(Short title of thesis)

EXTRATERRITORIAL ENFORCEMENT OF
EXCHANGE REGULATIONS-IMF

EXTRATERRITORIAL ENFORCEMENT OF EXCHANGE CONTROL REGULATIONS UNDER THE INTERNATIONAL MONETARY FUND AGREEMENT

by

JOHN S. WILLIAMS
(Candidate L.L.M.)

Institute of Comparative Law
Faculty of Law

McGILL UNIVERSITY

August 27, 1973

Extraterritorial Enforcement Of Exchange Control Regulations Under the International Monetary Fund Agreement

Abstract

This essay contains a systematic statement of the legal doctrines emanating from the first sentence of Article VIII, Section 2(b) of the Fund Agreement. The sentence renders contracts which violate Fund member's exchange control regulations consistent with the Fund Agreement unenforceable in other Fund members' forums. The essay begins with a survey of the economic and historical background for the Fund Agreement and the means for interpreting that sentence. There follows an indepth analysis of the key phrases of that sentence; a discussion of the scope of that sentence; and a statement of the impact of that sentence upon public policy, private international law and the "act of state" doctrine.

All important relevant court decisions and scholarly writings available in English are analyzed, as are certain pertinent decisions and works in other languages. The essay concludes with a summary of the main principles of law and significant conclusions reached.

Mise en Vigueur Extra-Territoriale des Règlements de Contrôle d'Echange d'Après l'Accord du Fonds Monétaire International

Résumé

Cette dissertation contient un exposé systématique des doctrines légales qui émanent de la première phrase de l'Article VIII, Section 2(b) de l'Accord du Fonds. La phrase déclare que les contrats qui violent les règlements de contrôle d'échange des membres du Fonds - d'après les termes de l'accord du Fonds - ne peuvent pas être mis en vigueur dans les forums des autres membres du Fonds. La dissertation débute par un aperçu des bases économiques et historiques de l'Accord du Fonds et les manières d'interpréter cette phrase. Cela est suivi d'une analyse en profondeur des parties principales de cette phrase; une discussion de la portée de cette phrase; et un exposé de l'effet de cette phrase sur l'intérêt public, la loi internationale privée, et la doctrine de "l'acte d'état".

Toutes les importantes décisions judiciaires applicables et les documents érudits disponibles en anglais sont analysés, ainsi que certaines décisions pertinentes et des ouvrages en d'autres langues. La dissertation se termine par un résumé des principes judiciaires essentiels et les conclusions significatives atteintes.

PREFACE

"Authorship of any sort is a fantastic indulgence of the ego. It is well, no doubt, to reflect on how much one owes to others".*

So, too, am I much indebted to others for their contributions, large and small, to the undertaking and completion of this essay. My wife, Gail Williams, gave much assistance with the research on the economic background of, and the early work on the Fund Agreement. Also, she typed much of the basic draft and contributed a number of thoughtful comments on the structure of this essay. I am likewise indebted to Professor Maxwell Cohen of the Faculty of Law, McGill University and to Dr. H. R. Hahlo Director of The Institute of Comparative Law at McGill for their helpful suggestions and comments. I wish also to express my gratitude to Miss Carol Caracciolo who has patiently typed the final draft of this essay.

To a large extent this essay is a synthesis and re-analysis of the court decisions and the scholarly writings previously published on the subject matter of this essay. The writings of Joseph Gold, General Counsel of the International Monetary Fund, and of Professor F. A. Mann regarding Article VIII Section 2(b) of the Fund Agreement are the most important antecedents. The

---

*J. K. Galbraith, The Affluent Society, 1958, p. x (forward).

writings of Professor A. Nussbaum and of B. S. Meyer are also important.

Of central importance on most issues discussed are the cases decided by various courts in England, North America and elsewhere. It should be noted that in the ensuing discussion European cases are dealt with, where available, as fully as those from common law jurisdictions because Article VIII, Section 2(b) requires that the approach to the extraterritorial enforcement of exchange control regulations be consistent in all courts and other forums of Fund members. Thus, precedents from the courts of one member should be highly persuasive, although not necessarily controlling, in the forums of another.

Many of the views expressed and the conclusions reached in this essay are new and are my sole responsibility. So far as is known, no detailed analysis of the inclusiveness of this essay on this subject has before been undertaken. The section on the "act of state" doctrine and Article VIII, Section 2(b) of the Fund Agreement has no significant antecedents in scholarly writing.

Haworth, New Jersey
August 27, 1973

John S. Williams

Table of Contents

TABLE OF ABBREVIATIONS

Set forth below are some frequently used abbreviations which appear throughout this essay but which may not be immediately familiar to the reader.

Abbreviation	Full Name of Publication
All E. R.	All England Reports
A. J. I. L.	American Journal of International Law
B. Y. I. L.	British Yearbook of International Law
Gold (1962)	The Fund Agreement in the Courts, 1962, J. Gold
Gold (1964)	The Fund Agreement in the Courts (1964) II IMF Staff Papers 467, J. Gold
Gold (1965)	The International Monetary Fund and Private Business Transactions, 1965, IMF Pamphlet Series, No. 3, J. Gold
Gold (1966)	The Cuban Insurance Cases and the Articles of the Fund, 1966, IMF Pamphlet Series, No. 8, J. Gold
Gold (1967)	The Fund Agreement in the Courts - IX (1967) 14 IMF Staff Papers 369, J. Gold
I. C. L. Q.	International and Comparative Law Quarterly
IMF 1945-1965	The International Monetary Fund 1945-1965, 3 vols. 1969, J. K. Horsefield, ed.
Int. L. R.	International Law Reports

J. D. I. (Clunet)	Journal du Droit International (Clunet)
Mann 3rd ed.	The Legal Aspect of Money, 3rd ed. 1971, F. A. Mann
Mod. L. R.	Modern Law Review
Proceedings	Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, 2 vols. 1948

NOTE ON FORM OF CITATIONS

When a work is cited for the first time in any Part of this essay, the full citation is set forth at that time even though the full citation of the work has been set forth in an earlier Part of this essay. This method has been followed in all Parts except in Part IV. There the full citations of works have not been repeated, necessarily, if the full citations of those works has been set forth in Part III.

Also, an effort has been made to provide a comprehensive set of citations on every important point made in this essay, other than on general or well established points of law.

