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SEMINAR ON

CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW

PUBLICATION POLICIES OF THE FUND

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1. **Introduction**

Within the last decade, the International Monetary Fund (Fund) has undergone a remarkable turnaround on the matter of transparency, both in terms of disclosure about its own processes and in terms of the policies of its members.

This shift toward transparency has resulted from a confluence of motivations. First, many countries have themselves taken steps toward increased transparency. Secondly, transparency results from the interest of historical researches and academic observers in ready access to information. Thirdly, of nongovernmental organizations and other interested groups have exerted considerable pressure for openness. In addition, since the Asian crisis, a general consensus has emerged that transparency can contribute to better financial markets, thus contributing to the prevention and resolution of financial crisis.

The shift towards transparency, in the Fund as well as elsewhere, took time to gather momentum. Throughout, the concern was for the right balance. In general terms, how could the benefits of openness be furthered by making the Fund's operations and policy

deliberations more open to public view without compromising the Fund's primary role as banker, confidential adviser and assessor of national policies?

Transparency initiatives have been taken on many fronts—as you are no doubt aware—including a beefed-up external relations program, an active dialogue with the private sector, a strengthened interchange with civil society and NGO's, requests for policy inputs on the internet, engagement with national audit agencies, a willingness to talk to parliaments, and establishment of an internal evaluations office.

As part of this texture of transparency, the disclosure of information under an expanding policy for the publication of documents appears quite striking, even revolutionary. That trend peaked, but did not terminate, with the adoption of a comprehensive publications policy for Executive Board documents in January 2001.

2. The emergence of a publications policy

In the early 1990s, a number of considerations prompted the Fund to consider more exposure to the public, within discrete areas. Several steps were taken in that direction, as the Executive Board took up several general decisions.

(a) In mid-1994, the staff proposed to the Executive Board the systematic release of Reports on Recent Economic Developments, that is, the background studies to the Article IV Consultation, and Policy Framework Papers, that is, the supporting document for access to the resources of the ESAF.

In light of the novelty of the proposal, there was some opposition certain Executive Directors opposed strenuously, arguing that public circulation could affect the confidential

dialogue between the Fund and its members, as well change the nature of the documents themselves.

The Board adopted the proposal for publication, subject to the right of the concerned member, within 30 days of Board consideration of the document, to object to the document's release, or to identify confidential data to be deleted prior to its release.

(b) Shortly thereafter the Fund introduced a new policy providing for public access to its archives (coincidentally, with the arrival of the First Deputy Managing Director, Mr. S. Fischer).

Previously, the Board had responded to occasional requests from serious scholars or national authorities for access justified by particular scholarly objectives, with the product being subject to Fund review before publication.

The Board agreed, in light of well-established international and national practice, to move to a 30 year rule, with certain limited exceptions.

(c) In the second half of the decade, questions were raised about a member's right to release part or all of the Article IV Staff Report, and at times the Board considered the matter of authorizing the publication of a report of a member at its request—as it had in fact done occasionally in the past on a case-by-case basis.

It was clear, however, that the Fund had not adopted a policy on the matter; neither to permit publication on certain conditions nor to prohibit publication. In this situation, it was open to the Board to grant the request of a member (by a majority of the votes cast), although the sentiment was against doing so. Meanwhile, on occasions, national authorities ventured to publish, at times in edited (and more favorable) terms. In that event, the Fund informed

the member that the report was the Fund's document and not the member's, and unauthorized publication was improper. A truncated version was seen as an even greater transgression.

In this circumstance, the Fund adopted two new approaches. First, in 1997 the Board endorsed the issuance of a Public Information Notice (PIN)—that is, a statement for the public—that combined a factual background section on the member's economy with the Fund's assessment of the member's prospects and policies—corresponding closely to the Chairman's summing up of the Executive Board discussion. Normally, the PIN would be released within 5-10 days after discussion.

