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INTERNATIONAL MONETARY FUND

Minutes of Executive Board Meeting 90/178

3:00 p.m., December 19, 1990

M. Camdessus, Chairman

Executive Directors	Alternate Executive Directors
M. Al-Jasser	L. E. N. Fernando
C. S. Clark	Zhang Z.
T. C. Dawson	S. B. Creane, Temporary J. Prader
E. A. Evans	G. H. Spencer N. Kyriazidis M. B. Chatah, Temporary
M. Fogelholm	
B. Goos	
J. E. Ismael	G. Bindley-Taylor, Temporary J.-L. Menda, Temporary
A. Mirakhor	L. J. Mwananshiku J. O. Aderibigbe, Temporary
D. Peretz	C. J. Jarvis, Temporary
G. A. Posthumus	J. K. Orleans-Lindsay, Temporary R. Marino
A. Végh	A. G. Zoccali M. Nakagawa, Temporary

L. Van Houtven, Secretary and Counsellor
S. L. Yeager, Assistant

Also Present

Staff Association Committee: A. Doizé, Chairman; A. W. Lake, A. Muttardy. Administration Department: G. F. Rea, Director; D. S. Cutler, M. E. Gehringer, A. D. Goltz, J. D. Huddleston. External Relations Department: I. A. McDonald. Legal Department: F. P. Gianviti, General Counsel; W. E. Holder, Deputy General Counsel; R. H. Munzberg, Deputy General Counsel; D. Asiedu-Akrofi, J. S. Powers. Middle Eastern Department: H. P. G. Handy. Secretary's Department: R. S. Franklin. Personal Assistant to the Managing Director: B. P. A. Andrews. Advisors to Executive Directors: M. A. Ahmed, M. Galán, M. J. Mojarrad, A. M. Tanase. Assistants to Executive Directors: B. Abdullah, B. A. Christiansen, N. A. Espenilla, B. R. Fuleihan, O. A. Himani, J.-P. Schoder, C. M. Towe, S. von Stenglin.

1. ADMINISTRATIVE TRIBUNAL - FURTHER CONSIDERATION

The Executive Directors considered a staff paper on further issues for consideration on the establishment of an administrative tribunal for the Fund (EBAP/90/309, 11/28/90). They also had before them a position paper prepared by the Staff Association Committee (EBAP/90/325, 12/17/90).

The Chairman of the Staff Association Committee made the following statement:

> In its position paper, the Staff Association Committee (SAC) presented its comments and proposals for amendment of the draft Statute of the Administrative Tribunal for the Fund as proposed in EBAP/90/309. The SAC hopes that Directors will consider all the issues raised in its position paper. Nevertheless, I shall limit my comments to the three issues to which the SAC attaches paramount importance. These issues are the jurisdiction of the tribunal over decisions affecting the terms and conditions of employment in the Fund; the effective date of the tribunal's competence; and, the costs of litigation.
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> In a memorandum to the World Bank's Executive Directors on an administrative tribunal for the Bank dated January 14, 1980, Mr. McNamara, then President of the World Bank, noted that one of the reasons for the establishment of a tribunal was that, where administrative power is exercised, there should be the possibility for a fair hearing and due process. Because of the Fund's immunity from judicial process under any municipal law, the establishment of an effective administrative tribunal is necessary to provide the staff with this basic right. The SAC finds that the proposed draft statute for the Fund's Administrative Tribunal, as presently formulated, is unacceptable, as it does not afford the staff the protection enjoyed by employees of other international organizations, including the World Bank, nor does it afford staff members the protection they would be entitled to in any national court of law.
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> With respect to the first issue on which the SAC wishes to call Directors' attention--namely, the jurisdiction of the tribunal--the SAC feels strongly that the bracketed clause in Article II, Section (2), paragraph (b) of the proposed Statute, and the last sentence of Article III should be deleted, as these clauses provide two avenues through which the Executive Board could readily take away from the tribunal the competence to review regulatory or administrative decisions regarding the terms and conditions of employment. These provisions could leave the staff without the means of redress of legitimate employment disputes that is at the very heart of the establishment of the administrative tribunal for the Fund. They are contrary to the principles

governing administrative tribunals of all other international organizations. In any event, even in the absence of these clauses, the Board of Governors would retain the unfettered power of limiting the jurisdiction of the tribunal, to the extent of abolishing the tribunal altogether, and the Executive Board would retain the power of interpretation set forth in Article XXIX of the Articles of Agreement, including the interpretation of Article XII, Section 4.

Concerning the issue of the effective starting date for the competence of the tribunal, the SAC asks Directors not to penalize the staff for having shown patience and restraint when other matters of major importance were commanding the attention of the Executive Board and management, which has resulted in a delay of many years in establishing the administrative tribunal. The World Bank extended the competence of its Administrative Tribunal to causes of action arising prior to the entry into force of the Tribunal's Statute.

As to the costs of litigation before the tribunal, these costs may very well discourage staff members, in particular those who are at the lower end of the pay scale, from bringing a legitimate employment dispute before the tribunal. This would certainly not be in the interest of justice. The proposed amendments to Article XIV, Section 4 of the draft statute would alleviate the risk that financial needs might deter staff from availing themselves of their right to judicial review. Even more alarming is the potentially chilling effect of the proposed Article XV, under which costs may be imposed on an unsuccessful applicant when the administrative tribunal deems the case to be frivolous. There are other means to deal with so-called frivolous cases. The rules adopted by the World Bank's Administrative Tribunal, for instance, provide for the summary dismissal of an application that is clearly irreceivable or devoid of all merit.

Today, the Executive Board has the opportunity to show the staff, whose dedication, professionalism, and hard work it has often praised, that it is confident that its decisions regarding the terms and conditions of employment will stand up in a court of law. We, in the SAC, sincerely hope that the Statute for the Fund's Administrative Tribunal that will be proposed to the Board of Governors for adoption will provide the staff with a tribunal that will effectively protect its legitimate legal rights, and will improve the ability of the Fund to retain and recruit highly qualified staff as mandated by its Articles of Agreement.

In concluding, I would remind Directors that the Fund will be the last of the United Nations agencies to provide its staff with judicial review. In remedying this anomaly, the Fund must not be

seen to afford its staff less judicial protection than that provided to the staff of all other UN agencies and other international organizations.

The Board is called upon to take a landmark decision on an issue to which the staff attaches importance, as reflected in the SAC's survey of staff opinion conducted this summer. The Board has an opportunity today to deepen the relationship of trust that must prevail between the Executive Board and the management of this institution and its staff.

Mr. Fogelholm observed that the statement in the Appendix to the SAC's position paper that the tribunal should be able to review and reverse a decision on general salary levels and benefits that was "inconsistent with the Executive Board's previous policy on such matters" was striking. Although the Board usually approved some salary increase every year, it could decide that no salary increase, or even a reduction of salaries, was warranted. Even though the latter was unlikely, he wondered whether in the SAC's view, such an action would be deemed inconsistent and subject to challenge.

The Chairman of the Staff Association Committee remarked that other administrative tribunals had generally held that there could be no change in the fundamental conditions of employment that was inconsistent with established policy. In that light, if the current procedure for determining staff compensation was not adhered to in a meaningful way, the SAC might wish the Tribunal to look into the matter. In the absence of an established procedure, an established practice might serve as the basis for determining whether a decision was inconsistent. For example, the provision in the Fund's Articles of Agreement calling for a staff of the highest caliber was an important guideline for determining the consistency of the Board's policy on salaries.

The General Counsel remarked that he understood from the decisions of other tribunals that unless a practice or policy currently in place committed--explicitly or implicitly--the organization to apply a particular salary structure, the Board would be free to determine salaries as it saw fit.

Mr. Goos said that he wondered whether, as the SAC believed, the fact that decisions of the Board of Governors would not be subject to the tribunal's review and the possibility that the Executive Board's right to interpret the Articles of Agreement could be used to nullify decisions of the tribunal was indeed a serious constraint. It could be argued that those provisions would apply only in exceptional circumstances. So far, the Board of Governors had never taken decisions covering administrative policies, let alone decisions affecting individual staff members. The SAC's concern betrayed a considerable degree of mistrust toward the Executive Board.

While he would prefer to proceed on the basis of mutual trust, it might be desirable for the Fund to have some safeguard against those features of the draft statute that left him uneasy, particularly the provision that the tribunal would base its decisions not only on the established legal framework of the institution but also on the principles of laws that had been established in other tribunals. Moreover, he questioned the view that the draft statutes would afford the staff less protection than the legal systems of some member countries. National legal systems usually applied their own domestic law, and had no recourse to the laws of other countries. To avoid recourse to decisions appropriate to other tribunals but inappropriate to the particular context and environment of the Fund, some sort of safeguard would be desirable.

The Chairman of the Staff Association Committee remarked that in a climate of mutual trust, there was be no need for so-called safeguards. Indeed, the call for safeguards underlined the SAC's concerns. As to which laws should be applied by the Tribunal, the SAC considered that as international civil servants, the Fund's staff should receive the same protections as other international civil servants. The SAC was concerned that the Fund should not provide its staff with less protection in terms of judicial review than that enjoyed by other international civil servants.

The Executive Directors then took leave of the Chairman and members of the Staff Association Committee.