PART I

INTRODUCTION

> "Any plan for international monetary cooperation will have to solve the difficult problem of relaxing the restrictions of foreign exchange control ... This will be a complicated task ... because exchange control is such a powerful political instrument that the nations now practicing it will find it hard to dispense with it."*

The rules governing enforcement of foreign exchange control regulations as applied in the courts of states members of the International Monetary Fund is one of the most interesting and important aspects of contemporary monetary law.(1) At the heart of these rules is the first sentence of Article VIII, Section 2(b) of the Articles of Agreement of the International Monetary Fund.(2) That sentence, which sets forth one of the "general obligations" of Fund members, declares

---

*G. N. Halm, International Monetary Cooperation, 1945, pp. 134-135.

(1) The International Monetary Fund may sometimes hereinafter be referred to as the "Fund". In everyday usage the Fund is often referred to as the IMF.

The subject matter to be discussed in this essay is a part of the growing body of law governing international economic relations. Cf. Editor's Note (1971) 65 A.J.I.L. 112.

(2) The original Articles of Agreement of the International

unenforceable, in the territories of any member, "contracts which involve the currency" of a member and are contrary to that member's exchange control regulations. The sentence provides:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."(3)

The interpretation of this sentence, its application in the courts of member countries and its impact on and significance for private and public international law comprise the subject matter of this essay.

The first sentence of Article VIII, Section 2(b) - the legal formulation of an economic policy - is a part of the international monetary arrangements embodied in the Fund Agreement. A brief statement of the economic history preceding the drafting of the Fund Agreement and an outline of

---

(2) Continued.
Monetary Fund may be found in: 2 UNTS 39, USTIAS 1501, 60 Stat. 1401, 3 Bevans 1351. The Articles of Agreement are hereinafter referred to as the "Fund Agreement".

An amendment to the Fund Agreement was approved by the Board of Governors of the Fund on May 31, 1968. The amendment entered into force on July 28, 1969 and, in the main, added provisions creating Special Drawing Rights. Also, certain provisions not related to Special Drawing Rights were changed. For the text of the amendment, see 20 UST 2775, USTIAS 6748.

(3) The complete text of Article VIII, Section 2(b) is set forth in Appendix A hereto. A detailed analysis of the terms of this sentence is set forth in Part III hereof.

the main features of the Fund will be helpful to a full understanding of the effect of that sentence on contemporary monetary law. A summary of that history and those features follows.

The Facts and Policies Behind the Fund Agreement, In Brief

After much preliminary work commencing in 1941 and continuing through 1943, primarily by Lord John Maynard Keynes of the United Kingdom and Harry Dexter White of the United States and their collaboration on a Joint Statement of principles published in April 1944, delegates of forty-four United and Associated Nations met at Bretton Woods, New Hampshire from July 1 through July 22, 1944 and there drew up and signed the Articles of Agreement of the International Monetary Fund and the Articles of Agreement of the International Bank for Reconstruction and Development.(1)

---

(1) United Nations Monetary and Financial Conference Final Act and Related Documents (1944) Dept. of State Publication 2187. The Final Act is also set forth in Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, 2 vols. 1948 (hereinafter referred to as "Proceedings"), Doc. 492, p. 927 at p. 942. The Final Act of the Conference embodying the Fund and Bank Agreements was signed by representatives of all 44 delegations. Of these original signatories only the Soviet Union has never become a member. Three of the original members, Cuba, Czechoslovakia and Poland are no longer members of the Fund.

The history of the pre-conference negotiations is set forth in detail by J. Keith Horsefield in The International Monetary Fund 1945-1965, 3 vols. 1969, vol. I,

The Fund Agreement was designed to ameliorate certain aspects of the economic chaos which characterized the international economy during the Great Depression and up to the opening of the Second World War. These characteristics - the outgrowth of economic nationalism and monetary warfare - included competitive currency devaluations, excessive trade barriers, uneconomic barter deals, bilateral trade arrangements, multiple currency practices and restrictive exchange control regulations.(2)

The Fund was conceived in the early 1940's, a product of United States and British designs for the postwar world. The Keynes Plan for an "International Clearing Union" sought a means to amortize Britain's large foreign debt, to finance its chronic deficit on current account and to maintain full employ-

---

(1) Continued.
pp. 3-118. Hereinafter this work is referred to as the "IMF 1945-1965".

A discussion of the International Bank for Reconstruction and Development is beyond the scope of this essay.

(2) H. Morgenthau, Jr., Secretary of the Treasury of the United States, President of the Bretton Woods Conference, Closing Address to Conference, July 22, 1944. H. G. Johnson, The World Economy at the Crossroads, 1965, Chapter 3, "International Monetary Organization", pp. 20-35. See also, R. N. Gardner, Sterling Dollar Diplomacy, expanded ed. 1969, pp. 75-80; M. Hudson, Epitaph for Bretton Woods (1969) 23 J.Int.Aff. 266-269; J. H. Williams, Postwar Monetary Plans, 3rd ed. 1947, pp. 191-215; L. B. Yeager, International Monetary Relations, 1966, Part II, "History and Policy", Chs. 14-19, pp. 251-358; Hearings before the Senate Committee on Banking and Currency on H. R. 3314, and Hearings before the House Committee on Banking and Currency on H. R. 3211, 79th Cong. 1st Sess. (1945).

ment without domestic austerity.(3) The White Plan on the other hand, had as its main objectives: to prevent the disruption of the foreign exchange market and the collapse of monetary and credit systems; and to assure restoration of foreign trade.(4) The International Monetary Fund represents a compromise between the two Plans, but its legal structure is based in large measure upon the American blueprint.(5).

The Main Features of the International Monetary Fund

The Fund Agreement sought, in a positive way, to deal with the nationalistic policies which crippled international commerce in the 1930's; and to carry out the aims of the United States and British policy by promoting a unified international monetary system through multinational cooperation within a permanent institution, the International Monetary Fund.(1) The Fund Agreement made exchange rates, which had

---

(3) See, Keynes' Plans, Fourth draft, February 11, 1942 and draft of April, 1943, IMF 1945-1965, op. cit. supra, vol. III, pp. 3-36; Chancellor of the Exchequer, 386 H. C. Deb., Feb. 2, 1943; Gardner, op.cit. supra, pp. 77-80.

(4) See White Plan, IMF 1945-1965, op. cit. supra, vol. III, pp. 37-96; Gardner, op. cit. supra, pp. 75-76; Hudson, op. cit. supra, 23 J.Int.Aff. at p. 276.

(5) A. Nussbaum, Money in the Law National and International, rev. ed. 1950, p. 526. See also, Williams, op. cit. supra, p. 3.

