INTERNATIONAL MONETARY FUND

Minutes of Executive Board Meeting 89/88

10:00 a.m., July 7, 1989

M. Camdessus, Chairman
R. D. Erb, Deputy Managing Director

Executive Directors	Alternate Executive Directors
F. Cassell	C. Enoch
	Zhang Z.
	C. S. Warner
	J. Prader
	L. B. Monyake
	F. E. R. Alfiler, Temporary
	R. J. Lombardo
	R. Marino, Temporary
	N. Kyriazidis
	M. B. Chatah, Temporary
M. Fogelholm	
	O. Kabbaj
G. Grosche	
J. E. Ismael	
	L. E. N. Fernando
A. Kafka	
	D. McCormack
Mawakani Samba	C. V. Santos
	K. Kpetigo, Temporary
	I. A. Al-Assaf
H. Ploix	
G. A. Posthumus	
K. Yamazaki	S. Yoshikuni

J. W. Lang, Jr., Acting Secretary
M. J. Miller, Assistant

Also Present

Staff Association Committee: R. H. van Til, Chairman; M. Allen, I. McDonald. Administration Department: G. F. Rea, Director; H. J. O. Struckmeyer, Deputy Director; D. S. Cutler, A. Goltz, T. Usmani. African Department: M. Touré, Counsellor and Director; E. L. Bornemann, Deputy Director; G. E. Gondwe, Deputy Director; M. E. Bonangelino, C. V. Callender, K. B. Dillon, M. Nowak, P. M. Young. Exchange and Trade Relations Department: L. A. Whittome, Counsellor and Director; A. Basu, J. Berg, G. R. Kincaid. External Relations Department: F. L. Osunsade. Legal Department: F. P. Gianviti, General Counsel; W. E. Holder, Deputy General Counsel; R. H. Münzberg, Deputy General Counsel. Secretary's Department: C. Brachet, Deputy Secretary. Treasurer's Department: G. Laske, Treasurer; M. P. Blackwell, J. E. Blalock. Special Advisor to the Managing Director: A. K. Sengupta. Personal Assistant to the Managing Director: H. G. O. Simpson. Advisors to Executive Directors: S. M. Hassan, J. L. Menda, A. Raza, R. Wenzel. Assistants to Executive Directors: G. Bindley-Taylor, B. A. Christiansen, S. Chakrabarti, S. Gurumurthi, M. A. Hammoudi, J. Heywood, A. Iljas, M. E. F. Jones, J. A. K. Munthali, W. K. Parmena, A. Rieffel, M. J. Shaffrey.

1. ZAMBIA - REPORT BY MANAGING DIRECTOR; AND OVERDUE FINANCIAL OBLIGATIONS - REVIEW FOLLOWING DECLARATION OF INELIGIBILITY - POSTPONEMENT

The Chairman stated that one week previously, on July 2, 1989, the staffs of the Fund and the Bank had reached agreement ad referendum with the Zambian authorities on a policy framework paper covering the period through end-1993. President Kaunda had immediately announced a package of measures, including a devaluation of the currency from K 10 to K 16 per U.S. dollar, complete decontrol of all prices except that for maize, and measures to limit further the budgetary cost of the maize meal subsidy. On July 5, the Bank of Zambia had introduced regulations to put in place a monetary policy action program that had been agreed with the staff, including a 10 percentage point increase in interest rates--the Bank's maximum lending rate, for example, had been increased from 25 percent to 35 percent--an increase in reserve requirements, and, what was most important in order to mop up liquidity, a requirement for parastatals to pay into the central bank the local currency component of amounts they owed on overdue and maturing external debt service obligations. In addition, a nonrediscountable long-term government bond would be issued to permit more active management of bank loanable funds.

The Government had also announced a civil service wage increase ranging between 30 percent and 50 percent effective July 1, 1989, the Chairman continued. Since the previous wage increase in July 1988, consumer prices had risen by about 90 percent.

The policy framework paper was presently going through the internal clearance processes in both the Fund and the Bank, the Chairman concluded. However, the length of the procedure on the Bank side meant that it would probably not be possible to issue the policy framework paper until mid-August 1989. The staff would, however, be issuing in the following week a short paper to review Zambia's overdue financial obligations, which would describe the recent measures. Therefore, he proposed that the period for that review be extended from July 14 to July 21, 1989. In the meantime, the staff would be available to brief Directors on the key features of Zambia's adjustment strategy. In that connection, Directors might wish to note that the World Bank was in the process of organizing an informal meeting of donors to discuss Zambia's program, tentatively scheduled for July 28 in Paris. He hoped that the Board would be able to discuss Zambia's policy framework paper and conclude the 1988 Article IV consultation in September 1989. He was pleased to report that in the preceding two weeks, Zambia had paid $13 million to the Fund.

Without discussion, the Executive Board took the following decision:

Paragraph 4 of Executive Board Decision No. 9099-(89/30), adopted March 14, 1989, shall be amended by substituting "no later than July 21, 1989" for "at the time of the 1989 Article IV consultation or within four months from the date of this decision, whichever is earlier."

Decision No. 9208-(89/88), adopted
July 7, 1989

2. ADMINISTRATIVE TRIBUNAL

The Executive Directors considered a staff paper on the legal, financial, and administrative implications of the establishment of an administrative tribunal for the Fund (EBAP/89/160, 6/19/89).

The Chairman of the Staff Association Committee (SAC) made the following statement:

Almost a year ago when the SAC made a statement to the Board on the subject of today's discussion, it hoped and expected that an administrative tribunal would be established at the Annual Meeting in Berlin. We appreciate the thoroughness with which Executive Directors have wanted to discuss this important matter, but, at the same time, we have not lost our sense of urgency, and attach great importance to the timely establishment of a tribunal for the Fund. In this respect, we fear that the renewed interest shown by some Executive Directors in an association with the World Bank's Tribunal would greatly delay the process, apart from more substantive reservations we would have in seeking such an association.

The Staff Association agrees with many elements of management's proposal as set out in the paper. However, we would like to offer our comments on several issues raised during earlier discussions, including some specific comments on the proposed statute, the jurisdiction of the tribunal, the role of the Staff Association in challenging regulatory decisions, and the affiliation with the World Bank's Tribunal.

On an earlier occasion, the SAC had indicated that it could support Model 4, provided some important modifications were made, but our thoughts, inspired by comments of several Executive Directors, have evolved toward a preference for Model 1. The differences between Model 1 and Model 4 are subtle, but could in practice be important. We are convinced that it would be desirable to leave the Grievance Committee as it is, so as to maintain an existing and tested mechanism and to avoid the

possible conflict that might occur if staff members were placed in a quasi-judicial position. Model 1 would set up a mechanism that is more similar to the precedent of other international organizations. Also, any possible confusion over competence between the two panels would be avoided in Model 1. In addition, it would be difficult to combine the qualities of the Chairman of the Grievance Committee, which lie in arbitration and labor law, with the qualities needed for the chairman of the administrative tribunal, which lie primarily in administrative law. We do not believe that the cost of Model 1 need necessarily be greater than that of Model 4; it could be expected that most cases would be resolved by the Grievance Committee and would not be pursued further before the tribunal.

The draft statutes contain certain provisions, and lack others which we would like to commend for your further consideration.

First, the tribunal should have the power to compel the production of documents or the appearance of witnesses. The argument that the tribunal could in any case not enforce this power is not convincing. Such a provision is essential in strengthening the standing and authority of the tribunal, and noncompliance with its procedures would signify a prima facie case for ruling in favor of the appellant. We have no doubt that the tribunal would know how to deal properly with the confidentiality of the Fund's records, which would in any case not relate to the functions of the institution, as described in the Articles of Agreement.

Second, the provision that empowers the tribunal to assess costs against an appellant in frivolous cases is a deterrent to access to the tribunal, and we feel strongly that such a provision should not be incorporated in the statute before evidence has arisen that the tribunal is being misused. Apart from that, we believe that the tribunal would be competent to deal adequately with frivolous cases.

Third, we have argued that a good case can be made for backdating the effectiveness of the tribunal to the time that serious consideration of its establishment began.

We are surprised to note that some Executive Directors would want to establish a tribunal without meaningful jurisdiction by excluding regulatory decisions of the Executive Directors and the Board of Governors. The immunity from legal action accorded to the Fund and other international institutions has been the only rationale for establishing tribunals in these organizations to protect the staff members against unjust decisions by their governing bodies, and to test these decisions, where necessary, against the law of the organization and

generally accepted international law. To limit the authority of the tribunal in what is already a marginal jurisdiction, which does not encroach upon the prerogatives of the institution to formulate its own policies, would signify a major deviation from the practice elsewhere. We would urge you not to undermine the basic rationale for the establishment of a tribunal.

In the proposed statute, the Staff Association, as the representative of the staff, would be accorded the right to bring regulatory cases before the tribunal. This provision avoids the awkward situation in which the members of the SAC would be forced to pursue regulatory issues under the artificial umbrellas of an individual complaint. Let me give an example of how this right could be used. The recently revised General Administrative Order No. 34 on clearance of publications and public statements of staff members seems to go far beyond what is specified in Rules N-5 and N-6. If I interpret this General Administrative Order correctly, I would need the Fund's permission to address a meeting of our neighborhood watch. Such matters affect all staff, and, thus, it is entirely appropriate that a representative body be able to pursue regulatory cases. Therefore, we welcome management's proposal to this effect.

The Staff Association has serious reservations about a possible affiliation with the World Bank's Tribunal, or with any other tribunal, for that matter. Several issues are at stake here. First, and most importantly, the Fund staff appreciates the distinct identity of this institution, including the administrative part of it, and we cannot fail to see that those interested in affiliation with the World Bank's Tribunal consider this as a further step toward the administrative, if not otherwise, integration of both institutions; we are sister organizations, but we have different fathers. Affiliation with the World Bank Tribunal has also been discussed in the context of curing perceived deficiencies in its Tribunal. We find it curious, to say the least, that a reform of the Bank's Tribunal is being contemplated through the back door of the discussions on a Fund tribunal. Second, there are no economies of scale or other cost considerations which would favor an affiliation; if anything, costs are likely to be higher.

The Fund staff is looking to the Board for a transition from deliberations, to recommendations, and to decisions by the Board of Governors at the forthcoming Annual Meeting.

