

Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter

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I. INTRODUCTION

In recent years, several member countries of the International Monetary Fund (IMF) have failed to repay the loans and other forms of financial assistance that they have received from the IMF. The aggregate amount of these overdue obligations increased almost six-fold in the last four years of the 1980s.¹ In response to these mounting arrears, the IMF and its member countries initiated a strategy to address this problem. One controversial step in that strategy has been to undertake the onerous process of amending the IMF Charter, for only the third time in the IMF's nearly fifty-year history,² to provide the IMF with a new sanction that could be imposed on a member country for failing to repay its arrears to the IMF: the suspension of voting and related rights. That amendment process was completed in November 1992 when the so-called Third Amendment finally gained enough support among the IMF's member countries to take effect.³

The process of adopting the Third Amendment raises two critical questions of international law and policy concerning the IMF's authority to sanction member countries. First, as a legal matter, could the IMF have relied on the doctrine of implied powers to

1. See *infra* note 38 and accompanying Table.

2. The original Charter of the IMF was created at the Bretton Woods Conference of 1944. See Articles of Agreement of the International Monetary Fund, adopted July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (entered into force Dec. 27, 1945). That original Charter was first amended, effective July 28, 1969, at the time the provisions concerning the special drawing right (SDR) were introduced. Amendment of Articles of Agreement of the International Monetary Fund, approved May 31, 1968, 20 U.S.T. 2775, 726 U.N.T.S. 266 [hereinafter First Amendment]. For an explanation of the SDR, see *infra* note 8. A second amendment to the original IMF Charter, much more far-reaching than the first, entered into force April 1, 1978. Second Amendment to the Articles of Agreement of the International Monetary Fund, approved Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 [hereinafter Second Amendment] (All references hereinafter to the IMF Charter reflect the text as established by the Second Amendment, unless otherwise specified.). For a general exposition on the IMF, see Richard W. Edwards, Jr., *International Monetary Collaboration* 4-43 (1985). See generally Kenneth W. Dam, *The Rules of the Game: Reform and Evolution in the International Monetary System* 71-114 (1982); A.W. Hooke, *The International Monetary Fund: Its Evolution, Organization, and Activities* (IMF Pamphlet Series, No. 37, 1981).

3. That amendment, formally proposed in mid-1990, entered into force November 11, 1992. See Third Amendment of the Articles of Agreement of the International Monetary Fund, November 11, 1992, 31 I.L.M. 1307, 1309-10 [hereinafter Third Amendment]. For the text of the Third Amendment and related resolutions and explanations, see Attachment to Board of Governors Resolution No. 45-3 (June 28, 1990), reprinted in *International Monetary Fund, 1990 Ann. Rep.* 108-09 (1990) [hereinafter IMF 1990 Annual Report]; *International Monetary Fund, Proposed Third Amendment of the Articles of Agreement of the International Monetary Fund—Report of the Executive Board to the Board of Governors* (1990) [hereinafter Report on Proposed Third Amendment]; see also Richard W. Edwards, Jr., *International Monetary Law: The Next Twenty-Five Years*, 25 *Vand. J. Transnat'l L.* 209, 211 (1992) [hereinafter *The Next Twenty-Five Years*].

impose a suspension of voting rights on one or more of its member countries, or was the amendment of the IMF Charter necessary to accomplish this goal? Second, as a policy matter, does the additional exclusionary sanction provided by the Third Amendment constitute an effective response to the problems of deeply indebted countries who, through lack of either resources or will, fail to honor their international financial obligations?

This Article addresses both of these questions. Part II examines the growth in arrears to the IMF which created the pressure to expand the IMF's authority to sanction members failing to meet their financial obligations. The next part analyzes whether under international law the IMF could have relied on the doctrine of implied powers to impose exclusionary sanctions. Finally, the Article details the provisions of the Third Amendment and evaluates the wisdom of amending the IMF Charter to provide an additional sanction against member countries falling into arrears.

This examination of the Third Amendment supports two conclusions. First, in going to the effort of formally amending the Charter, the IMF and its member countries were correct as a matter of international law in not relying on the doctrine of implied powers as grounds for imposing exclusionary sanctions on member countries in arrears. Second, despite its legal validity, the Third Amendment is a short-sighted and regrettable response—a reaction but not a solution—to the rise in arrears to the IMF and to the larger problems that underlie those arrears.

II. THE PROBLEM: GROWING ARREARS TO THE IMF

The origins of the Third Amendment can be attributed to two factors. First, by 1990, the level of arrears to the IMF had gotten out of hand. Second, the IMF Charter did not provide as wide a range of sanctions as some member countries thought necessary to stop that growth in arrears. Each of these factors must be examined in turn to explain the circumstances giving rise to the movement to amend the IMF Charter.

A. *The Nature and Causes of the Growth in Arrears*

Most financial obligations arising out of member countries' use of IMF resources are repaid.⁴ Indeed, the IMF, along with the World

4. As of April 1992 the IMF had provided nearly SDR 118 billion in financial assistance to its member countries. See International Monetary Fund, 1992 Ann. Rep. 94 (1992) [hereinafter IMF 1992 Annual Report]. As of the same date, arrears to the IMF amounted to

Bank, has long been considered by some to be a "preferred creditor": countries usually honor their financial commitments to these institutions more promptly and fully than to other creditors.⁵ In the late 1980s, however, some member countries departed from that practice and began accumulating arrears to the IMF. This subsection examines how and why this change occurred, but first a brief explanation of the types of financial obligations member countries can incur to the IMF is required.

1. The Nature of Financial Obligations and Arrears to the IMF

From a legal perspective, most IMF financing does not take the form of loans. Instead, it consists of exchanges of currencies, typically under what is known as a stand-by arrangement.⁶ If, for example, the IMF approves a stand-by arrangement for Zaïre, that country is authorized, subject to certain conditions,⁷ to purchase from the

only a small fraction of that amount—about SDR 3.5 billion. See *infra* note 38 and accompanying Table. See *infra* note 8 for an explanation of the SDR.

5. For an examination of the IMF's "preferred creditor status," see Rutsel S.J. Martha, *Preferred Creditor Status Under International Law: The Case of the International Monetary Fund*, 39 *Int'l & Comp. L.Q.* 801, 801-26 (1990). The fact that member countries have generally avoided overdue financial obligations to the IMF may be explained in part by the triggering effect that IMF loans have on other financing, both commercial and official. Many creditors condition the disbursement of funds under a loan agreement with a lesser developed country on approval of an arrangement by the IMF, or on the continued effectiveness of such an arrangement. For an explanation of this triggering effect, see Joseph Gold, *Conditionality 14-15* (IMF Pamphlet Series, No. 31, 1979) [hereinafter Gold I]; see also Jacques J. Polak, *The Changing Nature of IMF Conditionality*, in 184 *Essays in International Finance* 22 (Princeton Univ. Dep't. of Economics ed., 1991) (reference to IMF "seal of approval" and its effects).

6. For a detailed explanation of stand-by arrangements, see Edwards, *supra* note 2, at 248-76; see also International Monetary Fund, *Financial Organization and Operations of the IMF*, 62-63 (IMF Pamphlet Series, No. 45, 1991) [hereinafter *Financial Organization and Operations*]; Joseph Gold, *Financial Assistance by the International Monetary Fund: Law and Practice* 11-19, 46-47 (IMF Pamphlet Series, No. 27, 2d ed. 1980) [hereinafter Gold II] (model form for stand-by arrangements).

7. Much has been written about IMF conditionality, the practice of making IMF financial resources available to member countries only if they observe specific financial and economic policies recommended by the IMF. For a general treatment of IMF conditionality, see Edwards, *supra* note 2, at 244-46; International Monetary Fund, *Conditionality: Financial Support for Member Countries Complements Economic Policy Changes*, IMF *Surv.*—Supplement On the IMF, Sept. 1992, at 12-13 [hereinafter *Financial Support*]; Manuel Guitián, *Fund Conditionality: Evolution of Principles and Practices* (IMF Pamphlet Series, No. 38, 1981); Gold I, *supra* note 5; Gold II, *supra* note 6, at 19-24; *Financial Organization and Operations*, *supra* note 6, at 52-55; Polak, *supra* note 5; John W. Head, *Environmental Conditionality in the Operations of International Development Finance Institutions*, 1 *Kan. J.L. & Pub. Pol'y* 15, 21-22 (1991). For critical commentaries on IMF conditionality, see various articles in 1 *The IMF, the World Bank, and the African Debt: The Economic Impact* (Bade Onimode ed., 1989) [hereinafter *Onimode I*]; 3 *The Political Morality of the*

IMF a specified amount of hard currency,⁸ using Zaïre's own currency. Zaïre is then required to reverse the transaction not later than a specified date by repurchasing its own currency with hard currency.⁹

The practical effect of such a purchase-repurchase transaction is largely the same as that of a loan, although some important legal differences exist.¹⁰ A member country's financial obligations under a

International Monetary Fund: Ethics and Foreign Policy (Robert J. Myers ed., 1987); Doug Bandow, *The IMF: Forever in its Debt*, *Bus. & Soc'y Rev.*, Spring 1990, at 4-7.

8. The terminology used in the Charter is "freely usable currency." IMF Charter art. V, § 3(d)-(e). Article XXX(f) defines "freely usable currency" as a currency "that the Fund determines (i) is, in fact, widely used to make payments for international transactions, and (ii) is widely traded in the principal exchange markets." *Id.* art. XXX(f). The IMF has determined that five currencies are "freely usable" currencies: the deutsche mark, French franc, Japanese yen, pound sterling, and U.S. dollar. IMF Executive Board Decision No. 5719-(78/46) (March 31, 1978), reprinted in *International Monetary Fund, Selected Decisions and Selected Documents of the International Monetary Fund* 413 (16th issue 1991) [hereinafter *Selected Decisions*]. The IMF also has authority to add currencies to or delete them from the list. Edwards, *supra* note 2, at 198, 224. The amount of a stand-by arrangement, or of any other arrangement for the provision of resources, is denominated in special drawing rights (SDRs). The SDR is an international reserve asset created in 1970 by the IMF following the First Amendment and allocated to its member countries to supplement existing reserve assets. See First Amendment, *supra* note 2. The value of the SDR is determined on the basis of a basket of five currencies, which happen to be the same as the five "freely usable" currencies: the U.S. dollar, the deutsche mark, the French franc, the Japanese yen, and the pound sterling. As of early April 1993, the SDR was valued at about US\$1.40. *International Monetary Fund, Currency Units per SDR*, *IMF Surv.*, April 19, 1993, at 118-19.

9. For a general discussion of repurchase requirements, see Edwards, *supra* note 2, at 227-29; *International Monetary Fund, IMF Provides Financial Assistance to Overcome Balance of Payments Difficulties*, *IMF Surv.—Supplement On the IMF*, Sept. 1992, at 2 [hereinafter *IMF Provides Financial Assistance*]; *International Monetary Fund, Facilities: IMF Provides Resources to Members Under Various Facilities*, *IMF Surv.—Supplement On the IMF*, Sept. 1992, at 14-16 [hereinafter *IMF Provides Resources*]. The repurchase must be made with SDRs or with a currency specified by the IMF, and this might not be the same currency that the member purchased originally. See Edwards, *supra* note 2, at 229.

10. For one thing, a stand-by arrangement is not treated as a contract or an international agreement, but rather as "a unilateral statement of intention on the part of the member country to pursue stated policies and a unilateral decision of the Fund to provide a specified amount of resources . . . upon call to support those policies." Edwards, *supra* note 2, at 267. IMF Executive Board Decision No. 6056-(79/38) (March 2, 1979) established the IMF's guidelines on conditionality; paragraph 3 provided that "[s]tand-by arrangements are not international agreements and therefore language having a contractual connotation will be avoided in stand-by arrangements and letters of intent." See *Selected Decisions*, *supra* note 8, at 61. That 1979 decision superseded a 1968 decision to the same effect. Edwards, *supra* note 2, at 267 n.175. Edwards cites James E.S. Fawcett, former General Counsel of the IMF, who noted that as of 1965, stand-by arrangements were characterized as contractual. *Id.* See generally Joseph Gold, *The Legal Character of the Fund's Stand-by Arrangements and Why It Matters* (IMF Pamphlet Series, No. 35, 1980); see also Joseph Gold, *The Law and Practice of the International Monetary Fund with Respect to "Stand-By Arrangements,"* 12 *Int'l & Comp. L.Q.* 1 (1963). One consequence of not characterizing a stand-by arrangement as an international agreement is that "[s]ince [it] is not an 'agreement,' the executive branch in many

stand-by arrangement, or any other sort of arrangement that involves an exchange of currencies,¹¹ consist of the repurchase obligation¹² and the obligation to pay periodic charges and any special charges levied on overdue obligations.¹³

In addition to the traditional purchase-repurchase arrangement, in the latter part of the 1980s, the IMF Executive Board¹⁴ established two facilities to provide assistance to low-income member countries in the form of loans: the Structural Adjustment Facility (SAF) and later the Enhanced Structural Adjustment Facility (ESAF).¹⁵ Both provide financing at concessional terms¹⁶—an annual interest rate of one-half of one percent spread over a longer maturity than under stand-by arrangements—to countries generally made eligible by virtue of low growth rates, declining per capita incomes, and protracted heavy

countries has greater leeway to conclude such an arrangement than it would have if the arrangement were an international agreement that under the country's law required parliamentary approval." Edwards, *supra* note 2, at 267.

11. In addition to stand-by arrangements, the IMF provides other forms of financing that take the form of exchanges of currencies and are not characterized as loans. The most common of these are extended arrangements. These usually have a period of three years, rather than 12 to 18 months as is the case with most stand-by arrangements. See IMF Provides Resources, *supra* note 9, at 16; IMF Provides Financial Assistance, *supra* note 9, at 2.

12. When a repurchase obligation arises depends upon the type of arrangement. For example, repurchase periods are usually 3 1/4 years to 5 years (payable in quarterly installments) under stand-by arrangements and 4 1/2 years to 10 years (payable in semi-annual installments) under extended arrangements. Financial Organization and Operations, *supra* note 6, at 57; IMF Provides Resources, *supra* note 9, at 15-16; IMF Provides Financial Assistance, *supra* note 9, at 2.

13. For information on charges on the use of IMF resources, see Financial Organization and Operations, *supra* note 6, at 27-28, 104; see also IMF Executive Board Decision No. 8165-(85/189) (Dec. 30, 1985), as amended, reprinted in Selected Decisions, *supra* note 8, at 225-27 (imposing special charges on overdue financial obligations); IMF Executive Board Decision No. 9723-(91-63) (Apr. 24, 1991), reprinted in Selected Decisions, *supra* note 8, at 227-28 (suspending special charges on certain member countries cooperating with the IMF).

14. For details on the Executive Board and other governing and advisory bodies of the IMF, see *infra* notes 55-56 and accompanying text.

15. See Financial Organization and Operations, *supra* note 6, at 78-83; International Monetary Fund, Structural Adjustment: Concessional Facilities Assist Low-Income Countries, IMF Surv.—Supplement On the IMF, Sept. 1992, at 19-20 [hereinafter Concessional Facilities]. Unlike stand-by arrangements and other purchase-repurchase arrangements, SAF and ESAF arrangements are funded from special resources outside the IMF's General Resources Account. SAF funding derives from repayments made by members to a trust fund established in 1976 to provide balance of payments assistance on concessional terms to certain members. ESAF funding derives from loans and donations made by wealthier IMF member countries. *Id.* See *infra* notes 25-36 and accompanying text for a discussion of the history of the SAF and the ESAF. SAF and ESAF loans are subject to conditionality. Polak, *supra* note 5, at 6-8.

16. Concessional Facilities, *supra* note 15, at 20. Repayment periods under SAF and ESAF loans begin 5 1/2 years after disbursement and end 10 years after disbursement. *Id.*

external debt burdens.¹⁷ The financial obligations of a member under a SAF or ESAF arrangement consist of the repayment obligation and the obligation to pay interest charges and any special charges levied on overdue obligations.¹⁸

2. *Arrears and the Debt Crisis*

The causes and manifestations of the international debt crisis have been heavily documented.¹⁹ The IMF's response to that crisis has taken several forms, some of which, ironically, may have set the stage for the rapid rise in arrears to the IMF.

A principal response by the IMF to the debt crisis was a massive increase in the amount of financing it made available to the lesser developed countries (LDCs) hardest hit by the crisis. Table 1 lists the total amount of IMF "credit"²⁰ outstanding to members over the past 15 years, together with annual data on disbursements and on repurchases and repayments.²¹

17. Financial Organization and Operations, *supra* note 6, at 79. The eligible member countries originally numbered 61 and now number 72. Concessional Facilities, *supra* note 15, at 20.

18. Financial Organization and Operations, *supra* note 6, at 80-81, 113; Concessional Facilities, *supra* note 15, at 19-20.