(1) See, Fund Agreement, Article I "Purposes". Cf. F. A. Mann, The Legal Aspect of Money, 3rd ed. 1971, p. 528. Hereinafter this work will be cited as "Mann 3rd ed.".

been considered a matter within the exclusive jurisdiction of sovereign nations, a matter of international concern.(2) Indeed, establishment of fixed exchange rates or par values among currencies is at the center of the international monetary system created by the Fund Agreement.(3)

---

(2) H. Aufricht, The International Monetary Fund, Legal Bases, Structure, Functions, 1964, p. 10; J.E.S. Fawcett, The International Monetary Fund and International Law (1964) 40 B.Y.I.L. 32 at pp. 55-56; J. Gold, The International Monetary Fund and International Law, 1965, IMF Pamphlet Series, No. 4, pp. 12-14.

(3) See, Fund Agreement, Article IV, "Par Values of Currencies".

From time to time the fixed or pegged exchange rates established under the Fund Agreement have been realigned. Recently there has been a dramatic shift in the alignment. On August 15, 1971 the United States dollar was set "afloat". N.Y. Times, Aug. 16, 1971, pp. 1, 14. This rift in the fabric of the par value system was apparently mended with the "Smithsonian Accord" among the Group of Ten countries, concluded on December 18, 1971 and approved the next day by the Executive Directors of the Fund, N.Y. Times, Dec. 20, 1971, p. 1, col. 8, p. 56, cols. 2-6. But on June 23, 1972 a new rift appeared: the British Government set the pound sterling "afloat". N.Y. Times, June 24, 1972, p. 1, cols. 7,8, p. 43, cols. 1-8. In light of the weakness in world monetary arrangements manifest in the breakdown of the fixed exchange rate system and the growing unacceptability of the United States dollar as a reserve currency, a consensus among world bankers and statesmen has emerged favoring reform and modification of the world monetary system established by the Fund Agreement. Work on reform began in November, 1972 (see, N.Y. Times, Mar. 16, 1972, p. 69, col. 1, p. 79, cols. 1,2; Long-Term International Monetary Reform: A Proposal for an Improved International Adjustment Process, 1972, by the Panel on International Monetary Policy of the American Society of International Law; N.Y. Times, July 18, 1972, p. 1, col. 1, p. 43, col. 1; N.Y. Times, Nov. 28, 1972, p. 63, cols. 2, 3, p. 66, col. 4; N.Y. Times, Nov. 29, 1972, p. 59, cols. 1, 2, p. 69, cols. 3, 4; Reform of the International Monetary System, A Report of the Executive Directors to the Board of Governors, August, 1972) but

The Fund was set up along the lines of a private stock company.(4) In general, any country may become a member of the Fund upon acceptance of the Fund Agreement after having taken all steps necessary to enable it to carry out all of its obligations under that Agreement.(5) As of June 15, 1973, there were 125 Fund members.(6) Members are assigned quotas payable to the Fund and the number of votes of each member is determined by the size of its quota.(7) The quotas are unequal, indivisible and untransferable and may be adjusted

---

(3) Continued.
before reform was seriously underway striking additional unilateral changes were made. On February 12, 1973 the United States again devalued the dollar. N.Y. Times, Feb. 13, 1973, p. 1, col. 8, p. 56, col. 1. And on March 12, 1973, six of the nine Common Market Countries jointly floated their currencies, while the other three continued an independent float against the dollar. N.Y. Times, March 12, 1973, p. 1, col. 1, p. 48, col. 6.

(4) Nussbaum, op. cit. supra, p. 529.

(5) Fund Agreement, Article II, "Membership", Article XX, Section 2, "Signature". When the Fund Agreement took effect on December 27, 1945, there were 22 members (Aufricht, op. cit. supra, p. 20) and 30 members by December 31, 1945. By December 31, 1946 there were 40 members (Ibid) although the Fund did not commence exchange operations until March 1, 1947 (Fund Agreement, Article XIV, Section 4; IMF 1945-1965, op. cit. supra, vol. I, pp. 160, 187-192). In 1951 after five years in operation there were 51 members and in 1965 after twenty years in existence there were 103 members (IMF 1945-1965, op. cit. supra, vol. II, p. 248).

(6) International Monetary Fund Annual Report of the Executive Directors for the Fiscal Year Ended April 30, 1972, p. 53. Hereinafter this and other similar Fund year end reports are referred to as "IMF Annual Report [year]"; XXVI International Financial Statistics ("I.F.S."), No. 7, July, 1973, p. 4.

(7) Fund Agreement, Article III, Section 1, "Quotas", Article

periodically.(8)

The United States with an initial quota of $2.750 billion had, under the voting provisions, 37.9% of the voting power of the Fund when the Fund Agreement entered into force on December 27, 1945.(9) With the increase in the number of members, of total subscriptions and, therefore, of the total number of votes, the percentage of the vote held by the United States - despite the increase in its subscription - had, as of May 31,

---

(7) Continued.
XII, Section 5, "Voting". In addition, under Article XII, Section 5(b) the voting power of a member may be increased or diminished in proportion to the net use of the currency of that member whenever voting is required on "waiver of conditions" on the use of the Fund's resources (Article V, Section 4) or on "ineligibility to use the Fund's resources" (Article V, Section 5).

(8) Nussbaum, op. cit. supra, p. 529; Fund Agreement, Article III, Section 2, "Adjustment of quotas". Each Fund member has subscribed to pay to the Fund an amount equal to its quota of which 25% is to be paid in gold or 10% of the member's net official gold holdings plus United States dollars, and 75% in the member's own currency. Fund Agreement, Article III, Section 3.

(9) Fund Agreement, Schedule A, Quotas; Article XII, Section 5(a), "Voting"; Article XX, Section 1; International Monetary Fund, First Annual Meeting of the Board of Governors (1946-1947); Aufricht, op. cit. supra, pp. 9, 20 and Appendices I and II, pp. 79-82; IMF 1945-1965, op. cit. supra, vol. I, pp. 113-118.

In 1959 the quota of the United States was increased from $2.750 billion to $4.125 billion. Board of Governors Resolutions Nos. 14-1 to 14-4 (1959). In 1965 it was increased from $4.125 to $5.160 billion. Board of Governors Resolution No. 20-6 adopted March 31, 1965. And in 1970 the United States quota was increased from $5.160 to $6.700 billion, its present level. Board of Governors Resolution No. 25-3 as amended by Res. No. 26-1 effective Dec. 8, 1970.