The Chairman of the SAC, responding to a question from Mr. Al-Assaf, said that he believed that the provision in the draft Articles of the administrative tribunal specifying that in case the tribunal found that a case brought before it by an appellant was manifestly without foundation, it would have the authority to order that compensation be made by the

appellant to the Fund to reimburse the Fund for the administrative and other costs of the case should be deleted. Such a provision would deter staff members from pursuing cases before the tribunal. Rather, such a provision should be inserted in the Articles only after the Fund had experience that it was necessary. An amendment of the tribunal's Articles could be inserted at that time. In any case, he believed that a Fund tribunal would be able to deal adequately and expeditiously with frivolous cases.

The Chairman said that it was clear from the remarks of the Chairman of the SAC that the staff considered the establishment of an administrative tribunal to be a matter of urgency. In the course of several meetings beginning in January 1987, Executive Directors had agreed in principle to meet the concerns of the staff, and to establish such a tribunal. The time given to that matter had been extremely useful, given that the existence of the tribunal and the jurisdiction which would be conferred upon it raised issues of considerable importance to the Fund and to the Board. He agreed on the need to consider carefully and come to a common understanding on all of the implications of the administrative tribunal that was established, so that in the future Directors were not surprised by the results of its actual workings. Following the clarification of the issues at EBM/89/21 on February 22, 1989, the three outstanding questions to be resolved appeared to him to concern the structure of the tribunal, the jurisdiction to be given to it, and the adequacy of the draft statute, as set forth in the staff paper, to provide a generally acceptable basis for further staff work on the matter.

After hearing the views of Directors on those points, the staff would prepare a paper adapting the draft statute to take account of the Board's views, and possibly incorporating a draft resolution for consideration by the Board of Governors, the Chairman concluded. That would allow for a detailed examination of the statute by the Executive Board shortly after the Annual Meeting. While he would appreciate knowing the views of Directors about the feasibility of such a timetable, he nevertheless believed that the Board should do everything in its power to be ready to establish the tribunal at the beginning of 1990.

Mr. Ismael stated that his chair supported the establishment of a separate Fund administrative tribunal. Several potential advantages of a separate body had been pointed out during the previous meeting on the subject (EBM/89/21, 2/22/89), and he continued to believe that a separate tribunal would better serve the special needs of the Fund and its staff. Furthermore, prospects for having a joint tribunal with the World Bank were clouded by uncertainty, and complicated by the expectation that the process of affiliation would be a long one. He therefore strongly endorsed the staff's recommendation that the Fund should proceed independently toward the establishment of a Fund tribunal, and he hoped that the present discussion would lead to its early establishment.

His chair continued to prefer Model 1 as the structure for the tribunal, Mr. Ismael continued. A Fund administrative tribunal should serve as a useful complement to, rather than a substitute for, the current Grievance Committee. The advisory status of the Grievance Committee which Model 1 envisaged would provide the needed flexibility and informality to the grievance procedures, and thus, could minimize recourse to the tribunal. However, given the need to make significant progress toward establishing the tribunal, he was prepared to endorse Model 4 if there were broad support in the Board for it.

With respect to the tribunal's jurisdiction, Mr. Ismael commented, he believed that it should not be empowered to challenge regulatory decisions taken by the Executive Board or by the Board of Governors. Such a limitation, which should be clearly expressed in the statute of the tribunal, was necessary to avoid potential complexities in employment-related decisions, such as staff compensation, benefits, and the job grading system.

He did not have strong views about the other issues which had been presented for consideration, including the production of documents, the effective date of the tribunal, and costs that could be charged to appellants in cases which were manifestly without foundation, Mr. Ismael concluded. He could therefore go along with the consensus of the Board on those issues.

Mr. Kafka said that the discussion on the establishment of an administrative tribunal had gone on for a very long time, because of the importance and complexity of the subject. That notwithstanding, speed was of the essence. Although setting a date for the Board's next discussion of the administrative tribunal before the Annual Meeting might be too short a time for the Board to give it adequate consideration. The end of the year, as the Chairman had suggested, was certainly not too early.

With respect to the issues that remained to be decided, Mr. Kafka went on, the structure of the tribunal should correspond to Model 1, and he had been glad to see that the Staff Association had also come around to that point of view. Model 4 was messy and complicated, and he believed that the preference for it had never been the view of a majority of Directors. The Fund's tribunal should be authorized to review the legality of all employment-related decisions taken by the Fund, whether regulatory or individual in nature. Finally, the establishment and functions of the tribunal should generally conform to the system contemplated in the draft statute for Model 1.

Since he assumed that the Board would discuss each individual article of the draft statute in the near future, Mr. Kafka commented, he would only make some points of a general nature about it.

Under Model 1, Mr. Kafka continued, the question might be raised as to whether the Grievance Committee should continue to exist. His chair would not object to its abolishment if that were the Board's consensus.

The question naturally arose as to whether a Grievance Committee would be needed if there were a tribunal and a perfectly respectable chain of administrative appeals.

The management should not be obliged to produce documents, Mr. Kafka noted. However, the tribunal would necessarily draw its own conclusion from the failure of the management to do so.

In the event of frivolous cases being brought to the tribunal, he agreed with the solution as proposed by the staff in the paper, namely, compensation to the Fund from the staff member for the cost of the case, Mr. Kafka added.

He was troubled by the proposal to exclude from consideration by the tribunal cases which had arisen before the date on which the tribunal would be formally established, Mr. Kafka concluded. However, he appreciated the difficulties which would be created by giving the tribunal a retroactive jurisdiction. That notwithstanding, the Board owed it to the staff to draw a practical conclusion with respect to its rejection of retroactive jurisdiction, namely, to set a short time limit for the establishment of the tribunal. It was for that reason, as well as others, that he maintained his position that a separate Fund tribunal should be established, rather than a joint Bank-Fund tribunal.

Mr. Grosche said that his authorities continued to believe that the tribunal should be authorized to review the legality only of individual employment-related decisions taken by the Fund. His authorities were frightened by the case law of the World Bank's tribunal, which was displaying a willingness to challenge decisions on salary matters taken by the Bank's Board. In their view, the Fund's tribunal should have more circumscribed powers. In order for them to be able to agree with the draft statute, the window through which the tribunal could challenge decisions taken by the Board of Governors and by the Executive Board would need to be narrowed. In line with their questioning of the rationale for giving the tribunal the competence to judge on regulatory decisions, his authorities were also not inclined to allow the Staff Association to bring cases before the tribunal; only individuals should have such access.

The World Bank Tribunal obviously had the competence to review the legality of all individual and regulatory decisions, Mr. Grosche observed. Therefore, he was less inclined to pursue his initial approach, namely, an association with the World Bank's Tribunal. However, if it were possible to restrict the competence of the World Bank Tribunal, and to amend some other features, he would like to continue to pursue the matter of a joint tribunal, although he recognized that for all practical purposes such a possibility appeared remote. Thus, the Fund should establish its own tribunal. In establishing a well functioning and cost-effective tribunal, the World Bank might perhaps be persuaded to modify its own, and eventually to associate with the Fund's sometime in the future.

He continued to favor Model 1 with respect to the structure of the tribunal, Mr. Grosche continued, first, because the Grievance Committee functioned well, and should not be changed, and second, because he did not wish to put staff members in a position to judge other staff members. Under Model 1, the Tribunal would consist of three members, all of whom would be external to the Fund, which he saw as appropriate. The cost might be somewhat higher, but he was confident that with a well functioning Grievance Committee, the tribunal would not become very active.

He had shared with the General Counsel several more technical comments concerning the draft statute, Mr. Grosche concluded. He hoped that some of those comments would prove useful in redrafting the statute.

Mr. Kyriazidis made the following statement:

This chair has expressed concerns about some aspects of the proposed arrangements, more particularly regarding the structure, jurisdiction, and competence of the tribunal. We have already expressed our preference for Model 1 with regard to the structure of the tribunal, and we have not found in the staff paper convincing arguments to change our minds.

The retention of the Grievance Committee in its present form as a consultative organ is strongly advisable, and is consistent with the practice of other international organizations, which maintain a consultative organ as an important element in administrative dispute procedures. We do not agree with the view that maintaining the Grievance Committee will make the procedures cumbersome or lead to unnecessary duplication. Past experience with the Grievance Committee suggests that its continued functioning may well contribute substantially toward reducing the number of cases that will be brought before the tribunal. Moreover, we conceive the tribunal as a complement to, not as a substitute for, existing procedures--as a court of final appeal after all other administrative procedures have been exhausted. As such, it will of course necessarily involve the duplication which forms an intrinsic part of all appeal procedures.

We are strongly opposed to members of the staff being in a position to issue decisions binding on management, or even participating in a decision which might invalidate acts of the Executive Board, which indeed seems to be perfectly possible in the cases envisaged under Article X, Section 2(d), regarding the rules of procedure of the tribunal.

This chair has expressed concern about the limitations that the establishment of the tribunal may introduce into the exercise of the powers of organs of the Fund under the Articles of

Agreement on matters of personnel administration. These concerns are being highlighted by the staff's analysis, the precedents quoted, and the wording of the relevant articles in the draft statute.

From the moment that direct challenge of regulatory decisions is allowed--and I take it that this includes Executive Board decisions and even decisions of the Board of Governors--important limitations are imposed on the organs of the Fund, the extent of which will depend on the interpretation that the tribunal gives to the principles of administrative law or higher legal norms which it considers relevant in the case under consideration.

The quotations on pages 8 and 9 of the staff paper from the judgments of the World Bank Administrative Tribunal indicate that the limitations may well be wide and intrusive, if not disruptive of the decision-making process in the Fund, the provisions of Article III of the draft statute notwithstanding. Article III protects the lawful exercise of the discretionary authority vested in the organs of the Fund under the Articles of Agreement. What is lawful or not may well have to be determined by the tribunal before the decision can be applied. I do not dispute the staff's view that this can be an advantage in certain circumstances, but this must be set against the detrimental effects of the disruption of the decision-making process and the probable encouragement of class action suits.

In view of these considerations, we are inclined to oppose the direct challenge of regulatory decisions, but, of course, without precluding the judicial review of such decisions if an individual case warrants it, in conformity with established practice. In this scheme, we would not need to envisage the total exclusion from judicial review of any category of decisions, something which we agree with the staff would be inappropriate and inadvisable.

