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June 27, 1991

To: Members of the Executive Board

From: The Secretary

Subject: Establishment of an Administrative Tribunal for the Fund -
Review of the Draft Statute

The Staff Association Committee has requested that the attached letter from its legal counsel, Williams & Connolly, concerning the establishment of an administrative tribunal for the Fund be circulated for the information of the Executive Board prior to the meeting scheduled for Friday, June 28, 1991.

Att: (1)

Other Distribution:
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June 14, 1991

Ms. Anne Doizé, Chairman
Staff Association
International Monetary Fund
700 19th Street, N.W.
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Dear Ms. Doizé:

You have asked for our opinion on the draft Statute of the Administrative Tribunal of the International Monetary Fund. In response to this request, we have reviewed the draft statute carefully to determine whether it meets the needs of the Staff Association's membership. We also have reviewed the commentary on the draft statute. At the outset, it is important to emphasize that the formation of an administrative tribunal is essential to ensure due process and fundamental fairness in the relationship between the staff and the Fund. There appears to be no alternative neutral forum. C. F. Amerasinghe has made the point:

"The need for such [administrative] tribunals could not be gainsaid, particularly because national courts have tended to recognize the immunity of governmental international organizations from their jurisdiction in matters pertaining to employment relations and, even if they did not, national courts would not be a desirable forum for the settlement of disputes relating to employment relations because this would have a divisive effect and be inconsistent with the international character of organizations and their staff."

C. F. Amerasinghe, Documents on International Administrative Tribunals, (1989), p. 1.

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But in order to be effective, the tribunal must be established with sufficient safeguards.

We have concluded that the draft statute has serious inadequacies, which if left uncorrected, will undermine the ability of the Tribunal to provide fair and full adjudication of challenges to employment-related decisions. In this letter, we enumerate and briefly describe our principal concerns. We would be glad, at a later date, to detail our criticisms and propose specific amendments, if you wish us to do so.

1. Jurisdiction of the Tribunal.

Perhaps the most serious defect of the draft statute is that it enables the Fund's management effectively to deprive the Tribunal of jurisdiction over any given challenge to an employment-related decision. The statute provides that the Executive Board of the Fund, by means of a formal interpretation, may declare such a decision lawful, subject to review only by the Board of Governors, and not by the Tribunal. (Article III). The statute also precludes the Tribunal from reviewing resolutions adopted by the Board of Governors, including resolutions adopted at the request of the Executive Board to approve an employment-related decision. (Article II.2.b.). The statute thus allows the Fund's management, through use of either of two simple mechanisms, to strip the Tribunal of the power to review any employment-related decision. The Tribunal's ability to review a managerial decision, in other words, hinges on the acquiescence of management. This aspect of the draft statute makes a mockery of the principle supporting establishment of the Tribunal -- that employees are entitled to neutral review of decisions affecting their employment.

The concern apparently giving rise to these provisions is that the Tribunal will attempt to substitute its judgment for the Fund's in sensitive employment-related matters and encroach upon areas of legitimate managerial discretion. This concern, however, can be addressed in fairer -- and possibly more effective -- ways than by allowing the Fund to place any given decision beyond the reach of the Tribunal. One obvious alternative is to specify appropriate standards of review to govern particular categories of cases. A statute providing for deferential review in certain kinds of cases would protect the appropriate prerogatives of management while preserving the right of employees to challenge in effective manner employment-related decisions.

Another issue relating to the jurisdiction of the Tribunal is whether it may adjudicate claims arising from employment decisions taken before the Tribunal is established. The draft statute would prevent the Tribunal from considering the legality of the major job regrading performed by the Fund in 1986 as well as other employment decisions taken since that time. If employees have substantial complaints about the 1986 action or decisions taken since then, the failure of the draft statute to provide the Tribunal with powers to adjudicate these claims should be considered a serious problem.

