sets clearly defined procedures and parameters within which the Fund may act. All staff members are entitled to proper application of the safeguard mechanism as a matter of principle and as an integral part of having a rules-based compensation framework, which is a “fundamental and essential” element of staff employment.

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<sup>9</sup> Statute, 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.”

<sup>10</sup> See *Elkjaer et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-4 (December 28, 2021), para. 61; *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.

3. The Fund has no discretion with regard to applying the 2019 framework, including the safeguard mechanism. The only question is whether the Fund complied with those obligations in taking the FY2022 staff compensation decision.
4. In particular, the Fund misapplied the rules governing the safeguard mechanism by: (a) utilizing salary data that terminated prior to the end of the fiscal year, so that it did not reflect fully annual wage erosion from the prior fiscal year; and (b) applying an average total salary increase of 2.8 percent, which was the salary increase for Grades A1-B3 staff members but did not take account of the 1.8 percent salary increase applicable to Grades B4-B5 staff members.
5. By failing to take account of the lower salary increase applicable to Grades B4-B5 staff members, an increase that is not market-based, Management indisputably and materially inflated the salary increase in the calculation. Management acknowledged to the Board that average salaries fell to 98.0 percent of the payline midpoints when the lower salary increase applicable to Grades B4-B5 staff members was reflected in calculating the comparatio. Applying the higher salary increase of 2.8 percent instead of the actual 1.8 percent for B4 and B5 staff members inflates “aggregate Fund salaries” for purposes of the calculation and does so in a way that materially affects the safeguard calculation result.
6. The plain text of the safeguard rule is unambiguous in calling for end-fiscal year data. Rule J-9 of the Fund’s Rules and Regulations states that the Fund’s “financial year shall begin on May 1 and end on the succeeding April 30.”
7. Additionally, the clear purpose of the safeguard mechanism, that is, to reflect the full effect of annual wage erosion in the comparatio calculation, compels use of end-fiscal year salary data. Management’s use of data from an earlier point in time constitutes a breach of the applicable rule.
8. The Fund’s breaches of the governing rules were not only theoretical errors but likely materially affected the outcome of the calculation and potentially the amount and the market competitiveness of the total salary increases most staff received. Management’s use of non-end fiscal year salary data inflated the comparatio calculation. Annex 6 of the newly filed applications, which has been admitted to the record of this case, shows that using salary data through April 30, 2021 results in a comparatio of 97.99.<sup>11</sup>

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<sup>11</sup> The parties have clarified in their further submissions that the calculation shown in Annex 6 of the newly filed applications, although applying April 30, 2021 data, does not take account of the 1.8 percent salary increase applicable to Grades B4-B5 staff, but rather applies to all staff the increase of 2.8 percent applicable to Grades A1-B3 staff.



9. “[T]he true comparatio result, when both problems are corrected [by using April 30 data and accounting for the actual increases of B4-B5 staff members], falls to somewhere around 97.9 (97.93, by Applicants’ calculations) rather than the 98.1 reported to the Board. [T]hat is the difference between remaining within the safeguard corridor or falling below the floor.”
10. Management failed to consider relevant facts and to present such facts to the Board. “[E]nd-fiscal-year salary data and the actual proposed salary increase under consideration are essential facts for conducting the safeguard analysis.”
11. If the Board, in adopting the 2019 CCBR decision, believed that using end-of fiscal year data was incompatible with the budget framework prescribed by Rule J-4 of the Fund’s Rules and Regulations, it would have called for use of something other than end-of fiscal year data in the safeguard mechanism. Furthermore, nothing prohibits the Board from modifying the budget in May or June to accommodate any additional increase if called for by calculating the safeguard mechanism using April 30 data. In any event, the salary increase is implemented retroactively to May 1.
12. Management’s use of non-end of financial year salary data creates the opportunity for manipulation or at least the appearance thereof. This approach will raise the question of whether Management chose the cutoff date with an eye to reaching a particular result. “[S]ubjective decision-making has no place in an objective, rules-based compensation system.”
13. The Fund’s failure to follow the clear, binding, and nondiscretionary safeguard rule should end the analysis and result in a ruling in Applicants’ favor. Alternatively, if the Fund had discretion in implementing the safeguard mechanism, it abused that discretion by failing to consider the very facts it had adopted in 2019 as the relevant benchmarks and by applying the safeguard mechanism in a manner that conflicted with its essential purpose.
14. The fact that SAC raised its concerns to the Board did not mean that the Board had all necessary facts to inform its decision; only Management could supply these facts.
15. The Board’s adoption of the FY2022 compensation decision cannot amount to amendment of a binding rule of the 2019 CCBR, the safeguard mechanism. Until a rule has been properly amended, the Fund remains obligated to follow it.