19. The debt crisis is generally considered to have surfaced in 1982 with Mexico's announcement that it was unable to service external debt obligations. See Margaret Garritsen De Vries, *The IMF In A Changing World—1945-85* 184 (1986). For some recent works on the debt crisis, see Alberto Gonzalo Santos, Note, *Beyond Baker and Brady: Deeper Debt Reduction for Latin American Sovereign Debtors*, 66 N.Y.U. L. Rev. 66 (1991); *International Money and Debt: Challenges For the World Economy* (Rudiger Dornbusch & Steve Marcus eds., 1991); George Macesich, *World Debt and Stability* (1991); *The Poverty of Nations: A Guide to the Debt Crisis—From Argentina to Zaïre* (Elmar Altvater et al. eds., 1991). Under the usual explanation, the debt crisis arose from an unfortunate combination of factors: (i) falling prices for commodities on which lesser developed countries largely rely for export revenues (or a failure of such prices to rise as hoped); (ii) an over-reliance by many such countries on loans made in the 1970s, mainly by commercial banks from funds deposited with them from OPEC countries following the dramatic rise in oil prices during that decade; and (iii) rising interest rates applicable to those loans. See, e.g., Bahram Nowzad, *Lessons of the Debt Decade*, *Fin. & Dev.*, March 1990, at 9, 9-12; De Vries, *supra*, at 182-86. For a different explanation, see Cheryl Payer, *Causes of the Debt Crisis*, in 2 *The IMF, The World Bank, and the African Debt: The Social and Political Impact* (Bade Onimode ed., 1989) [hereinafter *Onimode II*].

20. As noted above, most IMF financing does not, from a legal perspective, take the form of loans; only SAF and ESAF funds are lent. See *supra* notes 6-18 and accompanying text. Accordingly, the use of the term "credit" to encompass all IMF financing may not be technically correct. For the sake of simplicity, however, the term is used here and in the following pages. The term is also used in many IMF publications. See, e.g., *International Monetary Fund, 1991 Ann. Rep.* 63 (1991) [hereinafter *IMF 1991 Annual Report*]; *IMF Provides Resources*, *supra* note 9, at 14; see also Polak, *supra* note 5, at 6 n.1.

21. Information in Table 1 on "disbursements" includes those made by way of purchases, as in the case of the usual stand-by arrangement, as well as those made under SAF and ESAF

TABLE 1: PURCHASES, REPURCHASES, REPAYMENTS, AND TOTAL CREDIT OUTSTANDING, 1978-1992²²

Year	Amounts in Millions of SDRs ²³		Total Credit Outstanding
	Disbursements	Repurchases and Repayments	
1978	2,771	4,485	12,366
1979	4,390	4,859	9,843
1980	3,395	3,776	9,967
1981	5,920	2,853	12,536
1982	8,041	2,010	17,793
1983	11,392	1,574	26,563
1984	11,518	2,129	34,603
1985	6,289	2,943	37,622
1986	4,101	4,702	36,877
1987	3,824	6,749	33,443
1988	4,597	8,463	29,543
1989	3,095	6,705	25,520
1990	5,329	6,398	24,388
1991	7,530	5,608	25,603
1992	5,916	4,770	26,736

The data reveal two cycles. First, the amount of IMF disbursements rose dramatically at the outbreak of the debt crisis (1982-1984), and then dropped. Second, as that credit became due a few years later,²⁴ the amount of repurchases rose accordingly, and has dropped again in the last few years. These two cycles combined to create a large increase in the total IMF credit outstanding in the latter part of the 1980s. This rise in total credit outstanding naturally exposed the IMF to an increased risk that arrears would develop, a risk that, as shown below in Table 2, became reality.

These figures also reflect another part of the IMF's response to the debt crisis. In addition to providing member countries greater access

loans. As explained above, until the introduction of the SAF and ESAF in 1986 and 1988, respectively, virtually all IMF credit took the form of purchase-repurchase arrangements. See *supra* notes 6-18 and accompanying text. As of the end of April 1992, all outstanding SAF and ESAF loans accounted for SDR 3.15 billion, or about one-eighth of outstanding IMF credit. See IMF 1992 Annual Report, *supra* note 4, at 74.

22. See IMF 1991 Annual Report, *supra* note 20, at 88; IMF 1992 Annual Report, *supra* note 4, at 99.

23. See *supra* note 8 for an explanation of the SDR.

24. As noted above, repurchases under a stand-by arrangement are to be completed within 5 years after purchase. See *supra* note 12.

to regular IMF resources, the IMF also introduced the SAF and the ESAF in the latter part of the 1980s.²⁵ In doing so, the IMF gave practical effect to a distinction, first formally recognized at the time of the Second Amendment,²⁶ between LDCs and developed member countries of the IMF.

This departure from the IMF's long-standing practice of uniformity of treatment of member countries²⁷ marked a major shift in the organization's role in the international economic system. The IMF was established largely to overcome the breakdown of the international monetary system during the period preceding World War II.²⁸ Its principal challenge for the first twenty-five years of its existence was to foster exchange stability through a par value system.²⁹ When that system broke down in the early 1970s,³⁰ the IMF's role appeared to narrow from one of enforcing the par value system to one of surveillance.³¹ The establishment of the SAF in early 1986 signalled a

25. See *supra* notes 15-18 and accompanying text.

26. A political compromise struck in the negotiations of the Second Amendment provided that the IMF would sell 50 million ounces of gold, with the profits from half that amount earmarked for LDCs. Edwards, *supra* note 2, at 294. Part of the profit was to be remitted to each LDC directly, and part was to be set aside for the benefit of specified especially needy LDCs. To that end, the IMF established a trust fund separate from its other holdings. *Id.* at 294-95. Details on the arrangements for the sale of gold and use of the profits from that sale were provided in the report by the IMF Executive Board to the IMF Board of Governors regarding the Second Amendment. See International Monetary Fund, Proposed Second Amendment to the Articles of Agreement of the International Monetary Fund, Mar. 1976, at 40, 40-49.

27. "Prior to the establishment of the Trust Fund, the IMF had not made a formal distinction between developing countries and other members." Edwards, *supra* note 2, at 297.

28. David D. Driscoll, What is the International Monetary Fund? 5 (1987); see also De Vries, *supra* note 19, at 6-7. See generally Edwards, *supra* note 2, at 4-8.

29. De Vries, *supra* note 19, at 14-18, 40-49; Driscoll, *supra* note 28, at 9. Under the par value system, each IMF member country was required to establish a par value for its currency in terms of gold and to maintain the market rate of its currency within a narrow margin on either side of that par value. A par value could not be changed substantially without IMF approval. Hooke, *supra* note 2, at 2-3.

30. For detailed descriptions of the breakdown of the par value system, see Edwards, *supra* note 2, at 491-501; De Vries, *supra* note 19, at 111. For a more summary description, see *The Next Twenty-Five Years*, *supra* note 3, at 212-13. What replaced the par value system has been referred to as a "non-system" of exchange arrangements. See *id.* at 216. For a discussion of whether the IMF Charter after the Second Amendment establishes an international monetary "system," see Joseph Gold, *The Rule of Law in the International Monetary Fund* 13-16 (IMF Pamphlet Series, No. 32, 1980) [hereinafter *Gold III*].

31. See *The Next Twenty-Five Years*, *supra* note 3, at 213. In the context of the IMF, "surveillance" refers to the IMF's responsibilities under article IV, section 3(a), which provides that the IMF "shall oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations" to collaborate with the IMF and with other members to ensure orderly exchange arrangements and a stable international monetary system. IMF Charter art. IV, § 3(a). This section

broadening of the IMF's role again, this time into the sphere of activity for which it is best known and most criticized today: serving as a source of financing for LDCs.³² Establishing the ESAF less than two years later solidified the IMF's position in the role of financier.

The IMF might not have moved in this direction but for two related developments in 1985 arising from the debt crisis. The first was the "radicalization of the environment" surrounding the debt problem.³³ Several Latin American and African countries began placing limits on the amount of debt obligations they would honor and began to distance themselves from the IMF.³⁴

The second development of 1985 that influenced the establishment of the SAF was the response of the major industrialized countries to the LDCs' more radical approach to the debt crisis. Forced to re-evaluate their own strategy, the major developed countries adopted a new approach based on the United States' announcement in late 1985 of the Baker Plan.³⁵ Named for then U.S. Treasury Secretary James Baker, the plan called for increased availability of commercial and official credit, on the theory that an infusion of further loans would prompt significant economic growth in debt-ridden countries and

authorizes the IMF to conduct consultations with all members concerning their domestic and international economic and financial policies. Edwards, *supra* note 2, at 558.

32. "The onset of the debt crisis in the second half of 1982 provided the Fund with the ideal opportunity to recoup its central position—lost in the 1970s—in balance-of-payments adjustment with regard to the developing countries." Tyrone Ferguson, *The Third World and Decision Making in the International Monetary Fund* 232 (1988).

33. *Id.* at 233.

34. Ferguson explains that

in 1985, . . . Peru courted a break with the IMF-led debt strategy by making clear that only a specified proportion of its foreign exchange earnings would be used to service its debt[,] and Cuba . . . hosted an international conference on debt, at which strong sentiments were expressed for debt repudiation altogether. Also in 1985, Brazil, the major debtor-nation, stated its clear refusal to undertake any more Fund-recommended adjustment in dealing with its external debt. [Similarly, in Africa,] growing calls were made for a Third World approach to the problem. Nigeria took the decision not only to have nothing to do with the Fund, but, like Peru, indicated that only a specified proportion of its foreign exchange earnings would go to debt servicing.

Id. (citations omitted).

35. *Id.* For references to the Baker Plan's influence and details on the timing of the Baker Plan's announcement and the establishment of the SAF, see International Monetary Fund, 1987 Ann. Rep. 42 (1987) [hereinafter IMF 1987 Annual Report]; International Monetary Fund, *Highlights of the Last Two Years, IMF Surv.—Supplement On the Fund*, Sept. 1987, at 16; De Vries, *supra* note 19, at 197-98, 212. De Vries also notes the principle underlying both the Baker Plan and the establishment of the SAF, in quoting then Managing Director of the IMF, Mr. de Larosiere: "In short, the debtor countries must grow out of debt." *Id.* at 197.

assist in the eventual repayment of all debt obligations.³⁶ This new approach opened the way for the creation of new IMF facilities by underscoring the IMF's expanded role as a source of financial assistance for LDCs.

As Table 1 demonstrates, the result of the IMF's response to the debt crisis was a nearly four-fold increase in financing levels to its LDC members over the course of five years in the early to mid-1980s.³⁷ It further raised financing levels with the new SAF loans. Any financial institution that has a massive increase in its loan disbursements over the course of a few years would expect to see an increase in arrears when loan repayments become due. As Table 2 indicates, this is what happened in the case of the IMF during the 1980s. Arrears began rising dramatically, increasing by about six-fold during the last four years of the decade.

TABLE 2: ARREARS TO THE IMF, 1986-1992³⁸

<u>Year</u>	<u>Amount of Arrears (millions of SDRs)</u>	<u>Number of Member Countries in Arrears</u>
1986	482	8
1987	1,186	8
1988	1,945	9
1989	2,802	11
1990	3,251	11
1991	3,378	9
1992 ³⁹	3,496	10

36. International Monetary Fund, World Bank Report Reviews Initiatives to Reduce Debt and Debt Service, IMF Surv., Jan. 8, 1990, at 1, 13; see also Payer, supra note 19, at 14.

37. See supra note 22 and accompanying Table. Virtually all IMF credit over the past 15 years has gone to LDCs rather than to economically developed countries. Polak, supra note 5, at 1. As of the end of April 1987, for example, no existing arrangements (stand-by, extended, and SAF arrangements) were for "industrial countries," defined by the IMF to include the 21 richest IMF member countries, and no industrial country except Iceland had any outstanding IMF credit. See IMF 1987 Annual Report, supra note 35, at 146-49, 152, 171. Over two-thirds of those countries with existing arrangements were "primary product exporters," that is, countries with exports of agricultural and mineral primary products other than fuel accounting for over half of their total exports. Id. at 152, 172. As noted above, the drop in prices of commodities (primary products) helped cause the debt crisis. See supra note 19. Hence, many of the same countries experiencing the most difficulty as a result of the debt crisis were also undertaking further debt to the IMF.

38. All figures are as of the end of April and exclude obligations that are overdue by less than six months. See IMF 1991 Annual Report, supra note 20, at 68; IMF 1987 Annual Report, supra note 35, at 68; IMF 1992 Annual Report, supra note 4, at 77.

39. The member countries in arrears as of April 1992 included Cambodia, Iraq, Liberia, Peru, Sierra Leone, Somalia, Sudan, Viet Nam, Zaïre, and Zambia. IMF 1992 Annual Report,

The rise of arrears posed a problem not only because it threatened to undermine a fundamental principle of the IMF—that the use of the IMF's resources must be temporary in order that such resources can revolve to the benefit of all member countries⁴⁰—but also because it generated concern over the reputation of both the IMF and its member countries in arrears. The IMF and its member countries were thus compelled to deal directly with the growth of arrears to the IMF.⁴¹

B. *The Search for Solutions Under the Charter*

Although the IMF had had some earlier experience with arrears,⁴² the organization decided that, by 1990, the magnitude of the problem required a more varied and effective approach than before. In early 1990, the IMF formulated a “cooperative strategy on overdue obligations.”⁴³ The strategy includes three main elements: (1) prevention of

supra note 4, at 78; International Monetary Fund, *IMF Addresses Problem of Overdue Financial Obligations*, IMF Surv.—Supplement On the IMF, Sept. 1992, at 23-24 [hereinafter *Overdue Financial Obligations*]. The list of member countries in arrears changes only slowly, usually by no more than one or two additions or deletions each year, since most of those in arrears have overdue obligations of several years' duration. See, e.g., IMF 1991 Annual Report, supra note 20, at 67. This being the case, the portion of a member country's total arrears that represents interest and charges is typically very substantial, sometimes more than one-third of the total. See, e.g., *id.* at 147.

40. This is often referred to as the “revolving nature” or “revolving character” of the IMF's resources. See *Financial Support*, supra note 7, at 12; *Financial Organization and Operations*, supra note 6, at 2; *Gold II*, supra note 6, at 19.

41. Whereas an annual IMF publication referred to overdue financial obligations as “a matter for concern” in 1987, the same publication in 1990 called the arrears “a serious problem.” Compare *International Monetary Fund, Surveillance Tightened, SAF Increase Proposed; Debt Strategy Affirmed, but Problems Persist*, IMF Surv.—Supplement On the Fund, Sept. 1987, at 2 with *International Monetary Fund, Overdue Financial Obligations Affect IMF Operations*, IMF Surv.—Supplement On the Fund, Aug. 1990, at 16. For other reference to the damage that arrears could do to the IMF and its members, and to the need for action to address the problem, see *Press Communique of the Interim Committee Meeting of September 25-26, 1988*, reprinted in *International Monetary Fund, 1989 Ann. Rep.* 96 (1989); see also *Minutes of Executive Board Meetings 89/100 and 89/101 (July 27, 1989)*, reprinted in *Selected Decisions*, supra note 8, at 77:

Overdue financial obligations . . . impose[] financial cost on the Fund's membership, impair[] its capacity to assist members, and more generally weaken[] the Fund's ability to perform its broader responsibilities in the international financial system. . . . [C]ountries which accumulate arrears to the Fund also damage themselves, in part through the deterioration which inevitably follows in their financial relations with other creditors.

42. Cambodia, for example, has had relatively small amounts of overdue obligations to the IMF since 1975. IMF 1991 Annual Report, supra note 20, at 67 n.14.

43. For details on the cooperative strategy, see *id.* at 69; see also *Overdue Financial Obligations*, supra note 39, at 23; *Selected Decisions*, supra note 8, at 73-97 (referring to this strategy as the “strengthened cooperative strategy.” *Id.* at 96).

new arrears; (2) intensified collaboration among the members in arrears, the IMF, and other financial institutions to resolve existing protracted arrears; and (3) remedial and deterrent measures.⁴⁴

The first of these elements, prevention, has prompted a closer assessment of the likely ability of a member country to repurchase or repay on time, before the IMF extends credit to that country. In fact, since the mid-1980s, all IMF staff papers presented in support of the use of IMF resources have included a section explicitly assessing the member's capacity to repay.⁴⁵

The second element of the cooperative strategy, intensified collaboration, has featured the "rights approach": a member country with protracted arrears to the IMF can earn rights to obtain future financing from the IMF once its arrears have been cleared.⁴⁶ If, for example, Zaïre remained in arrears to the IMF, it could nevertheless earn rights to future financing by following IMF-approved economic and financial policies during a three-year period. Zaïre could then "cash in" these rights by clearing its arrears and securing IMF approval for a stand-by arrangement or SAF or ESAF arrangement.⁴⁷ Also, in the interest of intensified collaboration, the Executive Board has decided to suspend the application of all special charges on arrears for those member countries judged to be cooperating actively with the IMF in settling their arrears.⁴⁸

The third element of the cooperative strategy raises the question of the scope of the IMF's legal authority to sanction member countries that fail to meet their financial obligations to the IMF. Under the heading "remedial and deterrent measures," the IMF has enumerated "a series of steps of increasing severity" to be taken by the IMF in order to pressure a member country into settling its arrears:

These may include the formal consideration of the matter by the Executive Board; communications by the Managing Director with Governors of the Fund and heads of selected international financial institutions if the member is failing to cooperate with the Fund in seeking to resolve the problem; a declaration (which would be published) of the member's

44. Overdue Financial Obligations, *supra* note 39, at 23.

45. IMF 1991 Annual Report, *supra* note 20, at 69; see also Financial Organization and Operations, *supra* note 6, at 88.

46. Overdue Financial Obligations, *supra* note 39, at 23.

47. *Id.* By April 1992, the IMF Executive Board had endorsed "rights accumulation programs" for Peru, Sierra Leone, and Zambia. *Id.* at 24.

