THE AMENDMENT AND VARIATION OF THEIR CHARTERS BY INTERNATIONAL ORGANIZATIONS

by

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The amendment of a treaty establishing and regulating the activities of an international organization — its charter — may be a lengthy process because of the stages through which a proposal to amend must go before it can become effective. One complication may be the need for domestic action to ratify or accept a proposed amendment by a high proportion of the member countries that belong to the organization. The expansion of the membership of many organizations may make attainment of the necessary proportion a slow process not only because of the number of members that must act but also because some countries may have little interest in the proposal. They may be lukewarm because they believe that the proposed amendment will be no more than marginally beneficial for them, and with this conviction they may be dilatory in seeking any necessary parliamentary authority. Even when action is not retarded by the absence of enthusiasm on the part of the Executive, there may be delay because of such difficulties as a crowded parliamentary calendar. The negotiators of a proposal, however, will be convinced that it serves the general welfare, and normally they will regard the prospect of delay with impatience because it will hinder the promotion of their cause [1].

This article examines two techniques which the drafters of the charters of

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[1] The Council of the Organisation for European Economic Co-operation (OEEC) had the authority, which is now exercised by the Organisation for Economic Co-operation and Development (OECD), to amend many provisions of the European Monetary Agreement, although it must be noted that the Agreement is not part of the charter of the OECD or its forerunner. The Legal Adviser of the OEEC has written :

« Some of the most important provisions of the Agreement... may be, and have been in fact, amended by a decision of the OEEC Council with the consequence that the procedures and time normally required for the amendment of an international agreement

international institutions have adopted in order to simplify or accelerate the procedure by which the provisions of a charter can be adapted to changing conditions. The first of these techniques is amendment by decision of an organ of the institution, usually the senior and plenary organ. The amendment becomes effective once the decision is taken, and there is no need for action by members beyond their participation in the procedure by which the decision was taken.

The second technique is not amendment because no change is made in the text of the charter. Instead, authority is conferred on an organ to decide that the institution will apply some principle or rule other than the one that is included in the text of a particular provision. This power differs from a general grant of authority to an organ to apply such principles or rules as are considered appropriate from time to time, because an initial principle or rule which is subject to the power is included in the charter and made mandatory for the institution when it begins to operate. The power must be distinguished also from authority to waive the application of a principle or rule in particular cases, because there is then no substitution of a new principle or rule of general application. For convenience, the second technique is referred to in this article as « variation ».

The Articles of Agreement of the International Monetary Fund give no authority to its organs to amend in accordance with the first technique. No consideration was given to the incorporation of this technique in the complex amendment of July 28, 1969, the only amendment of the Fund's charter so far. The discussion of the first technique, therefore, will draw largely on the charters of other international organizations [2].

The Fund seems to have gone beyond most other organizations in the use of the second technique, and therefore much of the discussion of variation will be based on the Fund's charter.

I. AMENDMENT

Acceptance of amendments.

The procedure for amending most charters calls for action by members of

were reduced to a minimum. Anybody concerned with the problem of treaty revision will appreciate the point. »

ELKIN, A., « The European Monetary Agreement : Its Structure and Working », in *Annuaire européen : European Yearbook*, The Hague, 1960, vol. VII, p. 158.

[2] This articles does not deal with the problem of defining an « international organization ». For the purpose of this article, inclusion of a charter in PEASLEE, *A.J., International Governmental Organizations : Constitutional Documents*, The Hague, Rev. 2nd ed., 1961, has been considered sufficient in most instances. Some of the texts that are quoted, however, have been adopted after the last edition of Peaslee appeared.

the organization in their capacity as states. For example, the formal procedure in the Fund begins with a proposal to introduce modifications in the Articles, which may be made by the Executive Directors, the organ of the Fund that is in continuous session, or by any member state or governor [3]. The amendment of July 28, 1969, which dealt with special drawing rights, the new supplement to the existing reserve assets held by monetary authorities, and with certain modifications in the original provisions of the Articles, began with a proposal of the Executive Directors. If the Executive Directors had voted instead of following their normal practice of taking a decision according to the sense of the meeting, a majority of the votes cast, on the basis of the Fund's system of weighted voting power, would have sufficed for adoption of the *decision to make* the proposal [4].

Whether a proposal to amend the Articles be made by the Executive Directors, a member, or a governor, it must be communicated to the Chairman of the Board of Governors, who must bring it to the attention of the Board, the senior organ of the Fund. If the Board approves the proposal, for which purpose again a majority of the votes cast is sufficient, all members are asked by circular letter or telegram whether they « accept » the proposed amendment. « Acceptance » is a procedure for manifesting the consent of a government to a treaty which has been introduced in international practice in order to make it possible for states to dispense with the more formal and lengthier domestic procedures associated with « ratification » [5]. A proposal to modify the Fund's Articles cannot become effective as an amendment unless it is accepted by three-fifths of the members having four-fifths of the total voting power, but the acceptance of all members is required for amendments modifying three provisions [6]. The definition of acceptance in terms of both members and voting power is common in the charters of financial organizations because of the weighted voting power of members. The purpose of the double requirement is to ensure that amendment will not be effected by a large number of members with a small proportion of the total voting power or by a small number of members even though they have a large proportion of the total voting power.

When the necessary acceptances have been received, the Fund certifies the fact by a formal communication to all members. An amendment enters into force three months after the date of the formal communication unless a shorter period is prescribed in the circular letter or telegram by which the members

[3] Art. XVII of the Articles of Agreement of the International Monetary Fund, which entered into force on December 27, 1945 and were amended effective July 28, 1969. References hereinafter to an Article, followed by the abbreviation of an organization in parenthesis, are to a provision of the charter of that organization.

[4] Art. XII, Sect. 5(d) (IMF).

[5] ZACKLIN, R., *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies,* Leyden, 1968, pp. 155-56.

[6] Art. XVII(b) (IMF).

are asked whether they accept a proposed amendment [7]. The amendment binds all members, whether they accepted it or not, but any member may withdraw from the Fund at any time, with immediate effect, and without the need to give a reason [8]. The procedure for amendment of the Articles of the International Bank for Reconstruction and Development (IBRD) is substantially the same [9].

Amendment without acceptance.

The charters of some institutions provide for another approach to amendment. The role of organs in these institutions is not to recommend amendments to the membership but, by exercise of their own authority, to give legal effect to them. A designated organ may decide to adopt an amendment, whereupon it is binding on members without ratification, acceptance, or any other procedure for the manifestation of consent outside the organ. Normally, a member is able to withdraw if it objects to an amendment. There was some support for this approach at the Bretton Woods Conference, at which the Fund's charter was drafted. The delegations of the United States and the United Kingdom submitted the draft of a provision for amendment of the Fund's charter that had a number of the features of the provision that was finally adopted. A proposed amendment was not to take effect unless it was accepted by the governments of members having four-fifths of the total voting power, but an alternative text was introduced to permit certain provisions to be amended by a majority of four-fifths of the total voting power of the Board of Governors [10]. The provisions were to be specified, but they were described collectively in the preliminary text as « unimportant ».

