ADMINISTRATIVE TRIBUNAL

OF THE

INTERNATIONAL MONETARY FUND

Judgment No. 2023-5

December 29, 2023

Elkjaer et al. (No. 3), Applicants v. International Monetary Fund, Respondent

Office of the Registrar

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

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Mr. J. Manning, 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(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. Jonathan Manning, Mr. Joannes Mongardini, Mr. James McHugh, Ms. Linchun Li, and Ms. Haiyan Shi, staff members of the Fund, most of whom are current or former principals of the Staff Association Committee ("SAC"). Applicants were represented by Mr. Ryan Griffin, James & Hoffman, P.C. Respondent was represented by Mr. Brian Patterson, Assistant General Counsel, and Mr. Yongqing Liu, Counsel, in the Administrative Law Unit of the IMF Legal Department.

2. In identical Applications, Applicants contest decisions of the IMF Executive Board ("Board"), taken April 15, 2022, and effective May 1, 2022, relating to the Fund's staff compensation system. These decisions: (a) modified the "safeguard mechanism" rule to specify the use of end-January (rather than end-financial year) salary data for purposes of calculating the comparatio; and (b) adopted the FY2023 staff compensation decision based on a proposal from Management that calculated the comparatio in accordance with that modified rule. Applicants bring their challenges pursuant to Article VI(2) of the Tribunal's Statute, which permits direct challenges to regulatory decisions of the Fund within three months of the later of the announcement or effective date of the decision.

3. Applicants contend that the contested decisions represent an invalid exercise of the Fund's regulatory authority for two reasons. First, Applicants allege that modification of the safeguard mechanism rule to use end-January data violates the Fund's "rules-based" compensation system, which is a fundamental condition of staff employment. Applicants argue that using end-January data undermines the purpose and effectiveness of the safeguard mechanism adopted by the Board in 2019 because it fails to take account of a full year of salary data. The safeguard can function as intended, Applicants submit, only if average actual salaries are calculated to capture fully the effect of annual salary erosion. Second, and alternatively, Applicants contend that if the Board had discretion to modify the safeguard mechanism rule, it abused that discretion by its 2022

amendment. Applicants submit that the decision to use end-January salary data was arbitrary because it lacked any rational justification other than under-accounting for annual salary erosion. Applicants also assert that the Board adopted the challenged decisions without information from Management necessary to study the reform with sufficient care, including a meaningful analysis of how the change in the cutoff date was likely to affect the safeguard calculation going forward or whether feasible alternatives were available that would be less detrimental to staff.

4. In their Applications, Applicants seek as relief an order: (a) invalidating the modification to the safeguard rule adopted in April 2022, which calls for the use of end-January rather than end-April salary data in the safeguard calculation, as exceeding the Fund's regulatory authority; and (b) requiring Fund Management: (i) to rerun the safeguard analysis contained in its 2022 Review of Staff Compensation using end-April salary data as mandated by the 2019 safeguard rule; (ii) to alert the Board, SAC, and the staff to any resulting change in the safeguard calculation; and (iii) to take any other actions that may be warranted under the 2019 safeguard rule based on any change in the calculation, including but not limited to reconsidering the April 2022 salary increase decision and the higher increase originally proposed by Management to the Board. In their Reply, Applicants additionally seek, as a "forward-looking remedial component," that the Tribunal "make it explicit that while the 2019 safeguard rule and its stated purpose remain in effect, any implementation that fails to account for a full year's worth of wage erosion will be deemed presumptively invalid going forward." Applicants also seek legal fees and costs, which the Tribunal may award, in accordance with Article XIV(4) of the Statute, if it concludes that the Applications are well-founded in whole or in part.

5. Respondent, for its part, asks the Tribunal to uphold the contested Board decisions. Respondent submits that the 2019 safeguard rule, specifying use of salary data as of the end of the financial year, was a technical provision of the staff compensation system and thus did not constitute a fundamental condition of Fund employment that is immune from unilateral change. Respondent maintains that the Board's 2022 decision to modify the 2019 safeguard mechanism rule to specify use of end-January data should be sustained as a reasonable exercise of policy discretion, which was based on appropriate consideration of all relevant facts, reasonably related to the objectives it was intended to achieve, and not improperly motivated. Respondent contends that by setting the comparatio calculation earlier in the annual consultation and deliberation process on staff compensation, the amended rule provides greater certainty and predictability in that process. In Respondent's estimation, the Board reasonably concluded that the benefits of certainty and predictability "outweigh this small difference in the calculation compared to end-April data, and the Board continues to review the effects of this policy change on the compensation system." In its Rejoinder, Respondent additionally challenges Applicants' standing to bring their claims, asserting that they have not been "adversely affected" by the modification of the rule because the safeguard mechanism was, in fact, triggered when using end-January salary data for the FY2023 compensation decision, and the Board exercised its discretion to adjust compensation in response.

PROCEDURE

6. On July 29, 2022, Applicants filed identical Applications with the Tribunal. The Applications were transmitted to Respondent on August 1, 2022. On August 4, 2022, pursuant to

Rule IV(f) of the Tribunal's Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Applications.

7. On August 23, 2022, Respondent submitted a request for modification of the time limit for filing of its Answer, pursuant to Rule VIII(1) of the Tribunal's Rules of Procedure, until following the Tribunal's Judgment in the *Elkjaer et al. (No. 2)* case then pending. That case alleged misapplication of the safeguard mechanism rule in the context of the FY2022 staff compensation decision, including by using March 1 (rather than end-financial year) salary data in calculating the comparatio. The Tribunal sought Applicants' comments on Respondent's request to suspend the pleadings. On August 31, 2022, Applicants filed their non-objection to the request. On September 2, 2022, the President of the Tribunal suspended the pleadings in the instant case until notification of the Judgment in the related case.

8. On February 2, 2023, having notified the parties of its Judgment in *Elkjaer et al. (No. 2), Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2023-1 (January 30, 2023), the Tribunal requested from them a joint proposal regarding the procedure to govern the resumption of the pleadings. That joint proposal was filed on February 7, 2023, and accepted by the President of the Tribunal on the next day.

9. On March 20, 2023, Respondent filed its consolidated Answer to the Applications, which was supplemented on March 31, 2023, with an annex that had not been available at the time of filing. In light of this supplementation, the President of the Tribunal, pursuant to Rule IX(1) of the Tribunal's Rules of Procedure, provided Applicants a seven-day extension of time in which to file their Reply.

10. On April 28, 2023, Applicants submitted their Reply. Respondent's Rejoinder was filed on May 31, 2023.

11. On June 12 and 15, 2023, the parties responded to the Tribunal's requests for their views as to whether oral proceedings should be held in the case and the conduct of those proceedings. The parties were notified on July 7, 2023, that oral proceedings would be held. Those proceedings were conducted on July 27, 2023.

12. On August 8, 2023, Applicants submitted their supplemental request for costs, to which the Fund responded on August 10, 2023.

A. Applicants' Requests for production of documents and information

13. Pursuant to Rule XVII of the Tribunal's Rules of Procedure, in their Applications, Applicants made two requests for production of documents. In its Answer, Respondent opposed both requests. In their Reply, Applicants raised a Supplemental Request for Information, which Respondent opposed in its Rejoinder.

(1) Document Request No. 1

14. In Request No. 1, Applicants sought:

> All emails or other documents relating to management's proposal as reflected in Board Paper EBAP/22/9 . . . , paragraph 30, to use end-January salary data rather than March 1 or end-fiscal year (April 30) salary data in the comparatio calculation required by the safeguard mechanism.

15. Respondent advanced several arguments in opposition to the Request. The Tribunal found one of those arguments to be dispositive. Respondent stated that no responsive documents exist, save for those over which it asserted attorney-client privilege.