Mr. Peretz said that to expedite the discussion of the issues that had been raised by the SAC and the complex documents before the Board, he proposed that each Director provide detailed comments in writing on the draft statutes. The staff could then produced a summary of those comments, identifying areas of agreement as well as those points requiring further discussion.

The Chairman remarked that he welcomed suggestions for expediting the consideration of an urgent but complex issue. To proceed in writing could, however, been seen by the SAC as a practical refusal to consider its fundamental concerns. The Executive Board might indicate to the SAC that in order to give substantive consideration to the fundamental points that had been raised, Directors had decided to prepare written statements indicating their position on each point.

Mr. Posthumus said that Directors' detailed comments could be circulated not only to the staff but also to other Directors. Moreover, he would propose to discuss briefly the three issues that had been raised by the SAC, without delaying the decision-making process.

Mr. Fogelholm remarked that he supported a short discussion of the issues that the SAC had raised, because they would, in any event, have to be resolved before a decision could be taken on a draft statute. Detailed

written comments on the draft statute could then be prepared in the light of the more general discussion and circulated among Directors.

The Chairman suggested that the three basic issues that had been raised by the SAC could be taken up first. Thereafter, Directors could decide whether to proceed along the lines that had been proposed by Mr. Peretz.

Mr. Mirakhor commented that Directors might wish to raise other basic issues and concerns relating to the staff paper. He was willing to go along with Mr. Peretz's and Mr. Posthumus's suggestions if attention could first be given to the staff paper before turning to the issues raised by the SAC.

The Chairman observed that following several Board discussions on the establishment of an administrative tribunal, the remaining basic difficulties were, in fact, the three points raised by the SAC. He shared Mr. Peretz's concern about proceeding expeditiously to resolve those remaining issues so that the Board could progress toward a decision on the entire matter. Directors could, of course, present additional points in the course of the discussion, or in a written statement.

Without further discussion, Executive Directors agreed to take up the three issues that had been raised by the SAC and to submit for the record 1/ their detailed written comments on the draft statute.

The General Counsel recalled that the first issue was the scope of the tribunal's jurisdiction under the proposed statute. The proposed statute would impose essentially two limitations. The first was that the tribunal would have no jurisdiction over resolutions of the Board of Governors: the tribunal could review only decisions of the Executive Board and management. The second limitation was that the Executive Board would retain its power to interpret the Articles of Agreement, and those interpretations would be binding on the tribunal. The SAC had raised objections to those two points with respect to the tribunal's jurisdiction.

Mr. Al-Jasser said that he understood that the World Bank's Tribunal heard the cases of individuals who had been adversely affected by an administrative decision and that the individual could appeal to the Tribunal only after exhausting all other available means of recourse. The proposed jurisdiction of the Fund's administrative tribunal also extended to the review of regulatory decisions, which could include some decisions taken by the Executive Board. He wondered how to differentiate between policy decisions and regulatory decisions. If regulatory decisions could be contested by individuals, he wondered how the prerogatives of the Executive Board would be maintained while at the same time the rights of the staff members would be protected, including their right to appeal to a tribunal.

1/ Executive Directors' written comments on the draft Statute of the Administrative Tribunal are reproduced in the Appendix.

Mr. Dawson observed that with respect to the issue of jurisdiction, the proposed draft statutes might go further than--or not as far as--some Directors might desire. In that context, he had sympathy for the points that Mr. Al-Jasser had raised. While he had difficulties with a few of the issues that the SAC had raised, he also had more general concerns with the direction of the proposed draft statute, which he would set out in his written comments to be submitted for the record and circulated to Directors.

The General Counsel explained that there were indeed differences between the jurisdiction of the proposed tribunal and that of the World Bank Administrative Tribunal, but those differences were not as fundamental as they first appeared to be. The World Bank's Administrative Tribunal had jurisdiction over decisions affecting individuals, but it had interpreted its statute to include the right to challenge a regulation by challenging its implementation in individual cases. For example, a Bank staff member could not directly challenge the legality of a regulation adopted by the Bank's Executive Directors, but he could challenge the application of the regulation to himself and thereby could challenge the regulation indirectly. In the staff's view, the approach proposed in the draft statute for the Fund's tribunal would be more direct and thus more expeditious.

The authority of the tribunal to review the exercise of discretionary powers, policy decisions, and regulations was one of the most difficult, if not the most difficult, issues with respect to establishing an administrative tribunal, the General Counsel considered. In principle, the Executive Board exercised discretionary powers that were subject to some legal limits. For instance, the Executive Board could, as a matter of principle, decide on salaries, but it could not, as a matter of law, reduce salaries retroactively. There was thus a limitation on the Executive Board's power. Not all legal principles were explicitly set out in the Fund's Articles of Agreement. Some had to be derived from generally recognized principles of international administrative law, which were not placed in the charter of international organizations. A document such as the Articles of Agreement or the United Nations Charter dealt essentially with institutional questions rather than administrative matters. The principle of nonretroactivity, for example, would not be expressly stated in the UN Charter but would be considered as binding on the UN as a matter of generally accepted principles. The Fund's legal system was thus enriched by borrowing from the common wisdom of other international organizations and tribunals.

Mr. Al-Jasser asked whether with respect to the prerogatives of the Executive Board, the staff could assure Directors that there would be no difficulty, at least from a legal point of view, in distinguishing between a legal limitation and a policy prerogative of the Board. His concern was the prospect of a raft of litigations because a decision of the Executive Board, which had at the time been regarded as within its prerogative, was later deemed to be of questionable legality.

The General Counsel remarked that because there were no absolute assurances, the staff wished to be able to borrow from, and rely upon, the established law of international organizations so that it could provide the Executive Board the highest possible degree of certainty and thus avoid litigation. In his personal judgment, the degree of uncertainty on the legality of decisions was much greater in respect of individual decisions than in respect of regulations, because individual decisions involved questions of fact to a large extent, which could not always be easily assessed. It was difficult to know in advance how a jury would decide on questions of fact. The outcome with respect to questions of law was easier to foresee. In those instances, the staff should be able, at least in most cases, to advise the Board whether a proposed course had been overruled by a tribunal of another organization and to recommend whether the Board should refrain from taking that course because of a serious risk in case of litigation.

Mr. Fogelholm said that he could go along with the proposed draft statute as it stood. He could also go along with the amendments proposal by the SAC if the consensus favored that approach. Nevertheless, he regretted the tone of the SAC's comments, which displayed a certain lack of trust. In his view, the tribunal could easily distinguish between policy and law, and he saw no danger in that regard. Moreover, he did not see a potential for ensuing litigation in that respect.

Mr. Posthumus commented that if the establishment of an administrative tribunal would not derogate from the powers conferred on the organs of the Fund, including the Executive Board, by the Articles of Agreement, he wondered why the sentence in question could not be deleted as the SAC had suggested.

The General Counsel observed that the proposed deletion dealt with the power of interpretation of the Executive Board. He did not completely understand the SAC's position on that point because if it was generally agreed that the Executive Board would retain the power to adopt binding interpretations, the result was the same. He was concerned that the suggestion posed a more substantive problem; namely, that the withdrawal of the provision could lead to the conclusion that the Executive Board did not have the power to interpret the Articles in a binding fashion. There would thus be a limitation on the Executive Board's right of interpretation. The provision could, of course, be deleted, in which case the commentary on the proposed statute would restate the principle and confirm that the prerogative of the Executive Board to interpret the Articles of Agreement was not being amended or implicitly departed from in any way.

Mr. Kyriazidis said that he would appreciate a clarification of the meaning of "lawful" in the statement that "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 particular, did it refer only to the internal law of the Fund only, or did it refer also to the general principles of international administrative law?

The General Counsel explained that it referred to both, because, as indicated by the preceding sentence, the general principles of international administrative law were incorporated in the law of the Fund. For instance, if the Managing Director was authorized by the Executive Board to take certain decision, in doing so, he would be lawfully exercising the authority conferred upon him by the Executive Board. But there were some legal limitations, such as the principle of nonretroactivity, which was not explicitly set out in the Articles or in the Rules and Regulations but was a general principle of law that would apply in that case.

Mr. Kyriazidis remarked that he would appreciate the staff's confirmation of his understanding that in the absence of the statute, there was no legal obligation for the Board or the Managing Director to respect the general principles of administrative law, although, of course, there might be a moral obligation. The draft statute would explicitly introduce that particular consideration into the decisions to be taken by the Board and by management in the exercise of their powers.

The General Counsel said that in his view, the Fund had always had a legal obligation to respect the general principles of administrative law, but that obligation could not be enforced in the absence of a tribunal. For example, the principle of nonretroactivity had always been brought to the Executive Board's attention, not only in connection with salaries but also in connection with increases in the rate of charge. The Legal Department had always insisted that the rate of charge could not be increased retroactively. To that extent, no new considerations were being introduced.

Mr. Kyriazidis said that in the light of the staff's remarks, his chair would attach great importance to ensuring the primacy of the Executive Board's interpretative power in the statute establishing the tribunal. Otherwise, the interpretations of the Board would be open to challenge, and that was something that his authorities would consider particularly dangerous. He therefore could accept the staff's proposals with respect to the jurisdiction of the tribunal. He would have great difficulty in accepting Mr. Fogelholm's proposal because in his view, once a law was passed, its interpretation belonged to the courts. The powers of the Board should be clearly set out in the statute and not only in the commentary.