In this innovation, the decision granted the member several protections: participation was entirely voluntary. The consent of the member was controlling even to the point that consent, once given, could be withdrawn at any time. The policy allowed for the deletion of market-sensitive information (e.g., Fund views on exchange rate and interest rate matters). The member was entitled to review the draft, and, in the event that the member and management could not settle any differences, the Executive Board would return to the matter.¹

Second, and just as significantly, the Board decided to proceed with a pilot project (for 18 months) for the release of Article IV consultation reports. Recognizing that the Board had no existing policy, the Board solicited members to volunteer for the experiment, with the objective of releasing the Article IV staff reports, including combined Article IV/use of Fund resources reports. As with the PIN (which could coexist), the member's consent was

¹ Executive Board Decision No. 11493-(97/45), April 24, 1997, Selected Decisions (Twenty-Fifth Issue, 2000), p. 29.

overriding, and could be withdrawn at any time, and again market-sensitive information could be deleted.²

3. **Legal aspects**

As with all of its activities, the Fund, in dealing with publication policies, must act within its legal authority and consistent with its legal system. On the one side, the Fund must act within the given legal framework; on the other side, established policies and practices must be respected until changed.

(a) First, documents produced by the Fund bear the phrase “Document of International Monetary Fund and not for Public Use,” except when the documents are intended for publication. They may, in addition, be given an additional classification, security such as “Confidential”. Such documents fall within the ownership of the Fund, and its various rules for protecting the information contained therein came into play. Accordingly, Fund management, Fund Staff and Executive Directors have the obligation to protect the confidentiality of Fund documents.

In practice, therefore, Fund documents are not distributed outside the Fund nor published without due authorization. Even when distribution is approved, such as by a policy or decision of the Board, the use by the recipient may be carefully defined, so that the document cannot be further distributed, quoted or cited.

When Fund documents are issued to the Executive Board, an Executive Director, as part of his official duties, may communicate both the information and the documents to his

² Executive Board Decision No. 11973-(99/58), June 3, 1999, Selected Decisions (Twenty-Fifth Issue, 2000), p. 501.

national authorities, that is, to the member that appointed or elected him. Thereupon, the authorities of the member have an obligation to protect the confidentiality of Fund documents that are communicated to them. This obligation derives from the Articles. Specifically, Article IX, Section 5 states.” “The Archives of the Fund shall be inviolable:” Even though physically in the hands of a member or some other authorized party, the document remains part of the archives of the Fund, and for an indefinite time.

Accordingly, when Executive Directors distribute Fund documents to national authorities, that distribution is on the understanding that those documents are to be given the same security and confidential treatment as required by the status indicated on the paper. The view could be taken, also, that disclosure of the document without the consent of the Fund would be a breach of the member’s obligations to the Fund. This means, therefore, that the member must prevent any voluntary or forced disclosure, including disclosure under national “freedom of information” acts. In addition, the Fund takes the view that this distribution by Executive Directors to national authorities extends only to the executive branch (and central bank) of government, not to the member’s legislative branch.

In addition, the Executive Board, can decide to attach restrictive conditions even on the distribution of confidential documents to Executive Directors—including, for example, that the document be returned to the Secretary after the agenda item and not copied nor sent to capitals.

(b) Second, the constitutional structure of the Fund, there is a basic power-sharing feature, that is, between the Executive Board and the Managing Director. That power-sharing encompasses the area of the disclosure of information and the publication policies of the Fund.

Under the Articles, the Executive Board is charged with conducting the business of the Fund, and specifically it is to exercise all the powers delegated to it by the Board of Governors (Article XII, Section 3(a)). (In fact, a general delegation is in place). Accordingly, the Board controls publication policies for Executive Board papers, that is, papers prepared for it and distributed to Executive Directors as such.

At the same time, the Articles allocate authority to the Managing Director: “The Managing Director shall be the chief of the operating staff of the Fund and shall conduct, under the director of the Executive Board, the ordinary business of the Fund.”(Article XII, Section 4(b)). In other words, the Managing Director has responsibilities and authority conferred directly by the Articles, subject to the Executive Board directing him by means of general policies.

Concerning publication policy, therefore, the Managing Director (and, subject to this judgment, the staff) exercises considerable authority and discretion, in that he is dealing with a host of activity constituting the “ordinary business” of the Fund and not in practice circumscribed by Executive Board policy.

