

PRINCETON STUDIES IN INTERNATIONAL FINANCE NO. 23

The Fund Agreement:
Living Law and Emerging Practice

Hans Aufricht

INTERNATIONAL FINANCE SECTION
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This is the twenty-third number in the series PRINCETON STUDIES IN INTERNATIONAL FINANCE, published from time to time by the International Finance Section of the Department of Economics at Princeton University.

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THE FUND AGREEMENT: LIVING LAW AND EMERGING PRACTICE

I. THE FUND AGREEMENT—SOME GENERAL OBSERVATIONS

The Articles of Agreement of the International Monetary Fund (or the Fund Agreement), adopted at the Bretton Woods Conference¹ on July 22, 1944, entered into force on December 27, 1945.

The Fund Agreement² is the organic law of the IMF. It constitutes the legal basis of the structure and functions of the IMF. Up to now—October 1968—the Fund Agreement has never been formally amended, but it has been modified in various ways. The modifications of the Agreement can be traced back primarily to (1) interpretations of the Fund Agreement by the Fund, (2) changes in the structure of the Fund, and (3) rights and responsibilities of the Fund conferred on the Fund by other international agreements such as the General Agreement on Tariffs and Trade (GATT) and the General Arrangements to Borrow (GAB).

The first formal amendment of the Fund Agreement under Article XVII of the Agreement was recently proposed.³ In this connection the question arises: What is to be amended, the Fund Agreement as originally formulated at Bretton Woods or the Fund Agreement as modified in the period December 1945 through October 1968? To ignore the fact that during this period the Fund Agreement has been subject to significant modifications would be unrealistic. Clear insight into the legal framework within which the Fund operates presupposes

¹ For text of the Final Act and Related Documents, see *United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1 to July 22, 1944*. Department of State Publication 2187, Conference Series 55 (Washington: 1944), hereafter cited as "Final Act."

² For text of the Fund Agreement, see Final Act, pp. 28-67. The Fund Agreement has also been published by the U.S. Department of State in pamphlet form as *Treaties and Other International Acts Series 1501*, Department of State Publication 2512 (Washington: 1946). Also the IMF has issued the Fund Agreement in pamphlet form with analytical Index (Seventh Printing, Washington: 1967).

³ See IMF, *Proposed Amendment of Articles of Agreement: A Report by the Executive Directors to the Board of Governors* (Washington: April 1968), hereafter cited as the "April 1968 Report of the Executive Directors."

awareness of the living law of the Fund as it has evolved in the practice of the Fund in the course of 23 years of its existence.

This study purports to provide a guide to the living law of the Fund under the following major headings: I. The Fund Agreement—Some General Observations; II. Interpretation of the Fund Agreement; III. The Drawing Rights of Members—Law and Policy; IV. The Fund Agreement and the Gold Standard; V. The Changing Setting; and VI. Retrospect and Prospect.

I. OFFICIAL LANGUAGE

The English version of the Fund Agreement is the official version. All members are required to sign the original copy of the Articles held in the Archives of the Government of the United States of America.⁴ By signing the Agreement, the prospective member certifies that it is bound by the English version. This act of signature does not prohibit members from publishing the Fund Agreement *pro foro interno*, for example in the Official Gazette, in the official language or languages of the country. Also, under the domestic law of the member, courts and other organs of that member may rely in the first instance on the official translation published in the Gazette. If, however, the official translation conflicts with the original English version, the member is obliged, under general principles of international law, to comply with the English rather than with a divergent foreign-language version of the Agreement.

2. ORDINARY OR TECHNICAL MEANING OF WORDS AND PHRASES

Generally, a treaty shall be interpreted in good faith "with the ordinary meaning to be given to the terms of the treaty."⁵ There are, of course, numerous provisions throughout the Fund Agreement

⁴ For original members, this obligation is set forth in Art. XX, Sec. 2(a). For other than original members, this obligation is prescribed in the respective paragraph of the Membership Resolution. See paragraph 8(b) of Resolution No. 21-8 of the Board of Governors of the Fund (Membership for Guyana) in IMF, *Summary Proceedings*, 1966, p. 246.