Consistent with this line of thinking, we would also be inclined to oppose the proposed right of the staff to challenge regulatory decisions, even if the direct challenge of such decisions by individual staff members were to be allowed. Such a right could indeed develop into a major constraint on the ability of the Board and management to take timely action in personnel policy matters, even if it does not lead to a fundamental change in the decision-making process within the Fund. We believe that it is wise to follow the practice of other international institutions on this score, without of course precluding the Staff Association from participating in the judicial process, as a friend of the court, for example, in support of actions brought by staff members.

This chair has consistently supported the view that the Fund should establish its own tribunal, rather than joining with the World Bank's Tribunal. The report on the exploratory talks held with Bank staff confirms us in this position. We therefore support the staff's recommendations on this score.

We agree with the staff's recommendation with respect to the production of documents.

The staff proposes that the tribunal's jurisdiction should begin on the date it is formally established, and I fully accept the reasoning behind this proposal. However, could the staff clarify what would happen if the tribunal were called upon to review an individual decision taken after the starting date, but raising important principles of law related to a regulatory decision taken before the starting date.

The system contemplated in the proposed draft statute is acceptable, as long as it is adjusted so as to give a reasonable degree of certainty that the concerns we have expressed are met.

The staff paper seems to argue that there are widely recognized limitations to the exercise of the powers of all the organs of international institutions in matters of employment policies. These limitations derive from general principles and practice of administrative law, as well as what is called higher legal norms, and apply to all decisions--individual or regulatory. I agree with this fundamental argument, but I am concerned by its implications, as these limitations are not, and indeed cannot, be clearly spelled out. The review of the relevant jurisprudence and the learned opinion provided in the staff paper indicate that the definition of these limitations is an evolving process, depending on varying interpretations of the legal principles involved. The fluidity surrounding these concepts will be a cause of serious concern if the Board's regulatory decisions become subject to judicial review on a direct challenge basis.

Mrs. Ploix said that she wished to reiterate her authorities' support for the creation of an administrative tribunal in the Fund. The Fund would be much better served by establishing its own tribunal, rather than affiliating with the World Bank Administrative Tribunal. Such an affiliation would be more costly and less efficient, the World Bank Administrative Tribunal lacked some features of the existing grievance process in the Fund, and there were legal and procedural shortcomings. Moreover, a shared administrative tribunal was inappropriate, first, because given the differences in size and culture between the two institutions, each must preserve its own identity, and second, because such an approach might be

lengthy and time consuming. The discussions in that direction might even be conflicting, since the traditions of grievance procedures in the two institutions might not necessarily be reconciled.

The tribunal should be competent to review the legality of employment-related regulatory decisions taken by the Fund, Mrs. Ploix continued, which would be consistent with the usual practice of other major administrative tribunals, as the staff had made clear. However, the statute of the tribunal should incorporate the significant limitation that administrative tribunals had recognized regarding the review of regulatory and other types of discretionary decisions.

Her authorities supported Model 4 with respect to the structure of the tribunal, Mrs. Ploix went on, as it seemed to be the least complex, the most cost-effective, and the best suited to draw upon the positive experience of the existing Grievance Committee. Although she was aware of the concerns that had been expressed by several speakers regarding the propriety of having staff members participate in a juridical body, that was a practice that had been used in many countries without particular shortcomings--in France, for example. Furthermore, the fact that the Grievance Committee--which would have the same composition as the first panel--had worked very well so far, was reassuring. Moreover, the draft statute clearly stated that no staff member would have to give an opinion on regulatory decisions, in particular on Executive Board decisions, which was very appropriate, in the view of her authorities.

She could go along with the consensus regarding the possibility of allowing the Staff Association to bring cases before the tribunal, Mrs. Ploix concluded. Although such a provision was not currently extant in most international organizations, staff associations were already actively involved in practice in such cases, as the staff had pointed out.

Mr. Cassell said that the World Bank Administrative Tribunal might serve as a warning to the Board, because the Bank Board was beginning to find itself confronted with constraints, as, for example, in its discussion of the Joint Compensation Committee's Report, which was very worrying. He hoped that the Fund might be able to learn something from the Bank's experience that could be put to some use in the current discussion.

The question of whether there should be a joint tribunal had received rather summary treatment in the staff paper, Mr. Cassell commented. Although he would not wish the Fund to affiliate with the current model of the World Bank's Administrative Tribunal, it might be hoped that the World Bank was learning from the experience as well, and he recalled that a number of Directors had expressed interest in the proposal for the eventual establishment of a two-tiered joint tribunal. He recalled that the staff had undertaken to discuss that further with their counterparts in the World Bank, but the outcome of those discussions had not been mentioned in the staff paper. Rather, the paper had looked only at the narrower issue of whether the Bank's management would support the exclusion of regulatory decisions from a joint tribunal's competence. Since

the paper also argued quite firmly that regulatory decisions should not be so excluded, the discussions with the Bank's management might have been based, to a certain extent, on a false premise.

The option of moving toward a joint tribunal thus did not appear to have received the full consideration it perhaps deserved, given the desirability of achieving a broad parallelism in the terms and conditions of employment between the two institutions, Mr. Cassell went on. Although many Directors might believe that such an objective had not been contemplated originally, the fact that in other areas, by its actions, the Board had pursued parallelism needed to be recognized. There might also be cost advantages to be gained from a joint tribunal. That being said, the question of a tribunal had dragged on for a considerable time, and, along with Mr. Kafka, he was keen to take a decision on it as soon as possible. He would not wish to hold up the establishment of an independent Fund tribunal if that were the consensus of the Board.

With respect to the tribunal's competence, Mr. Cassell continued, the paper argued that the Fund was governed by the internal law of the organization, an internal law deriving from the constituent instruments of the Fund, from administrative practice, and from more general principles of law. The staff also pointed out that international tribunals had regularly invoked those higher legal principles to invalidate or ride over the provisions of an organization's written law. In those circumstances, it was not entirely clear what scope the Board had for constraining the competence of the tribunal. For example, even if the second sentence of Article III of the draft statute specifying that the internal law of the Fund would apply were deleted, along with Article IV specifying that the tribunal's competence would be settled by the tribunal, and parts of Article II, he wondered whether there could be any assurance that the tribunal, drawing on well-established legal precedents and appealing to higher legal principles, would not feel able to challenge the legality of Board decisions. That was a very important matter of competence. It was worth noting in that context that the United Nations Tribunal had not felt constrained from reviewing the regulatory decisions of the General Assembly despite the statement in the legislative history of the tribunal's statute that the tribunal would have to respect the authority of the General Assembly.

In addition, the implication of the staff analysis was that the Fund was already subject to the general principles of administrative law, Mr. Cassell pointed out. If that were true, it was not clear what new rights a future tribunal would give the staff. Conversely, if a tribunal were established that had no competence to review regulatory decisions, he wondered whether those decisions would still be subject, in some cases, to higher legal principles.

It followed from those arguments and uncertainties that the establishment of a tribunal for the Fund might not endow the staff with any new rights, Mr. Cassell continued. It might simply provide the staff for the first time with a judicial forum in which to exercise their existing legal

rights. He wished to know whether that was the view of the General Counsel. It also followed that, in practice, it might not be feasible to circumscribe sharply the competence of a future Fund tribunal. In those circumstances, and following the example of other international tribunals, he would be prepared to accept that a future Fund tribunal should be given competence to review the legality of all the individual and regulatory decisions taken by the organization. However, as the staff suggested, the draft statute should make it crystal clear that the tribunal would have no power to move beyond the well accepted principles of international law, which significantly limited the substantive review of discretionary decisions.

He had two specific questions for the General Counsel, Mr. Cassell went on. First, under the Fund's Article XXIX, the Board of Governors had the final decision on all questions of interpreting the Articles, including Article XII, Section 4. What authority did the Articles give the Board of Governors to delegate specific powers to independent organs such as a judicial tribunal? Second, it would surely be important for the Board to be aware of what powers it would have to relinquish--de facto--if a tribunal were established. More concretely, what were the constraints imposed by general legal principles other than the rule of nonretroactivity? In a recent World Bank suit, the tribunal had asserted that fundamental and essential elements of the conditions of employment might not be amended unilaterally by the Bank. It would be important to know what that covered--would it constrain the Board to agree to salary increases each year at or above the rate of inflation, for instance? Such a consideration was not entirely academic, judging from the discussions that had taken place in the World Bank.

He could support either Model 1 or Model 4 with respect to the structure of the administrative tribunal, Mr. Cassell stated. Model 1 would preserve the existing Grievance Committee, which had worked very well. However, he would place considerable weight on the staff's view that Model 4 would be the most cost-effective and streamlined option. He continued to have doubts about the suggestion that under Model 4, the full five-member panel could be called in to review particularly difficult or fundamental individual decisions. In his view, the second panel should confine itself to regulatory decisions, leaving all individual decisions to the first panel. That would avoid the need to draw invidious distinctions between fundamental and nonfundamental individual cases. With that caveat, he had a marginal preference for Model 4. Nevertheless, he could go along with the consensus for either Model 1 or Model 4.

He had a few technical questions on the draft statute for the administrative tribunal, which he wished to pursue with the General Counsel, Mr. Cassell concluded. Nevertheless, he could go along with the broad thrust of the draft statute.

Mr. McCormack made the following statement:

The staff paper advances our discussion considerably. It clarifies the general legal principles underlying the capacity of the tribunal to review the legality of decisions, as opposed to their advisability from a policy point of view. On the basis of this material, we would hope and expect that progress can be made toward the establishment of a tribunal. It is important for the Board to try to reach decisions as expeditiously as possible where the Fund staff has a particular interest, and the tribunal has been on our agenda for some considerable time.

The staff paper poses three issues for the Board's consideration. The first, the competence of the tribunal, is a difficult issue, on which we would probably all have a number of apprehensions. However, the careful analysis in the staff paper of the sources and nature of the legal principles governing the operation of administrative tribunals in international organizations was both welcome and reassuring. The staff carefully distinguishes between the ability of a tribunal to review decisions from a legal point of view, and its preclusion from dealing with the advisability of decisions from a policy perspective. The clear statement to the effect that the scope of review by the tribunal may not exceed the well-accepted principles of administrative law that significantly limit the substantive review of discretionary decisions is, to our minds, helpful. It should be reflected in the draft statute by inclusion in Article III.

