
IMF Surveillance as a Non-Compliance Mechanism

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*The Fund shall oversee . . . the compliance of each member with its obligations*¹

10.1 Introduction

This chapter evaluates the emergence and development of “surveillance” as the preferred non-compliance mechanism within the IMF architecture. This study highlights the specific role of international law within the field of international monetary relations, as well as illustrating how international monetary relations provide international law with original new tools and concepts.

John M. Keynes famously stated with respect to the creation of an international institution in charge of handling the international monetary system – what became the International Monetary Fund – that “(t)he most difficult question to determine is how much to decide by rule, and how much to leave to discretion”.² For lawyers, this often-quoted sentence evokes the systemic need to combine rules of conduct, aiming at ordering States’ behaviors, with adequate legal structures, aiming at ordering these rules of conduct and guaranteeing their efficiency, such as mechanisms of adjudication.³ This chapter starts from this premise

¹ Article IV, section 3(a), IMF Articles of Agreement, available at www.imf.org/external/pubs/ft/aa/index.htm.

² JM Keynes, “The Keynes Plan: Proposals for an International Currency (or Clearing) Union (Version dated 11 February 1942) (1945–1965)” in *IMF History Volume 3: Twenty Years of International Monetary Cooperation Volume III: Documents* (International Monetary Fund 1969) 552. Keynes was one of the most prominent negotiators of the Bretton Woods architecture, redesigning the rules of the game in international monetary relations, and providing the world with the IMF, the international organization in charge of managing these rules of the game in a multilateral fashion.

³ HLA Hart, *The Concept of Law* (Clarendon Press 1961) 93–120. According to Hart, “primary rules” are directed at behaviors, for instance determining that a given behaviour is allowed or forbidden, and “secondary rule,” or to put it simply “rules about rules,”

that there is a specific and systemic need to efficiently link “command” to “compliance” in the field of global monetary governance. This is of a particular and concrete relevance as it is often held that the defining features of international monetary law are that it is soft by nature, that its institutional framework is loose by design, and its dispute settlement system mainly informal and political.⁴ The chapter will therefore investigate the types of non-compliance options available in international monetary law which aim at the constitution of the international monetary system.

Surveillance is an original mechanism designed to ensure the conformity of countries’ behavior to the obligations set under the IMF legal regime, concerning exchange rates policies, broadly speaking.⁵ Through surveillance, the IMF monitors the international monetary system, world economic health, and also the economic policies of its member countries (to the extent that they influence international monetary conditions). IMF surveillance enables the international monetary system to achieve its purposes of sustaining monetary and financial stability, as well as promoting sound economic growth by facilitating the exchange of goods, services, and capital among countries, including by monitoring compliance with exchange rate obligations.⁶ This is achieved at two complementary levels: “bilateral surveillance,” bringing together, on a regular basis, the IMF and a given country; and “multilateral surveillance,” which provides an annual analysis of the international monetary system and global economic forecasts to the international community.⁷ The Fund also advises countries about the necessary policy adjustments to be made to prevent potential crises.

A paradox lies nonetheless in Article IV of the IMF Articles of Agreement which enables surveillance: “The Fund shall oversee . . . the compliance of each member with its obligations.” On one hand, obligations undertaken by States under the IMF Articles of Agreement should be obeyed, as they are conventional obligations.⁸ Reference to

enable the good functioning of the system, by allowing it to create, adapt, or enforce rules of conduct.

⁴ BA Simmons, “The Legalization of International Monetary Affairs” (2000) 54 *International Organization* 573–602 at 819–35.

⁵ Article IV, IMF Articles of Agreement.

⁶ Article I, IMF Articles of Agreement.

⁷ IMF Website, Factsheet, available at www.imf.org/en/About/Factsheets/IMF-Surveillance.

⁸ Article 26, Vienna Convention on the Law of Treaties: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

“compliance” in Article IV should therefore come as no surprise. On the other hand, the IMF must only “oversee” such “compliance” and it is usually assumed that this is the reason why the track record with respect to the non-compliance of States with their IMF legal obligations is said to be unsatisfactory.⁹ And each past financial crisis has prompted heated debate among both the public and policy experts about how the international monetary system could strengthen existing mechanisms to monitor and forecast global economic and monetary developments and enforce States’ obligations in this respect.¹⁰ That surveillance is the preferred compliance mechanism in the international monetary system emphasizes the lack of actual jurisdictional venue in international monetary relations.

This chapter engages with the hypothesis that the more broadly a legal interest is shared among States, the less desirable it is that a compliance procedure should bring about a particular result; more relevant is some ownership of the process.¹¹ Global monetary and economic stability is, by definition, a broad objective. At the same time as constituting a direct interest for every State, it also constitutes a community interest.¹² This contribution addresses both the extent to which the surveillance mechanism set up by the IMF ensures the compliance of its members with its code of conduct and the extent to which the hypothesis above is verified in the monetary field. The success of IMF surveillance can be explained according to this hypothesis, because the IMF’s surveillance involves broad flexibility in a way international adjudication does not. That IMF surveillance by essence is in the realm of flexibility does not mean, however, that the process is without rules. The fact that surveillance is meant to allow discretion for States and the IMF to achieve relevant objectives does not mean that it is a process that is unlegalized, more political or floats in a vacuum. It has developed procedural rules of its own. We will focus hereafter on its procedural characteristics. The fact that the IMF process is sustained universally and with regularity, that it is

⁹ IEO IMF Performance in the Run-Up to the Financial and Economic Crises: IMF Surveillance in 2004–2007, 2011, available at <https://ieo.imf.org/en/our-work/Evaluations/Completed/2011-0209-imf-performance-in-the-run-up-to-the-financial>.