(c) Third, the Fund displays a healthy appetite for information. The Articles provide the Fund the right to request information necessary for its activities (Article VIII, Section 5(a), Article V, Section 3). Additional information may be the result of agreement with members (Article VIII, Section 5(c)), or may be a necessary input to the use of Fund resources or technical assistance.

It is an accepted fact that some of the information may be regarded as confidential in nature by the member, and that it is communicated to the Fund on the understanding that its distribution be confined.

Moreover, the circle of confidentiality may vary, embracing the Managing Director and the Executive board. First, the information may be communicated to the Board, for the performance of its functions, on the understanding that it not be subject to public disclosure. Secondly, at times the member will communicate certain information to the Managing Director and staff on the understanding, not only that it not be published, but that it not be made available to Executive Directors.

In both cases, the Fund follows the general principle that the understanding of confidentiality be respected: no publication is available nor could be permitted by the Executive Board in the first situation; no communication to Executive Directors or publication in the second case.

(d) Fourth, in certain situations, a further impediment to publication might arise, in the form of Article XII, Section 8 of the Articles of Agreement.

While the Fund—that is, the Executive Board—benefits from a general power to publish reports that it considers desirable for carrying out its purposes (Article XII, Section 7(b)), if that report contains Fund views, it is prohibited from doing so, because of the application of Article XII, Section 8.³

³ Section XII, Section 8 states: “The Fund shall at all times have the right to communicate its views informally to any member on any matter arising under this Agreement. The Fund may, by a seventy percent majority of the total voting power, decide to publish a report made to a member regarding its monetary or economic conditions and developments which directly tend to produce a serious disequilibrium in the international balance of payments of members. If the member is not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Section 3(j) of this Article. The Fund shall not publish a report involving changes in the fundamental structure of the economic organization of members.”

That clause provides that in a defined circumstance and by a decision taken by a special majority of 70 percent of total voting power, the Fund may publish a report communicating its views to a member. The circumstance is defined: it must relate to the members “monetary or economic conditions and developments which directly tend to produce a serious disequilibrium in the international balance of payments of members.”

When that circumstance is not met, therefore, that is, in other circumstances, the Fund is not authorized to publish its views on a member’s policies.

To the extent, therefore, that a document reproduces, describes or summarizes the views of the Fund (again, the Executive Board), it is caught by the provision. An Article IV staff report, for example, at least in its present form, would fall within that category.

(e) Fifth, when the Executive Board has decided to establish a general policy, that policy binds the Board until changed. As a legal matter, the Executive Board cannot choose to ignore the policy on an ad hoc basis, nor to waive it in a particular situation, unless the policy itself provides for an exception or the possibility of a waiver. Accordingly, the publication policies, once put in place, govern according to their terms in all relevant situations.

4. **The Present State of Play**

Building on the accumulating experience relating to various elements of publication, and in the light of an extensive review of the pilot project to release Article IV Staff Reports, in August 2000 the Executive Board approved a consolidated publication policy. Soon thereafter, the Fund issued a PIN on this matter, together with a statement of guiding

principles.⁴ In due course, in January 2000, those policies were formalized by an Executive Board decision (“Publication Decision”)⁵

In general, the decision confirmed existing arrangements. In other respects, it introduced some new policies, and provided harmonization between different elements in several respects. Given the scope of documentation covered, and the different treatment amongst the range of documents, the matrix remains complex and a full understanding requires effort and detailed study.

In summary, the decision on Publication Policies of the Fund establishes the following:

- IMF staff reports, including Article IV staff reports, and combined Article IV/Use of Fund Resources staff reports, will be published, subject to the consent of the member (paragraph 1).
- For documents stating members’ policy intentions—including Letters of Intent, Memoranda of Economic and Financial Policies, Poverty Reduction Strategy Papers and certain papers under the HIPC initiative (preliminary, decision point, and completion point documents), the principle of voluntary release applies, but the consent to publication is presumed. In other words, the member that opposes publication must notify the Fund accordingly, and in that event is expected to provide an explanation to the Executive Board (paragraph 2).

