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Borrowing by the International Monetary Fund from Nonofficial Lenders

SYMPOSIUM
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<u>Editor's Note</u>: *International financial law has increased in importance dramatically in recent years and will undoubtedly continue to do so as national economies and financial systems become more interdependent and as international organizations expand their roles or are created to serve new functions. This Symposium, Part I of which appears in this issue, will address numerous aspects of international financial law from a variety of perspectives.*

The two articles presented here examine such issues from the perspective of international organizations. **Joseph Gold** *analyzes the potential for filling a portion of the International Monetary Fund's financing needs by borrowing from unofficial lenders, i.e., from the private market. He discusses the IMF's authority to borrow in that fashion, as well as various operational, legal, and policy issues related to such borrowings.* **Ibrahim F.I. Shihata's** *article describes a recent development of potentially great significance—the opening for signature of a convention to establish a new international development institution, the Multinational Guarantee Agency, which is designed to encourage investments to and among developing countries by issuing guarantees against noncommercial risk and engaging in various promotional activities.*

Part II of the Symposium, to appear in the next issue, will contain eight articles relating to financing activities in the United States or by U.S. parties, and to new forms of financing, refinancing, and restructuring.

Sir Joseph Gold*

Borrowing by the International Monetary Fund from Nonofficial Lenders

I. The IMF's Power to Borrow

A. Origin of IMF's Power to Borrow

The International Monetary Fund (IMF) has always had broad powers to borrow. The power is conferred now by Article VII, Section 1 of the present Articles.[1]

> *Measures to replenish the Fund's holdings of currencies*
> The Fund may, if it deems such action appropriate to replenish its holdings of any member's currency in the General Resources Account needed in connection with its transactions, take either or both of the following steps:
> (i) propose to the member that, on terms and conditions agreed between the Fund and the member, the latter lend its currency to the Fund or that, with the concurrence of the member, the Fund borrow such currency from some other source either within or outside the territories of the member, but no member shall be under any obligation to make such loans to the Fund or to concur in the borrowing of its currency by the Fund from any other source;
> (ii) require the member, if it is a participant, to sell its currency to the Fund for special drawing rights held in the General Resources Account, subject to Article XIX, Section 4. In replenishing with special drawing rights, the Fund shall pay due regard to the principles of designation under Article XIX, Section 5.

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1. International Monetary Fund Articles of Agreement, amended Apr. 1, 1978, 29 U.S.T. 2203, T.I.A.S. No 8937 [hereinafter cited as 1978 IMF Articles].

The IMF had a similar power to borrow under Article VII, Section 2 of the original Articles.[2]

The IMF's present power to borrow is referred to above as similar to its original power, and not the same. The reason for this distinction is that the words "concurrence" and "concur" in the present text have been substituted for "approval" and "approve" in the original text. The change has nothing to do with aesthetics. In the usage of the Articles, if a member's approval is necessary, there is no implication that the member must exercise a benevolent discretion in favor of approval. The general standard of good faith in the execution of treaties is the guidance that contracting parties receive under public international law. "Concurrence," however, has a different connotation in the usage of the Articles: it is that the member will exercise a favorable discretion in favor of concurrence.[3] The discussion of concurrence will be resumed after the role of borrowing by the IMF is considered.

The IMF's power to borrow is related to the contest between John Maynard Keynes and H. D. White on the character of the international organization that they were proposing. Keynes's proposal for an International Currency (or Clearing) Union contemplated that the Union would be able to issue a new international reserve asset, bancor, to meet the balance of payments needs of members, and that members in balance of payments surplus would be bound to receive bancor without limit from members in balance of payments deficit.[4] White, fearing the unlimited burden that the United States might have to assume under Keynes's Union, insisted on an organization in which each member's potential burden would be limited to a defined subscription.[5]

The IMF's power to borrow can be considered a compromise between the two approaches. The United States Treasury, commenting in June 1944 on the proposal for the IMF, explained that the original size of the IMF's resources would probably be adequate but that the IMF would be able to increase its resources "if this should become necessary and desirable."[6]

2. International Monetary Fund Articles of Agreement, Dec. 27, 1945, 60 Stat. 1401, 3 Bevans 1351 [hereinafter cited as 1945 IMF Articles].

3. *See* J. GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS 325 (1979) [hereinafter cited as GOLD, SELECTED ESSAYS].

4. THE INTERNATIONAL MONETARY FUND 1945–1965, TWENTY YEARS OF INTERNATIONAL MONETARY COOPERATION, VOLUME III: DOCUMENTS 3–36 (J. Horsefield ed. 1969).

5. *Id.* at 37–96. Original quotas were negotiated at the Bretton Woods Conference and set forth in Schedule A of the Articles. Adjustments in a member's quota could not be made without the member's consent. This rule could not be changed by amendment unless every member accepted the amendment.

6. *Id.* at 142; see also *id.* at 144. The Treasury explained that there would not be "provision for transferable currency or deposits in terms of a new or special monetary unit. The Fund does not have any means of creating, holding or transferring currencies or deposits which do not

The rationale that the United States commentators gave for the power to borrow was consistent with the attitude to be expected of a country that saw itself as likely to be the major country in surplus in its balance of payments. The rationale expressed by Keynes is more consistent with the attitude of the representative of a country that expected to be in balance of payments deficit and that might have to make substantial use of the IMF's resources. Keynes explained the power to borrow as a means of increasing the IMF's resources if waivers were granted enabling members to make outstanding use of the IMF's resources beyond a total equivalent to the member's gold subscription and its quota. He made this point in a letter to the distinguished economist Joan Robinson, in which he referred to Article V, Section 4, the provision that authorized the IMF to grant waivers permitting abnormal uses of its resources. The passage quoted below may be a little confusing, because it employs the words "borrow" and "borrowing" for a member's use of the IMF's resources and also for the IMF's power to borrow to replenish its holdings of currency. Furthermore, he used the word "quota" to refer to the maximum outstanding use that a member could make of the IMF's resources without waiver of the normal cumulative limit:

> The quotas are a minimum, not a maximum. The U.S. representatives were always eager to explain to us that that is strictly how they regarded them. There is nothing to prevent the Fund from allowing debtor countries to borrow more than their quotas. All this appears in V(4). Most people have not realised, I think, that this is the main purpose of that section. This also can be done by a majority vote. Thus, if the Fund were to decide to borrow a scarce currency, it could at the same time, increase the borrowing power of members under the section just mentioned. Thus the act of borrowing does not necessarily lead to an exhaustion of quotas.[7]

Keynes saw the power to borrow in relation to another aspect of the IMF that was of cardinal interest to him from the viewpoint of someone who spoke for a country that expected to be in balance of payments deficit. The IMF's power to replenish its holdings of a currency by borrowing was not confined to the replenishment of a currency formally declared "scarce" by the IMF. If a formal declaration were made, the IMF would ration its holdings of the scarce currency in conducting its transactions with members, and the declaration would authorize members to discriminate against the member issuing the scarce currency. Keynes saw the "scarce currency clause," which had been proposed by the United States, as an outstanding action of monetary statesmanship, because it implied that members in

originate with the member countries themselves." *Id.* at 153–54. The power to borrow was referred to again as a means of providing the IMF with additional resources "without the indirect compulsion inherent in the creation of credit."

7. THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES, VOL. XXVI: ACTIVITIES 1941–1946, SHAPING THE POST-WAR WORLD, BRETTON WOODS AND REPARATIONS 130 (D. Moggridge ed. 1980) [hereinafter cited as KEYNES, VOL. 26].

balance of payments surplus would share the burden of achieving the adjustment of balances of payments with members in balance of payments deficit.[8] Keynes saw the IMF's power to borrow as a means by which the member that made the loan or loans could fend off a declaration of scarcity. In his letter to Joan Robinson, he added this sentence to the passage quoted above: "In fact, I should expect the Fund to be very chary of borrowing scarce currencies, except to give the scarce currency country a breather to find another way out."[9]

B. Aspects of Borrowing

It is appropriate now to return to the discussion of "concurrence," and of other aspects of borrowing under the present Article VII, Section 1. The IMF has no power to compel members or others to lend to it, in contrast to the power it has always had to compel a member to sell its currency to the IMF. The *quid pro quo* for compulsory sales to the IMF has always been the principal reserve asset of the international monetary system at the time of replenishment in this way. Originally, the asset was gold, but since the legal dethronement of gold by the Second Amendment, the asset is the special drawing right (SDR). If, then, the IMF wishes to borrow, it must negotiate with the potential lender. For the purpose of this article, it is of particular interest that the IMF is authorized to borrow a member's currency from the member itself or "from some other source either within or outside the territories of the member."[10] This authority can be exercised by borrowing a member's currency from another member or even a nonmember or another international organization. But the IMF is authorized also to borrow from any private lender within the territory of the member whose currency is to be borrowed or from any private lender in other countries. Here, then, is ample authority for the IMF to enter into transactions with private parties.