Mr. Clark observed that the reference in the SAC's position paper to the appalling danger that the Executive Board would attempt to circumvent the tribunal through its power to interpret the Articles of Agreement was particularly disturbing. He wondered in what circumstances the Executive Board might wish to circumvent the tribunal through that particular mechanism. If the instances were few, perhaps in the interest of good faith and mutual trust, that particular sentence could be eliminated.

The General Counsel remarked that the power of interpretation, which was explicitly conferred on the Executive Board in the Fund and on Executive Directors in the World Bank, was exceptional; there was no equivalent in other international organizations. Because that provision was exceptional, it had been incorporated in the draft statute. As to possible disputes involving an interpretation of the Articles, an example could be found in Article XII, Section 4(d), which provided that "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." That Article had not yet been interpreted by the Executive Board. If, for example, a staff member believed that a regulation approved by the Executive Board gave insufficient attention to the provision of the Articles stating that the Fund should "pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible," the staff member might challenge the decision on the grounds that it was inconsistent with the obligation imposed under that provision of the Articles.

Mr. Peretz commented that he shared the view that once the statute was adopted, it would be interpreted by others, and he therefore preferred the staff's proposal to that of the SAC. His authorities wanted to keep the decisions of the Board of Governors and the Executive Board above challenge by the administrative tribunal. He was not, however, absolutely certain that the staff's formulation achieved that objective. He therefore wondered whether the staff might consider some addition to the commentary to make clear the limitations on the administrative tribunal's powers.

The General Counsel observed that the commentary would be submitted to the Board of Governors and, once approved, would guide the interpretation of the statute establishing the administrative tribunal. Clearly, the first sentence of Article III of the proposed statute--namely, "The Tribunal shall not have any powers beyond those conferred under this Statute"--was intended to limit the scope of the tribunal's powers. That point could be emphasized in the commentary.

Mr. Prader remarked that he preferred Mr. Peretz's approach. He shared the concern that the draft statute was not unambiguous with respect to the Executive Board's power to interpret the Fund's Articles of Agreement.

Mr. Goos said that he preferred to keep the text of the proposed statute as it was and to strengthen the commentary. While the deletion of the last sentence of Article III would make no material difference, he was concerned that it might be misunderstood by the SAC. He would prefer that the Board's intentions be fully transparent.

Ms. Creane, Mr. Menda, Mr. Mwananshiku, Mr. Nakagawa, Mr. Orleans-Lindsay, and Mr. Spencer remarked that they also supported the suggestion of Mr. Peretz and Mr. Prader to include the limitations on the tribunal's jurisdiction in the draft statute and to strengthen the commentary as well.

Mr. Chatah said that he supported the inclusion of a reference to the Board's powers of interpretation in the commentary. On another point, he had some sympathy with the SAC's view that resolutions of the Board of Governors should not be excluded from the tribunal's jurisdiction.

The General Counsel commented that while it was possible to include the resolutions of the Board of Governors in the tribunal's jurisdiction, in previous Board discussions, Directors had not supported that approach but had considered that the decisions of the highest political organ of the Fund should not be subject to such review. Moreover, the Board of Governors, as the organ establishing the tribunal, could always adopt a resolution exempting its own decisions from the tribunal's purview.

Mr. Posthumus said that he preferred to leave the resolutions of the Board of Governors outside the jurisdiction of the tribunal. As the decisions of the Executive Board and its power of interpretation were subject to review by the Board of Governors, leaving the decisions of the Executive Board within the jurisdiction of the tribunal would pose no problem. He could, however, go along with the approach that had been suggested by Mr. Peretz.

The Chairman noted that Directors generally preferred to keep Article III as it stood and to strengthen the commentary. He then asked the staff to introduce the second issue that had been raised by the SAC, namely, the effective starting date for the competence of the tribunal.

The General Counsel explained that, under the proposed statute, the tribunal would only have jurisdiction over causes of action arising after its establishment. The SAC proposed to give retroactive jurisdiction to the tribunal, which would allow it to challenge any individual or regulatory decision taken in the past four years. In establishing their tribunals, other organizations had provided for prospective jurisdiction, with one exception: the jurisdiction of the World Bank's tribunal had been made retroactive by one year. The purpose in that instance had been to open to challenge some recent decisions taken by the Bank's Executive Directors prior to the establishment of the tribunal.

Mr. Fogelholm said that he could go along with the date of the Board's decision to forward the draft statute to the Board of Governors as the effective starting date for the tribunal's competence. In his view, retroactivity was inadvisable.

Mr. Kyriazidis commented that he understood that it was possible that the tribunal could challenge a decision that had been taken after the effective date of its competence but was based on a decision that had been taken prior to its establishment. In that event, the tribunal would be called upon to judge the legality of an administrative act without being able to judge the legality of the regulatory decision on which it was based. To avoid that unfortunate situation, he favored a limited retroactivity of perhaps two years. Such limited retroactivity would be in accordance with practices in national legal systems.

Mr. Posthumus said that he would prefer an earlier effective date in view of the fact that as early as the beginning of 1989, most Executive Directors had supported the establishment of an administrative tribunal. The two-year period suggested by Mr. Kyriazidis was therefore reasonable, yet would avoid reopening some thorny issues, such as those surrounding the job grading exercise.

Mr. Mirakhor observed that Article XVII of the Statute of the World Bank Administrative Tribunal provided that "the tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to January 1, 1979." He wondered when the statute had been approved by the Board of Governors of the Bank.

The General Counsel remarked that the resolution establishing the World Bank Tribunal had been adopted on April 30, 1980, and the jurisdiction of the Tribunal had been retroactive to causes of action arising since January 1, 1979.

Mr. Clark said that he supported the views of Mr. Posthumus and Mr. Kyriazidis. Of course, any cut-off date was arbitrary and reflected some need for judgment. In his view, the Board should not be particularly concerned about a degree of retroactivity simply because it might result in a large number of applications to the tribunal. The issue was whether the tribunal would rule against the Board. He could therefore support some degree of retroactivity.

Mr. Zhang remarked that he could associate himself with Mr. Clark's comments. He agreed that some retroactivity should be allowed, perhaps two years, but he was flexible with regard to the exact period of time.

Mr. Peretz commented that he could associate himself with Mr. Fogelholm. It was a good principle, certainly in British law, that there was retroactivity only in exceptional circumstances. Retroactivity could lead to some difficulties, especially as actions taken by management in the past might not have anticipated the possibility of review by a tribunal.

Mr. Posthumus remarked that Mr. Peretz's comment precisely supported his own point of view, because two years earlier management had already known that there would be an administrative tribunal.

The Chairman commented that the prospect of review by a tribunal would not have changed any of his decisions on personnel management over the past four years. Those decisions had been taken with a sense of absolute equity and concern for avoiding litigation. Nevertheless, in his view, opening those decisions to the possibility of litigation could have an adverse effect on the institution and on staff morale. He therefore shared fully the views of Mr. Peretz on retroactivity.

The staff representative from the Administration Department observed that retroactivity of two years would open to challenge the Board's decisions on the compensation system and the subsequent salary review. Moreover, it would be extremely complicated to administer any retroactive changes resulting from a successful challenge, particularly in respect of achieving equity between staff members.

Mr. Menda said that he supported the principle of nonretroactivity.

Mr. Mirakhor remarked that in view of the Chairman's comments on the equity of the decisions that had been taken in the recent past, he did not consider that retroactivity would cause any great problem. Even if challenges arose, the Board should welcome the opportunity to correct instances where some harm had been done to the staff.

Mr. Clark said that he fully shared Mr. Mirakhor's views. Indeed, his own position in support of retroactivity very much reflected the Chairman's view that the Board had, in fact, taken decisions in the spirit of fairness and equity, so that it need not be concerned about any challenges that might arise.

Ms. Creane commented that she found the Chairman's arguments to be convincing and agreed with the staff that there should be no retroactivity.

Mr. Peretz remarked that he agreed that the Chairman's comments were convincing. Nonetheless, however fair and equitable any decisions had been, concerns remained about how those decisions had been drafted. From a legal point of view, they might not have been written for scrutiny by a tribunal. In that sense, he agreed with the staff and the Chairman that retroactivity was not desirable.

The staff representative from the Administration Department observed that throughout the period in question, staff members had had recourse to the Grievance Committee if they felt that they had been mistreated in any way. It should also be noted that the Managing Director had never turned down a recommendation of the Grievance Committee that had found in favor of a staff member. The only other decisions affecting the staff were the

administrative regulations, which had been undergoing revision in the past few years. At a recent meeting with the SAC, the Deputy Managing Director had recalled that management had consulted the SAC on every change in those regulations and had indicated that if the SAC questioned the legality of any regulation put into effect in the past two years, management would reconsider it.

Mr. Fernando commented that he did not favor retroactivity. He understood that if the decision to establish the tribunal was prospective, current regulatory decisions could not be challenged, but an individual staff member could have redress to the tribunal with respect to the administration of the decision. In that event, the tribunal could reach a decision that challenged the administrative intent of the regulation.