¹⁰ K Shigehara and PE Atkinson, Surveillance by International Institutions: Lessons from the Global Financial and Economic Crisis (June 7, 2011). OECD Working Paper No 860.

¹¹ Background Paper, Conference on Compliance Mechanisms, PluriCourts, available at www.jus.uio.no/pluricourts/english/news-and-events/news/2021/290421-cfp-courts-versus-compliance-mechanisms.html.

¹² See, generally E Benvenisti, G Nolte, and K Yalin-Mor, *Community Interests across International Law* (Oxford University Press 2018).

often exposed to the changes in the economic landscape, and that it is regularly reviewed, means that it is in a constant process of refining these procedural rules.

Nonetheless, “surveillance” remains a strange word in the realm of legal notions. It sounds familiar to the lawyer’s ears as it conveys a sense of discipline. However, it also sounds odd as it does not clearly express how it differs from functions, such as adjudication by international courts or political decision-making processes used to settle a disagreement. As a *sui generis* concept under IMF law, it was never explicitly defined, and evolved constantly. Interestingly, the word is also used in the World Trade Organization (WTO) or Organisation for Economic Co-operation (OECD) legal regimes.¹³ IMF surveillance has never been the object of major doctrinal interest, as is the case also for international monetary law generally.¹⁴

The success of IMF surveillance will be examined in three ways. Firstly, it will be shown that surveillance appears to be the most successful mechanism to enforce international monetary obligations thanks to its broad flexibility and original mechanism. The nature and scope of surveillance, as well as the factors explaining its success, will be assessed. IMF surveillance contrasts positively with alternatives. International courts outside the IMF or political dispute settlement systems inside the IMF indeed offer limited options to settle States’ disagreements with respect to their monetary obligations under the IMF Articles of Agreement. Finally, the chapter will underline how the legal dynamics of surveillance have provided States and the IMF with a dynamic and complete set of procedural rules addressing the process of surveillance as a transparent, rule-of-law inspired, and sophisticated procedure.

10.2 The Success of Surveillance as the Primary Compliance Mechanism in International Monetary Law

Explaining the relative success of IMF surveillance as the main non-compliance mechanism in global monetary governance¹⁵ requires

¹³ For a comparison, see M Kende, “Monetary Affairs in the WTO Trade Policy Review” in C Tietje, RM Lastra, and T Cottier (eds), *The Rule of Law in Monetary Affairs: World Trade Forum* (Cambridge University Press 2014) 384–408.

¹⁴ M Waibel, “Two Decades Lost: Reinvigorating the Weak Cousin of WTO Law” (2011) 3 *Selected Papers from ESIL Proceedings* 353–63; M Waibel, *Financial Crises and International Law: The Legal Implications of Global Financial Crises* (Brill Nijhoff 2020).

¹⁵ Global monetary governance refers to the governance of the operations of the international monetary system, such as exchange rates, exchange restrictions, and global

analyzing its essential features and how they constitute assets for the task of assessing international obligations regarding global monetary governance.

10.2.1 *Nature of IMF Surveillance*

10.2.1.1 Legal Basis of IMF Surveillance

Today, the legal basis for IMF surveillance is primarily rooted in Article IV, section 3(a) and (b) of the IMF Articles of Agreement and complemented by three Executive Board Decisions from 1977,¹⁶ 2007,¹⁷ and 2012.¹⁸ It also draws inspiration from the 2015 Guidance Note for Surveillance under Article IV and its 2021 Supplement. With respect to its function, surveillance requires members to provide relevant and accurate information about the conduct of their policies, not only on the basis of Article IV, section 3(b), which directly addresses surveillance, but also of Article VIII, section 5. Surveillance at a basic level has three faces: bilateral surveillance – which is led on the basis of Article IV consultations; multilateral surveillance, published twice a year in two reports: the “World Economic Outlook Report” and the “Global Financial Stability Report”; and regional surveillance, when the IMF considers, for instance, the EU or the Euro area.

Surveillance’s legal basis is also derived from the purposes of the IMF objectives as stated in Article I of the Articles of Agreement, and from a broader obligation to cooperate.¹⁹ The objectives of the IMF are expressly stated in Article I of the Articles of Agreement, in terms almost unchanged since its adoption. The first of its objectives stated in Article I is “to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems”.²⁰ Surveillance must be interpreted as contributing to fulfilling this objective. Historically, it was after the collapse of the Bretton Woods system of fixed (and adjustable)

liquidity (under the form of central banks’ reserves or external assistance, typically from the IMF). In that respect, it is closed to, but must not be confused with global financial governance.