Later in the Conference, and after the emergence of what was virtually the final text of the provision on amendment, the delegation of the United Kingdom proposed an addition to the provision. According to the proposed addition, the Executive Directors were to be empowered to decide by a unanimous vote to adopt an amendment that would enter into effect immediately and remain in force unless and until repealed or modified in accordance with the rest of the proposed provision. The amendment was to be submitted to the Board of Governors within a stated number of days from its adoption by the Executive Directors and was to be repealed if it was not accepted, with or without modification, by nine-tenths of the governors having nine-tenths of the total

[7] The amendment of July 28, 1969 entered into force as of the date on which the Fund certified, by formal communication, that the necessary acceptances had been received.

[8] Art. XV, Sect. 1 (IMF).

[9] Art. VIII (IBRD).

[10] *Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944,* Washington, U.S. Dept. of State Publication 2866, International Organization and Conference Series I, 3, 1948; hereinafter cited as *Procs. and Docs.*, pp. 57-58.

voting power of the Board of Governors. If the amendment of the Executive Directors was accepted in accordance with this double requirement, it remained in force. This second stage of the procedure envisaged confirmation of the amendment by the Board of Governors as the senior organ of the Fund and not by members. It was also proposed, however, that members should have a direct role in the procedure. The amendment as confirmed by the Board of Governors was to be sent to all members and was to remain in force unless within a prescribed number of days one-tenth or more of the members, or members possessing not less than one-tenth of the aggregate voting power, declared their opposition to it. If there was either degree of opposition, the amendment was repealed [11]. The additional proposal on amendment was inspired by the feeling that there might be an urgent need for an amendment in order to ensure the proper working of the Fund.

There was inadequate support among other delegations for the idea that the Executive Directors should have authority to amend the Articles even with the safeguards proposed by the United Kingdom. Even though the purposes of the institution would be non-political, members would be assuming obligations in connection with economic and financial activities that in the past had been free from international control, and the organization should not have the power to alter the obligations as agreed. The negotiators recognized, however, that circumstances might occur in which it would be urgent to consider an amendment, particularly because the novel obligations that members were undertaking might turn out to be unduly burdensome [12]. The compromise between the considerations that pulled in opposite directions was a provision under which « in the event of an emergency or the development of unforeseen circumstances threatening the operations of the Fund », the Executive Directors by unanimous vote may suspend the operation of certain specified provisions for not more than 120 days. Simultaneously with the exercise of this authority, the Executive Directors must call a meeting of the Board of Governors for the earliest practicable date. The Board, by a four-fifths majority of the total voting power, may extend the period of suspension for no more than an additional 240 days [13]. It is possible that the conditions of this provision are so restrictive that resort to it will be unlikely. The requirements of unanimous vote by the Executive Directors and a meeting of the Board of Governors are among the deterrents. Moreover, one purpose of the provision was to consider amendment, and it is obvious that a year was thought to be sufficient for giving effect to a proposed amendment, but this assumption could be questioned now as too optimistic. The amendment of July 28, 1969 became effective 15 months after it was

[11] *Ibid.*, pp. 570-71, 576-77.

[12] *Ibid.*, pp. 651-52, 697, 825.

[13] Art. XVI, Sect. 1 (IMF).

recommended by the Executive Directors, but it must be recognized that a major reason for the delay was its length and complexity.

Classification of powers to amend without acceptance.

The power that was denied the Fund has been incorporated in certain charters that were drafted after the Bretton Woods Conference. The powers of institutions to amend their own charter by the action of an organ fall into three separate classes. First, the organization is authorized to amend any provisions of its charter. Second, a distinction is made in general terms between two categories of provisions, and the organization is authorized to amend one of the categories. Third, the organization is authorized to amend certain identified provisions. These three powers are discussed in turn.

a) The charter of the International Finance Corporation (IFC) represents a new departure in connection with amendment of the charters of international financial organizations. It has been noted already that the provisions on amendment in the charter of the IBRD resemble those of the Fund, and the Executive Directors of the IBRD reproduced these provisions in drafting the charter of the International Development Association (IDA), the second newcomer to the IBRD's family of organizations[14]. The charter of the first newcomer, the IFC, provides, however, that the Articles may be amended by a vote of three-fifths of the governors exercising four-fifths of the total voting power. The affirmative vote of all governors is required for the amendment of three specified provisions[15]. A proposal to amend may be made by a member, a governor, or the Executive Directors of the IFC. It is communicated to the Chairman of the Board of Governors, who must then bring it before the Board. Acceptance by members is not required for any class of amendments or for

[14] It may be useful to set forth the dates on which the charters of certain of the organizations referred to in this article were agreed and took effect :

	Date of agreement	*Effective date*
IMF	July 22, 1944	December 27, 1945
IBRD	July 22, 1944	December 27, 1945
FAO	October 16, 1945	October 16, 1945
UNESCO	November 16, 1945	November 4, 1946
WMO	October 11, 1947	March 23, 1950
IFC	May 25, 1955	July 20, 1956
IADB	April 8, 1959	December 30, 1959
IDA	January 26, 1960	September 24, 1960
CIM	February 25, 1961	January 1, 1965
CIV	February 25, 1961	January 1, 1965
AfDB	August 4, 1963	September 10, 1964
AsDB	December 4, 1965	August 22, 1966

[15] Art. VII (IFC).

the amendment of any specified provisions. All members are bound when an amendment takes effect, but members are free to withdraw[16].

An explanatory memorandum approved by the Executive Directors of the IBRD when the proposed Articles of the IFC were submitted to members in 1955 stated that :

> « This Article (i.e., Article VII) is in substance the same as Article VIII of the Bank's Articles except that, to simplify the amendment procedure, it specifies that approval of amendments is to be by affirmative vote of Governors rather than of both Governors and members[17]. »

A similar procedure for amendment was incorporated in the charters of the Inter-American Development Bank (IADB) and the Asian Development Bank (AsDB). The former charter provides for amendment by the Board of Governors by a two-thirds majority of all governors, representing not less than three-fourths of the total voting power of members. A proposal may be made by a member or the Executive Directors, but not by a governor[18]. The charter of the AsDB permits any provision, without distinction, to be amended by a resolution of the Board of Governors approved by a vote of two-thirds of the total number of governors, representing not less than three-fourths of the total voting power of members. Proposals to amend can be made by a member or the Board of Directors[19]. Neither the IADB nor the AsDB is a member of the IBRD's group of organizations, but some of the drafters of the charters of these two banks had had experience in the preparation of the charters or in the operations of the IBRD group.

When the drafters of the African Development Bank (AfDB) were faced with the issue of amendment they chose to follow the precedent of the IBRD and not the IFC and the IADB[20]. The Committee of Nine, which had been appointed by the Economic Commission for Africa to prepare the draft of a charter for an AfDB, commented as follows on the provision dealing with amendment :

> « ... [T]he method and language used by the IBRD and IDA... have been chosen as being more in keeping with the intergovernmental character of the Bank : not all governors may be expected to come from government departments. It may therefore be more appropriate that after preliminary approval by the Board

[16] Art. V, Sect. 1 (IFC).

[17] U.S. Congress, Senate Committee on Banking and Currency, Subcommittee on International Finance, 84th Cong., 1st Sess., *Hearings on S. 1894, A Bill to Provide for the Participation of the United States in the International Finance Corporation,* June 6-7, 1955 (Washington, 1955), p. 20.

[18] Art. XII(c) (IADB).

[19] Art. 59 (AsDB). For the right of withdrawal, see Art. IX, Sect. 1 (IADB) and Art. 41 (AsDB).

[20] Art. 60 (AfDB).