Article VII, Section 1 makes the distinction, already referred to, between borrowing a member's currency from the member itself and borrowing the currency from some other source. In either form of borrowing, the IMF must reach agreement with the lender on the terms of the loan, but the concurrence of the member that issues the currency to be borrowed must be obtained if the lender is not the member itself.[11] The resonance of the word

8. *Id.* at 189, 192; see also R. Harrod, The Life of John Maynard Keynes 544–45 (1951).
9. Keynes, Vol. 26, *supra* note 7, at 130–31.
10. 1978 IMF Articles *supra* note 1, Art. VII, § 1.
11. The concurrence is necessary of only the member whose currency is to be received by the IMF in its borrowing. The fact that the IMF borrows on the basis of the SDR as the unit of account does not mean that the concurrence of the members issuing the currencies that compose the SDR valuation basket is necessary by virtue of the composition. If the borrower

"concurrence," however, is, as explained already, that the member will lean in favor of concurrence if the lender is not the member itself. The member's concurrence, and formerly its approval, have been necessary because the member's own interests may be involved when its currency is borrowed in financial markets. Therefore, the member is not bound to concur. The provision is explicit that "no member shall be under any obligation to make such loans to the Fund or to concur in the borrowing of its currency by the Fund from any other source."[12]

Keynes noted, in emphasizing the contribution that the power to borrow made to the flexibility of the IMF, that the power could be exercised by "a majority vote."[13] He meant the basic majority for taking decisions of the IMF and not a special majority. The basic majority is a majority of the votes cast in the Executive Board, which could be less even than a majority of the total voting power.[14] The decision, however, is simply a decision of the IMF to borrow and does not compel anyone to lend, which helps to explain why so modest a majority was deemed sufficient.[15] The safeguard for a member that is a potential lender is not the majority for decisions to borrow, but the member's freedom to agree whether or not to lend. Furthermore, if a member's currency is to be borrowed from some source other than the member itself, the safeguard for the member is the necessity for its concurrence. The member that regards the borrowing of its currency as detrimental to its interests can refuse to concur.

Keynes was prescient in assuming that the IMF would borrow if it were granting waivers of the normal limit on the cumulative outstanding use that members may make of the IMF's resources. In recent years, the IMF's policies have permitted members to make an outstanding use as high as six hundred percent of quota, and even this amount was net of outstanding use under some policies and certain repurchases (repayments) that would become payable.[16] With use of this magnitude, borrowing was inevitable. In one respect, however, Keynes was not clairvoyant. At no time has borrowing been seen to be the means to head off formal declarations of the scarcity of the currencies borrowed. If borrowing had not been arranged, it is highly unlikely that the IMF would have made these declarations. The members that issued the currencies borrowed by the IMF were not pursuing policies that were so flagrantly in disregard of the interests of other members that formal declarations of scarcity would have been justifiable. In any event, the IMF has demonstrated a distaste for invoking the scarce currency clause and authorizing the discrimination that a declaration permits.[17]

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has a choice of the currencies that it can draw under an agreement, the concurrence of the members issuing all the currencies will be necessary.

12. 1978 IMF Articles, *supra* note 1, Art. VII, § 1.

13. KEYNES, VOL. 26, *supra* note 7, at 130.

C. IMF's Exercise of Power to Borrow

The IMF has borrowed a total amount equivalent to approximately SDR $29 billion in the period from December 2, 1964, when the IMF received its first loan, to September 30, 1985. Substantial amounts remain on call under existing agreements. The IMF's power to borrow has inspired various Managing Directors of the IMF to take initiatives that led to decisions of the Executive Board designed to deal with new or threatening international developments. Mr. Jacobsson's initiative produced the standing General Arrangements to Borrow (GAB), intended originally to protect the international monetary system in the new conditions of convertibility and greater freedom for exchange markets. Mr. Witteveen took the initiative to borrow in the critical conditions that followed the increased prices of oil imports. Mr. de Larosière acted to raise borrowed money to help finance the Policy on Enlarged Access, adopted by the IMF as balance of payments deficits reached unprecedented proportions.

Borrowing by the IMF has been preferred to an enlargement of quotas equivalent to the amounts that have been borrowed, as supplements to the adjustments in quotas that have been made. The virtue of borrowing is that a need for resources that it is hoped will not be permanent can be met without distorting the structure of quotas and voting power. Distortion would be likely because relatively few currencies are needed. They are the currencies of members in a strong balance of payments and reserve position. The negotiation of increases in quotas (and thus of subscriptions[18]) is affected to some extent by political considerations. As a result, numerous subscriptions are increased that provide the IMF with holdings of currencies it cannot justifiably use in its transactions in accordance with its economic policies.

All of the IMF's borrowing so far has been negotiated with official lenders. They have been diverse in character, encompassing members and their monetary authorities, the nonmember Switzerland and its central bank, a regional authority in a member country, and the Bank for Interna-

14. 1945 IMF Articles, *supra* note 2, Art. XII, § 5(b); 1978 IMF Articles, *supra* note 1, Art. XII, § 5(c).

15. The majority can be compared with the majority necessary for decisions to allocate SDRs, a power that resembles the creation by the IMF of reserve assets, which Keynes proposed and White resisted. The majority for decisions to allocate SDRs is 85% of the total voting power.

16. The maximum amounts are being reduced, but they are still multiples of quota. International Monetary Fund, *Selected Decisions of the International Monetary Fund and Selected Documents, Eleventh Issue* at 42 (Washington, Apr. 30, 1985) [hereinafter cited as *Selected Decisions*].

17. Gold, Selected Essays, *supra* note 3; at 160–63, 175–76, 185–86, 204–12; J. Gold, 2 Legal and Institutional Aspects of the International Monetary System 91–92, 260, 294–97 [hereinafter cited as Gold, 2 Selected Essays].

18. A member's subscription is equal to its quota (Art. III, §§ 1 & 3).

tional Settlements. No attempt has been made to borrow from a private lender, although numerous proposals have been made that the IMF should borrow in this way. Most often, these proposals have been advanced by nonofficial commentators, but sometimes official entities have commented favorably on the possibility of this form of borrowing. For example, the communiqué issued on September 27, 1981 by the Interim Committee of the IMF's Board of Governors contained the following sentence:[19]

> As regards possible borrowing by the Fund in the private markets, the Committee reaffirmed its view that this possibility should remain open in the light of the evolution of the Fund's commitments and available resources.

This statement was a little warmer than the corresponding statement in the Interim Committee's communiqué of September 29, 1980:[20]

> In view of the magnitude of the expected need, the Committee agreed that the Executive Board and the Managing Director should make, as soon as possible, the necessary arrangements to enable the Fund to borrow from various potential sources of financing, not excluding a possible recourse to the private markets if this were indispensable.

Paragraph 13 of the communiqué of September 25, 1981 of the 23rd meeting of the Intergovernmental Group of 24 [Developing Countries] on International Monetary Affairs[21] included the following sentence:[22]

> Pending the Eighth General Review of Quotas, Ministers expressed willingness to endorse a program adequate to meet the Fund's liquidity needs, from official sources and, if necessary, from private sources, with the Fund borrowing and lending on appropriate terms as a financial intermediary.

(The reference to borrowing from private sources had not been included in a similar sentence on borrowing in the Group's communiqué of September 28, 1980.[23]) The report of the Deputies of the Group of 24 on *The Functioning and Improvement of the International Monetary System*, dated August 21, 1985, declared, in paragraph 131, that:[24]

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19. IMF Press Release No. 81/70, IMF SURVEY, Oct. 12, 1981, at 302–303. The Committee advises the Board of Governors with respect to the Board's functions in supervising the management and adaptation of the international monetary system. *Selected Decisions, supra* note 16, at 354.

20. IMF Press Release No. 80/67, IMF SURVEY, Oct. 13, 1980, at 328.

21. "The Group of 24, which is in fact an adjunct of the G.77 but yet having an almost autonomous existence and concerned more with the negotiating function for the South vis-à-vis the North. Its main activity is within the Bretton Woods institutions and has very little to do with the rest of the UN system. The G.24 is strongly representative of Ministries of Finance and Central Banks and is concerned primarily with the operation of the international monetary system and its possible re-definition." L. De Silva, *The Non-Aligned Movements and the Group of 77*, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT REPRINT SERIES, NO. 47, at 27 (1984). The Group of 24 is not integrated into the structure of the IMF.

22. IMF SURVEY, Oct. 12, 1981, at 308.

23. IMF SURVEY, Oct. 13, 1980, at 299–302.

24. IMF SURVEY, SUPP., Sept. 1985, at 14.

> Pending the Ninth General Review, it will be necessary for the Fund to supplement its resources adequately by resorting to borrowing, preferably from official sources, so that real access to Fund resources is not reduced in these difficult times.

