SM/89/127

June 28, 1989

To: Members of the Executive Board

From: The Secretary

Subject: The Issue of Suspension of Membership

The attached paper on the issue of suspension of membership has been tentatively scheduled for preliminary discussion in an Informal Session on Wednesday, July 5, 1989.

Mr. Gianviti (ext. 8329) is available to answer questions relating to this paper.

Att: (1)

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Department Heads

INTERNATIONAL MONETARY FUND

The Issue of Suspension of Membership

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June 27, 1989

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Introduction

Background and Synopsis

In response to a request made during an Executive Board discussion on overdue financial obligations and the question of ineligibility, the Legal Department issued a paper in August 1987 on legal considerations relating to the issue of suspension of membership in the Fund. 1/ That paper focused on: (i) the scope and implementation of suspension of rights as a sanction provided for in the charters of other international organizations; (ii) the existing forms of suspension already provided for in the Articles of Agreement of the Fund and the International Bank for Reconstruction and Development ("the World Bank" or "the Bank"); and (iii) issues bearing on the possibility of amending the Fund's Articles to provide for some further form of suspension, including a "suspension of membership." 2/

In discussing the two forms of suspension provided for in the Fund's Articles, the 1987 Suspension Paper noted that:

> Both ineligibility [under Article XXVI, Section 2] and suspension of the right to use SDRs [under Article XXIII, Section 2] involve suspension of specific rights. The Articles do not prescribe, nor allow, 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. 3/

In the course of subsequent deliberations on the issue of overdue financial obligations to the Fund, some Executive Directors have requested further consideration and elaboration of this and related matters. 4/ In particular, the question has been raised whether, despite the fact that the Fund's Articles, unlike those of the World Bank, do not include any express power to suspend all the rights of

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1/ "Suspension of Membership in the Fund--Legal Aspects," SM/87/229 (8/25/87) (hereinafter referred to as "the 1987 Suspension Paper"). The request for the paper was made during EBM/86/94 (6/9/86).

2/ These topics were addressed in Section I (pages 1-6), Section II (pages 6-15), and Section III (pages 15-36), respectively, of the 1987 Suspension Paper.

3/ 1987 Suspension Paper, p. 8.

4/ See, e.g., "Report of the Executive Board to the Interim Committee of the Board of Governors on Overdue Financial Obligations to the Fund," EBS/88/166 Rev. 2 (9/9/88), p. 9. A particular issue on which an inquiry has been made more recently is the notion of "censure." A paper addressing this issue, entitled "Censure or Declaration of Noncooperation--Legal Aspects," is being issued separately.

membership of a member, the Fund could nevertheless assert and exercise an implied power to do so.

This paper addresses that question. It is divided into two sections. Section I examines the doctrine of implied powers and discusses its applicability to exclusionary sanctions taken by international organizations in general. Section II first examines the scope of the recognition of implied powers in the Fund, and then discusses the question of whether the Fund has a power of suspension of membership in the absence of a specific provision to that effect in its Articles. The paper concludes that the Fund has no such power and examines possible amendments of the Articles, particularly with respect to the suspension of voting rights.

Definitions

"Suspension of membership." This expression was defined in the 1987 Suspension Paper as action that suspends "all of a member's rights derived from membership" but that does not affect any of the member's obligations--that is, the type of suspension that is provided for in the World Bank's Articles of Agreement. 1/ The expression is used in the same way in this paper. Suspension of membership is thus distinguished from the two types of suspension provided for in the Fund's Articles--ineligibility and suspension of the right to use SDRs--as well as from other possible types of suspension of particular rights, such as suspension of voting rights or suspension of rights of representation.

"Exclusionary sanction." Suspension of membership must be distinguished also from expulsion (referred to in the Fund's Articles as compulsory withdrawal), which is a complete termination of membership in an organization. In some cases, however, there may be a termination of, or exclusion from, participation only in certain subsidiary bodies or in specified activities of the organization. In this paper, the expression "exclusionary sanction" is used to encompass all types of action to suspend or terminate some or all rights of membership of a

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1/ 1987 Suspension Paper, p. 1. See Articles of Agreement of the International Bank for Reconstruction and Development, Article VI, Section 2:

"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."

member, including exclusion of a member from an organization or its subsidiary bodies or activities.

The need for this broadly inclusive notion of "exclusionary sanction" arises from the realities of the practice of other international organizations. As discussed below in Section I.B., the features of the cases in which other organizations have faced issues of exclusionary sanctions and implied powers have varied greatly in terms of the type of sanction (if any) provided for in the organization's charter, 1/ the type of sanction proposed, the type of sanction actually imposed (or rejected), and the relevant grounds or reasons for each. Although only some of this practice would be directly analogous to the specific issue of suspension of membership and implied powers of the Fund, 2/ a proper analysis of that specific issue requires a broader overview of "exclusionary sanctions" cases generally.

"Implied powers." This expression is described in detail below, specifically in the context of international law. It refers to powers that, while not granted by the express provisions of a charter, are nonetheless recognized as being exercisable by implication.

I. Implied Powers of International Organizations to Impose Exclusionary Sanctions

This section first describes the nature and scope of implied powers in international organizations (A), before examining the cases where implied powers were involved to justify the adoption of exclusionary sanctions (B).

A. Implied powers--general considerations

An analysis of whether an international organization has an implied power to take certain action not expressly authorized in its charter must begin with a consideration of the competence of international organizations generally and the context in which the question of implication of powers arises (1). Within that context, the doctrine of implied powers has been developed by international courts (2), but its application is subject to certain conditions (3).

1/ Different international organizations use various titles in referring to the international treaties that serve as their constitutive instruments--"constitution," "convention," "articles of agreement," etc. For the sake of simplicity, most such documents, except those of the Bank and the Fund, are referred to herein as "charters."

2/ Indeed, as explained below in Section I.B., it appears that there has been no case in the practice of other international organizations presenting the features that would be relevant to a conclusion that the Fund has an implied power to suspend membership rights.

1. Express and implied powers

A fundamental principle of international organizations is that they are entities of limited and delegated powers that are established by states for the achievement of specified purposes. 1/ An international organization's competence is confined to encompass only those powers that are granted to it by its member states, and those powers may only be exercised to achieve the purposes of the organization (see, for instance, the last sentence of Article I of the Fund's Articles of Agreement).

It is clear, however, that for practical reasons the basic instrument of an organization cannot provide a complete and exhaustive description of each aspect of every power granted. Hence, in practice, express provisions granting powers require interpretation.

In other cases, the basic instrument of an organization does not expressly confer or deny a specific power which is later found to be essential to the performance of the organization's duties. In such cases an unexpressed power may be required by implication, on the assumption that this power is so inherent in the effectiveness of the charter, that, had the contracting parties considered it, they would have conferred it upon the organization.

On the basis of this distinction between express and implied powers, the question of whether an implied power exists should be raised only after an examination of the international organization's charter reveals no express provision that, properly interpreted, grants--or, alternatively, disallows--such a power. In practice, however, the distinction between express and implied powers is not always clear, for several reasons:

(i) both types of powers require an interpretation of the charter;

(ii) both must be exercised in accordance with the purposes of the organization;

1/ See, e.g., Nguyen Quoc Dinh, Droit International Public (3rd ed., 1987), pp. 535-538. In respect of the Fund itself, see K.W. Dam, The Rules of the Game; Reform and Evolution in the International Monetary System (1982), p. 104: "[T]he Fund was conceived as an institution of specifically delegated and limited powers ...." Dam also quotes from explanations made in hearings before the U.S. Congress in 1945: "The fund is an instrumentality of delegated powers. It has only those powers that are given to it, the same as [the federal government under] our own Constitution." Id., p. 104, n. 184.

(iii) a broad interpretation of an express power may appear as a recognition of an implied power; and

(iv) an implied power may not be recognized to circumvent a limitation on an express power.

Although the distinction between an interpretation of existing powers and the recognition of implied powers is not always made, there are cases where it must be made because of its practical consequences. For instance, when the charter of the organization provides that, unless otherwise specified in the charter, all decisions will be taken by a majority of votes cast, actions based on the recognition of an implied power may be authorized by a majority of votes cast, in accordance with the general rule, whereas actions based on an interpretation of an express power that can only be exercised by a special majority will have to be authorized by the same special majority. Similarly, when all powers of the organization are vested in one organ, except those that are reserved to another organ, the recognition of an implied power of the organization will lead to an extension of the powers vested in the first organ; the powers of the other organ can be interpreted broadly, but cannot be supplemented by the recognition of implied powers of the organization.