In the light of this discussion, we could support proposals to give the tribunal fairly extensive powers of review over both individual and regulatory decisions. The analysis and proposed safeguards alleviate most of the reservations and concerns which we had earlier on this subject. Having said that, we see some merit, if only from a presentational and quasi-political point of view, in specifically excluding from review decisions made by the Board of Governors. This exclusion is more a matter of prudence than of logic, and its practical effect is likely to be small.

I would like to ask the staff to clarify what the force of precedents in the World Bank and other tribunals would have on the operation of the Fund tribunal. We have heard from Mr. Grosche, Mr. Kyriazidis, and Mr. Cassell about some of the unfortunate aspects of the decisions of the tribunals of the World Bank and United Nations, and I would wish to know what sort of situation the Board is likely to face. Would these precedents have only persuasive, rather than compelling, authority if cited in the Fund tribunal? Is the safeguard in Article III of the draft statute a substantive one, or is it weakened by the fact that the law appears to be somewhat fluid,

as Mr. Kyriazidis puts it? If that is indeed the case, the question arises as to what effect the Board's preparatory work or legislative history could have in shaping the way the tribunal goes about its business. Can the Board, at this stage of its deliberations, design some sort of counterweight which would perhaps offset any of the undesirable effects of possible precedents from other organizations?

With respect to the structure of the tribunal, we would favor Model 1. The Grievance Committee has worked well. We are impressed by the fact that, so far, all of its recommendations have been accepted by management, and the Committee seems well adapted to the culture of the Fund. To incorporate the Grievance Committee into the framework of an administrative tribunal would involve staff members in reviewing matters on which, arguably, they have an interest, and I think that others have that reservation also. Also, if the Grievance Committee were to continue to operate as efficiently as it has done in the past, it could serve to reduce the actual volume of litigation going before the administrative tribunal, and would therefore help to contain the cost of the tribunal. In this connection, we are not entirely persuaded by the suggestions of the staff that Model 1 requires any significant expansion of its present jurisdiction, and, in particular, we would have reservations about the appropriateness of establishing a number of specialized review or advisory bodies to deal with issues such as staff retirement. If possible, we would like to keep the Grievance Committee operating more or less as it is at present, perhaps with some minor modifications, but not revamping it. That is a substantial element in weighing the relative cost of the two models.

While we support Model 1, we could join an emerging consensus in favor of Model 4, in the interest of expediting progress toward establishment of the tribunal.

We are somewhat reluctant to have the Staff Association bring actions in its own name before the tribunal, and would rather have all actions brought by aggrieved individuals. We recognize, of course, that the Staff Association has a positive role to play as a friend of the court, and in helping its members mount challenges to specific decisions. To provide specifically for access by the Staff Association could, in our view, encourage the taking of class actions, and could lead to attempts to raise hypothetical, abstract arguments, rather than dealing with actual cases. We believe that the tribunal should have the power to request, but not compel, production of documents; this is a simple recognition of the realities of the situation. We think it is appropriate that cases manifestly without foundation should be discouraged by the awarding of costs against vexatious or frivolous litigants. Finally, we

believe the starting date should be the date of the formal establishment of the tribunal--that is, that the tribunal should operate on an entirely prospective basis.

Mr. Monyake stated that the Board had had several discussions on the matter of an administrative tribunal for the Fund, and had come to accept the principle of establishing such a body. He wished to commend the staff for the excellent paper, which presented the legal rationale for, and scope of, an administrative tribunal in simple language that was comprehensible to the layman. He had taken note of the sources and range of the tribunal's authority, and its limitations. The Fund staff's major anxiety had been in relation to job grading; the staff had felt some frustration in that regard, because it believed that had a tribunal been in existence during the job grading exercise, the staff would have had judicial recourse for employment-related grievances. Against that background, he had noted the reference to the von Stauffenberg case, which had challenged the legality of the World Bank's general salary adjustment decisions of 1984 and 1986. In that case, the World Bank Administrative Tribunal (WBAT) had ruled that its authority covered decisions of all organs of the World Bank in which the question of the violation of the appellant's condition of employment arose.

The establishment of the Fund's administrative tribunal should therefore usher in an era of rising staff morale, Mr. Monyake continued. It would only be fair to provide the staff with judicial protection comparable to the staffs of other organizations. The Fund's administrative tribunal would be expected to adhere to, and not go beyond, the principles of international administrative law.

Because the tribunal was intended to serve the staff, he could go along with the Staff Association's preference for Model 1 regarding the structure of the tribunal, Mr. Monyake noted. He would prefer a tribunal with broad powers, with authority to review both regulatory and individual decisions, comparable to most tribunals serving international organizations, Mr. Monyake concluded. Regarding the establishment and functioning of the tribunal, he had no problem endorsing the thrust of the draft statute which applied to the Model 1 structure, subject to the incorporation in it of the observations that had been made by the Chairman of the Staff Association Committee.

Mr. Lombardo noted that the Board was considering an important issue for the future functioning of the Fund. An administrative tribunal would be a major step in improving an already sound organization. He therefore welcomed the staff paper, which dealt with the implications of all the alternatives which would need to be considered in designing the statute.

With respect to the structure of the tribunal, considering the staff's analysis, he preferred Model 4, which in general made for a more straightforward mechanism, incorporating the Grievance Committee into the tribunal, Mr. Lombardo continued. He agreed with the staff that Model 4

would be more streamlined and cost-effective than Model 1, if most of the individual cases were heard by the first panel. One could assume that that would be the most usual situation, in any case.

The case with respect to the competence of the tribunal was not so clear, Mr. Lombardo observed, and there were arguments on both sides. Logic appeared to argue in favor of a more comprehensive competence for the tribunal. It was sometimes very difficult to deal with individual cases without also dealing with regulatory decisions, and sometimes it would be impossible to separate them. From that perspective, he could support the staff's opinion that the tribunal should be competent to review all employment-related decisions taken by the organization.

That notwithstanding, he had doubts, Mr. Lombardo noted. The staff had stated that all the organs of the Fund, whether exercising legislative or executive functions, were subject to the internal law of the organization. He wondered whether the Fund would not be creating something that went beyond the will of the member countries. He wondered whether a dangerous precedent would not be set by claiming that the competence to review regulatory decisions would enable the tribunal to examine decisions taken by the Board of Governors, the Executive Board, and the Managing Director, or those to whom the Managing Director had delegated administrative authority, as the staff had stated. Even though the tribunal would ostensibly only review employment-related decisions, like Mr. Cassell, he wondered whether the Board would not be taking the risk of creating something that went beyond the organization as outlined in the Articles of Agreement. It was true that Article III of the draft statute made it clear that the establishment of a tribunal would not derogate from the lawful exercise of authority by the organs of the Fund under the Articles of Agreement, but it was difficult to discern exactly what the limits of such a tribunal would be. He would appreciate further comments from the staff on that question.

The draft statute generally reflected the characteristics of the system that the Board had in mind, and he would look forward to receiving the formal proposal for the establishment of the tribunal, Mr. Lombardo concluded.

Mr. Fogelholm said that his chair was strongly in favor of an administrative tribunal, and believed that it was time to establish one.

With respect to the structure of the tribunal, he had previously been in favor of Model 4 because of its simplicity and cost efficiency, Mr. Fogelholm continued. However, after having heard the arguments of the Chairman of the Staff Association Committee and other Directors, he could also go along with Model 1, if that could attain a consensus.

A joint World Bank-Fund tribunal would not provide particular benefits for the Fund, and agreement on a joint tribunal appeared unrealistic, Mr. Fogelholm noted.

The most important issue that remained to be settled was the competence of the tribunal, Mr. Fogelholm went on. There appeared to be a wide divergence of opinion on that topic, in particular with regard to the review of regulatory decisions. He also was somewhat uneasy about the legal and practical consequences of allowing a judicial tribunal to review regulatory decisions. The concept of the international law of the organization was unclear, as well as the implications of that law. Also, he was unsure as to what extent international case law would be drawn into the deliberations of the tribunal.

Against that background, he wished to propose a compromise, Mr. Fogelholm stated. Decisions of the Board of Governors should be outside the scope of the tribunal altogether. He agreed with the staff and with Mr. McCormack that such a limitation would have little practical consequence. All other decisions, including those taken by the Board, should fall within the competence of the tribunal, but with the important qualification that the tribunal should have the right only to review, but not to override, Board decisions. That meant that if the tribunal found inconsistencies or illegalities in Board decisions, it would only be able to refer the matter back to the Board for decision or review. The tribunal would not have the power to overrule a Board decision because the Board was the policymaking body of the Fund. It would also mean that the Executive Board would have the right to reaffirm or confirm its earlier decisions, even if they were judged to be inconsistent or illegal. The Board would have to deal with the matter internally, on its own, to decide how to approach the issue at that point.

He could go along with the draft statute for the administrative tribunal, but he had some sympathy for the views that had been put forward by the Chairman of the Staff Association Committee with regard to the removal of the provision that costs should be levied on staff members for bringing frivolous cases before the tribunal, Mr. Fogelholm concluded. He also believed that what the Chairman of the Staff Association Committee had said about the importance of compelling the production of documents and witnesses needed to be taken into consideration. Finally, he agreed with other speakers that the effective date of the tribunal's jurisdiction should be the date of its establishment, and that there should be no retroactivity.

The Chairman observed that Mr. Fogelholm had made an interesting suggestion. Mr. Fogelholm's compromise was that, while the tribunal would have the competence to review decisions of the Executive Board, if it found those decisions illegal or inconsistent, it could only request the Executive Board to review them again. The Board would maintain the power to confirm those decisions, as it saw fit.

Mr. Kafka said that he was puzzled by the reference made by Mr. Fogelholm and Mr. McCormack to exempt decisions by the Board of Governors from judicial review. In the Fund's Articles of Agreement, all powers were ultimately lodged in the Board of Governors. A number of them had been delegated to the Executive Board. If Mr. Fogelholm's suggestion

were adopted, whether or not a judicial review could take place would be based not on the nature of the decision, but on the nature of the body which took the decision. One could conceive of a situation in which the Board of Governors began to allocate to itself certain decisions which it had delegated previously to the Board of Executive Directors, in order to make them unreviewable. In the meantime, those decisions might have been reviewed and in fact found to be illegal. He wondered if the Executive Board really wished to entertain such a possibility.