⁵ See the Draft Articles on the Law of Treaties, adopted by the International Law Commission of the United Nations at its 893rd Session on July 18, 1966. U.N. General Assembly, 21st Sess. *Official Records*, Supp. 9 (A/6309/Rev.1), Art. 27(1). The Draft Articles, together with the Commentary of the Commission, have also been published in *American Journal of International Law*, vol. 61 (January 1967) pp. 263-463. See, however, Art. 27(4) of the Draft Articles, which reads: "A special meaning shall be given to a term if it is established that the parties so intended."

which are readily understandable or which may be interpreted in terms of the "ordinary meaning" of the words or phrases employed. At the same time, the Fund Agreement, as the organic law of an international institution "which provides machinery for consultation and collaboration on international monetary problems," abounds with terms that are meaningful only as technical terms. To these terms the principle that treaty terms are to be interpreted by reference to their ordinary meaning cannot apply.⁶

Among the technical terms that are used in the Fund Agreement three different categories may be distinguished: (1) technical terms that have a special meaning for technicians—for example, "spot-exchange transactions" [Article IV, Section 3(i)]; (2) technical terms which, though frequently used by technicians, have a special meaning in the context of the Fund Agreement—for example, the definition of a member's holdings of convertible currencies as the "holdings of the currencies of other members which are not availing themselves of the transitional arrangements under Article XIV, Section 2" [Article XIX(d)]; and (3) terms that purport to have a technical meaning in the context of the Fund Agreement, but which are not defined in the Fund Agreement and which never have been conclusively interpreted by the Fund—for example, the term "fundamental disequilibrium" in Article IV, Section 5(a).⁷

In addition to the foregoing categories of terms, the Fund has introduced technical terms such as "gold tranche," "credit tranche," or "stand-by arrangements." These terms, used time and again in official documents of the Fund, are understandable only by reference

⁶ See, on this point, also V. D. Degan, *L'Interprétation des Accords en Droit International* (The Hague: Nijhoff, 1963), p. 89; "Malgré sa vaste application par la jurisprudence internationale, la règle du sens ordinaire est limitée par sa contre-règle, celle du sens technique."

⁷ On September 26, 1946, the Executive Directors of the Fund rendered an interpretation under Art. XVIII(a) of the Fund Agreement relating to steps to correct a fundamental disequilibrium. The operative paragraph of this decision (No. 71-2) reads as follows: "The Executive Directors interpret the Articles of Agreement to mean that steps which are necessary to protect a member from unemployment of a chronic or persistent character, arising from pressure on its balance of payments, are among the measures necessary to correct a fundamental disequilibrium; and that in each instance in which a member proposes a change in the par value of its currency to correct a fundamental disequilibrium the Fund will be required to determine, in the light of all relevant circumstances, whether in its opinion the proposed change is necessary to correct the fundamental disequilibrium." It should be clear that this interpretation does not purport to furnish a generally applicable definition of "fundamental disequilibrium."

to the Fund Agreement as interpreted through the years by the Fund. The implications of these terms will be discussed below, in Part III of this study, in connection with the principal types of Fund operations.

In brief, it is not always easy to determine whether ordinary or technical language is used. Moreover, where technical language is used, it is frequently difficult to pinpoint the exact meaning of technical terms employed in Fund parlance.

3. CONTINGENT PROVISIONS

There are numerous contingent provisions in the Fund Agreement, that is to say, provisions dependent on future contingencies for which no date could possibly be specified. To illustrate: (1) Under Article XX, Section 4(a) the Fund was to notify members of the date on which it expected shortly to be in a position to begin exchange transactions; in practice, the Fund designated September 12, 1946 as this date.⁸ (2) The effectiveness of other contingent provisions, for example, those relating to original members, was dependent primarily on action taken by members not later than December 31, 1945.⁹ (3) Other contingent provisions, for example, those relating to adjustment of quotas, require the initiative of the member requesting a quota adjustment as well as the concurrence of the members representing at least 80 per cent of the total voting power (Article III, Section 2).¹⁰

Up to now the Fund has not issued an annotated edition of the Fund Agreement that would permit the reader to determine whether, to what extent, and at which point in time, the numerous contingent provisions of the Fund Agreement became applicable or inapplicable. The present writer has endeavored to supply such information in the above-cited work entitled *The International Monetary Fund: Legal Bases, Structure, Functions*. The staff of the Fund has been engaged for quite some time in the preparation of a *Twenty Years History*. Pending the publication of this *History*, the *Annual Reports* of the Fund,¹¹ the *23 Summary Proceedings* of the Annual Meetings of the

⁸ For additional information on this point, see Hans Aufricht, *The International Monetary Fund: Legal Bases, Structure, Functions* (London and New York: F. A. Praeger, 1964), p. 9, fn. 4 (This source is hereafter cited as "Aufricht, *The International Monetary Fund*."