This report was to some extent a response to the report of the Deputies of the Group of 10[25] on *The Functioning of the International Monetary System*, dated June 1985. The Group of Ten's report raised the question whether it was possible to find some technique that avoided increases in quotas and perhaps borrowing:[26]

> 87. The IMF's resources are intended to deal both with balance of payments financing needs that arise in normal conditions and with exceptional situations involving a threat to the stability of the system. The Deputies agree that, barring unforeseen circumstances, the recent increase in IMF quotas and the enlargement and expansion of the GAB provide the IMF with an adequate basis to fulfill its responsibilities over the next few years. However, they recognize that negotiations on quotas and borrowing arrangements are complex and time consuming. They therefore suggest that the IMF undertake a study of alternative techniques that would provide resources to deal with exceptional circumstances without involving an immediate increase in member's subscriptions, thus adding to the operational flexibility of the IMF.

II. United States Treasury Report of March 15, 1985

A. General Description

In November 1983, the United States Congress passed a statute authorizing an increase in the quota of the United States in the IMF as a result of the Eighth General Review of Quotas, as well as an increase in that member's participation in the GAB.[27] The statute contained a long list of requests to the Treasury to provide reports on various issues of interest to factions in Congress. Section 50(c) instructed the Secretary of the Treasury to transmit a report to Congress on the operation of the international monetary and financial system, including a "review and analysis" of[28] "the feasibility of the Fund issuing securities in the private capital markets as a means of increasing its resources, either in lieu of, or in addition to, future quota increases,

25. The Group of 10 consists of the participants in the IMF's standing General Arrangements to Borrow. They are ten industrialized members of the IMF (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, United Kingdom, United States) and one non-member (Switzerland).

26. IMF Survey, Supp., July 1985, at 11.

27. Pub. L. No. 98–181, 97 Stat. 1267 (1983). *See* M. Ainley, The General Arrangements to Borrow, IMF Pamphlet Series, No. 41 (Washington, 1984); Gold, 2 Selected Essays, *supra* note 17, at 478–511.

28. Pub. L. No. 98–181, § 50(c)(2)(B), 97 Stat. 1267 (1983). Earlier, Congress had adopted the following provision, in Pub. L. No. 96–389, 94 Stat. 1553, Oct. 7, 1980, on the occasion of authorizing consent by the United States to an increase in its quota:

together with an evaluation of how such borrowing would affect the credit markets of the United States . . . ."

Section 811 of the statute is headed "Borrowing in United States Credit Markets" and provides that:

> Section 5 of the Bretton Woods Agreements Act (22 U.S.C. 286c) is amended by adding at the end thereof the following: 'Neither the President nor any person or agency shall, on behalf of the United States, consent to any borrowing (other than borrowing from a foreign government or other official public source) by the Fund of funds denominated in United States dollars, unless the Secretary of the Treasury transmits a notice of such proposed borrowing to both Houses of the Congress at least 60 days prior to the date on which such borrowing is scheduled to occur.'

Section 811 demonstrates the new concern of Congress with borrowing by the IMF in the United States market. The Bretton Woods Agreements Act,[29] as amended before Pub. L. No. 98-181, had provided only, on the subject of borrowing, that unless Congress by law authorized such action, neither the President nor any person or agency acting on behalf of the United States should make a loan to the IMF. The new statute, however, requires only notice to Congress and not Congressional authorization for the borrowing of U.S. dollars from nonofficial lenders.

On March 15, 1985, the Treasury sent a *Report to the Congress on the Functioning of the International Monetary and Financial System and the Role and Operation of the International Monetary Fund* (the "report" or the "Treasury report"), in which the Treasury responded to all outstanding Congressional requests for reports on the topics indicated by the title of the

RECYCLING BALANCE-OF-PAYMENTS SURPLUSES

SEC. 4(a) It is the sense of the Congress that (1) the interests of the United States and those of other member countries require an effective International Monetary Fund equipped with resources adequate to facilitate orderly balance-of-payments adjustments; (2) persistent balance-of-payments surpluses in oil exporting countries have placed, and will continue to place, severe strains on the resources of oil importing countries and on the liquidity of the Fund; (3) these strains can only be relieved if the oil exporting countries assume a greater burden for financing balance-of-payments deficits through proportionally greater contributions to the Fund and to the international lending institutions; and (4) the Fund must explore innovative proposals to encourage more direct recycling of oil surpluses and to increase its own liquidity.

(b) The Bretton Woods Agreements Act is further amended by adding at the end thereof the following new sections:

'SEC. 34. The Secretary of the Treasury, in consultation with the United States Executive Director of the Fund, shall study and, following consultations with member countries, shall report to the Congress prior to May 15, 1981, with respect to—. . .

'(3) the feasibility of increasing Fund liquidity by encouraging the Fund to borrow in private capital markets through the issuance of securities backed by Fund resources; . . .

'(5) methods to enhance cooperation between commercial banks and the Fund to promote the availability of adequate resources for balance-of-payments financing.'

29. Pub. L. No. 79–171 (1945).

report. The Introduction and Summary of the report summarize the views of the Treasury on borrowing in the private market:[30]

> Proposals for IMF private market borrowing, although feasible, could have an adverse impact on the cooperative international monetary character of the IMF and the ability of the United States to influence IMF policies. They would also pose possible legal and operational questions. The IMF Executive Board is likely to keep this issue under review, pending a clear need to borrow.

This passage is preceded by a paragraph in which the first sentence declares: "The review concludes that the IMF's liquidity position is currently strong enough to meet foreseeable demands for financing."[31]

The section of the report that deals with borrowing in more detail[32] begins by pointing out that proposals for recourse by the IMF to private markets reflect the large expansion of needs for international financing in recent years, past difficulties and delays in negotiating and implementing quota increases, and concern about possible concentration of borrowing from a limited number of members. This concern is not elaborated, but probably it is that lending members might obtain too much influence over the policies and activities of the IMF, while a large body of lenders in the market would not be able to exercise comparable influence.[33] Lenders undoubtedly have a concern of their own: the policies of the IMF and of members using the

30. P. iii [hereinafter cited as 1985 Treasury Report]. The content and conclusion of the report are substantially similar to the report entitled THE ADEQUACY OF IMF RESOURCES; IMF BORROWING FROM OIL EXPORTING COUNTRIES; and IMF BORROWING FROM PRIVATE CAPITAL MARKETS sent by the Treasury to Congress on July 21, 1981 in response to Sec. 34 of Pub. L. No. 96-389 (1980):

> The Secretary of the Treasury, in consultation with the United States Executive Director of the Fund, shall study and, following consultations with member countries, shall report to the Congress prior to May 15, 1981, with respect to—
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> (3) the feasibility of increasing Fund liquidity by encouraging the Fund to borrow in private capital markets through the issuance of securities backed by Fund resources; . . .

31. 1985 Treasury Report, *supra* note 30, at iii.

32. *Id.* at 39–45.

33. The subject of actual or potential influence by lenders is an interesting but difficult one, if only because of the absence of available information. But things are not always what they seem. For example, various provisions of the General Arrangements to Borrow might suggest that the lenders wanted to dictate the IMF's policies on conditionality by withholding resources if the lenders were not satisfied with an adjustment program. In fact, the other participants in the Arrangements feared that the United States might influence the IMF to accept a program by the United States that was not compatible with the IMF's policies. The other participants intended to ensure conformity with the IMF's policies and not the power to influence changes in them. *See* GOLD, 2 SELECTED ESSAYS, *supra* note 17, at pp. 478–511; M. AINLEY, THE GENERAL ARRANGEMENTS TO BORROW, IMF PAMPHLET SERIES, No. 41, at 9 (1984).

IMF's resources should not impair the capacity of the IMF to repay its lenders.

The report states that the IMF has discussed the possibility of resort to the private market:[34]

> The IMF Executive Board has examined the possibility of private market borrowing, but has not reached firm conclusions. While the Executive Board will keep this matter under careful review, it is not likely to come to a decision unless a clear IMF need to borrow arises, which is not expected at this time. Views on the desirability and feasibility of private market borrowings by the IMF differ substantially.

The report lists arguments that have been made in support of the proposal. The market would provide a flexible means of supplementing the resources of the IMF at a time of growing need for financing balances of payments, while reducing the need for negotiations on quota increases, and avoiding excessive reliance on a small group of official lenders. A secondary market in IMF securities would be established, which would improve the liquidity of official claims on the IMF and promote the use of the SDR.[35] Greater stability would be imparted to the financial system because the IMF would absorb some of the risks and the responsibilities for recycling now undertaken by the banking system. The IMF would be subjected to the discipline of the market, and therefore would receive additional encouragement to insist on sound financial programs by members. The IMF, by acting in this way, would ensure that it could make the timely repayment of loans and maintain its market creditworthiness.

As a counterweight to these considerations, the report states that the proposal raises serious questions about its potential impact on the character of the IMF as a cooperative international monetary organization, as well as about important operational and legal aspects of borrowing. These considerations are then elaborated in turn.