The fundamental principle stated above--that an international organization is an entity of limited and prescribed powers--rests on certain premises relating to international organizations or treaties in general. First, every such organization is established for particular purposes. Those purposes may be broad, but they are always limited to certain aspects of international affairs. Second, in creating an international organization, member states typically surrender some of their sovereignty by conferring powers on the organization, and it cannot be presumed that member states have surrendered more of their sovereign powers than they have expressly agreed. Third, when adhering to the treaty governing an international organization, member states have agreed to a certain balance of rights and obligations under the charter; any modification of this balance, either through a reduction of existing rights or through an imposition of additional obligations, would require an amendment of the treaty.

In respect of certain aspects of an international organization's operations, however, the last two of these general reasons for limitation on its powers do not apply at all or to any significant degree. For example, initiatives by an international organization to enter into contracts for services, to provide certain types of assistance to members, or to take actions to improve its relations with its staff or other organizations, typically would not affect the sovereignty of its member states or the balance of their rights and obligations.

The legal basis for contractual relations is often an express provision in the charter conferring upon the organization "full juridical personality" and "capacity" to contract and to acquire

property (e.g., Article IX, Section 2 of the Fund's Articles). However, the scope of "personality" and "capacity" is not always fully clear, and it may become necessary to demonstrate that it includes certain actions not expressly authorized by the charter. Moreover, personality and capacity as usually understood do not necessarily cover the full range of an organization's proposed activities (short of an infringement on a member's sovereignty or a change in the balance of a member's rights and obligations). In such cases, the authority of the organization's actions will rest on the determination of specific powers without which the organization could not effectively fulfill its purposes. Since the concern over matters of sovereignty and balance of rights and obligations would be absent, such powers of the organization to take certain actions that exceed its contractual capacity could be determined to exist, if not by a broad interpretation of the organization's capacity, at least by resort to the concept of implied powers, so long as they could be adequately justified as being necessary to achieve the purposes for which the organization was established. Indeed, it is on this reasoning that a "doctrine" of implied powers of international organizations has developed in international law.

Thus, the doctrine of implied powers has been invoked mainly to determine the actions that may be taken by an international organization, beyond the normal range of actions inherent in its capacity as a legal entity, but without infringing on the sovereignty of members or changing the balance of their rights and obligations.

2. Development of the doctrine of implied powers

International courts have recognized and applied the doctrine of implied powers of international organizations, under which an international organization may, in limited circumstances, exercise certain powers despite the fact that they are not within the express charter provisions. 1/ In particular, in several advisory opinions 2/ the International Court of Justice ("the ICJ") has endorsed the

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1/ See Gordon, "The World Court and the Interpretation of Constitutive Treaties," 59 Am. J. Int'l Law 794 (1965), pp. 816-821.

2/ Aside from the obvious importance of the ICJ to the definition and development of international law generally, Professor Schermers explains further reasons for the importance of advisory opinions of the ICJ in respect of the law of international organizations:

"Firstly, international organizations cannot be parties before the [International] Court, so that they are unable to initiate proceedings other than those leading to an advisory opinion. Secondly, the Court has been restrictive in allowing Member States to submit cases concerning the law of international organizations, so that questions concerning this law cannot be judged by any other means."
H.G. Schermers, International Institutional Law (1980) (hereinafter referred to as Schermers), p. 673.

doctrine of implied powers, especially relating to the capacity of the United Nations to take certain actions. In the 1949 Reparations for Injuries case, 1/ the ICJ, referring to advisory opinions of its predecessor, the Permanent Court of International Justice, considered whether the United Nations had capacity to bring claims for reparation due in respect of damages to its agents. The court decided the issue in the affirmative:

> The Charter does not expressly confer upon the [United Nations] Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection...of a claim on their behalf.... Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. 2/

The ICJ reaffirmed this approach to the doctrine of implied powers in the 1954 Effect of Awards case. 3/ At issue was whether the General Assembly could validly establish an administrative tribunal notwithstanding the facts (i) that Article 22 of the Charter only enabled the General Assembly to establish subsidiary organs that it deemed necessary to the performance of its own functions, and (ii) that the General Assembly had no judicial functions of the type that the administrative tribunal would carry out. In deciding that the United Nations had the capacity to establish such a tribunal, the ICJ again referred to the purposes of the charter and the efficient performance of the United Nations' functions:

> [T]he power to establish [such] a tribunal...was essential to ensure the efficient working of the [UN] Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity

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1/ (1949) ICJ Reports 174.
2/ Id., p. 182 (emphasis added).
3/ (1954) ICJ Reports 47.

> [among staff]. Capacity to do this arises by necessary intendment of the Charter. 1/

The Court also held that the competent organ to establish the tribunal was the General Assembly.

3. Conditions of implied powers

a. Basis for a finding of implied power ("justification requirement")

In the cases decided by the ICJ, the finding of an implied power was based on a determination that this power was "essential to the performance of [the organization's] duties" or "essential to ensure the efficient working of the [UN] Secretariat." In the same cases, it was concluded that the organization had the "capacity" to perform certain actions of a noncontractual nature: diplomatic protection of civil servants, and establishment of an administrative tribunal. These quasi-governmental actions exceed the capacity normally conferred upon any legal entity by its charter, which may explain the need for a particularly strong justification for the recognition of an implied power.

In many cases, however, the exercise of an organization's capacity does not involve actions of a quasi-governmental nature, but rather, for instance, the conclusion of contracts. Then, it is usually sufficient to rely on an interpretation of the capacity expressly conferred on the organization by its charter. Capacity is normally understood to authorize contracts that are necessary or useful to the achievement of the organization's purposes.

Whether the capacity of an organization is exercised as an express power or as an implied power, the source of the capacity is the charter of the organization, and the capacity can only be exercised within the limits prescribed by the charter. Therefore, in practice, an interpretation will always be required to determine the consistency of a particular action with the charter.

1/ Id., p. 57. In other cases, the issue was not the recognition of an implied power, but whether an express power conferred by the charter or other treaties was subject to an implied limitation. See the Application for Review case, (1973) ICJ Reports 166 (confirming the legality of the creation of a committee that could have judicial or quasi-judicial responsibilities that would place it outside the scope of Article 22); the Expenses case, (1962) ICJ Reports 151; the Namibia case, (1971) ICJ Reports 16. See generally Campbell, "The Limits of the Powers of International Organizations," 32 Int'l & Comp. L.Q. 523 (1983) (hereinafter cited as Campbell).

b. Consistency with the charter ("consistency requirement")

The exercise of an implied or express power cannot contradict the charter governing the organization. Accordingly, a limitation on an express power cannot be circumvented by the recognition of a broader implied power.

In order to determine the consistency of a particular action with the charter, the provisions of the charter must be examined and interpreted. This interpretation may require recourse to supplementary means of interpretation, such as the legislative history of the charter, in addition to the text itself.

In the final analysis, as the doctrine of implied powers is a method of interpretation of treaties, it rests on the presumed intention of the contracting parties. Therefore, an implied power cannot be recognized if it is demonstrated that it would be inconsistent with the intention of the contracting parties.

B. Implied powers to impose exclusionary sanctions

In the description given above of the doctrine of implied powers, and of the requirements that apply under it, the point was emphasized that that doctrine is applicable only in the context of questions concerning an international organization's capacity as distinguished from the power of the organization to impose obligations on members or to limit their rights. Consistent with the premises that member states cannot be presumed to have surrendered more sovereignty than expressly agreed in the charter of the organization, and that any change in the balance of members' rights and obligations would require an amendment of the charter, the International Court cases on implied powers offer no support for the proposition that powers can be implied that would significantly affect sovereignty of member states--that is, powers to impose additional obligations on members, or limit their rights, thus changing the balance of rights and obligations of membership.

The actual practice of other international organizations is, however, relevant in this regard. That practice is mixed, both in terms of outcomes--that is, the types of actions that the organizations have taken or declined to take--and in terms of the legal and factual settings in which the cases have arisen. Two important conclusions do emerge, though, from a review of the practice of other organizations.

First, in terms of outcomes, it appears that the proposition that an international organization has, as a general matter, an implied power to impose exclusionary sanctions apart from those, if any, expressly provided for in its charter has consistently been rejected on legal grounds, and that therefore, contrary practice notwithstanding, no such generally accepted power exists. Second, in terms of legal and factual settings, there apparently has been no case in which an organi-

zation, having in its charter an express provision for a particular exclusionary sanction for failure to meet a charter obligation, has imposed instead a different exclusionary sanction against a member for failure to meet that obligation. Hence the actual practice of other international organizations, like the formal doctrine of implied powers announced by international courts, would seem to offer no support for a conclusion that the Fund has an implied power of suspension of membership for failure of a member to meet its financial obligations to the Fund.