16. On the basis of Respondent's representations, and in the absence of any proffer to the contrary by Applicants, the Tribunal decided that Applicants had not shown that they had been denied access to responsive, relevant documents as required by Rule XVII(1) of the Tribunal's Rules of Procedure. *See Elkjaer et al. (No. 2)*, paras. 16-18; *Mr. "RR", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021- 2 (December 24, 2021), para. 12. Accordingly, on April 13, 2023, the Tribunal denied Applicants' Request No. 1.

(2) Document Request No. 2

17. In Request No. 2, Applicants sought:

> A document showing the actual amount of wage erosion at the Fund for the last quarter of each fiscal year (*i.e.*, February 1 through April 30) for the past ten years.

18. In response, Respondent stated that the relevant data had been produced in its Answer. On that basis, on April 13, 2023, the Tribunal dismissed as moot Applicants' Request No. 2.

(3) Supplemental Request for Information

19. In their Reply, Applicants made a Supplemental Request for Information ("Supplemental Request"), which sought:

> [A]ny report and material (for instance power point) produced by the Technical Review Working Group relating to the historical comparatio analysis presented to the Board. *See* . . . [EBAP/23/21 (March 27, 2023)], para. 45 and box 2 (describing the composition and terms of reference for the Working Group).

Additionally, Applicants requested:

> [T]o the extent that any such report or material does not supply the necessary answers, Respondent should be required to supplement management's analysis to provide an accurate historical baseline for assessing the impact of any changes to the data cutoff date for the year-end comparatio calculation. Any such supplemental analysis should: 1) account for a full twelve months of salary erosion for each fiscal year such that the

> pre-FY2021 results are directly comparable to the FY2021 and FY2022 results reported to the Board; and 2) supply any other information needed to explain the discrepancies between the comparatios reported to the Board for FY2013-22 and the corresponding merit increases for those fiscal years.

20. In support of their Supplemental Request, Applicants asserted that a "key piece of the analysis that management provided to the Board, and that Respondent relies on its Answer, is the historical analysis of annual wage erosion over the past ten years." In Applicants' view, that analysis "appears to be flawed when compared with another indicator of annual wage erosion (historical merit increases), at least in part because it looks at only ten months of data rather than twelve for each year prior to FY2021." Applicants asserted: "This squarely raises the question of whether—and how much—the Board may have been 'misdirected on the relevant facts.' *See Elkjaer (No. 2)*, para. 108. To answer this question, Respondent should be required to produce [the material sought by the Supplemental Request]."

21. In its Rejoinder, Respondent advanced several arguments in opposition to Applicants' Supplemental Request. First, Respondent challenged as "unfounded" Applicants' premise that the Working Group's analysis of annual wage erosion over the past ten years appeared to be flawed. In Respondent's view, what is relevant is average wage erosion for the February-April period, and that data "confirms the Board's decision that the effect of excluding this period was so insignificant that it was acceptable to balance other operational needs of the organization." Second, Respondent contended that the Supplemental Request was "objectionably overbroad and unduly burdensome." Third, Respondent stated that the Working Group had held regular meetings with the SAC to discuss the technical review, so that "[e]ven if other materials than the final analysis that was submitted to the Board are deemed relevant, they have been shared with the SAC" and Applicants' Supplemental Request should be dismissed as "moot."

22. The Tribunal observes that Applicants' Supplemental Request relates to their claim that the Board may have been "'misdirected on the relevant facts'" (quoting *Elkjaer (No. 2)*, para. 108) in deciding to modify the safeguard rule to use end-January data and to apply that modified rule in taking the FY2023 staff compensation decision. The Supplemental Request, however, concerns the Working Group's Technical Review that was reported to the Board in March 2023, that is, a year *after* the decisions contested in this case were taken. At the same time, the Tribunal also notes that Respondent has introduced the Working Group's March 2023 analysis (as described in EBAP/23/21) into the record of the case and relies in its pleadings on that analysis as having "confirmed the reasonableness" of the Board's decision of April 15, 2022.

23. As considered further below, the essence of Respondent's defense of the impugned decisions is that the Board reasonably balanced competing considerations in deciding to use end-January salary data in calculating the comparatio. Respondent contends that the decision represents a reasonable balancing of a purportedly "small difference in the calculation compared to end-April data" against the "benefits of certainty and predictability" in the staff compensation decision-making process. Applicants, for their part, contend—assuming the Board had discretion to modify the safeguard rule—that the Board was not fully informed because the historical data did not accurately capture the effects of using end-January data vis-à-vis using end-April data. Applicants

submit that the historical analysis should encompass twelve-month periods, rather than focusing on the February-April segment.

24. On July 10, 2023, the Tribunal notified the parties that, having reviewed their arguments and the record of the case, it had concluded that the dispute concerning Applicants' Supplemental Request reflected the parties' differing identification of the issues of the case and, in turn, of what facts may be relevant to those issues. The Tribunal provisionally denied Applicants' Supplemental Request and invited the parties to elaborate in the oral proceedings their respective views on the following: whether the Working Group's Technical Review as reported to the Board in March 2023 is relevant to the Tribunal's consideration of the issues of the case, and if so, whether the information sought by Applicants' Supplemental Request is also relevant to those issues.

25. Having heard the parties' respective representations at oral argument, and having further considered the issues of the case, the Tribunal decides that the provisional denial of Applicants' Supplemental Request shall be permanent. Although the Tribunal makes reference to the activities of the Working Group later in this Judgment, it does not rely on the Working Group's March 2023 analysis—which was reported after the events at issue in the instant case—in deciding whether to sustain Applicants' challenges to the impugned decisions. Accordingly, the Tribunal denies Applicants' Supplemental Request because it seeks information not relevant to the controversy decided in this case.

B. Oral proceedings

26. 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 audio-video link. Both parties responded that they favored the Tribunal's holding of oral proceedings and making them available to Fund staff in the manner proposed.

27. Having considered those views, the Tribunal decided that oral proceedings, limited to the oral arguments of the parties and their counsel (Rule XIII(6) of the Tribunal's Rules of Procedure), would be "useful" (Rule XIII(1)). In challenging the modification of the safeguard mechanism rule and the FY2023 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. *See Elkjaer et al. (No. 2)*, para. 44. The parties were so notified on July 7, 2023.

28. Additionally, 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.[1]

29. On July 14, 2023, the Tribunal issued a Procedural Order governing the protocol for the oral proceedings. On July 21, 2023, by FUNDALL announcement, the Registrar invited the staff of the Fund to observe the oral proceedings via audio-video link and to access the written pleadings in the case.

30. Oral proceedings were held on July 27, 2023. The Tribunal found the oral representations of counsel helpful in elucidating the issues of the case.

FACTUAL BACKGROUND

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

A. 2019 Comprehensive Compensation and Benefits Review ("CCBR") and adoption of the "safeguard mechanism" rule

32. The controversy in this case concerns the Board's 2022 modification of the "safeguard mechanism" rule—a rule it had established in 2019 as part of the Comprehensive Compensation and Benefits Review ("CCBR") decision—and the application of that modified rule in the context of the FY2023 staff compensation decision. The history of the CCBR is elaborated in *Elkjaer et al. (No. 2)*, paras. 50-56. Key elements are recounted here.

33. A significant feature of the 2019 CCBR decision 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" adjustment, 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.[2]

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[1] The Tribunal had taken the same approach in two earlier challenges to regulatory decisions concerning staff compensation and benefits. *See Elkjaer et al. (No. 2)*, para. 46 (challenge to FY2022 staff compensation decision); *Elkjaer et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-4 (December 28, 2021), para. 32 (challenge to change in contribution rates for Medical Benefits Plan).

[2] The CCBR Overview Paper, p. 12, 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." 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. *Elkjaer et al. (No. 2)*, para. 54.

34. An important element of the decision to decouple adjustments to the payline from the total salary increase was the inclusion of a "safeguard mechanism." The safeguard mechanism is "to ensure that average salaries continue to track the midpoints well and maintain the current international competitiveness test." (Comprehensive Compensation and Benefits Review—Overview Paper, EBAP/19/88 (October 15, 2019) ("CCBR Overview Paper"), p. 12.) (Emphasis omitted.) In particular, 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. As formulated in 2019, the "safeguard mechanism" rule specified that the calculation of the comparatio was to be made utilizing salary data collected at the end of the Fund's financial year.

