of A, has this situation changed as a result of the Articles if A is a member and B a non-member? There is a decision of the Supreme Court of the Federal Republic of Germany which may perhaps be understood in this way,[42] but there is not yet sufficient authority on which to base a confident conclusion.[43]

9. Agreement Between Fund and Switzerland—*Stipulation Pour Autrui*

One effect of the Articles on non-members results from the exercise of the Fund's authority to enter into agreements with them. The major example of an international agreement of this kind is the agreement of June 11, 1964 between the Fund and Switzerland.[44]

On October 24, 1962 the Fund's General Arrangements to Borrow took effect.[45] Under them, eight members and the central banks of two other members agreed to lend their currencies to the Fund in accordance with the terms of the Arrangements. One purpose of the Arrangements, although not the only one, is to provide the Fund with supplementary resources of the currencies of those members to which capital is likely to flow from a member whose currency is under pressure.[46] In this way, the Fund can replenish its resources of the currencies with which it could appropriately help the member in difficulties. However, the ring was not complete because some capital might move to Switzerland, and Switzerland is not a member of the Fund.

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[42] Gold, *op. cit.*, pp. 139-42.

[43] However, it has been argued that Article VIII, Section 2(*b*), and the cases involving it have exerted a "favourable influence by increasing respect for the foreign exchange laws of non-member States" (I. Meznerics, "Application of Foreign Exchange Laws by Foreign Courts," *Acta Juridica Academiae Scientiarum Hungaricae*, T. [Vol.] V, Fasc. 1-2, 1963, pp. 56 and 64). The author, Head of the Legal Department of the National Bank of Hungary, cites no cases in support of this proposition. He criticizes the German case referred to above.

[44] *Selected Decisions*, pp. 69-72. Reproduced in Appendix II.

[45] *Selected Decisions*, pp. 56-68.

[46] "In order to enable the International Monetary Fund to fulfill more effectively its role in the international monetary system in the new conditions of widespread convertibility, including greater freedom for short-term capital movements. . . ." (Preamble of the General Arrangements to Borrow, *Selected Decisions*, p. 56).

Under Article VII, Section 2,[47] the Fund may agree with a member that it lend its currency to the Fund. It is also provided that, with the approval of a member, the Fund may borrow that member's currency from "some other source either within or outside the territories of the member." These territories are not expressly declared to be the territories of members, and there is no reason to assume any tacit limitation of this kind. It would therefore be possible for the Fund to borrow from non-members or their residents. However, it is quite clear that no matter who the lender may be, the Fund's power to borrow under Article VII, Section 2, is confined to the replenishment of its holdings of member currencies. In short, the Fund does not hold Swiss francs and has no power to borrow them under Article VII, Section 2.[48]

The agreement of June 11, 1964 between the Swiss Federal Council and the Fund solves the problem by providing for a form of association of the Swiss Confederation with the General Arrangements to Borrow.[49] Switzerland could not adhere to the General Arrangements, but undertakes, subject to the terms of the agreement, to make a direct loan to a participant in the General

[47] "*Measures to replenish the Fund's holdings of scarce currencies.*—The Fund may, if it deems such action appropriate to replenish its holdings of any member's currency, take either or both of the following steps:

(i) Propose to the member that, on terms and conditions agreed between the Fund and the member, the latter lend its currency to the Fund or that, with the approval of the member, the Fund borrow such currency from some other source either within or outside the territories of the member, but no member shall be under any obligation to make such loans to the Fund or to approve the borrowing of its currency by the Fund from any other source.

(ii) Require the member to sell its currency to the Fund for gold."

[48] Normally, the Fund cannot hold the currency of a non-member. Under Article V, Section 7(*b*), a member's obligations to repurchase its currency from the Fund where the Fund holds more of it than 75 per cent of the member's quota depends on increases in its monetary reserves, and under Article XIX (*a*) the Fund may specify the currency of a non-member for inclusion in the calculation of the monetary reserves of members. However, Schedule B, paragraph 2, provides that nevertheless the Fund shall not acquire the currency of a non-member under Article V, Section 7(*b*). But, of course, the Fund could hold the currency of a non-member country as a result of the withdrawal of that country from membership in the Fund. Again, a member may have a common currency with a non-member.

[49] Annex Prepared by Deputies to Ministerial Statement of the Group of Ten, August 1964, paragraph 2: ". . . The discussions also benefited from the presence of representatives of the Swiss National Bank, as decided by Ministers following completion of the legislation looking to Swiss cooperation with the General Arrangements to Borrow."