Broad international agreement existed that, "as a practical matter,"[36] quotas should remain the basic source of the IMF's resources; borrowing in the private market, however limited, might undermine prospects for future increases in quotas. Furthermore, members that were not prepared to lend directly to the IMF might divert funds to the purchase of IMF securities in the market so as to obtain higher yields, anonymity, and greater liquidity. In the result, the proposal might not increase, and could reduce, the total amount of resources available to the IMF.

There were questions whether the role of the IMF in the international monetary system as monitor and lender of last resort would be impaired by

34. 1985 Treasury Report, *supra* note 30, at 40.
35. As a unit of account, and not the SDR proper.
36. 1985 Treasury Report, *supra* note 30, at 40.

substantial reliance on the private markets. The markets might be least willing to lend at times of international financial strain. The question might be raised whether the IMF's decisions were being unduly influenced by concern about maintaining its market creditworthiness. "In short, would the official monetary character of the institution be impaired by making the IMF more like a banking intermediary?"[37]

It was unlikely that any foreseeable borrowing by the IMF would have more than a marginal impact on U.S. capital markets in view of their depth and breadth. It was conceivable, however, that IMF securities might absorb more than a negligible share of the markets of some other countries, compete with the securities of other international institutions, and exert pressure on yields and prices. Furthermore, countries with access to private financing had expressed concern that the IMF might compete unduly with their efforts to raise financing, either by raising their borrowing costs or by absorbing the private financing they could have obtained in the absence of borrowing by the IMF.

The report takes up a number of operational considerations. There was no experience of the IMF on which to base an assessment of possible success with respect to the amounts or the terms of borrowing. Private investors had attached importance to the ability of the World Bank and other multilateral financing organizations to rely on the callable capital subscriptions of members to meet debt service obligations. The Articles of the IMF did not provide for callable or guarantee capital, and members had no obligations to make resources available beyond their subscriptions.

The IMF had substantial assets in gold and currencies, but there were factors that might limit the ability to attract additional financing from the private market. A large part of the IMF's currency assets represented claims on members in weak balance of payments and reserve positions. Indeed, when the IMF's borrowing needs were greatest, its holdings of the currencies of members in a strong financial position would be at the lowest. The IMF could use its holdings of weaker currencies to meet debt service requirements, but private investors might not give much weight to such assets in assessing the IMF's credit rating. If the IMF retained holdings of stronger currencies for debt servicing purposes, there would be no net improvement in its capacity to engage in financing its members' needs. The IMF's substantial gold holdings might increase its credit rating, but the extent to which the IMF could rely on its gold to back its borrowing was uncertain. The price of gold was volatile, the gold markets were thin, and substantial sales might be posssible only over an extended period, which might raise questions about the IMF's ability to mobilize its gold promptly.

37. *Id.* at 41.

Furthermore, decisions to sell gold required an 85 percent majority of the total voting power, and past experience suggested that prolonged negotiations would be required to reach an agreement to sell gold, as needed, to meet the IMF's indebtedness.

The implication in this part of the report is that the IMF would leave to the future the question whether to sell gold to service indebtedness to private lenders. It is possible, however, that the IMF might have to give a contractual undertaking that gold would be used for this purpose if the IMF lacked, say, the necessary U.S. dollars. On this hypothesis, the issue of the IMF's willingness to sell gold, if necessary, would be resolved by a decision on the terms the IMF would offer for borrowing before entry into the market. The question whether the necessary majority of voting power could be assembled would not be left to the future, but this timing might not make it easier to assemble the majority. For example, if the IMF had incurred substantial outstanding indebtedness to official lenders,[38] they might not be eager to support a decision that the terms for borrowing in the market should include an undertaking on sales of gold that they had not received.[39]

A decision taken by the IMF on December 23, 1983 already implies that the volume of borrowing by the IMF must be controlled, and it is reasonable to suppose that an assurance to official lenders that had made loans or had undertaken commitments to lend was an objective of the decision. The following paragraphs are at the heart of the decision:[40]

> 2. Subject to paragraph 4 below, the Fund will not allow the total of outstanding borrowing plus unused credit lines to exceed the range of 50–60 percent of the total of Fund quotas. If the total of outstanding borrowing plus unused credit lines reaches the level of 50 percent of quotas, the Executive Board shall assess the various technical factors that determine, at that time, the availability of balances of unused lines of credit. While this assessment is being made, the total of outstanding borrowing plus unused credit lines may rise, if necessary, beyond 50 percent, but shall not exceed 60 percent of total quotas.
>
> 3. The total of outstanding borrowing plus unused credit lines under paragraph 2 above shall include, in respect of the GAB and borrowing arrangements associ-

38. The holders of substantial reserve positions in the IMF without lending to it might hold the same views as official lenders to the IMF.

39. If the undertaking were given, it might fall within the *pari passu* clause quoted in *infra* note 48.

40. *Selected Decisions, supra* note 16, at 250. The decision on the volume of borrowing by the IMF contains the following paragraphs 4 and 5:

> 4. In the case of major developments, the Executive Board shall promptly review, and may adjust, the guidelines. In any event, the guidelines shall be reviewed when the Board of Governors has completed the Ninth General Review of Quotas, or when there is a significant change in the GAB or associated arrangements, and may be adjusted as a result of such reviews.
>
> 5. The percentage limits specified in paragraph 2 above, or any other limits that may be adopted as a result of a review pursuant to paragraph 4 above, are not to be understood, at any time, as targets for borrowing by the Fund.

ated with the GAB, either outstanding borrowing by the Fund under these arrangements, or two thirds of the total of credit lines under these arrangements, whichever is the greater.

The topic of the servicing of the IMF's indebtedness to official lenders is not discussed by the report. The report reaches the following conclusion on amounts: "In view of the uncertainties regarding the market's assessment of the IMF's borrowing capacity, it is likely that, at least initially, the Fund would be able to obtain only limited amounts of additional financing through market borrowings."[41]

B. Operational Aspects

On the subject of the type of borrowing as an operational consideration,[42] the report stresses the effect of the special character of the IMF's financial activities. The IMF may need to have funds available on extremely short notice to finance transactions and to enable members to mobilize their claims on the IMF, so that the IMF can act within three days of a request in accordance with established procedures. If the necessary funds were to be forthcoming under private borrowing, the IMF would have to hold relatively large balances in advance of actual need or would have to develop standby credit lines with commercial banks. Each technique, the report states, poses problems.

In dealing with idle balances, the report recalls that certain rights and obligations of a member are determined by the amount the IMF holds of the member's currency. Increases in holdings are detrimental for the member, either by reducing its rights, or by increasing its obligations.[43] If, therefore, the IMF were to hold borrowed resources without prompt disbursement of them, the position in the IMF of the member whose currency was borrowed and held would deteriorate.

The report states that under the IMF's typical borrowing arrangements with official entities, borrowed resources are passed on immediately to the member whose transaction the IMF is financing, so that the lender's rights and obligations under the Articles are unaffected. The report surmises that

41. 1985 Treasury Report, *supra* note 30, at 42. Private investors might take account of the prospect that the IMF would resort to the private markets frequently and not on an isolated occasion and that the total of borrowing would grow over time. It should be recalled, however, that, as noted by the Treasury report, there is widespread agreement that subscriptions should be the main resources of the IMF.

42. The maturity of borrowing might be affected by a desire to avoid competition with the longer-term borrowing of other international organizations, principally the World Bank.

43. The principle applies only to the member's currency held by the IMF in the General Resources Account of the General Department.

the IMF might have only limited ability to arrange such "pass-through" operations when using standby lines of credit under agreements with private lenders. These lenders acquire funds from the market as needed and normally would not hold large amounts of currencies available for immediate call.

The report overlooks three measures the IMF has taken in relation to its Policy on Enlarged Access to mitigate the inconvenience that official lenders might experience if calls were made on them for advances without warning. At least some official lenders might suffer from this inconvenience just as much as private lenders. The three measures are discussed as (a), (b), and (c) below.

(a) The agreement of May 7, 1981 by the Saudi Arabian Monetary Authority (SAMA) to lend to the IMF provides that, unless otherwise agreed between the parties, the IMF shall give SAMA at least ninety days notice of the IMF's intention to make a call under the agreement. Furthermore, at the beginning of each year of the commitment period, the IMF must provide SAMA with the IMF's best estimates of the minimum and maximum amounts it expects to call during the year, and must provide SAMA with revised estimates periodically during the year. The IMF has the right to repay any loan or installment of a loan on any day on which interest is payable on the loan, provided that the IMF has given at least sixty days notice of its intention to repay.[44] Under the agreement of June 1, 1981 by the Bank for International Settlements to open a facility for the benefit of the IMF, loans can be made available to the IMF on seven days for notice.[45]

(b) As a result of the terms of the agreement with SAMA, the IMF may receive balances from SAMA before they can be used in the IMF's transactions with members and may receive balances from members in settlements under these transactions (repurchase) before the funds can be used in repayment to SAMA. The IMF decided, therefore, on May 5, 1981, that it had an implied power to establish Borrowed Resources Suspense Accounts and to transfer to them balances it receives from SAMA or members before they can be used in transactions or in repayments. Furthermore, the IMF decided that it had an implied power to invest these balances until they can be transferred to the General Resources Account for immediate use in either kind of transaction. Investments can be made only with national or international institutions that are both official and financial in character, and deposits or obligations must be denominated in the SDR.[46] Investments

44. *Selected Decisions, supra* note 16, at 183. In 1984, agreement was reached on a supplement to the original agreement (IMF, ANNUAL REPORT 1985, at 82). For the two agreements, see *Selected Decisions, supra* note 16, at 177–220.