¹⁶ IMF Executive Board Decision No 5392-(72/63), Surveillance over Exchange Rates Policies, April 29, 1977.

¹⁷ IMF Executive Board Decision No 1319-(07/51), June 15, 2007.

¹⁸ IMF Executive Board Decision No 15203-(12/72), July 18, 2012.

¹⁹ Article X, IMF Articles of Agreement.

²⁰ Article I(i), IMF Articles of Agreement.

exchange rates in 1971 that the surveillance function was incorporated into the Articles of Agreement through the Second Amendment.

As previously stated, the IMF enjoys a range of options to “remind” its members of their obligations as stated in its Articles of Agreement and made precise in various Executive Board Decisions.²¹ Furthermore, it is expected that the nature of the IMF as an international organization informs us about the contours of this duty. In this perspective, it must be highlighted that the IMF Articles of Agreement truly constitute the world monetary constitution and, as such, create obligations of a more far-reaching kind than any other conventional monetary regime. They provide a “code of conduct” (the articles of the IMF Articles of Agreement, which refer to members’ obligations to follow a given policy) concerned with exchange rates, international transfers, and liquidity assistance to its members.

In addition, IMF members also are under a general obligation to collaborate with the Fund to manage a stable system of exchange rates and exchange arrangements.²² This duty is extended through a specific duty to consult with the Fund when requested and to provide relevant information. Against this backdrop, it is noteworthy that these obligations of collaboration, consultation, and then provision of information apply to all three core IMF functions: financial assistance,²³ technical assistance,²⁴ and surveillance²⁵ – surveillance being the monitoring of the members’ compliance with their obligations under the IMF Articles of Agreement. The IMF’s general functioning is thus inspired by these various duties to transparently collaborate, consult, and provide information.

10.2.1.2 Scope of Surveillance

Article IV not only sets out procedural rules as to the conduct of surveillance but also covers substantial obligations concerning exchange rate arrangements and the policies of IMF members. It is complemented by and must be read in conjunction with a set of Executive Board

²¹ Additionally, under general international law, international organizations have, under certain circumstances, a duty to institute a legal framework to “remind” members of their obligations. *Reparation for Injuries Suffered in the Services of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, at 178–79.

²² Article IV, section 1, IMF Articles of Agreement.

²³ Article V, section 3, IMF Articles of Agreement.

²⁴ Article V, section 2(b), IMF Articles of Agreement.

²⁵ Article IV, IMF Articles of Agreement.

Decisions establishing principles that guide members.²⁶ Yet the exact material scope of surveillance requires a careful and dynamic analysis. Article IV's history is illuminating in this respect. Whereas it was initially dedicated to the management of a system of fixed exchange rates, the demise of this system in the 1970s led to a more diffuse set of rules of conduct, allowing all types of exchange rate arrangements, including floating arrangements. Therefore, the *ratione materiae* jurisdiction of the field of surveillance must now be understood in a more dynamic way. There is an expectation that members will pursue policies favoring a "stable system of exchange rates" and "avoid manipulating exchange rates".²⁷ The material scope of surveillance relates not only to exchange rates, but also to other domestic or external economic and monetary policy "to the extent that they significantly influence present or prospective external stability".²⁸

Obligations related to exchange rates are expressed in stronger language than those related to other fields of domestic or external policy, reflecting the dominant post-war consensus over the importance at that time of fostering effective collaboration in the field of exchange rates, while preserving the domestic policy space of members of an unprecedented international organization.²⁹ However, IMF surveillance focussed in the past on a wide range of sectors. For instance, it delivered prescriptions over members' financial sector policies despite the lack of a formal mandate relating to the international financial system.³⁰ Surveillance was also used to assess the capital flow policy of its members, despite the right of members embodied in the IMF Articles of Agreement to regulate this field according to their preference and without IMF involvement.³¹ More surprisingly, as it does not seem to be directly linked to IMF goals, surveillance also addressed non-economic policies such as

²⁶ IMF Executive Board Decision No 15203-(12/72), July 18, 2012; Decision No 15203-(12/72), July 18, 2012.

²⁷ Article IV, IMF Articles of Agreement.

²⁸ §5, IMF Executive Board Decision No 1319-(07/51), June 15, 2007.

²⁹ N Rendak, "Monitoring and Surveillance of the International Monetary System: What Can Be Learnt from the Trade Field?" in C Tietje, RM Lastra and T Cottier (eds), *The Rule of Law in Monetary Affairs: World Trade Forum* (Cambridge University Press 2014) 204–31.

³⁰ A Feibelman, "Law in the Global Order: The IMF and Financial Regulation" (2017) 49 *New York University Journal of International Law and Politics* 687–745.

³¹ M Broos and S Grund, "The IMF's Jurisdiction Over the Capital Account – Reviewing the Role of Surveillance in Managing Cross-Border Capital Flows" (2018) 21 *Journal of International Economic Law* 489–507.

environmental, labor, military, or institutional policies to the extent that they influence external stability.