1972, decreased to 22.10%.(10) The United Kingdom, the second largest subscriber with an initial subscription of $1.300 billion has had, over the years, somewhat less than one half of United States voting power.(11) As of May 31, 1972 the United Kingdom had 9.28% of the total vote.(12)

The weighted voting regime of the Fund is combined with a "majority rule" principle set forth in Article XII, Section 5(d): "Except as otherwise specifically provided, all decisions of the Fund shall be made by a majority of the votes cast". But an 85% majority of the "total voting power" is required for any change in quotas proposed as a result of a general review and a four-fifths majority of the total voting power is required for any other change in quotas.(13) Also, a unanimous vote is required for the amendment of certain provisions of the Fund Agreement.(14) Uniform "proportionate changes" in the par values, or fixed exchange rates, of currencies may only be decided by an 85% "majority of the

---

(10) See IMF Annual Report 1972, p. 94 (Appendix IV); XXV International Financial Statistics, No. 7, July 1972, p. 8.

(11) See citations footnote 9 this section, supra, p. 8. In 1959 Britain's quota was increased from $1.300 billion to $1.950 billion; in 1965 to $2.440 billion and in 1970 to $2.800 billion.

(12) See IMF Annual Report 1972, p. 94 (Appendix IV); XXV International Financial Statistics, No. 7, July 1972, p. 8.

(13) Fund Agreement, Article III, Section 2, "Adjustment of quotas", as amended, effective July 28, 1969.

(14) See enumeration in Fund Agreement, Article XVII (b).

total voting power".(15) This last provision gives the United States, the only member with more than 15% of the voting power, a veto over uniform changes in par values, such as those agreed upon on December 18, 1971.(16) Despite these rules on voting, in practice many decisions of the Executive Board are made without any formal roll-call vote - usually on the basis of a consensus of the members.(17)

The Fund with its headquarters in Washington, D.C. acts through its Board of Governors, Executive Directors and the

---

(15) Fund Agreement, Article IV, Section 7, "Uniform changes in par values", as amended, effective July 28, 1969. Also, Article III, Section 2, "Adjustment of quotas" as amended effective July 28, 1969 states in part: "... An eighty-five percent majority of the total voting power shall be required for any change in quotas proposed as the result of a general review and a four-fifths majority of the total voting power shall be required for any other change in quotas...."

(16) See citations in footnote 10 supra, p. 9. Under Article IV, Section 5(b), "Changes in par value", the Fund may not make a decision without the consent of the member affected.

Other provisions that require more than a mere majority vote are: Article V, Section 8(e) - a change in charges requires 75% of the vote; Article XII, Section 3(b) - an increase in the number of directors requires 80% of the vote; Article XII, Section 8 second sentence - publication of reports on a member's economy requires 66 2/3% of the vote; Article XV, Section 2(b) - compulsory withdrawal requires a majority of the Board representing a majority of the voting power. See also, Article XII, Section 2(c), (d); Article XVI, Section 1 (a), (c), (d); Article XVII (a), (b); and Schedule C.

(17) Aufricht, op. cit. supra, p. 43; See also, Rule C-10 of the Rules and Regulations of the Fund and Section 11 of the By-Laws allowing the Managing Director or Chairman to "ascertain the sense of the meeting in lieu of a formal vote".

Managing Director and staff.(18) The Board of Governors is comprised of one governor and one alternate from each member country and, in theory, all powers of the Fund are vested in the Board.(19) However, certain powers have been delegated to the Executive Directors and in practice the Executive Directors, with certain exceptions, exercise the Fund's powers.(20) As of June 16, 1972, there were twenty Executive Directors, of which five have been appointed by the five members with the largest quotas and the others are appointed or elected according to a formula set forth in the Fund Agreement.(21) The Executive Board comprises the Executive Directors and the Chairman (Managing Director). The Executive Board is responsible for the conduct of the day-to-day business of the Fund.(22) The Managing Director is the chief of the

---

(18) Fund Agreement, Article XIII, Section 1, "Location of offices"; Article XII, Section 1, "Structure of the Fund". See also Article IX on the status, immunities and privileges of the Fund.

(19) Fund Agreement, Article XII, Section 2, "Board of Governors".

(20) Fund Agreement, Article XII, Section 2(b) and Section 3, "Executive Directors". The exceptions are those functions specifically conferred on the Board of Governors and not delegated by the Fund Agreement. Article XII, Section 2.

(21) Fund Agreement, Article XII, Section 3(b). As of May 31, 1972 the five members with the largest quotas were: The United States, Great Britain, Germany, France and Japan.

(22) Rule B-2 of the Rules and Regulations of the Fund; Fund Agreement, Article XII, Section 4(a). Aufricht, op. cit. supra, p. 30.

operating staff of the Fund, and, subject to the direction of the Executive Directors, conducts the "ordinary business" of the Fund.(23) The present Managing Director is Pierre-Paul Schweitzer. Mr. Schweitzer will be replaced as Managing Director in the near future.

The main functions of the Fund are:

> To implement the system of reasonably stable exchange rates(24);
>
> To make available to and to facilitate the purchase by members in time of temporary balance of payments difficulties, foreign currencies held by the Fund up to an amount equivalent to twice that member's quota(25);

---

(23) Fund Agreement, Article XII, Section 4, "Managing Director and staff".

(24) Fund Agreement, Article IV, Section 4, "Obligations regarding exchange stability". See also: Fawcett, op. cit. supra, 40 B.Y.I.L. at pp. 35, 36; Mann, 3rd ed. op. cit. supra, p. 530; Nussbaum, op. cit. supra, pp. 533-536.

(25) Fund Agreement, Article V, "Transactions with the Fund". Fawcett, op. cit. supra, 40 B.Y.I.L. at pp. 35, 36-49; J. Gold, The International Monetary Fund and International Law, op. cit. supra, pp. 22-26.

Since the 1969 amendment to Article V, Section 3, "Conditions governing use of the Fund's resources" a member may, as a matter of law, automatically draw approximately one-fourth of its quota, that is an amount equal to its gold tranche, from the Fund. Establishment of a Facility Based on Special Drawing Rights in the International Monetary Fund and Modification in the Rules and Practices of the Fund, A Report of the Executive Directors to the Board of Governors Proposing Amendment of the Articles of Agreement, Part II, para. 32-34, 7 International Legal Materials 473, at pp. 498-500. See also, J. Gold, The Reform of the Fund, 1969, IMF Pamphlet Series No. 12, pp. 18-20. Additional drawings are subject to certain conditions which may be imposed by the Fund.

> To provide a forum for international monetary cooperation, to promote research and disseminate information and to provide technical assistance and training(26); and
>
> To assist in the establishment of a multilateral system of payments and the elimination of foreign exchange restrictions on current transactions which hamper the growth of world trade(27).