35. The "safeguard mechanism," as adopted as part of the 2019 CCBR decision, provided in its entirety as follows:

> ***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*[Footnote 10]* 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.) (Emphases in original.)

B. Previous challenge to application of the "safeguard mechanism" rule in the context of the FY2022 staff compensation decision

36. On August 2, 2021, some of the same staff members who would later bring the instant Applications challenged before the Tribunal the FY2022 staff compensation decision, alleging that the Fund had misapplied the "safeguard mechanism" rule in the context of that year's compensation round by utilizing salary data that terminated on March 1, rather than at the end of the Fund's financial year (i.e., April 30).[3] That challenge resulted in the Tribunal's Judgment in *Elkjaer et al. (No. 2)*.

C. Modification of the "safeguard mechanism" rule and the FY2023 staff compensation decision

37. While the applications in *Elkjaer et al. (No. 2)* were pending, Management proposed and the Board adopted: (a) the modification of the "safeguard mechanism" rule to cut off salary data as of January 31 for purposes of calculating the comparatio; and (b) the FY2023 staff compensation decision based on such calculation. These are the two decisions impugned in the instant case. The process leading to their adoption is outlined below.

(1) 2022 Review of Staff Compensation

38. Management proposed to the Board the decisions at issue in this case in the 2022 Review of Staff Compensation (EBAP/22/9, March 21, 2022) ("2022 Board Paper"). The 2022 Board Paper made reference to the applications then pending before the Tribunal (2022 Board Paper, Box 3) and proposed modifications to the "safeguard mechanism" rule in the context of responding to the issues raised therein:

> **[I]n response to SAC's concerns (Box 3), it is proposed to formally amend the description of the safeguard mechanism in the *CCBR Revised Proposed Decision* to explicitly recognize the dates and data, to be used in the safeguard calculations for the Board's decision on compensation:**
>
> - First, it is proposed that the data used in the comparatio calculation will be as of January 31 of the calendar year in which the Board adopts the Fund's budget. January 31 was chosen as an appropriate date to balance the objective of substantively reflecting internal labor dynamics during the year that impact the comparatio and hence the safeguards assessment, with the need to ensure that the annual budget and compensation reviews could be completed—

[3] The applicants in that case also challenged the use, in the calculation of the comparatio, of 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.

including with sufficient time for consultations with stakeholders—before the end of each fiscal year, and

- Second, it is proposed that footnote 10 of the *CCBR Revised Proposed Decision* be deleted from the rules of the compensation system, because its reference to "actual" salaries has generated some confusion. [footnote omitted.] The comparatio analysis' objective is to ensure that aggregate staff salaries across all grades (i.e., A1 through B5) remain aligned with compactor markets based on the salary increase index, without regard to any discretionary adjustments that may be made to the actual annual salary increases for grades B4-B5.

(2022 Board Paper, Paragraph 30.)

39. The 2022 Board Paper, p. 11, repeated verbatim Steps 1, 2 and 3 of Paragraph 20 of the 2019 CCBR decision (set out above at paragraph 35 of this Judgment). Steps 1 and 2, it will be recalled, refer expressly to making calculations based on data from the "end of the financial year." Step 3 prescribes that a determination be made based on that data.

40. Nonetheless, the section of the 2022 Board Paper detailing how the "safeguard mechanism analysis for the FY2023 salary increase [was] applied" disclosed that "data from January 31, 2022" was used in Step 1 and "salaries as of January 31, 2022" were used in Steps 2 and 3. (2022 Board Paper, pp. 12-13.) The 3-Step analysis for the FY2023 staff compensation decision resulted in a comparatio of 97.4 percent, which was below the 98 percent safeguard floor. (*Id.*, p. 14.)

41. Given that the comparatio fell outside of the safeguard corridor, Management proceeded to undertake the four-factor supplemental analysis prescribed by Paragraph 21 of the 2019 CCBR decision. As to the first factor, Management stated that "the indexes are representative of general salary trends in the U.S. comparator market"; however, a "tight labor market when entering a period of high and accelerating inflation, elevates the risk that data lags may not capture recent competitive pressures in labor costs." Management concluded with regard to the first factor: "It would, therefore, be prudent to add an upward adjustment to the salary increase indicated by the index." As to the second factor, Management concluded that there had not been recent changes in U.S. tax policy that would have a material effect on Fund net salaries. Likewise, as to the third factor, Management's analysis concluded that the Euro-U.S. dollar and Yen-U.S. dollar exchange rates had been relatively stable. However, as to the fourth factor, which is recent recruitment and retention experience at the Fund, Management's analysis revealed that the Fund was "experiencing competitive pressures to recruit in important areas of its mandate"; that staff with particular skills were "increasingly difficult to attract"; and that the rejection rate of offers to Economist Program (EP) recruits "rose to a record high." (2022 Board Paper, pp. 15-16.)

42. As a result of the four-factor supplemental analysis, Management made the following recommendation to the Board: "[I]n light of the safeguard mechanism's ultimate objective of ensuring that aggregate Fund salaries remain aligned with the U.S. comparator markets, it is recommended that a 5.0 percent salary increase be approved by the Executive Board." *(Id.*, p. 19.)

The proposed increase would bring the comparatio to 98.9 percent, "safely within the safeguard range," helping to "mitigate the risk of falling outside the range in the year ahead, especially in a period of high and uncertain inflation and when the Fund is launching a major recruitment effort to support the new strategic priorities and replace the significant number of staff that are about to retire." (*Id.*, p. 16.)

43. The 2022 Board Paper reaffirmed that the Fund's staff compensation system is both "comparator-based" and "rules-based." As to the latter feature, the paper noted: "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.) The 2022 Board Paper additionally highlighted that "[a]s approved by the Executive Board in December 2019, the *salary structure is adjusted separately from the annual salary increase paid to staff*," and that the "safeguard mechanism" had been established to "mitigate the risk" of divergence between the salary structure adjustment and staff salary increase under this new scheme. (*Id.*, pp. 6, 10-11.) (Emphasis in original.)

(2) HRD consultation with SAC

44. Prior to finalizing the 2022 Board Paper, on February 25, 2022, HRD officials circulated a draft to the SAC for its comments by March 2, 2022. SAC provided comments on March 7, 2022. SAC's additional comments were communicated on March 11, 2022.

45. In its initial comments of March 7, 2022, SAC stated that it "strongly disagree[d] with the proposals in the paper" and that the "proposed rule changes to the Safeguard Mechanism only two years after a grueling CCBR process shows staff that the CCBR process was never about maintaining competitiveness but instead about generating savings at the expense of staff." SAC suggested an increase for staff salaries of 8.3 percent, "enough to bring the comparatio of the Safeguard Mechanism up to 102 percent." SAC further stated: "The result of the CCBR framework is insufficient salary increases to maintain competitiveness. The Safeguard Mechanism is meant to account for this CCBR deficiency and protect staff from excessive salary erosion." (2022 Compensation Paper - SAC Comments, pp. 1, 3.)

46. Concerning the proposed changes to the safeguard mechanism rule, SAC commented: "These proposed changes came without forewarning and the window provided to SAC for comments is far too short for proper consultation." (*Id.*, p. 7) Furthermore, "[n]ow to codify that end of the financial year, means end-January, is to staff simply a bridge to[o] far and can only be[] seen by staff as a manipulation of what the intents of the CCBR safeguard were, namely, to control for the wage drift during the full fiscal year." (*Id.*, p. 8.)