The IMF considers obligations related to exchange rates to constitute obligations of result as opposed to the obligations of conduct, that prevails with respect to domestic or external policy. This dichotomy should not be interpreted as distinguishing between optional and mandatory obligations, or between political and fully legalized norms. Indeed, the asymmetry rather lies in the distinction between the obligation to *attempt* to achieve a given result, and the obligation to *achieve* the desired outcome. In the first case, it goes without saying that a breach of obligation can be found. At the same time, contrary to what is usually assumed, nothing stands in the way of finding a breach of an obligation of conduct. However, the breach will not be directly concerned with the unachieved goal, but with a failure in the means employed by the member State. The fact that the nature of members' obligations varies according to the material domain of the policy at stake constitutes a challenge for efficient IMF leadership.

10.2.1.3 Procedural Stages

Article IV consultations typically start with the annual IMF mission visit to each member State. They aim to gather relevant data for the purpose of updating analyses of members' current economic situation. They can include meetings with State officials, but also more surprisingly "other stakeholders such as parliamentarians, and representatives of business, labor unions and civil society".³² This is followed by an "assessment" by the mission of the member's economic situation. The mission then engages in a further round of discussions to address the actual or prospective efficiency of the implemented policies. The mission closes its intervention by sending a report containing its preliminary findings, and then a final report to the Executive Board. The Executive Board discusses the findings of the final report sent by the mission and agrees with the State on specific conclusions. The Chairman of the Board provides then a Summing Up of the discussion which is formally addressed to the member's authority. This terminates the consultation phase. After consultations close, the IMF offers to publish the report. This only occurs if the State consents to it. Interestingly, whereas States' consent is typically verified at the jurisdictional phase in front of

³² IMF FSAP Factsheet, available at www.imf.org/en/Publications/fssa/mandatory-financial-stability-assessments-under-the-fsap.

international courts, surveillance as a process is mandatory for both the IMF and States. Consent is expressed at the end of the process and relates only to publication of the result.

10.2.2 *Factors Explaining IMF Surveillance Process: Scope, Normativity, and Authority*

The dominant narrative identifies “surveillance” as one of the core functions of the IMF in the international monetary system, possessing characteristics that can be contrasted with formal dispute settlement mechanisms.³³ Its contours are blurred and its influence mainly political. As such, it is said to be fitted for the needs of international monetary governance. As a result, surveillance has mainly been analyzed so far through an economics lens, stressing the importance of transparency, peer pressure, or the relevant sectors to be monitored as factors explaining its relative success as an enforcement mechanism.³⁴ Legal considerations have been underemphasized so that its precise legal contours remain in the shadow of institutional practice. What are the legal features that explain the use of surveillance as a preferred method to achieve members’ compliance with their obligations under IMF law?

Surveillance appears to be a practical procedure to monitor the global economy from a holistic perspective. This all-encompassing approach is increasingly needed in today’s economy, in which international monetary and economic spillovers play a significant role. The initial Bretton Woods institutional set-up indeed conceived of global economic governance as best organized through a three-pronged scheme, dividing monetary, trade-related, and development-related issues, and allocating their management to three corresponding universal international organizations. Nonetheless, today’s globalized economy differs greatly from the post-war era and the legal framework must mirror these paradigmatic shifts, including the substantial inter-linkages between the monetary, trade, and development fields. Global economic governance also increasingly requires not only a public international law understanding, but also awareness of key international economic issues and international political dynamics. Surveillance has been able to adapt to these key economic

³³ H Gherari, “La surveillance” in P Daillier, G de La Pradelle, and H Gherari (eds), *Le droit des relations économiques internationales* (A Pedone 2004) 857–59.

³⁴ M Breen and E Doak, “The IMF as a Global Monitor: Surveillance, Information, and Financial Markets” (2021) 30(1) *Review of International Political Economy* 1–25.

changes thanks to an evolution of its *ratione materiae* jurisdiction. IMF surveillance's *ratione materiae* jurisdiction is built around a dynamic principle: "Other policies will be examined in the context of surveillance only to the extent that they significantly influence present or prospective external stability."³⁵ Though this has been possible only at the cost of an asymmetry in terms of bindingness as between exchange rate-related obligations and obligations related to "other policies", this evolution was key to maintaining the IMF's relevance in global economic governance.

Whereas financial and technical assistance offered by the IMF are voluntary in nature, surveillance is mandatory and universal. As previously explained, the IMF is legally obliged to conduct surveillance proceedings and the member is legally obliged to participate and to conduct itself in certain ways during the proceedings. Nonetheless, surveillance does not aim at producing mandatory decisions of the nature an international court would. It also does not necessitate the existence of a "dispute". The political cost of engaging in a review of a member's obligation is therefore significantly lower than in an international court's typical proceedings. Regularity of the process also contributes to assuring a review of obligations, without triggering the political or economic costs a "dispute" would.

Though non-binding, IMF surveillance nevertheless offers an authoritative assessment of a member's compliance. The IMF cannot oblige members to implement assessments resulting from surveillance procedures. It can only persuade them. Persuasion can be direct and result from the intrinsic quality of the IMF assessment. A report's authority can also flow less directly from the reputational effects it creates, triggering peer-pressure mechanisms or market pressure. Markets or peers are given access to the IMF reports and will immediately reflect the IMF analysis in their own economic analysis. Non-compliance with IMF reports will lead to higher borrowing prices, lower foreign direct investment, and, generally speaking, lower trust in the country's word and ability to successfully manage its economy. In a nutshell, the procedure does not encompass rules obliging members to comply with the IMF assessment. This does not, however, mean that it does not possess any effective authority. Reputational effects fulfill a non-compliance sanction role.