16. Applicants seek as relief an order requiring the Fund<sup>12</sup>:

- a. to rerun the comparatio analysis mandated by the 2019 salary erosion safeguard mechanism (i) using salary data as of April 30, 2021, and (ii) accounting for the actual proposed total salary increases for FY2022, including the smaller increase for staff in Grades B4-B5, and to notify all staff members of both the data used and the results;
- b. to comply with the additional steps required under the safeguard mechanism to the extent the resulting comparatio falls below the safeguard threshold of 98 percent, and to notify all staff members of the evidence and analysis needed under these additional steps; and
- c. to the extent that such steps result in augmentation of the previously approved total salary increase, to notify all staff members of the additional total salary increase and the basis for this change.
- d. Applicants also seek 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

78. The principal arguments presented by Respondent in its written and oral pleadings may be summarized as follows:

1. The Tribunal's competence to review regulatory decisions of the Board is limited. The impugned decision "represents a reasonable exercise of the discretion vested in the Board and should be given the highest deference."
2. The Board's FY2022 staff compensation decision was taken in compliance with the Fund's revised compensation system adopted in 2019 and was fully consistent with its rules, including those governing the safeguard mechanism.
3. In applying the safeguard mechanism, it was reasonable of the Fund to interpret "at the end of the fiscal year" to mean the last segment of the year. This interpretation is consistent with the overall purposes of the Fund's compensation rules to provide predictability, consistency and transparency to salary decisions. "It is eminently reasonable to interpret 'at the end of the fiscal year' to mean such last segment of

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<sup>12</sup> The Tribunal notes that although Applicants' oral pleadings were not entirely clear and consistent as to their requests for relief, Applicants, in their written pleadings, have not requested annulment of any decision. The requests for relief set out above are those stated in the Applications. The same requests are reflected in Applicants' Reply: "[T]he Tribunal should order management to rerun its safeguard calculation and should compel management and the Board to undertake the further analysis required by the safeguard mechanism in good faith if the recalculated result falls below the safeguard corridor floor."

the fiscal year[,] as this allows for predictable, orderly and timely preparation of the budget as well as give[s] staff critical salary information at the start of the new fiscal year.”

4. To interpret the safeguard mechanism rules to require use of data through April 30 would be an “excessively formalistic and unworkable interpretation, and would pose insurmountable practical difficulties . . . .” It would be impossible, in practice, for the Board to require use of staff salary data as of April 30. Rule J-4 of the Fund’s Rules and Regulations requires that the necessary decisional documents for the annual administrative budget be submitted by Management to the Board no later than April 1 and approved by the Board before the start of the new fiscal year on May 1.
5. Management’s exercise of discretion to determine separately the salary increase for senior level staff (at B4-B-5) at a lower rate should not affect the application of a single salary increase for all staff in the comparatio calculation. It would not be in keeping with the rules-based compensation system if the safeguard mechanism were to be influenced by the margin of discretion that is applied to the uppermost pay grades. “Aggregate salaries” is qualified by the phrase “salary increase indicated by the indexation formula” in the safeguard mechanism rules.
6. The Board properly exercised its discretion in taking the FY2022 staff compensation decision. That decision was based on an appropriate consideration of relevant facts and was reasonably related to the objectives that it sought to achieve.
7. The FY2022 staff compensation decision was not improperly motivated. Applicants have not produced any evidence that the Board was motivated to reduce compensation levels below the market.
8. In taking the FY2022 staff compensation decision, the Board had the benefit of both Management’s recommendations and the views of SAC, including supplementary responses by Management to concerns raised by SAC in relation to the same elements of the implementation of the safeguard mechanism that Applicants challenge before the Tribunal. “SAC (Applicants here) had a full airing of their views before the Board, the Board demanded responses from management which they carefully considered, and the Board made a reasonable and considered judgment in adopting the FY22 Compensation Decision. In so doing, the Board conclusively extinguished any arguable controversy about the calculations complained of by Applicants . . . .”
9. Even if the comparatio were to fall outside the 98-102 percent testing range, that circumstance would trigger only a further review by the Board and not an automatic salary increase.

10. Management advised the Board that it did not see any of the four factors specified in the safeguard mechanism for further review to be at play, so as to warrant deviation from the proposed salary increase.
11. Based on its assessment of the four factors that would allow the Board to exercise discretion in the event that the comparatio fell outside the 98-102 percent safety corridor, the Board was not disposed to adopt a supplemental salary increase as proposed by SAC. Accordingly, the Board did not deem it necessary for Fund Management to rerun the comparatio calculation using end-fiscal year data or taking account of the lower salary increase proposed for Grades B4-B5 staff members.

## CONSIDERATION OF THE ISSUES

79. The Applications present the following principal questions for decision by the Tribunal. First, in recommending to the Board the FY2022 staff compensation decision, did Fund Management comply fully with the “safeguard mechanism” rules prescribed by the 2019 CCBR decision? In particular, did those rules require Management (a) to utilize salary data running through April 30, 2021, and (b) to take account of the 1.8 percent salary increase applicable only to Grades B4-B5 staff members in applying the average total salary increase, which was otherwise 2.8 percent? Second, and depending on the Tribunal’s decision on the first set of questions, would the Board have been in a position to exercise properly its discretionary authority in taking the FY2022 staff compensation decision?