Mr. Fogelholm said that for practical and perhaps political purposes, it appeared wise to leave decisions of the Board of Governors outside the competence of the administrative tribunal. However, he recognized Mr. Kafka's point. Nevertheless, given the structure of the tribunal he had proposed, there would be no need to remove decisions of the Board of Governors from review by the tribunal, because the Executive Board would maintain the power of reconfirming them once they had been reviewed.

Mr. Kpetigo stated that he supported the establishment of an independent Fund tribunal with the purpose of reviewing the legality of employment-related decisions. The tribunal should not be affiliated with the World Bank Administrative Tribunal.

With respect to the structure of the tribunal, his chair preferred Model 1, in which the Grievance Committee would remain an advisory body chaired by an outside lawyer, and its jurisdiction expanded to cover a broader range of individual decisions, Mr. Kpetigo went on. That would allow the Grievance Committee to deal with a greater number of cases, and there would thus be no real need to place all cases before the tribunal. The administrative tribunal could devote more of its time to a few complex cases.

He agreed with the staff that, in practice, there were uncertainties that made it difficult to predict the administrative costs of the proposed models, Mr. Kpetigo continued. However, it appeared from the staff's arguments that Model 4 was likely to be less expensive than Model 1. However, the effectiveness of the model should be seen as of greater importance than its costs, in his view.

The Fund's tribunal should be empowered to review the legality of any decision affecting the terms and conditions of employment, even if the discretion of the Fund in that matter was broadly recognized, Mr. Kpetigo concluded. The authority to review the legality of all employment-related decisions should be general, covering regulatory as well as individual discretionary decisions. He could go along with the draft statute, which he understood would be submitted formally to the Board for consideration at a later date.

Mr. Al-Assaf stated that he believed that it would be best to maintain the current successful system of settling administrative disputes, namely, through the Grievance Committee. He therefore preferred Model 1 concerning the structure of the administrative tribunal. He agreed with

the arguments that had been made by the Chairman of the Staff Association Committee and by some other Directors in that regard. He would not mind broadening the competence of the Grievance Committee to include issues that were presently outside its jurisdiction. He would prefer a more formal link between the administrative tribunal and the Grievance Committee, perhaps by making Article V, Section 1 of the draft statute more explicit in that regard.

He was in favor of excluding from the tribunal's competence decisions by the Board of Governors and the Executive Board, Mr. Al-Assaf continued. However, if the consensus of the Executive Board were in favor of a wider competence, he could agree with Mr. Fogelholm's suggestion that the tribunal be empowered to review regulatory decisions and return them to the attention of the Board. He was certain that, because the Board was a reasonable body, it would not hesitate to reverse a decision if it discovered that it was wrong. He would therefore suggest that the phrase in the second sentence of Article III of the proposed statute referring to the generally recognized principles of international administrative law concerning the judicial review of administrative acts be deleted. In addition, he supported making the appropriate changes needed to accommodate Mr. Fogelholm's suggestion.

Regarding a joint tribunal with the World Bank, it would be extremely difficult to amend the World Bank Administrative Tribunal to conform to the Board's concerns, and he therefore preferred a tribunal tailored to the Fund's needs, Mr. Al-Assaf noted.

The tribunal should adopt its own rules and procedures, including those regarding requests for documents, Mr. Al-Assaf went on. However, the final word on whether or not to produce such documents would be that of the Managing Director, depending upon the documents' confidentiality.

With respect to access to the tribunal, the Staff Association as a body and in its own name should not have the power to challenge the rulings of the Grievance Committee under Model 1, Mr. Al-Assaf observed. He wondered about whether, in a case in which a grievant accepted the ruling of the Grievance Committee, the Staff Association would still be able to challenge the ruling and bring it to the tribunal's attention.

He agreed with the wording in Article XV (XVI) with respect to the levying of costs for cases shown to be manifestly without foundation, Mr. Al-Assaf concluded. Those cases should be discouraged. On the timing of the Board's next discussion, like Mr. Kafka, he believed that it would be appropriate to hold a discussion sometime after the Annual Meeting.

Mr. Alfiler said that he had no major difficulties with the staff's conclusions, including in support of a Fund-specific tribunal. He could also support the draft statute.

He favored Model 4 with respect to the structure of the tribunal, Mr. Alfiler continued, because it appeared simpler, and more cost-efficient and cost-effective. Another major factor which favored that model was that he saw no point in ending up with two formal bodies to adjudicate employment-related decisions. He agreed completely with the staff regarding the scope of the tribunal's authority. The staff's point that it would be anomalous if fundamental and far-reaching decisions could not be tested for legality, but only the individual implementation of those decisions, was very apt. In that respect, the staff's analysis went far in reassuring him that the establishment of an administrative tribunal would not constrain the decision-making power of the Executive Board or the Board of Governors, but would serve only to ensure that their decisions were in accordance with the laws applicable to the Fund.

He was in general agreement with the draft statute and had no major comments about it, Mr. Alfiler noted. He favored the statute which pertained to Model 4.

With regard to the production of documents, he wondered whether the staff's interpretation that the tribunal would have the authority to request, but not to compel, the production of any Fund documents could not be made explicit in the draft statute, Mr. Alfiler concluded.

Mr. Yoshikuni said that the staff paper clarified the points that needed to be addressed before the Board could establish an administrative tribunal for the Fund, with due reference to the actual experience with tribunals in other international institutions, including the World Bank.

While his authorities generally supported the idea of establishing an administrative tribunal for the Fund, they attached importance to safeguarding the discretionary powers of the Executive Board and the Board of Governors that was mandated by the internal laws of the Fund, including the Articles of Agreement, Mr. Yoshikuni stated. They also stressed that the establishment of a tribunal should not lead to a significant increase in administrative expenses, and should not render the process of legal dispute on employment issues too complicated.

He was somewhat skeptical about the feasibility of creating a joint tribunal with the World Bank, when there was no pressing need on the Bank's side to amend its tribunal, Mr. Yoshikuni commented. He could therefore go along with the majority in favor of establishing an independent tribunal for the Fund. That notwithstanding, his authorities had expressed some concerns about the implication for such bodies as the Joint Committee on Staff Compensation having two separate tribunals. There was room, in his view, to continue to study the possibility of a joint tribunal at some stage in the future.

He would prefer Model 4 regarding the structure of the Fund's tribunal because of its simplicity and cost-effectiveness, Mr. Yoshikuni went on. In his view, if there were a clear separation between the first

panel and the second panel in Model 4, there would be no fundamental difference between Model 1 and Model 4. He could go along with the consensus of the Board.

The tribunal should not have the power to challenge the discretionary powers of the Executive Board and the Board of Governors that were duly given to those bodies by the internal laws of the Fund, Mr. Yoshikuni concluded. He could go along with the consensus on the question of whether regulatory decisions should be included in the competence of the tribunal, on the condition that the concerns that he had expressed were addressed in the draft statute. In that connection, he had been interested in Mr. Fogelholm's suggestion, and would appreciate the staff's comments on it. He could also go along with Mr. McCormack's idea of excluding decisions of the Board of Governors from the tribunal's competence, if the consensus of the Board were in that direction.

Mr. Kabbaj said that he continued to support the creation of an administrative tribunal, because most other international organizations had such a tribunal. He hoped that a final decision could be taken in a reasonable amount of time, perhaps before the end of 1989.

During the discussion of an administrative tribunal in February 1989 (EBM/89/21, 2/22/89), he had expressed interest in exploring further the possibility of joining the World Bank Administrative Tribunal, Mr. Kabbaj recalled. Given the problems that such an undertaking would raise, and after the convincing case Mrs. Ploix had made in her capacity as dual Executive Director, he was prepared to support the creation of a separate Fund tribunal.

He preferred Model 1 with respect to the structure of the tribunal, Mr. Kabbaj continued, given its simplicity and the fact that it would build onto the existing Grievance Committee procedure. The view that the Grievance Committee had worked well appeared to be shared by all parties. However, he was prepared to join the consensus of the Board in favor of Model 4.

The administrative tribunal should not have the competence to challenge the regulatory decisions of the Executive Board or the Board of Governors, Mr. Kabbaj concluded. The tribunal should have the power only to rule on individual decisions. He had no strong views with respect to the other issues that had been raised in the paper, and could go along with Mr. Kafka's positions, or with the consensus of the Board in that regard.

Mr. Chatah said that he continued to prefer Model 1 with respect to the structure of the tribunal for the reasons outlined by the Chairman of the Staff Association Committee. He also supported having a separate tribunal from that of the World Bank, although that was not a matter of principle, but of practicality; from the perspective of principle, the argument weighed heavily in the other direction--for a joint tribunal.

The question of the competence and jurisdiction of the tribunal was the most difficult one, not only from the technical and legal standpoints, but also because there was merit in the arguments both for and against including regulatory decisions in the jurisdiction of the tribunal, Mr. Chatah commented. Like Mr. Fogelholm, we wondered whether it would not be possible to bridge the gap by giving the tribunal an advisory role on regulatory matters. In that respect, the power of the tribunal on regulatory decisions would be similar to that of the Grievance Committee on individual decisions.

On issues such as the effective date of the tribunal, its power to procure documents, the summoning of witnesses, and others, he could support the view taken in the staff paper, Mr. Chatah noted.

He did not feel strongly about the question of recovery of costs for frivolous cases, Mr. Chatah concluded. He did not believe that the tribunal would penalize the staff, except in blatantly frivolous cases in which the staff must have known that the case was absurd. Nevertheless, even without that provision, he did not believe that there was much risk of the staff flooding the tribunal with absurd cases.

The Chairman commented that in a group of more than a thousand people, there was always the possibility that a few individuals would monopolize the time of an administrative tribunal for years with frivolous cases. He did not wish to influence the position of Directors in that regard at that stage of the discussions, but he believed that the risk of such an eventuality should not be overlooked.

Mr. Warner made the following statement:

> I have been very impressed with the statements of my colleagues, and much of what I will say merely expands upon some of their observations.
>
> First, and most importantly, I think the United States has been totally consistent in its basic position: we support the creation of a forum for the fair and impartial hearing of appropriate concerns of the staff.
>
> In recent years, however, I have had some experience with international tribunals. Like most courts of justice, be they national or otherwise, you can get some extraordinary decisions out of them. You can be surprised; they can create precedents that are startling. And there is a risk of an imbalance of powers. As I proceed with my brief remarks, I am going to emphasize the careful framing of our statutes. This will probably be more important than whether we choose Model 1 or Model 4.