> of Governors, formal acceptance of the amendment should be sought by the Bank from the member Governments as such... [21]. »

When an organization is able to amend its charter, the power is frequently vested in the senior organ only, which for the financial organizations is the Board of Governors. The most important reason for choosing the senior organ is that each member appoints a governor to the Board, and therefore the membership is more directly involved in the process of amendment. Normally, nothing is said about the qualifications of governors, but the charter of the AfDB states that governors and their alternates « shall be persons of the highest competence and wide experience in economic and financial matters » [22].

Among non-financial organizations, the Pan American Health Organization (PAHO) has a power to amend its charter which resembles the power of the IFC, IADB, and AsDB. The power is broader, however, because its exercise is not confined to the senior organ :

> « Proposals to amend the Constitution shall be communicated to the Member Governments at least three months in advance of their consideration by the Conference or the Council. Amendments shall come into force for all Member Governments when adopted by the Conference by a two-thirds vote of the representatives of all Member Governments or when adopted by the Council by a two-thirds vote of those representatives [23]. »

b) Under the abortive Havana Charter of the International Trade Organization (ITO), the senior organ was the Conference, which was to consist of the representatives of all members of the organization, each of whom would have one vote [24]. A distinction was made between amendments to the charter that altered the obligations of members and those that did not. It will be recalled that one of the unsuccessful proposals at Bretton Woods also distinguished between two categories of provisions, although the distinction never reached the stage of refinement and in its rough state referred to « unimportant » and other provisions. The Preparatory Committee of the U.N. Conference on Trade and Employment explained the distinction in the draft charter of the ITO in language reminiscent of the proposal for the Fund :

> « ... [I]t was generally recognized that the Organization should be so constituted

[21] United Nations Economic Commission for Africa, *Agreement Establishing the African Development Bank : Preparatory Work, Including Summary Records of the Conference of Finance Ministers*, New York, *E/CN.14/ADB/28*, 1964, p. 193.

[22] Art. 30 (AfDB).

[23] Art. 28 (PAHO) (*Basic Documents of the Pan American Health Organization*, Washington, Pan American Health Organization Off., Doc. N° 105, 1970, p. 19). See also the Universal Postal Union, art. 29, paragraph 2 and the International Telecommunication Union, art. 6(h); ZACKLIN, R., *op. cit.*, see fn. 5, pp. 134-35.

[24] Arts. 74 and 75 (ITO).

> as to allow it to meet constitutional changes of a minor kind without undue difficulty... [25]. »

Amendments of the ITO charter that did not affect the obligations of members, like the modifications of « unimportant » provisions under the unsuccessful proposal for the Fund, were to become effective by decision of the senior organ. These amendments of the ITO charter were to take effect upon approval by the Conference by a two-thirds majority of all members, and would bind all members [26].

Any proposed amendment that altered the obligations of members had to receive the approval of the Conference by a two-thirds majority of the members present and voting. An amendment was to become effective upon the ninetieth day after two-thirds of the members had notified the Director-General of their acceptance of it. The amendment would bind those members that had notified the Director-General of their acceptance before that date and thereafter each member upon its acceptance. When approving an amendment altering the obligations of members, the Conference could determine that the amendment was of such a nature that those members that did not accept it within a specified period should be suspended from membership. Members not accepting an amendment of this character were to be free to withdraw [27]. The Conference would be able to decide, by a two-thirds majority of the members present and voting, whether an amendment did or did not alter the obligations of members [28].

Charters have become effective in which the distinction of the Havana Charter, or a comparable distinction, is made between two categories of provisions in order to permit an organ to amend one of them by decision. The charters of the Food and Agriculture Organization (FAO) and the World Meteorological Organization (WMO) refer to amendments « not involving new obligations ».

[25] Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (London, 1946), Chapter VI, Sect. I, paragraph (4)(a). Reprinted in U.S. Congress, Senate Committee on Finance, 80th Cong., 1st Sess., *Hearings on Trade Agreements System and Proposed International Trade Organization Charter*, March 20-31, April 1-3, 1947, Part 2, Exhibits, Washington, 1947 (hereinafter referred to as *Senate Hearings)*, p. 792.

[26] Art. 100, par. 1 (ITO).

[27] Art. 100, par. 3 (ITO).

[28] Art. 100, par. 4 (ITO). On amendment under the Havana Charter, see U.S. Congress, House Committee on Foreign Affairs, 81st Cong., 2nd Sess., *Hearings on Membership and Participation by the United States in the International Trade Organization* (H.J. Res. 236), April 19-27, May 1-12, 1950 (Washington, 1950), pp. 46-47, 242, 362-65, 421, 490, 537-38, 568. For the forerunners of Art. 100, see Art. 75 of the *Suggested Charter for an International Trade Organization of the United Nations* (U.S. Dept. of State Publication 2598, Commercial Policy Series 93, September 1946); Art. 85 of London Draft (U.S. Dept. of State Publication 2728, Commercial Policy Series 98, December 1946); Art. 85 of New York Draft (February 1947); and Art. 95 of Geneva Draft (U.S. Dept. of State Publication 2927, Commercial Policy Series 106, August 1947). See also *Senate Hearings* (see fn. 25), pp. 564-65.

The charter of the FAO provides that the Conference, the senior organ, may decide to amend the provisions of the charter by a two-thirds majority of the votes cast, provided that the majority includes more than half of the Member Nations. An amendment not involving new obligations for Member Nations or Associate Members takes effect forthwith, unless the decision approving it establishes some other date, and binds all members. An amendment involving new obligations takes effect for each Member Nation and Associate Member accepting it on acceptance by two-thirds of the Member Nations and thereafter for each remaining Member Nation or Associate Member on its acceptance of the amendment [29].

According to the charter of the WMO, the text of any proposed amendment must be communicated by the Secretary-General to members six months in advance of its consideration by the Congress, the senior organ of the WMO. Amendments involving new obligations for members require approval by the Congress by a majority of two-thirds, and they come into force on acceptance by two-thirds of the Members which are states for each such member accepting the amendment and thereafter for each remaining member on acceptance by it. Other amendments come into force for all members on approval by the Congress by a majority of two-thirds of the members are states [30].

The provision on amendment in the charter of the United Nations Educational, Scientific and Cultural Organization (UNESCO) distinguishes between two categories of provisions, but the distinction is not based solely on new obligations. Proposals for amendment of the charter that do not fundamentally alter the aims of the organization or create new obligations become effective upon receiving the approval of the General Conference by a two-thirds majority, and, as in the case of the FAO and WMO, the amendment binds all members [31], subject to their right to withdraw. Proposed amendments of the charter of UNESCO, however, that « involve fundamental alterations in the aims of the Organization or new obligations » for member states require « subsequent acceptance » by two-thirds of the member states before the proposals come into force [32].

The charters of the FAO, WMO, and UNESCO do not say how determinations are to be made if there is controversy about the classification of a proposed amendment. According to the author of one monograph, the competent organ of the international institution in which it is proposed to amend the charter must decide any question of classification and not the individual

[29] Art. 20, Sect. 2 (FAO).

[30] Art. 28 (WMO).

[31] PHILLIPS, L.H., « Constitutional Revision in the Specialized Agencies », *A.J.I.L.*, vol. 62, (1968), p. 671.

[32] Art. 13, par. 1 (UNESCO).

members [33]. Decision by the competent organ was the solution made explicit in the Havana Charter of the ITO.