45. *Selected Decisions, supra* note 16, at 221.

46. *Id.* at 247–49.

with commercial banks are not authorized by the decision because the IMF has not yet embarked on a policy of borrowing from, or having other financial relations with, them.[47] Investment protects the capital value of the balances in terms of the SDR, generates income to offset the cost of borrowing, and relieves the IMF of exchange risk that otherwise might exist because the IMF has no option but to use the balances in transactions or repayments at the SDR value.[48] The amounts held in the Suspense Accounts do not affect the rights and obligations of members under the Articles.[49]

(c) Rule G-4 of the IMF's Rules and Regulations was amended on February 24, 1982[50] and May 1, 1984,[51] to establish value dates for purchases of exchange from the IMF and for repurchases. The objective is to allow the IMF to coordinate its borrowing more closely with its disbursement of, and repayments in respect of, borrowed funds. The value date for a purchase under a standby or extended arrangement normally will be the fifteenth or the last day of the month (or the preceding business day if the specified day is not a business day). If the request for a purchase is not received in time for the IMF to issue instructions for the first of these value dates following the day of receipt, the purchase will be executed at the next value date. Repurchases normally will be made with a value date of either the sixth or the twenty-second day of the month (or the next business day if the specified day is not a business day).[52]

Rule G-4 provides also that members should consult the IMF in a timely manner with respect to the date at which they expect to make a purchase or a repurchase. By means of this procedure, the IMF should be able to give appropriate instructions for completing purchases and repurchases on a specific date.

The various agreements entered into, and decisions taken by, the IMF as summarized in (a), (b), and (c) above demonstrate considerable flexibility by the IMF in accommodating official lenders and in installing efficient procedures to deal with the terms and consequences of borrowing by the IMF. Even if further or different terms and procedures were necessary for the purpose of borrowing in the private market, the terms and procedures

47. This statement refers to the management of funds in the General Resources Account. The IMF has decided, as Trustee of its Trust Fund, that trust funds may be invested in deposits denominated in SDRs with commercial banks among others. *Id.* at 325, 328–29.

48. IMF, ANNUAL REPORT 1983, at 96; IMF, ANNUAL REPORT 1984, at 82–83. The obligation under Article V, Section 11 to maintain the value of the IMF's holdings of currencies applies only to balances held in the General Resources Account.

49. *See supra* note 43.

50. IMF, ANNUAL REPORT 1982, at 128.

51. IMF, ANNUAL REPORT 1984, at 135.

52. Provided that a repurchase will not be delayed beyond the seven years from a purchase that is the maximum period for repurchase if a purchase was financed with borrowed resources under the policy on Enlarged Access.

already undertaken suggest that the necessary adaptations would not be beyond the law or the wit of the IMF.

The last of the operational considerations mentioned in the Treasury's report is SDR denomination. On this topic, the report makes only the following remark:[53]

> The IMF's unit of account is the SDR, and all Fund transactions are denominated in SDR. There has been little experience to date with SDR-denominated issues on the private markets, and there is no assurance at this time that the IMF could borrow on an SDR basis on a significant scale.

C. Legal Aspects

The Treasury's report takes up legal considerations as the next main topic and declares that several areas of United States law would have to be considered in determining the manner in which the IMF could borrow in United States markets, the amount that could be borrowed, and the time required to arrange any such borrowing. Legal considerations are discussed or referred to under the following headings: United States securities law, local investment laws, laws governing bank loans, bank examinations, legal and policy limitations on SDR-denomination of IMF obligations.

Foreign borrowers, which would include the IMF, may enter the domestic market in the United States. Federal securities laws establish rules governing the sale of a security in the United States, but certain transactions and

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53. 1985 Treasury Report, *supra* note 30, at 43. This reference to the SDR is brief but implies a number of problems. For example, investors might be wary of a unit of account when the borrower can change the method of valuing it in terms of the currency to be lent and repaid. Investors might want an option to maintain the value of their rights and obligations in accordance with the earlier method of valuation after a change. *See* J. Gold, SDR's Gold, and Currencies: Third Survey of New Legal Developments 7–8, IMF Pamphlet No. 26 (1979); J. Gold, Floating Currencies, Gold, and SDRs: Some Recent Legal Developments 54–57, (IMF Pamphlet Series No. 19) (1976); Gold, *Development of the SDR as Reserve Asset, Unit of Account, and Denominator: A Survey*, 16 G.W.J. Int'l L. & Econ. 7–10 (1981) (for a discussion of the "fixed," "flexible," "variable," "optional," and "lagged flexible" SDR).

Paragraph 8 of the agreement between the IMF and SAMA, dated May 7, 1981, contains the following provisions:

> (b) If the Fund should decide to change the method of valuation of the special drawing right, SAMA may at its option require that the method of valuation in effect immediately prior to such change continue to apply to any or all loans made hereunder which are outstanding at the date the change becomes effective, other than loans outstanding at the date of a previous change in respect of which SAMA has already exercised its option under this subparagraph (b). The option of SAMA hereunder shall be exercised by notice to the Fund within 30 days after the adoption of the Fund's decision, but not later than 14 days after the date the change becomes effective.
>
> (c) If SAMA shall have exercised its option under (b) above, (i) the Fund shall be entitled, at any time thereafter, to repay any or all loans with respect to which the option has been exercised, upon giving at least 14 days' notice to SAMA of its intention to make such repayment, and (ii) SAMA's right to request Notes pursuant to paragraph 15 of this Agreement shall terminate with respect to all such loans.

certain securities are exempted from the regulations. If the IMF were to arrange a private placement of securities, the transaction would not be subject to the Securities Acts, but there is much uncertainty about what constitutes a "public offering."[54] Certain types of securities are exempted from the securities regulations by specific statutory provisions. Exemptions have been legislated for the benefit of the World Bank and regional multilateral development banks. "It might be desirable," declares the report, "to amend U.S. law to obtain such exemption for the IMF as well, should it seek to borrow in U.S. private markets."[55] State securities laws, as well as federal law, would have to be observed by the IMF.

Potential purchasers of IMF obligations might be subject to federal and state regulation which, therefore, would affect the extent of the market for such obligations. Commercial banks, for example, are subject to laws regulating the kinds, and amounts, of securities they may acquire, as well as their dealing in and underwriting of investment securities. Once again, statutory exemptions from limitations on the last of these activities by banks have been granted for the benefit of multilateral development banks (MDBs). The report continues:[56]

> If the IMF were to borrow in U.S. capital markets, using distribution techniques such as those used by the MDBs, a similar statutory exemption would be desirable. Moreover, in order to enhance the marketability of IMF-issued securities, amendments to state laws governing the lawful investments of, for example, commercial banks, insurance companies, pensions funds, and other state-regulated entities, may be desirable. The MDBs have obtained such state law amendments in a number of states, a process which took the World Bank several years.

If the IMF were to borrow by means of loans from commercial banks rather than by the issuance of investment securities, federal and state laws governing loans by national and state-chartered banks would apply. Limitations are imposed on the amount of loans to an individual borrower by a national bank, and by some state-chartered banks.[57] Virtually all commercial banks in the United States are subject to examination by federal regulatory agencies to ensure that United States banks have not engaged in, or are not engaging in, unauthorized, unsafe, or unsound practices in conducting their business.

It is not surprising that the report does not deal with the question whether the United States Treasury, before concurring in a borrowing in the private

54. Some of the conditions to be observed so that an offering is deemed not to be public, such as the condition that no more than a limited number of possible investors may be approached, could limit the amount that the IMF could borrow, at least on each occasion.

55. 1985 Treasury Report, *supra* note 30, at 44.

56. *Id.*

57. Syndication would help to meet this problem.

market by the IMF, would satisfy itself that the project would be fully in accordance with all applicable laws in the United States. Perhaps, the Treasury might concur in principle but subject to the condition subsequent that the IMF demonstrated to the appropriate authorities in the United States that the project was in accordance with all applicable laws.[58]

The marketability of IMF obligations, whether in the form of investment securities or bank loans, would be affected by the IMF's financial soundness. Furthermore, the IMF's immunity from suit on its obligations, and its waiver of immunity, could affect this assessment. This topic is discussed further in the next section below.

