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To: Members of the Executive Board

From: The Secretary

Subject: Suspension of Membership in the Fund - Legal Aspects

There is attached for the information of the Executive Directors a paper examining the possibility of introducing in the Articles of Agreement a provision on suspension of membership of members with prolonged arrears to the Fund.

Mr. Francotte (ext. 7798) is available to answer technical or factual questions relating to this paper.

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INTERNATIONAL MONETARY FUND

Suspension of Membership in the Fund -
Legal Aspects

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August 24, 1987

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Introduction

During the Executive Board's discussion of the Six-Monthly Report on Overdue Financial Obligations to the Fund and of a paper on the legal aspects of ineligibility, on June 9, 1986 (EBM/86/94), the staff was requested to prepare a paper examining the possibility of introducing in the Articles a provision on suspension of membership of members with prolonged arrears to the Fund, especially in the light of the provision on suspension that appears in the Articles of Agreement of the International Bank for Reconstruction and Development ("the Bank"). 1/

Suspension of membership, as these terms are used in the charters of international organizations, generally means that all of a member's rights derived from membership are suspended, but that all of its obligations as a member remain in effect. In this context, therefore, suspension of membership is not given a literal meaning, whereby both the rights and the obligations of membership would be suspended.

This paper is in three sections. Section I examines the scope and implementation of suspension, as well as the link between suspension and expulsion, in the charters of international organizations. Section II discusses and compares more specifically the forms of suspension already provided for in the respective Articles of Agreement of the Fund and the Bank. The introduction of a provision on suspension of membership in the Articles of the Fund, by an amendment of the Articles, is discussed in Section III.

Section I. Suspension in the Charters of International Organizations

The charters of most international, including regional organizations, contain some form of suspension of rights among the sanctions or remedies available to the organization. Between organizations, however, there are differences, especially concerning the scope of suspension (A), its implementation (B), and the relation between suspension and expulsion (C).

1/ Chairman's Summing Up at EBM/86/94 (6/9/86), Buff 86/102 (6/16/86).

A. Scope of suspension

The scope of suspension varies as between organizations: in some organizations, suspension relates to all rights derived from membership, whereas in others it affects specified rights only.

1. Suspension of all rights of membership

The charters of several organizations provide for suspension of membership, whereby all of a member's rights attached to membership in the organization are suspended, while all of its obligations remain in effect. Thus, in the Bank and most regional development banks, the breach of any obligation--not only financial obligations--may lead to suspension of all rights. 1/ Similarly, in the United Nations, suspension may be *imposed on any member against which preventive or enforcement action has been taken by the Security Council.* 2/

2. Suspension of specified rights of membership

The charters of some organizations provide for suspension of designated rights only. Thus, suspension of voting rights is a feature of the charters of several organizations. For example, in the United Nations and several nonfinancial and noneconomic organizations related to the United Nations, the charters stipulate that the failure by a member to pay its contributions to the organization leads automatically to the suspension of voting rights. 3/ Also, in some organizations, a member's breach of an obligation may be the

1/ See the charters of the International Bank for Reconstruction and Development (IBRD), Article VI, Section 2; the International Development Association (IDA), Article VII, Section 2; the International Finance Corporation (IFC), Article V, Section 2; the Inter-American Development Bank (IADB), Article IX, Section 2; the Asian Development Bank (AsDB), Article 42; the African Development Bank (AfDB), Article 44; the Islamic Development Bank (IsDB), Article 44; and the International Fund for Agricultural Development (IFAD), Article 9, Section 2.

2/ Article 5 of the charter of the United Nations (UN).

3/ See, for example, the charters of the UN, Article 19; the International Labor Organization (ILO), Article 13, paragraph 4; the Food and Agriculture Organization of the United Nations (FAO), Article III, paragraph 4; the United Nations Educational, Scientific and Cultural Organization (UNESCO), Article IV, paragraph 8(b); the International Atomic Energy Agency (IAEA), Article XIX, paragraph A; the International Maritime Organization (IMO), Article 52; the World Health Organization (WHO), Article 7; and the International Civil Aviation Organization (ICAO), Article 62.

basis for suspension of services or assistance normally available to members under the charter of the organization. 1/

3. Coexistence of both types of suspension

Suspension of membership and suspension of specific rights may coexist in a single organization, as responses to different actions by members. The United Nations provides an example. 2/

Another example of combination of different forms of suspension in a single organization is provided by the Articles of Agreement of the Arab Monetary Fund, which contain a provision on ineligibility to use the resources of the organization in case of use of its resources in a manner contrary to the purposes for which it was established, 3/ as well as a provision on suspension of membership. 4/ The charter specifies that the effect of suspension of membership in the organization is to "void the member's right to borrow and to vote," but that the member "shall remain liable for all its obligations under this agreement." 5/ This type of suspension of membership amounts to a suspension of specified rights.

B. Implementation of suspension

1. Automatic or optional suspension

Under the charters of international organizations, the automaticity of suspension, once obligations are breached, varies.

1/ See Article XII, paragraph C of the IAEA Charter (which provides for "direct curtailment or suspension of assistance being provided by the Agency or by a member, and call for the return of materials and equipment made available to the recipient member or group of members"); Article 7 of the WHO Charter (which empowers the organization to "suspend the voting privileges and services to which a member is entitled"); and Article 26 of the charter of the European Investment Bank (EIB) (under which "the granting of loans or guarantees to [a] member state or its nationals may be suspended" by the EIB). As discussed in Section II, ineligibility to use the general resources of the Fund constitutes such a type of suspension (Article V, Section 5; Article VI, Section 1(a) and Article XXVI, Section 2(a) of the Fund's Articles); see, also, Article 27 of the Articles of Agreement of the Arab Monetary Fund (AMF), which is similar to Article V, Section 5 of the Fund's Articles.

2/ UN Charter, Articles 5 and 19: Article 5 provides for the suspension of the rights and privileges of membership, whereas Article 19 contemplates the suspension of voting rights only.

3/ Article 27.

4/ Article 37.

5/ Article 38.

Most organizations have, under their charters, the discretion to decide whether or not to suspend a member when the conditions for suspension have been fulfilled. 1/ Some charters call, however, for automatic, nondiscretionary suspension of certain rights in specified circumstances. For instance, the charters of the United Nations and of several specialized agencies provide for automatic suspension of voting rights when arrears on contributions by the member equal or exceed the amount of contributions due from it for the preceding two years. 2/

2. Grounds for suspension

Suspension is usually a measure that may be taken when an obligation has been breached. In some cases, suspension is linked to the breach of any obligation under the charter. 3/ In other cases, it sanctions the violation of specified obligations only. 4/ Sometimes, however, suspension is not related to a breach of an obligation, but rather to actions that are contrary to the purposes of the organization. 5/

3. Procedures for suspension

When suspension is not automatic, the power to invoke suspension is normally entrusted to the plenary organ of the organization. 6/

1/ See, for instance, the charters of the IBRD (Article VI, Section 2) and the UN (Article 5). See, also, Article V, Section 5, Article VI, Section 1(a), and Article XXVI, Section 2(a) of the Fund's Articles.

2/ See the charters of the UN (Article 19); the ILO (Article 13, paragraph 4); the FAO (Article III, paragraph 4); the UNESCO (Article IV, paragraph 8(b)); and the IAEA (Article XIX, paragraph A).

3/ See, for instance, the charters of the IBRD (Article VI, Section 2); the IDA (Article VII, Section 2); the IFC (Article V, Section 2); the IADB (Article IX, Section 2); the AsDB (Article 42); the AfDB (Article 44); the IsDB (Article 44); the IFAD (Article 9, Section 2); and the AMF (Article 37).

4/ See, for example, the charters of the UN (Article 19); the ILO (Article 13); the FAO (Article III, paragraph 4). See also Article XXIII, Section 2 and XXVI, Section 2(a) of the Fund's Articles.

5/ See Article V, Section 5, Article VI, Section 1(a), and Article XIV, Section 3 of the Fund's Articles. See also Article 27 of the AMF Charter.

6/ See, for instance, the charters of the UN (Article 5); the IBRD (Article VI, Section 2); the WHO (Article 7); the ICAO (Article 62); and the AMF (Articles 27 and 37).

Moreover, the exercise of this power generally requires a qualified majority. 1/ Exceptionally, the power is exercised by the executive organ, 2/ and no qualified majority is required. 3/

C. Suspension and expulsion

Differences also exist, as between organizations and within an organization, with respect to the relation between suspension and expulsion.