48. *Id.* For further information on the rights approach and suspension of special charges, see IMF 1991 Annual Report, *supra* note 20, at 70-71.

ineligibility to use the Fund's resources; and a declaration (which would also be published) of noncooperation with the Fund.⁴⁹

All but one of these steps rely on peer pressure and the "mobilization of shame" as the means of persuading a delinquent member country to pay its debts.⁵⁰ The exception is the declaration of ineligibility to use the IMF's resources, an exclusionary sanction foreclosing access to a basic benefit of IMF membership. Before the Third Amendment, the only other exclusionary sanction⁵¹ expressly authorized under the IMF Charter was mandatory withdrawal—that is, expulsion—from the organization. As discussed below, the express powers of the IMF to impose exclusionary sanctions are delineated in article XXVI of the organization's Charter.

C. *The Exclusionary Sanctions of Old Article XXVI*

Article XXVI of the IMF Charter, as it appeared up until the time the Third Amendment took effect in November 1992 ("old article XXVI"), expressly provides for two exclusionary sanctions: ineligibility to make further use of the IMF's resources⁵² and compulsory

49. Financial Organization and Operations, *supra* note 6, at 89 n.21.

50. See Joseph Gold, *Legal and Institutional Aspects of the International Monetary System: Selected Essays* 153 (1979) [hereinafter Gold IV].

51. Sir Joseph Gold, the IMF General Counsel from 1959 to 1979 and the foremost authority on legal aspects of the IMF, uses the term "remedies," instead of "sanctions," to encompass all measures that the IMF may apply against a member without its consent and that are considered censorious. See *id.* at 149-50. One such remedy, falling under the category of denial of benefits in Gold's analysis, is ineligibility. *Id.* at 157. Another, falling under the same category, is compulsory withdrawal. *Id.* at 163. In this Article, the term "sanction" or "exclusionary sanction" is used in this sense of a measure that denies some or all benefits of membership. By focusing on these types of formal, denial-of-benefits sanctions, the following discussion is not meant to question the importance of other less formal types of sanctions that do not involve a denial of benefits. These include both public and non-public means of expressing displeasure with a member country's behavior. *Id.* at 151-57. These can be very effective, especially in an organization such as the IMF where the actual casting of votes is rare. See *infra* note 56 (reference to IMF practice of operating by consensus).

52. More specifically, ineligibility under article XXVI applies only to the IMF's "general resources." See IMF Charter art. XXVI, § 2(a). Although this term does not include SAF and ESAF resources, access to those resources is denied immediately upon a member country's failure to make payments on its SAF or ESAF loans. See IMF Executive Board Decision No. 8238-(86/56) SAF (Mar. 26, 1986), as amended, Annex to Decision II, ¶ 6(2), at 14, reprinted in *Selected Decisions*, *supra* note 8, at 263, 265; see also The Acting Chairman's Concluding Remarks at the Discussion on Additions to the Special Contingent Account, IMF Executive Board Meeting 88/12 (Jan. 29, 1988), reprinted in *Selected Decisions*, *supra* note 8, at 76. For other, less general IMF Charter provisions on ineligibility, see IMF Charter art. V, § 5, art. VI, § 1; see also Gold IV, *supra* note 50, at 157-58. Related to the sanction of ineligibility is the automatic interruption of purchases or disbursements under an existing arrangement if

withdrawal from the IMF altogether.⁵³

Old article XXVI specifies which IMF bodies are authorized to impose exclusionary sanctions and what the scope of their discretion is to do so. Section 2(a) provides that "the Fund" may declare a member country ineligible.⁵⁴ In practice, this authority rests with the IMF's twenty-four-member Executive Board.⁵⁵ Under old section 2(b), responsibility for the decision to order a member's withdrawal lies with the IMF Board of Governors, and requires a special majority based both on the number of governors and on their voting power.⁵⁶

The formulation of old article XXVI reflects the gravity associated

arrears develop. For the relevant provisions in the standard forms for stand-by arrangements and extended arrangements, see Selected Decisions, *supra* note 8, at 127, 132.

53. The pertinent provisions of old article XXVI are as follows:

Section 2. Compulsory Withdrawal

(a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund.

.....

(b) If, after the expiration of a reasonable period the member persists in its failure to fulfill any of its obligations under this Agreement, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the Governors having eighty-five percent of the total voting power.

IMF Charter art. XXVI, § 2.

54. *Id.*

55. The Executive Board, consisting of 24 executive directors appointed or elected by the member countries of the IMF, is the organ that is in continuous session and that exercises all the powers of the IMF that have not been reserved to the Board of Governors. See IMF Charter art. XII, §§ 2(b), 3(a); IMF by-laws § 15, in *International Monetary Fund, By-Laws, Rules and Regulations* 11 (45th issue, Aug. 23, 1988); see also Gold IV, *supra* note 50, at 151; Hooke, *supra* note 2, at 11-13; *International Monetary Fund, IMF Board of Governors Exercise Many Powers through Executive Board*, IMF Surv.—Supplement On the IMF, Sept. 1992, at 3-4 [hereinafter IMF Board of Governors]; *International Monetary Fund, New Executive Board Representing 173 Countries Holds First Meeting*, IMF Surv., Nov. 30, 1992, at 368.

56. The Board of Governors consists of one governor and one alternate appointed by each member country. IMF Charter art. XII, § 2(a). A governor (or the alternate in the governor's absence) casts the number of votes allotted, in accordance with a system of weighted voting power, to the member that appointed him or her. *Id.* § 2(e). As of November 1992, member countries with the greatest voting power were the United States (17.64% of the total), the United Kingdom (6.12%), Germany (5.34%), France (4.43%), and Japan (4.18%). IMF Board of Governors, *supra* note 55, at 4. Although the same five countries still have the greatest voting power following the quota increase linked to the Third Amendment, the voting power of each member country has changed. For details on quota changes, see *infra* note 199 and accompanying text. (The U.S. voting share after the quota increase will remain at about 17.6 percent. *International Monetary Fund, IMF Quotas under the Ninth General Review of Quotas*, IMF Surv., Nov. 30, 1992, at 367.) For details on weighted voting, see William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 *Fordham Int'l L.J.* 910, 918-27 (1991). Voting power is often not directly relevant to IMF decisions, since the IMF operates largely on the basis of consensus. Nevertheless, voting percentages form an important backdrop to the formation of that consensus. See generally

with the ultimate exclusionary sanction of expulsion.⁵⁷ Universal membership is a goal of the IMF,⁵⁸ and expulsion of a member naturally would run counter to that objective.⁵⁹

As for the discretion of the respective IMF bodies to impose these sanctions, section 2 is expressed in permissive rather than mandatory terms. In other words, neither ineligibility nor expulsion is automatic.⁶⁰ The Executive Board may decide to threaten ineligibility, as one of several weapons included in the IMF's arsenal of deterrent and remedial measures,⁶¹ before actually declaring ineligibility. As a result, some member countries with arrears to the IMF have not been declared ineligible to use IMF resources.⁶²

Discretion is not the same as license, however. Although the formulation of old article XXVI gives the IMF some flexibility in the imposition of sanctions against a member country, the provisions are

Stephen Zamora, *Voting in International Economic Organizations*, 74 *Am. J. Int'l L.* 566 (1980).

57. See Gold IV, *supra* note 50, at 164-165.

The contrast between the requirements for decisions on ineligibility and compulsory withdrawal shows that it was to be relatively easy for the Fund to impose ineligibility in order to safeguard its resources and perhaps promote adjustment, but not so easy to take the final step of banishing countries from the institution.

Id. at 165. As Gold also explains, "the Fund's distaste for compulsory withdrawal" was underscored at the time of the Second Amendment, when the current special majority provisions were introduced; under the original version of the Charter and the First Amendment, the Board of Governors could compel compulsory withdrawal by a decision taken by a majority of the governors representing a majority of the voting power. *Id.* at 12.

58. See, e.g., *International Monetary Fund, IMF Moved Toward Universal Membership During 1991/92*, IMF *Surv.*, Sept. 21, 1992, at 273. As of late January 1993, IMF membership totalled 178 countries, up from 157 at the end of April 1991. *Id.*; *International Monetary Fund, New IMF Members: Republics of Croatia and Slovenia*, IMF *Surv.*, Jan. 25, 1993, at 25.

59. The compulsory withdrawal provisions have been applied only once, against Czechoslovakia in 1954-55. For details on the compulsory withdrawal of Czechoslovakia, see Joseph Gold, *Interpretation by the Fund 11-14* (IMF Pamphlet series, No. 11, 1968) [hereinafter Gold V].

60. Before the Second Amendment, ineligibility was automatic, not discretionary, in one set of circumstances: if a member country made an unauthorized change in the par value of its currency. On this ground, France was ineligible for several years. See Gold IV, *supra* note 50, at 12-13, 164.

61. See *supra* note 49 and accompanying text.

62. IMF 1991 Annual Report, *supra* note 20, at 68, table 5. Cambodia, for example, has never been declared ineligible despite its long overdue obligations to the IMF. *Id.* at 67 n.14. As a policy matter, however, the Executive Board has endorsed the practice by which the IMF's "management will not submit to the Board any requests for the use of Fund resources under a stand-by or extended arrangement as long as the member concerned has overdue payments to the Fund." Minutes of Executive Board Meeting 84/54, at 37-38, reprinted in *Selected Decisions*, *supra* note 8, at 74. Moreover, the development of arrears to the IMF has the immediate effect of interrupting the availability of credit under existing arrangements. See *supra* note 52.

not entirely open-ended. For example, old article XXVI does not expressly provide for any intermediate exclusionary sanction, a measure more severe than ineligibility but less drastic than expulsion.

Some IMF member countries viewed the absence of such an intermediate exclusionary sanction as an impediment to dealing with the worsening arrears problem.⁶³ Such a view raises an important legal issue: on what grounds might the IMF legitimately exercise authority to impose additional sanctions on member states in arrears? The answer depends on how broadly an international organization's authority to impose exclusionary sanctions can be construed under international law.

III. THE QUESTION OF IMPLIED POWERS

The fact that an international organization's charter does not expressly grant a particular power does not automatically preclude the organization from exercising that power. International organizations are generally considered to have certain implied powers. Given the difficulty of amending the charter of an international organization such as the IMF,⁶⁴ it makes sense for an international organization seeking to exercise broader authority first to consider whether any such implied power exists.

Put specifically in the context of the IMF and its problem of growing arrears, the question is whether the IMF has an implied power to impose on a member country an intermediate exclusionary sanction distinct from the two delineated in old article XXVI. In addressing this question, this part first examines the doctrine of implied powers of international organizations generally, and then focuses specifically on the use of implied powers to impose exclusionary sanctions.⁶⁵

A. *The Doctrine of Implied Powers of International Organizations*

In establishing and conferring powers on an international organiza-

63. This view ultimately led to the proposal to amend the IMF Charter. See International Monetary Fund, All Member Countries Compromise to Reach Agreement on Quota Increase, *IMF Surv.*, May 21, 1990, at 158.

64. As discussed more fully below, the amendment of the IMF Charter requires in most cases the approval by three-fifths of the member countries having 85 percent of total voting power. See *infra* note 175 and accompanying text.

65. The analysis presented here is based substantially on research conducted in 1989 while the author served as Legal Counsellor to the IMF. The author gratefully acknowledges the contribution of Mr. Michael Sposato, IMF research assistant, in helping with that work, and the valuable guidance and insight provided by other members of the IMF Legal Department. The views expressed here, however, and in this Article as a whole, are those of the author and not necessarily the views of the IMF or its staff.

tion, its member states generally surrender some of their sovereignty.⁶⁶ However, it cannot be presumed that member states have surrendered more of their sovereign powers than they have expressly authorized. That being the case, international organizations are necessarily entities of limited powers.⁶⁷ Still, in some cases, an organization's charter does not expressly confer or deny a specific power which an organization might later consider to be essential to the performance of its functions. The question then becomes whether that power may be deemed to have been conferred by implication. An invocation of implied powers is predicated on the assumption that a specific power is so unobjectionable or of such importance that had the contracting parties originally considered it, they would have conferred such power on the organization.

International courts have long recognized the doctrine of implied powers of international organizations. Under that doctrine, an international organization may, in limited circumstances, exercise certain powers not within the express provisions of its charter.⁶⁸ The most important articulations of the doctrine have appeared in advisory opinions of the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ).⁶⁹

66. As originally conceived, the IMF represented a surrender of sovereignty over the setting of exchange rates. See Dam, *supra* note 2, at 128; Hooke, *supra* note 2, at 2-3. For references to the par value system that resulted from this surrender of sovereignty, see *supra* note 29. "Sovereignty" is used here in the traditional sense, to refer to a "bundle of legal entitlements" supposedly granted by the international community to every state upon its legal independence, and protected by international law against encroachment by any state. See, e.g., Anthony D'Amato, *International Law: Process and Prospect* 16 (1987), reprinted in Burns H. Weston et al., *International Law and World Order* 34-35 (2d ed. 1990).

67. See Nguyen Quoc Dinh et al., *Droit International Public* 535-38 (3d ed. 1987). With respect to the IMF itself, see Dam, *supra* note 2, at 104 (stating that "the Fund was conceived as an institution of specifically delegated and limited powers."). Dam also quotes from explanations made in hearings before the U.S. Congress in 1945: "The fund is an instrumentality of delegated powers. It has only those powers that are given to it, the same as [the federal government under] our own Constitution." *Id.* at 104 n.184 (citing Bretton Woods Agreement Act: Hearings on H.R. 2211 Before the House Comm. on Banking and Currency, 79th Cong., 1st Sess. (1945)).

68. See Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 *Am. J. Int'l L.* 794, 816-21 (1965).

69. Aside from the obvious importance of the PCIJ and the ICJ to the development of international law generally, there are two reasons why advisory opinions of these two courts play an especially important role with respect to the law of international organizations: first, neither court has permitted international organizations to be parties before it, so international organizations have been unable to initiate proceedings other than those leading to an advisory opinion; second, both courts have been restrictive in allowing states to submit cases concerning the law of international organizations. See Henry G. Schermers, *International Institutional Law* § 1213 (2d ed. 1980). Other international courts also have applied the doctrine of implied powers. See, e.g., *id.* § 333 (quoting a 1956 opinion of the Court of Justice

An early expression of the doctrine of implied powers of international organizations appeared in a 1926 advisory opinion of the PCIJ concerning the competence of the International Labour Organization (ILO).⁷⁰ At issue was whether the ILO had authority to formulate and propose legislation that, although intended to protect certain classes of workers, incidentally regulated the same work when performed by the employer. The court reasoned that even though the ILO's charter did not expressly provide for a particular power, that power nevertheless could be judged to have been conferred as an implied power if the charter revealed no contrary intention and if it were essential to achieving the objectives of the charter.⁷¹

The ICJ has also invoked the doctrine of implied powers, especially in instances relating to the authority of the United Nations. In the 1949 *Reparation for Injuries* case, the ICJ followed the rulings of the PCIJ (to which it referred explicitly) in considering whether the United Nations had capacity to bring claims for reparation due with respect to damages to its agents, even though the Charter of the United Nations did not expressly confer such a power on the organization.⁷² The court decided the issue in the affirmative, holding that "[u]nder international law, the [United Nations] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."⁷³ The ICJ later reaffirmed this

of the European Communities that "rules laid down by an international treaty . . . presuppose the rules without which that treaty . . . would have no meaning or could not be reasonably and usefully applied." Case 8/55, *Fédéchar Case*, 1956 E.C.R. 299.

70. Advisory Opinion No. 13, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, 1926 P.C.I.J. (ser. B) No. 13 (July 23).

71. *Id.* at 18. The court summarized its reasoning as follows:

It results from the consideration of the provisions of the [ILO charter] that the High Contracting Parties clearly intended to give to the [ILO] a very broad power of cooperating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. . . . If such a limitation of the powers of the [ILO], clearly inconsistent with the aim and scope of [the charter,] had been intended, it would have been expressed in the [charter] itself.

Id.

Later pronouncements by the PCIJ of the doctrine of implied powers of international organizations appeared in similar form in other advisory opinions. See Gordon, *supra* note 68, at 816-21; see also Advisory Opinion No. 50, *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, 1932 P.C.I.J. (ser. A/B) No. 50 (Nov. 15).

72. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

73. *Id.* at 182. As this decision suggests, the ICJ gave somewhat less emphasis than did the

approach in the 1954 *Effect of Awards* case.⁷⁴

Two central standards emerge from these cases under the doctrine of implied powers of international organizations: the necessity test⁷⁵ and the consistency test.⁷⁶ First, in order to be implied, a power must

PCIJ to the intentions of the contracting parties who created the organization, and somewhat more emphasis to the need for the organization to have implied powers if the organization was to be able to perform its functions.

74. *Effect of Awards of Compensation Made By the United Nations Administrative Tribunal*, 1954 I.C.J. 47 (July 13). At issue was whether the General Assembly could establish an administrative tribunal notwithstanding the facts that (1) article 22 of the Charter only enabled the General Assembly to establish subsidiary organs that it deemed necessary to the performance of its own functions, and (2) the General Assembly had no judicial functions of the type that the administrative tribunal would carry out. *Id.* at 56-58. In deciding that the United Nations did have the capacity to establish such a tribunal, the ICJ pointed out that the power to do so "was essential to ensure the efficient working of the [U.N.] Secretariat . . . Capacity to do this arises by necessary intendment out of the Charter." *Id.* at 57.

