ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2002-3

Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent

Introduction

1. On December 16, 17, and 18, 2002, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "G", a staff member of the Fund, and in which Mr. "H", also a member of the staff, was admitted as an Intervenor.

2. Ms. "G", a staff member of the Fund employed at its Washington, D.C. headquarters, is a national foreign to the United States holding lawful permanent resident ("LPR")[1] status. She contests the denial of her request for an exception to the Fund's policy governing expatriate benefits. That policy, as amended by the Fund's Executive Board effective in 2002, extends expatriate benefits to current and newly appointed Fund staff who are U.S. LPRs on the condition that they relinquish their LPR status in favor of obtaining a G-4 visa. Applicant sought, and was denied, an exception to the policy to allow her to receive expatriate benefits while retaining her LPR status. Ms. "G" and Mr. "H", who has been admitted as an Intervenor in the case, contend that the amended policy impermissibly discriminates among categories of Fund staff and that exceptions should be drawn to the policy to correct the effects of that discrimination.

The Procedure

3. On July 2, 2002, Ms. "G" filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on the following day. On July 10, 2002, the

[1] Lawful permanent residents of the United States ("LPRs") hold Permanent Resident ("PR") visas, which are also known as Resident Alien ("RA") visas or "green cards." For simplicity, the term "LPR" is used herein, consistent with the Fund's usage in Staff Bulletin No. 02/2 (January 11, 2002).

Registrar issued a summary of the Application within the Fund, pursuant to Rule XIV, paragraph 4 of the Rules of Procedure which provides:

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

4. On August 1, 2002, Mr. "H", also a member of the staff of the Fund, having been so notified of the pending case, filed an Application for Intervention under Rule XIV[2] of the Tribunal's Rules of Procedure. Pursuant to paragraph 3 of that Rule, on August 2, 2002, the Application for Intervention was transmitted to both Applicant and Respondent, and each was accorded, simultaneously, thirty days in which to present views as to the admissibility of Mr. "H"'s Application for Intervention.

5. Following an inquiry from the Fund seeking clarification as to whether the filing of the Application for Intervention suspended the deadline for submission of the Answer, the President of the Administrative Tribunal directed the parties that Respondent's Answer would remain due, as usual, forty-five days from the transmittal of the Application, but that

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[2] Rule XIV provides:

"*Intervention*

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

2. The rules regarding the preparation and submission of applications specified above shall apply *mutatis mutandis* to the application for intervention.

3. Upon ascertaining that the formal requirements of this Rule have been complied with, the Registrar shall transmit a copy of the application for intervention to the Applicant and to the Fund, each being entitled to present views on the issue of intervention within thirty days. Upon expiration of that deadline, whether or not the parties have replied, the President, in consultation with the other members of the Tribunal, shall decide whether to grant the application to intervene. If intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party.

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

the Answer would be held in the Office of the Registrar of the Tribunal until the matter of the admissibility of the Application for Intervention was resolved.[3]

6. Respondent filed its Answer to Ms. "G"'s Application on August 19, 2002.[4]

7. On September 18, 2002, following consideration of the views of the Applicant and Respondent as to the admissibility of Mr. "H"'s Application for Intervention, the President of the Administrative Tribunal, in consultation with its other members, decided to admit the Intervention, and the parties were so notified. Consistent with Rule XIV's requirement that an intervenor "participate in the proceedings as a party," the previously submitted pleadings on the merits, i.e. Ms. "G"'s Application and the Fund's Answer, were transmitted to Mr. "H". The Applicant and the Intervenor each were given thirty days in which, simultaneously, to file a Reply to the Fund's Answer.

8. The Intervenor submitted his Reply on October 17, 2002, and the Applicant submitted her Reply on October 18, 2002. The Fund's Rejoinder was filed on November 20, 2002.

9. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.[5]

The Factual Background of the Case

The relevant facts may be summarized as follows.

10. Ms. "G" has been continuously employed by the Fund since 1994, serving initially as a contractual employee, later as a fixed-term staff member, and, since 1999, as a regular staff member of the Fund. At the time that Ms. "G" was first employed by the Fund in 1994, she was a lawful permanent resident ("LPR") of the United States and remains in that visa status today. According to Applicant, at the time of her employment by the Fund, she was living in the U.S. on a temporary basis for the purpose of seeking work, while at the same time maintaining a residence in her home country, in which she had acquired earlier work experience. As of the time of her Application to the Administrative Tribunal, Ms. "G" was 46 years of age.

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[3] The President's action was taken pursuant to his residual powers under Rule XXI, paras. 2 and 3 to modify the application of the rules, including time limits thereunder, and to deal with any matter not expressly provided for in the Rules.

[4] As the Answer did not comply fully with the requirement of Rule VIII, paragraph 1 to annex all documents referred to in the Answer, Respondent was given until September 4, 2002 to supplement the Answer, which was done on August 23, 2002.

[5] Article XII of the Tribunal's Statute provides that the Tribunal shall "… decide in each case whether oral proceedings are warranted." Rule XIII, paragraph 1 of the Rules of Procedure provides that such proceedings shall be held "… if the Tribunal decides that such proceedings are necessary for the disposition of the case."

11. In 1998, when considering acceptance of the fixed-term appointment offered by the Fund, Ms. "G" raised with representatives of the Human Resources Department ("HRD") the matter of expatriate benefits. She expressed dissatisfaction that her LPR status rendered her ineligible for such benefits and she attempted to negotiate special provision in her letter of appointment to compensate for the lack of those benefits and the costs associated with maintaining ties with her home country and educating her children in her language and culture. Ms. "G" was advised that no exceptions could be made to the policy and, accordingly, no consideration could be given to her request for provision for special compensation. Ms. "G" apparently took no steps to contest that decision.

12. As discussed in greater detail below, in January 2002, the Fund amended, in certain respects, the eligibility criteria for receiving expatriate benefits. Unlike the previous policy, the amended policy makes such benefits available to staff members currently in LPR status, on the condition that they relinquish their LPR status in favor of G-4 visa status. Under the United States immigration laws, G-4 visa status is provided specifically to employees of international organizations and only for the duration of their employment. Other provisions of the immigration laws permit G-4 visa holders, upon completion of at least 15 years of employment *in that visa status*, to convert to LPR status. An individual with LPR status may remain in the United States indefinitely and seek employment with private employers.

13. Following notification to the staff via Staff Bulletin No. 02/2 (January 11, 2002) of the change in the Fund's policy on eligibility for expatriate benefits, on April 9, 2002 Ms. "G" wrote to an official of the Fund's Human Resources Department requesting an exception to the recently adopted amendment so that she might receive expatriate benefits without giving up her LPR visa status. Applicant noted that she sought the exception "...principally to rectify the discrimination created by the Amendment."

14. Ms. "G" set forth a number of arguments in favor of her position, similar to those she now presents to the Administrative Tribunal. First, contended Ms. "G", the current policy discriminates against her vis-à-vis other staff members with LPR status, who, having begun work for the Fund before a policy change in 1985, receive expatriate benefits while maintaining their LPR visa status because they have been "grandfathered" under the former policy, which used nationality as the basis for determining eligibility for expatriate benefits. Second, in Ms. "G"'s view, the policy discriminates against mid-career LPR staff such as herself vis-à-vis mid-career G-4 staff because if mid-career LPR staff now relinquish that visa status in favor of G-4 status they may not be able to attain 15 years of employment in G-4 status before retirement age, so as to avail themselves of the opportunity provided under (currently applicable) U.S. law to regain LPR status following separation from the Fund. As a corollary to this argument, Ms. "G" also presented the view that her career development might suffer unfairly because there would be a disincentive for her to take Fund assignments overseas, as these would not count toward the 15-year requirement. Finally, Ms. "G" challenged the underlying policy of offering expatriate benefits on the basis of visa status, asserting that the distinction between LPR and G-4 status may not correlate with the goal of expatriate benefits to compensate for the additional costs of maintaining contacts with one's

home country. In Ms. "G"'s view, the degree of "cultural proximity" to one's home country or the degree of one's permanence in the U.S. may not be reflected by visa status.