Arrangements when the Fund borrows under the General Arrangements in order to finance an exchange transaction with that participant. For this purpose, there has to be an "implementing agreement" between the participant and Switzerland, which will be written in terms of reciprocity if Switzerland requires. Switzerland undertakes that it will be prepared to consider the conclusion of an implementing agreement if requested by a participant. The Fund accepts no responsibility or liability, whether as guarantor or otherwise, in connection with the basic agreement or any implementing agreement. Switzerland is to advance to the participant in the General Arrangements the amount specified by the Managing Director, provided that this does not exceed the amount of the implementing agreement or a total of outstanding advances to all participants equivalent to US$200 million, and provided further that Switzerland does not represent that its present and prospective balance of payments and reserve position do not justify the advance. A number of other provisions of equal importance need not be referred to here. However, it is important to note that Switzerland undertakes that repayment terms in an implementing agreement will correspond to the maximum extent practicable with the repayment provisions of the General Arrangements. Special arrangements were made by Switzerland for this purpose because the repayment provisions of the General Arrangements permit a use of the resources advanced that goes beyond the customary period of loans by the Swiss National Bank under Swiss law.[50] The form of the resources to be advanced is not prescribed in the agreement between Switzerland and the Fund, but the Decree enacted by the Swiss Federal Council authorizing entry into the agreement refers to Swiss francs or gold.[51]

The crux of the agreement is that the "Swiss Confederation will be prepared to consider the conclusion of agreements (hereinafter referred to as 'implementing agreements') with any of the participants in the General Arrangements if requested by such

[50] See in general *Message du Conseil fédéral à l'Assemblée fédérale concernant la collaboration de la Suisse aux mesures monétaires internationales* (No. 8698, of March 1, 1963).

[51] *Feuille Fédérale,* 1963, Vol. II, p. 796.

participants."[52] Although legally any participant can benefit from this undertaking, there is less likelihood that in practice the benefit will be needed by participants that are not reserve currency countries, and this accounts for the fact that the undertaking is written in low key ("prepared to consider"). Whatever the content of the undertaking, it appears to be a *stipulation pour autrui,* that is to say, a stipulation for the benefit of the participants in the General Arrangements to Borrow on which they can rely on their own initiative. They are third parties because they are not parties to the agreement between Switzerland and the Fund.

Sir Gerald Fitzmaurice, in the Report already referred to, concluded that international law recognizes the *stipulation pour autrui* as conferring a right or benefit on a third party which it can legally insist on against the parties to the treaty.[53] Sir Gerald reconciles the *stipulation* with the basic rule that treaties cannot confer legal rights on third parties by stating that legal rights can be created only if the parties intend this result. It is perhaps more satisfying to regard the *stipulation pour autrui* simply as an important exception to the traditional rule than to attempt a reconciliation with it. In any event, it is hardly likely that the *stipulation pour autrui* could create a legal right unless the parties so intend. However, although Sir Gerald speaks of an intention to create a legal right against them both, there would seem to be no reason why it should not be possible for them to create a legal right exercisable against only one party if that is their intention. In the case of the agreement between Switzerland and the Fund, it is Switzerland that must consider the conclusion of an implementing

[52] See Appendix II.

[53] Art. 20: "(1) Where a treaty expressly confers rights or benefits on, or makes provision for the exercise of rights or faculties, or for the enjoyment of facilities or benefits by a third State, in such a way as to indicate that the parties meant to create legal rights for the third State, or to bind themselves to grant them, or to create a legal relationship between themselves and the third State, the third State concerned thereby acquires a legal right to claim the benefit of the provisions in question. . . .

"(3) . . . the claiming third State has a direct right of recourse against the parties to the treaty, acting in its own name and of its own motion, if the provisions of the treaty concerning the third State are not carried out—provided always that the third State has complied, or is willing to comply, with any conditions attached by these provisions to the grant." (See Fitzmaurice, *op. cit.*, pp. 42-43; discussed in pars. 82-90.)

agreement. It will be recalled that the Fund accepts no responsibility or liability, whether as guarantor or in any other capacity, in connection with the agreement.

The Fund is, of course, a third party in relation to any "implementing agreement" that is entered into between Switzerland and a participant in the General Arrangements. The Fund has no responsibility or liability in connection with the performance of an implementing agreement. However, without prejudice to this, it is stated in the agreement between Switzerland and the Fund that, at the request of a party to an implementing agreement, the Fund may make any determination or use its good offices to facilitate the operation of the implementing agreement.

10. Objective International Personality and Non-Members

Article IX, Section 1, provides that to enable the Fund to fulfill its functions the status, privileges and immunities set forth in Article IX "shall be accorded to the Fund in the territories of each member." Section 2 provides that the Fund "shall possess full juridical personality" and, in particular, the capacity to contract, acquire, and dispose of property, and institute legal proceedings. Notwithstanding the reference to the territories of members, it has never been doubted that the Fund has juridical personality and the capacity that flows from it in relations with non-members. Indeed, there is explicit evidence in the Articles that the reference to the territories of members in Article IX, Section 1, does not circumscribe the personality and capacity of the Fund. Under Article X, the Fund may make arrangements with other international organizations, and it has already been seen that under Article VII, Section 2, the Fund may borrow from sources "either within or outside the territories" of a member. Even these express provisions, however, do not exhaust the personality and capacity of the Fund. It is established in international law now that an international organization has an objective personality which goes beyond the express provisions of its charter. In its Advisory Opinion of April 11, 1949 *(Reparation for Injuries*