The IMF surveillance procedure navigates between an initial confidential stage, and then a process of making the result of the procedure

³⁵ §5, IMF Executive Board Decision No 1319-(07/51), June 15, 2007.

transparent. During the consultations, the procedure requires confidentiality and informality. It allows for more space to build trust between the stakeholders. Importantly, it avoids sending adverse signals to markets, which could trigger by anticipation precisely the effects that the process aims at preventing. Some information might also be confidential. The publication of the IMF view is then critical to obtain the peer pressure and market signal effects on which compliance is based. While consent remains the rule, publication might also be decided upon under certain specific circumstances which require immediate action.³⁶ The balance between other members' interest in a stable international monetary environment and a member's right to confidentiality in the management of its balance-of-payments depends upon the circumstances and the adverse effects that publication might cause. And the determination of such circumstances will be made according to a political process ending with a voting procedure.

10.3 Weaknesses of Non-Compliance Alternatives to IMF Surveillance

We now turn to the existing alternatives to the IMF in order to contrast their respective features. We will focus on both internal and external alternatives.

Firstly, international courts have not played a significant role in global monetary governance. Matters relating to compliance with IMF obligations have not been brought to general international courts, or even international arbitration proceedings, in which specialists on monetary issues could have been appointed. This does not appear to be a matter of the skills of the judicial bodies with respect to specialized issues. The existence of an all-encompassing and conventionalized sub-regime explains the situation more satisfactorily. Secondly, within the IMF, options implying a withdrawal, a loss of rights by IMF members, an

³⁶ Article XII, section 8, IMF Articles of Agreement: "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. The relevant member 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."

interpretation of the Articles of Agreement, or an amendment have appeared too political.

10.3.1 *The Limited Recourse to International Courts in Global Monetary Governance*

The International Court of Justice (ICJ) (or its predecessor, the PCIJ) has, in the past, seized the opportunity to clarify significant general international monetary law issues, such as the customary international law principle of monetary sovereignty.³⁷ The Court has also shown its ability to deal with monetary issues in a case involving a discriminatory system of license control in respect of imports not involving an official allocation of currency.³⁸ However, the fact is that the ICJ has not played a regular role in solving disputes between States in relation to international monetary relations. It is generally assumed that the ICJ, as a non-specialized court, is not the most appropriate venue to deal with international economic law issues and that such issues should be scrutinized by specialized arbitral bodies like arbitral investment tribunals or the Dispute Settlement Body of the WTO. Yet, after a closer look, it appears that the explanation is not to be found in the often-alleged distinction between specialized and non-specialized issues, and the resulting ability of the respective judicial body to handle the issue at stake.³⁹

A more explanatory distinction is the one between topics extensively covered by international conventions on one side, and residual, general, and systemic issues on the other side. Monetary rules are generally embodied in complex treaties, sometimes forming entire sub-regimes, and having their own dispute settlement systems, be it political, institutional, or to a certain extent judicial. Recourse has mainly been had to the ICJ to clarify architectural issues of international law external to or underpinning these treaties and regimes, but not specialized and conventionalized matters. The recent involvement of the ICJ in matters

³⁷ "It is indeed a generally accepted principle that a state is entitled to regulate its own currency." *Case Concerning the Payment of Various Serbian Loans Issued in France (France v Serbia)*, Judgment of 12 July 1929, PCIJ Report Series A Nos 20–21, 44; Charles Proctor, *Mann on the Legal Aspect of Money* (7th ed., Oxford University Press 2012) 526.

³⁸ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)*, ICJ Report 1952, 176–233.

³⁹ K Wellens, *Economic Conflicts and Disputes before the World Court (1922–1995): A Functional Analysis* (Kluwer Law International 1996) 252.

pertaining to monetary flows is only incidental and is a by-product of the embargo put in place by the United States against Iran in a broader geopolitical context.⁴⁰

Neither has the IMF had recourse to ICJ Advisory Opinions. The IMF Articles of Agreement entered into force on December 27, 1945, two months after the UN Charter, and the IMF and the UN entered into a relationship agreement on November 15, 1947. From this perspective, it will be of no surprise that the “Agreement between the United Nations and the International Monetary Fund” offers the IMF the possibility to “request advisory opinions of the International Court of Justice on any legal question arising within the scope of the Fund’s activities”. It was expected that this option could prove useful where general international law became relevant in the activities of the IMF, such as State succession. In practice, the IMF has never seized the opportunity to request an Advisory Opinion from the ICJ and has handled matters of general international law independently.⁴¹ Two points could be deduced. Firstly, the lack of expertise of the IMF in general international law has not prompted the need to resort to general international courts. Secondly, the fact that ICJ Advisory Opinions avoid the confrontational aspect of judgments has not led the IMF to resort to such opinions.