In other cases, the issue was not the recognition of an implied power, but whether an express power conferred by the Charter or other treaties was subject to an implied limitation. See *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, 1973 I.C.J. 166 (July 12) (confirming the legality of the creation of a committee that could have judicial or quasi-judicial responsibilities that would place it outside the scope of article 22); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (June 21); *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 1962 I.C.J. 151 (July 20). See generally A.I.L. Campbell, *The Limits of the Powers of International Organisations*, 32 *Int'l & Comp. L.Q.* 523 (1983).

75. The "necessity test" is also inherent in the doctrine of implied powers as applied in the areas of constitutional and corporations law in numerous domestic jurisdictions. For example, under U.S. constitutional law, "a power may be implied whenever *necessary to give effect to a power expressly granted*." 16 *Am. Jur. 2d Constitutional Law* § 286 (1979) (emphasis added). "[T]he courts cannot read into [a constitution] provisions which are not there merely because so doing will be helpful in dealing with conditions which exist at the present." *Id.* § 96. Similarly, under rules of corporation law generally applicable in jurisdictions in the United States, "[a] corporation has only such powers as are expressly granted in its charter or in the statutes under which it is created . . . plus such implied or incidental powers as are *necessary* for the purpose of carrying out its express powers and the objects of its incorporation." 18B *Am. Jur. 2d Corporations* § 1990 (1985) (emphasis added). "Powers merely convenient or useful are not implied if they are not essential, having in view the nature and object of the corporation." *Id.* § 1992.

76. As with the "necessity test," the "consistency test" is also a familiar feature of the doctrine of implied powers in domestic law jurisdictions. Indeed, it is fundamental to the interpretation of any provision of a constitution, statute, or corporate charter to determine the existence and proper scope of express or implied powers. For example, courts must, in interpreting U.S. constitutional provisions, "avoid a construction which renders any constitutional provision meaningless, purposeless . . . or in conflict with another provision . . ." 16 *Am. Jur. 2d*, supra note 75, § 101. Among the fundamental maxims of interpretation often cited as requiring the "consistency test" in domestic law application of the doctrine of implied powers are those of *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another) and *in pari materia* (provisions of one or several related documents should be construed together and in a consistent and harmonious way). See, e.g., 18B *Am. Jur. 2d*, supra note 75, § 1995; 16 *Am. Jur. 2d*, supra note 75, § 100; 73 *Am. Jur. 2d Statutes* §§ 187, 211 (1974); *Black's Law Dictionary* 581, 791 (6th ed. 1990).

be judged to be necessary or essential in order for the organization to carry out its duties or purpose effectively.⁷⁷ The justification for this test rests on the need to preserve the charter's integrity as a binding agreement reflecting the intent of the sovereign states that drafted and acceded to it. If a permissive test were applied—for example, if an international organization were able to claim and exercise any power it showed to be “useful” to its operations—the charter's express provisions could quickly be diluted. Moreover, such express provisions could eventually be supplanted entirely by the will of a majority in the organization, leaving an individual member state or a minority of member states unprotected against the exercise of powers far in excess of those that they agreed to vest in the organization when they created or joined it. This would subject the organization itself to criticism, erode the support of those member states that considered their sovereignty threatened, and very likely discourage states from joining international organizations.⁷⁸

The second fundamental limitation inherent in the doctrine of implied powers is that no implied power can be inconsistent with powers expressly granted by the organization's charter.⁷⁹ The existence of an express power, especially one central to the organization's character or function, would necessarily rule out the possibility of any implied power supplanting, interfering with, or reducing the significance of the express power.⁸⁰ In this regard, A.I.L. Campbell has observed that the ICJ “has generally been concerned to interpret the [U.N.] Charter as a whole and to adopt an interpretation of a provision which would fit in with other provisions.”⁸¹ In particular, he points out that the ICJ probably would not find an implied power similar to the express authority conferred in certain basic provisions

77. Advisory Opinion No. 13, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, 1926 P.C.I.J. (ser. B) No. 13, at 18 (July 23).

78. This concern over sovereignty has emerged in several contexts. For example, the original drafters of the IMF Charter rejected a proposal that would have enabled the organs of the IMF to amend the Charter without the necessity for action by members (“self-amendment”): “The main objection to a power of self-amendment was the likelihood that it would be resented and rejected by legislatures because they would see the proposal as a move to circumvent them and possibly to increase the obligations of membership without legislative approval.” Gold III, *supra* note 30, at 19.

79. See, e.g., *Competence of the ILO*, 1926 P.C.I.J. at 18.

80. There would also be no possibility, of course, of finding an implied power if it were expressly prohibited by the charter, either by means of a general provision disallowing any inference of powers or by means of a specific provision excluding a particular power. See Campbell, *supra* note 74, at 523-24.

81. *Id.* at 528.

governing the United Nations, such as article 4 (on membership) and article 18 (on voting in the General Assembly): "The Court's attitude to [these articles] . . . indicates that *such fundamental provisions could not be overridden or supplanted by the implication of a power in the same field* . . . so as to alter the basic characteristics of the Organisation."⁸² Hence under the consistency test, an international organization cannot properly claim or exercise an implied power that would be inconsistent with those powers expressly granted by its charter, especially powers of fundamental importance.

In sum, an international organization cannot properly exercise a power not expressly conferred upon it unless the implied power satisfies both the necessity and consistency tests. The power must be shown to be both necessary to the organization's function and consistent with the express provisions of its charter. These requirements reflect the concern, grounded in the concept of state sovereignty, that an international organization not exercise powers beyond those its member states intended to surrender.⁸³

B. *Implied Powers to Impose Exclusionary Sanctions*

The advisory opinions of the PCIJ and the ICJ have not directly addressed the question of whether, based on the doctrine of implied powers, international organizations may impose exclusionary sanctions, such as the suspension of voting rights. The IMF Charter, in particular, does not give any guidance as to what implied power the IMF might have to impose such sanctions,⁸⁴ nor does any general treaty exist establishing rules on implied powers of international

82. *Id.* at 527 (emphasis added). Campbell concludes that although "the existence of express powers does not preclude the exercise of similar [implied] powers in the same field," it seems clear that "the exercise of [implied] powers would have to be such as would not substantially *encroach on, detract from, or nullify [such express] powers.*" *Id.* at 528 (emphasis added).

83. The role of intention in the interpretation of treaties is well established. Article 31 of the 1969 Vienna Convention on the Law of Treaties, for example, provides that the terms of a treaty are to be interpreted "in the light of its object and purpose," and both articles 31 and 32 detail the methods by which the object and purpose intended by the drafters of the treaty can be ascertained. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31, 32, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980).

84. The IMF Charter does include some provisions vaguely relating to unexpressed powers or to the exercise of express powers. An example of the former is article IX, section 2, which gives the IMF "full juridical personality." IMF Charter art. IX, § 2. An example of the latter is the last sentence of article I, stating that the IMF "shall be guided in all its decisions by the purposes set forth" in that article. *Id.* art. I. These provisions do not, however, help determine whether the IMF has an implied power to impose an exclusionary sanction not expressly provided.

organizations. Therefore, other sources of international law must be considered to determine if such an implied power exists.

One such source is customary international law, as manifested in the actual practice of international organizations.⁸⁵ Proving the existence of a rule of customary international law requires, among other things, a showing that a particular practice has been consistently followed.⁸⁶ A second important source is legal scholarship.⁸⁷

The remainder of this subpart presents numerous cases in which international organizations have decided whether or not to impose exclusionary sanctions, and examines the views of legal scholars on the issue of implied powers to impose such sanctions. The cases reveal that the practice of international organizations is not consistent. Instead, the practice is mixed both in terms of outcomes—that is, the types of actions that organizations have taken or declined to take in the absence of express charter provisions—and in terms of the legal and factual settings in which the issues have arisen. Two important conclusions do, however, emerge.

First, in terms of outcomes, the proposition that an international organization has an implied power to impose exclusionary sanctions apart from those expressly provided for in its charter has been rejected on legal grounds. Some contrary practice notwithstanding, no such general power exists.

Second, in terms of legal and factual settings, there appears to be no case in which an organization, having in its charter an express provision for a particular exclusionary sanction for failure to meet a charter obligation, has imposed instead a different exclusionary sanction against a member for failure to meet that obligation. Hence, the actual practice of international organizations, like the formal doctrine of implied powers announced by international courts, appears to undermine any potential claim by the IMF of an implied power to suspend the voting rights of a member country that fails to meet its financial obligations to the IMF.

85. Article 38(1) of the ICJ Statute, commonly regarded as providing a list of "sources" of international law, refers to (a) international conventions, (b) customary international law ("international custom, as evidence of a general practice accepted as law"), (c) general principles of law, and (d) subsidiary means, including judicial decisions and legal writings. Statute of the International Court of Justice, done June 26, 1945, art. 38(1), 59 Stat. 1031, 3 Bevans 1153 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute].

86. In addition to the element of consistency, it is necessary to show generality and duration of the practice, as well as the sense of obligation to follow the practice as a matter of law (*opinio juris*). See Ian Brownlie, *Principles of Public International Law* 5-7 (4th ed. 1990).

87. See *supra* note 85.

1. *Cases In Which Exclusionary Sanctions Were Imposed*

In several instances, international organizations have imposed exclusionary sanctions on member states in the absence of an express charter provision authorizing such sanctions, or in the presence of a provision authorizing such sanctions but on different grounds.⁸⁸ The legality of such actions has sometimes been explained or justified by invoking the doctrine of implied powers.

a. OAS and Cuba

In 1962, the Organization of American States (OAS) adopted a resolution declaring that "the present Government of Cuba . . . is incompatible with the principles and objectives of the inter-American system," and that "this incompatibility excludes the present Government of Cuba from participation in the inter-American system."⁸⁹ The OAS charter does not contain a provision for expulsion of a member country,⁹⁰ but the resolution was formulated as an exclusion of a *government* by its own action, and Cuba as a *country* remained a member of the OAS.⁹¹ The general effect, however, was the same: an exclusionary sanction was imposed on Cuba, notwithstanding the absence of a provision expressly authorizing such a sanction. The Cuban government challenged the legal validity of the resolution.⁹² As part of its challenge it requested that the United Nations Security Council ask the ICJ to give an advisory opinion on the question of whether the OAS has an implied power to exclude a member state. The Security Council, however, rejected that request.⁹³

b. UNESCO and Portugal, South Africa, and Rhodesia

In 1966, the General Conference of the United Nations Educa-

88. The following survey of instances in which exclusionary sanctions were imposed is presented in chronological order. Most of the incidents took place over a number of months or years. For purposes of arranging the following accounts in chronological order, the dates of imposition of exclusionary sanctions govern.

89. Expulsion, Suspension, Forced Withdrawal, and Forced Nonparticipation, 13 *Whiteman Dig.* § 13, at 248 (1968) [hereinafter *Whiteman Digest*]. The OAS also declared that the government of Cuba "has voluntarily placed itself outside the inter-American system." *Id.* See generally Rahmatullah Khan, *Implied Powers of the United Nations* 127-28, 217-18 (1970); D.W. Bowett, *The Law of International Institutions* 351 (2d ed. 1970).

90. See Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended February 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324.

91. See Khan, *supra* note 89, at 128.

92. *Id.*

93. *Id.* See generally D.W. Greig, *International Law* 858 (2d ed. 1976) (discussing suspension and expulsion from international organizations).

tional, Scientific and Cultural Organization (UNESCO) adopted a resolution authorizing its Director-General "to withhold assistance from the Governments of Portugal, the Republic of South Africa and the illegal regime of Southern Rhodesia in matters relating to education, science and culture, and not to invite them to attend [UNESCO] conferences or take part in other UNESCO activities"⁹⁴ UNESCO's charter at that time authorized the imposition of exclusionary sanctions only (a) in cases where a member was suspended or expelled from the United Nations (the member then was to be suspended or expelled from UNESCO)⁹⁵ or (b) in cases where the member failed to pay its contributions (the member then was to have no vote).⁹⁶ Portugal challenged the resolution and asked that the matter be submitted to the ICJ for an advisory opinion. UNESCO's Legal Committee agreed, by a unanimous vote, that the matter should be submitted to the ICJ. However, the General Conference overrode the Legal Committee's opinion and rejected Portugal's request for an advisory opinion.⁹⁷ Thus, as in the case of the OAS and Cuba,⁹⁸ UNESCO effectively imposed on three of its member countries exclusionary sanctions that were not expressly provided for in its charter.

c. ICAO and South Africa

In 1965, an attempt was made to exclude South Africa from the International Civil Aviation Organization (ICAO) by adopting an amendment to the ICAO charter calling for the suspension or exclusion of any member that violated the principles laid down in the preamble to the charter or practiced a policy of apartheid or racial discrimination.⁹⁹ The proposed amendment was not adopted.

94. Whiteman Digest, *supra* note 89, at 246 (quoting United Nations Educational, Scientific and Cultural Organization, Res. 11 (Nov. 28, 1966), in United Nations Educational, Scientific and Cultural Organization, Record of the General Conference, 14 Sess., Res. 11, at 94-96 (1967)).

95. For UNESCO charter provisions on suspension sanction, see Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, art. II(4), 61 Stat. 2495, 4 U.N.T.S. 275.

96. This sanction was added to the UNESCO charter by an amendment in 1949. See *id.*, as amended Oct. 5, 1949, art. IV, 10 U.S.T. 963, 575 U.N.T.S. 256.

97. Sixth Report of the Legal Committee, 1966 U.N. Jurid. Y.B. 153-64, U.N. Doc. ST/LEG/SER.C/4; see also Felice Morgenstern, *Legality in International Organizations, 1976-77 Brit. Y.B. Int'l L.* 241, 243, U.N. Doc. ST/LEG/SER.C/4.

98. See *supra* notes 89-92 and accompanying text.

99. Whiteman Digest, *supra* note 89, at 244; see Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. The ICAO charter originally provided for suspension of voting rights if a member failed to pay its contribution, *id.* art. 62, or failed to give effect to certain rules concerning fly-over privileges. *Id.* art. 88. The charter was amended in 1947 to provide (in a new provision numbered "Article 93 bis") for suspension or expulsion

Instead, the ICAO Assembly adopted a resolution strongly condemning South Africa's apartheid policies.¹⁰⁰ In 1971, however, following an escalation of the political pressure against South Africa in the U.N. General Assembly and elsewhere, the ICAO Assembly adopted a resolution suspending the rights and privileges of South Africa in the ICAO.¹⁰¹ In the debates leading to the resolution's adoption, its legality was strongly challenged.¹⁰² The action stood, however, and might therefore be viewed as an example of the suspension of a member country's rights in an organization notwithstanding the absence of express charter authority to do so.

d. United Nations General Assembly and South Africa (1974)

In 1974, as in some earlier years, the U.N. General Assembly voted to refuse to accept the credentials of the South African delegation.¹⁰³ On that basis, the President of the General Assembly ruled that the South African delegation had no right to participate in the General Assembly or its committees during the 29th Assembly Session.¹⁰⁴

Under articles 5 and 6 of the United Nations Charter, the suspension of a member's rights or the expulsion of a member is possible only "upon the recommendation of the Security Council."¹⁰⁵ No

of a member that had been suspended or expelled from the United Nations. See Protocol Relating to an Amendment to the Convention on International Civil Aviation, May 27, 1947, 418 U.N.T.S. 161.

100. Whiteman Digest, *supra* note 89, at 244 (citing Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa, Ass. Res. A15-p/5 (1965), ICAO Doc. 8516).

101. Ebere Osieke, Sanctions in International Law: The Contributions of International Organizations, 31 *Neth. Int'l L. Rev.* 183, 187 (1984).

102. *Id.* at 187-88.

103. See *infra* notes 142-44.

104. International Organizations, 1974 Digest § 4. Legal objections were raised by several delegations. See, e.g., *id.* (U.S. objections); Organisation des Nations Unies, 1975 *Annuaire Français de Droit International* 1080 (objections of the French delegation). The President of the General Assembly reasoned that since the General Assembly had rejected the credentials of that delegation,

one may legitimately infer that the General Assembly would in the same way reject the credentials of any other delegation authorized by the Government of the Republic of South Africa to represent it, which is tantamount to saying in explicit terms that the General Assembly refuses to allow the delegation of South Africa to participate in its work.

International Organizations, 1974 Digest § 4 (citation omitted).

105. Article 5 of the U.N. Charter authorizes the suspension of a member country only after a prevention or enforcement action has been taken and only subsequent to a General Assembly vote upon a recommendation by the Security Council. U.N. Charter art. 5. Article 6 of the U.N. Charter authorizes the expulsion of a member state that persists in violating the principles of the Charter and only upon a General Assembly vote upon a recommendation of the Security Council. *Id.* art. 6.

such recommendation had been given; on the contrary, a draft resolution calling for the expulsion of South Africa had been defeated in the Security Council by a triple veto.¹⁰⁶ Hence, this 1974 ruling by the General Assembly President, effectively (although not technically) suspending South Africa from membership in the organization, could be justified only on the basis of implied powers. In this respect, however, the ruling was directly contrary to a 1970 ruling by the President of the General Assembly that the rejection of a member state's credentials could not be used as a *de facto* means of suspending a member.¹⁰⁷

Several other instances of exclusion have been reported, but they are less clear in terms of either their outcome or their evidentiary value. These include the procedurally suspect expulsion of the U.S.S.R. from the League of Nations following the Soviet Union's invasion of Finland in 1939,¹⁰⁸ the move in 1963 to exclude South Africa from participation in certain meetings and activities of the Food and Agriculture Organization (FAO),¹⁰⁹ and the 1966 exclusion

106. The countries vetoing the resolution were the United States, the United Kingdom, and France. International Organizations, *supra* note 104, at 30.