15. Ms. "G"'s April 9, 2002 request for exceptional treatment was referred to another officer in HRD who advised Ms. "G" by memorandum of April 12, 2002 of the denial of her request. The denial explained that the policy, approved by the Fund's Executive Board, does not grant any authority to management to make exceptions and is to be applied uniformly to all staff members. In addition, the memorandum noted that the arguments Ms. "G" had raised in her request for exception to the policy were ones that were discussed, and ultimately rejected, by the Fund during the formulation of the 2002 amendment to its expatriate benefits policy.

The Channels of Administrative Review

16. On May 6, 2002, Ms. "G" addressed a written request for administrative review to the Director of the Fund's Human Resources Department. By memorandum of May 20, 2002, the Director affirmed the denial of Ms "G"'s April 9 request for an exception to the expatriate benefits policy. The Human Resources Director reaffirmed that the Executive Board had not authorized management to make exceptions to the newly adopted policy and rejected, in the following terms, Ms. "G"'s contentions that the policy is discriminatory. While acknowledging that "... an intention to sever ties with one's home country cannot be inferred automatically from possession of an RA visa," the Director explained:

> "... the Fund cannot offer expatriate benefits to every staff member for reasons of costs and to remain consistent with the policy objective of these benefits. The Fund must draw a line somewhere. Any eligibility criteria will, by necessity, differentiate among groups of staff, and the Executive Board concluded that the most reasonable place to draw the line is to provide expatriate benefits to any staff member who is not a permanent resident or citizen of the duty station country, including allowing permanent residents who relinquish that status and obtain a G-4 visa to become eligible for such benefits.
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> ....
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> All staff who are not U.S. citizens have the option to obtain G-4 visas and thereby gain eligibility for expatriate benefits. Therefore, similarly situated staff are being treated in a like manner, and this cannot be considered discriminatory. The differential compensation, as between staff who are eligible for expatriate benefits and those who are not, reflects the disadvantages faced by G-4s vis-à-vis their colleagues who are U.S. citizens or permanent residents, and are appropriate to the recruitment and retention goals of the Fund."

17. The Director's decision also expressed the view that difficulties in regaining LPR status that result from converting to G-4 status stem from the operation of U.S. law, not from

the Fund's policy. Finally, it was observed that "grandfathering" of staff under a pre-existing policy is a commonly recognized practice when a change in rules would otherwise abolish a benefit enjoyed by a staff member.

18. Following the May 20, 2002 decision of the Director of Human Resources, Ms. "G" filed her Application with the Administrative Tribunal on July 2, 2002.

19. It has not been disputed that Applicant has fulfilled the requirement of Article V, Section 1[6] of the Tribunal's Statute to exhaust all available channels of administrative review before filing an application with the Administrative Tribunal. It is noted that on July 16, 2002, following the filing of her Application, Applicant filed a Grievance with the Fund's Grievance Committee in order to preserve her right to review in that forum, in the event that exhaustion of that procedure were required.

20. The Fund took the position in the Grievance Committee that the Committee did not have jurisdiction over the matter, as Applicant presented a challenge to a decision of the Fund's Executive Board, a matter which is expressly excluded from the Grievance Committee's jurisdiction under GAO No. 31, Rev. 3 (November 1, 1995).[7] Subsequently, the Grievance Committee dismissed Ms. "G"'s Grievance on that basis.[8]

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[6] Article V, Section 1 provides:

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

[7] Section 4 of GAO No. 31 prescribes the Grievance Committee's jurisdiction as follows:

> *"Section 4. Jurisdiction of the Grievance Committee*
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> 4.01 *Committee's Jurisdiction.* Subject to the limitations set forth at Section 4.03, the Grievance Committee shall have jurisdiction to hear any complaint brought by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service.
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> ….
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> 4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to (i) a decision of the Executive Board; (ii) staff regulations as approved by the Managing Director; or (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan."

[8] The case of Ms. "G" is similar in form to the type of dispute reviewed in Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), i.e. a challenge to denial of a

(continued)

The Intervention of Mr. "H"

21. As noted *supra*, on August 1, 2002, Mr. "H", a member of the staff of the Fund, filed an Application for Intervention in the case of Ms. "G" pursuant to Rule XIV.[9] Mr. "H", like Ms. "G", is a national foreign to the United States with LPR visa status employed at the IMF's Washington, D.C. headquarters. Mr. "H" first joined the Fund in 1990 when he was hired on a contractual basis, in which capacity he served until 2001 when he was appointed as a fixed-term member of the staff. Previously, Mr. "H" had been employed with the World Bank. As of the time of the Application for Intervention, he was 54 years of age.

22. On September 18, 2002, following consideration of the views of the parties, the President, in consultation with the Associate Judges, decided to admit Mr. "H"'s Application for Intervention. The basis for that decision is reviewed below.

23. The admissibility of an application for intervention is governed by Article X, Section 2 (b) of the Statute and Rule XIV, paragraph 1 of the Rules of Procedure. Article X, Section 2 (b) of the Statute of the Administrative Tribunal provides:

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request for exception to a generally applicable policy. In Mr. "R", the applicant had sought review by the Grievance Committee *before* filing his application with the Administrative Tribunal. The Grievance Committee dismissed the grievance for lack of jurisdiction, on the basis that Mr. "R"'s complaint represented a challenge to a Fund policy rather than a challenge to "... a decision ... inconsistent with Fund regulations governing personnel and their conditions of service." (GAO No. 31, Section 4.01.) Thereafter, Mr. "R" sought review by the Tribunal. (*See* Mr. "R", paragraph 17.)

[9] Rule XIV provides in its entirety:

"*Intervention*

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

2. The rules regarding the preparation and submission of applications specified above shall apply *mutatis mutandis* to the application for intervention.

3. Upon ascertaining that the formal requirements of this Rule have been complied with, the Registrar shall transmit a copy of the application for intervention to the Applicant and to the Fund, each being entitled to present views on the issue of intervention within thirty days. Upon expiration of that deadline, whether or not the parties have replied, the President, in consultation with the other members of the Tribunal, shall decide whether to grant the application to intervene. If intervention is admitted, the intervenor shall thereafter participate in the proceedings as a party.

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

> "2. Subject to the provisions of this Statute, the members of the Tribunal shall, by majority vote, establish the Tribunal's Rules of Procedure. The Rules of Procedure shall include provisions concerning:
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> ...
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> b. intervention by persons to whom the Tribunal is open under Section 1 of Article II, whose rights may be affected by the judgment."

24. Rule XIV, paragraph 1 of the Rules of Procedure provides in pertinent part:

> "1. Any person to whom the Tribunal is open under Article II, Section 1 of the Statute may, before the closure of the written pleadings, apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given by the Tribunal."

25. As the Tribunal noted in Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent, Judgment No. 2001-2 (November 20, 2001), paragraph 49, there are two statutory requirements for intervention in the IMF Administrative Tribunal. First, the intervenor must be a person who is within the Tribunal's jurisdiction *ratione personae*. Second, the intervenor must have a right that may be affected by the judgment to be given by the Tribunal.

26. The views of Applicant and Respondent with respect to the admissibility of the Application for Intervention may be summarized as follows.