The General Counsel said that nonretroactivity would protect against any challenge to past decisions, including regulations. It would not be possible to challenge a regulation that was in existence before the cutoff date by challenging its application in an individual decision taken after the cutoff date.

Mr. Bindley-Taylor commented that even though he had sympathy for the comments of Mr. Posthumus and Mr. Clark, he would have to go along with the general principle of law that there should be no retroactivity.

Mr. Marino remarked that he also supported the view that there should be no retroactivity. Moreover, in formulating its proposals, the Board should be careful to avoid giving the impression that the establishment of the tribunal had been deliberately delayed because the institution was not confident that decisions taken prior to the tribunal's effective date of competence could withstand judicial scrutiny.

Mr. Kyriazidis observed that the introduction of retroactivity to two years would not be contrary to the basic principles of law.

Mr. Mirakhor remarked that he agreed with Mr. Kyriazidis. As the possibility of establishing an administrative tribunal had been under discussion by the Board for about four and a half years and as management had reassured the staff and the Board that over the past two years equity had been served, there was nothing to be feared from limited retroactivity. He therefore urged Directors to consider the possibility of an effective date retroactive for a two-year period.

Mr. Goos said that, on balance, he favored nonretroactivity.

Mr. Zoccali commented that he was very much persuaded by the Chairman's line of argument, and he would certainly support the staff's proposal. He could go along with Mr. Fogelholm's suggestion that the effective date be retroactive to the date of the Executive Board decision on submission of the draft statute to the Board of Governors.

Mr. Nakagawa said that to secure a clear-cut solution, he wished to associate himself with those favoring nonretroactivity and to support the staff's proposal.

Mr. Posthumus observed that if Directors agreed that the effective date would be the date of the Executive Board's decision rather than the Board of Governors' decision, an exception was already being made to the principle of nonretroactivity. In that light, he would suggest that the Board should make another exception, explicitly, to allow limited retroactivity. The fact that the SAC had had an opportunity over the past two years to offer its views on proposed administrative orders suggested that retroactivity should pose no risks. Nonretroactivity, by contrast, might create the impression that the actions of the past two years merited closer scrutiny.

Mr. Prader commented that he was opposed to retroactivity, primarily because of the litigiousness of modern society. Nevertheless, he could accept Mr. Fogelholm's proposal.

Mr. Spencer said that he agreed with Mr. Prader's comments. In his view, there was not a strong case for retroactivity. In th regard, he agreed with the Chairman's views on the matter. He could, however, go along with the proposal of Mr. Fogelholm.

Mr. Jarvis commented that he understood that the staff's main concern with respect to decisions taken in the past two years related to revisions to General Administrative Orders. He further understood that after the tribunal had been established, management could, if it so desired, open those decisions to the scrutiny of the tribunal simply by reiterating the orders that were particularly contentious or of questionable legality. That approach could perhaps help to allay the SAC's concerns.

Mr. Aderibigbe said that he could not support the principle of retroactivity. In that connection, he wondered whether it was possible to make a commitment that the effective date of the tribunal's competence would be, say, January 1991.

The General Counsel explained that such a commitment would require expediting the completion of the exercise. For the proposal to be reasonable, the exercise would have to be complete' in approximately three months.

The Chairman observed that the majority of speakers had favored nonretroactivity, but that several of them had indicated that they could go along with the proposal of Mr. Fogelholm, namely, that the effective date of the tribunal's competence should be the date of the Executive Board's decision to submit the draft statute to the Board of Governors.

The General Counsel remarked that there were two aspects to the third issue raised by the Staff Association--the risk that the cost of litigation would discourage staff members from bringing a legitimate dispute before the

tribunal. The first was the normal burden of costs. Under the proposed statute, each party, whether the Fund or the applicant staff member, would bear the costs of his own legal advice and other associated costs. In the end, however, when deciding on the merits of the case, the tribunal would have the option to decide that all or part of the costs of the successful staff member should be borne by the Fund. The SAC was proposing that when a staff member succeeded in an action, the Fund would have to bear the costs of litigation.

The second aspect of the issue related to so-called frivolous cases, the General Counsel commented. Under the proposed statute, the Fund could recover some costs, but only if the application was manifestly ill-founded. The SAC had objected to any recovery of costs by the Fund on the grounds that it would deter the staff from bringing actions.

In its position paper, the SAC had raised yet another point, the General Counsel observed. The SAC had argued that if a staff member could not afford litigation, he should have access to legal representation. The SAC had proposed an amendment to that effect, namely, that "The Tribunal may order payment of such costs upon application, where the applicant demonstrates a financial and substantive need for legal representation."

Mr. Mirakhor remarked that the criteria for judging frivolity was "manifestly without foundation." In most judicial systems in which monetary sanctions could be imposed upon a frivolous plaintiff, the appropriate legal standard was not "manifestly without foundation" but rather demonstration that the sole purpose of the suit was to harass, cause unnecessary delay or costs, or an improper purpose. For that reason, he recommended that the words "manifestly without foundation" be stricken.

Mr. Spencer said that in his view, there was no basis for the provision of legal aid or a staff advocate as proposed by the SAC. However, it would be appropriate to amend Article XIV, Section 4 of the draft statute to limit the Fund's obligation to the payment of "some reasonable costs" in the case of a successful action. That qualification would provide needed constraint in that regard.

On frivolous actions, he agreed with the SAC's proposal that Article XV be deleted, Mr. Spencer commented. Under Article X, Section 2(d), in the event of a frivolous application, the tribunal could summarily dismiss the application, and the tribunal should be willing to do so in such cases. If the tribunal had the opportunity to dismiss a case, failed to do so, and then found against the action, there would be no grounds for assigning costs to the applicant.

Ms. Creane remarked that Article XV should not be deleted. Some alternative language might, however, be helpful. The words "manifestly without foundation" could be replaced by "patently misusing the review

process." That formulation had been suggested by some SAC members, and she could accept it as a compromise.

The General Counsel observed that the suggested language would introduce a different concept, namely, the requirement to prove a deliberate intention to misuse, whereas the staff had proposed more objective criteria.

Mr. Jarvis said that he would like to retain Article XV because it served an important function. He would, however, be open to suggestions to amend that provision if it could be done in a manner compatible with maintaining an objective criterion. More generally, he was concerned about the potential costs of the tribunal. Some further attention might be given to that aspect. If there was extensive recourse to private lawyers, the legal costs of litigation might be substantial, and that would not be in the interest of either the staff or the Fund. For that reason, he would be interested to hear the staff's reaction to the SAC's proposal regarding a staff advocate. That approach might help to restrain costs and render the entire process less adversarial and more collegial.

The General Counsel commented that the question of a staff advocate could, of course, be considered. One question in that regard would be whether the advocate should be from the staff or from outside the Fund. Another question would be the selection of the staff advocate and the determination of his responsibilities.

Mr. Kyriazidis remarked that he agreed with Mr. Spencer regarding legal aid and the provision of an advocate. He was sensitive to the arguments presented by Mr. Mirakhor concerning Article XV. While he agreed with the purpose of the provision, he was concerned that as currently formulated, it appeared to be draconian and might inhibit the pursuit of legitimate claims. More specifically, he was not sure that "manifestly without foundation" established the appropriate legal standard. Although he would opt for retention of the provision, he wondered whether the language could be clearer and more restrictive so that the provision could apply only where it was manifest that the sole purpose was harassment or to create delays--namely, some of the criteria that Mr. Mirakhor had mentioned. He would be open to any reformulation that was more specific and narrower in scope.

Mr. Bindley-Taylor commented that he understood that prior to bringing a matter to the tribunal, the applicant would have first gone through the Grievance Committee process. He wondered whether it was correct to assume that the Grievance Committee would not allow a frivolous case be taken to the tribunal. Also, he wondered at what point a petition was determined to be frivolous.

The General Counsel observed that the provision for summary dismissal of an application to the tribunal would apply in instances where the application was readily deemed to have no chance of success. In that event, no costs, or only minimal costs, would be incurred, and there would be no need

to allocate costs. If, however, a plaintiff had been able to allege an ostensibly solid case that was later found to have no basis, but only after a lengthy, costly procedure, the provision on allocating costs would come into play. The provision on summary dismissal and that on allocating costs, therefore, were intended to address two different situations.

The language offered by Ms. Creane to define "frivolous" might be helpful in the second instance, the General Counsel considered. But in some cases, it was difficult to prove intent. With respect to the concept of abuse of right, for example, the court, had gradually abandoned the requirement that malice or other unlawful intent be demonstrated, because it was difficult, if not impossible, to demonstrate intent. The staff had therefore proposed to rely on more objective criteria.

The Grievance Committee could not prevent someone who had lost a cause before the Committee from appealing the decision to the administrative tribunal, the General Counsel explained. Because there was no screening process, even if the Grievance Committee found the action frivolous, it could still be continued before the tribunal.

Mr. Kyriazidis observed that the staff's illustration suggested that the notion "manifestly without foundation" could be extended to a number of cases that were neither frivolous nor illegitimate.