Two categories of cases in which international organizations have decided upon exclusionary sanctions are presented below: those in which exclusionary sanctions were imposed (1) and those in which they were rejected (2). The presentation of these cases is followed by a survey of the views of legal scholars (3).

1. Cases where exclusionary sanctions were imposed

In several instances an exclusionary sanction has been imposed by an organization against a member despite the fact that the organization's charter either had no express provision authorizing the imposition of a sanction, or had an express provision authorizing the imposition of that sanction (or another type of sanction) but on different grounds. Explanation or justification of the legality of such actions has sometimes been based on the notion of implied powers. Some such instances are recounted below, in chronological order. 1/

a. OAS and Cuba

In 1962 the Organization of American States adopted a resolution declaring that "the present Government of Cuba...is incompatible with the principles and objectives of the inter-American system," and that "this incompatibility excludes the present Government of Cuba from participation in the inter-American system." 2/ The OAS charter does not contain a provision for expulsion of a member, but the decision was formulated as an exclusion of a government by its own action, and Cuba remained a member of the OAS. 3/ The Cuban Government challenged the

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1/ Most such incidents took place over a number of months or years. For purposes of arranging the following accounts in chronological order, the dates of imposition of exclusionary sanctions govern.

2/ The OAS also declared that the Government of Cuba "has voluntarily placed itself outside the inter-American system." See the text in 13 Dig. Int'l L. 236 (1968), p. 247. See also R. Khan, Implied Powers of the United Nations (1970) (hereinafter cited as Khan), pp. 127-128. See also D. W. Bowett, The Law of International Institutions (2d ed., 1970), p. 351.

3/ See Charter of the Organization of American States, April 30, 1948, as amended, February 27, 1967, 2 U.S.T. 2394, T.I.A.S. 2361, 119, U.N.T.S. 3; 21 U.S.T. 707, T.I.A.S. 6847. See also Khan, supra, p. 127.

legal validity of the resolution. 1/ As part of its challenge it requested the United Nations Security Council to ask the ICJ to give an advisory opinion on the question of whether the OAS has an implied power to exclude a member state. That request was rejected by the Security Council. 2/

b. UNESCO and Portugal, South Africa, and Rhodesia

In 1966 the General Conference of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") adopted a resolution authorizing its Director-General "to withhold assistance from the Governments of Portugal, the Republic of South Africa, and the illegal regime in Southern Rhodesia in matters relating to education, science, and culture, and not to invite them to attend [UNESCO] conferences or to take part in other UNESCO activities." 3/ UNESCO's charter at that time authorized the imposition of exclusionary sanctions only (a) in cases where a member was suspended or expelled from the United Nations (the member then was to be suspended or expelled from UNESCO) or (b) in cases where the member failed to pay its contributions (the member then was to have no vote). 4/ Portugal challenged the resolution and asked that the matter be submitted to the ICJ for an advisory opinion. UNESCO's Legal Committee agreed, by a unanimous vote, that the matter should be submitted to the ICJ. 5/ However, the General Conference overrode the Legal Committee's opinion and rejected Portugal's request for an advisory opinion. 6/

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

In 1974, as in some earlier years, the United Nations General Assembly voted to refuse to accept the credentials of the South African delegation. On that basis, the President of the General Assembly ruled that the South African delegation had no right to participate in the General Assembly or its committees during the

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1/ See Khan, supra, pp. 127-128.

2/ Id. See also D.W. Greig, International Law (2nd ed., 1976) (hereinafter cited as Greig), p. 858.

3/ 13 Dig. Int'l L. 236 (1968), p. 246.

4/ See Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 61 Stat. 2495, 3 Bevans 1311, 4 U.N.T.S. 275.

5/ 1966 UN Jurid. Y.B., pp. 153-163.

6/ Id., pp. 163-164. See also F. Morgenstern, "Legality in International Organizations," 48 Brit. Y.B. Int'l L. 241 (1976-77) (hereinafter cited as Morgenstern), p. 243.

29th Assembly Session. 1/ His reasoning was that since the General Assembly had rejected the credentials of that delegation,

> one may legitimately infer that the General Assembly would in the same way reject the credentials of any other delegation authorized by the Government of the Republic of South Africa to represent it, which is tantamount to saying in explicit terms that the General Assembly refuses to allow the Delegation of South Africa to participate in its work. 2/

Under Articles 5 and 6 of the United Nations Charter, the suspension of a member's rights or the expulsion of a member is possible only "upon the recommendation of the Security Council." 3/ No such recommendation had been given; instead, a draft resolution calling for the expulsion of South Africa had been defeated in the Security Council by a "triple veto." 4/

1/ 1974 Dig. U.S. Prac. in Int'l L. 29, p. 33. Legal objections were raised by several delegations. See, for instance, on the U.S. objections, Id. pp. 33-35, and, on the objections of the French delegation, 1975 Annuaire Francais de Droit International, p. 1080.

2/ Id., p. 37, quoting UN Doc. A/PV. 2281, November 12, 1974, pp. 72-76.

3/ Articles 5 and 6 of the United Nations charter read as follows (emphasis added):

> **Article 5.** "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 the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council."
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> **Article 6.** "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council."

"Preventive or enforcement action" as referred to in Article 5 can be taken by the Security Council under Articles 40, 41, and 42 to prevent or counteract "any threat to the peace, breach of the peace, or act of aggression." (UN Charter, Article 39.) Suspension of voting rights in the General Assembly is provided for, in Article 19, where a member is in arrears in its financial contributions to the organization.

4/ 1974 Dig. U.S. Prac. in Int'l L., pp. 29-31.

Technically, the refusal of a delegation's credentials, usually based on a nonrecognition of the sending government, does not suspend the rights of the member state in the organization, if the organization is prepared to recognize another government for the member and to accept the credentials of the delegation sent by that government. If, however, the organization is not prepared to recognize any government or to accept the credentials of any delegation as representing the member state, the rights of the member state are in effect suspended.

Hence, the 1974 ruling by the President of the General Assembly, although it was not based on an implied power to suspend membership, but rather on the exercise of the power to verify credentials, effectively denied South Africa some rights of membership in the organization, as no other delegation was admitted to represent South Africa. In this respect, the ruling was directly contrary to an earlier ruling by the President of the General Assembly in 1970, according to which rejection of credentials could not be used as a means de facto to suspend a member. 1/

d. Other instances

Several other instances have been reported, but they are less clear in terms of their outcome or their evidentiary value. These include the following:

(i) League of Nations and the USSR. Following its 1939 invasion of Finland, the USSR was expelled from the League of Nations. The decision was in accordance with the provisions of the League's Covenant on expulsion, with one procedural exception: when four members of the Security Council abstained from voting, the President of the League of Nations ruled that "abstentions do not count in establishing unanimity," despite the Covenant requirement that expulsions be decided by the unanimous vote of all the other members of the League represented at the meeting. 2/

1/ See 2.e. below. Some other instances involving credentials challenges as means of attempting to exclude members from participation in international organizations are reported at: 1973 UN Jurid. Y.B. 81, 1979 UN Jurid. Y.B. 90, and 1979 Brit. Y.B. Int'l L., pp. 310-311 (all referring to the Universal Postal Union and South Africa); Gross, "On the Degradation of the Constitutional Environment of the United Nations," 77 Am. J. Int'l L. 569 (1983) (hereinafter cited as Gross), pp. 574-583 (referring to the International Atomic Energy Agency and Israel); Morgenstern, pp. 243-244 (referring to the ILO and Hungary).

2/ See Sohn, "Expulsion or Forced Withdrawal by an International Organization," 77 Harv. L. Rev. 1381 (1964) (hereinafter cited as Sohn), pp. 1387-1390. See also Gross, supra, p. 569: "Thus the drive to score an ideological victory prevailed over the traditional concern for constitutional propriety."