27. Applicant opposed granting the Application for Intervention on the basis that she did not consider the intervention to be in her interest. Specifically, she asserted that the Application for Intervention raised issues that she did not wish to raise and that the intervention of Mr. "H" would add another layer of procedures and hence an additional burden for her as a litigant, not matched by any obvious benefits. Applicant did not address the statutory requirements for intervention or consider whether Mr. "H" had met these requirements.

28. Respondent, by contrast, concluded that, on balance, it did not object to the Tribunal's granting Mr. "H"'s Application for Intervention in the case. At the same time, Respondent suggested that the Administrative Tribunal has discretion to deny an application for intervention when the prospective intervenor has only an "indirect" interest in the outcome of the case. In such circumstances, maintained the Fund, the Tribunal should weigh the following factors to determine whether or not the intervention should be granted: a) the timing of the application for intervention, in terms of whether a party would be prejudiced by delay or "hampered in their arguments;" b) the "relatedness" of the intervenor's factual and legal situation to that of the applicant and the degree to which resolution of the original claim might be complicated by the intervention; c) the extent to which the intervenor's situation and arguments are so similar to those of the applicant that they are "...simply duplicative or

cumulative...such that no reasonable purpose is served by permitting intervention;" and d) any potential prejudice to the applicant for intervention were his application to be denied.

29. Applying its proposed test to the present case, Respondent observed that Mr. "H" submitted his Application for Intervention relatively early in the proceedings, before the Fund had filed its Answer. In addition, in Respondent's view, Mr. "H"'s argument of age discrimination is but a different expression of Ms. "G"'s own theory of the case. Accordingly, admission of the intervention, asserted Respondent, would not complicate resolution of the case. On the other hand, argued the Fund, consideration of the two other factors (whether the potential intervenor's claims are duplicative of the applicant's and whether the applicant for intervention would be prejudiced by denial of his application) weighed against admission of the intervention. In Respondent's view, Mr. "H"'s

> "...only real interest in this case is as a member of the group which stands to benefit from a judgment in favor of Ms. ["G"]. Indeed, it is difficult to see how he would suffer any prejudice if he is not permitted to intervene, because his rights are adequately represented by Ms. ["G"]. Thus, it would be within the Tribunal's discretionary judgment to deny intervention, as Mr. ["H"] would still be entitled to pursue his own application with the Tribunal should the outcome of this case be unfavorable to the Applicant."

30. Respondent concluded that, on balance, Mr. "H"'s Application for Intervention should be granted in the interest of judicial economy, considering the timeliness of its filing and the similarity of his claims to those of the Applicant.

31. In the view of the Tribunal, it is not disputed that Mr. "H", a member of the staff of the Fund, is a person to whom the Tribunal is open under Article II, Section 1 of the Statute.[10] In addition, he has a right that may be affected by the judgment of the Tribunal. Like the Applicant, Mr. "H" has LPR status and would be affected by any decision taken by the Tribunal with respect to the legality of the expatriate benefits policy.

32. The Tribunal did not find persuasive Respondent's contention that the Tribunal had discretion to deny the Application for Intervention because Mr. "H" would be only "indirectly" affected by the judgment of the Tribunal in Ms. "G"'s case. First, Respondent presented no basis, e.g. in the legislative history of the IMFAT Statute or in the jurisprudence

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[10] Article II, Section 2 (c) (i) provides:

> "c. the expression 'member of the staff' shall mean:
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> > (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff."

of other international administrative tribunals, for its view that the Tribunal is vested with discretion to deny an application for intervention in the circumstance that the prospective intervenor may be only "indirectly" affected by the judgment. Second, the contention that Mr. "H"'s interest in the outcome of the case is only "indirect" was not persuasive. While it is true that, pursuant to Article XIV of the Statute,[11] Mr. "H" would be in the class of persons who would benefit from a favorable outcome in Ms. "G"'s case even without the intervention, that fact did not serve as a viable argument for denying an application for intervention. Indeed, that the prospective intervenor would be affected by such an outcome supported the conclusion that he should be admitted as an intervenor and thereby granted the opportunity to attempt to persuade the Tribunal of his views on the matter.

33. It may also be observed that the standard "may be affected" by the judgment is a broad one. Hence, the intervenor's interests need not be *determined* by the judgment but merely *affected* by it. Additionally, the Fund's position that Mr. "H" would be entitled to pursue his own application with the Tribunal should the outcome of the case be unfavorable to Ms. "G" may not be realistic. While a judgment is *res judicata* only with respect to the actual parties, in the case of a challenge to a regulatory decision, the precedent established would affect any future challenge on similar grounds to the policy at issue.

34. Finally, Respondent's contention that the Tribunal has discretion to deny an application for intervention on the basis that it is merely duplicative of the claims of the applicant runs counter to the purposes of intervention. An identity between the claims of an applicant and of an intervenor is ordinarily the touchstone for a decision to admit an intervention.

35. As to Ms. "G"'s view that the intervention would pose additional burdens for her as a litigant, this contention also was found not to be persuasive, as there is no support for the view that the Tribunal would have discretion to deny an application for intervention on such a basis. Moreover, in light of the similarity between the contentions of the prospective intervenor and her own, Ms. "G"'s burdens as a litigant should not be significantly affected by the admission of the intervention.

36. Accordingly, having met the statutory requirements for intervention, Mr. "H"'s Application for Intervention was granted.

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[11] Article XIV, Section 3 provides:

> "3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void."

Summary of Parties' Principal Contentions

Applicant's principal contentions

37. The principal arguments presented by Applicant in the Application and the Applicant's Reply are summarized below.

1. The Fund's expatriate benefits policy discriminates against Applicant vis-à-vis staff members in LPR status who were hired by the Fund before 1985 and remain eligible to receive expatriate benefits without relinquishing their LPR status pursuant to a "grandfathering" provision of the policy adopted in 1985.

2. The Fund's expatriate benefits policy discriminates against Applicant vis-à-vis staff members who differ only in their visa histories, i.e. having the same number of years of service but who began their careers in G-4 status, with respect to the ability to regain LPR status in the future. If Applicant converted now to G-4 status, she would not be able to acquire 15 years of service in that status before early retirement. In addition, she would face disincentives to taking Fund assignments overseas, as this service would not qualify as part of the 15-year period.

3. Applicant's request for exception is fully within the spirit of the Fund's expatriate benefits policy, which is designed to compensate international staff for the costs of maintaining and renewing cultural ties with their home countries.

4. The possibility of obtaining LPR status must be considered part of the overall benefits package, although it is not directly a Fund benefit. This option allows time and flexibility in making plans for whether and when to return to one's home country. The advantages of regaining LPR status are recognized by the Fund in Staff Bulletin No. 02/2.

5. Applicant is adversely affected by the timing of the new policy. Had the policy been implemented earlier she would have had the opportunity to complete 15 years in G-4 status by early retirement and therefore would have been "much less adversely affected." In situations where timing is an issue, "grandfathering" is appropriate.

6. Staff members in LPR status face many of the same challenges as do their G-4 colleagues, yet G-4s with comparable rank and family status have substantially higher income due to expatriate benefits.

7. Applicant seeks as relief that she be granted full expatriate benefits as of May 1, 2002, while maintaining her LPR visa status.

Intervenor's principal contentions

38. The principal arguments presented by Intervenor in the Application for Intervention and the Intervenor's Reply are summarized below.

1. Intervenor supports the contentions in Ms. "G"'s Application.

2. The Fund's current policy on expatriate benefits represents age discrimination because it "...requires older staff to perform an action that deprives them of an opportunity that is available to younger staff with identical employment and national characteristics." This is because of the 15-year period required to regain LPR status if one converts to G-4 status. Intervenor will not be able to complete that service by retirement age, although he would have worked for international organizations for 25 years (including his service with the World Bank).