Thus, in some cases, suspension is, with respect to a particular action by a member, the most severe measure that the organization

1/ A majority of Governors exercising a majority of the voting power is required in the IBRD (Article VI, Section 2), the IDA (Article VII, Section 2) and the IFC (Article V, Section 2). A two-thirds majority of members present and voting is required in the UN for a suspension under Article 5 of the Charter (Article 18) and in the IAEA for a suspension under Article XIX, paragraph B (Articles V, paragraph B and XIX, paragraph B). In the AsDB, a three-fourths majority of the total number of Governors, representing not less than three-fourths of the total voting power, is necessary (Article 42). The majority required in the IsDB is three-fourths of the total voting power (Article 44) and, in the IFAD, three-fourths of the total number of votes (Article 9, Section 2). In the IADB, the required majority is threefourths of the total voting power, including a two-thirds majority of the total number of Governors, which, in the case of suspension of a regional member, shall include a two-thirds majority of the Governors of regional members and, in the case of suspension of a nonregional member, shall include a two-thirds majority of the Governors of nonregional members (Article IX, Section 2). In the AFDB, members are suspended by the Board of Directors, "unless the Board of Governors at a subsequent meeting, called by the Board of Directors for that purpose, decides otherwise by a decision taken by a majority of the Governors exercising a majority of the total voting power of the members." (Article 44, Section 1).

2/ E.g., in the Fund (Article V, Section 5, Article VI, Section 1(a), Article XXIII, Section 2, and Article XXVI, Section 2(a)).

3/ Ibid. Also, no special majority is specified in the charter of the EIB (Article 26).

may adopt; 1/ in other cases, it constitutes an intermediary step in a procedure that may lead to expulsion. 2/

In some organizations, the charter provides for the automatic cessation of membership for suspended members, after the lapse of a specified period of time, without the need for any further decision by the organization. 3/ In other organizations, in contrast, no such automatic link is stipulated. 4/

Section II. Suspension of Rights in the Fund and the Bank

The provisions on suspension in the Articles of the Fund and the Bank are of different types. Thus, while the Articles of the Fund provide for the suspension of specific rights, the Articles of the Bank contain a general provision on suspension of membership.

A. Suspension in the Fund

The Articles of the Fund contain four provisions that authorize some form of suspension of members' rights: Article V, Section 5,

1/ In the Fund, for example, a member may be declared ineligible, but may not be compelled to withdraw, on the grounds that it is using the general resources of the Fund in a manner contrary to the purposes of the Fund or that it fails to exercise appropriate controls to prevent a use of the general resources of the Fund to meet a large or sustained outflow of capital; similarly, while the rights of a participant in the SDR Department to use its SDRs may be suspended in the event of a failure by the participant to fulfill any of its obligations with respect to SDRs, a participant may not be compelled to withdraw from the Fund on this account. See "Overdue Financial Obligations to the Fund - Ineligibility to Use the General Resources and Subsequent Actions by the Fund - Legal Aspects" SM/86/102 (5/14/86), p. 12.

2/ See, for instance, the charters of the IBRD (Article VI, Section 2) and the AMF (Article 39); see also Article XXVI, Section 2 of the Fund's Articles.

3/ See the charters of the IBRD (Article VI, Section 2); the IDA (Article VII, Section 2); the IFC (Article V, Section 2); the IADB (Article IX, Section 2); the AfDB (Article 44); the AsDB (Article 42, Section 2); the IsDB (Article 44, Section 2); and the IFAD (Article 9, Section 2).

4/ See, for instance, the charters of the UN (Article 6) and the AMF (Article 39); see also Article XXVI, Section 2(b) of the Fund's Articles.

Article VI, Section 1(a), Article XXIII, Sections 2(a) and (b), and Article XXVI, Section 2(a). 1/

In three of these provisions, the term "ineligibility" is used to refer to a particular form of suspension of rights. 2/ Under each of these provisions, the Fund may declare a member ineligible to use the Fund's general resources on the grounds, respectively, that the member is using the general resources of the Fund in a manner contrary to the purposes of the Fund (Article V, Section 5), that the member fails, following a request by the Fund, to exercise appropriate controls to prevent use of the Fund's general resources to meet a large or sustained outflow of capital (Article VI, Section 1(a)), or that the member is failing to fulfill any of its obligations under the Articles (Article XXVI, Section 2(a)). 3/

1/ See, also, the specific reference to Article XXVI, Section 2(a) in Article XIV, Section 3. Moreover, Article V, Section 12, paragraphs (e) and (f)(iii) contemplate a form of suspension of sales of gold and distribution of assets of the Special Disbursement Account to members that have been declared ineligible under Article V, Section 5; these provisions are examined in more detail in Section III, Subsection A, paragraph 1(a) below.

2/ These provisions, and the process of ineligibility, were fully examined in "Overdue Financial Obligations to the Fund - Ineligibility to Use the General Resources and Subsequent Actions by the Fund - Legal Aspects" SM/86/102 (5/14/86).

3/ Article V, Section 5 reads as follows:

"Whenever the Fund is of the opinion that any member is using the general resources of the Fund in a manner contrary to the purposes of the Fund, it shall present to the member a report setting forth the views of the Fund and prescribing a suitable time for reply. After presenting such a report to a member, the Fund may limit the use of its general resources by the member. If no reply to the report is received from the member within the prescribed time, or if the reply received is unsatisfactory, the Fund may continue to limit the member's use of the general resources of the Fund or may, after giving reasonable notice to the member, declare it ineligible to use the general resources of the Fund."

Article VI, Section 1(a) states that:

"A member may not use the Fund's general resources to meet a large or sustained outflow of capital except as provided in Section 2 of this Article, and the Fund may request a member to exercise controls to prevent such use of the general resources of the Fund. If, after receiving such a request, a member fails to exercise appropriate controls, the Fund may declare the member ineligible to use the general resources of the Fund."

Article XXVI, Section 2(a) provides that:

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

The fourth provision, Article XXIII, Section 2(a) and (b), provides for the suspension of a participant's right to use SDRs in case of failure to fulfill any of its obligations with respect to SDRs. 1/

The Fund has adopted several decisions implementing its powers under these provisions as well as its power to "adopt policies on the use of its resources" under Article V, Section 3(a), on the suspension of the right to use the resources of the Fund or SDRs. Thus, Rule K-2 specifies that the Fund may, whenever it is authorized to declare a member ineligible, refrain from doing so and instead limit the use of the Fund's general resources by the member. In addition, the Fund has decided not to negotiate or approve the use of its general resources, both under a stand-by or an extended arrangement and outside an arrangement, for a member in arrears to the Fund. 2/ It has also decided that stand-by and extended arrangements shall include a provision suspending purchases under the arrangement while the member has overdue financial obligations to the Fund. 3/ With respect to the use of SDRs, Rule S-4 also provides for a form of limitation prior to suspension of the right to use SDRs.

Both ineligibility and suspension of the right to use SDRs involve suspension of specific rights. The Articles do not prescribe, nor allow for, any other form of suspension. Thus, the Fund may not, without an amendment of the Articles, suspend other specific rights of a member, such as voting rights, or all of a member's rights of membership generally. 4/

1/ Article XXIII, Section 2(a) and (b) states:

"(a) If the Fund finds that a participant has failed to fulfill its obligations under Article XIX, Section 4, the right of the participant to use its special drawing rights shall be suspended unless the Fund otherwise decides.

(b) If the Fund finds that a participant has failed to fulfill any other obligation with respect to special drawing rights, the Fund may suspend the right of the participant to use special drawing rights it acquires after the suspension."

2/ See Chairman's Summing Up of EBM/84/54 (4/5/84), Buff 84/56, (4/12/84), Selected Decisions, Thirteenth Issue, p. 76, and EBM/85/26 (2/20/85), p. 19, ibid., p. 80.

3/ Decision No. 7908-(85/26), February 20, 1985, Selected Decisions, Thirteenth Issue, p. 76. Paragraph 6(2) of the SAF Regulations, similarly, provides for the suspension of disbursements under the facility to a member in arrears to the Fund: Annex to Decision No. 8238-(86/56) SAF, March 26, 1986, Selected Decisions, Thirteenth Issue, p. 142.

4/ See "Overdue Financial Obligations to the Fund - Ineligibility to Use the General Resources and Subsequent Actions by the Fund - Legal Aspects" SM/86/102 (5/14/86), pp. 16-17.

The preceding statement relates to the suspension of rights, as distinct from the withholding of discretionary benefits, such as technical assistance. 1/ While the Fund may not suspend rights except as specifically permitted in the Articles, it may decide to refrain from granting discretionary benefits to members.

B. Suspension in the Bank

Article VI, Section 2 of the Bank's Articles gives the Bank the power to suspend the membership of a member that fails to fulfill any of its obligations to the Bank. This provision reads as follows:

"Suspension of Membership

If a member fails to fulfill any of its obligations to the Bank, the Bank may suspend its membership by decision of a majority of the Governors, exercising a majority of the total voting power. The member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing. While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all obligations."

Two aspects of this provision are notable. First, the Bank is not specifically empowered to suspend rights selectively, and a member whose membership has been suspended may not be permitted to exercise any right (except for the right of withdrawal, which is not subject to suspension). 2/ Secondly, suspension of membership under Article VI, Section 2 may be applied in the case of a breach by the member of "any of its obligations to the Bank," that is, not only the obligations specified in the Articles, 3/ but also the member's contractual obligations to the Bank under its loan or guarantee agreements.