(ii) FAO and South Africa. In 1963 an amendment to the FAO's charter was proposed in order to exclude South Africa from that organization. The proposal, which would have provided for exclusion of any member which persistently committed breaches of the charter, failed to receive the two-thirds majority required for adoption. Despite this, a resolution was passed stating that South Africa would "no longer be invited to participate in any capacity in FAO conferences, meetings, training centers, or other activities in the African region, until the Conference decides otherwise." 1/

(iii) ICAO and South Africa. In 1965 an attempt was made to exclude South Africa from the International Civil Aviation Organization by adopting an amendment to its charter 2/ that would call for the suspension or exclusion of any member that violated the principles laid down in the preamble to the charter or practiced a policy of apartheid or racial discrimination. 3/ The proposed amendment was not adopted; instead, the ICAO Assembly adopted a resolution strongly condemning South Africa's apartheid policies. 4/ In 1971, however, following an escalation of the political pressure being applied against South Africa in the United Nations General Assembly and elsewhere, the ICAO resolved that South Africa would not be invited to ICAO meetings other than those it was entitled to attend as a member of the organization. 5/ In the debates leading to the adoption of the resolution, the legality of that action was strongly challenged. 6/

(iv) ITU and Rhodesia. A post hoc exclusion of Rhodesia from the International Telecommunication Union occurred in 1966, following Rhodesia's declaration of independence from the United Kingdom. On being informed by the United Kingdom that the Rhodesian delegation signing the ITU charter had not been empowered by the United Kingdom to

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1/ See 13 Dig. Int'l L. 236 (1968), pp. 241-242. Similar cases of partial or temporary withholding of invitations to participate in certain activities of an international organization--directed against Spain and South Africa--are also reported at 13 Dig. Int'l L. (1968), pp. 212, 245-246.

2/ Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, 3 Bevans 944, 15 U.N.T.S. 295. The ICAO charter already provided for suspension or expulsion on the same types of grounds as cited in UNESCO'S charter (see the preceding paragraph concerning UNESCO) as well as for failure to give effect to certain rules concerning flyover privileges.

3/ 13 Dig. Int'l L. 236 (1968), p. 244.

4/ Id.

5/ E. Osieke, "Sanctions in International Law: The Contributions of International Organizations," 31 Netherlands Int'l L. Rev. 183 (1984) (hereinafter cited as Osieke), p. 187.

6/ See id., pp. 187-188. In practice the resolution applied to regional meetings. For a similar resolution on Portugal, see 1973 Dig. U.S. Prac. in Int'l L., pp. 52-58.

do so (they were instead representing the independent Rhodesian Government), the ITU's Administrative Council took action to have those signatures deleted and to disallow any participation by the independent Rhodesian Government in the ITU. 1/

2. Cases where exclusionary sanctions were rejected

In contrast to the instances discussed above, several attempts to impose exclusionary sanctions outside the scope of express charter provisions of international organizations were successfully resisted on legal grounds. 2/ Some of these are summarized below.

a. ICAO and Spain

On December 12, 1946, a resolution of the United Nations General Assembly recommended that "the Franco Government of Spain" be barred from membership in United Nations specialized agencies. On December 14, 1946, in approving an agreement between the United Nations and the ICAO, the General Assembly inserted a proviso that the ICAO "complies with any decision of the General Assembly regarding Franco Spain." The ICAO proceeded to amend its charter to provide for automatic expulsion of a member upon the recommendation of the General Assembly of the United Nations. The amendment did not become effective until March 20, 1961. By that time, however, the General Assembly had revoked its recommendation intended to debar Spain from membership in specialized agencies. From the adoption of the amendment to the revocation of the recommendation, Spain voluntarily ceased to participate in the ICAO. No expulsion procedure was initiated. 3/

b. ILO and South Africa

In 1961 the International Labour Conference adopted a resolution condemning South Africa's racial policies and declaring that continued membership of South Africa in the ILO was inconsistent with the aims and purposes of that organization. South Africa was asked to withdraw from the organization. 4/ South Africa and other ILO members disputed the constitutionality of the resolution, and declined to give any further consideration to the matter. 5/ The ILO's charter at that

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1/ 1966 UN Jurid. Y.B., pp. 164-165. See also 1970 UN Jurid. Y.B., pp. 115, 119. This case should rather be viewed as a denial that the conditions for membership were met, rather than an expulsion of a member.

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

3/ See 13 Dig. Int'l L. 188 (1968), pp. 210-211; Osieke, supra, pp. 186-187.

4/ 13 Dig. Int'l L. 236 (1968), p. 242. See also Sohn, supra, p. 1412.

5/ Sohn, supra, p. 1413.

time provided for suspension of a member's right to vote only in the event that the member fell into substantial arrears in payments to the ILO but there were no other charter provisions authorizing exclusionary sanctions. 1/ South Africa did not withdraw. A proposal for outright expulsion of South Africa from the ILO emerged in 1963. 2/ Proponents of the measure argued that the ILO had an implied power to expel South Africa. The Director-General of the ILO expressed a contrary view, explaining that there was "a constitutional right and obligation of all Members of the Organisation" to participate in the International Labour Conference, and that the omission from the charter of a provision authorizing expulsion was deliberate, as the object of the framers was to achieve universality of membership. He suggested that the expulsion proposal be referred to the UN Security Council. 3/

Before this could be done, however, other measures were taken. First, the proposal for outright expulsion was rejected. 4/ Then, in 1964, the ILO approved amendments to its charter dealing with suspension and expulsion. 5/ The amendment on suspension called for suspending any member from the ILO "which has been found by the United Nations to be flagrantly and persistently pursuing by its legislation a declared policy of racial discrimination such as apartheid." 6/ South Africa withdrew from the ILO during the same session. 7/

c. World Bank and South Africa and Portugal

In June 1965 a Special Committee of the United Nations General Assembly adopted a resolution appealing to the Fund and the Bank to refrain from granting Portugal any financial, economic, or technical assistance as long as Portugal failed to renounce its colonial policy; and in December 1965 the General Assembly itself adopted a resolution requesting all states and international institutions to refrain from providing assistance of any kind to the Governments of Portugal and South Africa. 8/ In June 1966 and September 1966, respectively, the Bank entered into agreements granting loans to Portuguese and South African concerns. Shortly thereafter the

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1/ See Constitution of the International Labour Organisation, April 20, 1948, 62 Stat. 3485, 4 Bevans 188, 15 U.N.T.S. 35.

2/ Sohn, supra, pp. 1413-1414.

3/ Id., pp. 1414-1415.

4/ Instead, a proposal was adopted under which South Africa was to be excluded from those meetings of the ILO at which participation had to be determined by the Governing Body. In this limited respect, this case could also be included in the category of cases discussed above in which exclusionary sanctions were imposed in the absence of express charter authority. See Sohn, supra, p. 1415.

5/ See 13 Dig. Int'l L. 236 (1968), p. 243.

6/ Id.

7/ Id. See also Sohn, supra, p. 1415.

8/ 1967 UN Jurid. Y.B., pp. 109, 110-111.

General Counsel of the Bank was invited to a meeting of a committee of the General Assembly that was considering the question of the territories under Portuguese administration. At that meeting, the General Counsel made the following statement:

> The Bank's Articles provide that the Bank and its officers shall not interfere in the political affairs of any member and that they shall not be influenced in their decisions by the political character of the member or members concerned. Only economic considerations are to be relevant to their decisions. Therefore, I propose to continue to treat requests for loans from these countries in the same manner as applications from other members. 1/

In December 1966 the General Assembly then passed a further resolution calling for the withholding of assistance of any kind to South Africa and Portugal. 2/ In addition, the UN Legal Counsel sent a memorandum to the General Counsel of the Bank, concluding that the "political affairs" provision in the Bank's Articles of Agreement only prohibited the Bank from interfering in the internal political affairs of a member, but should not be interpreted as confining the Bank to a consideration of nothing but the economic facts relevant to a particular loan and obliging it to disregard other materials factors such as the international conduct of a member country and its repercussions upon international peace and security. 3/

In reply, the General Counsel of the Bank forwarded to the United Nations a memorandum of the Legal Department of the Bank, commenting on the UN Secretariat's memorandum. 4/ The Bank's memorandum disagreed with the UN Secretariat's interpretation of the "political affairs" provision, asserted that the Bank had to avoid involvement in all the political affairs of its members, and re-emphasized that it could only consider relevant economic factors in making loans. 5/ The Bank's memorandum drew upon the history of the provision and refuted the suggestion that the Bank had, by any subsequent contrary practice, limited itself to avoiding interference only in the internal affairs of a state. In this respect, the memorandum pointed out that there could be no modification-by-practice of the limitations imposed by the Articles of Agreement without formally amending the Articles. The memorandum also drew on functional considerations relevant to the Articles, noting that a failure to observe strictly the "political affairs" provision--such as by granting or withholding financial

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1/ Id., p. 112, citing Official Records of the General Assembly, Twenty-first Session, Fourth Committee, 1645th meeting, para. 39.
2/ 1967 UN Jurid. Y.B., p. 109.
3/ Id., pp. 115-118.
4/ Id., pp. 121-131.
5/ Id., pp. 123-124.

assistance to a particular member to gain the political objectives of some members--would seriously undermine the Bank's efforts to ensure that the investing public would put money into Bank securities on the understanding that economic, not political, considerations would govern the Bank's activity and their return. 1/ The President of the Bank later informed the UN Secretary-General that the Executive Directors of the Bank, being responsible for interpreting the Articles of Agreement, had endorsed the position taken by the Bank's General Counsel. 2/

Thus the argument that the Bank had the power to deny financial assistance on certain political grounds not specified in its charter was rejected.