107. See *infra* notes 142-43 and accompanying text. For other instances of credentials challenges as a means of attempting to exclude members from participation in international organizations, see Exclusion of the Republic of South Africa from the 17th Congress of the UPU and from all other Congresses and Meetings of the Universal Postal Union, 1974 U.N. Jurid. Y.B. 81, U.N. Doc. ST/LEG/SER.C/12; Expulsion of the Republic of South Africa from the UPU, 1979 U.N. Jurid. Y.B. 90, U.N. Doc. ST/LEG/SER.C/17; Subjects of International Law—International Organizations—in General—Participation of States in International Organizations—Suspension, Withdrawal and Expulsion, 1979 Brit. Y.B. Int'l L. 310-11 (all referring to the Universal Postal Union and South Africa); see also Leo Gross, On the Degradation of the Constitutional Environment of the United Nations, 77 Am. J. Int'l L. 569, 574-83 (1983) (referring to the International Atomic Energy Agency's suspension of Israel from membership); Morgenstern, *supra* note 97, at 243-44 (referring to the ILO's invalidation of the credentials of delegates representing Hungary).

108. See Louis B. Sohn, Expulsion or Forced Withdrawal by an International Organization, 77 Harv. L. Rev. 1381, 1387-90 (1964). The expulsion of the U.S.S.R. was in accordance with provisions of the League's Covenant, with one procedural exception: when four members of the Security Council abstained from voting on the proposed expulsion, the President of the League of Nations ruled that "abstentions do not count in establishing unanimity," despite the Covenant requirement that expulsions be decided by the unanimous vote of all the other members of the League represented at the meeting. *Id.* at 1389. This action might therefore be seen as an expulsion of a member by procedures other than those expressed in the Covenant. Cf. Gross, *supra* note 107, at 569 ("Thus the drive to score an ideological victory prevailed over the traditional concern for constitutional propriety.").

109. In 1963 an amendment to the charter of the FAO was proposed in order to exclude South Africa from that organization. The proposal, which would have provided for exclusion of any member that persistently committed breaches of the FAO charter, failed to receive the two-thirds majority required for adoption. Whiteman Digest, *supra* note 89, at 241-42. Despite this, a resolution was passed stating that South Africa would "no longer be invited to participate in any capacity in FAO conferences, meetings, training centers or other activities in

of the independent Rhodesian government from participation in the International Telecommunications Union (ITU).¹¹⁰

The cases recounted above share a common feature: in each one, an international organization imposed an exclusionary sanction different from, or in the absence of, any exclusionary sanction provided in the organization's charter. For several reasons, however, no clear rule emerges from those cases supporting an implied power to impose such exclusionary sanctions. In several of the cases where the moral, political, or ideological pressures favoring the imposition of exclusionary sanctions did prevail, such action was taken despite a clear official legal opinion either that it was impermissible under the organization's charter,¹¹¹ or that the question of implied powers required review by the ICJ.¹¹² In other such cases, although no such official legal opinion was present, the same type of request for ICJ review of the issue of implied powers was made, both by the member country concerned and by other parties (sometimes even including the management of the organization), but rejected by the governing body of the organization itself.¹¹³ Moreover, in nearly all cases, the overall course of events reveals uncertainty and discomfort on the part of many of the organization's members over the prospect of taking exclusionary action not provided for in the organization's charter. This appears,

the African region, until the Conference decides otherwise." *Id.* (quoting FAO Res. 38/63, United Nations Food and Agriculture Organization, 12th Sess., at 83-84 (1963)). Similar cases of partial or temporary withholding of invitations to participate in certain activities of an international organization, directed against Spain and South Africa, are also reported in *id.* at 212; see also 1973 Digest U.S. Prac. Int'l L. 57-58 (resolution by the Assembly of the International Civil Aviation Organization to stop issuing invitations and providing documents to Portugal).

110. On being informed by the United Kingdom that the Rhodesian delegates signing the ITU charter had not been empowered by the United Kingdom to do so (they were instead representing the Rhodesian government following Rhodesia's declaration of independence from the United Kingdom), the ITU's Administrative Council took action to have those signatures deleted and to disallow any participation by the independent Rhodesian government in the ITU. Resolution No. 559 Regarding Rhodesia Adopted by the Administrative Council of the ITU at Its Twenty-first Session in 1966, 1966 U.N. Jurid. Y.B. 164-65, U.N. Doc. ST/LEG/SER.C/4; see also United Nations Educational, Scientific and Cultural Organization, 1970 U.N. Jurid. Y.B. 115, 119, U.N. Doc. ST/LEG/SER.8. This case might alternatively be viewed as a refusal to admit a member rather than an expulsion of a member.

111. For example, the 1974 case of the United Nations General Assembly and South Africa. See *supra* notes 103-07, *infra* notes 142-44, and accompanying text.

112. For example, the case of UNESCO and Portugal. See *supra* note 97 and accompanying text.

113. For example, the case of the OAS and Cuba. See *supra* notes 89-93 and accompanying text.

for example, in the relations between the ICAO and South Africa.¹¹⁴

2. *Cases In Which Exclusionary Sanctions Were Rejected*

In contrast to the above cases, several attempts to impose exclusionary sanctions outside the scope of express charter provisions of international organizations were successfully resisted on legal grounds.¹¹⁵

a. ICAO and Spain

In late December 1946, the U.N. General Assembly pressured the ICAO to bar the Franco Government of Spain from the organization's membership. Although the ICAO charter at that time included some provisions for suspending or expelling a member,¹¹⁶ none of those provisions could have been invoked to exclude Spain merely on the recommendation of the General Assembly. In view of that fact, the ICAO proceeded to amend its charter accordingly (to provide for automatic expulsion of a member upon the recommendation of the General Assembly),¹¹⁷ rather than resort to action that might have been challenged as being *ultra vires* on grounds that it was outside the scope of the exclusionary provisions in its charter. The ICAO's practice in this case is thus consistent with the view that it had no implied power to exclude Spain.

b. ILO and South Africa

In 1961, the International Labour Conference adopted a resolution condemning South Africa's racial policies and declaring that the continued membership of South Africa in the ILO was inconsistent with the aims and purposes of that organization.¹¹⁸ South Africa was asked to withdraw from the ILO.¹¹⁹ South Africa and a number of other ILO members disputed the constitutionality of the resolution.¹²⁰ The ILO charter at that time provided for suspension of a member's right to vote only in the event that the member fell into substantial

114. Earlier attempts had been made to amend the ICAO charter to support suspension on grounds of apartheid. See *supra* note 99 and accompanying text.

115. This analysis does not deal with cases in which attempts to impose such exclusionary sanctions were rejected on political or other non-legal grounds.

116. See *supra* note 99 and accompanying text.

117. See *Whiteman Digest*, *supra* note 89, at 210-11.

118. *Id.* at 242 (citing International Labour Conference, Forty-Fifth Session, Geneva, 1961 Record of Proceedings 891 (1962)).

119. *Whiteman Digest*, *supra* note 89, at 210-11; see also Sohn, *supra* note 108, at 1412.

120. Sohn, *supra* note 108, at 1413-14.

arrears in payments to the ILO. There were no other charter provisions authorizing exclusionary sanctions.¹²¹ South Africa did not withdraw.

A proposal for outright expulsion of South Africa from the ILO emerged in 1963.¹²² Proponents of the measure argued that the ILO had an implied power to expel South Africa. The ILO Director-General disagreed, explaining that there was " 'a constitutional right and obligation of all Members of the Organisation' " to participate in the International Labour Conference, and that the omission from the charter of a provision authorizing expulsion was deliberate, as the object of the framers was to achieve universality of membership.¹²³ He recommended that the expulsion proposal be referred to the U.N. Security Council.¹²⁴

Before this could be done, however, other measures were taken. First, the proposal for outright expulsion was rejected.¹²⁵ Then, in 1964, the ILO adopted amendments to its charter dealing with suspension and expulsion.¹²⁶ The amendment on suspension called for suspending any member from the ILO "which has been found by the United Nations to be flagrantly and persistently pursuing by its legislation a declared policy of racial discrimination such as apartheid" ¹²⁷ South Africa withdrew from the ILO during the same session.¹²⁸

c. World Bank and South Africa and Portugal

In June 1965, a Special Committee of the U.N. General Assembly adopted a resolution appealing to the IMF and the World Bank to refrain from granting Portugal any financial, economic, or technical assistance as long as Portugal failed to renounce its colonial policy. In December 1965, the General Assembly itself adopted a resolution

121. See Constitution of the International Labour Organization, April 20, 1948, 62 Stat. 3485, 15 U.N.T.S. 35.

122. Sohn, *supra* note 108, at 1413-14.

123. *Id.* at 1414.

124. *Id.*

125. Instead, a proposal was adopted under which South Africa was to be excluded from those meetings of the ILO at which membership was determined by the Governing Body. *Id.* at 1415 (citing International Labour Organization, 46 Official Bull. 333 (1963)). In this limited respect, this case could also be included in the category of cases discussed above in which exclusionary sanctions were imposed in the absence of express charter authority. See *supra* notes 88-107 and accompanying text.

126. Whiteman Digest, *supra* note 89, at 243 (citing International Labour Conference, Forty-Eighth Session, Geneva, 1964 Record of Proceedings 834, 838 (1965)).

127. Whiteman Digest, *supra* note 89, at 243 (emphasis omitted).

128. *Id.*; see also Sohn, *supra* note 108, at 1415.

requesting all states and international institutions to refrain from providing assistance of any kind to the governments of Portugal and South Africa.¹²⁹

In June 1966 and September 1966, respectively, the World Bank entered into agreements granting loans to Portuguese and South African concerns. Shortly thereafter, the General Counsel of the World Bank was invited to a meeting of a committee of the General Assembly that was considering the question of the territories under Portuguese administration. At that meeting, the General Counsel made the following statement:

The Bank's Articles provide that the Bank and its officers shall not interfere in the political affairs of any member and that they shall not be influenced in their decisions by the political character of the member or members concerned. Only economic considerations are to be relevant to their decisions. Therefore, I propose to continue to treat requests for loans from these countries in the same manner as applications from other members.¹³⁰

In December 1966, the General Assembly passed a further resolution calling for the withholding of assistance of any kind to South Africa and Portugal.¹³¹ In addition, the U.N. Legal Counsel forwarded to the General Counsel of the World Bank a memorandum of the U.N. Secretariat asserting that the "political affairs" provision in the World Bank's charter only prohibited the Bank from interfering in the internal political affairs of a member. That provision should not, according to the U.N. Secretariat's memorandum, be interpreted as requiring the World Bank to consider nothing but the economic facts relevant to a particular loan—obliging it, in other words, to disregard any other material factors such as the international conduct of a member country and its repercussions upon international peace and security.¹³²

In reply, the General Counsel of the World Bank forwarded to the United Nations a memorandum commenting on the U.N. Secretariat's memorandum.¹³³ The World Bank memorandum disagreed

129. Consultation with the International Bank for Reconstruction and Development—Report of the Secretary General, 1967 U.N. Jurid. Y.B. 109, 110-11, U.N. Doc. ST/LEG/SER.C/5.

130. *Id.* at 112.

131. *Id.* at 109.

132. *Id.* at 115-18.

133. *Id.* at 121-31.

with the U.N. Secretariat's interpretation of the "political affairs" provision, asserted that the Bank had to avoid involvement in all the political affairs of its member countries, and re-emphasized that the Bank could only consider relevant economic factors in making loans.¹³⁴ The World Bank memorandum drew upon the history of the "political affairs" provision and contested the suggestion that the Bank had, by any subsequent contrary practice, limited itself to avoiding interference only in the internal affairs of a state. In this respect, the memorandum pointed out that there could be no modification-by-practice of the limitations imposed by the World Bank charter without formally amending that charter.¹³⁵ The memorandum also drew on functional considerations relevant to the World Bank charter, noting that a failure to observe the "political affairs" provision would seriously undermine its efforts to encourage the investing public to put money into World Bank securities on the understanding that economic, not political, considerations would govern the Bank's lending decisions.¹³⁶

Thus the World Bank, in the face of pressure to take action that would have amounted to a partial suspension of Portugal and South Africa, rejected the argument that it had the authority to deny financial assistance on grounds not specified in its charter.¹³⁷

d. United Nations General Assembly and South Africa (1968)

In 1968, a proposal was made to the U.N. General Assembly to suspend South Africa from membership in the United Nations Conference on Trade and Development (UNCTAD). Expelling South Africa would have constituted suspension of one of the rights of a member of the United Nations—the right to membership in a U.N. subsidiary organ.¹³⁸ The U.N. Legal Counsel advised, however, that the proposed action, prompted by political and moral pressure against the South African government's apartheid policies, faced legal imped-

134. *Id.* at 123-24.

135. *Id.* at 125-29.

136. *Id.* at 131.

137. This instance is also referred to in Ibrahim I. Shihata, *The World Bank in a Changing World* 77-78, 103-04 (1991). The IMF apparently rebuffed the same type of external pressure in 1982. In October 1982, the U.N. General Assembly specifically requested that the IMF refrain from granting financial assistance to South Africa. G.A. Res. 2, U.N. GAOR Special Committee Against Apartheid, 37th Sess., U.N. Doc. A/Res/37/2 (1982). In November 1982, the Executive Board nevertheless approved a stand-by arrangement for South Africa. See International Monetary Fund, 1983 Ann. Rep. 89.

138. See *Contemporary Practice of the United States Relating to International Law*, 63 Am. J. Int'l L. 312, 332-33 (1969) [hereinafter *Contemporary Practice*].

iments. He reasoned that procedures for the suspension of a member from an organ open to the general membership were laid down exclusively in article 5 of the U.N. Charter, which permits suspension only through joint action by both the Security Council and the General Assembly.¹³⁹ He contended that had the drafters of the Charter intended to curtail membership rights in a manner other than those provided for in articles 5, 6, and 19 of the Charter, they would have so specified.¹⁴⁰ The General Assembly rejected the proposed suspension,¹⁴¹ apparently underscoring the view that the United Nations had no implied power to impose an exclusionary sanction other than those specified in the U.N. Charter.

e. United Nations General Assembly and South Africa (1970)

In 1970, the U.N. General Assembly rejected the credentials of the South African delegation. An attempt was made, on the basis of this rejection of credentials, to bar South Africa from participating in General Assembly meetings. The President of the General Assembly ruled that South Africa could not be barred in this manner.¹⁴² In so doing, he relied on written advice by the U.N. Legal Counsel to the effect that: (1) the proposed rejection of credentials would amount to a suspension of a member state from the exercise of important rights and privileges of membership; (2) this type of suspension is not provided for in the U.N. Charter, because it would not satisfy the requirements of article 5 that suspension can be imposed only by a two-thirds vote of the General Assembly upon the recommendation of the Security Council; and (3) such action "would therefore be contrary to the Charter."¹⁴³ The General Assembly did not override the

139. Schermers, *supra* note 69, § 1310. Article 5 permits suspension of a member from exercise of the rights and privileges of membership if the Security Council has taken preventive or enforcement action against that member. U.N. Charter art. 5.

140. Article 6 permits expulsion of a member "which has persistently violated the Principles" contained in the Charter. U.N. Charter art. 6. Article 19 permits suspension of voting rights in the General Assembly if a member is in arrears in its financial contributions to the organization. *Id.* art. 19.

141. *Contemporary Practice*, *supra* note 138, at 332.

142. See Malvina Halberstam, *Excluding Israel from the General Assembly by a Rejection of its Credentials*, 78 *Am. J. Int'l L.* 179, 184 (1984). This 1970 ruling is often referred to as the "Hambro Ruling," after Edvard Hambro, the President of the General Assembly who made the decision. See *id.* at 184-85 n.29. As discussed above, a contrary ruling was made by the succeeding President of the General Assembly in 1974. See *supra* note 104 and accompanying text.

143. Halberstam, *supra* note 142, at 184-85 (quoting U.N. GAOR, 25th Sess., Annex, Agenda Item 3, at 3, U.N. Doc. A/8160 (1970)).

ruling of the President.¹⁴⁴

Two common elements characterize the cases surveyed above. First, in nearly every case, the effort to impose the exclusionary sanction was only one element in a larger campaign prompted by a sense of revulsion or outrage felt by other members against a particular member on moral, political, or ideological grounds. This is illustrated in part by the fact that the same small group of countries has most often been the target of such sanctions.

Second, attempts by international organizations to sanction members based on implied powers have routinely been resisted by strong legal challenges asserting the imposition of such sanctions to be *ultra vires*. Some of those challenges have been successful;¹⁴⁵ in those cases, the doctrine of implied powers was not judged to encompass the power to impose exclusionary sanctions differing from those expressly conferred in the organization's charter. Moreover, as noted above,¹⁴⁶ even in those cases in which the legal challenges were unsuccessful, no clear rule emerges supporting any such implied power.

Taken as a whole, therefore, the foregoing survey of practice reveals no general acknowledgment of the existence of an implied power of an international organization to impose exclusionary sanctions apart from those expressly provided for in its charter. In view of that fact, and given the nature of international organizations as entities of limited powers,¹⁴⁷ it may be concluded that no such power exists as a general matter under international law.

