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**IMMEDIATE
ATTENTION**

MASTER FILES

ROOM C-120

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SM/86/236

September 9, 1986

To: Members of the Executive Board

From: The Secretary

Subject: Lesotho, South Africa, and Swaziland - Designation of the
Managing Director to Appoint President of Arbitral Tribunal

It is not proposed to bring the attached memorandum to the agenda of the Executive Board for discussion unless an Executive Director so requests by noon on Monday, September 15, 1986. In the absence of such a request, the draft decision that appears on page 2 will be deemed approved by the Executive Board and it will be so recorded in the minutes of the next meeting thereafter.

Mr. Liuksila (ext. 7797) is available to answer technical or factual questions relating to this paper.

Att: (1)

Other Distribution:
Department Heads

INTERNATIONAL MONETARY FUND

Lesotho, South Africa and Swaziland - Designation
of the Managing Director
to Appoint President of Arbitral Tribunal

Prepared by the Legal Department

(In consultation with other departments)

Approved by James G. Evans Jr.

September 8, 1986

In the attached letter dated May 12, 1986, Dr. Stals asks, on behalf of Lesotho, South Africa and Swaziland, whether the Managing Director would be prepared to continue, should the need arise, to appoint the President of the Arbitral Tribunal in the circumstances referred to in Article 9 of an amended "Trilateral Monetary Agreement" between Lesotho, Swaziland and South Africa. Such an appointment by the Managing Director would be required only if the parties could not agree on a President. The Managing Director was authorized, by the Executive Board E.B. Decision No. 4492-(74/144), adopted November 13, 1974, to perform the same function for these same contracting parties to the previous Agreement which has been amended with effect from April 1, 1986 and is now referred to as the Trilateral Monetary Agreement. These amendments are set forth in the attached letter from Dr. Stals and are described in the Staff Reports for the Article IV Consultation with South Africa and Swaziland 1/. In 1974, the acceptance of the Managing Director was notified to the South African authorities acting on behalf of the contracting parties.

Article 9 of the previous Monetary Agreement which designated the Managing Director of the Fund to appoint the President of the Arbitral Tribunal, has not been amended as a consequence of changes in the regional monetary arrangements. As before, the Managing Director's sole duty under Article 9 of the Trilateral Monetary Agreement is the appointment, at the request of either party to the

1/ The changes in monetary arrangements between South Africa, and Lesotho and Swaziland have been described in two staff reports. See South Africa - Staff Report for the 1986 Article IV Consultation, SM/86/185, July 30, 1986, p. 24 and Swaziland - Staff Report for the 1986 Article IV Consultation, SM/86/192, August 5, 1986, pp. 2-3 and Appendix IV. The 1974 Monetary Agreement, the 1986 Trilateral Monetary Agreement and the bilateral implementing agreements are available in the Secretary's Department.

dispute, of the President of an Arbitral Tribunal to settle disputes between the parties concerning the application or interpretation of the provisions of the Trilateral Monetary Agreement. Such a request is to be made only in the event that the parties themselves cannot agree on the appointment of a President. Should the Managing Director fail to discharge this duty, the President of the Bank for International Settlements would appoint the President of the Arbitral Tribunal 1/. The same procedure for the appointment of the President of an Arbitral Tribunal will be followed for the settlement of disputes arising under the bilateral implementing agreements entered into by the three contracting parties on April 18, 1986. 2/

As regards the request, if there is no objection to the attached draft reply, Dr. Stals, who wrote on behalf of all the contracting parties, will be informed that the Managing Director of the Fund has been authorized by the Executive Board to appoint the President of the Arbitral Tribunal in the circumstances described in Article 9(3)(c) of the Trilateral Monetary Agreement for the purposes of that Agreement and the bilateral implementing agreements concluded thereunder between South Africa, and Lesotho and Swaziland respectively.

The following draft decision is proposed for adoption by the Executive Board:

"The Executive Board approves the letter, set out in the Attachment to SM/86/236, from the Managing Director to Dr. Stals, Director-General, Finance, South Africa, stating that the Managing Director has been authorized to appoint the President of an Arbitral Tribunal in the circumstances described in Article 9 of the Trilateral Monetary Agreement and for the purposes of that Agreement and the bilateral implementing agreements concluded thereunder between South Africa, and Lesotho and Swaziland respectively."