### A. Framework for the Tribunal’s analysis

80. It is well established that the Tribunal’s “degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker.” *Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 99. The Tribunal has consistently held that “[t]his deference is at its height when the Tribunal reviews regulatory decisions (as contrasted with individual decisions), especially policy decisions taken by the Fund’s Executive Board.” *Ms. “J”, para. 105; Daseking-Frank et al.*, para. 46.

81. In reviewing regulatory decisions, the Tribunal distinguishes “fundamental and essential” conditions of Fund employment, which are not open to unilateral amendment, from non-fundamental and non-essential conditions of employment, which may be amended but are subject to the constraints that govern the lawful exercise of discretionary authority. *Daseking-Frank et al.*, para. 59. In reviewing those latter decisions, including staff compensation decisions, this Tribunal has looked to the standard developed by the World Bank Administrative Tribunal (“WBAT”) in *de Merode*, WBAT Decision No. 1 (1981), para. 47:

Changes 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.

Quoted in *Daseking-Frank et al.*, para. 90; *Elkjaer et al.*, para. 109.

82. The Tribunal has also recognized that the Fund, in a variety of contexts, constrains its discretionary authority by adopting rules governing the particular exercise of discretion.<sup>13</sup> In the context of a challenge to a regulatory decision affecting staff compensation, the Tribunal considers that the Fund’s obligation to adhere to its written rules will be heightened. This is so because a “fundamental and essential” condition of staff employment is that the compensation system will be “rules-based” and “comparator-based.” *Daseking-Frank et al.*, paras. 62-75. These are principles that the Fund itself has repeatedly confirmed. *See, e.g.*, ECBR decision (2006), quoted in *Daseking-Frank et al.*, para. 71; CCBR Overview Paper (2019), p. 5; Board Paper (2021), p. 3. The Board’s annual decisions setting staff salaries are therefore closely cabined by the rules-based and comparator-based character of the compensation system.

83. In this case, Applicants challenge the FY2022 staff compensation decision, which was proposed by Management and adopted by the Executive Board, following a multi-step decision-making process.

84. Accordingly, in deciding Applicants’ challenge to the FY2022 staff compensation decision, the Tribunal will scrutinize closely the Fund’s adherence to the governing rules as found in the compensation system’s current iteration, the 2019 CCBR decision, including its “safeguard mechanism.” The safeguard mechanism itself, which prescribes rules to test the proposed salary increase against the market-based adjustment to the Fund’s payline, reflects both the rules-based and the comparator-based nature of the system.

85. The Fund’s staff compensation system recognizes that there is “scope for management and the Executive Board to exercise judgement, within defined parameters, in setting salary levels.” (Board Paper, p. 3.) *See also Daseking-Frank et al.*, para. 71, quoting 2006 ECBR (“annual reviews will be conducted in accordance with an established methodology, while still allowing management and the Executive Board to exercise judgment, within defined parameters, in setting salary levels.”). As will be seen, the parties dispute how much discretion is afforded by the safeguard mechanism and how that discretion is allocated between Management and the Board. Accordingly, this case asks the Tribunal to consider whether Management and the Board, in taking

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<sup>13</sup> For example, “[w]hen the Tribunal considers a challenge to a non-conversion [of a fixed-term appointment], it will consider whether the Fund has met the requirements it has set for itself in exercising that discretionary authority.” *Mr. “RR”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-2 (December 24, 2021), para. 79 (testing lawfulness of non-conversion decision against Fund’s applicable written rules).

the FY2022 staff compensation system, struck the proper balance between the exercise of judgment and compliance with the parameters prescribed by the 2019 CCBR decision.

B. In recommending to the Board the FY2022 staff compensation decision, did Fund Management comply fully with the “safeguard mechanism” rules prescribed by the 2019 CCBR decision?

86. Applicants contend that the Fund misapplied the rules adopted in 2019 to safeguard staff salaries against erosion relative to market-based adjustments to the Fund’s overall salary structure by: (a) utilizing salary data that terminated prior to the end of the financial year, so that it did not fully reflect annual wage erosion from the prior financial year; and (b) applying a 2.8 percent average total salary increase, which was the salary increase for Grades A1-B3 staff members but did not take account of the 1.8 percent salary increase applicable to Grades B4-B5 staff members. Each of these allegations will be considered in turn.

(1) Was Fund Management required by the “safeguard mechanism” rules to utilize salary data running through April 30, 2021?