3. The current policy is discriminatory because it lacks the "grandfathering" clause that was granted under a previous policy change to staff holding LPR status.

4. The Tribunal has jurisdiction under Article XX of its Statute because the January 2002 amendment, Ms. "G"'s request for exception to that amendment, and the denial of the request are post-October 15, 1992. The Fund's current policy on expatriate benefits is a new policy by virtue of its amendment, even though it contains elements of the 1985 and 1947 policies.

5. Uniform application of the 2002 amendment to the following categories of staff has discriminatory results:

    a) staff who may now relinquish LPR status but, because of their age, will be able to complete 15 years of service before retirement so as to retain the option of later regaining LPR status;

    b) staff who (like Applicant), because of their age, will not be able to complete 15 years of service before reaching early retirement age; and

    c) staff who (like Intervenor), because of their age, will not be able to complete 15 years of service before mandatory retirement age.

    Accordingly, the policy discriminates against long-serving staff and older staff.

6. LPR status should be considered a "benefit," which is not administered by the Fund but "facilitated" by it.

7. Granting an exception to those staff discriminated against by the policy will not interfere with the policy's fundamental intent. The Fund's Human Resources Department ("HRD") has authority to grant such an exception.

8. Intervenor seeks as relief, preferably, (a) the "grandfathering" of all Fund staff holding LPR status as of the time of the January 2002 amendment or, alternatively, (b) "grandfathering" only of those who, because of their age at the time of the amendment, would lose the option to apply for LPR status at retirement from the Fund.

Respondent's principal contentions

39. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1. Applicant and Intervenor do not challenge any administrative act falling within the Tribunal's jurisdiction *ratione materiæ* under Article II, Section 1 of the Statute because the terms and conditions of their employment have not been adversely affected by the 2002 amendment to the Fund's expatriate benefits policy. That change only expanded their choices and, for the first time, gave them the opportunity to become eligible for expatriate benefits.

2. When an organization implements a change in employment conditions favorable to employees, a staff member who benefits less from the change than do other members of the staff has no legal claim. Such a staff member has not been adversely affected by the amendment or its timing, even if he would have benefited more had it been enacted earlier.

3. The essence of Applicant's and Intervenor's complaints is to challenge the policy implemented by the Fund in 1985 to deny expatriate benefits to staff with LPR status. As this policy pre-dates the Tribunal's Statute, these claims fall outside the Tribunal's jurisdiction *ratione temporis* as prescribed by Article XX of the Statute. Later requests for exception to a policy pre-dating the Statute are also outside the Tribunal's jurisdiction. Additionally, it is not possible to address the question of denial of exception to a generally applicable policy without subjecting the policy itself to review.

4. Assuming that the Tribunal has jurisdiction to consider the question, the Fund's policy on expatriate benefits is a proper exercise of managerial discretion, supported by evidence and rationally related to legitimate purposes. The policy is not discriminatory, as there is a rational nexus between the visa test for eligibility and the recruitment and retention objectives of the expatriate benefits policy. Additionally, the Fund may consider not only the policy objectives of the benefits but also their costs.

5. The Fund's decision to "grandfather" existing staff when adopting the 1985 change in eligibility for expatriate benefits was legal and is not discriminatory.

6. The 2002 amendment to the Fund's expatriate benefits policy is not discriminatory as between Applicant or Intervenor and younger staff in LPR status. The Fund is not required to place all staff in the same situation with regard to becoming permanent residents of the duty station country. The ability to attain LPR status following 15 years in G-4 status is not a Fund "benefit" but rather a function of U.S. law. Applicant's emphasis on being disadvantaged with respect to regaining LPR status if she were now to relinquish it conflicts with a key rationale for providing expatriate benefits, i.e. repatriation following separation from the Fund.

7. The term "grandfathering" normally refers to the preservation of an entitlement to a benefit after the benefit is abolished or made less favorable. As Applicant and Intervenor have never been entitled to expatriate benefits, there is no basis for "grandfathering."

8. The Fund's expatriate benefits policy as enacted in 1985 and amended in 2002 makes no provision for exception in individual cases. Therefore, any such exception would be *ultra vires*.

The Fund's Policy on Expatriate Benefits

40. Central to assessing the contentions of the parties in this case is an understanding of the Fund's policy on expatriate benefits and the evolution of that policy over time.

41. As an international organization comprised of member countries from all continents, the IMF is mandated by its Articles of Agreement to "...pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible."[12] To recruit and retain a geographically diverse staff representative of its membership, the IMF, like other international organizations, offers "expatriate benefits," designed to compensate staff members for the additional costs of maintaining associations with their home countries during their employment and to facilitate their repatriation thereafter. This policy benefits both the international civil servants, who incur certain disadvantages in taking employment away from their home countries, and the organizations for which they work by sustaining their international character and outlook.

42. Expatriate benefits currently offered by the Fund include Home Leave (GAO No. 17, Rev. 9) (May 6, 1999), Education Allowances (GAO No. 21, Rev. 7) (June 12, 2000), and certain aspects of repatriation benefits pursuant to GAO No. 8, Rev. 6 (January 1, 1988). The stated purpose of Home Leave is to enable eligible staff members to "...spend periods of authorized leave with their families in their home countries as a means of maintaining their cultural and personal ties to those countries." The benefit includes allowances for travel costs of the staff member and qualifying family members, an allowance toward the expenses incurred at the home leave destination, insurance coverage, and travel time for staff members who take home leave during periods of accrued annual leave. (GAO No. 17, Rev. 9, Section 1.01.) Similarly, Education Allowances are intended to assist eligible staff members serving outside their home countries "...in educating their children, either in their home countries or elsewhere, in a manner intended to facilitate their children's eventual return to their home

[12] IMF Articles of Agreement, Article XII, Section 4(d). *See also* IMF Rules and Regulations, Rule N-1: "Persons on the staff of the Fund shall be nationals of members of the Fund unless the Executive Board authorizes exceptions in particular cases. In appointing the staff the Managing Director shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible."

countries." The associated allowances may partially defray, as applicable, tuition, boarding or subsistence, travel and certain types of tutoring. (GAO No. 21, Rev. 7, Section 1.01.)

43. Over time, the Fund has enacted changes to the eligibility requirements for receiving expatriate benefits. These changes are the subject of the dispute in this case.

44. During approximately the first forty years of its existence, from 1947 until 1985, the IMF granted expatriate benefits to staff members on the basis of nationality foreign to the duty station, regardless of their particular visa status. By the early 1980s, however, both the Fund and the World Bank had concluded that eligibility for expatriate benefits should be re-examined and consideration given to alternatives to the nationality test. To that end, a Joint Bank/Fund Working Group was established to study the matter.

45. The Working Group assessed five possible bases for allocating expatriate benefits: (I) nationality; (II) international recruitment; (III) visa status prior to recruitment; (IV) length of residence in the U.S.; and (V) a combination of visa status prior to appointment and residency. The Working Group's conclusion was to recommend option III, visa status prior to appointment, because it was, in their view, "...the most logical criterion and recognizes the different circumstances and needs of U.S. nationals and permanent residents on the one hand and expatriates in G-4 status on the other." (Report of the Working Group on Expatriate Benefits, June 27, 1984.)

46. Heeding the Working Group's recommendation, on January 28, 1985, the IMF Executive Board replaced the nationality test with a policy based on visa status prior to appointment to the Fund. As notified to the staff in Staff Bulletin No. 85/1 (February 1, 1985), "...all staff members stationed at headquarters who have held permanent resident (PR) status or U.S. citizenship at any time during the 12 months prior to their entry-on-duty date in the Fund, or who acquire PR status or U.S. citizenship after their entry on duty, will <u>not</u> be eligible for expatriate benefits." (Staff Bulletin No. 85/1, Section 1.a.) (Emphasis in original.) A "grandfathering" exception was drawn to allow present staff members in LPR status (and those who had initiated procedures to attain LPR status) to remain eligible for present and future expatriate benefits. (Staff Bulletin No. 85/1, Section 1.b.)