47. In additional comments of March 11, 2022, SAC stated: "Management and the Board may have the authority to change the Safeguard Mechanism rules to reflect practice. In SAC's view, the practice should be changed to reflect the agreed rules consistent with a rules-based system. Re-opening the CCBR at this point is not proper." In addition, SAC commented: "It is difficult for SAC to accept the argument for changing the Safeguard Mechanism to only reflect salary erosion through January 31 [footnote omitted] when it was possible to include March 31 data in the 2021 Compensation Paper. Moreover, SAC disagrees that January 31 can reasonabl[y] be viewed as the

end of the fiscal year when it is a full three months before the end of the fiscal year." ("Additional SAC Comments on the Revised 2022 Compensation Proposal as of March 11, 2022," p. 1.)

(3) Management's Responses to Technical Questions of the Board

48. Prior to the Board's April 15, 2022, meeting, Management provided written responses to questions posed by Executive Directors. (*See* "2022 Review of Staff Compensation and Staff Recruitment and Retention in CY2021, Responses to Technical Questions Posed by Executive Directors in Advance of EBM/22/38—April 15, 2022.") ("Responses.") The Responses echoed the 2022 Board Paper: "January 31 was chosen as an appropriate date to balance the objective of substantially reflecting internal labor dynamics during the year that impact the comparatio and hence the safeguards assessment, with the need to ensure that the annual budget and compensation reviews could be completed—including with sufficient time for consultations with stakeholders—before the end of each fiscal year." In addition, the Responses advised the Board that "calculations demonstrate that the comparatio does not change significantly between January and March (for example, the comparatio is calculated at 97.4 percent at January 31, 2022 and March 15, 2022)."

(4) SAC Statement to the Board

49. Following Management's transmittal to the Board of the 2022 Board Paper, SAC submitted its own Statement to the Board. (*See* Executive Board Meeting on 2022 Review of Staff Compensation; Staff Recruitment and Retention Experience for CY2021, April 15, 2022, Statement by Staff Association Committee.) SAC's Statement proposed a salary increase of 8.3 percent to raise salaries to 102 percent of the comparatio, that is, to the ceiling of the safeguard corridor, asserting that "[t]his is how the rules-based system can protect staff salaries from real declines in the current high inflation environment." (*Id.,* p. 8.) With regard to the proposed modification of the safeguard mechanism rule: "SAC opposes changes to the rules of the safeguard mechanism because they will systematically underestimate salary erosion against comparator labor markets and introduce a bias against triggering the safeguard mechanism." (*Id.*, p. 11.) "The CCBR compensation framework introduced the safeguard mechanism to keep in check this risk of delinking Fund salaries from labor market comparators." (*Id.*, p. 9.)

50. In its Statement to the Board, SAC additionally noted with regard to the FY2022 staff compensation decision: "SAC has now learned that the salaries had dropped below the 98 percent comparatio and therefore the safeguard mechanism should have been activated, but it was not, see Box 2." (*Id.*, p. 10.) "Now, it is argued that the term 'end of the financial year' is not well-defined and for budget formulating reasons it can mean end-January. Such an approach can only be[ ] viewed by staff as a manipulation of what the intents of the CCBR safeguard were, namely, to control for the wage drift during the full fiscal year. . . . **Last year's salary did indeed drop below the safeguard.** SAC conjectured in its 2021 Board statement that salaries had fallen below the safeguard, which now have been confirmed." (Emphasis in original.) SAC suggested that the Fund "[f]ind a way to include 12 full months of salary erosion instead of a shorter period." (*Id.*, p. 12.)

(5) Board Decisions

51. On April 15, 2022, the Board approved three Decisions: (1) modification of the safeguard mechanism rule, as proposed at Paragraph 30 of the 2022 Board Paper; (2) adjustment to the salary structure by 2.2 percent, as proposed in the 2022 Board Paper, Annex IV, with effect from May 1, 2022; and (3) an average salary increase of 4.6 percent for staff in Grades A1-B5, with effect from May 1, 2022. The salary increase adopted by the Board differed from the 5.0 percent increase proposed by Management and was said to represent a "middle outcome" in relation to the range of views expressed by various Executive Directors. (*See* The Chair's Summing Up, 2022 Review of Staff Compensation; Staff Recruitment and Retention Experience in CY2021," Executive Board Meeting 22/38, April 15, 2022.)

52. On April 15, 2022, the Human Resources Director notified the staff of the Fund by FUNDALL announcement that the Board had adopted a 2.2 percent adjustment to the salary structure and a 4.6 percent average salary increase.

DIRECT REVIEW OF REGULATORY DECISIONS

53. Pursuant to Article VI(2) of the Statute of the Administrative Tribunal, an application challenging the legality of a "regulatory decision"[4] 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.[5]

54. The Fund's Executive Board took the contested decisions on April 15, 2022, with effect from May 1, 2022.

55. On July 29, 2022, Applicants timely filed their Applications with this Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicants' principal contentions

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

[4] Statute, Article II (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."

[5] *See Elkjaer et al. (No. 2)*, para. 74; *Elkjaer et al.*, 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.

1. The modified safeguard mechanism rule is invalid because it breaches a fundamental condition of Fund employment, that is, the entitlement to a rules-based staff compensation system. The 2019 safeguard mechanism supplies one such rule.

2. By accounting only partially for annual wage erosion, the modified safeguard mechanism rule is at odds with the CCBR framework. The result of the modification is to enable a further decoupling of staff salaries from the market-based payline, weakening the safeguard mechanism's effectiveness in maintaining the competitiveness of Fund salaries.

3. The Board may revisit the safeguard rule itself, but while the rule is in effect, it may not chip away at its effectiveness through modifications that undermine its central purpose. That purpose is to alert Management and the Board that annual salaries are drifting too far from the comparator-based payline, so that corrective action can be considered.

4. By under-accounting for annual salary erosion, the amended rule makes it both less likely that the comparatio will fall below the 98 percent threshold, permitting consideration of an adjustment to the salary increase, and—if it does fall below the threshold—less likely that the resulting adjustment will fully account for that erosion.

5. By changing the safeguard rule, Management has enabled itself to manipulate what should be an objective and transparent starting point for the exercise of discretion. Sustaining the amendment would mean that Management and the Board are free to move the goal posts and modify the supposedly objective inputs anytime they wish.

6. While the amendment's stated objective is to "balance" operational and budgetary concerns, such a "balance" is not contemplated by the 2019 safeguard mechanism.

7. If the Fund did have discretion to modify the safeguard mechanism rule, it abused that discretion. The use of end-January data is arbitrary and lacks any rational justification other than under-accounting for salary erosion. The amendment is not reasonably related to the stated objective of the reform, was not studied with sufficient care, and was not adopted in a reasonable manner seeking to avoid unnecessary harm to the staff.

8. The Board's decision to modify the safeguard mechanism rule was based on incomplete information regarding the extent of salary erosion that would result from the use of end-January instead of end-financial year salary data.

9. Management actively misdirected the Board by omitting a critical material fact, that is, that re-running the safeguard analysis in relation to the FY2022 staff

compensation decision by using end-April rather than end-February data caused the comparatio to drop below the safeguard floor.

10. The Fund failed to explore alternative means of taking the staff compensation decision before the end of the financial year that would not modify the safeguard mechanism rule in a manner detrimental to staff.

11. When the Board took the impugned decisions of April 15, 2022 challenged in this case, it did not have before it the March 2023 Report of the Technical Working Group on which Respondent seeks to rely in its pleadings. In any event, the data in that Report does not support the decisions challenged in this case.

12. Applicants were adversely affected by the 2022 decision to modify the safeguard mechanism rule because they were deprived of an integral aspect of the rules-based compensation framework. Additionally, Applicants suffered actual harm because, even as a signaling device, calculating the comparatio in a manner that does not fully account for annual wage erosion may have affected the Board's decision concerning the extent of the salary increase that was warranted to restore the competitiveness of Fund salaries.