The Bank has adopted additional measures with respect to the incurrence of loan service arrears to it by members. Pursuant to the Bank's policies, further lending to a member is suspended if the member incurs such arrears to the Bank. Additional steps, of a contractual nature, are provided for under the loan agreements

1/ Ibid., p. 7.

2/ This provision has only been applied once by the Bank, namely, in the case of Czechoslovakia in 1953.

3/ For example, the obligation of maintenance of value, the obligation of payment of capital subscriptions, and the obligation with respect to the immunity of the Bank.

between the Bank and the members. Thus, disbursements under such an agreement may be suspended 1/ if, inter alia, the member fails to make any payment to the Bank under either that particular loan agreement or any other loan or guarantee agreement with the Bank. 2/ These agreements also provide for possible further actions by the Bank in such cases, such as the cancellation of undisbursed loan balances 3/ and the acceleration of the maturities of outstanding loan obligations. 4/

1/ Under the Bank's policies, disbursements are automatically suspended when the member has been in default for 90 days.

2/ See Section 6.02(a) of the General Conditions Applicable to Loan and Guarantee Agreements ("the General Conditions"), which reads as follows:

"Suspension by the Bank. If any of the following events of suspension shall have occurred and be continuing, the Bank may, by notice to the Borrower and the Guarantor, suspend in whole or in part the right of the Borrower to make withdrawals from the Loan Account:

(a) The Borrower shall have failed to make payment (notwithstanding the fact that such payment may have been made by the Guarantor or a third party) of principal or interest or any other amount due to the Bank or the Association [IDA]:

(i) under the Loan Agreement, or (ii) under any other loan or guarantee agreement between the Bank and the Borrower or (iii) in consequence of any guarantee or other financial obligation of any kind extended by the Bank to any third party with the agreement of the Borrower, or (iv) under any development credit agreement between the Borrower and the Association."

A similar provision is included in Section 6.02(b) with respect to a failure to make disbursements under a Guarantee Agreement. In addition, Section 6.02(f) provides for suspension of disbursements if "the member of the Bank which is the Borrower or the Guarantor...shall have been suspended from membership in or ceased to be a member of the Bank...."

3/ Section 6.03(a) of the General Conditions.

4/ Section 7.01 of the General Conditions.

C. Comparison between suspension in the Fund and the Bank

There are significant differences, both substantive and procedural, between the suspension of all rights of membership in the Bank and the suspension of specified rights in the Fund. The legislative history of the charters of the Fund and the Bank does not fully reveal the reasons for these differences.

1. Differences between suspension in the Fund and the Bank

A first difference between suspension in the Fund and the Bank relates to the scope of suspension: only certain designated rights may be suspended in the Fund, whereas all rights (except that of withdrawal) are suspended in the Bank. Each organization is afforded only limited flexibility in this respect by its respective charter, in that the Fund's Articles provide only for suspension of specific rights, and the Bank's Articles do not specifically empower the Bank to suspend rights selectively.

Secondly, the organ in the organization authorized to suspend the rights, as well as the majority required for such a decision, is different. In the Fund, both a declaration of ineligibility and a decision to suspend the right to use SDRs fall within the powers of the Executive Board; these decisions require a majority of the votes cast. In the Bank, it is the Board of Governors that decides upon suspension; the decision requires a qualified majority (that is, a majority of Governors, exercising a majority of the total voting power).

A third main difference relates to the link between suspension and expulsion in the two organizations. In the Fund, a declaration of ineligibility under Article XXVI, while a necessary prerequisite to compulsory withdrawal, does not lead to compulsory withdrawal without further decision. 1/ A separate decision of the Board of Governors, by a qualified majority, is necessary for compulsory withdrawal. 2/ In the Bank, in contrast, no further decision by any

1/ A member may not be compelled to withdraw either on the grounds of use of the general resources in a manner contrary to the purposes of the Fund or on account of a failure to exercise appropriate controls to prevent the use of the general resources of the Fund to meet a large or sustained outflow of capital (Article XXVI, Section 2(b)), nor because of a failure to meet its obligations with respect to SDRs (Article XXIII, Section 2(f)); see "Overdue Financial Obligations to the Fund - Ineligibility to Use the General Resources and Subsequent Actions by the Fund - Legal Aspects" SM/86/102 (5/14/86), p. 12.

2/ A majority of Governors having eighty-five percent of the total voting power is required (Article XXVI, Section 2(b)). This compares with a majority of Governors exercising a majority of the total voting power for suspension of membership in the Bank.

organ of the institution is required after a member has been suspended: absent a decision of the Board of Governors restoring the member to good standing, the member automatically ceases to be a member of the Bank one year after the date of suspension.

In this comparison between the rules on suspension in the Fund and the Bank, the provisions of their Articles need to be supplemented by their decisions with respect to members in arrears to the organizations. In the Fund, existing procedures envisage four possible steps with respect to a member with overdue financial obligations to the Fund. These steps are: (i) the non-negotiation or approval of the use of Fund resources, and the suspension of the member's right to purchase under arrangements already approved; (ii) the limitation of the use of general resources under Rule K-2; (iii) ineligibility; and (iv) compulsory withdrawal. In the Bank, the procedure is in two stages: (i) suspension of disbursements under existing loan agreements ^{1/} and suspension of further lending to the member; and (ii) suspension of membership with its automatic linkage to cessation of membership.

The regimes of suspension in the Fund and the Bank are, therefore, somewhat different. At the same time, suspension of membership in the Bank presents several similarities with one form of compulsory withdrawal open to the Fund, namely, compulsory withdrawal with delayed effectiveness. In the Fund, the Board of Governors may, when adopting a resolution compelling a member to withdraw, decide that this decision will be effective at a specified later date, so as to give the member an additional opportunity to resume compliance with its obligations under the Articles. ^{2/} Thus, for both suspension of membership in the Bank and compulsory withdrawal with delayed effectiveness in the Fund, the Board of Governors is the competent authority to take the decision, the required majority is a qualified majority, and the effect of the decision is that the member will cease to be a member after a specified period of time without any further decision by the institution. A declaration of ineligibility, in contrast, is decided upon by the Executive Board of the Fund by a simple majority of the votes cast, and does not automatically result in cessation of membership. In several respects, therefore, suspension of membership in the Bank approximates compulsory withdrawal with delayed effectiveness in the Fund, rather than ineligibility. A major difference, however, is

^{1/} This may be combined with a cancellation of outstanding loan balances and an acceleration of the maturities of outstanding loan obligations.

^{2/} See "Overdue Financial Obligations to the Fund - Ineligibility to Use the General Resources of the Fund - Legal Aspects" SM/86/102 (5/14/86), pp. 15-16.

that a Fund member that is compelled to withdraw effective some time after the date of the Board of Governors' resolution continues to enjoy its membership rights other than the entitlement to use the general resources of the Fund, until withdrawal becomes effective.

2. Legislative history

The available legislative history pertaining to Article VI, Section 2 of the Bank's Articles, and Articles V, Section 5 and XXVI, Section 2 of the Fund's Articles, does not fully disclose the reasons for the differences between the provisions on suspension in the Fund and the Bank. 1/

Early in 1943, during the discussions of draft Articles for the Fund and the Bank, the United States proposed a provision on suspension of membership, in terms similar to Article VI, Section 2 of the Bank's Articles as it now stands, for both the Bank and the Fund. 2/ The proposal for the Bank was ultimately incorporated in the Bank's Articles, with only minor modifications. For the Fund, however, the proposal lacked support. Thus, it was not included in the Joint Statement of Experts of April 1944, which contained instead a provision on suspension of the use of Fund resources in the event of use of its resources in a manner contrary to the purposes and policies of the Fund. 3/

In further negotiations, between April and June 1944, some differences of view persisted. The United Kingdom argued for ineligibility, as incorporated in the Joint Statement, as the only form of suspension in the Fund. In contrast, the United States continued to prefer a more general provision on suspension of membership for the violation of any obligation under the Articles, possibly in addition to ineligibility as proposed by the United Kingdom. These discussions, which continued during the Atlantic City Conference of June 1944, 4/

1/ These provisions have not been modified significantly since the adoption of the original Articles in the Bank and the Fund. Article XXIII, Section 2 was incorporated in the Fund's Articles by the First Amendment.

2/ "Preliminary Draft Outline of Proposal for a United and Associated Nation's Stabilization Fund" of April 7, 1943, Article V, paragraph 8, in Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944 [hereinafter referred to as "Proc. and Doc."], Vol. II, 1546.

3/ "Joint Statement by Experts on the Establishment of an International Monetary Fund of the United and Associated Nations," April 21, 1944, Article III, Section 2(d), Proc. and Doc., Vol. II, 1632.