The General Counsel remarked that two types of cases could be brought before the tribunal: those where the legality of a regulation was challenged and those where an individual decision was challenged. In the case of an individual decision that had been lost before the Grievance Committee and then appealed to the tribunal, the tribunal would have to make two findings before awarding costs: first, that the action was ill founded; and second, that it was manifestly apparent that the appeal had no chance of success. The introduction of a third condition, intent--namely, that the applicant had brought the action for an improper purpose--would be difficult to prove, although that condition could, of course, be included.

Mr. Kyriazidis said that if the objective of the provision was to prevent an appeal to the tribunal once an individual case had been lost before the Grievance Committee, the concerns of the SAC were perhaps justified. In his view, the right of appeal had to be maintained and without many restrictions. It was therefore necessary to define those instances in which the provision could apply so as to avoid discouraging individuals from pursuing legitimate disputes.

The General Counsel observed that other tribunals had no similar provision and had been asked to award costs against applicants without clear criteria. The staff's proposal was intended to protect the interests of the Fund by providing the possibility of such an award while also protecting the applicant by defining the criteria for such an award. Directors could, of

course, decide to leave the question open, in which case the tribunal would have implicit power to decide when damages should be awarded.

Mr. Kyriazidis said that the problem for him was one of language. A provision that implicitly meant that an adverse judgment of the tribunal could be considered as a cause for the adjudication of damages against the applicant was too draconian. He was uncertain whether applicants would be exposed to greater danger if there was no such provision. Some further thought should be given to a formulation that would apply a somewhat stricter standard than was implied by the proposed language.

The General Counsel observed that Article XIV, paragraph 4 provided that if the tribunal's conclusion was that the application was well founded, the applicant might be reimbursed for his costs by the Fund. In the event that the applicant lost, an application was not automatically considered to be manifestly without foundation. Rather, criteria were established under the provision to judge whether an application was indeed manifestly unfounded. Of course, other formulations could be considered, and the staff would welcome suggestions in that regard.

Mr. Chatah remarked that Ms. Creane's suggestion in many ways met the concerns of the SAC. In his view, the provision should not be applied when the tribunal could not prove malice. He could support language that entailed the concept of intent. On the issue of obliging the Fund to pay reasonable costs, he agreed with Mr. Spencer's comments.

Mr. Goos commented that difficulties with language could perhaps be resolved through an additional explanation in the commentary. In any event, he would like to have a provision containing the thrust of Article XV to reflect the concerns that had been expressed by Directors.

Mr. Bindley-Taylor said that he could go along with Mr. Spencer's views on Article XV. Moreover, Mr. Mirakhor had earlier suggested explicit grounds for determining the meaning of "without foundation." He would like to examine that suggestion further.

The General Counsel remarked that the staff could incorporate alternative language that reflected the various proposals made by Directors as well as some proposed amendments to the charters of other tribunals where such provisions had originally been omitted. The staff could also examine the issue of the provision of a staff advocate.

The Chairman observed that Directors had clarified many issues. The remaining concerns as well as comments on other aspects of the proposed draft statute could, as Directors had agreed at the outset, be submitted in writing to the Secretary for circulation to the Board. On the basis of Directors' oral and written comments, the staff would prepare a paper for

a concluding discussion on the matter, preferably early in the spring. He would, of course, be informing the Staff Association Committee of the progress of the Board's work.

DECISIONS TAKEN SINCE PREVIOUS BOARD MEETING

The following decisions were adopted by the Executive Board without meeting in the period between EBM/90/177 (12/19/90) and EBM/90/178 (12/19/90).

2. SDR DEPARTMENT - DESIGNATION PLAN FOR DECEMBER 1990-FEBRUARY 1991

The Executive Board approves the designation plan for the quarterly period beginning December 19, 1990 as set out in EBS/90/206 (12/5/90).

Decision No. 9613-(90/178) S, adopted December 19, 1990

3. OPERATIONAL BUDGET FOR DECEMBER 1990-FEBRUARY 1991

The Executive Board approves the list of members considered sufficiently strong as set out in EBS/90/207 (12/5/90), page 2, footnote 1 and the operational budget for the quarterly period beginning December 19, 1990 as set out in EBS/90/207.

Decision No. 9614-(90/178), adopted December 19, 1990

4. SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA - DECISION CONCLUDING 1990 ARTICLE XIV CONSULTATION

1. The Fund takes this decision relating to exchange measures of the Socialist People's Libyan Arab Jamahiriya subject to Article VIII, Sections 2(a) and 3, and in concluding the 1990 Article XIV consultation with the Socialist People's Libyan Arab Jamahiriya.

2. The Socialist People's Libyan Arab Jamahiriya continues to maintain restrictions on the making of payments and transfers for current international transactions in accordance with Article XIV, except for the multiple currency practice and exchange restrictions as described in SM/89/201 and SM/90/208 that are subject to Fund approval under Article VIII, Sections 2(a) and 3. The Fund urges the authorities to liberalize the exchange system and to eliminate the multiple currency practice as soon as possible. (SM/90/227, 12/14/90)

Decision No. 9615-(90/178), adopted
December 19, 1990

APPROVED: September 20, 1991

LEO VAN HOUTVEN
Secretary

APPENDIX

Directors' Comments on Draft Statute of the Administrative Tribunal of the International Monetary Fund

Mr. Mirakhor submitted the following statement for the record:

The following are my comments on some remaining issues regarding the draft statute of an administrative tribunal:

Article III

The second sentence of this Article lists the sources of law that the tribunal may draw upon. This list should be expanded to also include general principles of law to bring within its purview fundamental notions of due process that are common to major legal systems. Mere reference to "generally recognized principles of international administrative law" is an unnecessarily restrictive phrase. These specific changes may seem minor but are especially important in view of Articles III and IV, which limit the tribunal's power and competence to "this statute."

Article IV

This Article prescribes a three-month statute of limitations subject to discretionary waiver in case of exceptional circumstances. While the commentary to the draft statute indicates that prolonged mission travel, extended illness, or similar exceptional circumstances may be cases in which the tribunal could in its discretion, waive the three-month limit, there is no reason to vest discretionary powers when this is unnecessary. Accordingly, the time limit should be extended to six months after exhaustion of administrative review or one year after accrual of the cause of action, whichever is later; and, the tribunal should be required to grant a mandatory, rather than permissive, waiver in case of excusable delay resulting from exceptional circumstances.

Article V

I am certainly in agreement with this Article, which sets forth the usual requirement of exhaustion of primary administrative remedies prior to judicial resolution. However, I would suggest that the draft be amended so that this requirement is waived if it is manifestly clear that obtaining such review would be futile.

Article VI

Paragraphs 4 and 5 of this Article should be made more precise. In paragraph 5, which states that no application may be filed with the tribunal if the Fund and the petitioner have reached an "agreement" on the settlement of the matter, the statute should make clear what constitutes an "agreement." It would be preferable to define "agreement" so as to avoid later misunderstanding. In addition, paragraph 4 rules out the possibility of suspending implementation of a contested decision pending its resolution by the tribunal. While I agree that the mere filing of an application with the tribunal cannot be allowed to automatically suspend implementation of decisions, I believe that it is necessary to allow for this possibility in certain cases. Thus, when substantial irreparable harm is likely to result if the decision is implemented, the applicant should be able to request injunctive relief. Accordingly, this subparagraph should be expanded to allow the tribunal to grant injunctive relief in those rare instances where this is legally appropriate.

Article VII

This article concerns the composition of the tribunal. Unlike the World Bank Administrative Tribunal which has seven members, this Article contemplates a three-person tribunal. In addition, all three members are to be appointed by the Managing Director and in the case of associate members, the Managing Director need not obtain the approval of the Executive Board. I would suggest that the tribunal consist of a larger number of persons, say five, and that in line with the established practice in arbitration proceedings, both the applicant and the Fund be allowed to name two, or an equal number, members, each of whom, in turn, collectively chooses another member. In this connection, I appreciate the mandate of Article VIII relating to the independence of the tribunal. Paragraph 3 of Article VII requires refusal if a member of the tribunal has a conflict of interest. This is only a provision for self-disqualification. There is no provision under which the applicant or the Fund can move to disqualify a tribunal member if either party perceives a member of the tribunal as being biased, unfair, and the like. Such a provision needs to be added.

Article X

Paragraph 1 of this Article permits the Managing Director, at his discretion, to suppress documentary evidence which he feels is secret or confidential. Moreover, the Managing Director's determination is to be final and nonappealable. Most judicial systems permit the suppression of evidence only if the evidence is

tainted--namely, it is illegally obtained. The only other example of permissible suppression of evidence, of which I am aware, relates to executive privilege of the U.S. President. Even here, the Chief Executive must make a showing of possible grave harm to national security interests for the claim to have any chance to succeed. Even then, courts may require in camera examination of the evidence. I suppose, therefore, that the power granted the Managing Director in the first paragraph of Article X is analogous to executive privilege. If so, it would require us to find authority for such a privilege in the inherent powers of the chief executive because they are not expressly granted in the constituent document of the Fund. Rather than pursue this dubious route, the paragraph should be redrafted to require that when a document is deemed confidential by the Managing Director, the tribunal would conduct an in camera--namely, in chambers or in closed or executive sessions--examination of it to determine its relevance and probative value for the case.