87. As set out in the 2019 CCBR decision, Step 1 of the safeguard mechanism requires the Fund to “[d]etermine the ratio of average salaries at the *end of the financial year* to the midpoints at the *end of the previous financial year*. This will determine the *end-year* comparatio”; Step 2 requires the Fund to “[d]etermine the ratio of average salaries at the *end of the financial year* to the new midpoints after adjustment of the salary structure.” (2019 CCBR decision, para. 20.<sup>14</sup>) (Emphasis added.) It is not disputed that in taking these steps in preparation for the FY2022 compensation decision, the Fund used salary data as of March 1, 2021 in its final Board Paper (and mid-February data in an earlier draft of that paper).

88. Applicants contend that the plain meaning of the words “end of the financial year” is unambiguous. Rule J-9 of the Fund’s Rules and Regulations provides: “For purposes of the Fund’s accounts and reports, its financial year shall begin on May 1 and end on the succeeding April 30.” (Adopted February 7, 1947; amended May 28, 1947, effective September 17, 1947; April 1, 1978; and May 22, 1998.) (IMF Rules and Regulations, 65<sup>th</sup> Issue, November 2019.)

89. Respondent submits that using salary data as of March 1, 2021 was a defensible approach to implementation of the safeguard mechanism because it was “eminently reasonable to interpret ‘at the end of the fiscal year’ to mean such last segment of the fiscal year[,] as this allows for predictable, orderly and timely preparation of the budget as well as give[s] staff critical salary information at the start of the new fiscal year.” This budgetary argument echoes footnote 12 of the Board Paper, which reads:

Under the new compensation system adopted in December 2019, *end-fiscal year data is to be used* in the safeguard mechanism and the comparatio

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<sup>14</sup> The safeguard mechanism rules are reproduced in their entirety *supra* at FACTUAL BACKGROUND; Safeguard Mechanism.

calculation. *However*, as the Fund’s budget must be approved before the end of the fiscal year (cf., *Rule J-4*) and the compensation decision is necessarily a part of that, *in practice the latest available staff and salary data is used in the calculations.*

(Emphasis added.)

90. The Tribunal observes that the cited footnote itself acknowledges a difference between the rule as adopted and its application “in practice” in the context of the FY2022 compensation round. Respondent has not explained, if the timing of the Fund’s budget process poses an obstacle to implementing the safeguard mechanism based on an end-of financial year standard, why the Board did not anticipate that problem and adopt a more practicable approach. The Tribunal finds Respondent’s budgetary argument unpersuasive.

91. The Tribunal further observes that the purpose of the safeguard mechanism is to ensure—on an annual basis—that Fund salaries maintain their competitiveness, given the decoupling of the salary increase decision from the market-based adjustment to the payline. Accordingly, a purposive interpretation of the governing rule also supports the conclusion that the safeguard mechanism must be implemented in such manner as to capture wage erosion experienced over the full course of the Fund’s financial year.

92. Applicants additionally point out that making the term “end of the financial year” subject to the “latest available” data renders the standard open to manipulation and abuse. Substituting a rule that enunciates in clear terms that data will be collected at the “end of the financial year” with an indeterminate standard of “latest available” data is inconsistent with the Fund’s commitment to compensation reviews that will be “. . . conducted within an agreed framework, which provides transparency to the process.” (Board Paper, p. 3.) The CCBR Overview Paper, p. 8, observed that the Fund’s rules- and comparator-based compensation system “. . . has brought predictability, consistency, and transparency to salary decisions.” (Emphasis omitted.) In the view of the Tribunal, the failure of the Fund to follow the “end of the financial year” rule as written undermines these principles and, along with them, the trust of the staff in the process. This approach is not compatible with a rules-based compensation system.

93. Accordingly, although the Fund argues that the choice of cut-off date was within Management’s discretion, the Tribunal concludes that the text and the purpose of the safeguard mechanism leave no room for Management to depart from the definition of financial year specified by Rule J-9. In recommending to the Board the FY2022 staff compensation decision, Fund Management exceeded the ambit of its discretionary authority when it interpreted the safeguard mechanism rules to permit it to utilize salary data that terminated prior to the end of the Fund’s financial year, that is, April 30, 2021. As elaborated above, there are three reasons for this conclusion: First, Rule J-9 of the Fund’s Rules and Regulations specifies that the Fund’s financial year runs from May 1 through April 30. Second, the purpose of the safeguard mechanism is to take account of a full year of wage erosion and to compare it to the previous year in setting the annual staff compensation. Third, applying the safeguard mechanism rules in an imprecise and variable manner is inconsistent with the principles of “predictability, consistency, and transparency”

(CCBR Overview Paper, p. 8) that the Fund itself acknowledges inhere in a rules-based staff compensation system.

- (2) Was Fund Management required by the “safeguard mechanism” rules to take account of the 1.8 percent salary increase applicable only to Grades B4-B5 staff members in applying the average total salary increase, which was otherwise 2.8 percent?