47. The advent of the 1985 policy was not without controversy, however, and, in the ensuing years, the Fund has on more than one occasion undertaken to reassess its policy on eligibility for expatriate benefits. In 1994, the IMF Executive Board reviewed the following options: (I) reverting to the nationality criterion; (II) adopting the "modified INTELSAT option," which would take into account not only a staff member's visa status but also that of the staff member's spouse; or (III) retaining the policy embodied in Staff Bulletin No. 85/1. The first two options were rejected on the basis of cost and difficulty of administration, respectively. Accordingly, the Fund's Executive Board in 1994 decided to retain the 1985 policy.

48. The eligibility issue, however, continued to remain alive following its reaffirmation by the Executive Board in 1994. In 1997, the Staff Association Committee ("SAC") circulated a Discussion Paper titled "Expatriate Benefits and Green Card Holders: Is Visa Status a Fair Criterion for Eligibility?" (October 1997), exploring difficulties with the system as adopted in 1985 (and reaffirmed in 1994) and discussing alternative approaches.

49. In 2001, the matter of eligibility for expatriate benefits returned once again to the agenda of the Fund's Executive Board. As of May of that year, of the Fund's 2,649 staff members, 26 percent were U.S. nationals (*ineligible* for expatriate benefits), 60 percent were G-4 visa holders (*eligible* for expatriate benefits), 9 percent were LPRs who were *ineligible* for expatriate benefits under the policy adopted in 1985, and 5 percent were LPRs who were *eligible* for expatriate benefits by reason of the "grandfathering" provision of that policy. The annual cost to the Fund of providing expatriate benefits was approximately $11,000 per eligible staff member.

50. During the period preceding the Executive Board's 2001 consideration of the issue of eligibility for expatriate benefits, the Staff Association Committee ("SAC") presented its views by memorandum to the Fund's Deputy Managing Director, requesting re-establishment of the nationality test because the "...current practice is discriminatory, creating wide inequalities in benefits for staff members in broadly similar situations." At the same time, the SAC described as an "alternative, which we could contemplate" the granting of expatriate benefits to those LPRs willing to convert to G-4 status, as there is "... a manifest inequity in the existing rule that staff members who had resident alien status within 12 months of joining the Fund are ineligible for expatriate benefits even if they give up their green cards and apply for a G-4 visa." (Memorandum from SAC Chair to Deputy Managing Director, June 13, 2001.)

51. On October 26, 2001, the Fund's Human Resources Department ("HRD") reported to the Executive Board its proposal for revision of the policy first adopted in 1985. The report noted that expatriate benefits are a key instrument for promoting the international character of the Fund, as such benefits enhance the ability to recruit and retain an internationally diverse staff.

52. In proposing a change in policy, the HRD report asserted that the nationality criterion previously used by the Fund would in many respects be the one that is most consistent with the diversity mandate of the Articles of Agreement, as LPR visa status holders are considered non-U.S. nationals for meeting the Fund's geographic diversity objectives, while at the same time they do not receive the benefits associated with their expatriate status. In addition, the report highlighted some of the difficulties with the operation of the visa test. In particular, noted the report, with the increase in international labor market mobility since 1985, inferences based on visa status regarding intention to stay in the United States have grown increasingly problematic. Each year, the Fund hires non-U.S. nationals who have completed their education in the United States. Many of these individuals secured LPR visa status to support themselves during their studies, although they may have no intention to remain permanently in the United States. In addition, some non-U.S. nationals joining the staff as

mid-career recruits have gained work experience in the United States and, as a consequence, hold LPR visa status. Finally, the report noted that the current policy therefore puts individuals who acquire work experience in the United States at a disadvantage compared with their compatriots who have not previously worked in the United States, because they cannot become eligible for expatriate benefits even if they convert to a G-4 visa.

53. Accordingly, the report identified as the most problematic aspect of the policy adopted in 1985 the asymmetric treatment of those who wish to give up their LPR visa status but are still ineligible to qualify for expatriate benefits. Therefore, the report's recommendation was that the Executive Board enact the policy that was to be embodied in Staff Bulletin No. 02/2. Such a change in policy was, in the view of HRD, designed to better reflect the principle of equal treatment of similarly situated staff and would be more in line with the classification of staff for the purpose of meeting the Fund's diversity objectives.

54. On December 18, 2001, the Executive Board approved the change in policy that forms the basis for the dispute before the Administrative Tribunal. That amendment, which was notified to the Fund's staff on January 11, 2002 in Staff Bulletin No. 02/2 ("Amendment of Eligibility for Expatriate Benefits"), with effect from May 1, 2002, is referred to herein as the "2002 amendment." It extends expatriate benefits to current and newly appointed Fund staff who are LPRs on the condition that they relinquish their LPR status in favor of obtaining a G-4 visa. Under the policy, only one such change in status is permitted per IMF career. Current G-4 staff who previously had been denied eligibility for expatriate benefits because they held LPR status sometime within the 12 months prior to their entry on duty are also now eligible for such benefits. (Staff Bulletin No. 02/2.)

55. In announcing the change in policy, the Staff Bulletin addressed at some length the matter of reacquisition of LPR status, cautioning staff who contemplate relinquishing LPR status and converting to G-4 status with the expectation of returning to LPR status in the future carefully to consider all factors before doing so, including the fact that the U.S. immigration laws are subject to change and that, under currently applicable law, only time spent in G-4 status in the United States will count toward the 15 years required for reacquisition of LPR status. The Staff Bulletin announced that information and counseling sessions would be made available to assist staff in making a fully informed decision.

Consideration of the Issues of the Case

56. The Respondent has raised in its Answer and Rejoinder two challenges to the jurisdiction of the Tribunal.

Jurisdiction *Ratione Materiæ*

57. Article II of the Statute of the Administrative Tribunal sets forth the Tribunal's jurisdiction *ratione materiæ* as follows:

"***ARTICLE II***

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

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; …

2. For purposes of this Statute:

a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;

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

58. Respondent contends that Applicant's complaint falls outside the scope of the Tribunal's jurisdiction *ratione materiæ* because, in Respondent's view, Applicant has not been "adversely affected" by any administrative act of the Fund. Specifically, asserts the Fund, Applicant challenges a policy that, from the time of her appointment to the present, has not changed in any respect that is adverse to her. She has been, and continues to be, ineligible for expatriate benefits because she is a U.S. LPR employed after 1985. The 2002 amendment, notes the Fund, only expanded Applicant's options by permitting her to become eligible for expatriate benefits if she chooses to convert to G-4 visa status.

59. In addition, Respondent cites the following paragraph from the Administrative Tribunal's decision in Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), in which the IMFAT held that when the content of an "individual decision" is to deny a request for exception to a generally applicable policy, it is not possible to analyze the challenge to the "individual decision" without also subjecting to scrutiny the legality of the underlying "regulatory decision":

"It may be observed that in this case the 'individual decision' and 'regulatory decision' are essentially indistinguishable analytically, inasmuch as the decision taken not to grant Mr. "R" an exception to the policy may be said to be tantamount to upholding the validity of the policy itself.[footnote omitted] Thus, it seems clear that an 'individual decision' was taken on October 2, 2000, when management declined Applicant's request for exceptions to the benefits policy;[footnote omitted] however, the content of that 'individual decision' was to uphold the validity of the 'regulatory decision' assigning differing benefits packages to different categories

> of staff. Hence, it is not possible to address the question posed expressly by Mr. "R"'s Application, i.e. whether the Fund abused its discretion in denying the requested exceptions, without also subjecting to review the benefits classification scheme itself. Therefore the 'regulatory decision' to maintain the differing policies and the 'individual decision' to deny Applicant an exception to these policies must be considered together."