A study of the practice of the three institutions up to 1967 shows that the charters of the FAO and UNESCO had been amended frequently but always in accordance with the procedure that does not call for acceptance by members. There had been fewer amendments of the charter of the WMO. It has been said that one reason for the less frequent amendment of this charter was the difficulty that the organization had faced in trying to settle disputes about the classification of certain proposed amendments without the benefit of an express provision on the settlement of disputes [34].

c) The charter of an organization may identify specific provisions as subject to amendment by the organization itself. The charter of the European Organization for Nuclear Research (CERN) [35] is an example of this third category. It provides that although amendments recommended by the Council require acceptance by all members, the Council may amend the Financial Protocol annexed to the charter by a two-thirds majority without the necessity for acceptance by members, but the amendment must not conflict with the provisions of the body of the charter [36].

A similar technique has been followed in various conventions establishing a range of institutions with tasks of a highly technical character. Provisions of the International Convention Concerning the Carriage of Goods by Rail, 1961 (CIM) [37] are reminiscent in some respects of the proposal advanced by the delegation of the United Kingdom at the Bretton Woods Conference. The Convention provides for ordinary and extraordinary conferences of the contracting states to revise the convention [38], but :

> « In the intervals between revision conferences, Articles 3, 4, 5(5), 6, 11, 13, 17, 19, 21, 22, 23, 24, 25, 48, 49, 50 and 53 of this Convention and Annexes II, III, IVa, IVb, IX and X to this Convention may be amended by a Revision Committee. The composition and procedure of this Committee shall be in accordance with the provisions of Annex VI to this Convention.
>
> The decisions of the Revision Committee shall be notified without delay to the Governments of the Contracting States through the Central Office. The

[33] ZACKLIN, R., *op. cit.*, see fn. 5, p. 149.

[34] *Ibid.*, pp. 149-54.

[35] PEASLEE, A.J., *op. cit.*, see fn. 2, pp. 645-56.

[36] Art. 10, pars. 2 and 3 (CERN).

[37] This Convention, which was signed at Berne, February 25, 1961 and took effect on January 1, 1965, replaces the Convention of October 25, 1952, *U.K. Cmnd. 2187*, London, H.M.S.O., 1963.

[38] Art. 69 (CIM).

> decisions shall be deemed to be accepted unless within three months from the date of such notification at least five Governments have lodged objections; and shall come into force on the first day of the sixth month following the month in which the Central Office shall have brought them to the notice of the Governments of the Contracting States. The Central Office shall indicate that date when communicating the decisions [39]. »

In addition, certain other provisions may be amended by Committees of Experts [40]. A proposal for amendment is deemed to be adopted by a Revision Committee or Committee of Experts if half or more of the delegations of contracting states have voted on the proposal and a majority of the votes cast are in favor of it [41]. Similar provisions are included in the International Convention Concerning the Carriage of Passengers and Luggage by Rail, 1961 (CIV) [42].

The International Convention for the Regulation of Whaling establishes a complex procedure for amendment [43]. The Convention creates an International Whaling Commission, composed of one member from each contracting government, and the Commission is empowered to amend from time to time certain provisions in the Schedule with respect to the conservation and utilization of whale resources. The amendments must meet certain conditions. For example, they must be necessary to carry out the objectives and purposes of the Convention, be based on scientific findings, and take into consideration the interests of consumers of whale products and the industry. Decisions to amend are taken by a three-fourths majority of the members of the Commission who cast their votes [44]. Amendments become effective 90 days after notice by the Commission to the contracting governments, except that effectiveness is postponed for another 90 days if any government objects. Other governments may object within the second 90 days or within 30 days of the last objection during that second 90 days. Thereafter, the amendment becomes effective with respect to any government that has not objected or has withdrawn an objection [45].

Comparison of amendment with and without acceptance.

If the procedure for amendment of the charters of the Fund and the IFC are compared, an obvious difference, although not the most important one,

[39] Art. 69, par. 3 (CIM).

[40] Art. 69, par. 4 and Annex VI (CIM).

[41] Annex VI, Art. 9 (CIM).

[42] This Convention, which was signed at Berne, February 25, 1961 and took effect on January 1, 1965, replaces the Convention of October 25, 1952, *U.K. Cmnd. 2186,* London, H.M.S.O., 1963. See Art. 68, par. 3 and Annex III, Article 9 (CIV).

[43] See Art. V, PEASLEE, A.J., *op. cit.,* see fn. 2, p. 1514.

[44] Art. III, par. 2, PEASLEE, A.J., *op. cit.,* see fn. 2, p. 1513.

[45] Art. V, par. 3, PEASLEE, A.J., *op. cit.,* see fn. 2, p. 1514.

is that the approval of a proposed amendment by the Board of Governors as an intermediate stage is eliminated by the charter of the IFC. The elimination of this stage may save some time, although the economy would be modest. For example, 45 days were allowed for approval by the Board of Governors of the proposed amendment of the Articles of the Fund, and this period was sufficient. The Board of Governors voted without meeting under standard procedures of the Fund [46].

The cardinal difference is that the charter of the Fund makes amendment depend on acceptances by a certain proportion of members having a certain proportion of the total voting power, whereas the charters of the organizations in the three categories that have been discussed dispense with this necessity, at least for the amendment of some provisions. To amend the Fund's charter, members must complete whatever procedures are necessary for acceptance under their individual law and practice, but the other charters permit amendment simply by decision of the senior or other authorized organ. It is undoubtedly implied that each member can decide for itself what legal steps are necessary under its law and practice in order that it can instruct its appointee to the amending organ.

The procedure which dispenses with acceptance permits a member to decide that under its law and practice it need take no special steps in order to instruct its appointee on how to vote. The member may decide, therefore, that an instruction by a minister or some official is permissible. If many members can take action of this kind, the procedure that enables an organ to give effect to an amendment without the need for acceptance by the membership or some proportion of it is simpler and might reduce the time required for bringing amendments into force.

It is equally possible for some members to insist that under their law and practice the same formality is necessary as is required for acceptance. This attitude may be confined to the United States [47], but even if the United States is alone in this practice, the effect on the process of amendment could be decisive. The action of the United States alone could determine whether or when an amendment becomes effective. In the financial organizations, voting power is weighted, and the size of the contribution of the United States gives it a considerable proportion of the total voting power and may even give it an effective veto on amendment [48]. The Bretton Woods Agreements Act provides that unless Congress by law authorizes such action, neither the President nor any person or agency shall accept on behalf of the United States any

[46] By-laws, Sect. 13 (IMF).

[47] This statement is based on a scrutiny of the laws of only a modest proportion of member countries.

[48] For example, in the IADB and IFC.

amendment of the Articles of the Fund or the IBRD [49]. The same kind of provision has been included in the legislation which authorized the United States to participate in the IFC and IADB, even though the charters of the organizations do not call for the acceptance of amendments [50]. The statutes follow the model of the Bretton Woods Agreements Act even to the extent of using the word « accept » in referring to action on behalf of the United States in connection with any amendment of the charter of the IFC or the IADB.

The Joint Resolution by which Congress authorized membership of the United States in the FAO[51] made the same distinction between categories of provisions that is included in the charter of the organization [52]. Congress resolved that no person or agency should accept an amendment involving any new obligation for the United States unless Congress by law authorized that action. There is no similar requirement for other amendments. The Joint Resolution providing for membership and participation of the United States in UNESCO followed the charter of that organization only in part. It will be recalled that the charter distinguishes between amendments that involve fundamental alterations in the aims of the organization or new obligations for member states and other amendments. The Joint Resolution, however, requires the authorization of Congress by law only for amendments involving any new obligation for the United States [53].