94. Applicants’ second allegation is that, in calculating the comparatio for the FY2022 staff compensation decision, Fund Management failed to adhere to the safeguard mechanism rules when it did not take account of the 1.8 percent salary increase applicable to Grades B4-B5 staff members in applying the average total salary increase, which was otherwise 2.8 percent. Applicants submit that “the fact the safeguard mechanism deems relevant is whether actual Fund salaries in the aggregate will remain aligned with the market-adjusted pay grade midpoints after the proposed increases take effect.” Applicants assert that Management’s treatment, in calculating the comparatio, of the lower salary increase for Grades B4-B5 staff resulted in an “overstated and fictitious aggregate salary figure for the safeguard calculation that materially inflated the resulting salary-to-midpoints ratio” and that the salaries of Grades B4-B5 staff must be treated as part of the “aggregate Fund salaries’ that the safeguard rule is designed to ensure remain properly aligned.”

95. As set out in the 2019 CCBR decision, para. 20, the “safeguard mechanism will assess whether the salary increase indicated by the indexation formula leaves aggregate salaries below a comparatio [footnote 10] of 98 or above a comparatio of 102 percent of the market.” The associated footnote states: “The comparatio measures actual salary relative to the salary range midpoints. When used for aggregate salaries, a comparatio of 100 indicates that average actual salaries are equal to the average of the midpoints—that is, average salaries are at the market.” Applicants point to the use of the word “actual” in the footnote, in support of their argument that the lower salary increase afforded Grades B4-B5 staff should be reflected in the comparatio calculation.

96. Respondent, for its part, asserts that the Fund complied with the safeguard mechanism rules in applying a 2.8 percent salary increase across-the-board to all staff for purposes of calculating the comparatio, even though Grades B4-B5 staff were to receive a 1.8 percent total salary increase. Respondent notes that the 2019 CCBR decision, para. 20, provides that the safeguard mechanism will “assess whether the *salary increase indicated by the indexation formula* leaves aggregate salaries below a comparatio [footnote 10] of 98 or above a comparatio of 102 percent of the market.” (Emphasis added.) Respondent thus contends that the safeguard mechanism requires Management to calculate the comparatio on the basis of the indexation formula, that is, *before* applying the discretionary lower salary increase to Grades B4-B5 staff.

97. It is recalled that, unlike salaries for staff members at Grades A1-B3, which are subject to a market-based increase derived from data of comparator institutions, salaries for staff members



at Grades B4-B5 are not tied to market factors but rather reflect intra-Fund considerations.<sup>15</sup> Management, in its Responses, p. 6, to technical questions posed by Executive Directors, stated: “The safeguard is applied to validate the indexation formula before the measures that flatten the B4-B5 payline (i.e., 1.8 percent salary increase), because it would not be in keeping with the rules-based system if this safeguard mechanism was influenced by the margin of discretion that is applied to the B4-B5 or B3-B5 payline segments.”

98. The question arises as to how the different—and non-market-based—approach to salary increases for Grades B4-B5 staff shall be reflected in the calculation of the comparatio, which is designed to ensure that staff salaries maintain their competitiveness relative to market comparators by testing the proposed salary increase against adjustments to the Fund’s payline. In the view of the Tribunal, the terms of the safeguard mechanism do not compel the interpretation that Applicants urge. Unlike with regard to the “end of the financial year” requirement, Applicants have not brought to the Tribunal’s attention any higher norm, such as is found in the Fund’s J-Rules, that would constrain Management’s authority to calculate the comparatio with regard to the lower actual salary increase for B4-B5 staff members in the manner that it did.

99. The Tribunal accordingly concludes, having regard for the safeguard mechanism text, that it was within Management’s discretion to calculate the comparatio by using the 2.8 percent salary increase applicable to the vast majority of Fund staff, even while those at Grades B4-B5 were to receive an increase of 1.8 percent. There may be other approaches that would better align the safeguard mechanism’s purpose of ensuring the market competitiveness of Fund salaries with its methodology in relation to a segment of Fund staff that is not subject to market-based increases. On this record, however, the Tribunal cannot say that it was unreasonable of the Fund to have made the choice that it did. *See Ms. “G,” Applicant and Mr. “H,” Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 80.

100. The Tribunal is not persuaded that the safeguard mechanism rules required Management to take account of the 1.8 percent salary increase applicable only to Grades B4-B5 staff members in performing the safeguard analysis or that it abused its discretion in interpreting this element of the safeguard mechanism as it did. This decision fell within the “scope for management and the Executive Board to exercise judgement, within defined parameters, in setting salary levels.” (Board Paper, p. 3.)

101. At the same time, the Tribunal also takes note that the record of the case shows that Fund Management, when queried by Executive Directors, reran the comparatio to take account of the percent salary increase actually applied to Grades B4-B5 staff, an exercise it referred to as a

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<sup>15</sup> *See supra* FACTUAL BACKGROUND; 2019 Comprehensive Compensation and Benefits Review (“CCBR”) decision. At the most senior level pay grades, the payline midpoints are set using an interpolation between the B2 midpoint and the salary of the Deputy Managing Directors “[s]ince market data are not obtained for grades B3-B5 and the payline at these levels is constrained by management salaries.” (Comprehensive Compensation and Benefits Review–Revised Proposed Decision, EBAP/19/104, Supp. 1, December 16, 2019, para. 23.)