4/ See Minutes of the "Formal Agenda Conference," June 28, 1944 (p.m.), p. 2.

culminated in a joint United Kingdom-United States proposal at the Bretton Woods Conference in July 1944. 1/ This joint proposal provided for ineligibility both for the violation of any obligation under the Articles and for use of the Fund's resources in a manner contrary to the purposes and policies of the Fund, but did not include any provision on suspension of membership. It was ultimately approved, after further drafting changes, in the form of Article V, Section 5 and Article XXVI, Section 2(a). 2/

While the historical record does not disclose the reasons for the adoption of the two different types of provisions on suspension for the Fund and the Bank, this difference could be partly explained in terms of the disparity that existed under the original Articles of the Fund and the Bank with respect to access to the resources of the two organizations by their members. At the time of their adoption, the Articles of the Fund conferred on members an entitlement to use the Fund's resources subject only to the objective conditions set forth in Article V, Section 3. 3/ Ineligibility, therefore, had

1/ Proc. and Doc., Vol. 1, p. 272.

2/ Article XXVI, Section 2(a) was Article XV, Section 2(a) in the original Articles.

3/ Article V, Section 3 of the original Articles provided that:

"(a) A member shall be entitled to buy the currency of another member from the Fund in exchange for its own currency subject to the following conditions:

- (i) The member desiring to purchase the currency represents that it is presently needed for making in that currency payments which are consistent with the provisions of this Agreement;
- (ii) The Fund has not given notice under Article VII, Section 3, that its holdings of the currency desired have become scarce;
- (iii) The proposed purchase would not cause the Fund's holdings of the purchasing member's currency to increase by more than twenty-five percent of its quota during the period of twelve months ending on the date of the purchase nor to exceed two hundred percent of its quota, but the twenty-five percent limitation shall apply only to the extent that the Fund's holdings of the member's currency have been brought above seventy-five percent of its quota if they had been below that amount;
- (iv) The Fund has not previously declared under Section 5 of this Article, Article IV, Section 6, Article VI, Section 1, or Article XV, Section 2(a), that the member desiring to purchase is ineligible to use the resources of the Fund.

(b) A member shall not be entitled without the permission of the Fund to use the Fund's resources to acquire currency to hold against forward exchange transactions."

to be understood in the context of affecting such an entitlement to obtain resources. 1/ In the Bank, where no such unqualified entitlement of members was ever expressly recognized in the Bank's Articles, no equivalent sanction could have been envisaged. This may explain why ineligibility was not included in the Bank's Articles. It does not explain, however, why suspension of all rights of membership was not included in the Fund's Articles; there is no explanation for this difference in the legislative history.

Section III. Amendment of the Articles of the Fund

Any modification of the existing provisions on ineligibility and suspension of the right to use SDRs, including the introduction of a provision on suspension of membership, would require an amendment of the Articles in accordance with the provisions of Article XXVIII. 2/

1/ The entitlement was not unconditional, as each purchase had to be "consistent with the provisions of [the] Agreement," which was interpreted by the Fund as meaning "consistent both with the provisions of the Fund Agreement other than Article I and with the purposes of the Fund contained in Article I": Decision No. 287-3, March 17, 1948, Selected Decisions, Thirteenth Issue, p. 24. The conditionality with respect to the use of the Fund's resources was expressly incorporated in the Articles by the Second Amendment.

2/ Article XXVIII provides that:

"(a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a Governor, or the Executive Board, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board of Governors. If the proposed amendment is approved by the Board of Governors, the Fund shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members.

(b) Notwithstanding (a) above, acceptance by all members is required in the case of any amendment modifying:

- (i) the right to withdraw from the Fund (Article XXVI, Section 1);
- (ii) the provision that no change in a member's quota shall be made without its consent (Article III, Section 2(d)); and
- (iii) the provision that no change may be made in the par value of a member's currency except on the proposal of that member (Schedule C, paragraph 6).

(c) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram."

Such an amendment could take various forms. For instance, suspension could sanction a failure of the member to comply with certain types of obligations--such as financial obligations to the Fund--or with any obligation under the Articles; it could affect either all membership rights or certain specified rights (in addition to those that can already be suspended); it could be automatic or require a decision of the organization; and it could lead automatically to expulsion or not.

Any such amendment of the Articles would raise a number of issues for consideration, and, in particular, its potential effect on the balance of rights and obligations of members under the Articles. Additional questions would arise for particular types of amendments, the nature and complexity of which would depend on the characteristics of the amendment in question.

The adoption of a provision on suspension of membership modeled upon the Bank's Articles, for instance, would call for an examination of two main issues: first, the nature and the scope of the suspension, and, secondly, the relationship between the "conversion" feature--whereby suspension is automatically converted into cessation of membership--and the existing provisions in the Articles on compulsory withdrawal.

A. Nature and scope of suspension of membership

Any organization that contemplates a provision on suspension would need to examine questions concerning both the nature and the scope of the suspension. As the discussion below shows, however, such questions would likely have more profound ramifications for the Fund than for most other organizations, including the Bank, because of the nature of the Fund and of its underlying principles and rules.

1. Nature of suspension of membership: suspension of the exercise of the rights of membership or of their existence

Suspension of membership affects all rights derived from membership. To which degree they are so affected depends on the nature of suspension. There are two possible analyses of this nature. Under one analysis, the exercise by the member of its rights of membership is suspended, but the existence of these rights is not affected. Under the other analysis, the member is treated as if it were a nonmember for purposes of its rights of membership, so that the very existence of these rights is suspended. Under this latter analysis, the suspension of the existence of the rights of membership would

be comparable, in many respects, to a temporary expulsion of the member. 1/

Most of the charters of international organizations that contain a provision on suspension of membership stipulate that suspension affects the "exercise" of the rights of membership. For instance, Article VI, Section 2 of the Articles of Agreement of the Bank provides that:

"While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except for the right of withdrawal, but shall remain subject to all obligations."
(underlining added). 2/

Similarly, Article 5 of the Charter of the United Nations provides that:

"A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council."
(underlining added).

It is uncertain, however, whether the term "exercise" is necessarily used in these charters in contradistinction to the term "existence". Apparently, the concept of "exercise" has not been defined either in the charters or through established practice of these organizations. Thus, while the concept of exercise in Article 5 of the UN Charter has been interpreted by some scholars to contrast with the concept of existence of rights, 3/ it has been questioned by others whether this distinction between exercise and existence of rights could be applied in the context of international organizations. 4/

1/ The member's obligations under the Articles would remain in effect. In a sense, therefore, a suspended member's situation would be worse than if it had withdrawn. The suspended member would not, however, have to reapply for membership upon cessation of suspension contrary to a member that has withdrawn.

2/ The charters of the regional development banks which have been modeled upon the Articles of Agreement of the IBRD follow the same terminology.

3/ Combacau, Le pouvoir de sanction de l'ONU (1974), p. 350.

4/ Leben in Cot & Pellet, La charte des Nations Unies (1985), pp. 184-185.

In the Fund, members have three possible types of rights under the Articles: the rights that are enjoyed by members only through their exercise; the rights that are enjoyed by members both with and without exercise, namely the rights that may accrue to members over a period of time; and the rights that do not involve any exercise. The significance of the distinction between suspension of the exercise of rights of membership and suspension of their existence can be demonstrated by examining their respective effects on these three types of rights.

(a) Effect of suspension on rights enjoyed through exercise

Most of the rights of membership in international organizations are enjoyed by members in a concrete form only when the members exercise them. For instance, the right to vote has a practical meaning for a member when the votes are cast. ^{1/} Similarly, the right to use the resources of the organization takes a concrete form for the member when it proceeds to request assistance. For such rights, the distinction between suspension of their existence and suspension of their exercise would have no practical significance: under both, the suspension would effectively affect the member by preventing the exercise of its rights. ^{2/}

(b) Effect of suspension on the accrual of rights

Rights that, because of their nature, may accrue to members prior to their exercise, such as the right to participate in a distribution of net income, would be affected by a suspension of the existence of the rights of membership in a deeper and more permanent way than by a suspension of their exercise. Suspension of the exercise of rights would not prevent the accrual of rights by the suspended member. In contrast, suspension of the existence of rights would prevent the accrual of rights during the period of suspension. For instance, with respect to such rights as the right to receive remuneration under Article V, Section 9(a) and the right to receive a share of income or reserves distributed by the Fund

^{1/} Because of the particular structure of the Fund, suspension of membership would have certain effects on voting and related rights that deserve to be examined in more detail. These effects are discussed in paragraph 2(f) below.