The legislation of the United States authorizing membership in the AsDB is yet another variant. The charter permits the amendment of any provision

[49] U.S. Bretton Woods Agreements Act, Pub. L. 171, Sect. 5, 59 Stat. 514 (1945). A vote by the governor appointed by the United States on a resolution of the Board of Governors of the Fund to approve a proposed amendment does not require congressional authorization :

« Approval by the Governors does not constitute, as a matter of law, acceptance or ratification of the Amendment on behalf of any member government. I have cast an affirmative vote as the U.S. Governor of the Fund, after consultation with the National Advisory Council on International Monetary and Financial Policies.

After approval by the Board of Governors, the governments of members of the Fund will be asked formally whether they accept the Amendment. It is at this stage that formal governmental acceptance is involved, and prior legislative authorization by the Congress is required. » (Statement of Mr. Henry H. Fowler, Secretary of the Treasury, U.S. Congress, House Committee on Banking and Currency, 90th Cong., 2nd Sess., *Hearings on H.R. 16911, To Establish a Facility Based on Special Drawing Rights in the International Monetary Fund,* May 1-2, 1968 (Washington, 1968), p. 151; see also Senate Committee on Foreign Relations, 90th Cong., 2nd Sess., *Hearing on S. 3423 and H.R. 16911, Special Drawing Rights in the International Monetary Fund.,* May 13, 1968 (Washington, 1968), p. 17).

[50] International Finance Corporation Act, Pub. L. 350, August 11, 1955, 69 Stat. 669; Inter-American Development Bank Act, Pub. L. 86-147, August 7, 1959, 73 Stat. 299.

[51] H.J. Res. 145, Pub. L. 174 July 31, 1945, 59 Stat. 529.

[52] *Ibid.*, Sect. 4.

[53] H.J. Res. 305, Pub. L. 565, July 30, 1946, 60 Stat. 712, Sect. 7.

without acceptance, but the U.S. legislation requires the authorization of Congress by law before any person or agency votes for or agrees to any amendment « which increases the obligations of the United States, or which would change the purpose or functions of the Bank »[54]. This language recalls the language of the charter of UNESCO, in which Congress approved membership and participation without requiring its authorization for amendments that would involve fundamental alterations in the aims of the organization.

The legislation approving the membership of the United States in the IFC and IADB on the one hand and AsDB on the other hand followed different courses even though the charters of all three permit the amendment of any provision by the Board of Governors of the institution without the necessity for acceptance by the membership. The legislation with respect to the IFC and IADB requires the authorization of Congress before any agency or person can take favorable action on behalf of the United States in connection with any amendment. The authorization of Congress is required for some but not all amendments of the charter of the AsDB.

The U.S. legislation with respect to the AsDB makes a distinction which is not to be found in the charter of that organization, and raises once again the question of competence to apply the distinction and make classifications on the basis of it. The argument that an organ of the institution making the amendment must have this competence can hardly be sustained when the distinction appears in domestic legislation only.

Because the procedure for the amendment of a charter which does not require acceptance can be affected by the requirements of the domestic law and practice of members, it may be impossible for the Board of Governors of an organization to decide by votes cast at the same time to give effect to an amendment. For example, when the charter of the IFC was amended, the Executive Directors proposed a draft resolution for adoption by the Board of Governors within a stated period. The resolution was adopted only after the necessary votes had been received from governors over time. The procedure resembles the receipt of acceptances required by a charter that makes amendment dependent on a certain volume of acceptances by members.

II. VARIATION

Introduction.

It is not a widespread practice to confer on international organizations the power to vary provisions in their charters. It is probable that the drafters of charters think of amendment as the more obvious or more desirable technique

[54] Asian Development Bank Act, Pub. L. 89.369, March 16, 1966, 80 Stat. 71, Sect. 5.

for modifying provisions. Nevertheless, there are examples of the power to vary. For example, the charters of international banking organizations prescribe the amount of the authorized capital stock but empower the organization to increase it [55]. These charters also establish the minimum rate of commission that the organization is to charge on its loans but permit it to change the rate [56]. An example of a power to vary possessed by a non-financial organization is the provision in the charter of the Intergovernmental Maritime Consultative Organization (IMCO) which declares that the headquarters of the organization are to be established in London but that the organization may change this site [57]. The extent of the Fund's power to vary provisions in its charter is discussed in the next section.

Power to vary provisions of Fund's charter.

In the original Articles of the Fund, there were four examples of the power to vary, two of which related to the structure of the Fund and two to its financial activities. The Articles establish the Executive Directors as an organ composed of twelve directors, of whom five are appointed by the five members with the largest quotas, two are elected by the American Republics not entitled to appoint directors, and five are elected by all other members not entitled to appoint directors. When countries that did not attend the Bretton Woods Conference, and therefore are not listed in Schedule A of the Articles, join the Fund, the number of directors to be elected may be increased by decision of the Board of Governors [58]. Elections take place, in accordance with the provisions of Schedule C, at intervals of two years, but when the Fund increases the number of directors to be elected it must make appropriate changes in the proportions of votes required to elect directors under Schedule C [59].

The Fund's main financial transactions are conducted now through what is called the General Account in order to distinguish it from the Special Drawing Account through which special drawing rights are allocated. The main financial transaction takes the form of sale by the Fund to a member of the currencies of other members in order to help it deal with its balance of payments difficulties. The member purchases the foreign exchange with its own currency and, to the extent that the Fund does not use this currency, the member must repurchase it with reserve assets within a period not exceeding three to five years. In this way, the resources held by the Fund in the General Account and used in its financial transactions can be kept revolving for the benefit

[55] Art. II, Sect. 2(e) (IADB); Art. II, Sect. 2(b) (IBRD); Art. 4, par. 3 (AsDB); Art. 5, par. 3 (AfDB).

[56] Art. IV, Sect. 4(a) and 5(a) (IBRD); Art. III, Sect. 12 (IADB); Art. 16, par. 1 (AsDB); Art. 19, par. 1 (AfDB).

[57] Art. 44 (IMCO).

[58] Art. XII, Sect. 3(b) (IMF).

[59] Art. XII, Sect. 3(d) (IMF).

of all members in need. When a member purchases currencies from the Fund, it must pay a service charge which was fixed by the Articles at 3/4 of 1 per cent but which can be changed by the Fund within a range of 1/2 of 1 per cent to 1 per cent. While the purchase is still unreversed by the Fund's use of the member's currency or by repurchase, the member pays charges at fixed intervals on the Fund's holdings of the member's currency above a certain level. The rates of these charges, which ascend in relation to the proportion between the Fund's holdings of the currency and the member's quota in the Fund and also in relation to the length of time since the purchase was made, are set forth in the Articles, but the Fund is able to change these rates [60].

The Fund has made frequent use of the power to vary the four provisions of the original Articles that could be varied. The power to vary these provisions continues to exist after the amendment of the Fund's charter of July 28, 1969, but the amendment gave the Fund the power to vary other provisions. Among these are the provisions that govern repurchase by a member of its currency from the Fund. The original provisions on the obligations of members to repurchase have been amended, and the Fund has been given the power to vary some of the amended provisions [61].