The report mentions that limitations on SDR-denominated obligations are imposed by members other than the United States. The report says only that: "Legal restrictions on the SDR-denomination of obligations payable in national currency continue to be in effect in several countries that are IMF members and whose national currency the IMF might wish to borrow."[59]

D. Quasi-Commercial Terms and Private Obligees

In dealing with the IMF's immunity from suit, the report does not mention the step taken already by the IMF in borrowing from SAMA. This step, however, is part of a wider acceptance by the IMF of terms that resemble those that are familiar to lenders in purely private transactions. Furthermore, it is important to note that, in principle, the IMF could be indebted to private parties as a result of the agreement with SAMA.

Terms resembling those of private contracts that appeared for the first time in the IMF's practice in the agreement between the IMF and SAMA include terms that provide for a negative pledge by the IMF,[60] *pari passu*

58. United States legislation mentions only a possible fiscal agent for the IMF and is silent on other duties that would have to be performed in connection with a borrowing. Section 6 of the Bretton Woods Agreements Act, Public Law No. 79–171, provides that "Any Federal Reserve Bank which is requested to do so by the Fund or the (World) Bank shall act as its depository or as its fiscal agent, and the Board of Governors of the Federal Reserve System shall supervise and direct the carrying out of these functions by the Federal Reserve Banks." The Federal Reserve Bank of New York has been the fiscal agent for almost all of the World Bank's U.S. dollar issues.

59. 1985 Treasury Report, *supra* note 30, at 45.

60.

> 12. (a) The Fund covenants that, so long as any loan made hereunder shall be outstanding, the Fund will not cause or permit to be created on any of the property or assets held by the Fund on its own account any mortgage, pledge, lien or charge as security for any notes or bonds issued or other indebtedness heretofore or hereafter incurred by the Fund through borrowing for its own account (other than mortgages, pledges, liens or charges on property, not including monetary assets, purchased by the Fund securing all or part of the purchase price thereof) unless the loans made hereunder shall be equally and ratably

treatment,[61] cross-defaults,[62] and most-favored-creditor treatment.[63]

SAMA may request the IMF at any time to deliver promissory notes in bearer form in exchange for all or part of any outstanding installment of a loan, and the IMF must deliver the notes within thirty days after receiving the request. The content of the notes is set forth in Annex B to the agreement. The IMF was required, within thirty days after entry into force of the agreement, to designate one or more financial institutions acceptable to SAMA as paying agents under the notes, and to designate agents for service as contemplated in the notes. Interest coupons are to be attached to the notes. Paying agents of the IMF were to be appointed in Frankfurt, London, New York, Paris, and Tokyo. The potential holders of notes and coupons are undefined, and therefore they may include private parties.[64]

Paragraph 11(a) of the notes is of special interest:[65]

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secured by such mortgage, pledge, lien or charge. In addition, the Fund agrees that loan claims under this Agreement shall rank *pari passu* in respect of priority of payment with the highest ranking debt incurred by the Fund through borrowing for its own account.

Selected Decisions, supra note 16, at 184–185.

61. *Id.*

62. "(b) A default under any security arrangement agreed between the Fund and any lender after the date of this Agreement shall be deemed to constitute a default under this Agreement to the same extent as if the security arrangement were incorporated herein for the benefit of SAMA. For purposes of this subparagraph (b), the term 'security arrangement' shall include affirmative and negative covenants, events of default or conditions of mandatory prepayment and all similar undertakings for the benefit of creditors, but shall not include financial terms such as interest rates, spreads or margins, commissions or fees or maturity schedules."

Id. at 185.

63. "(c) If the Fund enters into a borrowing arrangement with any lender that is a Member of the Fund or the central bank of a Member which (i) is on financial terms that can reasonably be considered by either SAMA or the Fund to be more favorable to the lender than those provided herein and is entered into during the period of two years following the entry into force of this Agreement, or (ii) contains provisions under which the Fund waives its immunity from judicial process with respect to the settlement of disputes, SAMA and the Fund shall at the request of SAMA consult with a view to reaching agreement on an amendment to this Agreement under which comparable financial terms or a comparable waiver of immunity are applied to loans by SAMA hereunder, and, to the extent appropriate to any Notes that may subsequently be delivered to SAMA in exchange for such loans. In addition, of at any time while any loan made hereunder remains outstanding the Fund accords to any holder of its notes, bonds, or similar obligations a waiver of immunity more extensive in scope than the waiver contained in the form of Note attached as Annex B, SAMA and the Fund shall at the request of SAMA consult with a view to reach an agreement on an amendment to this Agreement that will accord a waiver of comparable scope in respect of any Notes that may subsequently be delivered to SAMA hereunder. If no such agreement on an amendment has been reached within 30 days from the date of SAMA's request, the matter shall be settled by arbitration in accordance with paragraph 18."

Id. at 185–86.

64. The agreement goes beyond earlier borrowing agreements of the IMF under which, at least in principle, claims against the IMF could be transferred to private parties, but only with the prior consent of the IMF and on such terms and conditions as it might prescribe. *Id.* at 155, 159, 172.

65. *Id.* at 199–200. "These blanks will be filled in as soon as the arrangements with agents for the receipt of process are completed."

11. (a) The Notes and coupons shall be governed by and construed in accordance with the laws of the State of New York, U.S.A. An action against the Fund for failure to pay any amount due under any Note or coupon may be brought in the Federal Courts (or if such Courts lack competence, in State Courts) in the State of New York, the Courts of England, or the ordinary Courts of Justice of the Canton of Geneva, Switzerland, with right of recourse in each of these jurisdictions to competent higher courts. The Fund irrevocably agrees to waive its immunity from judicial process and to submit to the jurisdiction of such Courts with respect to such action and with respect to the execution in any member country of the Fund and in Switzerland of a final judgment against the Fund rendered by any of such Courts, and hereby appoints [ ]* in New York City, [ ]* in London, and [ ]* in Geneva as its agent to receive on behalf of the Fund service of writs, copies of the summons and complaint and any other process which may be served in any such action brought in New York, England or Switzerland respectively. Such waiver and submission shall not extend to any action or proceeding other than as specified in this paragraph or in any Courts except those specified in this paragraph.

The provisions of the agreement on notes and coupons are lengthy and complex.[66] The freeze of Iran's assets by the United States may be one explanation of the provisions for notes and coupons and of the intricacy of the provisions.

The agreement between the IMF and SAMA suggests that a member could make a loan to the IMF in return for marketable debt instruments on the understanding or with the undertaking that the instruments would be passed on to the market.[67] The IMF might be relieved of some of the task of marketing by this procedure, but the applicable law would have to be observed to enable the member to undertake the marketing. The member would have to be willing to make the loan and take its chances on marketing, and the member would have to comply with any requirement of its own law for lending to the IMF.

The waiver is of immunity from both suit and execution of a final judgment. The IMF's immunity from all judicial process is granted by Article IX, Section 3: "The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract." According to Article IX, Section 1: "To enable the Fund to fulfill the functions with which it is entrusted, the status, immunities, and privileges set forth in this Article shall be accorded to the Fund in the territories of each member." But the IMF as an international organization may have objective legal personality in the territories of nonmembers. (*See* J. GOLD, MEMBERSHIP AND NONMEMBERSHIP IN THE INTERNATIONAL MONETARY FUND 456–463 (1974)).

66. *Selected Decisions, supra* note 16, at 194–201; *see also* the IMF's agreement on borrowing from central banks and other official institutions on terms similar to those of the agreement between the IMF and the Bank for International Settlements, *id.* at 221–47.

67. It is not suggested that it is the intention of SAMA to take this step in normal conditions.

E. Some Further Comments on the Treasury Report

The Treasury report gives an impression of at least hesitation, and perhaps dubiety, about borrowing by the IMF in the private market, but this attitude may be confined to current conditions. The report emphasizes the problems of law and policy that would have to be resolved, without referring to solutions or less troublesome choices. Problems would certainly have to be faced, but except for those arising under the domestic law of the United States because of the form of borrowing chosen by the IMF, the operational and legal problems might not be intractable or even seriously hampering.

The most substantial problem would relate to policy: the risk of reducing the sense of responsibility by members for the IMF and its financing and the danger that the role of the IMF in the international monetary system might be prejudiced. It might be feared that the capacity of the IMF to act in its traditional role as the central monetary authority and lender of last resort in the international monetary system would be undermined. The concept of the IMF as a mutual Fund, channelling resources from members in a strong balance of payments and reserve position to members in balance of payments need while imposing conditionally under its basic policies,[68] might seem to be endangered. If the concept were to be abandoned, the IMF might become more like a bank or financial intermediary.[69] The widespread

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68. *See, e.g.*, Art. V, § 3. The relevant sections of this provision, however, deal only with sales by the IMF. Article VII, Section 1 does not prescribe that the IMF may borrow only from members in a strong balance of payments and reserve position. Article VII, Section 1 refers to replenishment of the IMF's "holdings of any member's currency in the General Resources Account needed in connection with its (the IMF's) transactions." The currencies needed would be those that met the criteria for sale by the IMF under Article V, Section 3. While a member in a weak balance of payments and reserve position is protected by Article V, Section 3 against the IMF's use of its holdings of the member's currency in the IMF's transactions, the member is protected against the burden of lending to the IMF by the necessity for the member's agreement to lend under Article VII, Section 1. The IMF might be reluctant to borrow from such a member even if the member were willing to lend, because of the greater risk of an early encashment by the member of its claim against the IMF. This reluctance might be reduced if, at some time, the IMF turned to a policy of encouraging a diverse range of members to hold part of their reserves in the form of deposits with the IMF under its power to borrow.