The decisions of tribunals can impose an extraordinary set of conditions on management which raises the question of balance. As I said at the outset, we want a fair and impartial hearing of appropriate concerns of the staff. Yet we must be very careful in drawing up our statutes to ensure that we do not give away too much. I have in mind the concept of stare decisis in case law, which is frequently the burden that managements face when earlier decisions by international tribunals are cited by staff associations as opposed to individual staff members.

The problem we have to deal with--which my colleague, Mr. de Groote, often refers to as an "acquired rights syndrome"--is found in various national settings, but can also occur in international settings. Thus, without a careful drafting of these statutes, we may introduce litigious characteristics to the tribunal process. I am not referring just to frivolous cases; the problem can be more substantive than that. I am pleased, however, that the staff has recognized this problem, and has proposed arrangements to defend against frivolous actions.

Turning now to some structural considerations, I think we should consider very carefully the question of competence. Mr. Grosche has addressed this question very carefully in speaking of "narrowing the window." I think it is something that bears further consideration in subsequent discussions before we reach a final conclusion on this matter. I think that Mr. McCormack and Mr. Fogelholm have also raised some interesting questions about partitioning the processes of the Board of Governors, and narrowing the window with respect to certain processes of the Executive Board, particularly as it deals with delegated authority from Governors. This is something the General Counsel can give us guidance on, and therefore I will not address it extensively. But it is here where I think we can tailor the statutes to maintain the appropriate balance of power within a framework that offers a fair and impartial hearing for staff concerns. At the same time, if you will pardon the expression, we will not be giving the whole store away, so that future Managing Directors might wonder who is managing the store. I have seen instances in international organizations where there has been a very sudden and very severe shift in the balance of power.

In this regard, we should not shy away from trying to create, in an architectural sense, an innovative tribunal that we think will serve the broad interests of our organization, and will not be bound by the structures created in the past by other international bodies. I do not think we should be worried about having a different architecture. The Fund is an extraordinary organization. I have been impressed by it since I came here. Therefore, I do not think we should be concerned about having a

tribunal that is unique, particularly if it avoids some of the disadvantageous elements that have emerged from the experience of other tribunals over the last decade or so. Earlier references to the UN Tribunal are most pertinent in this regard.

Attention has also been given to the potentially joint character of a tribunal for the Fund. Now that we have been able to establish a joint compensation system with the World Bank, if we could begin with a clean slate, the advantages of a joint tribunal might be obvious. Like Mr. Grosche and Mr. Cassell, I do not think that we should give up on this idea. On the other hand, there are some immediate practical considerations that constitute an impediment to proceeding directly to this stage. Therefore, I would strongly suggest that, as we draw up the statutes, we should keep in mind--even though this may now appear idealistic thinking--the possibility that at some future date we could invite the Bank to join the tribunal which we have created, and which is working better. Therefore, as we go ahead, let us seek a standard of quality that at some future date might create the opportunity for our tribunal to become a joint tribunal.

I think appropriate attention has been given to cost effectiveness. My experience would tell me that it is difficult to make a clear determination as to which model would be more cost effective. I say this because I believe that the true cost of operation of the tribunal will depend more on how the tribunal operates and what its work load is than how we design it in the first place. Our initial impression was that Model 4 was perhaps more efficient. On the other hand, having heard other speakers, I think we could join a consensus to embrace Model 1, provided that we have the statutory framework that is the key not only to cost considerations, but also to effective operations in general and the provision of a fair and equitable forum for our staff.

Obviously, as we progress in this discussion, I will comment on more detailed points. But I think that much can be illuminated by the comments of the General Counsel and the staff at the conclusion of our discussion.

Mr. Posthumus said that he supported establishing a separate, not a joint, administrative tribunal. Despite Mr. Warner's proposal, he would still hesitate to recommend that the World Bank tribunal be encouraged to join with the Fund's tribunal. That might be an attractive idea, but it was not very likely to be successful. Moreover, it disregarded the fundamental argument for a separate tribunal, that the Fund and the Bank remained different organizations.

With respect to the structure of the tribunal, Mr. Posthumus went on, although he preferred Model 1 because of the arguments that had been made by others, he could go along with Model 4.

Although he believed that the competence of the tribunal should be as wide as possible, he was not sure whether the words "regulatory" and "employment related" were sufficiently clear in describing the types of decisions that the tribunal could review, Mr. Posthumus noted.

He was not certain what would be gained by Mr. Fogelholm's compromise, Mr. Posthumus went on, because in that compromise the tribunal would not be able to take a regulatory decision in any case, but only to declare that a specific decision was invalid or illegal. Because there would then be an absence of regulation in the area affected by the invalidation by the tribunal of a previous decision or regulation, the Board would have to address itself to the matter again. In that sense, he was not sure whether the compromise would not lead in the end to the undermining of the entire concept of an administrative tribunal.

He wondered whether it would be possible for the Executive Directors to establish a tribunal which could assess the legality of the decisions of the Board of Governors, Mr. Posthumus remarked. He wondered whether such a decision in itself would not be illegal.

The effective date of the tribunal should be the date of its establishment, and it should not be a retroactive date, Mr. Posthumus interjected.

The question as to whether the Staff Association should have the right to bring cases before the tribunal depended to a certain extent upon the competence of the tribunal, Mr. Posthumus concluded. He assumed that most of the cases that would be brought before the tribunal would be individual cases, and he could not see that the type of case that the Staff Association might bring would, in essence, be any different.

The Chairman, responding to Mr. Posthumus' question about the legality of a decision by the Executive Board to establish an administrative tribunal, explained that the establishment of a tribunal would have to be submitted to the Board of Governors for its approval in any case.

Mr. Fernando said that if a decision were taken to establish a tribunal, the tribunal should be separate from the World Bank Administrative Tribunal. He could contemplate taking action with respect to the tribunal so that it could be established by the end of 1989. He favored Model 1 with respect to the structure of the tribunal, which sought to preserve the Grievance Committee. The Grievance Committee would have the potential to be an effective channel which would limit the need for extensive recourse to the administrative tribunal. He concurred with the views of Mr. Ismael and several other speakers that the review of regulatory decisions should be excluded from the competence and jurisdiction of the tribunal. However, he recognized that Mr. Kyriazidis, Mr. Cassell,

and Mr. Fogelholm had raised some important issues, particularly Mr. Cassell's point that if regulatory decisions were excluded from the competence of the tribunal, the tribunal might be no more than an additional administrative layer. That would be particularly relevant if Model 1 were chosen for the structure of the tribunal. Mr. Fogelholm's compromise proposal, to permit the tribunal to review regulatory decisions, and refer them back to the Executive Board if it found them to be illegal, was an interesting one, about which he would appreciate some further staff comment.

The effective date of the tribunal should be the date of its establishment, Mr. Fernando went on. However, Mr. Kyriazidis had made an interesting point in that regard, namely, what the situation would be with respect to individual decisions that had been taken after the establishment of the tribunal, but subject to regulations or decisions that had been in force before the establishment of the tribunal.

Given the range of views that had been expressed about the statute of the tribunal, he was certain that a sufficient case could be made for further reviewing it, Mr. Fernando concluded. He recognized the practical difficulty of requiring the submission of documents, but at the same time he believed that the benefit of the doubt should be given to the party seeking redress in those instances in which the documents were not released.

Mr. Prader said that he fully supported the views that had been expressed by Mr. Fogelholm, including his compromise solution to the problem of the area of competence of the tribunal. That compromise was completely in accord with the tradition of social consensus of his chair.

Mr. Marino stated that he continued to support the establishment of an administrative tribunal for the Fund independent of existing tribunals servicing other organizations. He supported Model 1 with respect to the structure of the tribunal. He supported the practice that had been followed by other major international administrative tribunals with respect to the issue of the tribunal's competence. Therefore, the tribunal should have the authority to review the legality of all employment-related decisions taken by the Fund, whether regulatory or individual in nature. Finally, he was in general agreement with the draft statute as set forth in the staff paper.

Mr. Zhang stated that he concurred in general with the conclusions in the staff paper. He continued to support the view that the Fund should establish its own administrative tribunal, because of the substantial uncertainty related to the outcome of further discussions on the establishment of a joint tribunal with the World Bank, the length of time it would take to reach agreement, and most importantly, because of the different features of the two organizations. The Fund should therefore proceed independently toward the establishment of its own administrative tribunal.

He was in favor of Model 1 concerning the structure of the tribunal, Mr. Zhang went on. However, as the staff had pointed out, Model 4 appeared to be more cost effective and less time consuming. If there were a consensus in the Board in favor of Model 4, therefore, he could keep an open mind about it.

The Fund tribunal should be authorized to review the legality of all employment-related decisions taken by the Fund, Mr. Zhang concluded. He could go along in general with the system and functioning of the tribunal as set forth in the draft statute.

The General Counsel observed that the consensus appeared to be in the direction of the establishment of a separate tribunal, with a structure as laid out in Model 1.

The question had been asked by Mr. Kyriazidis as to the meaning of the transitional provision at the end of the draft statute concerning the effective date of the administrative tribunal, the General Counsel recalled. The question was that, assuming that an individual decision was taken after the effective date of the establishment of the tribunal, and a staff member challenged that individual decision, the decision might appear in fact to be based on a regulation adopted before the establishment of the tribunal. In that case, could the staff member challenge not only the individual decision, but also, through that decision, the regulation supporting it? The answer lay in the final provision of the draft statute, which provided that the tribunal would not be competent to pass judgment on any application challenging the legality, or asserting the illegality, of an administrative act taken before the effective date.

There were two aspects to calling into question the legality of an administrative act, the General Counsel explained: a challenge and an assertion. A challenge was directed against the decision which was the subject of the administrative act; an assertion concerned the legality the underlying regulation. Therefore, given the meaning of the last provision of the statute, neither the individual decision itself, nor the underlying regulation, could be touched by an action brought after the effective date of the establishment of the tribunal. In practice, that meant that, even if the regulation on the basis of which the individual decision was taken after the tribunal was established was illegal, the fact of its illegality could not be raised in the action. Past regulations taken before the establishment of the tribunal would be completely preserved, in consequence.