Nor does the practice of international organizations support the proposition that the IMF in particular has an implied power to impose exclusionary sanctions other than those set forth in its charter. Indeed, no case recounted above presents the combination of circumstances that would bear directly on the question of whether the IMF has an implied power to suspend the voting rights of a member country. That combination would be (i) the existence of express charter provisions authorizing a particular type of suspension; (ii) a reliance on the *same grounds* for imposing the sanction as those specified in the charter provision; but (iii) the imposition of a different *type* of exclusionary sanction from the one specified in the charter.¹⁴⁸ In

144. *Id.*

145. See *supra* notes 118-28 (ILO and South Africa), 129-37 (World Bank and South Africa and Portugal), 138-41 (United Nations and South Africa in UNCTAD), 142-44 (United Nations and South Africa in General Assembly), and accompanying text.

146. See *supra* notes 88-114 and accompanying text.

147. See *supra* note 67 and accompanying text.

148. In some cases recounted above, the organization's charter had no provision for

view of this combination of circumstances and the general practice of international organizations, it seems highly unlikely that the imposition of some different type of exclusionary sanction on the grounds of implied powers could be legally justified.

3. *Views of Legal Scholars*

Another potential source of support for a rule permitting exclusionary sanctions based on implied powers is legal scholarship.¹⁴⁹ However, while not unanimous, the commentators have generally been highly critical, on legal grounds, of the actions taken by international organizations to exclude members in circumstances or under procedures not provided for in their charters.

In a commentary from the 1960s (before most of the actions surveyed above had been taken), a leading international law scholar, Louis B. Sohn, took what is now a minority view, suggesting that an international organization might have an implied power to suspend a member under conditions not specified in the organization's charter.¹⁵⁰ Sohn reviewed several cases of exclusionary sanctions and concluded that international organizations possess numerous weapons—outright expulsion, suspension of all rights, exclusion from some activities of the organization, and other measures to make clear that a member is no longer welcome and should withdraw.¹⁵¹ He argued that “[a]ll these measures can be taken by international organizations, whether or not their own constitutions expressly provide for them. . . . Strict constitutional interpretation seems generally to have been replaced by the principle of ‘effectiveness’”¹⁵²

More recently, however, the commentators have urged a more restrictive approach. For example, one legal scholar has referred to the 1974 action taken by the U.N. General Assembly against South

suspension or exclusion. See *supra* notes 89-93 and accompanying text (OAS and Cuba); 116-17 and accompanying text (ICAO and Spain). In others, there was such a provision, and the exclusionary sanction being urged was one of the same (or similar) type as that expressly provided for, but it was sought on grounds outside the ambit of the charter. See *supra* notes 99-102 and accompanying text (ICAO and South Africa); 118-28 and accompanying text (ILO and South Africa). In still others, the type of exclusionary sanction itself was different from the one(s) provided for in the charter. See *supra* notes 129-37 and accompanying text (World Bank and South Africa and Portugal).

149. See ICJ Statute, *supra* note 85, art. 38(1)(d) (directing the ICJ to refer to “the teachings of the most highly qualified publicists” as a “subsidiary means for the determination of rules of law”); see also Greig, *supra* note 93, at 6, 47-49.

150. Sohn, *supra* note 108, at 1421.

151. *Id.* at 1387-90, 1401-03, 1412-14, 1417-19, 1420-21.

152. *Id.* at 1421. As noted below, even Sohn identified certain important limitations on the use of implied powers. See *infra* note 172 and accompanying text.

Africa as a "patently unconstitutional" action brought about by "a conniving President of the Assembly . . . , disregarding precedent and the opinion of the Legal Counsel of the United Nations."¹⁵³ Another commentator, Malvina Halberstam, has concluded likewise "that use of the accreditation process as an alternative method of suspension or expulsion is contrary to the purposes and provisions of the [United Nations] Charter."¹⁵⁴ Halberstam points out that "given the universal abhorrence for apartheid, it is not surprising that several writers have attempted to find a legal basis for the General Assembly's decision [in 1974] to exclude South Africa."¹⁵⁵ Yet she emphasizes that despite such abhorrence, "all the Western states that spoke on the question considered the Assembly's action illegal, including Australia, which believed that South Africa should be expelled and which had so voted when the matter was before the Security Council."¹⁵⁶ She notes in particular that the United States, Great Britain, and France "denounced the action as illegal."¹⁵⁷

Of the 1974 South Africa case, and of the use of implied powers generally, another legal scholar has offered the criticism that "[o]ne cannot circumvent the express conditions of a specific provision by using another procedure, in the exercise of another power, where its exercise offends the underlying principle which explains the former."¹⁵⁸ The relevant underlying principle in the South Africa case is that of "the collective control by the permanent members of the Security Council over the admission, expulsion and suspension of member states."¹⁵⁹ This principle "is the underpinning of specific rules, namely Articles 4, 5 and 6" of the United Nations Charter, and

153. Gross, *supra* note 107, at 570.

154. Halberstam, *supra* note 142, at 179. But see Farrokh Jhabvala, *The Credentials Approach to Representation Questions in the United Nations General Assembly*, 7 *Cal. W. Int'l L.J.* 615 (1977); Edward McWhinney, *Credentials of State Delegations to the U.N. General Assembly: A New Approach to Effectuation of Self-Determination of Southern Africa*, 3 *Hastings Const. L.Q.* 19 (1976). McWhinney argues that either (i) the membership articles of the U.N. Charter "have been so transformed through [practice] that the requirement of prior Security Council 'recommendation' has atrophied" and is no longer effective, *id.* at 29-30, or (ii) the South Africa credentials cases (and similar cases) do not raise questions covered by the membership articles at all but rather present an issue of the "representative quality of delegations," a matter solely in the jurisdiction of the General Assembly. *Id.* at 34-35. Thus he does not base his argument on the doctrine of implied powers.

155. Halberstam, *supra* note 142, at 187.

156. *Id.* at 190. See U.N. SCOR, 29th Sess., 1807th plen. mtg., at 26-31, U.N. Doc/S/PU. 1807 (1974).

157. Halberstam, *supra* note 142, at 191.

158. Dan Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations*, 25 *Int'l & Comp. L.Q.* 351, 379 (1976).

159. *Id.*

“it explains why *the exercise by member States of their rights and privileges under the Charter may not be suspended except under the conditions set out in Article 5.*”¹⁶⁰

Finally, in a recent comprehensive treatment of the issue of exclusionary sanctions, H.G. Schermers, a leading authority on the law of international organizations, enumerates several types of sanctions available to international organizations and reviews the practice of organizations in applying such sanctions.¹⁶¹ He offers the following observations and conclusions. First, he states, “[t]he possibility of expulsion may be considered as an implied power of every international organization to defend itself against a situation which would prevent it from functioning”;¹⁶² and indeed this explains the case of the OAS and Cuba.¹⁶³ However, according to Schermers, “[w]hen the constitution does not provide for expulsion the most appropriate way of pushing a Member out of [an] organization is to exert pressure for voluntary withdrawal,”¹⁶⁴ as was done in the cases of the ICAO and Spain¹⁶⁵ and the ILO and South Africa.¹⁶⁶ In both cases the efforts to amend the charters to provide for expulsion prompted the target state to withdraw voluntarily from the organization before the amendments took effect.¹⁶⁷

If such “pressure for voluntary withdrawal” does not succeed in pushing a member out, the question arises whether the organization can nevertheless expel the member absent authority in the charter to do so. Schermers asserts that the usual and proper answer is in the negative. “Especially in organizations of universal character the possibility to expel Members without constitutional provision seems objectionable.”¹⁶⁸ A nearly identical analysis applies to the question of suspension of membership or certain other less drastic forms of exclusionary sanctions.¹⁶⁹ “May [such lesser] sanctions be taken which are not provided for in the constitution of the organization? A strict interpretation of powers would suggest a negative answer

160. *Id.* (emphasis added).

161. Schermers, *supra* note 69, §§ 110-22, 1288-1340.

162. *Id.* § 112 (citing Rahmatullah Khan, *Implied Powers of the United Nations* 124 (1970)).

163. Schermers, *supra* note 69, § 121. See *supra* notes 89-93 and accompanying text.

164. Schermers, *supra* note 69, § 118.

165. See *supra* notes 116-17 and accompanying text.

166. See *supra* notes 118-28 and accompanying text.

167. Schermers, *supra* note 69, § 118.

168. *Id.* § 120.

169. *Id.* §§ 109, 1308-10.

. . . ,¹⁷⁰ and such a strict interpretation is the more appropriate one.¹⁷¹

4. *Synthesis: Implied Powers and Exclusionary Sanctions*

In sum, the preceding analysis of the relevant sources of international law rejects the proposition that an international organization has authority under the doctrine of implied powers to impose exclusionary sanctions apart from those expressly provided for in its charter. The practice of international organizations does not prove the existence of any such general rule. Instead, the practice strongly suggests just the opposite, that no such implied power exists. Furthermore, the weight of legal scholarship leans in the same direction. Commentators have generally criticized exclusionary actions that can be justified only on grounds of implied powers. While acknowledging that rules of custom necessarily follow behavior (for better or worse), the majority of commentators find, as a factual matter, no general implied power of an international organization to impose exclusionary sanctions.

That majority view is correct not only as a factual matter but from a policy standpoint as well. Playing fast and loose with the charter of an international organization is a bad business. If too many powers are claimed as implied powers, the charter will begin to lose its authoritative character. The charter of an international organization already represents a transfer of powers by its member states to the organization. Too flexible an application of the charter, or a departure from it altogether, can prompt a further *de facto* shift of power away from the organization itself and toward those member states with enough voting strength to carry the day.

This view is based not only on a preference for the rule of law but also on very practical considerations. As one scholar has written:

170. *Id.* § 1293.

171. *Id.* §§ 110-12, 118-20, 1293, 1312. In discussing sanctions less drastic than either expulsion or suspension of a member, Schermers points out that there are cases, such as the 1974 case of the United Nations and South Africa, in which "[t]he sanction of suspension of representation has been used . . . without express constitutional authority" through the power to approve credentials. *Id.* § 1301. But he notes that "[t]his could [only] be used as a sanction against States violating the general principle that a government must represent the entire population[.]" and not as a sanction against other violations. *Id.* He also notes that, similarly, "the competence of the organization to form its own inferior organs . . . would provide a basis for a denial of representation in those organs." *Id.* His discussion of the matter makes it clear, however, that these exceptions do not erode the principle that the sanctions of expulsion and suspension of membership require express authorization in the organization's charter, as exists in the charters of many organizations. See *id.* §§ 1305-12.

even the most loosely written documents cannot be stretched beyond a certain point without depriving them of their basic characteristic as the supreme law of the organization. . . . [E]ven rampantly nationalistic states realize that international institutions are needed to protect them against other nations' imperialism. If international institutions should constantly be abused for achieving partisan aims of a particular state or group of states, a temporary victory today might result in the crumbling of the whole structure tomorrow.¹⁷²

Had the IMF's Executive Board attempted to rely on the doctrine of implied powers to suspend the voting rights of a member country for failure to pay its overdue obligations to the IMF, it almost surely would have aroused harsh criticism. That criticism could have drawn support from the practice of other institutions, the general consensus of legal scholars, and policy considerations. Furthermore, critics could have pointed to the record of the IMF and the World Bank in urging adherence to their own charters,¹⁷³ and to the fact that neither institution had ever before attempted to impose on a member country an exclusionary sanction other than one expressly provided for in its charter.¹⁷⁴

172. Sohn, *supra* note 108, at 1423-24. For other observations on the erosion of the credibility or stature of an organization following the imposition of exclusionary sanctions without express charter authorization, see William Schaufele, Jr., *The United States and The United Nations*, 1975 *Am. Soc. Int'l L. Proc.* 114, 114-15; see also Gross, *supra* note 107, at 578-79; 1966 *U.N. Jurid. Y.B.* 163, *U.N. Doc. ST/LEG/SER.C/4*.

173. For a compelling defense of legality in the operations of the World Bank, see generally Shihata, *supra* note 137. Shihata, the World Bank's General Counsel for the past decade, notes that despite temptations to the contrary, "it has always been recognized that the Bank and its affiliates must maintain at all times consistency of their actions with their own respective basic laws." *Id.* at 2; see also *id.* at 108. For a commentary on Shihata's thesis, see John W. Head, *Book Review*, 87 *Am. J. Int'l L.* 351 (1993). For general principles said to have guided the IMF in its interpretation of its own Charter, see *Gold V*, *supra* note 59, at 16-25.

174. This is not to say that there have been no cases of reliance by the IMF on implied powers. In 1976, for example, the IMF's Executive Board established a trust fund notwithstanding the fact that the IMF Charter did not at that time (i.e., before the Second Amendment) expressly authorize the IMF to establish administered accounts whose assets and liabilities would be separate from the rest of the IMF's assets and liabilities. See *Trust Fund*, IMF Executive Board Decision No. 5069-(76/72) (May 5, 1976), reprinted in *Selected Decisions*, *supra* note 8, at 414-15; see also *Gold, Borrowing By the IMF—Ultra Vires and Other Problems*, in *International Financial Policy: Essays In Honor of Jacques J. Polak* 221 (1991) [hereinafter *Gold VI*] ("[B]efore the Second Amendment the IMF had relied on an implied power . . . to establish the Trust Fund."). Likewise, the IMF Charter contains no express provision authorizing the IMF to impose special charges on overdue financial obligations to the IMF, but in 1985 the Executive Board introduced such special charges. See

IV. THE THIRD AMENDMENT

In adopting additional remedial measures as part of its strategy to address the arrears problem, the IMF demonstrated a commendable reluctance to invoke implied powers to expand its authority to impose exclusionary sanctions. Instead, despite the difficulty of the amendment process,¹⁷⁵ the IMF proposed the Third Amendment to provide for the suspension of voting rights. Linked to the amendment, and coming into effect simultaneously with it, was a large increase in the total resources of the IMF. An examination of this linkage is necessary to understand why the IMF undertook the complicated amendment process. This part first describes the new provisions added to the IMF Charter. It then analyzes the compromise inherent in the linkage of the amendment to the financial quota increase. The final subpart evaluates the wisdom of the Third Amendment as a response to the arrears problem.

A. *The New Provisions*

In June 1990, the IMF Executive Board, prompted by a request from the Interim Committee,¹⁷⁶ recommended to the Board of Governors the text of a proposed amendment that would authorize the sus-

Charges: Special Charges on Overdue Financial Obligations to the Fund, IMF Executive Board Decision No. 8165-(85/189) G/TR (Dec. 30, 1985), reprinted in Selected Decisions, *supra* note 8, at 225-27. Gold suggests that the doctrine of implied powers might also justify the IMF's borrowing from a nonmember country. Gold VI, *supra*, at 222.

175. Amending the IMF Charter involves several procedural steps requiring approval of various entities. These are set out generally in the Charter. See IMF Charter art. XXVIII. As explained in the case of the Third Amendment, the procedure began with a recommendation of the Executive Board, which was transmitted by the Secretary of the IMF to all members of the Board of Governors. See Report on Proposed Third Amendment, *supra* note 3, at 9-10. To gain approval by the Board of Governors, the proposal required a simple majority of votes cast by the Board of Governors (assuming at least a majority of governors, exercising two-thirds of the total voting power, cast votes by a specified date). *Id.* The proposal then required another vote, this time by the member countries themselves. For acceptance at that stage, the proposal required approval by three-fifths of the total number of members, having 85 percent of the total voting power. *Id.* Each of these stages involved a detailed schedule and prescribed procedures for communications and voting. See *id.*

176. The Interim Committee, established at the 1974 Annual Meetings of the IMF, has advisory but not decision-making authority. IMF Board of Governors, *supra* note 55, at 3. It has roughly the same composition, and serves roughly the same purposes, as were envisioned for a Council, which was authorized under the Second Amendment but has never been established. *Id.* Each IMF member country or group of member countries that selects an executive director is entitled to appoint a member of the Interim Committee. International Monetary Fund, *The Role and Function of the International Monetary Fund* 20 (1985). Persons eligible to serve as members of the Interim Committee are governors of the IMF, ministers of state, or persons of comparable rank. *Id.* Meetings of the Interim Committee are usually held twice each year. *Id.* See generally Resolution of the IMF Board of Governors,

pension of voting and related rights of members with overdue financial obligations to the IMF.¹⁷⁷ The text of the Third Amendment as approved by the Executive Board, the Board of Governors, and the IMF membership is reproduced in the Annex to this Article. Although the Third Amendment makes four distinct changes to the language of the Charter, its central feature is the addition of a new clause to article XXVI, section 2, authorizing the suspension of voting and related rights of a member country that "persists in its failure to fulfill any of its obligations" under the Charter.¹⁷⁸ The new power of suspension has been inserted in the middle of what previously was a

No. 29-8 (October 2, 1974), reprinted in Selected Decisions, *supra* note 8, at 454-57. In its May 1990 meeting, the Interim Committee included the following sentence in its communique:

In order to deal with the rare cases where it is evident that a member with arrears to the Fund is persistently not cooperating with the Fund, the Committee invited the Executive Board to propose to the Board of Governors, by end May 1990, the text of an amendment of the Articles providing for suspension of voting and related rights of members that do not fulfill their obligations under the Articles.

Report On Proposed Third Amendment, *supra* note 3, at 1.