(Mr. "R", paragraph 25.) The Fund contends that because review of the "individual decision" denying Ms. "G"'s request for exception to the expatriate benefits policy requires analysis of the "regulatory decision," i.e. the policy itself, and because that policy has not changed in any way adverse to Ms. "G", Applicant has not been "adversely affected" by any administrative act of the Fund. Accordingly, the Fund concludes that the Tribunal is without jurisdiction *ratione materiæ* pursuant to Article II, Section (1) (a) of the Statute.

60. It may be observed, as a preliminary matter, that the above quoted paragraph from Mr. "R" responded to the contentions of the Fund, on the one hand, that the only decision before the Tribunal for review in that case was the "regulatory decision," and of the Applicant, on the other, that his challenge was to the denial of exception to the policy.[13] (Mr. "R", paras. 23 –24.) The Tribunal specified that an "individual decision" had been taken but that the Tribunal's review of that decision could not be made without reviewing the "regulatory decision" as well.

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

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

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

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[13] Similarly, in the present case, both Applicant and Intervenor emphasize that the dispute centers on the denial of exception to the policy. In Applicant's words: "I accept the current policy. I am merely requesting an exception based on my own particular circumstances." Intervenor asserts: "...uniform application of the amended policy will be discriminatory against long-standing and older staff;...the exceptions requested by the Applicant and the Intervenor will not fundamentally change the amended policy."

62. The policy in dispute, first adopted in 1985, namely, to allot expatriate benefits in accordance with visa status rather than nationality, was thoroughly reconsidered and reaffirmed in 1994 and materially refashioned as of 2002. Ms. "G" has been "adversely affected" by that policy, under which, as a staff member employed after 1985 and continuing to hold LPR visa status, she is not entitled to receive such benefits. Accordingly, the Tribunal has jurisdiction *ratione materiæ*.

Jurisdiction *Ratione Temporis*

63. Article XX, Section 1 of the Statute of the Administrative Tribunal prescribes the Tribunal's jurisdiction *ratione temporis*:

> "***ARTICLE XX***
>
> 1. The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date."

64. Respondent contends that because "in essence" Applicant's challenge is to a policy of the Fund--the "visa test" for expatriate benefits--that has been in effect since 1985, i.e. before the effective date of the Tribunal's Statute, the Tribunal does not have jurisdiction *ratione temporis* over the Application. That the Fund's 1985 expatriate benefits policy continues to bar Ms. "G" from receiving expatriate benefits as long as she retains her LPR visa status, asserts the Fund, cannot give the Tribunal jurisdiction over a challenge to the underlying policy. Moreover, citing the Tribunal's jurisprudence in Mr. "X", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1994-1 (August 31, 1994) and Ms. "S", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1995-1 (May 5, 1995), Respondent asserts that the Tribunal has interpreted Article XX to bar an application challenging the denial of a later request for exception to a policy that was established prior to October 15, 1992. On that basis, Respondent urges dismissal of the Application.

65. Applicant has not addressed expressly the jurisdictional challenges to her Application. Intervenor contends that the Tribunal has jurisdiction under Article XX because the January 2002 amendment, Ms. "G"'s request for exception to that amendment, and the denial of the request are post-October 15, 1992. In addition, asserts Intervenor, the Fund's current policy on expatriate benefits may be considered a "new" policy by virtue of its amendment, even though it contains elements of the 1985 and prior policies.

66. In Mr. "X", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1994-1 (August 31, 1994) and Ms. "S", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1995-1 (May 5, 1995), the Tribunal granted the Fund's motions for summary dismissal on the basis of the time-bar of Article XX. In both cases, the Tribunal rejected arguments that jurisdiction could be conferred upon the Tribunal because

past administrative acts may continue to have effect in the period of the Tribunal's competence.

67. In Mr. "X", the substantive dispute between Applicant and the Fund centered on the duration of Mr. "X"'s pensionable period of service and hence the amount of his pension payments. The jurisdictional question required the Tribunal to identify the allegedly illegal "administrative act" (in the sense of Article II) taken by the Fund, and to pinpoint when it took place. The Tribunal concluded that it was the determination in 1986 of the period of Mr. "X"'s pensionable service rather than the calculation and disbursement of his pension payments beginning in 1993 that constituted the challenged "administrative act":

> "The calculation of Mr. "X"'s pension in 1993 was a purely arithmetical act governed by the decision of 1986 as to the extent of his pensionable service….The fact that that decision of 1986 produces consequences for Mr. "X" now can have no effect upon the extent of the jurisdiction of the Tribunal; if it were otherwise, then the limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts may well be felt for years after the date when the Tribunal's Statute came into force. Equally, the Applicant's claim that the 1986 decision was open to reconsideration does not mean that it was not taken when it was taken….Continued discontent with the results of an administrative act and eventual renewal of a challenge to its legality cannot put in question the fact that the act was taken, and taken when it was taken."

(Mr. "X", paragraph 26.)

68. Later, in Ms. "S", the Tribunal expanded on the principles developed in Mr. "X". In that case, the applicant contested the legality of a provision of the Staff Retirement Plan (and its application to her) that excluded prior part-time contractual service from the contractual service that could be credited retroactively as qualified service under the Plan. The Tribunal concluded that the challenged "administrative act" was the Plan provision itself, a provision that pre-dated the Tribunal's competence:

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

> Monetary Fund. That principle governs in respect of assertions of the illegality of pre-existing rules. It also governs requests for changes in pre-existing rules and requests for exception to their application."

(Ms. "S", paragraph 21.) The Tribunal also noted:

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

(Ms. "S", paragraph 22.)

69. The question therefore is whether the facts of the present case may be distinguished from those considered by this Tribunal in Mr. "X" and in Ms. "S". As in those cases, the Tribunal in the case of Ms. "G" must resolve the question of when the administrative act whose legality is challenged, or whose illegality is asserted, was taken for purposes of its jurisdiction *ratione temporis*.

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

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

72. As indicated above, the Executive Board's reaffirmation of the eligibility requirements in 1994 and its adoption of the 2002 amendment represented the re-consideration of the contested policy and its adaptation at the highest levels of the Fund's decision-making. As such, they represent an "administrative act" falling within the Tribunal's jurisdiction *ratione temporis*. In the Tribunal's view, the facts in the present case may be distinguished from those of Ms. "S", in which there was no evidence that the contested rule had been re-

considered and reaffirmed in the period of the Tribunal's jurisdiction apart from the "individual decision" resulting from Ms. "S"'s request for an exception to the generally applicable policy; no new policy was adopted in that case. In the instant case, because re-consideration, reaffirmation, and amendment of the 1985 policy took place years after the Statute of the Tribunal took effect, the Tribunal concludes that the Application and the Intervention should not be held to be inadmissible on temporal grounds.

Does the Fund's policy, adopted in 1985 and reaffirmed in 1994, of determining eligibility for expatriate benefits on the basis of visa status discriminate impermissibly among categories of Fund staff?

73. As noted *supra*, it is not possible to analyze the challenge to the "individual decision" in this case without also reviewing the "regulatory decision." Moreover, Applicant's contentions make clear that Ms. "G" challenges as discriminatory the Fund's underlying policy of determining eligibility for expatriate benefits on the basis of visa status. In Ms. "G"'s request for exception to the policy, she asserted that the distinction between LPR and G-4 status may not correlate with the objectives of expatriate benefits to compensate for the additional costs of maintaining contacts with one's home country, as the degree of "cultural proximity" to one's home country or the degree of permanence in the United States may not be reflected by visa status.