69. The Fund must be in a position to continue and expand these activities. Indeed, the Fund stands as insurance against the inadequacy, or even the failure, of the capital markets. The Fund is also an irreplaceable channel for concessional financing in conjunction with the difficult but necessary exercise of conditionality, designed to restore the borrower's external equilibrium. For these reasons, France firmly supports a large International Monetary Fund.

However, the growth of the Fund, desirable as it is, must not become uncontrolled expansion. To my mind, Fund recourse to borrowing, which is inconsistent with its calling as a mutual association of governments and an international monetary authority, must remain exceptional and temporary and be limited to approximately its present order of magnitude.

Such recourse must be confined to public borrowing, as borrowing on the market can only deprive the Fund of its special character, transforming it into a kind of Eurobank. This

insistence among members that subscriptions should be the normal source of financing the IMF's transactions is an expression of the desire to cling to the concept of a mutual Fund, which involves a degree of concessionality, or, in other words, a cooperative enterprise among members. The same consideration is a reason for expressing a guideline on the total volume of actual and potential borrowing by the IMF as a ratio to total quotas. The problem discussed here is of sufficient magnitude in itself to warrant the view often expressed that borrowing in the market should be the last resort for the IMF when in temporary need of additional resources to meet an exceptional need.[70]

III. Borrowing from Commercial Banks and International Liquidity

Borrowing by the IMF from commercial banks might appear to some critics to be a process for relieving banks of the responsibility they should undertake for financing the members with which the IMF would conduct transactions with funds borrowed from the banks. However questionable Congressional and public opposition may be to "bailouts of banks," that opposition has been expressed by law:[71]

> SEC. 807. The Bretton Woods Agreements Act (22 U.S.C. 286 *et seq.*) is amended by adding at the end thereof the following:
>
> "OPPOSING FUND BAILOUTS OF BANKS
>
> "SEC. 46. The Secretary of the Treasury shall instruct the United States Executive Director of the Fund—
>
> "(1) to oppose and vote against any Fund drawing by a member country where, in his judgment, the Fund resources would be drawn principally for the purpose of repaying loans which have been imprudently made by banking institutions to the member country; and
>
> "(2) to work to insure that the Fund encourages borrowing countries and banking institutions to negotiate, where appropriate, a rescheduling of debt which is consistent with safe and sound banking practices and the country's ability to pay."

It is obvious that there is a difference between a member's use of the IMF's resources to repay banks and the IMF's borrowing from banks in lieu

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> cautious approach is consistent with the nature of the Fund, which is to finance temporary balance of payments deficits of certain members by calling upon the resources of members with surpluses. It is also necessary in order to preserve the concessionality of Fund assistance; the difficulties encountered in creating the subsidy account indicate clearly that this concessionality would be threatened if the proportion of resources at market rates were to become excessive.

Governor of the IMF for France, SUMMARY PROCEEDINGS, ANNUAL MEETING 1981, at 53.

70. In such circumstances, however, the market might view lending to the IMF as something of a risk because the IMF's liquidity was low.

71. Pub. L. No. 98-181, 97 Stat. 1273 (1983).

of new lending by them to the member. But both kinds of transactions might seem to offer relief to the banks, in the one case by the use of official resources and in the other by the assumption of official obligations to the banks. In early 1981, this author wrote:[72]

> [I]f the Fund were to consider borrowing from banks, it should do so on terms that the banks would provide some measure of direct assistance to the member. I would not be overcome with gratitude if banks offered to lend to the Fund because they wanted to maintain their business while allowing the Fund to assume all the risk. An arrangement of the kind that I have mentioned would meet a number of the problems noted by Professor Cohen, including the objection often heard in Congress and elsewhere that use of the Fund's resources enables the banks to be bailed out. An amendment of the Articles would not be necessary for the arrangements that I have mentioned.

Professor Benjamin J. Cohen, who is referred to in the passage quoted above, had pointed out that in view of rising oil prices, the surpluses of oil exporters, severe balance of payments problems for oil importers, and the inadequate resources of the IMF, much of the task of financing balance of payments deficits had fallen on the private credit markets. A major role in "balancing" the system that had been reserved in principle for multilateral agencies, especially the IMF, had been assumed by private banks. Professor Cohen discussed the prospects for increasing the role of the IMF in financing on the basis of conditionality.[73] Borrowing by the IMF in the market would be one technique by which the IMF could increase its resources for this purpose. His discussion presents many of the considerations and conclusions that appear in the later report of the United States Treasury.

Professor Cohen carried the discussion further, however, by considering the problem of controlling international liquidity. Despite the flexibility of exchange rates, most observers agreed that there was still a need for better control of the supply and rate of growth of reserves in accordance with the multilateral evaluation of global liquidity. The increase in private lending for balance of payments financing had complicated the problem. Monetary reserves had become a minor element of international liquidity; official liquidity could no longer be measured simply by reference to monetary reserves. Three was no effective multilateral control of the liquidity created by private banks, with the consequence that the volume of lending by them could produce worldwide inflation or recession. "In effect, the world monetary system has taken on some of the characteristics of a domestic credit system without a central bank."[74]

72. THE INTERNATIONAL FRAMEWORK FOR MONEY AND BANKING IN THE 1980S, at 183 (G. Hufbauer ed. 1981).
73. *Id.* at 93–169.
74. *Id.* at 156.

Professor Cohen discussed the possibility that the IMF might gain some direct means of leverage over private international lending by borrowing from the markets:[75]

> Historically, the Fund has always dealt solely with official financial institutions, and hence has been able to influence the scale of private intermediation only indirectly, through its leverage on national monetary policies. In the future, it would be only with its projected program of borrowing from the markets that the Fund might gain some direct means of leverage over private international lending. By absorbing some part of the effective supply of loanable funds, Fund borrowing would limit the total of financial resources available to banking institutions for lending onward to deficit countries. By varying its operation in the markets at its own discretion—now borrowing more when the growth rate of reserves seems excessive, now borrowing less (or perhaps even buying debt) when growth seems deficient—the Fund could exercise direct control over private creation of international liquidity.
>
> But there, of course, is the rub. Authority to borrow on the open market at its own discretion would give the Fund enormous influence over the stance of monetary policy in the system as a whole—in effect, transforming it into a kind of world central bank. Monetary policy is still regarded as an essential element of national sovereignty. Most governments are loath to transfer their formal money-making powers to a supranational institution. Consequently, most governments can be expected to turn thumbs down on any but the most limited extension of the Fund's role in controlling private liquidity creation.

He was not optimistic that the membership of the IMF would consent to any such practice of the IMF. There is evidence in the Articles to support this rejection. During the negotiation of the Second Amendment, there was vigorous debate about the extent to which the IMF should have the power to control international liquidity. The debate related at first to the control of gold, and later to gold and reserve currencies, for which reason the proposal was resisted by two separate groups of objectors.[76] At one stage, opinion was so fragmented that no provision on the subject seemed feasible. Finally, agreement was reached on Article VIII, Section 7:

> *Obligation to collaborate regarding policies on reserve assets*
>
> Each member undertakes to collaborate with the Fund and with other members in order to ensure that the policies of the member with respect to reserve assets shall be consistent with the objectives of promoting better international surveillance of international liquidity and making the special drawing right the principal reserve asset in the international monetary system.

The provision is deliberately obscure and less than forceful in prescribing collaboration for the purpose of better international surveillance of international liquidity. Collaboration and surveillance substitute "soft law" for the firm obligations that were proposed without success.

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75. *Id.* at 156–57.

76. GOLD, 2 SELECTED ESSAYS, *supra* note 17, at 197–98.

The provision refers, however, to the SDR, and on this subject the Articles are clearer on the function of the IMF in relation to international liquidity. Article XVIII, Section 1(a) provides that:[77]

> In all its decisions with respect to the allocation and cancellation of special drawing rights the Fund shall seek to meet the long-term global need, as and when it arises, to supplement existing reserve assets in such manner as will promote the attainment of its purposes and will avoid economic stagnation and deflation as well as excess demand and inflation in the world.

The impact on international liquidity foreseen by this provision would be exercised by decisions on the allocation and the cancellation of SDRs, but the small proportion that SDRs represent in monetary reserves has made the IMF's influence ineffective so far.