⁹ See Art. II, Sec. 1 and Art. XX, Sec. 2(e).

¹⁰ The proposed Amendment to the Articles of Agreement requires an 85 per cent majority for any decision on a general review of quotas, see below p. 66.

¹¹ The Fund's *Annual Reports* have been issued for the Fund's fiscal years

Board of Governors,¹² and the Fund's *Annual Reports on Exchange Restrictions*¹³ are the most significant official sources of information on changes in the law and practice of the Fund.

4. SIGNIFICANCE OF FIGURES IN THE FUND AGREEMENT

Many of the figures included in the original Fund Agreement are by now obsolete. Under Article III, Section 1 of the Fund Agreement, the quotas of the original members of the Fund—that is, the members accepting the Agreement not later than December 31, 1945—were to be those set forth in Schedule A.¹⁴ However, all figures contained therein, with the exception of the quota of China, have been superseded as a result of general and individual quota increases that have taken place between 1947 and 1968.¹⁵ Also, the rates of charges provided for in Article V, Section 8(c) and (d) are no longer in force; they have been modified from time to time, in accordance with Article V, Section 8(e). The number of Executive Directors, originally limited to twelve—five appointed and seven elected—has been increased to 20, in accordance with the last sentence of Article XII, Section 3(b).¹⁶

The foregoing examples do not purport to constitute a complete enumeration of all relevant figures that appear in the Fund Agreement, but merely to point up the fact that even some of the basic numerical assumptions of the Agreement have been subject to change in the law and practice of the Fund in the period 1944-1968. Many factors account for these changes; but the most pervasive one is the expansion

1947 through 1968; in addition there is an *Annual Report* for 1946. The full title of the latest *Annual Report* is International Monetary Fund, *Annual Report of the Executive Directors for the Fiscal Year ended April 30, 1968*.

¹² The *Summary Proceedings* of the Annual Meetings of the Board of Governors, hereafter cited for example, "IMF, *Summary Proceedings, 1967*," cover the Annual Meetings from 1946 to 1968.

¹³ From 1950 to 1968 the Fund has issued 19 *Annual Reports on Exchange Restrictions*, hereafter cited for example, "IMF, *Nineteenth Annual Report on Exchange Restrictions, 1968*."

¹⁴ For Schedule-A Quotas, see Appendix III.

¹⁵ For synopsis of Quotas and Voting Powers in the Fund, as of November 1, 1968, see below Appendix II.

¹⁶ For list of appointed and elected Executive Directors as of November 1, 1968, see Appendix II. It should also be noted that Schedule C of the Fund Agreement has been superseded by subsequent Rules, adopted by the Board of Governors, for the Conduct of the Regular Election of Executive Directors of the Fund. For text of the 1966 Election Rules, as approved by Board of Governors Resolution No. 21-7, see IMF, *Summary Proceedings, 1966*, pp. 223-229.

of Fund membership from 22 countries on December 27, 1945 to 111 members on November 1, 1968.¹⁷

5. ARE THE RIGHTS AND OBLIGATIONS OF MEMBERS UNIFORM?

Each government about to join the Fund is required to deposit with the Government of the United States of America an Instrument of Acceptance stating that it accepts the Fund Agreement "in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement" [Article XX, Section 2(a)]. Although there are many obligations that apply to all members,¹⁸ there is a conspicuous lack of uniformity regarding specific obligations. The same holds true, *mutatis mutandis*, for the rights of members under the Fund Agreement. Some of the principal reasons for the lack of uniformity of members' obligations and rights may be briefly indicated:

(a) *Original and Other Members*

Generally speaking, the provisions of the Fund Agreement are addressed to the original members. Members joining after December 31, 1946, pursuant to Article II, Section 2 of the Fund Agreement, are subject to the Articles of Agreement and the terms and conditions of the Resolutions of the Board of Governors of the Fund relating to the admission to membership of the country concerned (hereafter referred to as "Membership Resolution"). By contrast, no individual Membership Resolution was adopted for the ten members joining between January 1 and December 31, 1946¹⁹ under Resolution No. IM-9 of the Board of Governors.²⁰ However this may be, in the period January 1, 1947 through September 30, 1968, 74 countries joined the Fund under individual Membership Resolutions.²¹

¹⁷ The IMF, *International Financial Statistics*, issues monthly figures relating to the status, financial structure, and operations of the Fund. In general, however, no legal link is shown between the relevant provisions of the Fund Agreement and these figures.