The ultimate aim of the Fund Agreement is to eliminate exchange control regulations on current transactions. But the Agreement also recognizes economic reality and permits the maintenance or imposition of controls: (1) on current transactions during a transitional period(28); (2) when a Fund member's currency becomes scarce(29); (3) at all times on capital movements(30); and (4) when directed toward non-member countries(31). The Fund Agreement, through Article VIII, Section 2(b), attempts to unify the treatment these controls receive in the courts and administrative authorities of member countries. This essay focuses on this attempt.

---

(26) Fund Agreement, Article I "Purposes", par. (i); Aufricht, op. cit. supra, pp. 72-77.

(27) Fund Agreement, Article I (iv); Fawcett, op. cit. supra, 40 B.Y.I.L. at pp. 35, 36-49.

(28) Fund Agreement, Article XIV, Section 2, "Exchange restrictions".

(29) Fund Agreement, Article VII, Section 3(b).

(30) Fund Agreement, Article VI, Section 3, "Controls of capital transfers".

(31) Fund Agreement, Article XI, Section 2, "Restrictions on transactions with non-member countries".

The Potential Impact of Article VIII, Section 2(b)

The international monetary system brought forth at Bretton Woods enabled international trade, as fed and enhanced by the dynamic growth of the free world economy, to increase from an annual rate of approximately $55 billion in 1950 to an annual rate of approximately $372 billion in 1972.(1) This growth in trade has occurred despite the continuance of exchange regulations affecting current transactions.

From the inception of the Fund, many members have maintained or imposed various forms of exchange control regulations.(2) And, there is evidence that since August 15, 1971 new regulations have been imposed.(3) Under the first sentence of Article VIII, Section 2(b) these regulations must be given

---

(1) XXVI I.F.S., No. 7 (July, 1973) p. 36; Long-Term International Monetary Reform: A Proposal for an Improved International Adjustment Process, op. cit. supra, p. 2.

(2) See, IMF, Twenty-Third Annual Report on Exchange Restrictions, 1972. In general, exchange control regulations include: (a) those rules which require the observance of certain procedures before transnational payments may be made; (b) those rules which restrict payments on certain transactions; and (c) those rules which require that all or some specified part of foreign exchange be surrendered to a governmental authority in return for local currency at specified rates. Such regulations may relate both to current international payments and to capital transfers.

The conditions under which a member may maintain or impose regulations depends in part upon whether that member is an Article XIV "Transitional Period" member or an Article VIII member. The distinction and its significance for present purposes is discussed infra, Part II, under the heading, "The Economic Background and Policies of the Fund Agreement", pp. 20-21.

(3) The Wall Street Journal, July 6, 1972, p. 1, col. 6, p. 31, col. 4.

effect in the courts and administrative authorities of member countries. The imposition of new regulations and the judicial interpretations of those regulations will undoubtedly have a wide impact on international commercial transactions. Such impact has occurred in the past. For example: following the change of regime in Cuba in 1959 a large number of cases involving insurance policies of Cuban refugees arose in the United States. These cases represented only a small portion of the total maturity value of similar policies in existence. That total value is said to range from $100 million to $250 million.(4)

Again, the first sentence of Article VIII, Section 2(b) has been the subject of more cases throughout the world and has generated more interest among lawyers and legal scholars than any other provision of the Fund Agreement.(5) This interest is the result not only of practical necessity but also of: the change this provision has brought about in private international law regarding enforcement of foreign exchange control regulations; and the sharp differences of opinion which have arisen over the proper interpretation of the terms

---

(4) J. Gold, The Cuban Insurance Cases and the Articles of the Fund, 1966, IMF Pamphlet Series, No. 8, p. 2. And see R.R. Paradise, Cuban Refugee Insureds and the Articles of Agreement of the International Monetary Fund (1965) 18 U. Fla. L.R. 29 at pp. 37-38. Various of these "Cuban insurance cases" are discussed under appropriate topic headings throughout the text of this essay.

(5) J. Gold, The International Monetary Fund and Private Business Transactions, 1965, IMF Pamphlet Series, No. 3, p. 21.

of that provision.(6)

The legal issue central to the cases discussed herein arises, in general, as follows: Plaintiff seeks to recover in the courts of member-country X on a contract which involves or affects the currency and violates the exchange control regulations of member-country Y. The courts of country X must then decide whether they will apply Article VIII, Section 2(b) and reject the plaintiff's claim or whether they will find a way to avoid the application of that provision, and give plaintiff the fruits of his contract. Thus these cases raise a basic philosophical issue of whether the courts will decree justice between the parties in a given case, or whether they will deny justice and implement the broad policy of international monetary cooperation declared by the Fund Agreement. Such decisions have broad impact not only on the rule of international law as interpreted in the courts of member states but also on the conduct of international trade and relations.

Further examination of Article VIII, Section 2(b) is also called for in light of the twenty-five years of practical experience with it, of the current international economic and monetary upheavals and of the agreement to reform the international monetary system as embodied in the present Fund Agreement. To this end, this essay proceeds with Part II on

---

(6) The changes and sharp differences of opinion will be evident as the reader continues.

the background and bases for interpretation of the provision. Part III contains a detailed analysis of the terms of the provision. In Part IV certain aspects of the scope of the provision are discussed. Part V examines the relation of the provision to public policy, private international law and the act of state doctrine. Part VI sets forth a summary of the main principles discussed and the principal conclusions reached in this study.

PART II

THE BACKGROUND AND TOOLS FOR INTERPRETATION OF THE FIRST SENTENCE OF ARTICLE VIII, SECTION 2(b) OF THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND

Interpretation of the ambiguous and obscure wording of the first sentence of Article VIII, Section 2(b) of the Fund Agreement should, if possible, harmonize the diverse views which are supported by the different analyses of that sentence. Those analyses stem from various approaches: to the facts underlying the economic purposes of the agreement; to the construction of the sentence as a matter of treaty interpretation; to the drafting history, or travaux préparatoires,(1) of the Agreement; to the Fund's own authoritative interpretation of the sentence; and to the constructions which the courts and administrative authorities of the Fund members have given that sentence in deciding cases and controversies before them.

None of the interpretations of that sentence is based upon one approach to the exclusion of all others. Rather the analyses and approaches are intertwined. And, in formulating an interpretation the authorities have preferred or given greater weight to one approach or another, thus giving rise to the differences in viewpoint on the proper interpretation of the sentence. Accordingly, before discussing the terms of the

---

(1) The French term travaux préparatoires, preparatory work, is similar in meaning to the English term "legislative history".

sentence in detail it should be helpful to set forth the foundations of those different approaches.