13. Applicants seek as relief:

    a. an order invalidating the modification to the safeguard rule adopted in April 2022, which calls for the use of end-January rather than end-April salary data in the safeguard calculation, as exceeding the Fund's regulatory authority; and

    b. an order requiring Fund Management: (i) to rerun the safeguard analysis contained in its 2022 Review of Staff Compensation using end-April salary data as mandated by the 2019 safeguard rule; (ii) to alert the Board, SAC, and the staff to any resulting change in the safeguard calculation; and (iii) to take any other actions that may be warranted under the 2019 safeguard rule based on any change in the calculation, including but not limited to reconsidering the April 2022 salary increase decision and the higher increase originally proposed by Management to the Board.

    c. In their Reply, Applicants additionally seek a "forward-looking remedial component," that the Tribunal "make it explicit that while the 2019 safeguard rule and its stated purpose remains in effect, any implementation that fails to account for a full year's worth of wage erosion will be deemed presumptively invalid going forward."

d. Applicants also seek legal fees and costs, which the Tribunal may award, in accordance with Article XIV(4) of the Statute, if it concludes that the Applications are well-founded in whole or in part.

B. Respondent's principal contentions

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

1. Applicants do not have standing to challenge the 2022 modification of the safeguard mechanism rule because they have not been adversely affected by it, given that the safeguard mechanism was triggered when using end-January salary data for the FY2023 compensation decision and the Board exercised its discretion to adjust compensation upward in response.

2. The safeguard mechanism rule is not a fundamental and immutable term of Fund employment, and the Board has authority to amend it unilaterally. The modification does not violate the principles of "international competitiveness" or a "rules-based" compensation system.

3. The amendment of the safeguard rule is not constrained by the rule itself. There has been no longstanding practice or formal commitment to maintain the safeguard mechanism rule as adopted in 2019.

4. The modification of the safeguard mechanism rule constituted a reasonable exercise of the Board's discretionary authority. The decision was taken in the exercise of the Board's policy-making authority and is entitled to a high degree of deference by the Tribunal, which is not competent to question the advisability of policy decisions. It is for the Board to decide whether removing three months of salary erosion from the safeguard calculation would unacceptably undermine the precision of its trigger for closer scrutiny of the annual salary increase.

5. The Board understood that the modified rule introduced an "upward bias" into the comparatio calculation as compared with the original rule. The Board reasonably concluded that the drawback of this upward bias was outweighed by the benefits of certainty and predictability achieved by fixing the calculation earlier in the annual compensation review process.

6. The care with which a reform has been studied is not a standalone basis for overturning the exercise of policy-making discretion.

7. The modification of the safeguard mechanism rule was based on an appropriate consideration of relevant facts and reasonably related to the objectives it was intended to achieve. The primary consideration underlying the proposed change was to reformulate the rule consistent with the actual practice of staff compensation reviews and budget preparation.

8. The decision represents a practical solution that strikes a fair balance between competing considerations, including the need to complete the annual compensation review and budget preparation before the end of the financial year. The use of April 30 data did not well reflect the operational need to submit the annual administrative budget to the Board by April 1 each year and it was never so implemented. March 15 was also considered and was found to not have a significant effect compared to January 31. Subsequently, the Technical Working Group considered other alternative time periods to capture a "full-year picture" but found them unsuitable.

9. The Board was fully informed by the SAC of the "upward bias" that the modified rule may introduce to the comparatio analysis. The Board was also properly apprised by Fund Management of the objectives of the proposed change to balance the need to reflect internal labor dynamics that impact the comparatio and hence the safeguard assessment on the one hand, with the operational need for timely and orderly conduct of the annual budget and compensation reviews, on the other.

10. The decision represents a reasonable balancing of a "small difference in the calculation compared to end-April data" against the "benefits of certainty and predictability." The modified safeguard mechanism rule strikes a fair balance between conflicting objectives, and it was reasonably approved by the Board for good governance purposes.

11. The Working Group's Technical Review, which was reported to the Board in March 2023, "confirmed the reasonableness" of the Board's April 15, 2022, decision to modify the safeguard mechanism rule.

12. The decision to amend the safeguard mechanism rule was not improperly motivated.

13. None of the remedies that Applicants seek is warranted.

CONSIDERATION OF THE ISSUES

58. The Applications present the following principal questions for decision by the Tribunal. First, do Applicants have standing to challenge the modification of the "safeguard mechanism" rule and the FY2023 staff compensation decision? Second, did the Board violate a "fundamental and essential" condition of Applicants' employment by modifying the "safeguard mechanism" rule to provide that the comparatio will be calculated using end-January (rather than end-financial year) salary data? Third, if the Board had discretion to modify the "safeguard mechanism" rule, did it abuse that discretion by modifying the rule in the manner that it did? Fourth, did the Board abuse its discretion by adopting the FY2023 staff compensation decision based on the modified "safeguard mechanism" rule?

59. The questions presented in this case differ from those presented in *Elkjaer et al. (No. 2)*. In the earlier controversy, the Tribunal was required to decide whether, in connection with taking the

FY2022 staff compensation decision, the Fund properly applied the safeguard mechanism rule as enacted in 2019. The Tribunal concluded that Management had failed to comply fully with that rule—as the rule was then formulated, that is, specifying the calculation of the comparatio using end-financial year (i.e., April 30) data—when it used March 1 data to make the calculation. Furthermore, the Tribunal found that, as a result, the Board was not in a position to exercise properly its discretionary authority in taking the FY2022 staff compensation decision. *Elkjaer et al. (No. 2)*, paras. 115, 117. By contrast, the issues raised by the instant Applications are whether the Fund lawfully amended the safeguard mechanism rule in 2022, in connection with taking the FY2023 staff compensation decision, to specify that the comparatio will be calculated using end-January (rather than end-financial year) salary data, and lawfully took the FY2023 staff compensation decision based on that modified rule.

A. Do Applicants have standing to challenge the modification of the "safeguard mechanism" rule?

60. The Tribunal addresses at the outset Respondent's contention, raised for the first time in its Rejoinder and pursued at oral proceedings, that Applicants lack standing to challenge the impugned decisions on the ground that Applicants were not "adversely affect[ed]" by those decisions within the meaning of Article II(1) of the Tribunal's Statute. Respondent asserts that Applicants' claims are not admissible because the safeguard mechanism was triggered when using end-January salary data for the FY2023 compensation decision, and the Board exercised its discretion to adjust compensation upward in response. Respondent submits that Applicants' challenge is thus not ripe and would result in an advisory opinion by the Tribunal.

61. Applicants contend that they have standing to bring their claims because, by modifying the "safeguard mechanism" rule and applying it in the context of the FY2023 compensation decision, Respondent either violated Applicants' fundamental right to a rules-based compensation system or abused its regulatory discretion. Applicants allege actual financial harm on the ground that calculating the comparatio in a manner that does not fully account for annual wage erosion may have affected the Board's decision concerning the extent of the salary increase that was warranted to restore the competitiveness of Fund salaries.

62. It is settled jurisprudence that the "intendment of [the 'adversely affect[ed]'] requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy." *Ms. "G", Applicant, and Mr. "H", Intervenor, v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3, (December 18, 2002), para. 61; *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005), para. 17. This requirement supports the admonition that ". . . the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions." Commentary on the Statute, p. 13.

63. On several occasions, including in cases challenging regulatory decisions, the Tribunal has rejected the Fund's assertions that applicants have not been "adversely affected" by the decisions they seek to contest. *See, e.g., Ms. "G"*, para. 61; *Baker et al. (Admissibility of the Applications)*, para. 19 (motion for summary dismissal). *See also Mr. M. D'Aoust (No. 3), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2008-1 (January 7, 2008), para.

32 (challenge to individual decision). The Tribunal has also emphasized that the question of whether an applicant has been "adversely affected" by a decision of the Fund for purposes of determining the admissibility of a claim before this Tribunal is "distinct from the inquiry as to whether the challenged decision constitutes an abuse of discretion on which an applicant may prevail on the merits." *Daseking-Frank et al.*, para. 87; *D'Aoust (No. 3)*, para. 32.