^{2/} This lack of practical importance of the distinction, combined with the limited practice of international organizations with respect to suspension, may explain the absence of any comprehensive discussion of the concept of suspension of the exercise of rights in the context of the UN Charter and the Articles of the IBRD and international development banks.

under Article XII, Section 6(c) and (d), 1/ a suspension affecting the exercise of rights would cause the payment of the remuneration or of the share of income or reserves to be withheld by the Fund, but would not prevent the accrual to the member of the right to these amounts. As a consequence, these amounts would become available to the member upon cessation of suspension. In contrast, under a form of suspension affecting the existence of the rights of membership, these amounts would be permanently lost to the suspended member.

In fact, the Articles contain two examples of provisions contemplating a form of suspension that does not affect the accrual, but only the exercise of rights. Thus, Article V, Section 12, paragraphs (e) and (f)(iii) provide for the suspension respectively of sales of gold, and of distributions of assets of the Special Disbursement Account, to members that have been declared ineligible to use the general resources of the Fund under Article V, Section 5. 2/ These provisions specify that the sale of gold or the distribution of assets shall take place when the ineligibility ceases, unless the Fund decides to make them sooner.

(c) Effect of suspension on rights that are not exercised

There are some rights which members enjoy without having to exercise them. In the Fund, for instance, members may derive a benefit from the observance by all other members of their obligations under the Articles, such as the obligation to refrain from imposing exchange restrictions and multiple currency practices without the approval of the Fund (Article VIII, Section 2(a) and Section 3). The question of whether a member derives from the Articles a "right" to the observance of these obligations by the other members is discussed below. 3/ These would be rights which members enjoy passively, i.e., without having to exercise them. 4/ The suspension of the exercise of the rights of membership would therefore have no effect on such rights.

1/ This right of members to receive a share of income or reserves distributed by the Fund is conditional upon a decision by the Fund to make such distributions.

2/ Under Article V, Section 5, a member may be declared ineligible on the grounds that it is using the general resources of the Fund in a manner that is not consistent with the purposes of the Fund.

3/ See paragraph (2)(a)(iii) of this Section.

4/ A complaint by a member that such a passive right has been violated by another member (e.g., with respect to exchange restrictions and multiple currency practices, a complaint in accordance with Rule H-2) is not a form of exercise of the right that was breached. It is the exercise of a separate right, namely the right to complain to the Fund that an obligation under the Articles is not complied with.

In contrast, the suspension of the existence of these rights would clearly have an impact on them. As these rights are correlated to obligations of the other members, the suspension of the existence of these rights would imply the suspension of the corresponding obligations of these other members as well. Therefore, the effect of such a form of suspension would be to reduce the scope of the other members' obligations under the Articles. For instance, these other members would be relieved during the period of the suspension from their obligations not to impose exchange restrictions against the suspended member. The effects of such a suspension would not be limited to the bilateral relationship between the member imposing the restrictions on the suspended member and the suspended member itself. It would undermine the Fund's multilateral system of payments in respect of current transactions between members. Therefore, as indicated below, 1/ suspension should have no effect in this case.

2. Scope of suspension

Under a provision on suspension of membership, all the rights of membership are suspended. The exact scope of suspension of membership depends therefore on the meaning attributed to the concept of "right of membership", as well as to its components of "right" and "membership".

(a) Concept of right: rights as compared to benefits

While the charters of several international organizations contain provisions on the suspension of members' rights 2/ of membership, they typically refrain from defining the concept of "right". 3/

The Articles of the Fund are generally drafted in terms of obligations of members and duties of the Fund and not in terms of rights of members. Also, in the few provisions in which the

1/ See paragraph 2(a)(iii) below.

2/ It may be noted that Article 5 of the UN Charter refers to both "rights" and "privileges". Scholars generally consider, however, that that privileges are rights and that the distinction is superfluous: see Kelsen, *The Law of the United Nations* (1950), p. 712; Leben, *Les sanctions privatives de droits ou de qualite dans les organisations internationales specialisees* (1979), p. 209.

3/ Indeed, few scholars have attempted to give a precise definition of the concept of right in the context of international law. See Bleckmann, "The Subjective Right in Public International Law" in 28 *German Yearbook of International Law* (1985), pp. 144 et seq. In his study, Mr. Bleckmann proposed to apply, with certain modifications, in the field of public international law the definition of subjective right developed in some domestic legal regimes, namely, that of a legally protected interest (idem at pp. 147-149).

concept of a right can be identified, the Articles use the term "entitlement", rather than the term "right", as in Article V, Section 3(b), which provides that members "shall be entitled to purchase the currencies of other members from the Fund," subject to certain conditions. 1/ A careful consideration of the relevant issues may therefore be necessary in order to determine whether a right, which, as such, would be subject to suspension, is conferred on members by a particular provision of the Articles.

(i) In many cases, it will be clear whether or not a provision of the Articles confers a right on members. For instance, Article V, Section 3(b), which has been mentioned above, confers on members an entitlement to use the general resources of the Fund. In addition, Article V, Section 7(a), pursuant to which "[a] member shall be entitled to repurchase at any time the Fund's holdings of its currency that are subject to charges under Section 8(b) of this Article," gives members a right to make early repurchases. This right would be suspended for a member whose membership is suspended. 2/ Other rights of members, which, as such, would be subject to suspension are the right, inherent in Article III, to participate in a quota increase and the rights to receive payment of remuneration (under Article V, Section 9(a)) and of a share of income or reserves distributed by the Fund (under Article XII, Section 6(c) and (d)).

(ii) It is equally clear that some other provisions of the Articles do not confer a right upon members, even though members may stand to benefit under them. For instance, members do not derive a right to technical assistance from Article V, Section 2(b). Similarly, members do not have a right to postponement of the date of discharge of a repurchase obligation under Article V, Section 7(g) or to authorization of the payment of charges in currencies under Article V, Section 8(e). These provisions give the Fund the authority, not a duty, to take certain actions.

(iii) In yet other cases, however, it will not be clear whether rights, in a strict sense, are actually conferred upon members.

1/ Ineligibility to use the general resources of the Fund constitutes a form of suspension of that entitlement.

2/ The result of the suspension would be to negate the assurance provided to members under the existing Articles that they will always be able to prevent the accrual of further charges on holdings of their currencies by repurchasing these holdings in advance of the maturity date.

For instance, as mentioned above, members of the Fund may derive a benefit from the observance by all other members of their obligations under the Articles. Under Article VIII, Section 2(a) and Section 3, for example, members may not impose exchange restrictions, or engage in multiple currency practices or discriminatory currency arrangements, without the approval of the Fund. Each member benefits from the observance by all other members of these obligations, in that the establishment of a free multilateral payments system is thereby promoted.

Another example of benefit derived from the obligations of other members can be found in Article VIII, Section 2(b), which provides that "[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member." This provision imposes an obligation on all members to refrain from enforcing certain contracts that are contrary to another member's exchange control regulations, provided these are maintained consistently with the Articles. From the point of view of the member whose exchange control regulations are involved, this provision confers a benefit, in that the observance of this obligation by the other members contributes to uphold the efficacy of its exchange control regulations. 1/

With respect to some other obligations imposed on members under the Articles, the benefit derived by other members will be less direct, albeit far from insignificant. This is the case, for instance, for the obligation under Article VIII, Section 5 to provide the Fund with the information which the Fund deems necessary for its activities. Clearly, all members benefit from the observance of this obligation by each member, insofar as, without this information, the activities of the Fund could be undermined.

The Articles do not specify whether obligations under the Articles are owed to the Fund, to each other member, or to both the Fund and each other member. Three interpretations appear, therefore, possible.

Under one interpretation, obligations under the Articles would be regarded as owed to the Fund and only to the Fund. The other members would be like third parties to a contract which, although they may benefit from the performance by the parties of their obligations under the contract, do not acquire rights under the contract and cannot demand performance of the contractual obligations. Under

1/ Other examples of obligations under the Articles from which other members are apt to benefit include the obligation to convert under Article VIII, Section 4 and the obligation of designated participants to provide currencies in exchange for SDRs under Article XIX, Section 4(a).

this interpretation, as members would only derive benefits, and not rights, from the other members' obligations, these benefits would not be affected by a suspension of the rights of membership.

Under another interpretation, obligations arising under the Articles would be owed not only to the Fund but also to each other member, thus reflecting a network of relationships linking each member to each other member as well as to the Fund. Under this interpretation, each member would have rights corresponding to each other member's obligations under the Articles. These rights would, however, also correspond to obligations owed to the Fund; therefore, suspension should not apply to them, because it would at the same time suspend the corresponding obligations owed by other members to the Fund.

The third interpretation would treat at least some of the members' obligations under the Articles (e.g., the obligations under Article VIII, Section 2(a) and Section 3, relating to exchange restrictions and multiple currency practices), as owed, not to the Fund, but exclusively to the other members. In contrast with the situation under the other two interpretations, the distinction between right and benefit would be of significance under this third interpretation: suspension of the rights of membership would suspend the former but not the latter. This interpretation would not, however, be consistent with the principle that there is no legal system of reciprocity under the Articles of the Fund, 1/ and should accordingly be rejected.