⁴ Public Information Notice No. 00/81, September 20, 2000.

⁵ Executive Board Decision No. 12405 (01/02), Selected Decisions (Twenty-Fifth Issue, 2000), p. 503.

- In the case of the Poverty Reduction Strategy Papers (PRSPs), if the member concerned does not agree to publication, then the Publication Decision states that the Managing Director “will not recommend its endorsement by the Executive Board” (paragraph 3).
- Background papers to the Article IV Consultation—Recent Economic Developments Report, Selected Issues Papers and Statistical Appendices—will be released on a voluntary basis (paragraph 1).
- Public Information Notices following Article IV Consultations and regional surveillance discussions likewise fall within the voluntary release principle (paragraph 1).
- Publication of a staff paper on a policy issue and/or a related PIN depends upon an ad hoc decision of the Executive Board (paragraph 11).
- On the issue of a member’s consent to publication, the Publications Decision states that this will “normally” be communicated to the Secretary of the Fund, and may be communicated by the Executive Director appointed or elected by the member (paragraph 5).
- The Publications Decision sets out a uniform deletions policy prior to publication for staff reports, country documents and country intention documents. Specifically, “Deletions should be limited to highly market-sensitive information; mainly exchange rate and interest rate matters, in particular....” In this respect, exclusion is not justified by “information in the public domain or politically sensitive information that is not highly market sensitive....” At the end of the

day, if the member and the Managing Director cannot agree on the matter, then the Executive Board will need to take it up (paragraph 8).

- Generally, publication of documents is to take place after Executive Board consideration, with some exceptions (paragraph 12).
- Finally, what is “publication”? The decision makes this clear: publication normally means publication on the Fund’s website but may include publication through other media (paragraph 13).

5. **Publication Policy: Follow-up**

The Publication Decision constitutes a substantial effort towards the transparency objective. In several respects, however, the policy has to be put in a broader context; in other words, it does not tell the full story, as follows.

(a) Side letters. Careful readers of Selected Decisions may be able to piece together the place of side letters in the process involved in the use of Fund resources.

In short, the Letter of Intent, which normally contains the full set of the member’s policy intentions, may be supplemented by an additional, confidential communication from the member to the Managing Director—a “side letter.” By definition, such a communication would contain undertakings of a highly sensitive nature, so that public disclosure cannot be contemplated, and even distribution to Executive Directors should be circumscribed.

In 1999, Executive Directors came to grips with the underlying issue: how to satisfy the member’s desire for confidentiality with the need of the Executive Board to come to a fully-informed decision in pursuit of its fiduciary responsibilities. Incidentally, this tension was increased to the extent that the side letter contained measures that were intended to be

picked up as performance criteria or specified prior actions and thus to constitute elements of Fund conditionality.

The 1999 Board decision on Side Letters and the Use of Fund Resources endorsed the practice of side letters, exhorting that they be used sparingly (paragraph 4).⁶ Under this decision, side letters are justified only when the publication of the understandings “would directly undermine the authorities’ ability to implement the program or render implementation more costly,” in that the release of information would cause adverse market reaction or undermine the authorities’ efforts to prepare the domestic groundwork for a measure (paragraph 5), for example, measures such as (i) exchange market intervention rules; (ii) bank closures; (iii) contingent fiscal measures; and (iv) measures affecting key prices (paragraph 6).

As a matter of principle, the existence and content of side letters will be treated with the utmost confidentiality (paragraph 1). As a matter of procedure, Executive Directors are shown a copy of the side letter at a restricted meeting of the Board; at the end of the meeting, the copy is returned (paragraph 8). In extreme cases of sensitivity, the decision contemplates some deletions from the circulated copy (paragraph 9). In turn, Executive Directors reports to their authorities are to be very circumscribed (paragraph 11).

Since 1999, therefore, the published documentation related to the use of Fund resources overlooks the possibility of a side letter. At the same time, however, to be treated

⁶ Executive Board Decision No. 12067-(99/108), September 22, 1999, Selected Decisions (Twenty-Fifth Issue, 2000), p. 131.

as part of the Fund's conditionality, the arrangement must incorporate the measure, either as a performance criterion or a prior action.