Attachment
Annexes I, II and III

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1/ See Article 9(3)(c) of Trilateral Monetary Agreement. - Annex II
2/ See Article 15 of Bilateral Agreement between South Africa and Lesotho, and Article 10 of Bilateral Agreement between South Africa and Swaziland. - Annex II

DRAFT REPLY

Dear Dr. Stals:

I refer to your letter of May 12, 1985 pertaining to a Trilateral Monetary Agreement between the Government of Lesotho, the Government of Swaziland and the Government of the Republic of South Africa which was amended with effect from April 1, 1986, as well as to two bilateral agreements thereunder between South Africa, and Lesotho and Swaziland respectively.

I am pleased to inform you that the Executive Board of the International Monetary Fund has authorized the Managing Director, when requested, to appoint, for the purposes of these Agreements, the President of an Arbitral Tribunal in accordance with Article 9(3)(c) of the amended Trilateral Monetary Agreement.

Sincerely yours,

J. de Larosiere

Dr. C.L. Stals
Director General: Finance
Department of Finance
Private Bag X115
40 Vermeulen and Andries Streets
Pretoria, South Africa

Republic
of
South Africa

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR-GENERAL

P.O. Box 29
Cape Town

Tel. 45-6269

May 12, 1986

Mr. J. de Larosiere
Managing Director
International Monetary Fund
1818 H Street
Washington, D.C. 20431
United States of America

Dear Mr. de Larosiere:

The Government of the Kingdom of Swaziland recently negotiated with my Government an arrangement whereby, with effect from 1 April 1986, the legal tender status of South African rand currency within Swaziland has been terminated. This arrangement has necessitated the amendment of the Monetary Agreement between the Governments of Swaziland, Lesotho and South Africa, referred to in our letter of 21 October 1984.

A copy of the Amending Agreement between the Government of the Kingdom of Lesotho, the Government of the Kingdom of Swaziland and the Government of the Republic of South Africa signed on 18 April 1986 is attached hereto, for your information. The Amending Agreement, in essence, provides for the re-naming of the original Monetary Agreement and re-designates the Rand Monetary Area as a "Common Monetary Area". It further amends Article 2 to accommodate the Swazi request regarding the issue of currency. Article 5.5 is also amended to provide for the access of the two other contracting parties to the foreign exchange market in South Africa which must, in future, be regulated in terms of bilateral agreements.

Copies of the bilateral agreements are enclosed. These agreements terminate the existing Agreements on the Issue of Notes and Coin between South Africa and Swaziland and South Africa and Lesotho and also terminate the arrangements, in amplification of the Monetary Agreement, contained in the letter dated 5 December 1974 addressed by South Africa to Lesotho and Swaziland.

/2 ... Article 9 of

Article 9 of the Monetary Agreement has not been amended and the provisions regarding the appointment of arbitrators have mutatis mutandis been adopted in the new bilateral agreements. Although all differences of opinion were always resolved by negotiation between the participants in an amicable way over the past ten years, you will understand that we must continue to provide for this possibility in an international agreement of this nature.

Referring to Mr. Witteveen's letter of 15 November 1974 addressed to the Secretary of Finance of South Africa, I therefore enquire, on behalf of South Africa, Lesotho and Swaziland, whether you would be prepared to continue to fulfil the function of appointing a President to the Arbitral Tribunal, should this ever prove to be necessary.

Yours sincerely,

/S/

DIRECTOR-GENERAL: FINANCE

Agreement between the Government of the Kingdom of Lesotho and the
Government of the Kingdom of Swaziland and the Government of the
Republic of South Africa

ARTICLE 9

SETTLEMENT OF DISPUTES

1. Should any dispute arise between any of the contracting parties concerning the interpretation or application of this Agreement, they shall make every effort to settle the dispute amicably and in good faith and any dispute which cannot be so settled shall be submitted to an Arbitral Tribunal as hereinafter provided.

2. The Arbitral Tribunal shall consist of three arbitrators: one to be appointed by each of the parties to the dispute and the third, who shall be President of the Tribunal, to be appointed by agreement of the parties to the dispute.

3. (a) Any contracting party may institute arbitration proceedings by giving written notice thereof to the other party to the dispute and such notice shall set forth the nature of the dispute, the nature of the relief sought and the name of the arbitrator appointed by such contracting party.

(b) The other party to the dispute shall within 30 days of such notice appoint its arbitrator and advise the first party of the name of such arbitrator and, should it fail so to appoint an arbitrator within the time specified for such appointment, such arbitrator shall be appointed by the President of the Tribunal.