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

In 1968 a proposal was made to the United Nations General Assembly to suspend South Africa from membership in the United Nations Conference on Trade and Development (UNCTAD); this would have amounted to a suspension of one of the rights of a member of the United Nations--the right to membership in a subsidiary organ of the United Nations. 3/ The Legal Counsel of the United Nations advised, however, that the proposed action, which had been prompted by political and moral pressure against the government's apartheid policies, faced legal impediments. He reasoned that (i) procedures for the suspension of a member from an organ open to the general membership were laid down exclusively in Article 5 of the Charter, which permits suspension only through joint action by both the Security Council and the General Assembly and (ii) had the drafters of the United Nations Charter intended to curtail membership rights in a manner other than those provided for in Articles 5, 6, and 19 of the Charter, they would have so specified. 4/ The proposed suspension was rejected by the General Assembly. 5/

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

In 1970, the General Assembly rejected the credentials of the South African delegation. An attempt was made, on the basis of this rejection of credentials, to bar South Africa from participating in meetings in the General Assembly. However, the President of the General Assembly ruled that South Africa could not be barred in this

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1/ Id., p. 131.

2/ Id., pp. 131-132.

3/ See "Contemporary Practice of the United States Relating to International Law," 63 Am. J. Int'l L. 312 (1969) (hereinafter cited as Contemporary Practice--1969), pp. 332-333.

4/ See H. G. Schermers, International Institutional Law (1980) (hereinafter cited as Schermers), p. 591.

5/ Contemporary Practice--1969, supra, p. 332.

manner. 1/ In so doing, he relied on this advice given in writing by the Legal Counsel to the United Nations:

> Should the General Assembly, where there is no question of rival claimants, reject credentials satisfying the requirements of rule 27 for the purpose of excluding a Member State from participation in its meetings, this would have the effect of suspending a Member State from the exercise of rights and privileges of membership in a manner not foreseen by the Charter. ...The participation in meetings of the General Assembly is quite clearly one of the important rights and privileges of membership, [and] suspension of this right through the rejection of credentials would not satisfy the...requirements [of Article 5 of the UN Charter, which provides that suspension can be imposed only by a two-thirds vote of the General Assembly upon the recommendation of the Security Council] and [such action] would therefore be contrary to the Charter. 2/

The General Assembly did not override the ruling of the President.

3. Views of legal scholars

In analyzing the practice summarized above, the comments of legal scholars are instructive. 3/ While not unanimous, the commentaries have generally been highly critical, on legal grounds, of the actions taken by international organizations in excluding members in circumstances or under procedures not provided for in their charters.

1/ See M. Halberstam, "Excluding Israel from the General Assembly by a Rejection of its Credentials," 78 Am. J. Int'l L. 179 (1984) (hereinafter cited as Halberstam), p. 184. This 1970 ruling is often referred to as the "Hambro Ruling", after Edvard Hambro, the President of the General Assembly who made the decision. Id., pp. 184-185, note 29. As discussed above, a contrary ruling was made by the succeeding President of the General Assembly in 1974.

2/ Id. pp. 184-185, quoting 25 U.N. G.A.O.R. annexes (Agenda Item 3), at 3 UN Doc. A/PV. 1901 (1970) (emphasis added).

3/ The sources and evidences of international law are generally considered to include international conventions, international custom, "general principles of law recognized by civilized nations," judicial decisions (both of international tribunals and, as appropriate, of domestic courts), and juristic writing on international law. See Article 38 of the ICJ Statute; Greig, supra, p. 6. While the last of these is generally seen in modern times as the least dispositive, it nevertheless is significant in assessing the practice of international entities. Id., pp. 47-49.

For example, the 1974 action taken by the United Nations General Assembly against South Africa has been referred to by one legal scholar as a "patently unconstitutional" action brought about by "a conniving President of the Assembly, disregarding precedent and the opinion of the Legal Counsel of the United Nations." 1/ Another commentator has concluded likewise "that the use of the accreditation process as an alternative method of suspension or expulsion is contrary to the purposes and provisions of the [United Nations] Charter." 2/

It has been pointed out that "given the universal abhorrence for apartheid, it is not surprising that several writers have attempted to find a legal basis for the General Assembly's decision [in 1974] to exclude South Africa." 3/ Yet it has also been emphasized that despite such abhorrence, "all the Western states that spoke on the question considered the Assembly's action illegal, including Australia, which believed South Africa should be expelled and which had so voted when the matter was before the Security Council." 4/ It has been noted in particular that the United States, Great Britain, and France "denounced the action as illegal." 5/

Of the 1974 South Africa case, and of the use of implied powers generally, another legal scholar has offered the criticism, based on the notion of "underlying principles," that "[o]ne cannot circumvent the express conditions of a specific provision by using another procedure, in the exercise of another power, where its exercise offends the underlying principle which explains the former." 6/ The relevant underlying principle in the South Africa case is that of "the collective control by the permanent members of the Security Council

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1/ Gross, supra, p. 570.

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

3/ Halberstam, supra, p. 187.

4/ Id., p. 190.

5/ Id., p. 191.

6/ Ciobanu, "Credentials of Delegations and Representation of Member States at the United Nations," 25 Int'l & Comp. L.Q. 351 (1976), p. 379.

over the admission, expulsion and suspension of member states." 1/ This principle "is the underpinning of specific rules, namely Articles 4, 5 and 6" of the United Nations Charter, and "it explains why the exercise by member States of their rights and privileges under the Charter may not be suspended except under the conditions set out in Article 5." 2/

In an earlier commentary, however, Professor Sohn took the view that an international organization might have implied power to suspend a member under conditions not specified in the organization's charter. He reviewed several cases of exclusionary sanctions and concluded that international organizations possess numerous weapons--outright expulsion, suspension of all rights, exclusion from some activities of the organization, and other steps to make clear that a member is no longer welcome and should withdraw--and that "[a]ll these measures can be taken by international organizations, whether or not their own constitutions expressly provide for them. ...Strict constitutional interpretation seems generally to have been replaced by the principle of 'effectiveness'." 3/ In taking this expansive position on implied powers of exclusion, however, Professor Sohn emphasized that

> there are two important limitations operating to prevent constitutional interpretations which are too radical. In the first place, even the most loosely written documents cannot be stretched beyond a certain point without depriving them of their basic characteristics as the supreme law of the organization. ...In the second place, destructive interpretation of constitutional provisions is made less likely by the fact that even rampantly nationalistic states realize that international institutions are needed to protect them against other nations' imperialism. If international institutions should constantly be abused for achieving partisan aims of a particular state or group of states, a temporary victory today might result in the crumbling of the whole structure tomorrow. 4/

1/ Id.

2/ Id. (emphasis added).

3/ Sohn, supra, p. 1421.

4/ Id., pp. 1423-1424. For observations on the erosion of the credibility or stature of an organization following the imposition of exclusionary sanctions without express charter authorization, see "Remarks by Ambassador William Shaufele, Jr.," Proc. Am. Soc. Int'l L. (1975-77), pp. 114-116; Gross, supra, pp. 578-579; 1966 UN Jurid. Y.B., p. 163.