Article XIX

I suggest that this Article be redrafted to allow for amendment of the statute by the Executive Board rather than by the Board of Governors.

Mr. Kyriazidis submitted the following statement for the record:

The following are my further remarks on the provisions of the draft statute.

Article VI

With regard to the length of the period within which an application challenging the legality of an individual administrative act or regulatory decisions would be admissible, I think that three months is perhaps too short. Despite the flexibility introduced in paragraph 3, it would be reasonable to extend the period of admissibility beyond the proposed three months to perhaps up to six months without any prejudice to the Fund's interests.

Article VII, Paragraphs 1(a) and (b)

With regard to the appointment of members of the Tribunal, I wonder why a procedure different from that applicable to the President should apply to members. I believe that in principle, a uniform procedure should apply for the appointment of all members of the tribunal, and my preference would be the procedure proposed for the appointment of the President.

Article VII, Paragraph 3

This paragraph requires refusal if a member of the tribunal has a conflict of interest. But under the proposed formulation, this can be achieved only through self-disqualification. It would be useful and in conformity with legal practice in most countries of the world to add a provision under which the Fund or an applicant can move to disqualify a tribunal member for the reasons generally recognized as valid in all developed legal systems. The decision on disqualification would then be taken by the tribunal.

Article X

Under this Article, the Managing Director is granted the power to withhold evidence if he determines that the introduction of such evidence might hinder the operations of the Fund because of the secret or confidential nature of the document. Although I understand the rationale behind this provision and agree with its general purpose, as formulated in the draft statute, it is perhaps too sweeping and appears to go beyond the limits recognized, for example, under U.S. law for the exercise of executive privilege. I wonder whether it would not be advisable to mitigate the provision by allowing in addition to withholding, and as a possible alternative to it, the examination of confidential documents by the tribunal in camera. The final choice would, of course, remain with the Managing Director.

Mr. Posthumus submitted the following statement for the record:

The following are my further views on the provisions of the draft statute.

Article II, Paragraph 1(c)

This paragraph should be maintained so that the Staff Association would have access to the tribunal in the category of cases indicated.

Article VI

The period for filing an application challenging the legality of an individual decision should, in my view, be lengthened from three months to six months.

Mr. Végh submitted the following statement for the record:

The following constitute my comments on those provisions of the proposed draft statute that were not discussed at the Board Meeting on December 19.

Article VI

The time lapse provided for in paragraphs 1 and 2 for the filing of applications challenging the legality of an individual or regulatory decision might, in certain instances, prove to be too short. At the same time, the review procedure for extensions foreseen in paragraph 3 introduces an additional discretionary element, which leads me to favor a lengthening of the filing period by up to six months without any exceptions.

As to paragraph 4, I could support empowering the tribunal to grant stays of execution upon specific application of the complainant, if there is prima facie evidence that the complaint is justified and that the effectiveness of the decision being challenged is likely to cause substantive harm. Interlocutory relief in such specific instances should, in fact, serve as an instrument of moral suasion to shorten the pendency of cases before the Tribunal.

Article VII

With respect to the approval procedure foreseen in paragraph 1(b) for associate members and alternates of the tribunal, I believe that it should be similar to that stipulated in paragraph 1(a) for the appointment of its President. Similarly, the conflict of interest situation provided for in paragraph 3 should also allow the Fund or the applicant to request the tribunal to consider the disqualification of the member concerned.

Having said this, it remains my expectation that timely implementation of this decision will not preclude other, perhaps more forward-looking, actions aimed at maintaining the Fund's competitiveness in a highly specialized labor market and at preserving its efficient and high-quality staff.

Mr. Peretz submitted the following statement for the record:

I support the establishment of an administrative tribunal, although we must keep in mind the limitations on what such a tribunal can achieve. An administrative tribunal cannot take the place of good management. It serves a much more limited

purpose: to provide staff with the assurance that in extreme circumstances there is some form of redress open to it.

A central question concerns the remit of the tribunal with respect to regulatory decisions regarding the terms and conditions of Fund employment. Here, it is necessary to strike a balance. It is appropriate to provide explicitly for the tribunal to have the power to review regulatory decisions, including those taken by the Board. The Board is not infallible, and the tribunal's ability to review its decisions will provide the staff with an important safeguard.

The remit of the administrative tribunal should not, however, be so broad that it detracts from the responsibility of the Board or of the Governors to make administrative decisions. For this reason, I welcome the provisions in the draft Articles that place decisions by the Board of Governors and interpretations of the Articles of Agreement by the Board outside the competence of the administrative tribunal.

Ideally, the powers of the tribunal should be so constructed that the Board would never need to have recourse to this extraordinary power provided for in the draft Articles. But I am not certain that the current draft achieves this purpose. My concern is with Article III. This says that the Tribunal should apply "the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts."

As I understand it, there is no single or fixed definition of what constitutes a generally recognized principle of international law. Moreover, the body of law changes over time, so that tomorrow the definition could be taken to include principles that are not recognized today. It would be up to the tribunal to decide what principles are generally recognized. Coupled with draft Article IV, which says that any issue concerning the competence of the tribunal should be settled by the tribunal in accordance with the statute, this gives the tribunal powers that are potentially very wide.

I have a particular concern about the possible application of this provision in the area of staff compensation. For example, one generally recognized principle cited in the staff paper is the obligation of the organization not to alter the "fundamental terms and conditions of employment." This concept itself has been the subject of various interpretations by different tribunals. I note that recently the World Bank Tribunal found that a decision of the World Bank Executive Directors had violated what the Tribunal termed a fundamental right to "periodic review and adjustment of

salaries based on cost of living and other factors." Whatever the merits of this particular decision, its existence does underline the point that tribunals can interpret their power very broadly if they are allowed to do so.

For this reason, it is worth exploring whether some formulation can be found, and perhaps inserted into the commentary on the statute, which makes it clear that the Board's intention in establishing this administrative tribunal is that the tribunal should act in a restrained way. I understand that the tribunal would be obliged to at least consider such an injunction in interpreting its Articles, as it is empowered to do. I am pleased that the Board, in its discussion on December 19, agreed that the Legal Department should attempt to strengthen the commentary in this way.

In addition to this general point, the Board was asked to give guidance on an number of other specific questions. Briefly, I agree with the recommendation that the tribunal should be authorized to pass judgment on the legality of regulatory decisions on the basis of either a direct or indirect challenge. This is likely to save us some trouble, and at no great cost.

As to the parts of the draft statute in brackets, I have no problem with the idea of the Staff Association being allowed to challenge the legality of a regulatory decision. Again, this should simply save trouble in the long run. It will also be clear from what I have said that I would like to leave in the phrase in brackets in Article II, paragraph 2(b) concerning resolutions adopted by the Board of Governors, and I welcome the agreement of the Board on this. I would support the exclusion of contractual employees from access to the tribunal.

On Article XX, in my view, the appropriate date from which the tribunal's competency should start should be the date on which these Articles are approved by the Board of Governors. I would be reluctant to see retroactive applicability. There is a strong general legal presumption against retroactivity, and indeed I see that it is one of the generally recognized principles of administrative law. Moreover, retroactive application could open up a host of complaints, perhaps based on language that was not drafted with sufficient rigor to stand the scrutiny of an administrative tribunal. However, I can accept the compromise proposed in the Board by Mr. Fogelholm, whereby the tribunal's competency will begin from the date at which the Executive Board reaches a final agreement on its statute. I would also hope that management and the Board can be flexible if asked to consider amendments to

regulations drafted shortly before the formation of the administrative tribunal, if there is any question as to their legality.

After looking at the Staff Association Committee paper on the administrative tribunal, the only other proposal on which I would like to comment is that concerning legal costs. I am alarmed about the potential cost of this tribunal, and I think that some further attention should be given to this issue. If there is extensive recourse to private practice lawyers, then legal costs incurred during litigation may be substantial, and, of course, these costs may well fall to the Fund. Therefore, there is considerable merit in the SAC's proposal that the Fund should provide a staff advocate where there seems to be a good prima facie case for submission to the tribunal. I look forward to seeing management's comments on this point.

Mr. Santos submitted the following statement for the record:

I associate myself with other speakers in welcoming today's consideration of the few remaining issues on the establishment of an administrative tribunal for the Fund.

Since the position of this chair has not changed regarding the positive benefits to be derived from the establishment of an administrative tribunal for the Fund, I shall limit my comments to those articles of the draft statute on which points of view appear to differ and consensus has not yet emerged. Some of my comments are indirect responses to some of the issues raised by the Staff Association in EBAP/90/325.

Article II, Paragraph 1(c)

To recognize the SAC's role in seeking the interests of staff and to help in pursuing class action complaints, I can go along with the proposal to include subparagraph (c) in the statute.

Article II, Paragraph 2(b)

I support the proposal that the jurisdiction of the tribunal should explicitly be over regulatory decisions, as defined, but to exclude any resolutions adopted by the Board of Governors of the Fund, as well as decisions of the Executive Board under its competence to interpret the Fund's Articles of Agreement.