The Economic Background and the Policies of the Fund Agreement

The idea of the International Monetary Fund was conceived in the early 1940's as a part of the United States and British plans for the postwar world. The Fund was created to end the pre-World War II era of economic nationalism, monetary warfare and protectionism which frustrated the growth of the international economy.(1) Hopes for postwar economic development were predicated on the Bretton Woods Agreements(2) and the consensus regarding trade policy which ultimately led to the General Agreements on Tariffs and Trade.(3)

The Fund Agreement was not only a compromise between the British and American draft proposals but was also a compromise between their joint proposals and the proposals and suggestions of the other delegations to the Bretton Woods Conference. Much of the vagueness in the terms of the Fund Agreement is the intended result of hard bargaining and compromise. Nevertheless, in line with American leadership in world monetary

---

(1) See supra, Part I, "The Facts and Policies Behind the Fund Agreement, In Brief", pp. 3-5.

(2) That is, both the Fund and Bank Agreements. See, supra, p. 3.

(3) The General Agreement on Tariffs and Trade (GATT) may be found in 55-61 UNTS, USTIAS 1700, 4 Bevans 639; amendment, March 2, 1970, 21 UST 1090, USTIAS 6864 (Protocols for the various accessions are not listed).

affairs, the basic structure of the Fund clearly resembles the American proposal.(4) In addition, the stated purposes of the Fund strongly reflect the lines of solution to the economic problems manifest before the outbreak of World War II. The first purpose of the Fund is "to promote international monetary cooperation".(5) This and the other purposes of the Fund are of great importance when a contemporary court is obliged to construe the wording of the Fund Agreement, for a cardinal rule of treaty construction is that the interpretation must seek to implement the stated purposes.(6)

In the context of the overall purposes of the Fund, interpretation of the first sentence of Article VIII, Section 2(b) should attempt to implement the specific purpose of that provision. It is submitted that the purpose of that provision is to provide support for a member's currency by upholding and enforcing that member's exchange control regulations which are consistent with the Fund Agreement.(7) Significantly, Fund

---

(4) Nussbaum, Money in the Law National and International, rev. ed. 1950, p. 526. See also G. L. Weil and I. Davidson, The Gold War, 1970, p. 10; and J. H. Williams, Postwar Monetary Plans, 3rd. ed. 1947, p. 3.

(5) Fund Agreement, Article I, "Purposes".

(6) See U.S. Nationals in Morocco Case, I.C.J. Reports (1952) pp. 183-184, 197-198; Vienna Convention on the Law of Treaties, 1969, Section 3, "Interpretation of Treaties"; M. Lauterpacht, Oppenheim's International Law, 8th ed. 1955, p. 953.

(7) See Kraus v. Zivnostenska Banka, 187 Misc. 681, 685, 64 N.Y.S. 2d 208, 211 (Sup. Ct. N. Y. Co. 1946). Cf. J. Gold, The Cuban Insurance Cases and the Articles of the

members are required to give that sentence and its purpose effect in their territories for the first sentence of Article VIII, Section 2(b) is one of the "general obligations" of Fund members.(8) Moreover, all members of the Fund are bound by this provision whether or not they "have availed themselves of the transitional arrangements of Article XIV, Section 2" or whether they have accepted the obligations of Article VIII, Sections 2, 3 and 4.(9)

Construction of the Sentence as a Matter of Treaty Interpretation

As finally adopted the first sentence of Article VIII, Section 2(b) reads:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

---

(7) Continued.
Fund, 1966, IMF Pamphlet Series, No. 8, pp. 22, 24, 27 (hereinafter this pamphlet is cited as "Gold 1966"); B. S. Meyer, Recognition of Exchange Controls After the International Monetary Fund Agreement (1953) 62 Yale L. J. 867 at p. 896.

(8) Fund Agreement, Article VIII, "General Obligations of Members".

(9) IMF Decision No. 446-4, June 10, 1949 of Article VIII, Section 2(b), discussed infra pp. 29-33. See also, Aufricht, The International Monetary Fund, Legal Bases, Structure, Functions, 1964, p. 25; J. Gold, The International Monetary Fund and Private Business Transactions, 1965, IMF Pamphlet Series, No. 3, pp. 16-20 (hereinafter this pamphlet is cited as "Gold (1965)").

As of April 30, 1972 of the 120 members of the Fund, 35

It is submitted that this provision should not be construed narrowly as if it were legislation before a common law court. Diplomatic documents, including treaties do not as a rule invite the very strict methods of interpretation that, for example, an English court applies to an Act of Parliament.(1) Like the United Nations Charter, the Articles of Agreement of the International Monetary Fund is a fundamental law creating a legal order, and as a multilateral international constitution(2), the Fund Agreement should be interpreted to give broad effect to the purposes for which it was drafted.(3) By applicable canons of interpretation sound

---

(9) Continued.
were Article VIII members (IMF Annual Report 1972, p. 50). In 1952 of the 51 Fund members only 7 were Article VIII members. In 1965 of the 103 Fund members 26 were Article VIII members (The International Monetary Fund 1945-1965, 1969, vol. II, p. 567, hereinafter cited "IMF 1945-1965").

(1) J. L. Brierly, The Law of Nations, 6th ed. 1963 (Sir Humphrey Waldock) p. 325.

(2) F. A. Mann, The 'Interpretation' of the Constitutions of International Financial Organizations (1969) 43 B.Y.I.L. 1 at pp. 17, 18. In his Separate Opinion in the Status of South West Africa case, I.C.J. Reports (1950) p. 189 Judge de Visscher states: "one must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties do not suffice". See also, dissenting opinion of Judge Jessup, South West Africa Cases, I.C.J. Reports (1966) p. 6.

One may also recall the famous apothegm of Chief Judge John Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579, 602 (1819) "we must never forget that it is a constitution we are expounding" (emphasis added).

(3) Fund Agreement, Article I(i). Significantly, Article II

construction of Article VIII, Section 2(b) requires that member's courts and administrative authorities apply the provision so as to implement that broad purpose.

Moreover, recourse may be had to the travaux préparatoires, the preparatory work, to confirm the meaning of an interpretation of a provision or to determine the meaning where the terms are ambiguous or obscure or where other ways of interpretation lead to a meaning which is manifestly absurd or unreasonable.(4) Such recourse is often necessary here since the terms of the first sentence of Article VIII, Section 2(b) are patently ambiguous and obscure.