(b) Rights as distinguished from obligations
under the Articles

Provisions in the Articles typically establish either a right or an obligation for members, but not both.

1/ See Gold, "Some Characteristics of Operation" in The International Monetary Fund, 1945-1965, Vol. II: Analysis (1969), pp. 591 et seq: "It is true that the Articles envisage benefits for all members because all have assumed obligations by subscribing to the Articles. It does not follow from this, however, that there is a legal principle of reciprocity by which the failure of one member to observe an obligation releases another member or members from their obligations to the delinquent member. The purpose of the Articles is to preserve legal order notwithstanding failures by a member from time to time to fulfill any of its obligations under the Articles. It is the function of the Fund to decide whether there has been a failure and what the legal consequences shall be. Even if the Fund is satisfied that there has been a failure, it does not follow that the legal consequences will be the release of other members from any of their obligations in relation to the defaulter or other members" (at p. 592).

Article XII, Section 3(b)(i) constitutes an exception in this regard. Article XII, Section 3(b) specifies that:

"The Executive Board shall consist of Executive Directors with the Managing Director as chairman.

Of the Executive Directors:

- (i) five shall be appointed by the five members having the largest quotas; and,
- (ii) fifteen shall be elected by the other members (...)."

Clearly, this provision confers a right on each of the five members with the largest quotas to appoint an Executive Director and on each of all other members to participate in the elections of the other Executive Directors. It has been clarified, however, that the five members having the largest quotas have not only a right, but also an obligation, to appoint an Executive Director. 1/ In contrast, members that may appoint Executive Directors pursuant to Article XII, Section 3(c) 2/ have a right, but not an obligation to do so. 3/ Similarly, as the practice shows, members not entitled to appoint an Executive Director may, but are not required, under Article XII, Section 3(b)(ii), to participate in elections of Executive Directors.

The rationale for subjecting the five members with the largest quotas to an obligation to appoint was presumably to ensure that the Executive Board would at all times be composed of at least the minimum number of Executive Directors that is mandated by the Articles, namely twenty. No such compelling reason required that the other members also be under an obligation to elect Executive Directors, since, if a

1/ See the Commentary in the Report by the Executive Directors to the Board of Governors on the Proposed Second Amendment to the Articles of Agreement, which states that "(t)he five members having the largest quotas in the Fund are required to appoint Executive Directors..." (at p. 65). See, also, Gold, Voting and Decisions in the International Monetary Fund (1972), p. 57.

2/ Under that provision, if the members with the five largest quotas do not include the two members that have made available the largest absolute amounts of resources utilized by the Fund on the average over the two years preceding a regular election of Executive Directors, these two members may appoint an Executive Director.

3/ Prior to the Second Amendment, these members were also required to appoint Executive Directors. The Second Amendment has permitted them to waive this right and to participate in an election of Executive Directors instead, if they so wish. See the Commentary, p. 65.

member declined to participate in an election of Executive Directors, the number of Executive Directors that would be elected would not be reduced.

The question would arise, in the context of a provision on suspension of the rights of membership, whether suspension should affect the right of the five members with the largest quotas to appoint an Executive Director, considering that such an appointment is also an obligation of membership for these members. On the one hand, it could be argued that suspension should not affect the ability of these five members to appoint Executive Directors, on the grounds that suspension should not affect the scope of a suspended member's obligations. Such an approach could, however, be perceived as inequitable insofar as the right of the other members to appoint or elect an Executive Director would be subject to suspension.

On the other hand, it could be contended that all rights of membership should be subject to suspension, even when they also constitute obligations. This approach, although arguably more equitable as between members, would also adversely affect the Fund, because it would cause a departure from the rule requiring a minimum number of Executive Directors, which is a rule that was adopted in the interest of the Fund. 1/

(c) Membership in the Fund and participation
in the SDR Department

Under the Articles, membership in the Fund does not necessarily coincide with participation in the SDR Department. Indeed, while any member of the Fund may choose to be a participant in the SDR Department, it is not required to do so (Article XVII, Section 1). As a result, a separation is maintained under the Articles between the General Department and the SDR Department. Thus, all operations and transactions involving SDRs are conducted exclusively through the SDR Department, while all other operations and transactions are conducted through the General Department (Article XVI, Section 1). 2/ There is a corresponding separation of assets and property as well as liabilities and obligations between the two Departments (Article XVI, Section 2).

1/ This problem could be obviated by an amendment to the Articles providing, for instance, that the member with the sixth largest quota would be under an obligation to appoint an Executive Director if one of the five members with the largest quotas were suspended.

2/ Operations and transactions involving the acceptance and holdings of SDRs by the Fund in the General Resources Account or the use of SDRs thus held are conducted through both the General Department and the SDR Department (Article XVI, Section 1).

Moreover, the actions that the Fund may take in the event of a violation by a member of its obligations with respect to SDRs differ from those available to it in case of violation of any other obligation under the Articles by the member (Article XXIII, Section 2 and Article XXVI, Section 2, respectively). Thus, pursuant to Article XXIII, Section 2, a failure by a participant to fulfill its obligations with respect to SDRs may lead to a suspension of its right to use its SDRs. In contrast, under Article XXVI, Section 2, a failure by a member to fulfill any other obligation under the Articles may lead to ineligibility and, subsequently, to compulsory withdrawal.

Should the introduction of a provision on suspension of membership in the Articles be considered, it would have to be decided whether or not to maintain the existing separation between the two Departments. Thus, the question would arise whether the participation in the SDR Department of a member whose membership is suspended under the new provision would also be suspended.

If it were decided that suspension of membership should affect participation in the SDR Department, a number of additional questions would have to be addressed. For instance, it would have to be decided whether the provision on suspension of membership would supersede, or only supplement, the existing provisions on suspension of the participant's right to use its SDRs.

Another question would be whether suspension of membership would affect the rights of members as participants in the SDR Department, even in such cases where the obligation that is breached is extraneous to the SDR Department, or whether separate regimes of suspension of membership and of suspension of participation should be established. In the latter case, suspension of membership would sanction the breach of any obligation under the Articles other than obligations with respect to SDRs, and would affect only the rights attached to membership other than those derived from participation; suspension of participation in the SDR Department would, as at present, only follow from breaches of obligations with respect to SDRs and only affect the rights attached to participation.

(d) Rights attached to membership as distinguished
from other rights

Under a provision on suspension of membership, all rights of membership are subject to suspension. In this context, rights of membership should be understood to refer to rights attached to membership, i.e., the rights of members that are created by or under the charter of the organization. It follows that rights that members enjoy independently from the charter of the organization would not be subject to suspension, even if their existence were expressly recognized in a provision of the charter. Indeed, the suspension of such

extraneous rights would effectively amount to the imposition of a new obligation on the suspended member.

Article VI, Section 3 of the Articles provides an example of a provision that recognizes a right of members existing independently from the Articles. Under that provision, members "may exercise such controls as are necessary to regulate international capital movements...." The right of members to regulate international capital movements was not established by the Articles; rather, it pre-existed, and was simply recognized in, the Articles. It follows that the right of a member to exercise such controls would not be affected by a suspension of membership in the Fund.

Another example of such a provision is Article XIV, Section 2, pursuant to which a member may, "notwithstanding the provisions of any other Articles of this Agreement, maintain and adapt to changing circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date it became a member." This provision establishes an exception to Article VIII, Section 2 and Section 3, under which members may not impose exchange restrictions, or engage in multiple currency practices or discriminatory currency arrangements, without the approval of the Fund. Thus, the Articles impose an obligation on members under Article VIII, the scope of which is circumscribed by Article XIV, Section 2. Suspension of membership would not suspend the benefit of Article XIV, Section 2 for suspended members, as such a consequence would be tantamount to expanding the scope of their obligations under Article VIII.

Similarly, in the case of a loan by a member to the Fund, the lender's right to receive payment of principal and interest in accordance with the terms of the loans, being a right based on contract and not derived from membership, would not be affected by suspension of membership. The member's right to repayment and interest is not different from the right of any other lender to the Fund. ^{1/} Such a right needs to be contrasted with other rights which members have as creditors of the Fund, such as the right to be paid remuneration under Article V, Section 9(a) or to receive a share of income or general reserves distributed by the Fund pursuant to Article XII, Section 6(c) and (d), respectively. These are rights attached to membership, and, as such, subject to suspension.

(e) Members' rights as opposed to limitations
on the Fund's powers

The Articles contain provisions establishing limitations on the Fund's powers under the Articles. These limitations would not be

^{1/} The Fund may borrow from nonmembers or other parties with the consent of the member whose currency is borrowed.

subject to suspension. Indeed, were they subject to suspension, this would amount to an increase in the powers of the Fund vis-a-vis suspended members and to a commensurate increase in the suspended members' obligations under the Articles.