“thought experiment.” The result was a comparatio of 98.0. (Responses to Technical Questions Posed by Executive Directors in Advance of EBM /21/39, note. 1.)<sup>16</sup>

C. Given Management’s failure to comply fully with the “safeguard mechanism” rules, was the Board in a position to exercise properly its discretionary authority in taking the FY2022 staff compensation decision?

102. The Tribunal has concluded above that Fund Management failed to comply fully with the rules governing the safeguard mechanism when it sent to the Board its FY2022 staff compensation proposal, based on a calculation of the comparatio utilizing salary data that terminated before the end of the Fund’s financial year. The next question is, given Management’s flawed implementation of the safeguard mechanism, was the Board in a position to exercise properly its discretionary authority in taking the FY2022 staff compensation decision?

103. Respondent advances the following arguments in support of its position that the Board properly exercised its discretion in taking the FY2022 staff compensation decision. First, Management fully complied with the safeguard mechanism rules. Second, in taking the challenged decision, the Board considered and rejected arguments presented by SAC that are the same as those that Applicants now raise before the Tribunal. Third, irrespective of the outcome of Management’s safeguard analysis, the Board properly exercised its discretion in deciding not to approve any greater increase to staff salaries for FY2022. The Tribunal has disposed of the first contention above. It remains to address the other two.

104. It is not disputed that the Board, in taking the FY2022 staff compensation decision, had before it the views of SAC (through its Statement and Revised Statement to the Board) and of Management (through its Board Paper and its Responses to technical questions posed by Executive Directors) on the controversy associated with the use of non-end of financial year data. Respondent submits that, following this consultative process, the Board “made a reasonable and considered judgment in adopting the FY22 Compensation Decision.” Respondent further asserts that “[i]n so doing, the Board conclusively extinguished any arguable controversy about the calculations complained of by Applicants . . . .” The Fund states that, having considered both SAC’s concerns and Management’s responses, “the Board adopted this practice [of using “latest available” data] as an authentic interpretation of the 2019 CCBR decision.”

105. The Tribunal has emphasized that “[w]hen 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.” *Elkjaer et al.*, para. 128. The consultative process does not, however, excuse non-compliance with applicable rules. Nor does it supplant the formal amendment of those rules. Because the Tribunal has concluded that Management did not have discretion to deviate from the requirement to use end-of financial year data in implementing the safeguard mechanism, the fact that the Board was informed of the

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<sup>16</sup> The same response had been provided by HRD to SAC at an earlier stage of the consultations. *See supra* FACTUAL BACKGROUND; FY2022 Staff Compensation Decision.

controversy, and considered it in the decision-making process, is not dispositive of the question before the Tribunal.

106. The Tribunal further rejects any assertion that, by its FY2022 staff compensation decision, the Board amended the 2019 CCBR decision. The process of amending the 2019 CCBR decision must surely be more formal than is suggested by Respondent.

107. The proper exercise of discretionary authority requires that a decision is taken on the basis of relevant facts, *de Merode*, para. 47, and in accordance with the rules adopted to govern that process. Here, the Board identified in the 2019 CCBR decision what facts would be relevant to assessing whether a particular annual increase will continue to maintain the market competitiveness of staff salaries. Those facts, as the Tribunal has confirmed above, include performing the comparatio calculation utilizing salary data running through the end of the Fund's financial year.

108. Applicants point out that SAC's having raised concerns to the Board did not mean that the Board had before it all the facts necessary to inform its decision; only Management could supply those facts. In its Responses to technical questions posed by Executive Directors, p. 2, Management advised: "Based on January 15, 2021 data the comparatio is estimated at 98.1; it was 98.1 based on February 15, 2021 data and 98.1 based on March 1, 2021 data, which is the data used in the staff report. *We have no reason—based on recruitment and separations data for the month of April so far—to expect the comparatio to be substantially different than a few weeks earlier.*" (Emphasis in original.) Documentation that is now part of the record before the Tribunal suggests, however, that the comparatio did drift downward in the final month of the financial year. Having considered the evidence in the record, the Tribunal concludes that the Board, in taking the FY2022 staff compensation decision, did not have all of the necessary facts and, arguably, that the Board was misdirected on the relevant facts.

109. As underscored by the parties at oral argument, what is at stake in this dispute is whether the Board's discretionary authority to approve a supplemental salary increase would have been triggered had Management complied fully with the safeguard mechanism rules. Would the comparatio have fallen below the safeguard floor? Applicants emphasize that they do not question that the Board had discretion, subject to constraints on the lawful exercise thereof, in taking the ultimate decision as to whether to approve a supplemental salary increase for FY2022. One of those constraints was Management's full compliance with the safeguard mechanism rules.