64. In this case, the question is whether Applicants were "adversely affect[ed]" in terms of Article II(1) of the Tribunal's Statute, given that the modified safeguard rule, when applied in the context of the FY2023 staff compensation decision, resulted in a comparatio falling below the safeguard floor, triggering the four-factor analysis and a decision by the Board to adjust the proposed salary increase upward.

65. The fact that the safeguard mechanism was, in fact, triggered when the comparatio was calculated in accordance with the modified rule is not dispositive of whether Applicants were "adversely affect[ed]" by the rule in terms of Article II(1) of the Tribunal's Statute. *Cf., Elkjaer et al. (No. 2)*, para. 110 (rejecting "harmless error" argument that proper application of the rule by Management would not have been outcome determinative).

66. The Tribunal concludes that Applicants have met the threshold of admissibility. As staff members whose salaries have been affected by the FY2023 compensation decision, which was predicated on an allegedly unlawfully modified "safeguard mechanism" rule, Applicants have an adequate stake in the controversy to press their claims. The Tribunal turns now to the merits of those claims.

B. Did the Board violate a "fundamental and essential" condition of Applicants' employment by modifying the "safeguard mechanism" rule to provide that the comparatio will be calculated using end-January (rather than end-financial year) salary data?

67. In reviewing regulatory decisions, this Tribunal (drawing on principles developed by the World Bank Administrative Tribunal ("WBAT") in *de Merode*, WBAT Decision No. 1 (1981)) distinguishes between "fundamental and essential" conditions of employment, which are not subject to unilateral amendment, and non-fundamental and non-essential conditions of employment, which may be amended by the organization, subject to the constraints that govern the lawful exercise of discretionary authority. *Elkjaer et al. (No. 2)*, para. 81; *Daseking-Frank et al.*, para. 59.

68. In this case, Applicants contend that the modification of the safeguard mechanism rule, and its implementation in the context of the FY2023 staff compensation decision, violated a "fundamental and essential" condition of Fund staff employment.

69. In *de Merode*, para. 43, the WBAT acknowledged the difficulty that may arise in discerning which elements of the employment relationship meet the test of being "fundamental and essential" and which do not. The WBAT observed: "Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character." *Id.* The IMFAT has adopted this

distinction between "principle" and "implementation" in its own jurisprudence, *see Daseking-Frank et al.*, para. 60, and finds it apt in the present circumstances.

70. The Tribunal recognizes two principles as being "fundamental and essential" to the Fund's staff compensation system. These are that the system will be "rules-based" and that it will be "comparator-based." *Elkjaer et al. (No. 2)*, para. 82 (noting that "[t]hese are principles that the Fund itself has repeatedly confirmed" in Board Papers relating to the staff compensation system). How these principles are implemented through particular rules is, by contrast, a matter for the Fund's discretionary authority, reviewable by this Tribunal for abuse of discretion. *Daseking-Frank et al.*, para. 79.

71. Applicants submit that because the 2019 safeguard mechanism rule provides one rule of the Fund's "rules-based" compensation system, and because the 2022 amendment allegedly undermined that rule's purpose and effectiveness, the amendment violated a "fundamental and essential" condition of Applicants' employment. For the reasons set out below, the Tribunal does not find Applicants' argument persuasive.

72. The principle that the staff compensation system will be "rules-based" means that it will not be arbitrary. It will be transparent and predictable. Staff can expect that rules that have been enacted will be followed. This was the essential holding of *Elkjaer et al. (No. 2)*. At the same time, within a rules-based system, rules may lawfully be changed. *See Daseking-Frank et al.*, para. 73 ("[T]the Fund has always been, and remains, entitled to reconsider and re-shape the rules-based system for adjustment of staff salaries").

73. The Tribunal recalls that in *Elkjaer et al. (No. 2)*, paras. 82, 84, it underscored that the Board's annual decisions setting staff salaries are "closely cabined by the rules-based and comparator-based character of the compensation system" and that the safeguard mechanism itself reflects both those principles. On that basis, the Tribunal decided to "scrutinize closely" the Fund's adherence to the governing rules when the Board took the FY2022 compensation decision. *Id.*, para. 84. Nothing in that Judgment, however, precluded the Board from amending the safeguard mechanism rule, just as it may amend other non-fundamental and non-essential conditions of employment.

74. The Tribunal concludes that Applicants have not established that the safeguard mechanism rule is a "fundamental and essential" condition of Fund staff employment. Rather, it is one method for implementing a "rules-based" and "comparator-based" staff compensation system. The question of whether the amendment of the rule represents a lawful exercise of the Fund's discretionary authority is considered below.

C. Did the Board abuse its discretion by modifying the "safeguard mechanism" rule to provide that the comparatio will be calculated using end-January (rather than end-financial year) salary data?

75. In reviewing amendments to non-fundamental and non-essential terms of employment, including those affecting the staff compensation system, 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, which gives content to the lawful exercise of discretionary authority:

> 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.

Elkjaer et al. (No. 2), para. 81; *Elkjaer et al.*, para. 109; *Daseking-Frank et al.*, para. 90. This Tribunal has also held that its "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." *Elkjaer et al. (No. 2)*, para. 80; *Daseking-Frank et al.*, para. 46; *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 105.

76. With these principles in mind, the Tribunal will consider whether the challenged decision to modify the safeguard mechanism rule was not improperly motivated, whether it was reasonably related to the objective that it was intended to achieve, and whether it was based on an appropriate consideration of relevant facts.

(1) Was the decision to modify the "safeguard mechanism" rule improperly motivated?

77. The motive for the 2022 modification of the safeguard mechanism rule, which cut off data at January 31 for purposes of calculating the comparatio, was "to balance the objective of substantively reflecting internal labor dynamics during the year that impact the comparatio and hence the safeguards assessment, with the need to ensure that the annual budget and compensation reviews could be completed—including with sufficient time for consultations with stakeholders—before the end of each fiscal year." (2022 Board Paper, Paragraph 30. *See also* Management's Technical Responses to the Board.)

78. Applicants submit that such a "balance" is not contemplated by the 2019 safeguard mechanism and that the modified safeguard rule is at odds with the 2019 CCBR framework because it accounts only partially for annual salary erosion. Applicants contend that the Board "lacks the authority to weaken the safeguard rule through technical changes while purporting to adhere to core principles established in 2019." "Certainly the Board is free to revisit the safeguard rule itself," Applicants state, "but while the rule remains in effect, the Fund may not merely pay lip service to the safeguard while chipping away at its effectiveness." The Tribunal considers that this argument is an assertion of improper motive.

79. Respondent's position is that the modification of the safeguard mechanism rule was to strike a fair balance between the importance of the competitiveness of the Fund's salaries, on the

one hand, and the operational need to conduct the compensation review and prepare the annual budget in a timely and orderly manner, on the other. According to Respondent, the decision balanced a "small difference in the calculation compared to end-April data" with the "benefits of certainty and predictability" in the staff compensation decision-making process, including consultation with SAC. Respondent submits that the Board understood that the modified rule introduced an "upward bias" into the comparatio calculation as compared with the original rule, but also understood that this drawback was outweighed by the benefits of certainty and predictability of fixing the calculation earlier in the annual compensation review process.

80. Applicants assert, and Respondent does not appear to dispute, that an earlier cutoff date captures less erosion, results in a higher comparatio, and makes salaries appear more closely aligned to the payline than they actually are. As noted, Respondent contends that this small "upward bias" is outweighed by affording greater certainty and predictability to the annual compensation process.

81. The Tribunal recalls that in *Elkjaer et al. (No. 2)*, in which the Fund failed to comply with the terms of the then-governing safeguard mechanism rule, the Tribunal referred not only to the text of that rule (which specified that the comparatio calculation be based on data as of the end of the financial year) but also to a "purposive interpretation," *id.*, para. 91, of that rule: "[T]he 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." *Id.*, para. 93.