The Travaux Préparatoires of the First Sentence of Article VIII, Section 2(b)

The first sentence of Article VIII, Section 2(b) was drafted in final form at the Bretton Woods Conference. The

---

(3) Continued.
of the Vienna Convention on the Law of Treaties, 1969, provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

(4) Cf. Vienna Convention on the Law of Treaties, Article 32. See I. Brownlie, Principles of International Law, 1966, pp. 504-505; J. F. Hogg, The International Court: Rules of Treaty Interpretation II (1959) 44 Minn. L. R. 5 at pp. 49-66; Lauterpacht, op. cit. supra, pp. 957-958.

Of interest, also, on the interpretation of multilateral international charters, are: S. D. Metzger, Settlement of International Disputes by Non-Judicial Methods (1954) 48 A.J.I.L. 408; and S. J. Rubin, The Judicial Review Problem in the International Trade Organization (1949) 63 Harv. L. R. 78.

origins of that sentence can be traced back to a suggestion with regard to capital movements, set forth in the April 1943 Keynes Plan, that "inward movements" of funds "not approved by the countries from which they originate" may be "deterred" abroad by appropriate means.(1) This suggestion meant that imports of funds, "inward movements" of funds, from abroad not approved by the foreign exchange authority of the country from which such funds came might be blocked by the country into which they were to come in order to protect the foreign exchange resources of the first country.(2)

The first draft of the sentence submitted to the Bretton Woods Conference is contained in a Preliminary Draft of suggested Articles dated July 1, 1944, and reads: "exchange transactions in the territory of one member, which evade or avoid the exchange regulations prescribed by that other member

---

(1) Keynes' Proposals for an International Clearing Union, April 1943 (Cmd. 6437) under the general heading "Control of Capital Movements", paragraph 33. "...[T]he universal establishment of a control of capital movements cannot be regarded as essential to the operation of the Clearing Union; and the method and degree of such control should therefore be left to the decision of each member state. Some less drastic way might be found by which countries, not themselves controlling outward capital movements, can deter inward movements not approved by the countries from which they originate". Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, 2 vols. 1948 (hereinafter referred to as "Proceedings"), App. IV, p. 1567; IMF 1945-1965, op. cit. supra, vol. III, pp. 31-32. Keynes' "Proposals for an International Currency (or Clearing) Union" of February 11, 1942 did not contain this suggestion.

(2) Cf. Nussbaum, op. cit. supra, p. 541.

and authorized by this Agreement, shall not be enforceable in the territory of any member".(3) Alternate proposals were also submitted, one to make exchange transactions outside of the country of the currency involved an "offense", and the other, to confine the provision to transactions "outside the prescribed variations" of the exchange rate "par value" rule.(4)

On July 13, 1944 all three suggestions were referred to Commission I, which had been charged with responsibility for drafting the Fund Agreement.(5) That day Commission I referred the three suggestions to a new Special Committee.(6)

---

(3) This draft of the sentence, a joint proposal of the British and United States delegations, is set forth as Article IX, Section 3(c) in the Draft of July 1, 1944, under the heading, "Foreign Exchange Dealings Based on Par Values" Proceedings, op. cit. supra., Doc. 32, pp. 54-55.

Commission I of the Bretton Woods Conference to which this and the alternatives were referred by Report dated July 13, 1944, was charged with responsibility for drafting the Articles of Agreement of the International Monetary Fund. Commission I was chaired by Harry Dexter White of the United States. The IMF 1945-1965, op. cit. supra, p. 91.

(4) Both alternative proposals ultimately were rejected. See Proceedings, op. cit. supra: Doc. 236, p. 334 (British proposal, alternative B); Doc. 238, p. 341; Doc. 307, p. 502 (Drafting Committee proposal, third alternative); Doc. 326, p. 543; Doc. 343, pp. 575-576; Doc. 374, p. 605; Doc. 393, p. 628.

The Polish delegation also made a proposal, "to render really effective" controls and regulations regarding international movement of capital. Id. Doc. 191, p. 230. But that proposal was not pressed in view of the development of other terms of the Agreement. Id. Doc. 343, p. 576.

(5) Id. Doc. 343, pp. 575-576.

(6) Id. Doc. 370, p. 599.

On July 13-14 the Special Committee asked the Drafting Committee "to reconcile the differences" between "the wording of the 'evade or avoid' provision and the 'outside the prescribed variation' provision".(7) And, on July 14, 1944, Commission I reconsidered Article VIII "as reworded" and that Article "was adopted as presented by the Drafting Committee, with the inclusion of Section 2."(8) But the text of Article VIII "as reworded" by the Drafting Committee and "adopted" by Commission I has not been preserved. However, a "working draft" of the Fund Agreement prepared by the Drafting Committee and dated July 16, 1944, two days subsequent to Commission I's decision, sets forth as Article VIII, Section 2(b) a provision which, with minor revisions became the final text of that section.(9) Still it is not altogether clear what language Commission I adopted on July 14.

To cloud matters further, sometime after July 16, the Drafting Committee presented its Second Report which contains the following important statement:

> "All the material contained in this report has been approved in principle by the

---

(7) Id. Doc. 374, p. 605. The proposal to make invalid exchange transactions an "offense" was dropped. See n. 4, p. 25, supra.

(8) Id. Doc. 393, p. 628.

(9) Id. Doc. 413, p. 671. The minor revisions were the dropping of commas after "contracts" and "agreement", the addition of "which" after "and", and the deleting of "other" before the last word of the sentence.

> Commission at previous sessions. The present report contains, however, a new formulation of certain provisions to which I should specifically draw the attention of the Commission."(10)

Set forth beneath this statement in the Report are references to six provisions, of which Article VIII, Section 2(b) as finally adopted is one.

The meaning of this statement is the center of controversy between the two leading authorities in the field, Dr. Mann(11) and Joseph Gold, General Counsel of the International Monetary Fund.(12) Dr. Mann concludes from the statement that "it is clear that the members of the Conference thought that the differences related to wording and formulation", not to substance.(13) Mr. Gold states that the second sentence of the statement is an exception to the first sentence as indicated by the use of the word "however". He concludes that the reference to "new formulation" cannot be read "to imply that ... any one of the earlier drafts [of Article VIII, Section 2(b)]

---

(10) Id. Doc. 448, p. 808. The text of Article VIII, Section 2(b) accompanying this report is the same as the final text of that section.

(11) F. A. Mann, The Legal Aspect of Money, 3rd. ed. 1971, pp. 435-436, n. 1 ("Mann 3rd ed.").

(12) J. Gold, The Fund Agreement in the Courts, 1962, pp. 63-64 (hereinafter referred to as "Gold (1962)") in which he refers to the second edition of Dr. Mann's book, The Legal Aspect of Money, 1953, pp. 386-387 (hereinafter referred to as "Mann 2nd ed."). The position taken by Dr. Mann in the third edition of his book is similar.