Mr. Kyriazidis asked what the circumstances would be if an individual did not challenge the legality of, or assert the illegality of, a certain regulation, but the tribunal itself found that serious questions of legality of the underlying regulation arose in a particular individual case, which regulation had been adopted before the establishment of the tribunal. By rights, it appeared that the tribunal would have to judge itself incompetent to rule.

The General Counsel responded that the question of the legality or illegality of the underlying regulation could not be reopened, because it had been adopted before the establishment of the tribunal.

Mr. Kyriazidis commented that such an interpretation caused him some concern. An entire body of regulations had already been adopted, on the basis of which individual decisions had been taken, and would continue to be taken in the future. All those individual decisions would be excluded from review by the administrative tribunal. Such an interpretation would certainly go far in narrowing the window of the tribunal's area of competence.

The General Counsel explained that those individual decisions could still be challenged, but not on the grounds that they had been based on an invalid regulation. Individual decisions could be considered illegal for reasons other than the illegality of the underlying regulation. It was necessary to apply the principle of nonretroactivity to the jurisdiction of the tribunal because otherwise the question of the legality of all the previous regulations that had been taken by the Executive Board or other organs of the Fund since the beginning of the organization could be reopened.

Mr. Kyriazidis observed that the Fund would be applying two standards of justice, in effect. The problem would be both a practical and a moral one. There would be no redress for an individual who had been affected by an individual decision which, under other circumstances, would have been declared illegal because the regulation upon which the individual decision was based was also illegal. The determining factor would appear to be whether the underlying regulation had been adopted before or after the establishment of the administrative tribunal.

The General Counsel commented that there would not be two standards, because regulations that had already been adopted would be totally excluded from the jurisdiction of the tribunal. The tribunal would not have the opportunity to decide on the legality of those regulations at any time, regardless of whether the individual decision had taken place in the past, or would take place in the future. If the Executive Board were to terminate an existing regulation, and then introduce a new one, then of course the new regulation could be subject to challenge; but the regulation that had been adopted before the establishment of the tribunal could never be called into question.

Mr. Kyriazidis observed that it might be necessary for the Board, in order to establish uniform rules of equity and justice, to abolish all the regulations and reissue them. Failing that, the Board would have to keep in mind the fact that serious legal questions might arise with respect to those regulations that had been taken before the effective date of the administrative tribunal.

The General Counsel, responding to a question from Mr. Posthumus, said that although an administrative tribunal would not create new substantive rights for the staff, it would create new procedural rights, in the sense that the staff would have the opportunity to challenge the administrative decisions taken by the Managing Director or by an organ of the Fund. However, there was no intention, through the statute of the administrative tribunal, to introduce new substantive rights for the staff.

In response to a question from Mr. Al-Assaf, the General Counsel said that it was clear from the draft statute that the administrative tribunal would not have the power itself to challenge the Fund's rules and regulations. In that respect, it had no jurisdiction ex officio. The tribunal would have jurisdiction only through the bringing of an action by staff members or, depending upon whether the Board approved it, the Staff Association.

Mr. McCormack, returning to Mr. Kyriazidis' observations, said that he wondered whether, because the proposed structure for the tribunal in Model 4 was characterized by a single two-tier organ, Model 4 would have a tendency to restrict effective redress for the staff, whereas Model 1, by retaining the existing, less formal, legal structure, with the Grievance Committee as an advisory body, might be perceived to provide the staff with effective redress precisely in those cases that Mr. Kyriazidis had mentioned.

The General Counsel replied that the Grievance Committee was not authorized to review the legality of regulations under the present system. If Model 1 were chosen, with a Grievance Committee with the same jurisdiction that it had at present, above which was the administrative tribunal, the Grievance Committee itself would have no jurisdiction whatsoever over regulations. Only through the tribunal could the question of legality of a regulation be raised. Moreover, the jurisdiction of the tribunal would not extend to decisions that had been taken prior to the effective date of the tribunal. There would be the Grievance Committee, which would continue its current jurisdiction, and, on top of that, a tribunal, with a new jurisdiction, but without the power to rule retroactively on decisions. In that respect, the choice of the model--either Model 1 or Model 4--would not solve the dilemma that Mr. Kyriazidis had perceived.

Mr. Kyriazidis agreed that it was understood that the administrative tribunal would not have the power to initiate actions ex officio. However, courts did not have to restrict themselves to the evidence presented by the plaintiff in discussing the legal aspects of a case, but were free to use their reasoning and their own interpretation of the applicable law, even if that had not been put forward by the plaintiff. He wondered whether the tribunal would be limited to considering what had been presented by the litigants. If it were not, the tribunal might examine a past decision or regulation, find that its legality could be called into question, and yet also find that it was incompetent to judge the case. He found such a possibility somewhat disturbing.

The General Counsel said that the broader scope for judicial review that Mr. Kyriazidis had outlined was not universal. There were some countries with legal systems in which the judge was strictly limited to reviewing the legality of the provisions that had been laid before him. In the case of the Fund's tribunal, under the draft statute, a decision made by the tribunal concerning a regulation which had been adopted before the tribunal's establishment would go beyond the scope of the tribunal's jurisdiction. If, instead of a decision, the tribunal decided to express an opinion on the legality of such a regulation, it would have no legal effect. That notwithstanding, he agreed that even if the jurisdiction of the tribunal was limited, the question of legality could nevertheless arise. In the case of the tribunal, there was a difference between its jurisdiction, on the one hand, and its finding of legality, on the other hand. For example, the tribunal could state that, although it had no jurisdiction over a particular regulation because that regulation had been adopted before the effective date of the administrative tribunal, it nevertheless concluded that the regulation was illegal. Although that ruling would have no legal effect, the Executive Board would nevertheless have to be informed of it, in order to decide upon an appropriate course of action.

Mr. Fogelholm said that although no new substantive rights for the staff would be created by the establishment of an administrative tribunal, there would be new procedural rights. He wondered what procedural rights the staff had at present, without a tribunal. In particular, would there be the possibility to appeal to judicial organs beyond and outside of the Fund?

The General Counsel said that the staff had at present the right to raise an issue before the Grievance Committee, to the extent that the Grievance Committee had jurisdiction over that issue, excluding the validity of the Rules and Regulations and of the General Administrative Orders, and pension matters. However, the staff did not have a right to a binding decision by the Grievance Committee. The Committee could only issue a recommendation for the Managing Director's review, which the Managing Director had in practice followed, but was not bound to follow. If he did not follow it, the staff had no right of redress. There was no possibility of access to the International Court of Justice or any other external judicial organ. The administrative tribunal, if it were established, would be the only judicial organ to which the staff could appeal.

Mr. McCormack wondered whether, under Model 1 for the structure of the administrative tribunal, it would really be necessary to create a series of specialized bodies to supplement the Grievance Committee.

The General Counsel replied that if Model 1 were adopted, there would seem to be some need for preliminary review of an initial decision that would take the form, in effect, of an advisory opinion. It had been his understanding that those who were in favor of Model 1 had thought that there should be some preliminary stage, so that issues would not be raised

directly from the level of the initial decision to the level of judicial review by the administrative tribunal. Otherwise, it would seem that the scope of review of the Grievance Committee would have to be expanded.

Mr. McCormack stated that he believed that the basic principle was that all existing administrative remedies should be exhausted before approaching the tribunal. As he saw it, there was no legal requirement to create a series of subordinate bodies. For those issues for which no such subordinate body had been created, the administrative tribunal could be approached directly. On those issues from which the jurisdiction of the Grievance Committee was excluded, appeals could be made directly to the administrative tribunal. Whether or not a series of subordinate bodies should be set up was a policy decision that would have to be made on the basis, inter alia, of cost considerations, in his view.

The staff representative from the Administration Department said that, in the staff's view, it would not be necessary to set up a number of other forms of administrative review. In fact, the only one that came to mind was in connection with the pension plan, where the staff believed that it might be useful to insert one further step than existed at present between a decision of the Administration Committee of the pension plan and the administrative tribunal. For example, at present the Administration Committee could decide that a staff member would not be retired on disability because he was not totally and permanently disabled. That individual had no right of appeal from the Administration Committee on such a decision. The staff thought that perhaps the individual should have the power of making an appeal to the Pension Committee, for instance, which might appoint a small subcommittee to hear the appeal. The staff was not considering establishing a separate body on job grading decisions, for example, because that would be unnecessary, and represented a managerial decision in any case. There was thus no intention to establish a number of channels for administrative review.

However, the staff representative went on, the position of the Grievance Committee would probably have to be reviewed. There were a number of anomalies that the creation of an administrative tribunal opened up. For example, while the tribunal was open to contractual employees, the Grievance Committee, at present, was not. An amendment of General Administrative Order No. 31 therefore appeared to be in order, so as to channel contractual employees through the Grievance Committee as a final stage of administrative review before recourse to the administrative tribunal. Also, it was clear from the statute of the tribunal that if a staff member did not win a case, he would not be awarded any costs. That principle did not apply at the level of the Grievance Committee, although it was within the purview of management to decide what to do concerning costs. There might be a need to integrate the procedures with respect to the awarding of costs of the Grievance Committee into the statute of the tribunal.

The General Counsel said that under the draft statute of the administrative tribunal, the Staff Association would have the power to challenge only regulatory decisions, not individual decisions. Individual decisions could be challenged only by the staff member who was personally affected by the decision. In the draft statute, there had not been any intention to extend the scope of access to the tribunal to the Staff Association. He took it from the trend of the discussion that Directors were more in favor of restricting the access of the Staff Association to the administrative tribunal.

The comments of speakers seemed to suggest a structure of the tribunal along the following lines, the General Counsel continued. The present Grievance Committee would retain its advisory function with more or less the same jurisdiction--perhaps, as the staff representative from the Administration Department had said, to be expanded--and above it there would be an administrative tribunal, composed exclusively of professionals--not staff members. The basic function of the tribunal would be judicial. In addition, the tribunal could have an advisory function.

At the beginning of the Executive Board's discussions on the establishment of a tribunal, the General Counsel observed, there had been a clear preference for a strictly judicial organ. The staff had raised the possibility of giving the tribunal advisory functions as well, but there had been a clear consensus that the tribunal should not have that function. It was particularly interesting that, at the current juncture, that possibility had re-emerged.

The second major issue was the scope of the tribunal's jurisdiction, the General Counsel went on, and whether it should have the power to review individual decisions exclusively, or both individual and regulatory decisions.