(b) Arrangements and associated Executive Board decisions. While the Executive Board has deliberated on the matter, the Publications Decision does not extend to the publication of stand-by or extended arrangements, or arrangements under the PRGF/HIPC. To some extent, the essence may be captured by an associated PIN, Chairman's Statement, or press release, but the primary source remains hidden.

(c) In the same vein, technical assistance reports are essentially outside the umbrella of the Publications Decision. While produced at the request of the member, these documents constitute Fund property, and usually fall under the jurisdiction of the Managing Director, not the Executive Board. In practice, therefore, the member may opt to publish the report relating to technical assistance that it requested, which it may do upon the Managing Director's authorization.

At this time, however, the Board is about to re-examine the issue of the publication of country-specific TA reports. Several features condition this review. First, technical assistance is a privilege of the member, and at times relates to national policies of considerable sensitivity. Secondly, in practice technical assistance reports are usually tightly held within the Fund, and generally are not published. Thirdly, some confusion has arisen because certain categories of country-specific reports, namely Reports on Standards and Codes (ROSCs), Financial Sector Stability Assessments (FSSAs) and Offshore Financial Center Assessments are published routinely, subject to the consent of the member. (Legally the ROSCs, FSSA's and OFC assessments derive from exercise of the Fund's technical assistance function.)

(d) Access to Archives. In 1999, access to the Fund archives was broadened considerably.⁷ In general, the 30 year rule for general access was reduced to 20 years, and access was permitted for Executive Board documents older than five years.

Of these two time periods, which applies to Executive Board minutes? Based on the background to the decision, it is clear that Board minutes fall within “documentary materials maintained in the Fund’s archives” and not “Executive Board documents.” Accordingly, Executive Board minutes are governed by the 20 year rule.

Conclusion

As prefaced, the publications policy presents two legal facets: the legal framework within which the debate takes place, and the scope and nature of the controlling prescriptions. The former are relatively static, especially if derived from the Articles of Agreement. In contrast, the existing prescriptions are open to review, modification and evolution.

Pursuant to the publications policy—reinforced by the general move to openness of the Fund—the public has gained access to a deluge of information:

For instance,

- For Article IV staff reports (including combined Article IV/UFR report, 60 percent are currently published.
- More than three-quarters of the Fund’s membership agreed to the publication of the PINS summarizing the Board’s discussion of the country consultation;

⁷ Executive Board Decision No. 11192-(96/2), March 8, 1999, Selected Decisions (Twenty-Fifth Issue, 2000), p. 470.

- Background papers to the Article IV consultation are now routinely published; and
- Similarly, practically all country policy intention documents, such as Letters of Intent, are published.

As noted, “publication” includes, but is not confined, to promulgation on the IMF website. It is appropriate to note, therefore, that the website receives upwards of five million visits—or “hits”—a month at this stage.⁸

On the publications policies themselves, probably some equilibrium has been reached. Still, the spectrum of views remains quite broad, and the Executive Board will return to the matter within a matter of weeks.

Externally, also, some basic questions have been raised. In a recent Fund-sponsored discussion, for example, some widespread skepticism surfaced.⁹

- Is the effect of transparency on investors and the markets overrated?
- How big is the gap between what the Fund thinks and what it writes?
- Does the debate over transparency tend to become a means of avoiding the debate over the economic paradigm? and
- Does the Fund still lack a legal or regulatory framework to govern its operating rules and procedures?

⁸ IMF, Annual Report 2001, p. 36.

⁹ “Taking Stock of IMF Transparency,” IMF Survey, January 28, 2002, p. 28.

Overall, however, the opening up of the Fund, through its publications policy and otherwise, has largely taken the wind out of the critics' accusations of secrecy, political interference, and deals. In positive terms, the new millennium publications policy will contribute substantially to the Fund's accountability and legitimacy. Moreover, the debate has moved on to more concrete issues. Given these developments, it is reasonable to conclude that "it is no longer possible to put the genie back in the bottle."