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To: Members of the Executive Board
From: The Secretary
Subject: Censure or Declaration of Noncooperation - Legal Aspects

The attached paper on legal aspects of censure or declaration of noncooperation has been tentatively scheduled for preliminary discussion in an Informal Session on Wednesday, July 5, 1989.

Mr. Munzberg (ext. 6675) is available to answer questions relating to this paper.

Att: (1)

INTERNATIONAL MONETARY FUND

Censure or Declaration of Noncooperation--Legal Aspects

Prepared by the Legal Department

Approved by François Gianviti

June 26, 1989

In his summing up of the discussion at EBM/89/19 of February 17, 1989, the Managing Director suggested that forms of public censure or noncooperation status should be examined. 1/ As outlined in particular by one Executive Director during the discussion, censure should be explored as a possible step "between ineligibility and compulsory withdrawal. For example, it may be fruitful to consider some procedure for 'censuring' a member which has remained ineligible for a predetermined period of time--perhaps twelve months--and is clearly not cooperating fully with the Fund. In such a case, the Board might adopt a resolution of censure, or even submit such resolution to the Governors for a vote." 2/

Section I examines the conditions, content and effect of a declaration of censure or noncooperation (hereinafter "the declaration"). The declaration could be adopted, in the case of a member that remains in arrears to the Fund, during the period between a declaration of ineligibility and a resolution on compulsory withdrawal. Section II examines procedural aspects of the declaration: the timing of the decision, the competent organ, and the publication of the declaration.

Section I. Conditions, Content and Effects of the Declaration

1. Conditions of the declaration

After a declaration of ineligibility, the ineligible member is given a reasonable period (Article XXVI, Section 2(b)) in order to have an opportunity and adequate time to reconsider its position, to take appropriate measures, and to comply with its obligations to the Fund, before it can be required to withdraw from the Fund. During that period, a declaration of noncooperation could be adopted by the Fund on the basis of an assessment of the member's performance in the

1/ "Summing Up by the Chairman--Further Consideration of Modalities of the Cooperative Approach to Overdue Financial Obligations to the Fund," EBM/89/19 (2/17/89), Buff document 89/33 (2/23/89), p. 6.

2/ Statement by Mr. Dallara, Buff document 89/24 (2/16/89), p.8.

settlement of its arrears to the Fund and of its efforts, in consultation with the Fund, to follow appropriate policies for the settlement of its arrears.

Different tests would be relevant to this assessment. The first test would relate specifically to the member's payments performance vis-à-vis the Fund. Considerations would include the duration of arrears, their size, whether the volume of arrears has increased since the declaration of ineligibility, and, in particular, whether the member has made payments to the Fund. The second test would be whether the member has made payments to other creditors while continuing to be in arrears to the Fund. This would demonstrate that the member did not give highest priority to the discharge of its obligations to the Fund and did not respect the Fund's preferred creditor status. The third test would be whether the member has adopted adjustment policies that would improve inter alia its capacity to repay the Fund and would also provide a basis for embarking on a collaborative approach towards the clearance of its arrears to the Fund.

2. Content of the declaration

The declaration of noncooperation could combine several elements: the Fund could state that the member has been found not to have cooperated with the Fund in the clearance of its arrears and could call on the member to cooperate; the Fund could express its regret and disapproval of the member's noncooperation; the Fund could urge other members to assist the Fund in its effort to obtain the member's cooperation.

The Fund could also combine its declaration with a decision to require the member to withdraw after a specified period unless it has remedied its failure to comply with its obligations, but this decision would require a resolution of the Board of Governors adopted by a majority of the Governors having 85 percent of the total voting power. Alternatively, the Executive Board could express its intention to recommend compulsory withdrawal after a specified period.

The declaration could be formulated as follows:

"The Fund notes that, since the declaration of ineligibility on [date], the member has remained in arrears to the Fund, thus persisting in its failure to fulfill its obligations under the Articles, and that the level of its arrears has not decreased (or has increased);

notes that the member has made payments to other creditors while not discharging its obligations to the Fund (or not to the same extent), thus ignoring the preferred creditor status that members are expected to give to the Fund, and has not adopted policies that would ensure the

discharge of its obligations, thus failing to cooperate with the Fund;

urges the member to discharge its obligations to the Fund promptly and to cooperate with the Fund;

reminds the member that arrears to the Fund, which is a cooperative institution, are detrimental to the whole membership of the Fund in that they hamper the proper performance by the Fund of its function of assisting members facing balance of payments difficulties;

informs the member that, unless its arrears to the Fund are fully settled by [a specified date], the procedure for compulsory withdrawal will be initiated;

calls on all members to cooperate with the Fund toward the solution of the problem created by the member's arrears to the Fund."