Professor Schermers, an eminent authority on international institutional law, in a recent comprehensive treatment of the issue of exclusionary sanctions, enumerates several types of sanctions available to international organizations and reviews the practice of organizations in applying such sanctions. 1/ He then offers the following observations and conclusions:

(i) "The possibility of expulsion may be considered as an implied power of every international organization to defend itself against a situation which would prevent it from functioning," 2/ and indeed this explains the case of the OAS and Cuba. 3/

(ii) However, the constitutionally "appropriate way of pushing a Member out of [an] organization [whose constitution does not provide for expulsion] is to exert pressure for voluntary withdrawal," 4/ as was done in the cases of the ICAO and Spain and the ILO and South Africa; in both cases the target of charter amendment efforts withdrew voluntarily from the organization before the amendments took effect. 5/

(iii) If such "pressure for voluntary withdrawal" does not succeed in pushing a member out, the question arises whether the organization can nevertheless expel the member absent authority in the charter to do so. The usual and proper answer is in the negative. "Especially in organizations of universal character the possibility to expel Members without constitutional provision seems objectionable." 6/

(iv) A nearly identical analysis applies to the question of suspension of membership and certain other less drastic forms of exclusionary sanctions. 7/ "May [such lesser] sanctions be taken which are not provided for in the constitution of the organization? A strict interpretation of powers would suggest a negative answer...," 8/ and such a strict interpretation is the more appropriate one. 9/

1/ Schermers, supra, pp. 73-83, 718-745.
2/ Id., p. 76.
3/ Id., p. 82.
4/ Id., p. 79.
5/ Id.
6/ Id., p. 81.
7/ Id., pp. 73, 729.
8/ Id., p. 719.
9/ Id., pp. 73-76, 79-81, 719, 731. In discussing other lesser sanctions--that is, sanctions less drastic than either expulsion or suspension of member--Schermers points out that while there are cases, such as the 1974 case of the United Nations and South Africa, in which "[t]he sanction of suspension of representation has been

4. Conclusion on the practice of other international organizations

The practice of other international organizations is neither uniform nor always--within a particular organization--consistent. When the decision was in favor of imposing an exclusionary sanction beyond the scope of the organization's express powers, legal objections were raised, particularly by the legal advisers of the organization. Therefore, the practice of other international organizations reveals no general acknowledgment of the existence of an implied power of an international organization to impose exclusionary sanctions apart from those expressly provided for in its charter. It can be concluded that this practice lacks the necessary elements (consistency and widespread acceptance) required to constitute a rule of customary international law on the powers of international organizations.

II. Implied Powers of the Fund with Respect to Exclusionary Sanctions

Although most of the Fund's actions are based on express powers, the Fund has resorted to the doctrine of implied powers in several cases, 1/ but not as a basis for imposing exclusionary sanctions (A). In addition, an examination of the Fund's Articles leads to the conclusion that there is no power of suspension of membership under the present Articles (B).

9/ (Cont'd from p. 22).
used...without express constitutional authority," on the basis of the power to approve credentials, "[t]his could [only] be used as a sanction against States violating the general principle that a government must represent the entire population. It could not be used as a sanction against other violations." Id., p. 724. He also notes that, similarly, "the competence of the organization to form its own inferior organs...would provide a basis for a denial of representation in those organs." Id. His discussion of the matter makes it clear, however, that these exceptions do not erode the principle that the sanctions of expulsion and suspension of membership require express authorization in the organization's charter, as exists in the charters of many organizations. See id., pp. 727-731.

1/ As indicated above (Section I.A.1), the recognition of an implied power is often based in reality on an interpretation of an express power, such as "full juridical personality" and "capacity" (Article IX, Section 2) or the power to "adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Fund" (Article XII, Section 2(g)).

A. Implied powers of the Fund--precedents

The principle is that the organs of the Fund are required to act in strict conformity with the Fund's Articles of Agreement. Accordingly, a right under the Articles cannot be limited or denied by the Fund except in the exercise of powers expressly conferred by the Articles.

In accordance with this principle the doctrine of implied powers has generally been applied by the Fund in a first category of cases where it was clear that the Fund's actions did not impose additional obligations or suspend existing rights of members. In a second category of cases, however, the question could be raised whether this limitation on the exercise of implied powers has been observed.

Case 1 illustrates the principle; cases 2-5 the first category of implied powers; cases 6-9 the second.

1. South Africa's use of the Fund's resources

Over a period of time, the UN has passed resolutions urging specialized agencies to withhold assistance from certain members, in view of their colonial and apartheid policies.

On October 22, 1982 the General Assembly specifically requested the Fund to refrain from granting financial assistance to South Africa. 1/ To achieve the effectiveness of that resolution, a delegation from the UN Special Committee Against Apartheid visited the Fund on October 29, 1982. During discussions with the delegation, the Managing Director replied that the organs of the IMF were required to act in strict conformity with the Fund's Articles of Agreement. 2/ He mentioned, specifically, that each Fund member was entitled to use the Fund's resources if the requested use was in accordance with the Articles and relevant policies on the use of Fund resources. He explained that the staff had concluded that the South African request met these requirements; the final decision on the matter of access by South Africa to the Fund resources could be taken by the Executive Board on the basis of the merits of the case. He also explained to the UN delegation that the agreement between the Fund and the United Nations specifically recognizes that the Fund must function as an independent institution on the basis of its Articles of Agreement.

At EBM/82/141 (11/3/82), the Executive Board proceeded to approve the requested stand-by arrangement for South Africa and a purchase transaction under the CFF.

1/ A/Res/37/2.

2/ Report by the Managing Director, EBM/82/140 (11/3/82), pp. 4-5.

2. Investment of the Fund's gold

In 1950 a question arose as to whether it was within the Fund's capacity to invest its gold in U.S. securities, in the absence of an express provision in the Articles of Agreement empowering it to do so. In examining this question, the Legal Department reviewed the doctrine of implied powers of international organizations 1/ and found that doctrine applicable to the Fund. 2/

The justification for the investment, according to the Legal Department, was that the assets of the Fund, including those such as gold that had been "transferred to its ownership for certain specified purposes of international importance...must be wisely administered and protected so that they can be fully available for the purposes for which the Fund was established." 3/

As for the consistency with the Articles--which had been characterized as requiring "that an implied power must not conflict, directly or indirectly, with express provisions" of the Articles 4/--the Legal Department concluded that that test also was "satisfied in the case of an implied power of investment by the Fund." 5/ In this respect, the Legal Department explained that there would be no inconsistency between such an implied power of investment and the provisions of Article V, Section 2 imposing limitations on the Fund's operations, since those provisions were

> ...intended to describe the basic transactions for which the Fund was established in order to serve its members, i.e., those which directly carry out the purposes of Article I(v), ("to give confidence to members by making the Fund's resources available to them under adequate safeguards..."). On this view, Article V, Section 2 does not in any way deal with transactions of an administrative character. An investment of gold to

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1/ The Legal Department's consideration of the issue appeared in Document No. 1 of the Committee on Investment of Fund Assets, dated May 3, 1951, specifically in Attachment II to that document, entitled "Investment of Gold in U.S. Securities," which was itself dated August 24, 1950 (hereinafter referred to as "Document 1, Attachment II").

2/ Document 1, Attachment II, supra, p. 1. The document concluded that "implied powers have been recognized where they were: (a) incidental to the exercise of expressly granted powers; (b) necessary or appropriate for the performance of the functions of the international agency; and (c) not in conflict, directly or indirectly, with the provisions of the treaty establishing the agency."

3/ Document 1, Attachment II, supra, p. 2.

4/ Id.

5/ Id.

provide income to meet a deficit would be a transaction of this kind. 1/

On the basis of this reasoning, the Legal Department concluded "that the Fund possesses authority to make the investment [of the Fund's gold in U.S. securities] if certain conditions and safeguards are observed." 2/ In identifying such "conditions and safeguards," the Legal Department stressed the importance of exercising the implied power cautiously and conservatively, so as to ensure that its exercise would be fully consistent with existing policies and other provisions of the Articles of Agreement. 3/

Executive Board action on the issue was not taken in 1951. 4/ Only in 1956 did the Fund decide to permit such an investment of gold in U.S. securities. 5/

3. Voluntary pledge of gold to secure a purchase

In 1958, the United Arab Republic (Egyptian Region) offered to deposit gold collateral in order to secure the purchase it requested from the Fund. Under Article V, Section 4, as it then was, the Fund could require collateral, including gold, when granting a waiver of any of the conditions in Article V, Section 3(a), but the transaction requested by the United Arab Republic did not involve a waiver.

1/ Id., p. 3. The Legal Department placed reliance also on the provisions of Article XII, Section 2(g), under which the Board of Directors "may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Fund."

2/ Document 1, Attachment II, supra, p. 1.

3/ Id., p. 4.

4/ The Fund's Committee on Investment, to whom the Legal Department's views had been expressed, exhibited a desire to proceed cautiously on the issue. See Minutes of Meetings No. 1 and No. 2 of the Ad Hoc Committee on Investment of Fund Assets of May 8, 1951 and July 31, 1952 respectively, as well as EBD/52/136, dated August 5, 1952. The Fund's cautious approach toward any proposed recognition and exercise of implied powers was reflected as early as 1946, when the Legal Department prepared a preliminary memorandum on this subject--Executive Board Document No. 124, dated November 14, 1946--which noted that

> "...[an implied power] to invest gold as a matter of good administration must be understood narrowly, and must not be used to circumvent the limitations prescribed in the Articles of Agreement on the operations of the Fund. If the Fund's assets are so invested, it should not serve as a precedent for any use of the Fund's gold which is not completely and unequivocally a matter of administration."

5/ Decision No. 488-(56/5), adopted January 25, 1956. See also SM/55/30 and Correction (5/10/55).