In the search for a dispute settlement alternative fitted for international monetary issues, it appears that the WTO dispute settlement panels or specialized arbitral tribunals could play such a role, as they incorporate technical expertise that the ICJ allegedly lacks in the field of economic law. In practice, the WTO and international investment tribunals have determined a certain number of disputes with a monetary component so far.⁴² This apparent success comes at a cost. Monetary issues are only litigated insofar as they pose trade or investment-related issues.⁴³ As with the ICJ,

⁴⁰ *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, 2023, Judgment, International Court of Justice.

⁴¹ The IMF admitted Kosovo before the ICJ issued its legal opinion on its independence (members required only to be a “country”), available at www.imf.org/en/News/Articles/2015/09/14/01/49/pr09240, last accessed 21 August 2023; A Viterbo, *International Monetary Fund* (Kluwer Law International 2015) §23.

⁴² See generally DE Siegel, “Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements” (2002) 96 *American Journal of International Law* 561–99; CJ Tams, SW Schill, and R Hofmann, *International Investment Law and the Global Financial Architecture* (Edward Elgar Publishing 2017).

⁴³ For instance, a case involving quantitative restrictions imposed by India involved questions about the exact role the IMF should play in the assessment of the balance of payments issues that caused the measure. See Panel Report, “India – Quantitative

these specialized bodies have proven capable of addressing global monetary issues, albeit from a generalist economic legal perspective rather than a specialist monetary and financial perspective. However, once again, it is not the alleged lack of capability that explains non-recourse to international investment tribunals or the WTO dispute settlement system, but more particularly the fact that monetary issues are specific and submitted to a comprehensive conventional regime.

10.3.2 *The Limitations of Recourses to IMF Dispute Settlement Options other than Surveillance*

The IMF possesses a range of compliance mechanisms, though many of these are political in nature and seldom explicitly identified as compliance mechanisms. Disputes as to monetary issues can firstly be solved via a political or institutional change; and where a solution is difficult to reach, there are sanctions available, such as the forced withdrawal of a State from the IMF, or the suspension of a member's benefits. Although these options are not meant to be used on a regular basis⁴⁴ to solve members' disagreements, they offer ultimate institutional and political mechanisms to settle a dispute between members. As will be discussed, IMF members have alternatively been known to amend the IMF's constitutional charter itself, the IMF Articles of Agreement, in order to settle a dispute. There is also available a sophisticated authoritative interpretation mechanism, though this is in practice no longer used. The IMF has mainly resorted to non-authoritative interpretation.

10.3.2.1 Options Involving Forced Withdrawal or Suspension of Rights

The IMF Articles of Agreement provide for a procedure to force a member to withdraw as per Article XXVI, section 2(c). The only case to date is that of Czechoslovakia in 1954.⁴⁵ It is also noteworthy that Article XXIX of the IMF Articles of Agreement provides for the

Restrictions on Imports of Agricultural, Textile and Industrial Products”, WT/DS90/R, signed April 6, 1999, adopted September 22, 1999, as modified by Appellate Body Report, WT/DS90/AB/R, AB-1999-3. The consequences of the “pesification” (a change of exchange rate arrangement) of the economy in Argentina have notably given rise to many ICSID cases. None of these cases have however addressed pesification from a holistic monetary perspective.

⁴⁴ Amendments entered into force in 1969, 1978, 1992, 2009, 2011, and 2016.

⁴⁵ IMF Annual Report, 1954.

constitution of an “Arbitral Tribunal” to assist with the settlement of potential disputes arising from the withdrawal of a member. It goes without saying that this mechanism is only designed as a last-resort option.

A softer version of this approach consists of suspending a member’s financial⁴⁶ or political⁴⁷ rights. These approaches are not, however, perfectly fitted for the compliance task as non-compliant States are precisely those requiring financial and political rights to address financial needs or to build political legitimacy in the context of complex reforms. Depriving members of the resources designed for them when they need them the most might not always be the best dispute settlement or compliance option.

10.3.2.2 Options Involving an Amendment of the Articles of Agreement of the IMF

The IMF Articles of Agreement also provide for an Amendment procedure embodied in Article XXVIII. The Second Amendment of 1978⁴⁸ testifies in a spectacular way that the inability of a member like the United States to comply with core IMF obligations concerning exchange rates can be settled through this means, providing a workaround so that US policy is not qualified as a breach of IMF obligations. The United States announced on August 15, 1971, that it would suspend the convertibility of the dollar into gold.⁴⁹ The collapse of the par-value system that resulted was only legalized thereafter by the Second Amendment.

Amendments have also from time to time contributed to strengthening rules aimed at creating discipline in the international monetary system. The First Amendment (1969)⁵⁰ improved the rules relating to an authoritative procedure for interpretation by the

⁴⁶ As was the case with Zimbabwe in 2001.

⁴⁷ For instance, Liberia’s voting rights were suspended in 2003.

⁴⁸ The Articles of Agreement were amended for the second time, effective April 1, 1978, by the modifications approved by the Board of Governors in Resolution No 31–4, adopted April 30, 1976.