If there were to be a willingness to attempt to control international liquidity by means of borrowing by the IMF in the market, it would be necessary to consider whether Article VII, Section 1 authorized borrowing for this purpose. As described by Professor Cohen, the borrowing would be difficult to reconcile with the concept of replenishing the holdings of currency needed by the IMF in conducting its transactions.

IV. Other Issues

The Treasury report does not compare the advantages of borrowing from official and from private lenders in relation to the concept of mutuality. As noted already, an original concept of the IMF was that, through the medium of the organization and its administration of the resources subscribed to it, members would help each other to deal with balance of payments difficulties. The concept justified concessional rates of charge for use by members of the IMF's subscribed resources.[78] The same spirit was responsible for the low rates of interest payable by the IMF under the original GAB, which made it unnecessary for the IMF to increase the ordinary rates of charge when transactions were financed with resources borrowed under the GAB.[79] Rates of interest payable under renewals of the GAB and under other borrowing agreements of the IMF have progressively approached market rates of interest, and these expenditures of the IMF have been passed on in the form of charges to members engaging in transactions financed by the IMF with borrowed resources. This development has resulted from greater official deference to market forces in the United States[80]

77. On the complex meaning of this provision, *see* J. GOLD, SPECIAL DRAWING RIGHTS: THE ROLE OF LANGUAGE, IMF PAMPHLET SERIES, NO. 15 (Washington, 1971). On the role of the SDR, *see also* Article XXII; and on international liquidity, *see* Schedule D, paragraph 2(a).

78. GOLD, 2 SELECTED ESSAYS, *supra* note 17, at 418–21.

79. *Id.* at 489, 502–503.

80. Section 810 of Pub. L. No. 98-181, 97 Stat. 1273 (1983) provides as follows:

and some other countries. At the same time, the IMF's resources are perceived to be primarily for the benefit of developing members. The result is less emphasis on mutuality and concessionality in the IMF's financial activities. Whether official borrowing would continue to be markedly more advantageous, as compared with resources borrowed in the market, for members entering into transactions financed by the IMF with borrowed funds is an open question. Perhaps for this reason, the Treasury report does not add comparative cost to its roster of arguments against borrowing in the market.

The Treasury report makes no more than the briefest reference to borrowing by the IMF in markets other than in the United States, and therefore does not mention borrowing in the Euromarket. The latter form of borrowing would have to comply with the requirements of the law of each territory in which the borrowing transaction (the offering and distribution to investors) was conducted. But national authorities of a country in which a Euromarket exists normally do not maintain regulatory controls over borrowings within the jurisdiction by foreign borrowers in foreign currencies.

The Bretton Woods Agreements Act (22 U.S.C. 286 *et seq.*) is amended by adding at the end thereof the following:

"IMF INTEREST RATES

SEC. 48. The Secretary of the Treasury shall instruct the United States Executive Director of the Fund to propose and work for the adoption of Fund policies regarding the rate of remuneration paid on use of member's quota subscriptions and the rate of charges on Fund drawings to bring those rates in line with market rates."

The Treasury has responded in these paragraphs of its report of March 15, 1985:

The United States has strongly advocated, pursuant to the provisions of Section 48 of the Bretton Woods Agreement [sic] Act, that the IMF allow both the rate of charge and the rate of remuneration to be more closely determined by market interest rates. In our view, there is no persuasive case for the extension of IMF credit at below market rates. The IMF is not a development institution, and its limited resources should neither be committed to long-term structural projects nor provided at excessively concessional rates.

The IMF is the cornerstone of the international monetary system, and as such it is essential that it conduct its operations so as to ensure the continued confidence and financial support of the creditor countries, as well as the confidence of the international financial community in general. In this regard we have argued that it is important for the Fund to levy charges that reflect the true cost of its financial resources and which will protect its own financial integrity, as well as to provide adequate remuneration to the creditor countries upon which its financial operations depend.

Progress has been made toward achieving these objectives. The basic rate of charge was recently increased from 6.6 percent to 7.0 percent, and the United States intends to press for further increases in order to both close the gap between charges and market rates and to improve the Fund's own reserves and income. Additionally, at strong U.S. urging the Executive Board recently agreed to take steps to unify the rate of remuneration rate as a percentage of the SDR rate by 3⅓ percentage points per year for three years beginning May 1, 1984. Further, a formula has been adopted which would permit larger increases during a year in the event of a decline in the SDR rate. Beyond May 1, 1987 a complex formula linking further increases in the rate of remuneration to declines in the SDR interest rate could result in a remuneration rate equal to the full SDR rate."

1985 Treasury Report, *supra* note 30, at 52–53.

The financial entities operating in the Euromarket exercise such regulation as is applied. A few issues have been denominated in SDRs, but not in the recent past. The Euromarket does not insist on the differentiation between private placement and public offering that is made under United States law, and Euromarket offerings combine elements of both techniques. A single issue may be treated as a private placement in some jurisdictions and as a public offering in others, according to the local law.

Whether the IMF undertook borrowing in a national market or in a Euromarket, questions of taxation, such as the applicability of withholding tax on interest, might arise and would require rulings from the appropriate national authorities. Exemption from taxation would enable the IMF to offer advantages to investors.[81] The following provisions of Article IX, Section 9 of the IMF's Articles would come into play:

> (a) The Fund, its assets, property, income, and its operations and transactions authorized by this Agreement shall be immune from all taxation and from all customs duties. The Fund shall also be immune from liability for the collection or payment of any tax or duty.
>
> . . .
>
> (c) No taxation of any kind shall be levied on any obligation or security issued by the Fund, including any dividend or interest thereon, by whomsoever held:
> (i) which discriminates against such obligation or security solely because of its origin; or
> (ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund.

The Treasury report, in discussing the adequacy of the IMF's resources, mentions the GAB, "the full amount of which," says the report, "is available to meet emergency needs."[82] If borrowing from the market is thought to be a last resort for augmenting the resources of the IMF, and the need for further resources is itself deemed to be an emergency, the GAB would put off the need to borrow in the market and might eliminate the need altogether. Sweeping changes have been made in the GAB. Radical changes were made in that agreement under which ten members, joined now by Switzerland, undertake to consider lending to the IMF up to specified maximum amounts when "supplementary resources are needed to forestall or cope with an impairment of the international monetary system."[83]

The total amount of these undertakings has been increased from the equivalent of the original US $6 billion to SDR $17 billion. Saudi Arabia has entered into an associated agreement in an amount equivalent to SDR $1.5

81. It is not suggested that, because of Article IX, Section 9, interest received from the IMF would be exempt from taxation in the hands of the recipient.

82. 1985 Treasury Report, *supra* note 30, at 39.

83. *Selected Decisions, supra* note 16, at 128.

billion. The original version of the GAB limited loans to the financing of transactions with the IMF entered into by any of the ten participants. Under the amended agreement, the IMF may resort to it for the benefit of nonparticipants if the IMF "faces an inadequacy of resources to meet actual and expected requests for financing that reflect the existence of an exceptional situation associated with balance of payments problems of members of a character or aggregate size that could threaten the stability of the international monetary system."[84] The words "aggregate size" imply that the IMF's need for resources may itself amount to an emergency.

Under the original GAB, the whole amount could not be made available for financing a transaction with a participant because the IMF could not borrow under that participant's undertaking. Under the present version, the whole amount could be available, at least in principle, for the benefit of nonparticipants.[85] These provisions of the GAB, in particular, probably make borrowing from the market an even more remote possibility.

The fact that borrowing in the market would be a last resort does not mean that preparations to engage in such a borrowing must be postponed to the time when action had to be taken. An advantage of borrowing in the market, according to some observers, is that it could be completed in less time than it takes to negotiate and get legislative approval of increases in quotas. It can be assumed, therefore, that extensive preliminary work will have been done within the IMF to prepare for any possible recourse to the market, particularly by means of a form of borrowing that would avoid most of the legal complications that the Treasury report mentions for borrowing in the United States.[86]

84. *Id.* at 139.

85. In making calls for the benefit of nonparticipants, however, Managing Director must pay due regard to potential calls for the benefit of participants. *Id.* at 139.

86. The argument for an early approach to the market has been made for the purpose of enabling the IMF to obtain bridging resources while an increase in quotas was being negotiated, sometimes to open up all options for the IMF for the future, and sometimes to combine these two purposes. For the last of these views, see GROUP OF THIRTY, THE IMF AND THE PRIVATE MARKETS, 3 (New York, 1983). This report of the Group makes other arguments in favor of borrowing in the market. For example, members might be unwilling to augment the IMF's resources. ("The attitudes of member countries to the IMF have changed in the past and could change again." *Id.*) A participant in the General Arrangements to Borrow might be unwilling to lend because its position was weak. An official lender might request immediate repayment. Official claims on the IMF have risen, and the holders should be reassured that these claims could be encashed in the event of need. Borrowing, unlike increases in quota, do not increase potential demands on the IMF. The pamphlet discusses possible forms of borrowing in the market by the IMF, and records the responses, not always favorable, of international banks to a questionnaire on the subject.