177. See generally Report On Proposed Third Amendment, *supra* note 3. For brief explanations of the Third Amendment and the related quota increase, see Dominique Carreau, *Le Troisième Amendement aux Statuts du Fonds Monétaire International et la Neuvième Augmentation de Capital*, 36 *Annuaire Français De Droit International* 654, 654-57 (1990); Geneviève Burdeau, *Du Deuxième au Troisième Amendement aux Statuts du Fonds Monétaire International: Le Problème des Arriérés*, 119 *Journal Du Droit International* 71, 75-79 (1992).

178. The change in article XXVI, section 2 can be presented by showing the full text of the provision as amended, with new material underlined and deleted material struck through:

Section 2. Compulsory withdrawal

(a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article V, Section 5 or Article VI, Section 1.

(b) If, after the expiration of a reasonable period following a declaration of ineligibility under (a) above, the member persists in its failure to fulfill any of its obligations under this Agreement, the Fund may, by a seventy percent majority of the total voting power, suspend the voting rights of the member. During the period of the suspension, the provisions of Schedule L shall apply. The Fund may, by a seventy percent majority of the total voting power, terminate the suspension at any time.

(c) If, after the expiration of a reasonable period following a decision of suspension under (b) above, the member persists in its failure to fulfill any of its obligations under this Agreement, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the Governors having eighty-five percent of the total voting power.

(d) Regulations shall be adopted to ensure that before action is taken against any member under (a), (b), or (c) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.

Compare IMF Charter art. XXVI, § 2, with Report on Proposed Third Amendment, *supra* note 3, at 12 (emphasis in original).

two-step sequence, and is available after a declaration of ineligibility and prior to a requirement of compulsory withdrawal.

The old notice requirements of article XXVI have been extended to apply to all three steps in the sequence.¹⁷⁹ Before a member country may be declared ineligible, the IMF must inform that country of the complaint against it. A separate notice, and indeed a separate complaint, is required for each of the next two steps.¹⁸⁰

Suspension of voting rights requires a decision of the Executive Board by a 70 percent majority of the total voting power. Like the notion of suspension itself, this special majority lies numerically partway between the requirement for a declaration of ineligibility and the requirement for compulsory withdrawal. Ineligibility requires only a simple majority of votes cast by the executive directors,¹⁸¹ whereas compulsory withdrawal requires a higher voting majority and a "higher" organ of the IMF—85 percent of the total voting power and a majority of the actual number of governors.¹⁸² By specifying a 70 percent majority of total voting power, and by not reserving the power of suspension to the Board of Governors, the new subsection 2(b) would permit the Executive Board to suspend a member country's voting rights over the objections of a large proportion of the IMF's total membership.¹⁸³

Although the impetus behind the Third Amendment was the problem of growing arrears,¹⁸⁴ the new provision is not limited to arrears cases. Suspension can be imposed in the case of a member's breach of any obligation under the Charter,¹⁸⁵ with certain exceptions.¹⁸⁶

In addition to the insertion of a new subsection in article XXVI, the

179. IMF Charter art. XXVI, § 2(d) (formerly section 2(c)).

180. Report On Proposed Third Amendment, *supra* note 3, at 2.

181. Article XII, section 5(c) provides that "[e]xcept as otherwise specifically provided, all decisions of the Fund shall be made by a majority of the votes cast." IMF Charter art. XII, § 5(c); see also *supra* note 55 regarding the delegated authority of the Executive Board.

182. As noted above, each IMF member country appoints a governor, but the number of votes that each governor may cast is based on the IMF's system of weighted voting. See *supra* note 56. The requirement in section 2(d) of a majority of the number of governors and not just a special majority of votes has the effect of ensuring that a member country could not be expelled upon the initiative of a minority of the IMF's member countries, even if they held the requisite 85 percent of the total votes.

183. As of November 1, 1992, a 70 percent voting majority could be achieved by a combination of 60 of the IMF's 173 members. See IMF Board of Governors, *supra* note 55, at 4, table.

184. See Report on Proposed Third Amendment, *supra* note 3, at 1.

185. Theoretically, then, the IMF Executive Board could suspend a member country for failure to carry out its obligations under article IV to "collaborate" with the IMF and other members, to provide the IMF with certain information, and to consult with the IMF regarding exchange rates; or under article VIII, section 2 to refrain from imposing exchange restrictions

Third Amendment introduces two other important but subsidiary changes: the addition of a new schedule L and the insertion of a new provision in article XII, section 3(*i*). These subsidiary changes relate, respectively, to the consequences of a suspension and the termination of a suspension.¹⁸⁷

The new schedule L, entitled "Suspension of Voting Rights," specifies five principal consequences of a suspension under the new article XXVI, section 2(*b*). First, the suspended member country cannot participate in the adoption of most types of proposed amendments to the Charter.¹⁸⁸ Moreover, the number of votes allotted to that member "will not be included in the voting power of the members accepting the proposed amendment, for purposes of the last sentence of article XXVIII(*a*) [regarding amendments to the Charter]."¹⁸⁹ The main exception to this rule arises from a special provision in article XXVIII on amendments. Article XXVIII(*b*) requires unanimous acceptance for any amendment modifying certain fundamental Charter provisions—for example, the right of a member country to withdraw voluntarily from the IMF.¹⁹⁰ Suspension of a member country would not have the effect of disallowing its participation in the adoption of an amendment requiring unanimous acceptance.¹⁹¹

Second, the suspended member country is precluded from selecting

or engaging in multiple currency practices. Thus far, however, breach of these obligations has not led to ineligibility under article XXVI, section 2(*a*).

186. Article XXIII, section 2(*f*) provides that "Article XXVI, Section 2 shall not apply because a participant [in the SDR Department] has failed to fulfill any obligations with respect to special drawing rights." IMF Charter art. XXIII, § 2(*f*); see Report On Proposed Third Amendment, *supra* note 3, at 2-3.

187. A third subsidiary change relates exclusively to the Council, if it is ever established. See Report On Proposed Third Amendment, *supra* note 3, at 14. Some of the provisions of the new schedule L, regarding consequences of a suspension, also relate to the Council. For the sake of simplicity, all references to the Council are omitted in the following discussion.

188. Specifically, the suspended member "will not be asked whether it accepts a proposed amendment and will not be counted among the members that have accepted it . . ." Report on Proposed Third Amendment, *supra* note 3, at 3.

189. *Id.* In short, the suspended member country will be disregarded for purposes of the amendment process. Any amendment will, however, apply in respect of the suspended member. *Id.*

190. IMF Charter art. XXVIII(*b*). All other amendments require, under article XXVIII(*a*), acceptance by three-fifths of the members having 85 percent of the total voting power. *Id.* art. XXVIII(*a*).

191. Report on Proposed Third Amendment, *supra* note 3, at 4. Another exception to the rule that a suspended member is precluded from the amendment process arises from the distinction between the General Department and the SDR Department. Suspension of a member does not preclude it from participating in the adoption of a proposed amendment that pertains exclusively to the SDR Department. *Id.* For an explanation of the SDR Department, see Financial Organization and Operations, *supra* note 6, at 92-101.

or participating in the selection of a governor or an executive director. The suspension affects the right of a member country to select such an official on its own or with other members of a group.¹⁹² Third, the number of votes allotted to a suspended member country cannot be cast in either of the governing bodies of the IMF—the Board of Governors or the Executive Board. Fourth, the governor, the alternate governor, and the executive director for the suspended member country cease to hold office immediately,¹⁹³ except in the case of an executive director who is elected by two or more member countries, some of whom have not been suspended.¹⁹⁴ Fifth, although a suspended member country is “disenfranchised” in most respects, it is nevertheless entitled to send a representative to attend any meeting of the Board of Governors or the Executive Board when a matter particu-

192. Report On Proposed Third Amendment, *supra* note 3, at 4. Each member country appoints a governor, but the selection of executive directors is more complex. Each of the five member countries having the largest quotas appoints one executive director. The remaining 19 executive directors are elected. Of those 19, 17 are elected by groups of countries (“constituencies”), and the other two are elected by Saudi Arabia and China, under other Charter provisions. See IMF Board of Governors, *supra* note 55, at 4; see also IMF Charter art. XII, § 3(b).

193. The alternate to the executive director for a member country is not included among those officials ceasing to hold office immediately because that official is appointed not by the member country but by the executive director himself or herself. Report on Proposed Third Amendment, *supra* note 3, at 5.

194. These rules on voting and officials are complicated by several factors. First, most but not all executive directors are “shared”—that is, elected by more than one member country. See *supra* note 192. Second, executive directors and governors of the IMF are, as a legal matter, characterized as officials of the IMF and not “representatives” of the member countries. See IMF Board of Governors, *supra* note 55. This characterization is illustrated by the fact that the only use of the term “representative” in the Charter and by-laws of the IMF appears in the context of a member country’s right to “send a representative” to attend a meeting of the Executive Board involving a matter particularly affecting that member country, if that member country “shares” an executive director with other countries and that executive director is not a national of the member country in question. See, e.g., IMF Charter art. XII, § 3(f); International Monetary Fund: By-laws, Rules, and Regulations 13-14 (45th issue 1988). Third, votes are viewed as being allotted to the member countries, not to the executive directors or the governors they select (or participate in selecting). Hence the rules are stated in terms of “votes allotted to the member,” and provisions have to be included to exclude the number of votes allotted to a suspended member country from the total number of votes to be counted for purposes of quorums and majorities. See Report on Proposed Third Amendment, *supra* note 3, at 5. Finally, elections of executive directors are regularly held every two years. IMF Charter art. XII, § 3(d). This would be important in some suspension cases. For example, should a special election for an executive director be conducted upon the suspension of one of his or her “constituents” if the regular election would take place in a few weeks anyway? Schedule L, added by the Third Amendment, uses a 90-day rule: if a regular election would occur anyway within 90 days, the executive director in whose selection the suspended member country participated may remain in office until that next regular election. Report on Proposed Third Amendment, *supra* note 3, at 6.

larly affecting that member country is under consideration.¹⁹⁵

The last sentence of the new subsection (b) states that the termination of a suspension requires the same special majority—70 percent of the total voting power—as is required for the imposition of the suspension. The other subsidiary provision that the Third Amendment adds to the Charter, inserted in article XII, section 3, prescribes how the member country can be reintegrated into a constituency following the termination of that country's suspension. These procedures effectively "re-enfranchise" the member in the sense that they assign an executive director authorized to cast that member country's votes. The member would immediately regain the right to appoint a governor and alternate governor.¹⁹⁶

Although complex in its details, the main thrust of the Third Amendment is straightforward: to supply the IMF with a new exclusionary sanction. Alarmed by the growth in arrears and concerned that the trend might gain enough momentum to undermine other members' resolve to honor their financial commitments, some of the more powerful IMF member countries, particularly the United States, saw suspension as a form of rebuke likely to deter further defaults.¹⁹⁷

B. *The Linkage of the Third Amendment with the Quota Increase*

The foregoing description of the Third Amendment tells only half of the story that unfolded between mid-1990 and late 1992. The adoption of the Third Amendment was linked to a large increase in the financial resources that member countries make accessible to the IMF. This linkage can be viewed as a compromise between two disparate views of the IMF's proper role in providing financial assistance to LDCs. One of those views supports an expansive role for the IMF, the other a much narrower one.

Financial resources made available by the IMF to its member countries derive from the amounts that countries pledge to the IMF as subscriptions. A country is not free to choose the amount of its subscription to the IMF, but instead is assigned a quota determined on the basis of economic formulas designed to reflect the relative size of the country's economy. A country's quota determines both its voting power in the IMF's governing organs (the Executive Board and the Board of Governors) and its access to the IMF's financial resources. A country is generally required to pay about 25 percent of its quota in

195. Report on Proposed Third Amendment, *supra* note 3, at 13.

196. See *id.* at 7-8.

197. See *supra* note 63; see also *infra* notes 216-18 and accompanying text.

SDRs or in certain convertible currencies; it can pay the remainder in its own currency.¹⁹⁸

In June 1990, the IMF Board of Governors adopted a resolution, recommended by the Executive Board, to increase the quota levels so as to expand the IMF's resources by 50 percent, to just over SDR 135 billion.¹⁹⁹ The Board of Governors resolution provided that the increase in quotas would not become effective until the Third Amendment came into effect.²⁰⁰ The Secretary of the IMF declared both the quota increase and the Third Amendment to have taken effect on November 11, 1992,²⁰¹ shortly after the passage of legislation in the United States authorizing U.S. funding for its share of the quota increase.²⁰²

The linkage of the Third Amendment with the quota increase represents a compromise between two competing views of the IMF's proper role. According to one view, the IMF should serve as a vehicle for the transfer of resources on terms that would take account of perceived unfairness in the current international economic order.²⁰³ Under this expansive view of the IMF's role, the IMF would change

198. International Monetary Fund, *Members' Quotas Guide Their Access to IMF Resources*, IMF Surv.—Supplement On the IMF, Sept. 1992, at 5 [hereinafter *Members' Quotas*]. For further details on IMF quotas and subscriptions, see IMF Charter art. III; see also Lawrence H. Officer, *Are International Monetary Fund Quotas Unfavorable to Less-Developed Countries? A Normative Historical Analysis*, 10 J. Int'l Money & Fin. 193 (1991); Edwards, *supra* note 2, at 12-16.

199. *Members' Quotas*, *supra* note 198, at 7. The 50 percent increase is distributed among the member countries unevenly, with some of it going to certain countries in order to bring their shares more into line with their relative positions in the world economy. For example, once the quota increase process is complete, Japan's quota will have changed from the fifth largest to the second largest, equal to that of Germany; and France and the United Kingdom will have equal quotas, tied for fourth largest. The United States will still have the largest quota. *Id.* at 6, 7. For the text of the relevant Board of Governors resolution, see IMF 1990 Annual Report, *supra* note 3, at 103.

200. IMF 1990 Annual Report, *supra* note 3, at 103; see also *Members' Quotas*, *supra* note 198, at 7. For details on the mechanics of making payments under the quota increase, see *id.*

201. International Monetary Fund, Press Release No. 92/82, Nov. 11, 1992, reprinted in IMF Surv., Nov. 30, 1992, at 366. The quota increase takes effect for each individual member country upon that country's payment of the corresponding subscription. See IMF 1990 Annual Report, *supra* note 3, at 103; see also Richard W. Edwards, *Introductory Note to IMF: Third Amendment of the Articles of Agreement Regarding the Suspension of Voting Rights*, 31 I.L.M. 1307, 1308 (1992).

202. Two pieces of legislation were involved. See Bretton Woods Agreements Act, 22 U.S.C. § 286 (1988), amended by Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992, 106 Stat. 3320, 3357 (1992) [hereinafter *Freedom Support Act*].

203. For readings reflecting various aspects of this view, see Weston, et al., *supra* note 66, at 535-38, 545-47, 558-61. See also various articles appearing in Onimode I, *supra* note 7, and in Onimode II, *supra* note 19.

its conditionality policies and would provide greater amounts of funding on more concessional terms. These terms might even include a rescheduling of repayment obligations to the IMF or an outright forgiveness of debts.²⁰⁴ Finally, this view emphasizes that the IMF should enforce "symmetry in adjustment"; that is, the IMF would take measures to ensure that rich member countries that do not need to use IMF resources and are thus not subject to conditionality per se nevertheless adhere to the same types of economic and financial requirements that the poorer member countries are obliged to follow under IMF conditionality.²⁰⁵

A competing view envisions a much narrower role for the IMF.²⁰⁶ Though useful as a source of temporary relief from the aches and pain of a competitive world economy, the IMF under this view has no business initiating transfers of wealth from rich to poor countries. To do so, particularly in the form of debt forgiveness, could scramble incentives, rewarding delinquent countries at the expense of countries demonstrating economic discipline. Furthermore, according to the narrow view, the IMF is not the best forum for coordinating key matters of economic and monetary policy. Those who espouse this view argue instead that since sovereign control over exchange rates reverted to the individual member countries following the breakdown of the par value system, such matters of policy coordination are better dealt with at the ministerial level, such as at G-7 or similar meetings.²⁰⁷

204. See International Monetary Fund, *Industrial Countries' Role in Reviving World Economic Growth Is Central*, IMF Surv., May 25, 1992, at 166, 167 (summarizing report of meeting of Group of 24 which raised the possibility of "rescheduling of overdue obligations or the payment of charges in local currency").

205. The "symmetry in adjustment" argument draws on article IV, sections 1 and 3. Article IV, section 1 enumerates what have been called "growth" and "stability" obligations of IMF member countries. IMF Charter art. IV, § 1; see Edwards, *supra* note 2, at 612-13; Polak, *supra* note 5, at 16-22. Article IV, section 3 charges the IMF with responsibility to "oversee the compliance of each member with its obligations under Section 1." IMF Charter art. IV, § 3; see also Erik M.G. Denters, *IMF Conditionality*, in *International Law and Development* 235, 237-42 (Paul de Waurt et al. eds., 1988).

206. Elements of the view summarized here appear in Driscoll, *supra* note 28, at 1; David D. Driscoll, *The IMF and the World Bank—How Do They Differ?* 3, 5-6, 10 (1988); Michael P. Dooley and C. Maxwell Watson, *Reinvigorating the Debt Strategy*, 26 *Fin. & Dev.* 8, 11 (1989); Gold I, *supra* note 5, at 14-15; Bandow, *supra* note 7; see additional sources cited in notes 215-16 *infra*.