Article III, Paragraph 2(c)

Regarding the issue of granting contractual employees to the tribunal, I am more persuaded by the arguments that the employment relationship of contractual employees with the Fund is governed solely by their contracts. Hence, any disputes arising therefrom could more appropriately be resolved through binding arbitration rather than through the proposed tribunal. Moreover, one can argue that the resource to binding arbitration conforms to the need for the Fund to provide an appropriate mode of settlement of disputes arising out of the employment relationship with its contractual employees including technical experts. However, if the majority opinion is to include contractual employees in the jurisdiction of the tribunal, I can go along with it.

Article III

I support the retention of the last sentence of this Article, which SAC proposes to delete. The body that formally authorized the establishment of the tribunal should have the power to continue to exercise such authority over that tribunal. It does not seem appropriate that the tribunal, being the creature of the Board and the Governors, should be empowered to inquire into the decisions of the authority that established it. I can thus support the suggestion that Article III should be retained, and the accompanying commentary strengthened to clarify the binding clause on the Board's interpretation of the Fund's Articles of Agreement.

Article VI, Paragraph 1 and 2

Concerning the period for filing an application, this paragraph provides for three months, while the SAC proposes six months. I can go along with the consensus if it is considered that an extension of the period to six months would help applicants to thoroughly exhaust all the review procedures before filing for a hearing with the tribunal.

Article VII, Paragraph 5

I can support the SAC's proposal to insert "appropriate consultation" in this paragraph on the termination of the appointment of a member of the tribunal since the Managing Director would have initially made the same appropriate consultation for the member's appointment, as provided for in paragraph 1(b). The inclusion of the phrase would thus provide some logical symmetry to the whole of Article VII.

Article IX, Paragraph 2

I my view, those who should provide administrative support to the tribunal shall be responsible to the President. However, it is not clear to laymen what the legal difference is between "under the authority of the President" and being only "responsible to the tribunal." The staff may elaborate on any such differences, and clarify the implications for ensuring the loyalty of the staff of the Secretariat to the tribunal or to the President.

Article X, Paragraph 1

On the issue of the production of documents, I would opt for the retention of the proposed clause. Also under this article, the SAC is proposing that the Fund make provision for the hiring of a staff advocate to assist staff who are not able or cannot afford to hire a lawyer. This seems a reasonable request, and I would encourage the Fund, as a paternalistic institution, to agree to this proposal.

Article XIV, Paragraph 4

Regarding this paragraph which would authorize the tribunal to award costs, including legal fees, to a successful applicant, my view is that the tribunal should be allowed to exercise its discretion in these matters and should not be compelled to do so, as the SAC suggests. Therefore the word "may" should be retained in that clause.

Article XV

On the awarding of costs against applicants who bring cases that are determined by the tribunal as patently frivolous or without legal merit or foundation, the SAC strongly opposes this provision and wants it deleted from the statute. Management's position, which was endorsed by the Board at EBM/89/88, was that it is appropriate that an applicant who abuses the tribunal's review process and thereby imposes considerable cost on the Fund in defending the case should assume some kind of responsibility for the consequences of his actions. While it may indeed be appropriate to deter applicants from misusing the review process of the tribunal, it has become clear that the retention of this Article in the statute is one of the major concerns of the staff. In my view, the tribunal should be allowed to exercise its discretion in determining what is, or is not, frivolous and to consider whether it is appropriate to award costs against applicants in particular circumstances. I therefore favor the deletion of the Article from the statute.

Article XX

On this Article, my chair's position is the same as at EBM/89/88 when the Board endorsed the adoption of a prospective date for the tribunal's jurisdiction. We do not favor that the tribunal should have jurisdiction over all administrative and regulatory actions taken from January 1, 1986 onward, to include the legality of the job grading decisions, and the General Administrative Orders redrafted and reissued since then. Furthermore, the Fund should not necessarily follow the World Banks precedent, which backdated its tribunal's jurisdiction 18 months. Even in this instance, there are specific reasons adduced for doing so. If the Board agrees to retroactivity for four years or more, it could open a Pandora's box, which could disrupt the smooth administration of the Fund and create numerous staff personnel problems which the Administration Department might not be able to handle. In any event, I can go along with the consensus that seems to be emerging, namely, that the effective date of the tribunal's competence should be the one on which the Board submits the proposal for the establishment of the tribunal to the Board of Governors.

Mr. Kafka submitted the following statement for the record:

The following are my comments on the remaining issues with respect to the draft statute of the proposed administrative tribunal.

Article II, Paragraphs 1(c) and 2(c)

I can support a provision that would permit the Staff Association Committee to bring an issue before the tribunal in its own name, where it believes any regulatory decision adversely affects its members. I can also support the inclusion of contractual employees in the definition of "member of staff."

Article VI, Paragraph 4

I cannot agree with this paragraph as formulated, as it implies no stay in the effectiveness of any decision that is being challenged regardless of the adverse effect on the staff member. While I do not advocate automatic injunctive relief, I believe that this paragraph should be amended to provide for injunctive relief where implementation of the challenged decision can lead to substantial harm to the staff member.

Article VII, Paragraph 1(b)

Article VII, paragraph 1(a) mandates that the President be appointed by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board. Paragraph 1(b) is too vague; the same procedure applied for the appointment of the President should apply for the appointment of the two associate members and their alternates.

Article VII, Paragraph 3

This Article seems to indicate that withdrawal on the basis of a conflict of interest can only take place through self-disqualification. It would be more appropriate if this Article could be expanded to allow an applicant to request the withdrawal of a member of the tribunal from a particular hearing on certain generally accepted legal grounds. The other members of the tribunal--less the person requested to be disqualified--could then take a final decision on the request of the applicant.

Article XIV

I would be prepared to support an amendment to this paragraph, such that the discretionary clause "it may order" be replaced with a compulsory clause "it shall order."

Article XV

In many legal systems, there are general provisions for penalizing applicants for waste of judicial time. I therefore do not oppose this Article in principle. However, an application may be deemed to be "manifestly without foundation" either at its initial processing stage, during its hearing, or upon conclusion. I understand Article XV to imply that the tribunal may order compensation to be made by the applicant regardless of the point in time at which the application is deemed to be frivolous. If the purpose of this Article is to deter applicants from wasting the tribunal's time, then the penalty should be directly related to the time wasted. Therefore, if an application is deemed to be frivolous at its first hearing, it should be summarily dismissed without the applicant being penalized. This should not be the case, however, where either during the hearing or at the conclusion of the matter, the tribunal is of the firm opinion that the matter has no substance and its time had been wasted. In these cases, the penal element of the Article should apply.

The ability of both the applicant and the defendant to resort to legal counsel indicates a potential for costly, if not lengthy, issues before the tribunal. In this respect, I note the sizable

material advantage of the institution vis-à-vis the Staff Association and, more particularly, vis-à-vis individual staff members. In this context, I would be prepared to support the provision of a staff advocate.

Mr. Goos submitted the following statement for the record:

In addition to the issues already discussed at the Board meeting of December 19, 1990, I should be grateful for the Board's consideration of the following points:

My authorities continue to feel that the Staff Association should not be permitted to bring an action in its own name before the tribunal. Accordingly, Article II, paragraph 1(c) should be deleted from the draft statute.

The commentary on draft Article III, second sentence, to the effect that the tribunal could normally be expected to exercise judicial self-restraint may sound reassuring. Yet, I remain concerned that the reference in that sentence to "generally recognized principles of international administrative law" might open the door to undue interference by the tribunal with the ultimate responsibility of the Board for the formulation of employment policies.

This concern is reinforced by the decision of the World Bank Administrative Tribunal in the Pinto case stipulating a "fundamental right to periodic...adjustment of salaries based on cost of living and other factors." I am not aware that the compensation system in place in the Bank at the time of the Pinto decision provided such a fundamental right either explicitly or implicitly, so it appears the World Bank Administrative Tribunal transgressed considerably its judicial powers.

From this experience, I draw the conclusion that preferably the Fund's tribunal should not be empowered at all to review general compensation decisions of the Board. Alternatively, the objectives of the existing compensation system of the Fund should be clarified, perhaps in the commentary or at another appropriate place, leaving in particular no doubt about the prerogative of the Executive Board to decide on salary adjustments in a way that it considers appropriate to the needs and purposes of the Fund, without prejudice to income developments in the comparator markets or developments in the costs of living. Moreover, the principle of judicial self-restraint should be explicitly included in Article III.

Mr. Clark submitted the following statement for the record:

In addition to the specific issues raised during our meeting on December 19, 1990, I would like to make the following comments regarding the draft statute:

Article II, Paragraph 1(c)

I see no reason to preclude the Staff Association from challenging the legality of regulatory decisions adversely affecting its members, nor can I see how such a preclusion could be effectively enforced.

Article II, Paragraph 2(b)

As regards the scope of the tribunal, it would seem appropriate that the tribunal be empowered to review employment-related regulatory decisions taken by the Executive Board. However, I am persuaded by the argument that resolutions adopted by the Board of Governors should be excluded from the tribunal's review, which suggests the removal of the square brackets in Article II, Section 2(b).

Article II, Paragraph 2(c)

The arguments in EBAP/90/309 in favor of excluding contractual employees from access to the tribunal were unconvincing. Indeed, if, as stated, administrative decisions related to contractual employees are not likely to involve questions of legality, there seems little reason not to permit the tribunal's review in those rare instances in which questions arise. Therefore, unless stronger arguments are forthcoming, I would favor permitting contractual employees access to the tribunal.