The Fund is required by a new provision in the Articles to pay remuneration to a member on the net use made by the Fund of the member's currency in all the operations and transactions of the Fund in which it has been involved. The net use of a member's currency is measured by the reduction of the Fund's holdings of it below the level of 75 per cent of the member's quota, which is the original level of the Fund's holdings when members pay a normal subscription in currency and gold. The provision declares that the rate of remuneration shall be 1-1/2 per cent per annum, but the Fund is empowered to vary this rate [62].

A power to vary is included in three provisions that deal with special drawing rights. Members of the Fund that participate in the Special Drawing Account pay charges on the special drawing rights that have been allocated to them and receive interest on their holdings of special drawing rights. The rates of charges and interest must be the same, and payments of both are made in special

[60] Art. V, Sect. 8(a), (c), (d), and (e) (IMF). See also Art. III, Sect. 2 under which the Fund may permit the adjustment of members' quotas, including the quotas, set forth in Schedule A, of the countries that attended the Bretton Woods Conference. The original provision required a majority of 80 per cent of the total voting power for a decision of the Board of Governors to permit an adjustment; under the amended provision a majority of 85 per cent is required for some adjustments. A decision to permit the adjustment of any quota set forth in Schedule A could be regarded as the exercise of a power to vary, but no adjustment of a member's quota can be made without its consent.

[61] Art. V, Sect. 7(d) (IMF).

[62] Art. V, Sect. 9 (IMF).

drawing rights. The rates are 1-1/2 per cent per annum, but may be increased or reduced by the Fund [63].

The Fund has the duty to ensure that a participant in the Special Drawing Account will be able to use its special drawing rights in order to obtain convertible currency when it wishes, and the Fund performs this duty by designating another participant to receive the transfer and provide the currency. The Articles require the Fund to designate participants in such a manner as will promote a balanced distribution of special drawing rights among them, and rules for designation are included in a schedule to the Articles. Decisions with respect to the allocation of special drawing rights are taken for consecutive « basic periods », and the Fund must review the rules for designation before the end of the first and each subsequent basic period. The Fund may adopt new rules as the result of a review, but if new rules are not adopted, the rules in force at the time of the review remain in effect [64].

Participants in the Special Drawing Account must observe certain rules that require them to « reconstitute » their holdings of special drawing rights. A participant is required to maintain an average balance during successive quinquennial periods of 30 per cent of the allocation of special drawing rights to it. This mathematical rule is augmented by an imprecise and largely subjective rule which requires a participant to pay due regard to the desirability of pursuing over time a balanced relationship between its holdings of special drawing rights and its holdings of other reserve assets. The Fund must review the rules for reconstitution before the end of each basic period, and it may vary these rules if necessary or even abrogate all rules. Unless the Fund decides to adopt new rules or to dispense with rules, those in operation at the time of a review continue to apply [65].

Scope of power to vary.

The power to vary has been attached to specific provisions. It is very different, for example, from the power to suspend the operation of « any of the provisions relating to special drawing rights » in the event of an emergency or the development of unforeseen circumstances threatening the operations of the Fund with respect to the Special Drawing Account [66].

The scope of the power to vary differs with the provision that may be varied. The power to vary service charges on purchases of foreign exchange by members from the Fund is limited to the narrow range of 1/2 of 1 per cent to 1 per cent, but no limits are defined for variations in the rates at which members pay

[63] Art. XXVI, Sect. 3 (IMF).

[64] Art. XXV, Sect. 5(a) (i), (b), and (c); Schedule F (IMF).

[65] Art. XXV, Sect. 6; Schedule G (IMF).

[66] Art. XXIX, Sect. 1 (IMF).

periodic charges on the Fund's holdings of their currencies, or in the rate of remuneration which the Fund pays for the net use it makes of the normal amount of currency subscribed by members. Variations in the rates of charges on allocations of special drawing rights and interest on holdings of them are tied to the rate of remuneration. The Fund may increase the rates of charges and interest connected with special drawing rights to 2 per cent or the rate of remuneration, whichever is higher; or reduce it to 1 per cent or the rate of remuneration, whichever is lower.

The power to vary provisions dealing with the same subject matter may differ among international organizations. The power to vary the minimum commission to be charged on loans by the AsDB may be varied only after the first five years of operations, and then may be reduced [67]. The AfDB may vary the rate after the first ten years, and may then « change » it [68]. The charter of the IBRD prescribes both a minimum and a maximum rate, and permits a reduction after ten years if reserves are considered adequate. There is also a power to increase the rate beyond the maximum for future loans if experience indicates that an increase is desirable [69].

The Fund's power to vary other provisions in its charter is not confined to changes of a numerical character. The power to vary certain provisions relating to repurchase does include a power to revise, without limitation, the percentages in some provisions, but in addition the Fund « may revise and supplement » provisions of a different character. Similarly, the Fund may vary the rules for designation and in the exercise of this power may adopt new principles. Variation of the rules for reconstitution may go even further. The power to vary the rules for designation can be exercised only by the substitution of new rules, but the power to vary the rules for reconstitution enables the Fund not only to change them but also to abrogate them.

Purposes of power to vary.

The provisions of some charters empower the organization to adopt from time to time appropriate regulations for some particular purpose, but the provisions do not establish the initial regulations [70]. Provisions that grant a power to vary by definition include the initial rules that may be varied. The drafters of both types of provision recognize that there will be a need to adapt rules so as to make them more effective in circumstances that are likely to change even though it cannot be foreseen how they will change. The reasons for preferring provisions that give a power to vary initial rules instead of a

[67] Art. 16, par. 1 (AsDB).

[68] Art. 19, par. 1 (AfDB).

[69] Art. IV, Sects. 4(a) and 5(a) (IBRD).

[70] See, for example, Schedule G, par. 1 (a)(ii), last sentence (IMF).

completely general authority to adopt rules may not always be the same. The drafters may have a strong conviction about what the initial rules should be and therefore they write them into the provision, and they may also define an original period within which the initial rules may not be changed [71].

In some instances, the explanation of the adoption of initial rules is not a general conviction about what they should be but a difference of opinion about them or even a difference of opinion on whether there should be any rules at all. The power to vary the rules for designation is an example of the first kind. The Report of the Executive Directors recommending the amendment of the Articles discussed competing theories on the designation of participants to receive special drawing rights in transactions in order to promote a balanced distribution of holdings of special drawing rights among participants. One theory was based on the ratio of all holdings of special drawing rights to gross reserves and the other on the ratio of all holdings in excess of allocations to gross reserves. The latter theory prevailed but the rules based on them were to be subject to review before the end of each basic period and to change as the result of a review if change were thought desirable [72].

The power to vary the rules for reconstitution is an example of a power to vary initial rules because there was controversy about the need for reconstitution in any form. Some negotiators of the amendment of the Fund's charter wished to incorporate an element of credit in the new supplement to reserve assets and therefore pressed for the reconstitution of holdings of them in some form, but other negotiators argued that reconstitution would be inconsistent with the character of special drawing rights as reserve assets and therefore resisted reconstitution in any form. The result was a compromise which requires the Fund to review the rules before the end of each basic period and gives it not only authority to amend the rules, including the average proportion of allocations that must be reconstituted over time, but also authority to eliminate all rules for reconstitution [73].

The explanation of the existence of some powers to vary may be the uncertainty of the drafters about the way in which the initial rules will work. This is the explanation for the Fund's power to vary some of the provisions relating to repurchase. The drafters wondered whether some of the percentages in the initial rules would prove to be equitable. They also wondered whether

[71] See, for example, Art. IV, Sects. 4(a) and 5(a) (IBRD); Art. 16, par. 1 (AsDB); Art. 19, par. 1 (AfDB).