207. The Group of 7, or G-7, consists of the United States, Japan, Germany, the United Kingdom, and France (the G-5), plus Canada and Italy. For a discussion of the role of the G-7 in international monetary affairs, see Miles Kahler, *The United States and the International Monetary Fund: Declining Influence or Declining Interest?*, in *The United States and Multilateral Institutions* 110-12 (Margaret P. Karns & Karen A. Mingst eds., 1990).

Of these two competing views, the second, narrow view of the IMF's role usually prevails within the institution. For example, despite criticism of IMF conditionality, the guidelines on conditionality have not been substantially changed since they were adopted in their current form in 1979.²⁰⁸ This policy has been defended on the grounds that a country must be prepared to adjust to all economic shocks, including those resulting not from its own policies but from the policies of other countries.²⁰⁹ Furthermore, although the merits of enhanced surveillance of the economic, monetary, and financial policies of the rich countries have been urged,²¹⁰ the prevalence of the narrow view continues to deprive the IMF of much influence over such policies. Policy coordination for the industrialized nations, such as it is, still takes place largely at the G-7 level.²¹¹

The establishment of the SAF and the ESAF²¹² may be viewed as an exception to the prevailing narrow view of the IMF's role. Even those two LDC-targeted facilities, however, came into being only after the IMF's most powerful member country, the United States, proposed the Baker Plan to encourage new loans to the countries suffering most from the debt crisis.²¹³ Likewise, only when the United States announced the Brady Plan in early 1989²¹⁴ did the IMF accept

208. Guidelines on Conditionality, Executive Board Decision No. 6056-(79/38) (March 2, 1979), reprinted in Selected Decisions, *supra* note 8, at 60. For a detailed analysis of the 1979 guidelines on conditionality, see Gold I, *supra* note 5, at 14-36. Gold notes that most of the 1979 decision was "declaratory of the practice that ha[d] emerged in the years since 1968." *Id.* at 15. For further information on the history of IMF conditionality, and for the text of the 1968 Executive Board decision relating to conditionality, see Guitián, *supra* note 7, at 15-16, 44-45. See generally Polak, *supra* note 5.

209. See Gold I, *supra* note 5, at 24.

210. For Gold's view of IMF "firm surveillance" as a means of ensuring symmetry in adjustment, see Joseph Gold, Symmetry as a Legal Objective of the International Monetary System, 12 N.Y.U. J. Int'l L. & Pol. 423, 471-77 (1980).

211. One commentator finds "that the influence of the IMF on American policy has been slight and that little change in that influence has occurred over time," and offers two explanations: (i) "[the United States] has never had an upper-tranche, high-conditionality program with the Fund," and (ii) as "gatekeeper" for U.S. relations with the IMF, the U.S. Treasury Department has been hostile to the IMF, especially during the Reagan Administration. Kahler, *supra* note 207, at 107-09.

212. See *supra* notes 15-17 and accompanying text.

213. See *supra* note 35 and accompanying text.

214. In March 1989, "[i]n a reversal of long-standing policy, the United States called for commercial banks to negotiate arrangements with debtor nations for reductions in principal and interest payments." See Head, *supra* note 7, at 23; see also International Monetary Fund, World Bank Report Reviews Initiatives to Reduce Debt and Debt Service, IMF Surv., Jan. 8, 1990, at 13. Named after then-Secretary of the Treasury Nicholas Brady, the Brady Plan was intended to strengthen the strategy of dealing with the problems of heavily indebted countries by reducing both the principal and the interest obligations of such countries. *Id.*

a role in the encouragement of debt and debt-service reduction.²¹⁵ That reduction did not extend to IMF loans and repurchase expectations, and the IMF thus far has not entertained the possibility of forgiveness of those obligations. Thus, even those policies that have expanded the IMF's role in assisting debt-ridden LDCs originated outside the IMF and depended on the United States' endorsement for their effectiveness.

These factors are relevant in the linkage of the Third Amendment with the quota increase. That linkage, like the Third Amendment itself, was largely the handiwork of the United States. U.S. support for the quota increase was lukewarm at best in the latter part of the 1980s,²¹⁶ and the United States eventually conditioned its support for the increase on its linkage with the Third Amendment.²¹⁷ Indeed, in submitting the quota increase legislation to Congress, the Bush administration boasted of its success in linking the quota action to the Third Amendment.²¹⁸ In contrast, most LDCs, along with many other countries, accepted the Third Amendment grudgingly, as a

215. International Monetary Fund, World Bank Report Reviews Initiatives to Reduce Debt and Debt Service, *supra* note 214, at 13; see also Jeffrey Sachs, The IMF and the Developing Country Debt Crisis, 12 *Int'l Rev.* 14, 14-17 (1990). According to Sachs, IMF management apparently "was prepared to lead the Fund in the more constructive direction of debt reduction" well before March 1989 but "encountered enormous resistance from the US Treasury." *Id.* at 15. Sachs argues that "[t]he IMF fell short of meeting [its] responsibility" to "advise the world community clearly as to what is needed to restore financial and economic stability, even in the face of resistance by the US Treasury." *Id.*

216. See, e.g., Marjorie Deane, Degree of US Support Will Determine Future of IMF, *Financier*, Nov. 1989, at 13, 15 (noting that "the US, the largest [IMF] shareholder, . . . has resorted to all sorts of delaying tactics on the quota increase"). The United States was the last of the G-7 countries to approve the quota increase. Bureau of National Affairs, Bush Signs Foreign Appropriations Bill with IMF Quota Increase Funds, *BNA Int'l Fin. Daily*, Oct. 8, 1992, available in LEXIS, Nexis Library, BNAIFD file. For an assessment of the need for a quota increase, see *The International Monetary Fund in a Multipolar World: Pulling Together* 27-28 (Catherine Gwin & Richard E. Feinberg eds., 1989).

217. See Inter Press Service, Finance: IMF Quota Increase Takes Effect, Nov. 11, 1992, available on LEXIS, Nexis Library, INPRES file [hereinafter IMF Quota Increase] (stating that the Third Amendment, "which was opposed by most developing countries, was insisted on by the United States, which made its approval a condition for Washington's backing of the quota increase").

218. See Letter from U.S. Treasury Secretary Nicholas F. Brady to Dan Quayle, President of the Senate, March 26, 1991, in 137 *Cong. Rec.* S4459 (1991) (stating that "[a]s part of the quota increase, the United States gained agreement on a strengthened IMF arrears strategy" which includes a Charter amendment "permitting the suspension of the voting rights and representation privileges of members who fail to fulfill their obligations to the IMF"); see also H.R. Rep. No. 657, 102d Cong., 2d Sess. 53 (1992) (noting that the seriousness of the arrears to the IMF "prompted a major Administration initiative during the quota negotiations to develop a stronger strategy to encourage payment").

price of gaining the quota increase.²¹⁹

C. *The Wisdom of the Third Amendment*

Unfortunately, the Third Amendment is a short-sighted response to the problem of arrears. Of the two parts of the package finally accepted in late 1992—the Third Amendment and the quota increase—only the latter addressed the causes of the problem. The Third Amendment addressed only the most visible *symptoms* of the problem, and in a manner that seems unproductive and perhaps even counterproductive.

First, it is unclear what useful purpose such an exclusion could possibly serve. Although member countries' arrears to the IMF have grown to SDR 3.5 billion,²²⁰ the total voting power of the ten member countries in arrears as of April 1992 amounted to only 2.16 percent of the total IMF votes.²²¹ Even if all of them were suspended under the new article XXVI, section 2(b)—highly unlikely, since the IMF had approved "rights accumulations programs" for three of them as of April 1992²²²—the overall effect on the voting structure of the IMF would be insignificant. In short, disenfranchising the member countries in arrears would have no "cleansing" effect, since those countries have almost no influence to begin with.

The only possible benefit, then, of the Third Amendment would seem to be the addition of another form of rebuke and embarrassment of a member country for disregarding its financial obligations. If that is the case, the result is not worth the two-and-a-half-year effort. As noted above, the IMF's "remedial and deterrent measures" available

219. IMF Quota Increase, *supra* note 217. Initial LDC opposition to the Third Amendment appeared, among other places, in International Monetary Fund, *Ministers Cite Sluggish Country Growth as Potential Threat to Third World Stability*, IMF Surv., May 21, 1990, at 154, 155 [hereinafter *Ministers Cite Sluggish Country Growth*] (excerpting press communique of the Group of 24 stating that "Ministers . . . stressed that the proposal for suspension of voting and representation rights of those members [having arrears to the IMF] will not serve a useful purpose and is not acceptable").

220. See *supra* note 38 and accompanying Table.

221. As of April 30, 1992, Iraq held 5,290 votes (0.522 percent of the total IMF voting power of 1,013,636), Liberia 963 votes (0.095 percent), Peru 3,559 votes (0.351 percent), Sierra Leone 829 votes (0.082 percent), Somalia 692 votes (0.068 percent), Sudan 1,947 votes (0.192 percent), Viet Nam 2,018 votes (0.199 percent), Zaïre 3,160 votes (0.312 percent), and Zambia 2,953 (0.291 percent). See IMF 1992 Annual Report, *supra* note 4, at 136-39. Cambodia did not participate in the 1992 regular election of executive directors, so a suspension of voting rights would have little effect on it. See IMF Board of Governors, *supra* note 55, at 4 n.3. Cambodia has about 500 votes, or 0.049 percent of the total. See *id.*

222. Overdue Financial Obligations, *supra* note 39, at 24; see also *supra* note 47 and accompanying text.

to combat arrears already include several forms of public rebuke, including ineligibility and a published declaration of noncooperation.²²³ Any extra deterrent effect that suspension might provide pales in comparison to the time and effort involved in amending the Charter, an exercise usually reserved for matters of especially great importance.²²⁴

Beyond the time and effort involved, the insistence of the United States on adopting the Third Amendment surely entails other high political costs as well. The IMF Charter, like any treaty, resembles a contract in many respects. Because of the IMF's weighted voting regime,²²⁵ one of the parties to that contract—the United States—has significantly more control over the organization than other parties, especially those many LDCs that disliked the Third Amendment.²²⁶ Perhaps this is fair. After all, the United States provides a large proportion of the IMF's credit resources.²²⁷ Nonetheless, by using its dominant bargaining position to insist on the Third Amendment over the protests of many other IMF member countries, the United States invites charges that the IMF Charter amounts in practice to a contract of adhesion, to which a state must consent in order to survive,²²⁸ and to which the United States can make unilateral modifications over the objections of many of the other contracting parties.

223. See *supra* note 49 and accompanying text.

224. As noted above, the only other two amendments to the IMF Charter were undertaken to create a new international reserve asset, the SDR, and to reflect a radically changed international monetary system following the breakdown of the par value system. See *supra* note 2.

225. For a description of weighted voting in the IMF, see *supra* note 56.

226. See *Ministers Cite Sluggish Country Growth*, *supra* note 219, at 13.

227. As pointed out in the hearings before the United States Congress when the increased U.S. quota was under consideration, the quota commitment does not constitute a contribution to the IMF. See *Freedom for Russia and Emerging Eurasian Democracies and Open Market Support Act of 1992*, H.R. Rep. No. 569, 102d Cong., 2d Sess. 7 (1992), reprinted in 1992 U.S.C.A.N. 2703, 2745-46 ("Transactions between the United States Treasury and the IMF are, by definition, monetary exchanges through which the United States receives an international reserve asset comparable to a convertible foreign currency. These monetary exchanges are not budgetary receipts or expenditures."). The United States can, if it wishes, draw on its quota, and has in fact done so a couple of dozen times, most recently in 1978. H.R. Rep. 657, *supra* note 218, at 49. Beyond that, U.S. participation in the IMF during the 1980s reportedly resulted in a net financial gain for the United States of \$628 million per year as a result of interest that other member countries pay for the use of IMF resources and through favorable exchange rate adjustments. Senate Comm. on Foreign Relations, *Freedom for Russia and Emerging Eurasian Democracies and Open Market Support Act of 1992*, S. Rep. No. 292, 102d Cong., 2d Sess. 5 (1992).

228. For the argument that states, especially LDCs, are forced by circumstances to accept the terms of the IMF Charter (especially conditionality) in order to survive, see *Denters*, *supra* note 205, at 237.

Whether or not this perception of U.S. influence over the terms of the IMF Charter is accurate, the Third Amendment experience is bound to deepen the frustration that many LDCs and other observers already feel over the seemingly one-way relationship between the IMF and its most powerful member country.²²⁹ That relationship is perceived to embody a fundamental unfairness: whereas LDCs are obliged to follow IMF economic policy prescriptions because of their need for external financing, the United States can continue to disregard such prescriptions.²³⁰

The time, effort, and political goodwill spent on the Third Amendment could have been applied more productively to finding a long-term solution for the problems of deeply indebted countries that, through lack of resources or lack of will, fail to honor their international loan commitments. Numerous proposals, all beyond the scope of this article, have surfaced in recent years for dealing effectively with the problems of debt-ridden countries and their people.²³¹ The Third Amendment is not a move in that direction. Instead of creating new sanctions, the U.S. government should work toward new solutions.

V. CONCLUSION

The foregoing examination of the problem of arrears, the question of implied powers, and the Third Amendment prompts two main conclusions. First, going to the effort of formally amending the IMF Charter was preferable, as a legal matter, to a claim that the IMF has an implied power to suspend a member country's voting rights. Although international organizations do have some implied powers, a survey of the practice of international organizations, the views of legal scholars, and the policy issues involved indicates that there exists no

229. For a manifestation of that frustration, see Weston et al., *supra* note 66, at 535-39, 558-61 (2d ed. 1990).

230. See *supra* note 211 (United States' disregard for IMF policy prescriptions).

231. See, e.g., George Macesich, *World Debt and Stability* 8-14 (1991) (surveying various proposals, including economic adjustment by creditor countries, debt forgiveness, flexibility in banking regulations, changes in the framework of debt negotiations, massive refinancing operations, transfer of bank claims to new international organizations, increased involvement of the Bank for International Settlements, a system of guarantees, etc.); Brett H. Miller, Note, *Sovereign Bankruptcy: Examining the United States Bankruptcy System as a Forum for Sovereign Debtors*, *L. & Pol'y Int'l Bus.* 107, 108-09 (identifying proposed solutions to LDC debt and suggesting the application of bankruptcy principles); Santos, *supra* note 19, at 89-110 (discussing debt reduction plans and bankruptcy principles). Proposals aired in the context of arrears to the IMF include those now being implemented under the heading of "intensified collaboration," the centerpiece of which is the "rights approach." See *supra* notes 46-48 and accompanying text.

general implied power of an international organization to impose exclusionary sanctions apart from those expressly provided for in the organization's charter. Therefore, the IMF could not have legally imposed a suspension of voting and related rights without an amendment of the IMF Charter. From that perspective, the Third Amendment was necessary.

Second, the Third Amendment was, from a different perspective, neither necessary nor wise. Adding the threat of suspension to the various forms of rebuke already at the disposal of the IMF seems unlikely to persuade recalcitrant countries to clear their arrears to the IMF, especially considering how little voting power those countries represent in the institution. Nor does the new suspension power offer any means of overcoming the deeper economic and political problems that underlie those arrears. In short, the Third Amendment represents only a *reaction* to the problem of growing arrears, not a *solution* to it. Moreover, by insisting on the Third Amendment, the U.S. government gives the appearance of not taking seriously the complaints of many other countries and commentators that the United States uses the IMF to enforce against other countries economic discipline from which the United States itself remains conspicuously exempt.

ANNEX
THIRD AMENDMENT OF
THE ARTICLES OF AGREEMENT OF
THE INTERNATIONAL MONETARY FUND

The Governments on whose behalf the present Agreement is signed agree as follows:

1. The text of Article XXVI, Section 2 shall be amended to read as follows:

(a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article V, Section 5 or Article VI, Section 1.

(b) If, after the expiration of a reasonable period following a declaration of ineligibility under (a) above, the member persists in its failure to fulfill any of its obligations under this Agreement, the Fund may, by a seventy percent majority of the total voting power, suspend the voting rights of the member. During the period of the suspension, the provisions of Schedule L shall apply. The Fund may, by a seventy percent majority of the total voting power, terminate the suspension at any time.

(c) If, after the expiration of a reasonable period following a decision of suspension under (b) above, the member persists in its failure to fulfill any of its obligations under this Agreement, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the Governors having eighty-five percent of the total voting power.

(d) Regulations shall be adopted to ensure that before action is taken against any member under (a), (b), or (c) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.

2. A new Schedule L shall be added to the Articles, to read as follows:

Schedule L

Suspension of Voting Rights

In the case of a suspension of voting rights of a member under Article XXVI, Section 2(b), the following provisions shall apply:

1. The member shall not:

(a) participate in the adoption of a proposed amendment of this Agreement, or be counted in the total number of members for that purpose, except in the case of an amendment requiring acceptance by all members under Article XXVIII(b) or pertaining exclusively to the Special Drawing Rights Department;

ipated prior to the suspension, or his successor elected in accordance with paragraph 3(c)(i) of Schedule L or with (f) above, shall be entitled to cast the number of votes allotted to the member. The member shall be deemed to have participated in the election of the Executive Director entitled to cast the number of votes allotted to the member.

4. The following shall be added to paragraph 5 of Schedule D:

(f) When an Executive Director is entitled to cast the number of votes allotted to a member pursuant to Article XII, Section 3(f)(v), the Councillor appointed by the group whose members elected such Executive Director shall be entitled to vote and cast the number of votes allotted to such member. The member shall be deemed to have participated in the appointment of the Councillor entitled to vote and cast the number of votes allotted to the member.