Therefore, no collateral could be required. Nevertheless, it was concluded by the staff that the Fund had the "necessary implied authority" to accept an offer of collateral by a member, and that, if a member was willing to provide collateral, "the Fund [had] both capacity and justification for accepting," (EBS/58/87). The Board endorsed this conclusion on December 27, 1958 (Decision No. 836-(58/60)). It should be noted that, in this case, there was an incentive for an offer of gold collateral in that the credit tranche purchase by the United Arab Republic was treated as an unconditional gold tranche purchase, since the value of the purchase was fully covered by the collateral.

4. Trust Fund

Until the Second Amendment, there was no express authority in the Articles of Agreement to establish administered accounts whose assets and liabilities would be separate from the rest of the Fund's assets and liabilities. Other international organizations, however, had established trust accounts for specific activities, without express authority in their charters and without an amendment. 1/ Similarly, the Fund concluded that it had the capacity to establish a trust account, which would be funded from profits on sales of gold, and the Trust Fund was established by Decision No. 5069-(76/72), adopted May 5, 1976.

5. Holding of borrowed funds in suspense accounts

The doctrine of implied powers was also invoked in 1981 when the Fund recognized and exercised an implied power to hold borrowed funds in one or more separate accounts pending use of these funds in transactions with members. 2/ As in the earlier case of investing the Fund's gold, the reasoning supporting this decision reflected the principles noted above regarding implied powers.

The justification for the accounts was that the Fund's express power to borrow funds to replenish its holding of currencies needed in operations under Article VII, Section 1 could not be exercised unless the Fund had authority to devise and use appropriate operational techniques, such as separate "suspense" accounts. 3/

1/ See "Some Legal Aspects of Special Accounts and Trust Funds in Relation to the International Monetary System," SM/75/9 (1/7/75). Also, Gold, Sir Joseph, "Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles," in Legal and Institutional Aspects of the International Monetary System: Selected Essays, Volume II, 1984, pp. 862-875.

2/ See "Management of Borrowed Funds--Legal Aspects," SM/81/47 (2/18/81), p. 3 et seq.

3/ Id., p. 4.

Second, the consistency with the Articles was demonstrated by a showing that holding of borrowed funds in such suspense accounts could be carried out consistently with the other provisions of the Articles of Agreement (including, for example, those dealing with preservation of the value of the Fund's assets in the General Resources Account), as well as with existing policies of the Fund. 1/

6. Suspension of use of the Fund's general resources by members in arrears

Under Article XXVI, Section 2, a member that fails to fulfill any of its obligations under the Articles may be declared ineligible to use the Fund's general resources and, if the failure continues, after the expiration of a reasonable period, the member may be required to withdraw from the Fund. 2/ This provision attaches two consequences to a declaration of ineligibility for breach of an obligation: the declaration suspends the member's access to the Fund's general resources, and is a prerequisite for compulsory withdrawal.

The practice of the Fund shows that these two consequences are not necessarily linked. Under Rule K-2, the Fund may refrain from declaring a member ineligible and nonetheless restrict its access to the general resources. 3/ Under Rule K-4, the Fund may authorize the use of its general resources by a member that has been declared ineligible, without terminating the declaration of ineligibility.

Under both Rules, however, a decision of the Fund taking into account the member's circumstances is required. In this respect, the requirement of Article XXVI, Section 2(c) is observed.

In the case of arrears to the Fund, however, different rules have been adopted: there is no individual decision of the Fund suspending the use of its general resources; the existence of arrears automatically suspends the use of the Fund's general resources. 4/ The adoption of these rules could have been regarded as the exercise by the Fund of an implied power to apply sanctions without observing the procedures of Article XXVI, Section 2(a), which would raise doubts, either on the legality of the special rules on arrears or on the validity of the principle that exclusionary sanctions must be based on express authority. It must be noted, however, that the Fund has the power to adopt policies on the use of its general resources, and may

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1/ Id., pp. 4-6. The Legal Department also relied again (as it had in its memorandum concerning investment of the Fund's gold) on the "enabling" provision of Article XII, Section 2(g).

2/ Other grounds for a declaration of ineligibility may be found in Article V, Section 5, Article VI, Section 1, and Article XIV, Section 3.

3/ Article V, Section 5 contains a similar provision.

4/ See Selected Decisions, Thirteenth Issue, pp. 65, 70, 76, 80-81.

impose conditions consistent with its purposes and the need to safeguard the revolving character of its resources (Article V, Section 3(a)). The rules on arrears are based on that express authority.

7. Compensation of the Fund for overdue charges

The doctrine of implied powers was expressly relied on most recently in 1985, when the Fund decided to require members failing to make timely payment of periodic charges to the Fund to indemnify the Fund for losses resulting therefrom. 1/ The Legal Department's paper 2/ discussed the doctrine of implied powers, both as developed in the decisions of international courts and as applied by the Fund previously, and concluded that, under that doctrine, the Fund had capacity to take certain actions that would be both necessary to avert such financial losses and consistent with express provisions in the Articles.

This latter point--consistency with the Articles--was given particular attention. It was emphasized that there must be "no conflict between the arrangements proposed and any provision of the Articles." 3/ Moreover, the limited applicability of the doctrine of implied powers--that is, extending to questions of capacity to take certain operational or administrative actions but not to matters affecting the balance of rights or obligations of membership--was made clear: "The principle of implied powers cannot be used...as the legal basis for actions that serve purposes other than the recovery of financial damages." 4/ Hence the requirement that a member "indemnify the Fund for its financial loss...could not involve the application of a charge in the sense of Article V, Section 8." 5/

8. Valuation of late payments to the General Resources Account

The exchange rate used in operations and transactions between the Fund's General Resources Account and members is the rate as of three business days before the value date of the operation or transaction (Decision No. 5590-(77/163)). Since the SDR is the unit of account of the General Resources Account and the value of the Fund's

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1/ See "Special Charges on Overdue Financial Obligations to the Fund--Further Considerations and Proposed Decision," EBS/85/242, Sup. 1 (12/16/85), Cor. 1 (12/17/85) and Cor. 2 (12/23/85). See also "Special Charges to Recover Costs Arising from Members' Overdue Financial Obligations to the Fund--Further Consideration," EBS/85/242 (10/29/85).

2/ See "Financial Remedies in Connection with Overdue Financial Obligations to the Fund--Legal Aspects," SM/85/131 (5/13/85).

3/ Id., p. 8.

4/ Id.

5/ Id., p. 13.

currency holdings in that Account must be maintained in terms of SDRs, the instructions sent by the Fund for the payment are based on the value of the currency of payment (selected by the Fund), in terms of SDRs, as of three business days before the due date. The instructions are also sent three days before the due date.

When payment is made after the due date, the amount due by the member in terms of SDRs remains the same, but penalty charges may become due to the Fund. Moreover, in accordance with Decision No. 5590, the amount of currency due by the member will have to be determined as of three business days before the date of the actual payment (value date). If, since the initial instructions, the value of the currency of payment has depreciated or appreciated, the amount of currency to be paid will be adjusted, at least in principle, but subject to an exception which is discussed below. 1/

(a) If payment is made after the due date, and the currency of payment has depreciated, an additional payment must be made to the General Resources Account. 2/ Otherwise the General Resources Account would incur a loss in terms of SDRs.

(b) If payment is made after the due date, and the currency of payment has appreciated, two situations may arise:

(i) payment is not made within ten days from the date of the instructions: if the member informs the Fund that payment will be made on a certain date, new instructions are issued by the Fund, and the member will be asked to pay an amount calculated on the basis of the SDR rate as of three business days before the expected value date; alternatively, if payment is made without prior notice to the Fund, the amount due will be calculated on the basis of the rate as of three business days before the actual value date; in both cases the actual amount in terms of an appreciated currency of payment will be less than the initial amount in the same currency, but the SDR value remains the same;

(ii) payment is made within ten days from the date of the instructions: no new instructions are issued to adjust the amount due by the member on the basis of the new SDR value of the currency of payment; the member must pay the amount specified in the instructions; accordingly, the Fund receives an amount of currency which, in terms of SDRs (as of three business days before the value date) exceeds the amount due to the General Resources Account; as the SDR value of the currency holdings in the General

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1/ See "Review of Valuation of Late Payments in the Fund," EBS/88/16 (1/29/88).

2/ The additional payment is not claimed when its amount would not exceed SDR 5,000, unless the issuer of the currency of payment requests that the adjustment be made.