82. The Tribunal observes that in reformulating the safeguard rule in 2022, the Fund incorporated a purpose additional to "ensur[ing]—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." *Elkjaer et al. (No. 2)*, para. 91. That additional purpose is to provide a practicable approach to taking the annual staff compensation decision with due deliberation and consultation in the context of the Fund's budget timetable, including the requirement of the Fund's Rules and Regulations Rule J-4 that the annual budget be proposed by Management to the Board by April 1 each year.

83. The Tribunal finds that it was within the purview of the Fund's discretionary authority to modify the safeguard mechanism rule to respond to that additional objective. The Tribunal accordingly concludes that the 2022 decision to modify the safeguard mechanism rule to provide that the comparatio will be calculated using end-January (rather than end-financial year) salary data was not improperly motivated.

(2) Was the decision to modify the "safeguard mechanism" rule reasonably related to the objective that the modification was intended to achieve?

84. Having concluded that the decision to modify the safeguard mechanism rule was not improperly motivated, the next question is whether the impugned decision was reasonably related to its objective.

85. The Tribunal has found unavailing Applicants' assertion that it was impermissible of the Fund to seek to balance the goal of maintaining the competitiveness of the staff salaries against

operational needs. The further question is whether the particular modification chosen, that is, to truncate data collection after the first nine months of the Fund's financial year, is "reasonably related" to its objective. *See de Merode*, para. 47. This is a test of the proportionality between a legitimate objective and its means of implementation.

86. The Tribunal has consistently held that "the Fund's policy-making discretion extends to making choices between more than one reasonable alternative." *Daseking-Frank et al.*, paras. 49, 101; *Ms. "G"*, para. 80. That an alternative is a "reasonable" one includes that there is a rational nexus between the distinctions drawn by the rule and the overall goals of the policy that it serves. *See, e.g.*, *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), para. 64 (allocation of differing benefits to different categories of staff was reasonably related to purposes of the benefits); *Ms. C. Roehler, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2023-2 (January 31, 2023), para. 75 (requirements for B1 promotional consideration were rationally related to goals of strengthening managerial assessment and promoting B-level readiness).

87. The Tribunal's jurisprudence also "embraces the position that the existence of a rational nexus between the goals of a policy and the method for allocating its benefits 'does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and . . . may rest upon generalizations.'" *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010), para. 86, quoting *Daseking-Frank et al.*, para. 52. *See also Ms. "G,"* paras. 79-80 (sustaining Fund's choice of a visa criterion for allocation of expatriate benefits, in the light of the goals of the expatriate benefits policy, while acknowledging that the previous choice of a nationality criterion had also been "rational and defensible," indeed "perhaps even more so").

88. The Tribunal observes that since the enactment of the safeguard mechanism in 2019, the Fund has never calculated the comparatio on the basis of end-financial year data. In *Elkjaer et al. (No. 2)*, para. 90, the Tribunal noted Respondent's argument that the timing of the Fund's budget process posed an obstacle to such implementation. It further considered that "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." *Id.*

89. As noted, in reformulating the safeguard mechanism rule in 2022, the Fund incorporated a purpose additional to "ensur[ing]—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." *Id.*, para. 91. That additional purpose is to provide a practicable approach to taking the annual staff compensation decision with due deliberation and consultation with stakeholders in the context of the Fund's budget timetable. 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.

90. The Tribunal is persuaded that there is a rational nexus between a rule that truncates data collection for purposes of calculating the comparatio after the first nine months of the Fund's

financial year, on the one hand, and the Fund's policy goal of taking the annual staff compensation decision with due deliberation and consultation in the context of the budget timetable, on the other. The decision to cut off data collection at January 31, while perhaps not a "perfect fit" (*Ms. "G"*, para. 79), is reasonably related to the overall objective that it serves.

91. The Tribunal accordingly concludes that the decision to modify the "safeguard mechanism" rule was reasonably related to the objective that the modification was intended to achieve. It was within the Board's discretionary authority to modify the safeguard mechanism rule to balance competing goals in the manner that it did. The decision was not arbitrary, and it fell within the ambit of the Fund's authority to make choices among reasonable alternatives.

(3) Was the decision to modify the "safeguard mechanism" rule based on an appropriate consideration of relevant facts?

92. Having concluded that the modification to the safeguard mechanism rule was not improperly motivated and was reasonably related to the objective that it was intended to achieve, the next question is whether that decision was "based on a proper consideration of relevant facts." *de Merode*, para. 47.

93. Applicants contend that, given the goal of maintaining the international competitiveness of Fund salaries and Management's stated goal of being able to make a compensation decision before the end of the Fund's financial year, the Board must be informed, at a minimum, of the degree to which excluding a quarter-year of salary erosion would change the outcome of the comparatio calculation. Applicants assert that Management did not provide the Board with any relevant fact about what measuring nine months, rather than twelve months, of salary erosion would mean for the comparatio calculation or the safeguard analysis.

94. Furthermore, Applicants allege that Management actively misdirected the Board when it considered the modification of the safeguard rule in connection with the FY2023 staff compensation decision. Applicants submit that Management omitted a material fact, which was that when Management had re-run the safeguard analysis for the FY2022 compensation decision, using end-April rather than end-February data, the comparatio "did drift downward in the final month of the financial year," falling below the safeguard floor. *See Elkjaer et al. (No. 2)*, para. 108.

95. Applicants highlight Management's mistaken prediction, conveyed to the Board in relation to the FY2022 compensation decision, that it had "no reason . . . to expect the comparatio [at April 30, 2021] to be substantially different than a few weeks earlier." It was on this basis that the Tribunal in *Elkjaer et al. (No. 2)*, para. 108, concluded 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." Applicants allege that, just as with the FY2022 compensation decision, the Board was again misadvised in relation to the FY2023 compensation decision by speculative comments made in Management's Responses to Technical Questions of the Board; those Responses reported that "calculations demonstrate that the comparatio does not change significantly between January and March (for example, the comparatio is calculated at 97.4 percent at January 31, 2022 and March 15, 2022)."

96. Respondent counters that, in taking the FY2023 staff compensation decision, the Board did have knowledge of Management's mistaken prediction in relation to the FY2022 decision because SAC included that information in its own Statement to the Board, p. 10 and Box 2: "SAC has now learned that the salaries had dropped below the 98 percent comparatio and therefore the safeguard mechanism should have been activated, but it was not . . . . **Last year's salary did indeed drop below the safeguard.** SAC conjectured in its 2021 Board statement that salaries had fallen below the safeguard, which now have been confirmed." (Emphasis in original.) Respondent additionally submits that Management did not include this information in its Board Paper or in its Responses to Technical Questions because it considered it was not relevant to the FY2023 decision.

97. In *Elkjaer et al. (No. 2)*, the Tribunal found that the Board did not have all the relevant facts because the then-governing safeguard mechanism rule required in its text that the cutoff date for calculating the comparatio ratio was the end of the financial year and Management had not provided the Board with this calculation. In the instant case, the text of the applicable safeguard mechanism does not include this requirement. The Tribunal recognizes the importance of the Board having all relevant and available facts when it takes its decision. Given the facts that were before the Board in respect of the modification of the safeguard mechanism rule and the FY2023 staff compensation decision, the Tribunal finds that the Board had the relevant facts and did not abuse its discretion in proceeding to reach its decisions.

98. The Tribunal also notes that Respondent attempts to support the reasonableness of the Board's 2022 modification of the safeguard mechanism rule by invoking the Working Group's Technical Review, a report made to the Board in March 2023. Applicants properly point out that when the Board took the decisions of April 15, 2022, challenged in this case, it did not have before it the March 2023 Report of the Technical Working Group. The Tribunal considers that the Report is not relevant to the issues of this case and, as stated above,[6] it does not rely on the Working Group's March 2023 analysis in deciding Applicants' challenges to the impugned decisions.

99. In deciding whether the decision to modify the safeguard mechanism rule was based on an appropriate consideration of relevant facts, the Tribunal further considers that "[a]mendments 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 … [is] to be taken into account by the Tribunal." *de Merode*, para. 47.