74. By contrast, the Fund contends that, assuming that the Tribunal has jurisdiction to consider the question, the Fund's policy on expatriate benefits is a proper exercise of managerial discretion, supported by evidence and rationally related to legitimate purposes. Additionally, asserts the Fund, the policy is not discriminatory as there is a rational nexus between the visa test for eligibility and the recruitment and retention objectives of the policy. Further, the Fund maintains, it may legitimately consider costs associated with benefits as well as their objectives.

75. In Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), the Tribunal examined the contentions of a staff member who challenged as discriminatory another benefits classification system of the Fund, i.e. the differential in benefits allocated to two categories of Fund staff posted abroad, overseas Office Directors and Resident Representatives. Mr. "R" contended that, as an overseas Office Director posted in a particularly challenging location, he should have been entitled to the housing and overseas assignment allowances granted to Resident Representatives. Mr. "R" challenged the classification scheme because, on the basis of the location of his post, he claimed he sustained hardships that were more consistent with those associated with Resident Representative positions than Office Director positions. Similarly, Ms. "G" challenges the distinction drawn by the Fund's expatriate benefits policy, contending that as a staff member holding LPR visa status she has more in common--in terms of the costs associated with maintaining home country contacts--with staff members holding G-4 visa status than she does with U.S. nationals. Accordingly, her Application requires the Tribunal to consider whether the visa test for expatriate benefits is discriminatory.

76. As the Tribunal observed in the case of Mr. "R":

> "30. .... It is a well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization.
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> 31. In the de Merode case, the World Bank Administrative Tribunal, reviewing the exercise of legislative powers of the Bank in making changes to the terms or conditions of employment, enunciated the following standard:
>
> > 'The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and of technical competence.' Changes 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.'
>
> (de Merode, WBAT Decision No. 1 (1981), paragraph 47.)
>
> 32. That nondiscrimination is essential as well to the lawful exercise of the administrative functions of the organization is emphasized by the Commentary on the IMFAT Statute:
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> > '…with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, *discriminatory*, improperly motivated, based on an error of law or

> fact, or carried out in violation of fair and reasonable procedures.'

(Report of the Executive Board, p. 19.) (Emphasis supplied.) Hence, whether the decision in the present case is conceptualized as a regulatory decision or an individual decision, it is subject to review on the ground of alleged unjustified discrimination.

33. At the same time, the Tribunal's duty to assure that the Fund's discretionary authority has been exercised consistently with the principle of nondiscrimination must be understood within the context of the deference that the law requires that international administrative tribunals accord to the exercise of managerial discretion, especially where matters implicating managerial expertise are at issue. As the Asian Development Bank Administrative Tribunal has observed:

> 'The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.'

(Carl Gene Lindsey v. Asian Development Bank, AsDBAT Decision No. 1 (1992), paragraph 12.)

34. ... [T]he Commentary on the Statute [of the IMFAT] states:

> '… judicial bodies have repeatedly affirmed their incapacity to substitute their own judgments for those of the authorities in which the discretion has been conferred. [footnote omitted] Thus, although a tribunal may decide whether a discretionary act was lawful, it must respect the mandate of the legislative or executive organs to formulate employment policies appropriate to the needs and purposes of the organization. Similarly, a tribunal is not competent to question the advisability of policy decisions.' [footnote omitted]

(Report of the Executive Board, p. 20.)

35. ...

36. Cases of alleged discrimination may arise in two distinct ways. First, a classification may expressly differentiate between two or more groups of staff members, giving rise to a charge of discrimination. Second, a policy, neutral on its face, may result in some kind of consequential differentiation between groups. This was the case for example in de Merode, WBAT Decision No. 1 (1981). In that case, the challenged policy emerged from changes in the organization's tax reimbursement system, changes that had a disproportionate financial impact upon U.S. nationals. The legislation was upheld on the basis that its objective had been nondiscriminatory and hence there had been no abuse of motive. ...

37. Perhaps more common are those cases in which an allegation of discrimination arises with respect to an outright distinction that has been drawn between categories of staff members. Such a distinction was the subject of review by this Tribunal in the D'Aoust case. The applicant had challenged the Fund's practice, in the setting of compensation, of truncating the weight given to prior experience at ten years for non-economists, while imposing no such limit on the recognition of prior experience when it came to setting the salaries of economists. The Tribunal upheld the practice in its application to Mr. D'Aoust, [footnote omitted] as not violating the principle of equality of treatment:

> 'As to the merits or demerits of the practice as applied to Mr. D'Aoust, the Tribunal finds that the Fund may not unreasonably favor economists in deciding upon the terms of staff employment since economics is at the heart of the Fund's mission. Thus when the Fund applied the so-called non-economist matrix to the determination of the salary of Mr. D'Aoust, cutting off the credit given to his prior experience at ten years, that of itself did not give rise to a cause of action against the Fund on the ground of inequality of treatment.'

(D'Aoust, paragraph 29.) Hence, the Tribunal concluded that there was a reasonable basis, grounded in the Fund's mission, for the distinction drawn by the Fund between economist and non-economist staff in the discretionary act of setting compensation.

38. The conclusion reached by the IMFAT in D'Aoust, that there was a reasonable basis for the distinction at issue, has been drawn as well by other international administrative tribunals in reviewing allegations of discriminatory treatment. The World Bank

> Administrative Tribunal has articulated as a standard for review that for a classification to withstand a challenge based on inequality of treatment there must be a '… rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.' (Maurice C. Mould v. International Bank for Reconstruction and Development, WBAT Decision No. 210 (1999), paragraph 26.) ...
>
> 39. The International Labour Organisation Administrative Tribunal has phrased the principle of nondiscrimination as follows: '… for there to be a breach of equal treatment there must be different treatment of staff members who are in the same position in fact and in law.' (In re Vollering, ILOAT Judgment No. 1194 (1992), paragraph 2.) ...
>
> ...
>
> 47. From the preceding review of the jurisprudence, the following principles may be extracted for application in the present case. First, Respondent's proffered reasons for the distinction in benefits ... must be supported by evidence. In other words, the Tribunal may ask whether the decision '…could … have been taken on the basis of facts accurately gathered and properly weighed.' (Lindsey, paragraph 12.) Second, the Tribunal must find a '… rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.' (Mould, paragraph 26.) Thus, the Tribunal may consider the stated reasons for the different benefits and assess whether their allocation to the two categories of staff is rationally related to those purposes. ..."

77. It may be recalled that, in the case of Mr. "R", the fact that Respondent studied and then rejected the proposition that there should be complete parity of benefits between overseas Office Directors and Resident Representatives was given weight. Similarly, in de Merode, the World Bank Administrative Tribunal observed that in reviewing the exercise of legislative powers of an international organization to make changes to the terms or conditions of employment, "…the care with which a reform has been studied and conditions attached to a change are to be taken into account by the Tribunal." (paragraph 47.)

78. In this case, the Tribunal considers relevant the approach that it expressed in the case of Mr. "R", in these terms:

> "65. The management of the Fund necessarily enjoys a managerial and administrative discretion which is subject only to limited review by this Tribunal. If it is the Fund's considered decision that differences in the functions and recruitment of Resident Representatives and Office Directors justify a consequential difference

> in the benefits accorded those officials--even while uniquely serving in the same city overseas--it is not for the Tribunal to overrule that decision. This conclusion applies as well to the refusal of the Fund to make an exception to its policy in favor of the Applicant. ...."