⁴⁹ J.L. Butkiewicz and S. Ohlmacher, “Ending Bretton Woods: Evidence from the Nixon Tapes” (2021) 74 *The Economic History Review* 922–45; Address to the Nation by Richard Nixon Outlining a New Economic Policy: “The Challenge of Peace. August 15, 1971” (1971).

⁵⁰ The Articles of Agreement were amended for the first time, effective July 28, 1969, by the modifications approved by the Board of Governors in Resolution No 23–5, adopted May 31, 1968.

introduction of a Committee for Interpretation. The Third Amendment (1992)⁵¹ introduced stricter rules for the suspension of voting rights of members who failed to repay the IMF. However, the amendment procedure requires a very constraining process and is therefore not fitted to settle most disagreements between States. Indeed, and it is quite unique in the world of international organizations, the procedure requires a majority of at least three-fifths of the members holding 85 per cent of IMF voting rights.⁵² Compared with such radical and constraining dispute settlement options, “interpretation” offers a much more nuanced approach.

10.3.2.3 Options Involving Interpretation of the Articles of Agreement of the IMF

The IMF is the first international organization to be vested with the jurisdictional power to interpret its constitutive act, to formally “hear” and discuss complaints of its members through this means. Article XXIX (a) of the IMF Articles of Agreement provides that “any question of interpretation of the provisions of this Agreement between any member and the Fund or between members of the Fund shall be submitted to the Executive Board for its decision”. This mechanism additionally sets out an appeal to the Board of Governors, which is assisted by a Committee on Interpretation of the Board of Governors. Whereas the first phase of the procedure employs the usual weighted voting procedure, the second phase of the procedure, the appeal, is conducted following its own voting system, according to which each member has one equal vote.⁵³ Article XXIX(b) of the IMF Articles of Agreement refers to the Decision of the Board of Governors as being “final” with respect to questions of interpretation. The mechanism under Article XXIX has been used ten times with only one appeal. The most recent use of the procedure ended in 1959.⁵⁴

Interpretation could therefore have constituted a preferred, if unorthodox, means of dispute settlement within the IMF framework. It has indeed the advantage of bringing a potential solution to a situation

⁵¹ The Articles of Agreement were amended a third time, effective November 11, 1992, by the modifications approved by the Board of Governors in Resolution No 45-3, adopted June 28, 1990.

⁵² Article XII. 5, section 1, IMF Articles of Agreement.

⁵³ Article XII. 5, section 1, IMF Articles of Agreement.

⁵⁴ A Viterbo, *International Monetary Fund* (Kluwer Law International 2015) §57.

without directly highlighting a member's misconduct. This mechanism significantly evolved over time. Formal interpretations were useful in the first years of the life of the IMF, to clarify elements of such a new legal regime in a world not yet accustomed to international organizations of this kind. However, whereas in the first years of the IMF its formal interpretation mechanism was used on a regular basis, it has since disappeared to the benefit of regular interpretations made outside the formal IMF framework. Informal interpretations are adopted, leaving open the possibility of authoritative interpretation for settling any future or ongoing difficulty with respect to a previous interpretation. Both regular and authoritative interpretations are binding as they reflect the decision-making process of the Fund and members are obliged to comply by virtue of the obligation to collaborate with the Fund. But regular interpretations are not final because the possibility of a subsequent authoritative interpretation remains open. This two-tiered approach caters to IMF reluctance to issue formal interpretations that would inevitably tie its hands for the future and considerably reduce its space for discretionary measures.

10.4 The Dynamics of Procedural Rules Related to the Process of Surveillance

“Surveillance” has evolved over time, under the pressure of crises and internal reviews, or in order to adapt to joint surveillance exercises with other international institutions. One defining theoretical issue is the extent to which the IMF can draw from general principles used by international courts to develop its framework while preserving the unique and defining features that constitute IMF surveillance.

10.4.1 *Dynamics of Procedural Rules: Crises, Internal Reviews, and “Joint Surveillance” with Other Institutions*

Surveillance has become the main IMF instrument to oversee IMF members' compliance with their obligations. As opposed to other IMF or non-IMF existing dispute settlement methods, surveillance offers a non-compliance mechanism in large part based upon flexibility. Despite the flexibility that characterizes both the substantial and procedural aspects of its enforcement, surveillance seems to achieve compliance in an indirect way. That flexibility is the key to this mechanism does not

mean, however, that it has not evolved over time or been provided with procedural rules.

Two types of factor have shaped the development of surveillance. Firstly, structure has followed substance as surveillance has had to adapt to changes in the global economy. The most spectacular case is that of financial crises. As the etymology suggests, “crises” differ from simple “difficulties” in that their nature and gravity require a change of a systemic nature. More gradual changes in the structure of the global economy have also prompted substantial changes in the IMF surveillance process. Secondly, surveillance procedures have also evolved as a result of scrutiny, through the IMF internal schemes of evaluation, or through confrontation with other international institutional fora.