On the nature of the tribunal's functions, Mr. Fogelholm had suggested a referral procedure, the General Counsel recalled. The tribunal could, if it found a regulation to be illegal or invalid, refer the regulation back to the Executive Board for reconsideration. However, it would not have the power to invalidate or annul the regulation. In fact, the referral procedure was an advisory opinion, because the Executive Board would not be bound by that opinion.

Some national constitutions empowered a head of state to refer a matter back to the Parliament and ask for a second reading, which might then require a special majority, the General Counsel pointed out. In other countries, such a special majority would not be required. However, in the case of the Fund, the two organs involved were not of the same nature, in the sense that one--the tribunal--was a judicial organ, and the other--the Executive Board--was an administrative organ; in the example that he had just given, both the head of state and the Parliament were political organs.

If the Executive Board were faced with an advisory opinion from the administrative tribunal concluding that a regulation was illegal, the tribunal would obviously regard as illegal a confirmation of that regulation, the General Counsel continued. The tribunal would not have the power to say so expressly, but that did not mean that it would not be known outside the Fund. There was thus clearly a "political" risk. The Executive Board would be on notice that the regulation that it had adopted was illegal. There were consequences of that, but the risk could be taken consciously.

A slightly different approach would be to make a distinction not on the basis of advisory, as opposed to binding, opinions of the tribunal, but on the basis of the separation of powers between the Board of Governors and the Executive Board, the General Counsel went on. If the jurisdiction of the tribunal was not to extend to decisions of the Board of Governors, for example, then it would be possible to have major decisions--on salary structure, for instance--taken by the Board of Governors. However, the consequence of such a circumscription of the tribunal's competence would be that the scope of action of the Executive Board could be substantially limited in the future as well, as some types of decisions that it had taken in the past could be transferred to the level of the Board of Governors to be exempt from judicial review. Whether such an outcome was desirable or not was a different problem, which would have to be considered.

It would be possible to exclude regulations from the scope of the tribunal's jurisdiction, and such a possibility had been envisaged in the draft statute, the General Counsel explained. However, such a circumscription would mean in practice that the tribunal would have exactly the same jurisdiction as the Grievance Committee--namely, limited to individual decisions. The only difference would be that the Grievance Committee would issue advisory opinions, and the tribunal would issue binding decisions.

The consequences of excluding regulations from the scope of the tribunal's jurisdiction were as follows, the General Counsel went on. In practice, a recommendation of the Grievance Committee that was favorable to the staff had always been followed by the Managing Director, and, to that extent, the staff member would have found satisfaction. However, if the Grievance Committee's recommendation were favorable to the administration, and it were approved by the Managing Director, the staff would clearly have an incentive to pursue the case to the next level of review, i.e., the administrative tribunal. Such a system was strictly to the advantage of the staff. Although there were two levels of review, the scope of review was identical. In the World Bank, in comparison, the regulations would still be subject to review. Therefore, there would be cases in which the Fund's tribunal would be precluded from deciding on the legality of the regulation, while the World Bank's Tribunal would at the same time be deciding on the legality of the same regulation. There might, furthermore, be cases in which the World Bank's Tribunal would find a regulation that was very similar to the Fund's regulation invalid in the

World Bank. The Executive Board of the Fund would thereby be faced with a problem. If the Bank's regulation were found by the Bank's tribunal to be illegal and therefore changed, he wondered what would happen in the Fund. In practice, the Executive Board of the Fund would probably be asked to follow the decisions of the World Bank's Executive Board on the basis of the World Bank's Administrative Tribunal.

The limitation of the exercise of the tribunal's jurisdiction over discretionary decisions could also be considered, the General Counsel continued. It would not then be so much a question of regulations versus individual decisions, but of the scope of review within each decision. For example, with respect to clearly discretionary decisions such as the salary structure, the organization of the staff, and a new grading system, the problem would be to define the scope of discretion, while recognizing that such discretion was not unlimited. One clear limitation that was generally recognized was the principle of nonretroactivity for the protection of acquired rights. Another aspect was the inviolability of so-called fundamental rights. A distinction was generally made between rights which might be terminated, and those which might not be terminated. In most legal systems, there were statutory or sometimes even constitutional provisions limiting the scope of administrative discretion in the modification of the terms and conditions of employment in the civil service.

In drafting the statute of the administrative tribunal, therefore, it was for consideration whether it might not be possible to clarify the scope of the Executive Board's discretion which could not be encroached upon by the administrative tribunal, the General Counsel commented. Instead of a distinction based on the discretionary and nondiscretionary elements of a decision, it would be possible to exclude altogether from the tribunal's jurisdiction decisions when the discretionary element seemed preponderant. For instance, the statute could state explicitly that decisions with respect to salary structure and related matters could not be challenged by the administrative tribunal. However, it would be extremely difficult to formulate such a distinction. Moreover, it would lead to a very restrictive interpretation of the area of the tribunal's competence, which would tend to go against the fact that the administrative tribunals of most international organizations which had dealt with the question of their jurisdiction had taken a very broad understanding of that jurisdiction. Finally, it would seem preferable, even if certain regulations were exempted from judicial review, to reserve the right to challenge those which had a retroactive effect. If there were a clear consensus in the Board to limit the judicial review to certain types of regulations, the statute would have to be drafted extremely carefully.

The Chairman stated that the debate had clarified some important issues. First, Directors had reiterated their support for a Fund tribunal, and considered that it was time to proceed with its creation as soon as possible. It might be overambitious to insist upon a decision

before the Annual Meeting, but he was certain that the Board and the staff would do their best to complete preparations for a tribunal during the calendar year. The final decision would be taken by the Board of Governors.

He had noticed a preference for Method 1 with respect to the structure of the tribunal, the Chairman continued, and he believed that the staff should work on the basis of that method in preparing the final wording of the statute. There had also been a clear preference for a separate Fund tribunal. Like Mr. Warner, he hoped that the tribunal that the Fund would create would be so streamlined and efficient that the World Bank would be encouraged to join it. The management would focus on assuring that the Fund's administrative tribunal would be cost efficient, cost effective, and bound by the precedent of the tribunals of existing institutions and international bodies.

The staff of the Legal Department would revise the draft statute, bearing in mind the comments made by speakers, the Chairman said. He hoped that the next staff paper would analyze possible alternatives and parallel wording for the revised draft statute. It was clear, however, that Executive Directors themselves would have to make a further contribution.

There had been differences of view concerning the access of the Staff Association to the administrative tribunal, the Chairman concluded. However, there had been a broad consensus that the jurisdiction of the administrative tribunal should not extend before the effective date of its establishment, and that it should not have the power to examine retroactively decisions or regulations that had been made before the effective date of its establishment.

The Executive Directors concluded for the time being their consideration of the legal, financial, and administrative implications of an administrative tribunal for the Fund.

DECISIONS TAKEN SINCE PREVIOUS BOARD MEETING

The following decisions were adopted by the Executive Board without meeting in the period between EBM/89/87 (7/5/89) and EBM/89/88 (7/7/89).

3. JOINT COMMITTEE ON REMUNERATION OF EXECUTIVE DIRECTORS - SUBMISSION OF REPORT TO BOARD OF GOVERNORS

1. Section 14(e)(ii) of the By-Laws states that Reports of the standing Joint Committee on the Remuneration of Executive Directors and their Alternates shall be submitted to the Board of Governors for a vote on any recommendations contained therein without meeting, in accordance with Section 13 of the By-Laws.

2. The Board of Governors is therefore requested to vote upon the recommendations of this Committee without meeting, pursuant to Section 13 of the By-Laws of the Fund.

3. The Secretary is authorized and directed to send on Friday, July 7, 1989, to each member of the Fund by airmail or other rapid means of communication the following letter of transmittal, together with the Report of the standing Joint Committee to the Board of Governors:

> The standing Joint Committee on the Remuneration of Executive Directors and their Alternates has adopted a Report and recommendations to be submitted to the Board of Governors. At the request of the Joint Committee, I am transmitting its Report and recommendations herewith. The Joint Committee neither discussed with nor disclosed to Executive Directors its Report and recommendations prior to their transmittal to the Governors.
>
> The Board of Governors has been requested to vote without meeting, pursuant to Section 13 of the By-Laws of the Fund, on the Resolution attached to the Report. The Executive Board has decided, pursuant to Section 13(d) of the By-Laws, that no Governor shall vote on the Resolution until July 14, 1989.
>
> To be valid, votes on the Resolution must be cast by Governors or Alternate Governors and must be received at the seat of the Fund on or after Friday, July 14, 1989, but not later than 6:00 p.m., Washington time on Monday, August 21, 1989. Votes received before July 14, 1989, or after 6:00 p.m., Washington time on August 21, 1989, will not be counted.
>
> It would be appreciated if you would transmit the Report to the Governor of the Fund representing your country with the request that he vote on the Resolution attached to the Report. No particular form of vote is required, so long as the Fund receives a clear indication as to whether the Governor approves or disapproves the proposed Resolution; such communication should be signed by the Governor or Alternate Governor or there should be a clear indication that he has given instructions that his vote be transmitted by the sender.

4. All votes cast pursuant to this decision on the proposed Resolution shall be held in the custody of the Secretary until counted. As soon as practicable after the poll is

concluded, the Secretary shall canvass the votes on the proposed Resolution and report thereon to the Executive Board. Any Executive Director may challenge the Report or the status of any vote counted or disqualified, in which case the Executive Board shall determine the result of the vote.

5. The effective date of the Resolution of the Board of Governors shall be the last day allowed for voting.

6. The Secretary is authorized to take such further action as he shall deem necessary or appropriate in order to carry out the purposes of this decision. (EBAP/89/172, 7/3/89; and Cor. 1, 7/3/89)

Adopted July 6, 1989

4. EXECUTIVE BOARD COMMITTEES - NOMINATION

The Executive Board approves the nomination by the Managing Director for the vacant position on the Committee on Administrative Policies and the Committee on Interpretations, as set forth in EBD/89/205 (7/3/89).

Adopted July 5, 1989

5. EXECUTIVE BOARD TRAVEL

Travel by Executive Directors and by Advisors to Executive Directors as set forth in EBAP/89/171 (7/3/89) is approved.

APPROVED: February 12, 1990

LEO VAN HOUTVEN
Secretary