Article III

The final sentence, binding the tribunal by interpretation of the Articles of Agreement by the Executive Board seems unnecessary, given the discussion in EBAP/90/139. For example, on page 5 of the staff paper it is stated that "a tribunal will not substitute its judgment for that of the competent organs, and will review an organization's exercise of its discretionary powers in regulating employment conditions only on very limited grounds." The explicit reference to the Board's facility in this regard simply gives the appearance of inviting its use to circumvent the tribunal's review of regulatory decisions that might otherwise be judged illegal. I could favor, instead, the proposal to treat the delineation of powers in the commentary, rather than in the text.

Article VI

I can support the proposal to lengthen the period during which applications may be filed with the tribunal to six months.

Article VII, Paragraph 1(b)

I agree that the same procedure for appointing the President of the tribunal should apply to the appointment of the two associate members and their alternates.

Article X

The proposal that the Managing Director be able to withhold evidence of a confidential nature seems unnecessary. I agree that the confidentiality could be preserved if examination of documents were held in camera.

Article XIV, Paragraph 4

Since the precedents set by other major international tribunals will be relevant for cases brought to the Fund's tribunal, this suggests that significant legal expense may be required for litigants to mount an effective appeal. It would seem appropriate, therefore, that the Fund bear some of this cost, especially if an application is well-founded in whole, or in part. Therefore, I can support the replacement of "it may order" with "it shall order" in this section. However, in those cases in which litigant's claims are not upheld, it does not seem reasonable that the Fund should bear the full burden of their legal advice. One alternative would be for the Fund to provide half the expense of a staff advocate; the other half could be provided by the Staff Association.

Article XX

As I said during the Board meeting, I would favor some degree of retroactivity. Since the Grievance Committee is already empowered to review the administration of existing regulations, to restrict the tribunal to reviewing amendments of regulations would imply, at least initially, that the scope of the tribunal's competence would, in essence, be no broader than the jurisdiction now exercised by the Grievance Committee." In my view, the proposal to limit tribunal review of regulations to those approved after the date of the Executive Board's approval of the statute barely address as this concern.

It has been argued that allowing the tribunal to review existing regulations would, in some sense, be unjust, since management and the Board could be held accountable for actions taken prior to the tribunal's existence. This argument, quite reasonably, suggests that Fund employees should not be able to apply for damages incurred prior to the introduction of the Tribunal. However, this argument does not imply that, if a pre-existing regulation is inconsistent with "general principles of law," employees should be restricted from applying for damages that might arise following the tribunal's introduction that result from pre-existing regulations. Thus, I would propose that the tribunal be restricted from a retrospective review of existing regulations, but be permitted to undertake a prospective review of such regulations.

Mr. Dawson submitted the following statement for the record:

It is important for the staff to have a forum for fair hearings to resolve personnel matters. However, to our knowledge there have been no issues or cases that have not been satisfactorily resolved under existing Fund procedures. To our mind, therefore, it is still not clear that the creation of an administrative tribunal is essential.

Nonetheless, we recognize that a consensus has emerged in the Board to establish a tribunal, and we would like to work within that understanding. This issue has been subject to lengthy consideration, and we agree that it should be settled as quickly as possible--in particular before another change in the major players in this discussion takes place.

At the same time we caution against excessive haste. The Executive Board is being called on to make a decision that could alter the direction of the Fund as well as limit the ability of the Board and management to undertake their obligations defined under Article XII of the Articles of Agreement. We believe that the issues before us are critical enough not to be decided so quickly so as to leave outstanding issues unresolved for the sake of speediness. The key outstanding issue which has yet to be adequately resolved is the impact of the proposed tribunal on the effective jurisdiction of the Board and of management.

As currently designed, the tribunal will have an important but, at this stage, still unknown impact on the Executive Board's operations. For example, the creation of the tribunal will effectively introduce a strong new participant implicitly present at every Board meeting on administrative matters. This will inevitably alter the balance in Board discussions. Also, the tribunal's

interpretations over time will build a largely irreversible block of opinion that would be largely outside the Board's reach, as well as possibly inconsistent with Board decisions and with the policy advice it gives to member countries. Finally, as a rule, the Executive Board is likely to feel restrained from actively interfering with tribunal decisions. For example, the avenues currently proposed for reversing a tribunal decision are rarely likely to be taken.

Together with these uncertainties, there is another major unknown. As a group, Executive Directors have little knowledge of what the "generally recognized principles of international administrative law" are, yet the current framework proposed for Board approval states that this will be the basis for the tribunal's decisions. We believe that the Fund, including the staff, correctly sees itself as a cut apart from other international organizations, and that parallelism with other international organizations, for example, the United Nations or International Labor Organization (ILO), is not an objective of the Fund. The staff paper argues that "the [other international organizations'] tribunals have reaffirmed, in a wide range of context, that international organizations have broad power to adopt and modify policies concerning the terms and conditions of employment, as part of their mandate to carry out the purposes of the organization." However, the World Bank Tribunal's de Merode case, presumably part of these "generally recognized principles," clearly states that this power is restricted in noting that "the fundamental and essential element of the conditions of employment may not be amended unilaterally."

Consider that the Fund's tribunal could have the power to override a Board decision, when, for example: the Board approves an element in a down-grading program which prevents down-graded employees at the maximum of the lower grade from receiving periodic pay increases after a two-year "grandfathering" period; the Board approves an element in a reorganization which requires employees to sign releases when accepting an enhanced retirement package; the Board approves a lowering of the payout formula in the pension plan at the same time that it takes a compensating measure and raises salaries; or, the Board decides not to grant periodic salary increases reflecting changes in the cost of living because salaries in comparator markets had been stagnant or declining, or budget exigencies in the Fund made that inadvisable.

The first two of these decisions were overridden by the World Bank Administrative Tribunal, the third by the ILO Administrative

Tribunal, and a decision against the fourth is a logical extension of the de Merode case, which the staff paper appears to consider acceptable law.

In view of the concerns voiced above, we would suggest that a compromise be developed that, while not sacrificing individual staff member's rights, provides something of a safety net for the Executive Board. The Executive Board should be responsive to staff but not so much that it relinquishes the management responsibilities entrusted to it by the Board of Governors. Some assurance is needed that the tribunal is clear and constrained and will not override Board decisions of a policy nature.

To better understand the implications of our decision on the tribunal, we suggest that the staff prepare a short summary of the "generally recognized principles of international administrative law" that expands on those examples provided in the paper under consideration. The summary would be a more systematic and comprehensive--but still concise--review of key cases in areas where the tribunal is expected to be active. It would also be helpful if staff could describe how a hypothetical case, like de Merode, would proceed under the procedures in the proposed statute.

For these reasons, while we would be more comfortable with the tribunal in an advisory role, we would be prepared to support Article II of the proposed statute if the tribunal's jurisdiction is appropriately contained under subsequent Articles. Additionally, we do not believe that the Staff Association should have the ability to challenge the legality of regulatory decisions on behalf of Fund staff members; therefore, Article II(1)(c) should be dropped. Regarding Article II(2)(a), we want to reserve our views at this time on whether there should be a distinction between "individual decisions" and "regulatory decisions." Further, we would suggest that the phrase "taken in the administration" be replaced by "relating to the contract of employment or the terms and conditions of employment," as the proposed language is more familiar and narrower in scope. We strongly believe that the phrase in brackets within Article II(2)(b) should be retained, and ideally it should be extended to read "or by the Executive Board." Finally, it would not be productive to include contractual employees as "staff members."

In line with the arguments made above, we feel that the second sentence of Article III remains far too uncertain and open, while the third sentence does not establish adequate limits. We also believe that the fourth sentence of Article III should be modified, or interpretative language be added, so that the meaning is clear.

Briefly our views on other tribunal issues and Articles are as follows:

The timetable for filing of an application is adequate as described in the Articles, particularly as provision is made for a waiver of the time limits.

The process for appointing members of the tribunal, per Article VII, is appropriate, except that we would suggest that the phrase "and with the approval of the Executive Board," which is the precedent set in the World Bank Administrative Tribunal, be added to the end of Article VII(1)(b). Similarly, we agree with the procedure, proposed in Article X, by which the Managing Director may withhold evidence because of the secret nature of the document. However, we would be open to consider a compromise where this Article is amended to allow in camera viewing of sensitive documents.

With regard to Article XIV(4), and in order to better understand the concept of a staff advocate, it would be helpful to have a little more information, particularly on costs, regarding the different options. Some estimate might be possible by considering the experience of the Bank's tribunal. Our initial view, though, is the awarding of costs should be left to the discretion of the tribunal, which can take into account a wide range of factors beyond whether an individual has a financial and substantive need for legal representation. The Fund in any case should not be obliged to subsidize legal fees challenging its decisions.

Regarding Article XV, we have already suggested compromise language. In any case, we strongly support retaining some form of this provision. If the Fund is likely to bear a significant portion of applicants' costs under Article XIV(4), it is only equitable that an applicant, in the rare case where his application is "manifestly without foundation," bear the Fund's costs. That rule appears to have been accepted in principle in both the United Nations' and the World Bank's Administrative Tribunals.