[72] *Establishment of a Facility Based on Special Drawing Rights in the International Monetary Fund and Modifications in the Rules and Practices of the Fund : A Report by the Executive Directors to the Board of Governors Proposing Amendment of the Articles of Agreement,* Washington, International Monetary Fund, 1968, Sect. 13, pp. 11-13.

[73] See GOLD, J., *Special Drawing Rights : Character and Use,* International Monetary Fund Pamphlet Series, N° 13, 2nd ed., Washington, 1970, p. 80.

some of the changes they were making in the intricate provisions on repurchase would disturb the balanced operation of the provisions [74].

Broader purposes of power to vary.

The power to vary certain rates connected with the operations of an international financial organization may seem natural and of no great interest beyond the financial considerations most obviously involved. In fact, the power to vary rates has served, and in the future may serve, broader interests. The power to vary the rates of periodic charges on the Fund's holdings of a member's currency has been employed so as to make a fundamental contribution to the Fund's practice on the use of its resources. It was understood in the drafting of the original Articles that a member was entitled to make no more than a temporary use of the Fund's resources, but the Articles did not define a maximum period for this purpose. The formulas in the Articles for the calculation of repurchase obligations might not produce obligations for extensive periods or even at any foreseeable date. The prospect of protracted or indefinite use could not be reconciled with the principle that the Fund was intended to supply resources for temporary balance of payments difficulties, but at the same time the Articles provided for sales of foreign currency which although reversible were nevertheless not loans repayable at a fixed date. These difficulties produced an impasse that obstructed the use of the Fund's resources until a solution could be found which would be accepted as compatible with the Articles by both the members that had subscribed currency that was likely to be in demand and the members that were likely to use the Fund's resources.

The solution was found in the power to vary the rates of the periodic charges on the Fund's holdings of members' currencies. It was agreed that the appropriate period for the use of the Fund's resources must be determined by the nature of the balance of payments problem for which a member uses the Fund's resources but that the period should not extend beyond three to five years from the date of a purchase of foreign exchange. The provisions governing the initial charges in the Articles included the requirement that when the rate of charge on any part of the Fund's holdings of a currency reached 4 per cent per annum the Fund and the member must consider means by which the holdings could be reduced [75]. The stage of compulsory joint consideration might not be reached under the charges in the Articles until

[74] See GOLD, *J., The Reform of the Fund,* International Monetary Fund Pamphlet Series, N°. 12, Washington, 1969, pp. 45-46.

Uncertainty of some other kind may explain the power conferred on an organ to amend a particular provision. See, for example, Article 100, paragraph 5 and Annex N of the Havana Charter (ITO), United Nations Conference on Trade and Employment, E/CONF. 2/C.6/83, February 25, 1948, p. 3.

[75] Art. V, Sect. 8(d) (IMF).

seven years after a purchase. To give effect to the understanding on the appropriate period for the use of the Fund's resources, the rates of charges were altered so that the date for consultation on the reduction of the Fund's holdings of a currency would arrive not later than three years after a purchase of foreign exchange. Members were then able to agree that there was a demonstrable legal basis for a policy on the appropriate period for their use of the Fund's resources. They were willing to concur in a policy of the Fund under which a member would be expected to represent when requesting a purchase that it would agree in the consultation to complete repurchase as soon as possible and not later than five years after the purchase. This policy has been completely effective and is still in operation [76].

It seems likely that, in the reform of the international monetary system that is now being considered, special drawing rights will be given a central role at an earlier date than was contemplated when international agreement was reached on this new supplement to existing reserve assets. There is a widespread conviction that the payment of a higher rate of interest on holdings of special drawing rights than the initial 1-1/2 per cent per annum will be necessary in order to enhance the status of special drawing rights as a reserve asset. The rate of interest can be increased under the power to vary the provision of the present Articles governing the rate of interest, but it is possible that this provision also might be amended in some way as part of a modification of the Articles designed to give effect to a broad reform [77].

Safeguards.

The exercise of the power to vary many of the provisions that can be varied under the Fund's charter has been made subject to two kinds of safeguards : reservation of the power to the Board of Governors and a special majority for the adoption of decisions to exercise the power.

Only the Board of Governors can exercise the power in connection with the number of elected executive directors, the proportion of votes required to elect executive directors when their number is increased, repurchase, and reconstitution. The power to vary provisions relating to the five other topics can be exercised by the Executive Directors. Special majorities of the total voting power are required for the following decisions : 75 per cent to change the rates of the periodic charges on the Fund's holdings of currencies or to change the

[76] *The International Monetary Fund, 1945-1965 : Twenty Years of International Monetary Cooperation*, vol. II, Washington, International Monetary Fund, 1969, pp. 524-30.

[77] See POLAK, J.J., *Some Reflections on the Nature of Special Drawing Rights*, International Monetary Fund Pamphlet Series, N°. 16, Washington, 1971, pp. 10-13, 26-28; FLEMING, J.M., « The SDR : Some Problems and Possibilities », and HIRSCH, F., « SDRs and the Working of the Gold Exchange Standard », *Staff Papers*, vol. XVIII, Washington, International Monetary Fund, 1971, pp. 34-36, 237-39, 246-47.

rate of remuneration beyond the range of one to two per cent; 80 per cent to increase the number of elected executive directors; 85 per cent to modify or abrogate the rules for reconstitution or to revise or revise and supplement aspects of the provisions on repurchase. The power to vary the other provisions subject to variation can be exercised by decisions taken by a majority of the votes cast[78].

The distinction between the reservation to the Board of Governors and the delegation to the Executive Directors of the power to vary and the differences among the proportions of voting power required for decisions to exercise the power reflect a number of considerations. The drafters thought that it should be easy to adopt some variations because it was reasonable to regard the action as part of the ordinary operations of the Fund. Therefore, the service charge on purchases from the Fund can be changed by the Executive Directors by no more than a majority of the votes cast, although possible changes are confined to a narrow range. The motive for facilitating the exercise of the power to vary may be not the somewhat routine character of the change but the necessity to ensure change. For example, the increase in the number of elected executive directors is an act that has political importance for members and therefore only the Board of Governors can take a decision on increasing the number, and a majority of 80 per cent of the total voting power is required for a decision. Once a decision is taken, however, it is essential for the smooth working of the electoral process that the proportions of votes needed to elect executive directors be modified. Therefore, although authority to take this decision also is reserved to the Board of Governors, the decision can be taken by a majority of the votes cast.

The extent to which a variation may affect the operations of the Fund is an obvious explanation of certain distinctions. The service charge on a purchase of foreign exchange from the Fund is confined to the single occasion when the purchase is made, the charge is relatively modest, and the range within which the charge can be modified is narrow. The periodic charges, however, are payable throughout the period in which a member is using the Fund's resources and no limits are prescribed within which the rates may be fixed. Therefore, although the Executive Directors may vary both the service and the periodic charges, apparently on the theory that both are closely connected with the conduct of the general operations of the Fund, for which the Executive Directors are responsible[79], a majority of the votes cast suffices for a decision to change the service charge but a majority of 75 per cent of the total voting power is necessary for a decision to change the periodic charges.

Another explanation for the distinctions that have been mentioned may be

[78] Art. XII, Sect. 5(d) (IMF).