79. The Tribunal in the case before it must assess whether there is a rational nexus between the goals of the expatriate benefits policy--i.e. to compensate staff for costs associated with maintaining and renewing ties with their home countries (through home leave and education allowances), to facilitate their repatriation following service with the Fund, and to recruit and retain a diverse staff sustaining the international mission of the Fund--and its method for allocating these benefits. It is noted that the Tribunal's reasoning in Mr. "R" suggests that a "rational nexus" does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and indeed that the categories employed may rest upon generalizations.

80. In the view of the Tribunal, the Fund's choice of a visa criterion for allocation of expatriate benefits is reasonable. The procedure of selecting it was not arbitrary but deliberate. The substance of the Fund's choice is rational and defensible. So, perhaps even more so, was its earlier selection of the nationality criterion. But if in the exercise of its undoubted legislative authority and managerial discretion the Executive Board chooses a visa policy in 1985, reconsiders and reaffirms that policy in 1994, and refines that policy as of 2002, these decisions in the exercise of its managerial authority cannot be overridden by this Tribunal when they are rationally related to the mission and objectives of the Fund, in particular as regards expatriate benefits. It is reasonable to accord benefits to G-4 visa holders that are withheld from those in LPR status because the advantages of LPR status run counter to a fixed intention of the staff member concerned to return to his home country upon the completion of his Fund service. This may not necessarily be true in every case, but, in the large, the LPR visa status holder seeks a broadening of options to permit continued residence in the United States, not return to the country of his nationality. He seeks the option of indefinite expatriation in place of definite repatriation. In contrast, the options of the holder of a G-4 visa are more limited and directed towards eventual repatriation.

Does the 2002 amendment to the eligibility requirements of the Fund's expatriate benefits policy discriminate impermissibly among categories of Fund staff?

81. While Ms. "G"'s Application calls into question the validity of the underlying policy of allocating expatriate benefits on the basis of visa status, the focus of her complaint and that of the Intervenor is on the effect of the 2002 amendment.

82. It is well to recall what that amendment provides. It differs from the pre-existing policy by opening eligibility for expatriate benefits to staff who are currently in LPR status (or were in LPR status within the 12 months prior to their joining the Fund) on the condition that they convert to G-4 visa status. Under the policy in effect from 1985 until 2002, such staff members were, for purposes of eligibility for expatriate benefits, assigned to the category of

visa status held during the period preceding their appointment to the Fund's staff, regardless of a change to G-4 visa status thereafter.

83. The salient feature of the 2002 amendment, i.e. to make eligibility for expatriate benefits follow the staff member's choice of a visa, better realizes the objective of a fair and rational allocation of expatriate benefits than did the unamended policy of 1985. Inasmuch as LPR status may suggest an intention to stay in the United States, the new policy of permitting staff members to choose their status rather than to remain locked into their prior status for purposes of the expatriate benefits policy would seem to make the 2002 amendment more finely tailored to achieving the goals of the expatriate benefits policy, especially with regard to the objective of repatriation. As has been noted, a staff member's visa status prior to employment with the Fund may simply be a result of prior educational or employment history. Accordingly, as of 2002, only those staff members willing to incur the risk of not being able to regain LPR status in the future would be accorded the expatriate benefits.

84. Applicant and Intervenor seek to impugn the 2002 amendment on the basis that it places them (and other older and longer-serving staff members) at a disadvantage relative to younger staff and to those already holding G-4 visa status in respect of the ability to regain LPR status in the future.

85. The Applicant refers to the provision of the U.S. immigration law permitting individuals who have spent 15 or more years in G-4 status to move to LPR status, and contends that the possibility of acquiring LPR status in the future must be considered part of the overall benefits package of Fund staff although it is not "directly" a Fund benefit. Likewise, Intervenor asserts that LPR status should be considered a "benefit" which is not administered by the Fund but "facilitated" by it. By contrast, the Fund emphasizes that the ability to regain LPR status is a function of U.S. law and that, moreover, Applicant's focus on the issue of reacquisition of LPR status conflicts with a key rationale for providing expatriate benefits, i.e. repatriation following separation from the Fund.

86. The Tribunal on this question sustains the position of the Fund. LPR status is not a Fund entitlement, it is a feature of current U.S. law. It is a status that facilitates not repatriation but expatriation.

> Does the "grandfathering" provision of the eligibility requirements adopted in 1985 discriminate impermissibly among categories of Fund staff? Is a challenge to this provision within the Administrative Tribunal's jurisdiction *ratione temporis*?

87. Applicant contends that the Fund's expatriate benefits policy discriminates impermissibly among categories of Fund staff because she is disadvantaged vis-à-vis staff members who were employed in LPR visa status prior to 1985 and continue to receive expatriate benefits under a "grandfathering" provision of that policy without relinquishing their LPR visa status. In essence, Applicant challenges the legality of the "grandfathering" provision of the 1985 enactment. Accordingly, the Tribunal must consider at the outset whether it has jurisdiction *ratione temporis* over this claim when there is no evidence that the

"grandfathering" provision has been subject to the kind of re-consideration and re-adoption, within the time period of the Tribunal's jurisdiction, that may be said to attach to the visa test itself. In the view of the Tribunal, jurisdiction *ratione temporis* is lacking; the "grandfathering" proviso is and remains just that adopted in 1985.

88. It may be nonetheless observed that Applicant's argument suggests that an international organization would never be free to change terms and conditions of employment, if the effect would be to treat future employees, as a class, less favorably than current employees. In this connection it may be noted that the Asian Development Bank Administrative Tribunal has held, in Viswanathan v. Asian Development Bank, AsDBAT Decision No. 12 (1996), that the organization is not obliged to make retroactive a newly introduced benefit. (Paragraph 19.) "Grandfathering" provisions are intended to maintain the acquired rights of incumbents rather than to ensure equality of treatment of subsequently recruited staff members. [14]

Did the Fund err in denying Applicant's request for an exception to the eligibility requirements of the Fund's expatriate benefits policy?

89. Both Applicant and Intervenor seek exceptions to the eligibility requirements of the Fund's expatriate benefits policy to correct the effects of the discrimination they allege is inherent in the policy. Applicant seeks an exception for herself, based on her age and personal circumstances. Intervenor seeks an exception for all LPR staff members who, by reason of their age, would not be able to fulfill 15 years of service before retirement if they were now to convert to G-4 status. Respondent contends that the policy itself does not allow for exception and that therefore any exception would be *ultra vires*.

90. Since the Tribunal has concluded that the policy adopted by the Fund in allocation of expatriate benefits is not discriminatory, the Fund did not err in declining to accord exceptions to that policy in favor of the Applicant.

91. Moreover, the expatriate benefits policy adopted by the Executive Board does not expressly empower the Administration of the Fund to grant exceptions to the application of that policy. Administration of the Fund is based on the Articles of Agreement and the policies in pursuance of those Articles adopted by the organs of the Fund. While the Managing Director and his associates necessarily enjoy a measure of appreciation in the

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[14]It should be noted that both Applicant and Intervenor use the term "grandfathering" with respect to the relief they seek in the Administrative Tribunal. As Respondent points out, neither Ms. "G" nor Mr. "H" has ever been entitled to expatriate benefits under the Fund's policy. Accordingly, "grandfathering" is not a term correctly to be applied in this case. *See* Black's Law Dictionary (6th ed. 1990, p. 699):

> "**Grandfather clause**. Provision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction."

exercise of their authority, that discretion does not extend to granting exceptions to a Fund policy which, if granted, would run counter to its essential objectives.

Decision

FOR THESE REASONS

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

The Application of Ms. "G", and that of Mr. "H" as intervenor, are denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

_____
Stephen M. Schwebel, President

_____
Celia Goldman, Registrar

Washington, D.C.
December 18, 2002