2. Membership and staff of the Tribunal.

The draft statute does not give the Staff Association an effective role in determining who will serve on the Tribunal. The statute provides that the Managing Director shall appoint the President of the Tribunal, with the approval of the Executive Board, "after consultation with the Staff Association," and that the Managing Director shall appoint the associate members and alternates "after appropriate consultation." (Article VII.1.). These provisions place the appointments power solely in the hands of the Fund's management; the staff has no power to veto any appointments, let alone to participate as an equal in the appointments process. This allocation of authority over appointments is grossly unfair and could well have significant consequences.

Relatedly, the draft statute provides that the Managing Director shall appoint the staff of the Tribunal. This provision further exacerbates the danger that the Tribunal will become a less than independent arm of the Fund's management. By appointing the members and appointing the staff of the Tribunal, the Managing Director may effectively control the outcome of many of the Tribunal's decisions.

Finally, the draft statute is entirely silent respecting the compensation to be received by members of the Tribunal. Compensation levels can dramatically affect the caliber of those who serve on the Tribunal, as well as their sense of independence. The statute therefore should address the issue of compensation.

3. Procedures of the Tribunal.

The draft statute, although generally authorizing the Tribunal to compel the production of documents from the Fund, allows the Managing Director "to withhold evidence if he determines that the introduction of such evidence might hinder

the operation of the Fund because of the secret or confidential nature of the document." (Article X.1.). This provision may prevent the Tribunal from discovering critical materials and thus may prevent the Tribunal from adjudicating fairly and fully challenges to employment-related decisions. Of course, confidential documents should be kept confidential. But the Tribunal itself should have the express statutory authority to determine, by in camera review, whether a document truly is confidential; and if the document should be kept confidential, the Tribunal should have the authority to enter the document into evidence under seal.

Other aspects of the Tribunal's procedure are not adequately addressed by the draft statute. The statute does not specifically state whether the Tribunal may compel witness testimony or documents from sources other than the Fund, although commentary to the statute avers (without any basis in the text) that the Tribunal may not do so. (Commentary on Article III). The statute also does not address whether an employee may obtain discovery or whether he has the right to confront and cross-examine witnesses. Such procedural issues are of critical importance to persons bringing claims and should be explicitly addressed in the statute.

4. Authority of the Tribunal to Grant Relief.

The draft statute does not specifically empower the Tribunal to issue injunctions, including stays of administrative action pending the outcome of proceedings. The Tribunal must expressly have these powers if it is to provide effective relief in all cases.

5. Authority of the Tribunal to Shift Costs.

The draft statute provides that if "an application is well-founded in whole or in part, it may order that the costs incurred by the applicant in the case, including the cost of appellant's counsel, be totally or partially borne by the Fund." (Article XIV.4.). At the same time, the statute provides that if an application is "manifestly without foundation," it may order that compensation be made by the applicant to the Fund for all or part of the administrative and other costs of the case. (Article XV).

As an initial matter, these provisions are unclear. The statute does not define the phrase "well-founded"; the phrase may mean that the application was successful or simply that it had some substantial basis in law or fact. Assuming the

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application is "well-founded", the statute provides no standard by which the Tribunal is to determine whether costs are to be awarded to the applicant. Likewise, the statute provides no standard by which the Tribunal is to determine whether an applicant who brings a claim that is "manifestly without foundation" should pay the costs of the case to the Fund.

Perhaps more important, the gist of the fee-shifting provisions will close the Tribunal's door to many valid claims. All successful applicants should be guaranteed the costs of bringing their claims, including attorney's fees. And no applicant, even if ultimately unsuccessful, should have to face the prospect of paying administrative or other costs.

6. Publication of the Tribunal's Decisions.

The statute does not specifically provide for publication of the Tribunal's decisions, and in fact hints that there will be no general publication. Secret decisions are anathema to fair adjudication. All decisions should be published, and the statute should specifically address the stare decisis effect of prior decisions.

Conclusion

For the reasons outlined above, the draft Statute of the Administrative Tribunal of the International Monetary Fund fundamentally fails to provide a mechanism for fair and full adjudication of challenges to employment-related decisions. These deficiencies will create the appearance, if not the fact, of a Tribunal that is less than independent, and that is incapable of affording the basic elements of due process to those who appear before it. These flaws will undermine confidence in the Tribunal and render it ineffective.

Very truly yours,

WILLIAMS & CONNOLLY

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