110. Finally, Respondent seeks to persuade the Tribunal that any possible flaw in Management's implementation of the safeguard mechanism would amount to "harmless error" because the Board was not disposed to approve a supplemental salary increase for FY2022 irrespective of the outcome of the safeguard analysis. Thus, submits Respondent, there was no basis for the Board to ask HRD to rerun the safeguard calculation. The Tribunal finds this argument is also unavailing.

111. Respondent contends that even if Management's calculation had resulted in a comparatio falling below the safeguard threshold, the Board nonetheless would have properly exercised its discretion in deciding not to supplement the proposed salary increase for FY2022, given the four factors set out in the further provisions of the safeguard mechanism (2019 CCBR decision, para.

21). Management’s Responses, p. 2, to the technical questions posed by Executive Directors make clear, however, that Management did not undertake as part of its FY2022 compensation proposal an analysis of the four factors because it considered that such a review was “not necessary in the current context,” that is, because Management had calculated that the comparatio was within the safeguard corridor. At the same time, Management commented: “*Moreover, we do not see any of the above factors at play that would warrant any deviations in the system and especially, to recommend that management propose a higher salary increase.*” (*Id.*, p. 2.) (Emphasis in original.) The record shows that this comment, however, was not supported by any formal assessment of the four factors by Management. The Board itself did not perform any analysis of those factors for the purpose of taking the FY2022 staff compensation decision.

112. The safeguard mechanism sets out a sequential process by which, first, Management is to calculate the comparatio in conformity with prescribed rules and, second, if the comparatio falls outside the safety corridor, the Board, after applying the four-factor test to assess market competitiveness, may exercise its discretion to adjust the salary increase. In exercising its discretionary authority, the Board was bound by the rules it prescribed for Management to follow as a prerequisite to the Board’s taking the ultimate decision on annual staff compensation. In promulgating that multi-step decision-making process, the Board constrained the exercise of its own discretionary authority.

113. The Fund’s staff compensation system recognizes that there is “scope for management and the Executive Board to exercise judgement, within defined parameters, in setting salary levels.” (Board Paper, p. 3.) Those parameters included that Management will first carry out the safeguard analysis consistently with its governing rules. Accordingly, in the light of the Tribunal’s conclusion that Fund Management failed to comply fully with the rules governing the safeguard mechanism, the Tribunal further concludes that the Board consequently was not in a position to exercise properly its discretionary authority in taking the FY2022 staff compensation decision.

#### CONCLUSIONS OF THE TRIBUNAL

114. For the reasons elaborated above, the Tribunal concludes as follows:

115. In recommending to the Board the FY2022 staff compensation decision, Fund Management failed to comply fully with the rules governing the safeguard mechanism, as prescribed by the 2019 CCBR decision. Management exceeded its authority to “exercise judgement, within defined parameters” (Board Paper, p. 3) when it calculated the comparatio using salary data that terminated prior to the “end of the financial year.” That approach was inconsistent with the text and the purpose of the safeguard mechanism rules.

116. The Tribunal, however, does not sustain Applicants’ additional allegation that Management failed to comply with the safeguard mechanism rules in respect of its treatment of the lower salary increase applicable to Grades B4-B5 staff.

117. The safeguard mechanism sets out a sequential process by which, first, Management is to perform the safeguard analysis within prescribed rules and, second, if the comparatio falls outside the safety corridor, the Board, after applying a four-factor test to assess market competitiveness,

may exercise its discretion to adjust the salary increase. The Board's lawful exercise of its discretionary authority in taking the FY2022 staff compensation decision is accordingly predicated on Management's full compliance with rules that the Board established when it adopted the 2019 CCBP decision. Given Management's flawed implementation of those rules, the Board was not in a position to exercise properly its discretionary authority in taking the FY2022 staff compensation decision.

## REMEDIES

118. The Tribunal turns to the question of what remedy it shall prescribe. The Tribunal's remedial authority in respect of a challenge to a regulatory decision is found in Article XIV, Section 3, of the Statute, which states:

If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.

119. In their Applications, Applicants seek as relief an order requiring the Fund:

1. to rerun the comparatio analysis mandated by the 2019 salary erosion safeguard mechanism (i) using salary data as of April 30, 2021, and (ii) accounting for the actual proposed total salary increases for FY2022, including the smaller increase for staff in Grades B4-B5, and to notify all staff members of both the data used and the results;
2. to comply with the additional steps required under the safeguard mechanism to the extent the resulting comparatio falls below the safeguard threshold of 98 percent, and to notify all staff members of the evidence and analysis needed under these additional steps; and
3. to the extent that such steps result in augmentation of the previously approved total salary increase, to notify all staff members of the additional total salary increase and the basis for this change.