¹⁸ The IMF pamphlet edition of the Fund Agreement (cited in fn. 2, p. 1, above) contains a helpful guide to the principal provisions concerning "Obligations of members" on pages 61-62.

¹⁹ For text of this Resolution, see IMF, *Selected Documents: Board of Governors Inaugural Meeting* (Savannah, Ga.: March 8 to 18, 1946), p. 21.

²⁰ For detailed information on the ten countries and the dates of acceptance of membership under Resolution No. IM-9 of the Board of Governors, see Aufrecht, *The International Monetary Fund*, pp. 20-21.

²¹ The texts of these Membership Resolutions have been published by the Fund in the *Summary Proceedings* of the Annual Meeting of the Board of Gov-

Generally, if a Membership Resolution contains provisions that differ from what the Fund Agreement provides for original members—for example, the provisions governing the determination of the initial par value—the relevant provisions of the Membership Resolution rather than those of the Fund Agreement apply.

(b) *Article-XIV Members and Article-VIII Members*

In Fund practice a distinction is frequently made between Article XIV-members and Article-VIII members; the former category of members comprises those that have availed themselves of the transitional arrangements of Article XIV, Section 2, and notified the Fund of their intention to do so under the authority of Article XIV, Section 3.²²

Article-XIV members are exempt from certain obligations provided for in Article VIII, Sections 2 and 3—that is, from the obligation to seek the approval of the Fund in respect of certain exchange restrictions, multiple-currency practices, or discriminatory currency arrangements—and from the obligation of Article VIII, Section 4, to convert certain foreign-held balances. Article XIV, Section 2 expressly empowers members to maintain and adapt to changing circumstances the restrictions on payments and transfers in respect of current transactions that were in effect at the time the member joined the Fund.²³ Beginning with March 1, 1952, reliance on the transitional arrangements obligates members to consult annually with the Fund on the retention of those restrictions which, in the absence of Article XIV, Sec-

ernors of the year in which they were adopted (that is, if the date of adoption is not later than the day of the termination of the respective Annual Meeting). For a discussion of the principal features of Membership Resolutions, see Aufrecht, *The International Monetary Fund*, pp. 22-23.

²² It may be inferred from the wording of Art. XIV, Sec. 3 that the authorization of members to avail themselves of the transitional arrangements of Art. XIV, Sec. 2, and thus to become an Article-XIV member, was to be reserved for original members; in Fund practice the authorization has also been extended to other than original members.

²³ Under Art. XIV, Sec. 2 of the Fund Agreement “members whose territories have been occupied by the enemy” are expressly empowered to “introduce where necessary” restrictions on payments and transfers in respect of current international transactions. As far as can be ascertained, no member of the Fund has ever introduced exchange restrictions on current transactions by virtue of this provision. It appears that this provision, which forms part of the transitional arrangements of Art. XIV, Sec. 2, is now deemed by the Fund as no longer applicable; see for example, IMF, *Eighteenth Annual Report on Exchange Restrictions* (Washington: 1967), p. 2.

tion 2, would require approval of the Fund under Article VIII, Section 2 or 3.²⁴

An Article-VIII member—that is a member not availing itself of the transitional arrangements of Article XIV, Section 2—may not, without the approval of the Fund,²⁵ impose restrictions on payments or transfers in respect of current international transactions [Article VIII, Section 2(a)], or prescribe or permit “multiple-currency practices,” or discriminatory currency arrangements (Article VIII, Section 3).²⁶ An Article-VIII member is obligated to purchase certain foreign-held balances in accordance with the provisions of Article VIII, Section 4. Moreover, under the decision of June 1, 1960, of the Executive Board of the Fund, members in Article-VIII status²⁷ are also expected to consult periodically with the Fund at intervals of about one year.²⁸

(c) *The Fund's Authority to Approve Exemptions from Specified Obligations*

Differences in the obligations of members under the Fund Agreement may also be the result of the Fund's exercise of its authority to approve specified measures by members which, in the absence of such affirmative action, would constitute a breach of the member's obligations—for example, of the obligations provided for in Article VIII, Section 2(a). Actually, there are Article-VIII members which, as prescribed in Article VIII, Section 2(a), do not impose restrictions

²⁴ On the point that the currencies of Article-XIV members are not considered as “convertible currencies” in the sense of Art. XIX(d), see above p. 3.

²⁵ However, even an Article-VIII member is authorized under Art. VII, Sec. 3(b), after consultation with the Fund, to impose temporary limitations on the freedom of exchange operations in a currency that has formally been declared by the Fund to be “scarce currency” under Art. VII, Sec. 3(a). Up to September 30, 1968, the Fund has never formally declared the currency of any member to be a “scarce currency” under Art. VII, Sec. 3(a).