3. Effects of the declaration.

a. The declaration of ineligibility would continue to have its full effect in that the prohibition to use the Fund's general resources would exclusively derive from that declaration of ineligibility. Ineligibility would also remain the decisive precondition for compulsory withdrawal.

b. The declaration would not reduce any membership rights, and would not impose any additional obligations on the member.

c. The declaration would be essentially a form of exhortation of the ineligible member, by an organ of the Fund, to comply with its obligations.

Section II. Procedural Aspects of the Declaration

1. Timing of the declaration

The adoption of a declaration of noncooperation would take place at the time of a post-ineligibility review of the member's situation. The member would be informed of the possible outcome of the review and could send a representative to present its views (Section 19 of the By-Laws).

a. Consequently, this review would have a specific purpose. It could be added to the existing periodic review procedures for monitoring the situation of a member after a declaration of ineligibility, which are followed by a communication from the Managing Director to the member. These review procedures could

continue to serve a useful purpose as intermediate steps before the review that could lead to the declaration, but their timing would need to be harmonized with the new procedure.

b. The Fund could prescribe that the review will take place after a specified period following the declaration of ineligibility. The Fund has clarified that a fixed period of time could be prescribed for the reasonable period under Article XXVI, Section 2(b), 1/ and the same reasoning would apply to the timing of the review. In both cases, a judgment would need to be made, in one case as to what period would be reasonable for the member to remedy the failure to comply with its obligations, and, in the other case, as to what period would be appropriate to review whether the member has cooperated with the Fund towards the regularization of its arrears situation.

Since the review that could lead to the declaration would be an intermediate step before a possible decision on compulsory withdrawal, the review period would be shorter than the reasonable period in Article XXVI, Section 2(b), in order to allow further time for remedying the situation.

2. Competent organ

The declaration could be adopted by the Executive Board, or by the Board of Governors upon recommendation by the Executive Board.

A declaration by the Board of Governors would immediately raise the issue to the highest organ of the institution and would lead to direct participation of Governors in the relations with the member. Therefore, it seems preferable to leave the adoption of the declaration to the Executive Board, unless the declaration were to include a decision to require withdrawal after a specific period, in which case a resolution of the Board of Governors, adopted by a majority of the Governors having 85 percent of the total voting power, would be required.

If, as suggested, the declaration is adopted by the Executive Board, the Executive Directors could express their intention to recommend to the Board of Governors the compulsory withdrawal of the member, unless, after a specified period, the member had remedied its failure to comply with its obligations.

3. Publication of the declaration

The legality of a publication of the declaration by the Fund must be determined on the basis of the Articles. The general principle, in Article XII, Section 7, is that the Fund may publish such reports as it deems desirable for carrying out its purposes.

1/ Decision No. 343-(54/47), adopted August 11, 1954.

The Fund publishes decisions of the Executive Board and resolutions of the Board of Governors. For instance, a declaration of ineligibility and a resolution on compulsory withdrawal would be made public. The Fund has taken decisions on the publication of the declaration of ineligibility, has issued press releases, and has included relevant information in the Annual Report. 1/ A statement on compulsory withdrawal, including the reasons for the withdrawal, would be incorporated in the Annual Report. 2/

However, the declaration of noncooperation raises a particular legal issue, as it expresses the Fund's views on the performance by the member of its obligations under the Articles. With respect to communication of views, Article XII, Section 8 is somewhat restrictive: Article XII Section 8, first sentence authorizes the Fund at all times to communicate its views informally to any member on any matter arising under the Articles, but the second sentence of Article XII, Section 8 prescribes a special majority (70 percent of the total voting power) for the publication of a report made to a member regarding its monetary or economic conditions and developments which directly tend to produce a serious disequilibrium in the international balance of payments of members.

On the basis of these two provisions, it could be concluded that expressions of the Fund's views on a member's policies cannot be published if they do not meet the conditions required by the second sentence of Article XII, Section 8, and it would have to be demonstrated that arrears to the Fund "directly tend to produce a serious disequilibrium in the international balance of payments of members". However, decisions on ineligibility or compulsory withdrawal, which contain views on the member's performance of its obligations, have been published by the Fund without this finding of serious disequilibrium. Moreover, the Fund has informed the public through press release of differences of opinion between the Fund and a member. 3/ Therefore, the position taken by the Fund seems to be that views on the performance by a member of its obligations to the Fund may be published.

The decision to publish, if it is not subject to Article XII, Section 8, second sentence, could be taken by a majority of the votes cast.

1/ See Decision No. 7999-(85-90), adopted June 5, 1985, Selected Decisions, Thirteenth Issue, p. 322; Decision No. 7931-(85/41), adopted March 13, 1985, Selected Decisions, Thirteenth Issue p. 322; and summing up at EBM/89/19, Buff document 89/33 (2/23/89) p. 5.

2/ See the report on the withdrawal of Czechoslovakia, Annual Report, 1955, p. 115.

3/ For instance, see Press Release No. 35 of January 25, 1948, stating the views of the Fund after the unauthorized devaluation of the French franc.