Resources Account must remain at all times the same, the surplus of the payment is not retained by the Fund; it is paid to the issuer of the currency in accordance with the provisions of Article V, Section 10(b) and Section 11. 1/

The Executive Board has endorsed the practice described above, 2/ but the legal basis for the aspect described under (b)(ii) remains unclear. A possible justification for not taking into account the appreciation of the currency of payment and transferring the surplus payment to the issuer of that currency would be that the issuer of the appreciated currency would have the benefit of this surplus if the payment had been made on the due date and should not be deprived of that amount by the debtor's default to the Fund, but then the question would be (i) whether the Fund has such an implied power to collect claims for its members, and (ii) what kind of right the issuer of the appreciated currency has to the surplus payment, which does not exist if the late payment is made more than ten business days after the date of the instructions, since, in that case, a recalculation based on the new SDR value of the currency of payment would be made, reducing the amount to be paid in terms of the appreciated currency. Another possible justification would be that the Fund, in addition to its express power to impose penalties on late payments in the form of special charges under Article V, Section 8, would have an implied power to impose other penalties. However, this justification would be incompatible with the position taken with respect to charges on overdue charges, where it was explained that, in the absence of an express power to impose penalties, the Fund could only claim compensation for its actual loss. If the justification for the nonadjustment of a late payment in an appreciated currency is the Fund's right to be compensated for a financial loss, the obvious objection would be that the so-called "compensation" is transferred to the issuer of the currency, and is not even claimed from the debtor if payment is made more than ten business days from the date of the initial instructions.

9. Denial of quota increases to members in arrears

In the context of the discussion on the Ninth General Review of Quotas, the Executive Board has agreed in principle that members in arrears to the Fund should not be allowed to make subscription payments for their increased quotas, unless arrears to the General Resources Account have been cleared. In addition, a general deadline for the subscription payment would be set after which the quota increase for the member would lapse. 3/

1/ See "Review of Valuation of Late Payments in the Fund," EBS/88/16 (1/29/88), p. 3, footnote 2.

2/ EBM/88/73 (5/11/88).

3/ See "Ninth General Review of Quotas - Considerations Relating to the Decrease in Quotas," EB/CQuota/88/1 (2/17/88), pp. 23 and 24; "Report of the Executive Board to the Interim Committee of the Board of

Under the proposed mechanism, a member in arrears whose right to participate in a quota increase would be recognized on the basis of economic criteria, would be denied the exercise of this right if its arrears to the Fund were not cleared before the expiration of the period for the quota increase.

There is no specific provision for this measure in the Articles. However, it is the primary purpose of a quota increase to strengthen the resources available to the Fund in the General Resources Account. Payments by a member in arrears would only add to holdings that the member should have repurchased, and would be in a currency that is demonstrably not usable by the Fund. Therefore, the denial of a quota increase to a member in arrears would not constitute an exclusionary sanction. It would be based on a determination that a quota increase, in such circumstance, would not achieve its purpose.

Conclusion on the precedents

The Fund has not taken the view that it has a power to apply punitive measures on members beyond the express authority conferred by the Articles, even in cases of breach of obligations under the Articles. Quite to the contrary, in the case of charges on overdue charges, it was concluded that the Fund had the capacity, in accordance with general principles of law, to recover compensatory damages for an actual loss, but did not have an implied power to impose punitive damages.

B. Suspension of membership under the Fund's Articles

An amendment of the Articles could add suspension of membership to the arsenal of exclusionary sanctions under the Articles. In the absence of an amendment, however, is it open to the Fund to suspend all rights attached to membership?

1. The doctrine of implied powers has been applied by international courts to determine the extent of the capacity of international organizations in the area of quasi-governmental powers; it has not been applied to authorize exclusionary sanctions. The majority view in doctrinal opinions and in the practice of international organizations is that an international organization has no implied power to take sanctions affecting the balance of a member's rights and obligations. The practice of the Fund is consistent with this conclusion.

2. Assuming that the doctrine of implied powers is extended to exclusionary sanctions, an interpretation of the Articles would be required to demonstrate that the power to suspend membership is so

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3/ (Cont'd from p. 31).
Governors on the International Monetary System on the Ninth General Review of Quotas," SM/89/55, Rev. 3 (3/24/89), p. 7.

essential that the founders of the Fund, had they considered the matter, would have conferred that power to the Fund, and that suspension of membership is not inconsistent with the Fund's Articles. 1/

(a) The first condition is the essential character of the power (justification requirement). This condition is not met if the organization has sufficient other powers, as is apparently the case with exclusionary sanctions under the Fund's Articles (ineligibility, suspension of use of SDRs in the SDR Department, compulsory withdrawal).

(b) The second condition is that the implied power is not inconsistent with the organization's charter. In the case of the Fund, where ineligibility for a breach of obligation suspends only the member's access to the general resources of the Fund, suspension of membership, based on the same breach of obligation, would have broader effects on the member's rights. Therefore, the recognition of an implied power of suspension of membership would circumvent the limitation on ineligibility. As indicated above, it is a clear case where an implied power cannot be recognized. Moreover, this interpretation of the Fund's Articles is confirmed by their legislative history, which shows that the provision on ineligibility replaced an earlier U.S. proposal for a provision on suspension of membership both in the Fund's and Bank's Articles; eventually a British proposal in favor of ineligibility prevailed, at least for the Fund's Articles, but not for the Bank's. 2/ This rules out the possibility of recognizing an implied power of suspension in the Fund, as it would be inconsistent with the Fund's Articles.

3. A different approach would be, instead of invoking the doctrine of implied powers, to resort to an interpretation of existing express powers with respect to exclusionary sanctions, and specifically the power of the Fund to require a member to withdraw from the Fund. If the Fund may expel a member, can this power be exercised to a lesser extent by suspending membership rights? A comparison that comes to mind is a declaration of ineligibility with limited access to the Fund's general resources (Rule K-4), or even a limitation on the use of the Fund's general resources without any declaration of ineligibility (Rule K-2), where a declaration of ineligibility does not have its full effect.

(a) A consequence of this different approach would be that suspension of membership would not be regarded as an extended

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1/ This type of power cannot be regarded as an exercise of "capacity" as usually understood (contractual relations). Therefore, it must be demonstrated that it is essential to the performance of the organization's functions.

2/ See 1987 Suspension Paper, pp. 13-15.

ineligibility but rather as a limited withdrawal. The competent organ would have to be the Board of Governors, and the decision would require the same majority as compulsory withdrawal (majority of the Governors having 85 percent of the total voting power) under Article XXVI, Section 2(b).

(b) There are objections, however, to this approach. The first one is that this interpretation of Article XXVI, Section 2(b) would reintroduce suspension of membership, which was ruled out by the founders of the Fund. Whether the doctrine of implied powers or another interpretation technique is used, the result cannot be different in the face of a contrary intention expressed by the contracting parties. The second objection is that suspension of membership is not a limited withdrawal, which severs all ties between the Fund and the member, but rather a temporary deprivation of the member's rights while its obligations continue; in the case of withdrawal, the Fund has certain obligations, such as the restitution of the member's subscription, which do not exist when the member's rights are suspended. Therefore, suspension of membership, which changes the balance of the member's rights and obligations under the Articles, cannot be regarded as a form of limited compulsory withdrawal. In conclusion, Article XXVI, Section 2(b) cannot be a basis for suspension of membership.

Conclusion

The present Articles of Agreement provide for different forms of limited suspension of membership rights, but the Fund has no general power to suspend all membership rights of a member.

In order to confer such a power upon the Fund, an amendment of the Articles would be required. In practice, given the existing limited forms of suspension, the amendment could introduce an additional form of suspension, limited to voting rights attached to membership. In view of the separation between the SDR Department and the General Department with respect both to sanctions (Article XXIII, Section 2(f)) and voting rights (Article XXI(a)), the suspension would not apply to votes within the SDR Department.

This amendment could be formulated as follows:

"1. The following provision shall be added to the Articles of Agreement as Article XXVI, Section 2(b):

> 'When a member has been declared ineligible to use the general resources of the Fund under (a) above, the Fund may suspend the voting rights of the member. During the period of the suspension, the Governor appointed by the member and the Executive Director appointed or elected by the member shall not cast the votes allotted to the member, and the

votes allotted to the member shall not be included in the calculation of the total voting power.'

2. Article XXVI, Section 2(b) shall become Section 2(c) and shall be amended by inserting 'from the date of the suspension under (b)' after 'a reasonable period.'

3. Section XXVI, Section 2(c) shall become Section 2(d).

4. The following sentence shall be added at the end of Article XXIII, Section 2(f):

'Article XXVI, Section 2(b) shall not apply to decisions on matters pertaining exclusively to the Special Drawing Rights Department.'"

If the Executive Board expressed an interest in an amendment of the Articles to that effect, the staff could prepare a draft resolution for submission to the Board of Governors.