120. The Tribunal observes that the remedial authority granted by its Statute empowers the Tribunal to order annulment of a challenged regulatory decision. In this case, however, the principal relief that Applicants seek is to correct the effects of Management's failure to comply fully with the rules governing the safeguard mechanism. Applicants have emphasized, including at oral argument, that the case is about "process," that is, that Fund Management follow the process prescribed by the safeguard mechanism, so that the Board will be enabled to exercise properly its discretionary authority in taking the staff compensation decision.

121. Given that Article XIV, Section 3, of the Statute authorizes the Tribunal to annul a regulatory decision, the Tribunal considers, in the singular circumstances of this case, that a

remedy short of annulment is appropriate. This is so because the failure that the Tribunal has found affects but one component of a multi-step decision-making process, culminating in the challenged regulatory decision. Annulment of the final step in that process, that is, annulment of the FY2022 staff compensation decision, would be premature given: the terms of Applicants' requests for relief; the interests of the staff and the institution; and the deference to be afforded to the Board before it has had the opportunity to make a properly informed decision.

122. The Tribunal accordingly concludes that the appropriate remedy in this case is to place the Board in a position to exercise properly its discretionary authority in relation to the FY2022 staff compensation decision, and for the Board to take any further steps as may, in its view, be warranted.

123. Accordingly, the Tribunal orders Management to rerun the safeguard mechanism calculation for the FY2022 compensation decision on the basis of salary data concluding at the end of the Fund's financial year, that is, April 30, 2021. (Although the Tribunal does not sustain Applicants' additional allegation that Management failed to comply with the safeguard mechanism rules by not including the lower salary increase applicable to Grades B-4-B5 staff members in calculating the comparatio, Management could nonetheless consider, in recalculating the comparatio for the FY2022 compensation decision, whether to take account of the actual salary increase to Grades B4-B5 staff members of 1.8 percent.) If the recalculated comparatio falls below the safeguard threshold of 98 percent, then the Board shall consider whether any adjustment to staff salaries, retroactive to FY2022, is warranted, following an analysis of the four factors set out in paragraph 21 of the 2019 CCBR decision. The Fund shall take all measures necessary to implement any adjustment to staff salaries as it would determine following the rerun. The Fund shall additionally notify all staff members that it has taken the above steps and the results thereof, along with the essential elements of the underlying analysis, in accordance with its commitment to transparency in the compensation review process.

A. Legal fees and costs

124. As part of the Tribunal's remedial authority, Article XIV, Section 4, of its Statute provides for awards of legal fees and costs as follows:

If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

125. In accordance with Rule IX (5) of the Tribunal's Rules of Procedure, Applicants have submitted with the Reply documentation supporting their fee request. That request is considered together with Applicant's Supplementary Request for Costs, filed following the oral proceedings in the case. The Fund has objected to the award of any legal fees or costs to Applicants on the ground that they should not prevail on their Applications in whole or in part.

126. Having considered the representations of the parties and the criteria set out in Article XIV, Section 4, of the Statute, the Tribunal concludes that Applicants have substantially prevailed on their complaint, on a question of significance to the staff of the Fund as a whole. Accordingly, the Tribunal awards Applicants the full amount of attorneys' fees and costs incurred in the case, in the sum of \$28,987.50.

## DECISION

### FOR THESE REASONS

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

1. Management failed to comply fully with the rules governing the safeguard mechanism, as prescribed by the 2019 CCBR decision, when it calculated the comparatio using salary data that terminated prior to the “end of the financial year.”
2. To correct the effects of that decision, Management shall rerun the safeguard mechanism calculation for the FY2022 compensation decision on the basis of salary data concluding at the end of the Fund’s financial year, that is, April 30, 2021.
3. The Tribunal does not sustain Applicants’ additional allegation that Management failed to comply with the safeguard mechanism rules in respect of its treatment, for purposes of calculating the comparatio, of the lower salary increase applicable to Grades B4-B5 staff members.
4. In recalculating the comparatio for the FY2022 compensation decision, Management could nonetheless consider whether to take account of the actual salary increase to Grades B4-B5 staff members of 1.8 percent.
5. If the recalculated comparatio falls below the safeguard threshold of 98 percent, then the Board shall consider whether any adjustment to staff salaries, retroactive to FY2022, is warranted, following an analysis of the four factors set out in paragraph 21 of the 2019 CCBR decision.
6. The Fund shall take all measures necessary to implement any such adjustment to staff salaries.
7. The Fund shall notify all staff members that it has taken the above steps and the results thereof, along with the essential elements of the underlying analysis, in accordance with its commitment to transparency in the compensation review process.
8. The Fund shall pay Applicants \$28,987.50, which is the total amount of legal fees and costs they have incurred in the case.



Nassib G. Ziadé, President

Edith Brown Weiss, Judge

Andrew K.C. Nyirenda, Judge

*/s/*

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Nassib G. Ziadé, President

*/s/*

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Celia Goldman, Registrar

Washington, D.C.  
January 30, 2023