100. The Tribunal recalls that the purpose of the 2019 safeguard mechanism rule was to maintain a degree of alignment between the annual adjustment to the Fund's payline and the annual salary increase. The safeguard mechanism is "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.)

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[6] *See supra* PROCEDURE: Applicants' Requests for production of documents and information; Supplemental Request for Information.

101. Applicants contend that the Fund failed to explore available alternative means for taking a compensation decision before the end of the financial year without modifying the safeguard mechanism rule in a manner that it considered detrimental to Fund staff by limiting data collection to only three quarters of the financial year. The Tribunal recalls that SAC raised in its Statement to the Board that the Fund should "[f]ind a way to include 12 full months of salary erosion instead of a shorter period." Nonetheless, as far as the record reveals, it supplied no alternatives for consideration.

102. The Tribunal recognizes that Applicants' essential argument is that the 2019 safeguard mechanism rule's specification of a data cutoff at the end of the financial year—thereby capturing a full year's salary erosion—was essential to the rule's purpose and effectiveness. The Tribunal, having concluded that the decision did not violate a "fundamental and essential" condition of Applicant's employment, considers that the 2022 modification of the safeguard mechanism rule was a policy decision concerning the approach to taking the annual staff compensation decision.

103. The Tribunal can review policy decisions for their lawfulness but not for the soundness of the policy itself. Article III (third sentence) of the Tribunal's Statute provides: "Nothing in this Statute shall limit or modify the powers of the organs of the Fund under the Articles of Agreement, including the lawful exercise of their discretionary authority in the taking of individual or regulatory decisions, such as those establishing or amending the terms and conditions of employment with the Fund." As elaborated in the Commentary on the Statute, p. 20: "[A]lthough 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."

104. The adoption of the safeguard mechanism rule as part of the 2019 CCBR decision was itself a policy decision, resulting from the give and take of a political process that engaged key stakeholders. *See Elkjaer et al. (No. 2)*, paras. 50-56. The 2022 modification of the safeguard rule may also be said to have "reflected a process of compromise and deliberation," *Daseking-Frank et al.*, para. 94, common to the Fund's various reforms of its compensation system. As the Tribunal observed in reviewing a challenge to an earlier amendment to the staff compensation system: "This fact, however, does not mean that the decision failed to take proper account of the relevant facts or that the provisions adopted are not reasonably related to the objectives that they seek to achieve." *Id.*

105. As in that earlier case, the decision at issue here "reflects consultation with all pertinent stakeholders, the Board's drawing upon the information before it in taking its decision, and the compromises that characterize a legislative process." *Id.*, para. 97. That process included the proper consideration of facts relevant to the decision-making process.

106. Accordingly, the Tribunal finds that the modification of the safeguard mechanism rule was not improperly motivated, the modification was reasonably related to the objective it was intended to achieve, and it was based on an appropriate consideration of relevant facts.

107. For these reasons, Applicants' challenge to the 2022 modification of the safeguard mechanism rule is denied.

D. Did the Board abuse its discretion by adopting the FY2023 staff compensation decision based on the modified "safeguard mechanism" rule?

108. The Tribunal has concluded above that the decision to modify the safeguard mechanism rule to cut off data collection as of January 31 neither violated a "fundamental and essential" condition of Fund staff employment nor represented an abuse of the Fund's discretionary authority to amend those conditions of employment that are not fundamental and essential.

109. The Tribunal has emphasized that "[t]he 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." *Elkjaer et al. (No. 2)*, para. 112. Applicants do not allege that the Fund failed to follow the steps prescribed to be taken after the comparatio fell below the safeguard floor, in particular, to undertake the four-factor analysis specified by Paragraph 21 of the CCBR decision.

110. Applicants have not raised a challenge to the FY2023 staff compensation decision independent of that decision's reliance on the calculation of the comparatio based on the modified safeguard mechanism rule. Accordingly, for the same reasons that the Tribunal sustains the Board's modification of the safeguard mechanism rule, it also sustains the Board's FY2023 staff compensation decision.

111. The Applications are therefore denied in their entirety.

ADDITIONAL OBSERVATIONS OF THE TRIBUNAL

112. In concluding in *Elkjaer et al. (No. 2)* that the Fund failed to comply with the terms of the then-governing safeguard mechanism rule, the Tribunal referred not only to the text of that rule (which specified that the comparatio calculation be based on data as of the end of the financial year) but also to a "purposive interpretation," *id.*, para. 91, of that rule: "[T]he 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." *Id.*, para. 93.

113. As noted above, the Tribunal's conclusion in *Elkjaer et al. (No. 2)* was based on the safeguard mechanism rule as formulated in 2019. In reformulating the rule in 2022, the Fund has incorporated a purpose additional to "ensur[ing]—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." *Id.*, para. 91. That additional purpose is to provide a practicable approach to taking the annual staff compensation decision with due deliberation and consultation in the context of the Fund's budget timetable, including the requirement of the Fund's Rules and Regulations Rule J-4 that the annual budget be proposed by Management to the Board by April 1 each year. The Tribunal has concluded that it was within the Fund's discretionary authority to

modify the safeguard mechanism rule in the manner that it did to respond to this additional objective.

114. In taking the decision to modify the safeguard mechanism rule to truncate the collection of salary data at January 31 (thereby excluding three months of the year in assessing wage erosion) in the context of an annualized assessment of the competitiveness of the Fund's salaries, however, Management and the Board came close to exceeding their discretionary authority. That modification made a significant change in the architecture of the safeguard mechanism rule, which, when enacted in 2019, required (at paragraph 20, Step 1) that the Fund "[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* [and] [t]his will determine the end-year comparatio." (Emphasis added.)

115. The Fund continues to study the question of how best to design a methodology to support the competitiveness of Fund salaries under a compensation system that has de-linked adjustment of the payline from the salary increase. The Tribunal takes notice of the work of the Technical Working Group, as reflected in the 2023 Review of Staff Compensation EBAP/23/21 (March 27, 2023), which is part of the record of the instant case. The Working Group has recognized the "upward bias in the comparatio calculation when using less than full year data" and has suggested that "the Fund should consider options to address this shortcoming or risk triggering the safeguard mechanism each year and undermining its credibility." (EBAP/22/9, p. 39.) The Tribunal is of the view that concerns about compliance with the principles of "predictability, consistency, and transparency" (*see Elkjaer et al. (No. 2)*, para. 93) in the staff compensation system remain, and that if variability in the application of the safeguard mechanism rules were to persist, the Fund runs the risk of abusing its discretionary authority in maintaining a rules-based and comparator-based staff compensation system. The Tribunal, however, does not consider that Respondent has reached the point of abuse of discretion in the instant case.

CONCLUSIONS OF THE TRIBUNAL

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

117. Applicants have standing to challenge the decisions they seek to impugn. They have been "adversely affect[ed]" by the decisions within the meaning of Article II of the Tribunal's Statute because their salaries have been affected by the FY2023 staff compensation decision.

118. The safeguard mechanism rule adopted by the Board as part of its 2019 CCBR decision is not a "fundamental and essential" condition of Fund staff employment. Accordingly, it was open to the Board to modify that rule, subject to the constraints that govern the lawful exercise of discretionary authority.

119. The Board did not abuse its discretion by modifying the "safeguard mechanism" rule to provide that the comparatio will be calculated using end-January (rather than end-financial year) salary data. That decision was not improperly motivated, the modification was reasonably related to the objective it was intended to achieve, and it was based on an appropriate consideration of relevant facts.

DECISION

FOR THESE REASONS

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

The Applications of Mr. T. Elkjaer, Mr. J. Manning, Mr. J. Mongardini, Mr. J. McHugh, Ms. L. Li, and Ms. H. Shi are denied.

Nassib G. Ziadé, President

Edith Brown Weiss, Judge

Andrew K.C. Nyirenda, Judge

/s/
Nassib G. Ziadé, President

/s/
Celia Goldman, Registrar

Washington, D.C.
December 29, 2023