In 1998, the IMF undertook an *ex-post* analysis of the causes of the Asian economic crisis and of its management by the IMF services. Previously, the Mexican crisis had also left its footprint on surveillance’s procedures. The inability of the IMF to anticipate the Mexican crisis of 1993–1994 caused the IMF to review surveillance modalities. As a result, IMF surveillance procedures now encompass a stronger focus on sensitive matters, better internal coordination (information of the Executive Board), a broader scope of analysis (inclusion of data non-formally provided by the member), and more regular contact with officials of the member countries.⁵⁵ The 2008 global economic crisis prompted a paradigmatic shift as it introduced a more intensive recourse to joint surveillance with other international fora, such as the G20 through the Mutual Assessment Process (MAP)⁵⁶ or the Financial Stability Board through the IMF-FSB Early Warning Exercise.⁵⁷

The IMF periodically reviews its activities to better adapt to changes in the global economy, which includes surveillance in all its aspects. This reviewing process has been driven by the need to face the weaknesses unveiled by various crises and the ambition to anticipate future developments in the world economy. The 2012 Integrated Surveillance Decision,

⁵⁵ S Fischer, “The Asian Crisis and the Changing Role of the IMF” (1998) 35(2) *Finance & Development*, available at www.imf.org/external/pubs/ft/fandd/1998/06/fischer.htm.

⁵⁶ G20 Mutual Assessment Process (MAP), available at <file:///Users/ambroisefahrner/Downloads/G20-Mutual-Assessment-Process-MAP-SP.pdf>.

⁵⁷ IMF-FSB Early Warning Exercise, available at www.imf.org/en/About/Factsheets/Sheets/2023/Early-Warning-Exercise#:~:text=The%20IMF%2DFSB%20Early%20Warning%20Exercise&text=It%20was%20created%20in%202008,lead%20to%20further%20systemic%20shocks; ‘The Acting Chair’s Summing Up: IMF Membership in the Financial Stability Board,’ Executive Board Meeting 10/86, September 8, 2010.

the 2014 Triennial Surveillance Review, the 2018 Interim Surveillance Review and the ongoing Comprehensive Surveillance Review (CSR)⁵⁸ have identified substantial weaknesses in the monitoring of the global economy, but also improved the modalities of the conduct of the surveillance process. The IMF also has an Independent Evaluation Office (IEO), established by the Executive Board in 2001. It is functionally independent of the IMF and establishes its own agenda. It has access to all relevant data. The IEO regularly issues reports containing surveillance-related advice.⁵⁹

There has been some debate arising from the fact that the World Bank and the IMF's respective jurisdiction overlap from time to time with respect to States' borrowing. Overlapping conditions attached to external aid have been described as "cross-conditionality". Similar issues can be highlighted, which we will call "cross-surveillance" issues by analogy since existing terms do not fully describe the phenomenon. The Financial Sector Assessment Program (FSAP), for instance, is a joint World Bank–IMF program.⁶⁰ It functions very much like typical IMF surveillance activities, but its legal status is that of technical assistance. Previously operating on a voluntary basis, it is now mandatory for twenty-nine jurisdictions selected because of their systemically important financial sector. The G20 Mutual Assessment Process (MAP) involves the IMF and similar jurisdictions in a similar exercise. The legal basis is that of technical assistance, in conjunction with the legal framework of the IMF's ability to engage in joint activities. It is assumed that such collaborations have prompted discussion as to the methods and procedures employed by the IMF and other institutions. On this basis we can say that this joint exercise of surveillance has also contributed to an evolution in IMF procedures in exposing surveillance to the test of efficient collaboration.

10.4.2 *Dynamics of Procedural Principles: Borrowing from General Principles?*

Surveillance is a very demanding process: it is very broad in scope, it operates on a regular basis, and it is universal. This requires a sound and

⁵⁸ www.imf.org/en/Topics/Comprehensive-Surveillance-Review.

⁵⁹ <https://ieo.imf.org>.

⁶⁰ www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program; The IMF–World Bank Concordat (SM/89/54, Rev 1).

solid procedural framework to assure its legitimacy and efficiency. Its *sui generis* nature, the evolution of the world economy and the recurrence of crises have prompted regular review processes and resulted in densification of the rules relating to the procedural aspects of surveillance. It is submitted that the development of procedural rules fitted for surveillance can be viewed as reconciling two contradictory dynamics. Firstly, the rules draw inspiration from the general procedural principles used by international courts. Secondly, however, they do not properly borrow from this vocabulary, as they seek to underline the specificity of surveillance as a specific process. For instance, IMF surveillance must be conducted as a “dialogue,”⁶¹ but it is not referred to as an “adversarial process.” The procedure should be held in all “candor,”⁶² “frankness”⁶³ and “openness,”⁶⁴ but the IMF does not precisely refer to the general principle of “good faith” as such. The IMF assessment must be “persuasive”⁶⁵ and “clear,”⁶⁶ but the wording of “reasoning” is not used.⁶⁷

Yet, overall, IMF surveillance procedural rules are expressed in terms that evoke the general procedural principles of international litigation. This could imply that surveillance is considered as the exercise of a “quasi-international jurisdiction” to which general procedural principles of international litigation apply. At the same time the IMF’s emphasis on using a different set of terms to those employed in respect of proceedings in international courts and tribunals must be emphasized. The matter may become important in the future development of the IMF legal framework.

⁶¹ IMF Executive Board Decision No 1319-(07/51), June 15, 2007, §8.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Viterbo (n 54) para 131.