Article V, Section 8(e) provides an example of a provision defining the limitations on the powers of the Fund. Under Article V, Section 8(e), the Fund has the authority to permit the payment of charges by a member in other members' currencies specified by the Fund. This power to specify such currencies is, however, subject to a limitation; the final sentence of that provision stipulates that "[t]he Fund's holdings of a member's currency shall not be increased as a result of payments by other members under this provision above the level at which they would be subject to charges under (b)(ii) above." This limitation, which protects members against a use of their currency that would trigger an obligation on their part to pay charges, would not be subject to suspension under a provision on suspension of membership.

Other limitations on the Fund's powers relate to the consent that is required of members before the Fund takes certain actions. Thus, the Fund must obtain the consent of the member before changing the member's quota (Article III, Section 2(d)) and before borrowing its currency (Article VII, Section 1). Similarly, pursuant to Article V, Section 6(c), the Fund may enter into transactions under Article V, Section 6 (i.e., accepting SDRs offered by a participant or providing a participant with SDRs, in exchange for an equivalent amount of currencies of other members) "only if a member whose currency is provided or accepted by the Fund concurs in that use of its currency." Under Article XXVIII, paragraph (b), likewise, amendments to the Articles cannot enter into force without the acceptance of the proposed amendments by a specified majority--or, in some cases, the unanimity of members.

The requirement of a member's consent, concurrence or acceptance would not be eliminated by its suspension. Accordingly, suspension of membership would not have the effect of permitting the Fund to change unilaterally the suspended member's quota, or to borrow its currency, or to use it in transactions or operations under Article V, Section 6(c), without the member's consent. Similarly, proposed amendments adopted by the Board of Governors would have to be submitted for acceptance to all members, including suspended members; no amendment requiring acceptance by all members could enter into force without acceptance by suspended members.

(f) Rights of members as distinguished from powers
of Governors and Executive Directors

A distinction is drawn under the Articles between members on the one hand, and Governors and Executive Directors on the other.

As a legal matter, in the Fund, Executive Directors are not representatives of members. 1/ Rather, they are officials of the Fund, who act and speak on their own behalf, and not on behalf of the members that have appointed or elected them; 2/ thus, they do not legally bind the members to any view expressed or action taken by them, as representatives would. This is so not only for elected Executive Directors, who may not be removed during their tenure by the members that elected them, but also for appointed Executive Directors, whose appointment may be terminated by the appointing member at any time. Indeed, the precariousness of the appointment does not affect the status of the appointed Executive Director while the appointment stands. The similarity of relationship between members and appointed Executive Directors, on the one hand, and members and Governors, on the other hand, justifies the conclusion that Governors also are officials of the Fund, 3/ and not representatives of the members that appoint them. 4/

Evidence of the status of Governors and Executive Directors as officials of the Fund, rather than representatives of members, is that their immunities under the Articles may be waived by the Fund, and not by the members that have appointed or elected them (Article IX, Section 8(1)). 5/

1/ See the legal opinion by the General Counsel of March 10, 1966 on the "Status of Executive Directors", annexed to EBAP/66/138 (10/25/66). See, also, EBM/352 (8/11/48), where the General Counsel indicated that, for purposes of the proposed Convention on Privileges and Immunities of the Specialized Agencies, the Executive Directors of the Fund would be considered as "officials" of the Fund rather than "representatives" of members. See, also, to the same effect, EBM/74/137 (11/1/74), p. 8 and EBM/78/5 (1/9/78), p. 5.

2/ Although Executive Directors can be expected, as a matter of practice, to be aware of the interests of their respective constituencies, they are not required to seek advice or instructions from the member or members that have appointed or elected them.

3/ See Gold, Legal and Institutional Aspects of the International Monetary System, Selected Essays (1979), p. 204; Gold, Voting and Decisions in the International Monetary Fund (1972), pp. 99 et seq.

4/ The status of the members of the organs of a particular international organization depends on the provisions of the charter of that organization. Thus, the charter of the United Nations makes it clear that the members of the General Assembly and the Security Council are the member countries themselves, and that their delegates in these organs are their representatives: see Articles 9 and 23 of the UN Charter.

5/ In contrast, in the United Nations, the immunities of a representative may be waived by the member he represents: see Section 14 of the Convention on the Privileges and Immunities of the United Nations of February 13, 1946, United Nations Treaty Series, Vol. I, p. 15.

There are circumstances, however, in which Governors and Executive Directors may be called upon to act as representatives of members. For instance, a member, pursuant to Article XII, Section 3(j) and Section 19 of the By-Laws, may designate a representative to attend a meeting of the Executive Board when a request made by, or a matter particularly affecting, that member is under consideration; when a member designates his Governor or Executive Director for that purpose, the Governor or Executive Director acts as the representative, in the legal sense, of the member.

Governors also appear to act as representatives of the members that have appointed them when they participate in the elections of Executive Directors (Schedule E). Indeed, in doing so, Governors exercise a right, namely the right to elect Executive Directors, which is specifically conferred on members, rather than on the Board of Governors, by Article XII, Section 3(b). It may be concluded from this that Governors act as representatives of members in these elections and not, strictly speaking, as members of the Board of Governors.

The distinction between members, on the one hand, and Governors and Executive Directors, on the other, would be of importance in connection with a provision on suspension of membership, because under such a provision only the rights of members would be subject to suspension. In contrast, the powers of officials of the Fund, including Governors and Executive Directors when they act as members of their respective Boards, would not be affected. It follows that, if some or all of the powers of Governors and Executive Directors are to be subject to suspension, an amendment of the Articles that goes beyond suspension of membership would be necessary.

The impact of suspension of membership on voting and related rights is examined in more detail in the following paragraphs in the light of the distinction between suspension of the existence of rights of membership and the suspension of the exercise of these rights. 1/

(1) Appointment of Governors and appointment
or election of Executive Directors

Under both suspension of the existence of the rights of membership and suspension of their exercise, a member's right to appoint a Governor and an Alternate to the Board of Governors under Article XII, Section 2(a), and its right to appoint an Executive Director to the

1/ This distinction was discussed above in paragraph 1 of this Section.

Executive Board under Article XII, Section 3(b) 1/ or (c), would be subject to suspension. Thus, a suspended member would be unable to appoint a new Governor or Executive Director. A suspended member's right to elect an Executive Director under Article XII, Section 3(b) would also be suspended. This is notwithstanding that Executive Directors are, pursuant to paragraph 1 of Schedule E, elected by ballot of Governors, because, as explained above, in electing Executive Directors, Governors exercise a right, and act as representatives, of members. Consequently, a member could not participate in an election of Executive Directors through its Governor while its membership is suspended.

Suspension of the existence of rights of membership would have, in addition, an effect on the suspended member's right to retain the Governor it had already appointed, and the Executive Director he had already appointed or elected, by the time suspension was declared. Indeed, as explained above, suspension of the existence of rights reaches also the rights that are enjoyed without having to be exercised, such as the right to retain a Governor or Executive Director. As a result, the appointment of the suspended member's Governor would automatically terminate, under such a form of suspension, as would the appointment of the Executive Director he may have appointed. The Governor and appointed Executive Director would thereby cease to be officials of the Fund for the period of the suspension. If the suspended member had elected, rather than appointed, an Executive Director, this Executive Director would retain his status of Executive Director on account of the other, nonsuspended members of his constituency during the period of suspension, but the suspended member would be regarded as removed from the Executive Director's constituency.

In contrast, suspension of the exercise of the rights of membership would not affect the status of the suspended member's Governor and appointed Executive Director, and the member would continue to be treated as part of the constituency of an Executive Director he had elected, notwithstanding the suspension.

(ii) Attendance and representation to meetings of
the Board of Governors and the Executive Board

Under a form of suspension affecting the existence of rights of membership, the Governors and appointed Executive Directors (as well as the elected Executive Directors, all the members of whose constituency have been suspended) would cease to be officials of the Fund, as if the member appointing them had withdrawn from the Fund. Accordingly, they would lose the attributes attached to that status, including the right to attend and participate in meetings of the Board of Governors or of the Executive Board.

1/ See, however, the discussion above on the obligatory nature of these appointments (p. 25).

Suspension of the exercise of the rights of membership, conversely, would not, in and of itself, affect the status of Governors and Executive Directors. Nor would it affect their right to attend and participate in meetings of their respective Boards, because they exercise this right as officials of the Fund, not as representatives of members. ^{1/} Thus, such a right would be subject to curtailment only if a specific provision to that effect were adopted, aside from the provision on suspension of membership.

By contrast, the right of a member, under Section 19 of the By-Laws, to send a representative to meetings of the Executive Board when a request by, or a matter particularly affecting, the member is under consideration, would be subject to suspension, as any other right of members attached to membership.

(iii) Voting

Suspension of the existence of rights and suspension of their exercise would have different consequences with respect to voting rights as well.