(c) Should the parties to the dispute fail to agree on the appointment of the President of the Tribunal within 60 days of the notice referred to in sub-paragraph (b), then, at the request of either party, the Managing Director of the International Monetary Fund or, failing him, the President of the Bank for International Settlements, shall appoint a person as President who shall, however, not be a national or former national of any contracting party or a resident or former resident in any part of the Rand Monetary Area.

(d) Any vacancy occurring in the Tribunal, whether before or after its proceedings have begun, on account of an arbitrator's death, resignation or incapacity to act, shall *mutatis mutandis* be filled in accordance with the procedure prescribed for the original appointment.

4. (a) The Tribunal shall convene at a time and place to be fixed by the President and shall then determine where and when it shall thereafter sit.

(b) Subject to the provisions of this Article and except as the parties to the dispute may otherwise agree, the Tribunal shall determine all questions relating to its competence and procedure.

(c) All decisions of the Tribunal shall be by a majority vote of the members but in the event of there being no majority vote, the President shall have a casting vote in addition to a deliberative vote.

(d) The Tribunal shall afford both parties to the dispute a fair hearing and may render an award by default.

(e) The deliberations of the Tribunal shall remain secret, unless the parties to the dispute otherwise agree.

5. (a) The award of the Tribunal shall be in writing and signed by the members who voted for it and shall constitute the award of the Tribunal, and a signed counterpart of such award shall be transmitted to each party to the dispute.

(b) The award of the Tribunal shall be definitive and binding on the parties to the dispute and shall be duly and expeditiously carried out by them.

(c) During a period of 30 days after the award has been communicated to the parties to the dispute, the Tribunal may, either of its own accord or at the request of either party, rectify any clerical, typographical or arithmetical error in the award, or any obvious error of a similar nature and shall forthwith communicate any such rectification to both parties.

(d) Any dispute between the parties as to the meaning and scope of the award shall at the request of either party and within 60 days of the rendering of the award be referred for decision to the Tribunal which rendered the award.

6. (a) The parties shall fix the amount of the remuneration of the arbitrators and such other persons as shall be required for the conduct of the arbitration proceedings and should the parties not agree on such amount before the Tribunal convenes, the latter shall fix such amount as may be reasonable.

(b) Each party to the dispute shall bear its own costs in connection with any arbitration proceedings and the costs of the Tribunal shall be borne by them in equal shares:

Provided that in the event of disagreement between the parties as to the amount or division or the procedures for the payment of any costs, the Tribunal shall at the request of either party to the dispute decide the matter on an equitable basis.

Bilateral Monetary Agreement between the Government of the Republic
of South Africa and the Government of the Kingdom of Lesotho

ARTICLE 15

SETTLEMENT OF DISPUTES

Should any dispute arise between the Contracting Parties concerning the interpretation or application of this Agreement, they shall make every effort to settle the dispute amicably and in good faith and any such dispute which cannot be so settled shall be submitted to an Arbitral Tribunal mutatis mutandis in accordance with the provisions of Article 9 of the Trilateral Monetary Agreement.

Bilateral Monetary Agreement between the Government of the Kingdom of
Swaziland and the Government of the Republic of South Africa

ARTICLE 10

SETTLEMENT OF DISPUTES

Should any dispute arise between the Contracting Parties concerning the interpretation or application of this Agreement, they shall make every effort to settle the dispute amicably and in good faith and any such dispute which cannot be so settled shall be submitted to an Arbitral Tribunal mutatis mutandis in accordance with the provisions of Article 9 of the Trilateral Monetary Agreement.

9. MANAGING DIRECTOR - DESIGNATION TO APPOINT PRESIDENT OF
ARBITRAL TRIBUNAL

The Chairman said that his views had been sought in connection with a clause in the draft monetary agreement, to which South Africa, Lesotho, and Swaziland would be parties, and under which the Managing Director of the Fund might be designated to appoint the president of an arbitral tribunal to settle disputes between parties to that agreement, in the event that the parties themselves could not agree on a president. The Managing Director of the Fund had undertaken such a duty, with the acquiescence of the Executive Directors, on previous occasions. If there were no objection, he would inform the parties to the contemplated agreement that he had been authorized to make the appointment that he had described.

The Executive Directors agreed to the proposal.

Decision No. 4492-(74/144), adopted
November 13, 1974