[79] Art. XII, Sect. 3(a) (IMF).

the course of the negotiations that produced the provisions that are subject to the power to vary. For example, whether there should be a concept of reconstitution was controversial at the ministerial level during the negotiation of the provisions dealing with special drawing rights. The concept of the Fund's designation of participants to receive transfers of special drawing rights from participants using them was more readily accepted as a feature of the operation of the new assets. There was no serious controversy at ministerial level with respect to the principles of designation that should be employed in order to promote a balanced distribution of special drawing rights among participants in the Special Drawing Account. This was one reason why the problem of determining the initial rules was regarded as less fundamental. As a result, the power to vary the rules of reconstitution is reserved to the Board of Governors and can be exercised by decisions supported by 85 per cent of the total voting power, whereas the Executive Directors can change the rules for designation by a majority of the votes cast.

Safeguards may work in a way that the drafters did not intend or expect. The periodic charges on the Fund's holdings of currencies are charges for the use of the Fund's resources. Although there have been differences of opinion between members using the Fund's resources and members subscribing the currencies that are purchased on the policies for determining the rates of charges, there was broad agreement after a number of years that the initial rates set forth in the Articles had become inappropriate when tested by most defensible criteria. The rates were modified under the power to vary them, but the practice of the Fund was to adopt rates for limited periods and to examine them before each period ran its course so that the Fund could decide whether to renew them for a further limited period or change them.

There continued to be differences of opinion on what the policies should be for determining charges, and this absence of consensus was worrying because a majority of 75 per cent of the total voting power was necessary for a decision to renew existing rates or change them. It followed that members with a shade more than 25 per cent of the total voting power could prevent the adoption of a decision to renew the latest rates or change them to more appropriate levels, whereupon, because the earlier exercise of the power to vary the rates had not had the effect of amending the Articles, the thoroughly inappropriate initial rates as set forth in the Articles would revive. This phenomenon could occur whatever the passage of time might be since the Articles had taken effect. Clearly, this would not be a tolerable consequence of the exercise of the power to vary the rates. The solution was a decision adopting rates *sine die* but subject to regular review. If the opinion developed in a review that the rates should be changed, a majority of 75 per cent of the total voting would still be necessary for a decision to change them. If, however, a decision were opposed by a minority in excess of 25 per cent of the total voting power, the initial rates in the Articles would not revive. The decision adopting rates *sine die* would

continue to be effective. The rates in this decision would be more likely to be realistic than the initial rates, although there could be no certainty of this in circumstances in which there was substantial support for a change in the current rates.

The problem that a minority of the total voting power might revive the application of the original content of a provision subject to variation was avoided in the drafting of the provision with respect to reconstitution. The rules for reconstitution are to be reviewed before the end of each basic period, and if a majority of 85 per cent of the total voting power cannot be obtained for a change, the rules in force at the time of the review continue to apply. These rules might be less desirable than the new rules that a majority of the total voting power would wish to adopt, but with the passage of time the rules in force might be more appropriate than the initial rules.

Differences between amendment and variation.

If the drafters of a charter, or the amendment of a charter, are disposed to adopt the technique of amendment or variation as discussed in this article, the following differences between the two techniques might affect the choice between them.

i) It may be easier to attain the majority required for the exercise of a power to vary a provision than to satisfy the requirements for amendment by an organ of the institution. It is not possible to make a comparison on the basis of the Fund's charter because it contains no authority for any organ to amend the charter. There are certain provisions, however, that can be varied by decisions taken by no more than a majority of the votes cast. Moreover, a number of provisions can be varied by decisions of the Executive Directors, and therefore with less dramatic effect than procedures requiring action by the Board of Governors.

The charter of other organizations include both techniques, and it is possible to see that the drafters did not take the same view of all the provisions to which they attached a power to vary. The charter of the IADB provides for amendment by a decision of the Board of Governors taken by a two-thirds majority of the total number of governors, representing not less than three-fourths of the total voting power of member countries [80]. The same requirement is prescribed for an increase in the authorized capital stock of the organization [81], but the special commission of one per cent payable on loans, participations, or guarantees made out of or by commitment of the ordinary capital resources of the Bank may be reduced by the Executive Directors by a two-thirds majority

[80] Art. XII(a) (IADB).

[81] Art. II, Sect. 2(e) (IADB).

of the total voting power [82]. The charter of the IFC may be amended by a decision of the Board of Governors taken by three-fifths of the governors, exercising four-fifths of the total voting power [83], but the amount of authorized capital stock may be increased by the Board of Governors by a majority of the votes cast in some circumstances and by a three-fourths majority of the total voting power in other circumstances [84].

ii) The amendment of a provision results in the substitution of a modified text for the one in the charter, and the substituted text continues to be effective unless it is supplanted by a further amendment. If there is a power to vary a provision, variation does not substitute a new text in the charter for the original text. It would be possible, therefore, for the original text to become operative again if a decision were taken to vary the provision for a limited period and the period expired without a further decision because the necessary special majority could not be assembled. It is possible, however, to take precautions, either in the drafting of the provision that may be varied or in the way in which the power to vary is exercised, to ensure that the latest variation will continue to apply, and that the provision as it appears in the charter will not become applicable if a new decision cannot be taken.

iii) The legislation of the United States providing for the participation of that country in international organizations that have a power to amend their own charter has declared that no person or agency shall vote for an amendment, or for certain amendments, unless Congress authorizes that action. There has been no similar limitation on voting for a decision to exercise the power to vary a provision. No limitation has been suggested even though the exercise of the power may increase the obligations of members. The reason may be that the power to vary is circumscribed because it is always exercisable in relation to specific provisions. Legislators are then aware of the nature of the obligations that may be varied, and are content to see them varied, whereas general authority to amend the provisions of a charter gives no comparable assurance.

III. SOME CONCLUDING COMMENTS

The two techniques discussed in this article are evidence in themselves of the need for flexible procedures of adaptation that do not involve the acceptance of amendments by members. In many international organizations there are now well over a hundred members, and the requirement of acceptance by a high proportion of them can result in considerable delay before proposed amendments become effective. One reason for the delay may be difficulties of one kind or

[82] Art. III, Sect. 12 (IADB).

[83] Art. VII(a) (IFC).

[84] Art. II, Sect. 2(c) (IFC).

another in getting the necessary parliamentary authority for acceptance of an amendment. For this and other reasons, the two techniques may appeal to the Executive in member countries, but they may be viewed with reserve by the Legislature. An increased tendency to use the technique of amendment by an organ might result in a greater disposition to employ provisions of the kind that have been incorporated in U.S. legislation under which congressional authority is required before the appointees to the amending organ can vote for a proposed amendment. There has been no evidence so far of a movement to insist on this procedure in voting for the exercise of the power to vary, but this power is always confined to specifie provisions and in any event its use has not been widespread.

Another difference between the two techniques is that the power of amendment by an organ may be exercised so frequently that respect for the charter as a constituent document is undermined. Some charters, however, are undoubtedly in need of more frequent adaptation than others. If there is a true need for the frequent adaptation of a charter, there is less danger that it will be undermined by numerous amendments. International organizations with a circumscribed technical task are more likely to need constant adaptation, and there has been a greater willingness to equip them with the power to amend their own charters. If, however, the negotiators of a charter feel that it will affect vital national interests, whether they be political, economic, or financial, they are more wary about granting this power. Perhaps they will be more willing in the future to give the organization broader powers of variation.