If the existence of rights were subject to suspension, the suspended member would be treated as a nonmember. Therefore, as in the case of withdrawal, the total number of votes subject to casting in the Board of Governors and the Executive Board would be reduced by the number of votes allotted to the suspended member. Assuming that the suspended member had elected an Executive Director, the total number of votes available for casting by that Director would also be reduced by the number of votes allotted to the member. Voting by the suspended member's Governor and appointed Executive Director would not be conceivable since the Governor and Executive Director's appointment would have been terminated by the suspension.

Whether the suspension of the exercise of the rights of membership would prevent the casting of votes by the suspended member's Governor and Executive Director would depend on whether Governors and Directors are regarded as casting their own votes or the members' votes.

^{1/} Unlike other organizations, such as the United Nations, for instance, where the right to attend and participate in meetings and the right to vote are rights of members, which are subject to suspension under Article 5 of the Charter. See Kelsen, The Law of the United Nations (1950), p. 712 and Leben in Cot & Pellet, La charte des Nations Unies (1985), p. 183. See, also, Ruzie, Organisations internationales et sanctions internationales (1971), pp. 24 et seq.

The relevant provisions of the Articles are the following:

- "Each member shall have two hundred fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand special drawing rights...." (Article XII, Section 5(a));
- "Each Governor shall be entitled to cast the number of votes allotted under Section 5 of this Article to the member appointing him" (Article XII, Section 2(e));
- "Each appointed Executive Director shall be entitled to cast the number of votes allotted under Section 5 of this Article to the member appointing him" (Article XII, Section 3(i)(i)); and
- "Each elected Executive Director shall be entitled to cast the number of votes which counted towards his election" (Article XII, Section 3(i)(iii)).

Two interpretations of these provisions are possible. Under a first possible interpretation, the votes would be regarded as the members' votes, whereas their casting would be the responsibility of the Governors and Executive Directors. This interpretation would be based on Article XII, Section 2(e) which specifies that "each member shall have... votes" (emphasis added). Also, no provision in the Articles provides that Governors or Executive Directors shall have their own votes. If this interpretation were the correct one, it would be reasonable to conclude that suspension of membership would per se prevent the casting of the suspended votes. 1/ This interpretation does not, however, appear compatible with the principle that Executive Directors and Governors are not representatives of members.

Under the second possible interpretation, which is consistent with this principle, Governors and Executive Directors would be regarded as casting their own votes, with the members' votes used as a basis for calculation of the Governors' and Directors' votes. In support of this interpretation, it could be pointed out that Article XII, Section 2(e) and Section 3(i)(i) and (iii) do not provide that Governors and Executive Directors cast the votes of members, but rather that they cast the number of votes allotted to members under Article XII, Section 5(e), or the number of

1/ While suspension of membership would not directly suspend the right to cast the votes, which is a right of Governors and Executive Directors and not of members, it would suspend the right of the member to hold the votes, which, in turn, would prevent the suspended votes from being available for casting.

votes that counted towards their election, as the case may be. ^{1/} Under this interpretation, suspension of membership would not, by itself, suspend the ability of Governors and Executive Directors to cast votes. It would be possible, however, to prevent the casting of a suspended member's votes by introducing in the Articles, in addition to the provision on suspension of membership, a provision specifying that the casting of a suspended member's votes would also be suspended.

(g) Waivers of suspension and authorizations by the Fund

Under a provision on suspension of membership of the type examined above, all of a member's rights of membership would be suspended and, upon termination of suspension, all of these rights would be recovered by the member. Some measure of flexibility could be given to the Fund, however, by empowering it to grant waivers of suspension of certain rights without terminating the suspension for some other rights. The effect of a waiver of the suspension of such rights would be to restore these rights.

Waivers would have to be distinguished from authorizations which the Fund may grant to a member without establishing thereby a right for the member. Under the existing Articles, for instance, the Fund may, if it wishes, "accept from any member in place of part of the member's currency in the General Resources Account which in the judgment of the Fund is not needed for its operations and transactions, notes or similar obligations issued by the member or the depository designated by the member under Article XIII, Section 2." Members do not have a right to have notes accepted in place of currency, and the Fund's acceptance of such notes does not amount to an acknowledgement that any such right exists. Under a provision on suspension of the rights of membership, the Fund could also grant authorizations to the suspended member, without reviving a suspended right. For instance, as already indicated, a suspended member's right under Section 19 of the By-Laws to send a representative to meetings of the Executive Board when a request by the member, or a matter particularly affecting it, is under consideration would be suspended. This does not mean that the member would necessarily be barred from sending such a representative. His attendance would, however, be subject to the authorization of the Executive Board, as the attendance by any other person. Similarly, while suspension of membership would suspend the member's right to make early repurchases under Article V, Section 7(a), the Fund would have the authority to accept such early repurchases, if it so decided.

^{1/} See Gold, Voting and Decisions in the International Monetary Fund (1972), pp. 99-100: "[I]t is not said in the Articles that a Governor or an Executive Director casts the votes of a member. He casts 'the number of votes allotted' to a member or 'the number of votes which counted towards his election.' This language seems to suggest that he casts a number of votes equivalent to the votes of a member or members."

B. Conversion of suspension of membership
into cessation of membership

Article VI, Section 2 of the Bank's Articles provides that a member whose membership has been suspended "shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing." If the Fund were to adopt a provision on suspension of membership inspired from the Bank's Articles, it would have to decide whether to adopt such a conversion feature as well.

1. Link between suspension and compulsory withdrawal

Conceptually, suspension of membership and automatic conversion into withdrawal are distinct and separable, and there is no compelling reason for them to be necessarily adopted together. The Fund could therefore adopt the former and not the latter.

Alternatively, the existing provisions on ineligibility, which constitute a limited form of suspension, could be coupled with a conversion mechanism. For instance, the Articles could be amended to provide for compulsory withdrawal one year after ineligibility has been declared, unless a decision to the contrary is taken before that period has lapsed. This would require, however, a consideration of additional questions, such as whether a declaration of ineligibility should, in view of the automatic link to compulsory withdrawal that would be so created, remain within the competence of the Executive Board or be a responsibility of the Board of Governors, and whether it should require a qualified majority. 1/

2. Procedures for conversion of suspension

If it were decided to incorporate a conversion feature in an amendment to the Fund's Articles, some clarification regarding the relationship between the provision incorporating it and the existing provisions pertaining to compulsory withdrawal would be necessary.

First, it would have to be decided whether the feature of automatic cessation of membership after a specified period of time would replace the existing compulsory withdrawal provisions or whether it would supplement them.

1/ Compulsory withdrawal requires a decision of the Board of Governors carried by a majority of the Governors having eighty-five percent of the total voting power (Article XXVI, Section 2(b)).

Secondly, if the two systems were to coexist, it would have to be considered whether a decision taken by the same organ of the Fund with the same majority of votes should be required for compulsory withdrawal without prior suspension and for suspension leading automatically to compulsory withdrawal. Moreover, the respective scopes of these procedures would have to be determined. They could apply to the same or different obligations. For instance, compulsory withdrawal with prior suspension might apply to the violation of certain obligations (e.g., overdue financial obligations to the Fund) and compulsory withdrawal without prior suspension to the violation of other obligations.

Conclusion

1. The existing Articles provide for two forms of suspension of specified rights, namely, ineligibility to use the general resources of the Fund and suspension of the right to use SDRs. An amendment to the Articles would be necessary to enable the Fund to suspend other specified rights of membership or all of a member's rights attached to membership.

2. A number of issues would arise in connection with an amendment of the Articles introducing a provision on suspension of membership. Thus, it would have to be decided, inter alia, (i) whether suspension should affect the existence or the exercise of the rights; (ii) what meaning should be attributed to the concept of "right" and whether it should encompass benefits derived by members from the observance by other members of their obligations under the Articles; (iii) whether suspension should affect the rights of membership that also constitute obligations under the Articles; (iv) whether the separation between the General Department and the SDR Department should be maintained; (v) whether a provision on suspension of membership should be supplemented by another provision on suspension of powers of Governors and Executive Directors; and (vi) whether the provision on suspension of membership should include a feature of conversion of suspension into cessation of membership, or whether, alternatively, the conversion feature could be disconnected from suspension and made, instead, an automatic consequence of ineligibility.

The effect of suspension on the existing provisions of the Fund's Articles, including the provisions on ineligibility, voting and compulsory withdrawal, would have to be carefully considered before its adoption, and a modification of some of these provisions might prove necessary.

3. The Fund could, instead of a provision on suspension of all rights attached to membership, adopt a type of suspension with a more limited scope. For instance, the Fund could consider a form of suspension affecting specified rights only, such as voting rights.

While such an amendment would also substantially modify the balance of rights and obligations of members under the Articles, its impact would be less significant than an amendment providing for suspension of all rights attached to membership. The conceptual issues that such an amendment would raise would also be less complex and the amendment would require more limited changes to existing provisions of the Articles than suspension of membership.