²⁶ For purposes of this study the terms “multiple-currency practices” and “multiple exchange rates” are deemed interchangeable. On the implications of these terms and on the “single-rate” concept of the Fund Agreement, see Hans Aufricht, “The Fund Agreement and the Legal Theory of Money,” *Oesterreichische Zeitschrift fuer Oeffentliches Recht*, vol. X (1959), pp. 37-38 and 40-41.

²⁷ See paragraph 3 of the June 1 decision of the Executive Directors in IMF, *Annual Report, 1960*, p. 30.

²⁸ As of April 30, 1968, the following 31 members of the Fund had accepted Article-VIII status: Australia, Austria, Belgium, Bolivia, Canada, Costa Rica, Denmark, Dominican Republic, El Salvador, France, Germany, Guatemala, Guyana, Haiti, Honduras, Ireland, Italy, Jamaica, Japan, Kuwait, Luxembourg, Mexico, Netherlands, Nicaragua, Norway, Panama, Peru, Saudi Arabia, Sweden, United Kingdom, United States.

on payments and transfers in respect of current international transactions, while other Article-VIII members impose such restrictions, with the Fund's approval.

(d) *Special Rights of Members*

While the voting procedures of most international organizations—for example, the United Nations—confer upon each member one vote, the weighted-voting regime of the Fund is a built-in exception to the equality of member countries in the Fund.²⁹ Under Article XII, Section 5(a) of the Fund Agreement, "Each member shall have two hundred fifty votes plus one additional vote for each part of the quota equivalent to one hundred thousand United States dollars." Thus on November 1, 1968 the United States—the member with the largest quota—had 51,850 votes, or 21.63 per cent of the total voting power of the 111 members of the Fund. By contrast, Botswana had 280 votes, or 0.12 per cent of the total voting power.

Although the provisions of the Fund Agreement on weighted voting are of special interest to students and functionaries of international organizations, the significance of these provisions in the day-to-day decisions of the Fund should not be overestimated. In most instances, the decisions of the Executive Board and of the Board of Governors are taken without any formal or roll-call vote. In the Executive Board, the Managing Director (or the officer acting as Chairman in the absence of the Managing Director) "will ordinarily ascertain the sense of the meeting in lieu of a formal vote."³⁰ In the Board of Governors, the Chairman may ascertain the sense of the meeting in lieu of a formal vote but he shall require a formal vote upon the request of any Governor.³¹

Two examples may suffice to illustrate special rights accorded to the United States and the United Kingdom as a result of their large quota and voting rights: (1) The original Articles of Agreement provide that a "four-fifths majority of the total voting power shall be required for any change in quota" (Article III, Section 2); it thereby gives the United States a veto power over a proposed change in the

²⁹ For status of quotas and voting power in the Fund, as of November 1, 1968, see Appendix II.

³⁰ See Rule C-10 of the Rules and Regulations of the Fund. Under this provision, however, any Executive Director may require a formal vote to be taken, with votes cast as prescribed in Art. XII, Sec. 3(i).

³¹ See Sec. 11 of the By-Laws of the Fund.

quota of any other members so long as the voting power of the United States exceeds 20 per cent of the total voting power.³² (2) The United States and the United Kingdom, acting jointly or separately, can veto any comprehensive change of the price of monetary gold by means of a so-called uniform change in par values under Article IV, Section 7, since only the voting powers of the United States and the United Kingdom exceed 10 per cent of the total votes. The relevant clause of this section declares such changes permissible with the concurrence of "a majority of the total voting power . . . provided each such change is approved by every member which has ten per cent or more of the total of the quotas."³³

³² Under the proposed Amendment of the Articles of Agreement an 85 per cent majority of the total voting power is required for a general review of quotas; see below p. 66. On the implications of the 85 per cent vote, see Fritz Machlup, *Remaking the International Monetary System: The Rio Agreement and Beyond* (Baltimore: Johns Hopkins Press, 1968) p. 41. It should be noted that the relative voting strength of the United States decreased from 37.90 per cent on December 27, 1945 to 22.12 per cent on November 1, 1968. On "weighted voting" in the Fund, see Aufricht, *The International Monetary Fund*, pp. 41-43.

³³ Under the proposed Amendment of the Articles of Agreement an 85 per cent majority of the total voting power is required for decisions on uniform proportionate changes in the par values of the currencies of all members; see below p. 66.