(13) Mann 3rd ed., op. cit. supra, pp. 435-436, n. 1.

had been approved in principle by the Commission" or that "the Drafting Committee was merely giving it some new verbal form".(14)

As noted, the reports of the Conference do not state the text of Article VIII, Section 2(b) that was approved by Commission I on July 14, 1944, and the final draft evolved by the Drafting Committee gave no indication of the reasons for the changes made.(15) However, the similarity of the formulation of the provision in the draft of July 16 and the final formulation of the provision coupled with the proximity in time of the July 16 draft and the decision of Commission I to adopt the provision "as reworded" suggests the conclusion that it was the July 16 wording which was agreed upon in the Drafting Committee and adopted by Commission I on July 14. This conclusion is different from both Dr. Mann's conclusion and Mr. Gold's. But, it supports Dr. Mann's reading of the above quote from the Second Report of the Drafting Committee and it supports Mr. Gold's position on the meaning of the term "unenforceable" as used in Article VIII, Section 2(b).(16)

---

(14) Gold (1962) op. cit. supra, pp. 63-64. Meyer suggests that the "new formulation" was the statement of the principle as one of general application under Article VIII rather than as one directly related to par value of currencies under Article IV (62 Yale L.J. at p. 882).

(15) Nussbaum, op. cit. supra, p. 541; Proceedings, op. cit. supra, Doc. 448, p. 808.

(16) See infra, pp. 99, 101-102.

The Fund Interpretation
of the First Sentence of
Article VIII, Section 2(b)

The provisions of Article XX, Section (a) and Article XVIII (a) of the Fund Agreement give perspective to the affect that the first sentence of Article VIII, Section 2(b) is intended to have within the territories of Fund members. By Article XX, Section (a) the Fund members have bound themselves to "carry out [under their domestic laws] all of ... [their] obligations under this Agreement", which includes the obligation of Article VIII, Section 2(b).(1) By Article XVIII (a) "Any question of interpretation of the provisions of this

---

(1) Article XX, Section 2(a) of the Fund Agreement states in full:

> "Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement."

Pursuant to this provision some countries have adopted legislation to give certain provisions of the Fund Ageeement, such as Article VIII, Section 2(b), the force of law within their territories. See, for example: Canada, Bretton Woods Agreements Act, R. S. [1970], c. 19, s. 1, vol. 1, chap. B-9; United Kingdom, 9 & 10 Geo. 6 c. 19; S. R. & O. 1946, No. 36 [Sch. Pt. I, Art. 8 Sec. 2(b); United States, Bretton Woods Agreements Act, 59 Stat. 512, 22 U.S.C. §§ 286-286K. See also, Aufricht, op. cit. supra, pp. 10-11.

It has been suggested that Article VIII, Section 2(b) is not applicable unless the member whose exchange control regulations are to be enforced has made Article VIII, Section 2(b) a part of its domestic law. Mann, 2nd ed., op. cit. supra, p. 384; Nussbaum, op. cit. supra, p. 545.

Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision...". These powers of interpretation are, however, also implicitly limited by the terms of that Article. For, no power has been granted to decide disputed questions of fact, or to resolve general questions of international law, or to garb what may be fairly described as an amendment to the Fund Agreement in the clothes of an interpretation.(2) Interpretations which go beyond these limitations are ultra vires and are of no force or effect.(3)

Pursuant to the power conferred on the Fund by Article XVIII (a) the Executive Directors, on June 10, 1949, adopted an interpretation of the first sentence of Article VIII, Section 2(b).(4) That interpretation, it is submitted, is within

---

(1) Continued.
But that a member has made Article VIII, Section 2(b) a part of its law should be concluded from the deposit of the instrument of acceptance under Article XX, Section 2(a). Frantzmann v. Ponijen, 30 Int. L. R. 423 (1959), Nederlandse Jurisprudentie (1960), No. 290, Tijdschrift, VIII (1961), p. 190, discussed infra, pp. 47, 76, 89-90, 112-113, 120-121. See also, J. Gold, The Cuban Insurance Cases and the Articles of the Fund, IMF Pamphlet Series, No. 8, 1966, pp. 47-48

(2) Cf. Mann, op. cit. supra, 43 B.Y.I.L. p. 4.

(3) Mann, op. cit. supra, 43 B.Y.I.L. p. 13; Nussbaum, op. cit. supra, p. 529.

(4) The interpretation is set forth in: IMF Annual Report, 1949, Appendix XIV, pp. 82-83; Selected Decisions of the Executive Directors and Selected Documents, 5th Issue, 1971, pp. 92-93; U.S. Fed. Reg. 5208-9 (1949); XL Revue Critique de Droit International Prive, 586-587 (1951); IMF 1945-1965, op. cit. supra, vol. III, pp. 256-257.

the powers conferred on the Fund by the Fund Agreement. That interpretation sets forth three fundamentally important principles. First, the "judicial or administrative authorities" in a member country must not implement the "obligations" of an exchange contract which are contrary to the exchange control regulations of another member "maintained or imposed consistently with the Fund Agreement." Second, those authorities may not ignore the exchange control regulations of another member in such a case on the ground that the regulations are "contrary to the public policy (ordre public) of the forum". Third, such authorities may not ignore the exchange control regulations of another member in such a case on the ground that "under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance".(5) In pertinent part the Fund interpretation states:

---

(4) Continued.

On interpretation, in general, by the Fund, of its Articles of Agreement, see J. E. S. Fawcett, The Place of Law in an International Organization (1961) 36 B.Y.I.L. 322; J. Gold, The Interpretation by the International Monetary Fund of its Articles of Agreement (1954) 3 I.C.L.Q. 256; J. Gold, The Interpretation by the International Monetary Fund of its Articles of Agreement II (1967) 15 I.C.L.Q. 289; J. Gold, Interpretation by the Fund, 1968, IMF Pamphlet Series, No. 11; E. P. Hexner, Interpretation by Public International Organizations of their Basic Instruments (1959) 53 A.J.I.L. 341; F. A. Mann, The 'Interpretation' of the Constitutions of International Financial Organizations (1969) 43 B.Y.I.L. 1.

(5) See Gold (1962) op. cit. supra, pp. 12-13, 50.

"Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with the Agreement shall be unenforceable in the territories of any member.

"The meaning and effect of this provision are as follows:

"1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non-performance.

"2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2.

"An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

"The Fund will be pleased to lend its assistance in connection with any problem which may arise in relation to the foregoing interpretation or any other aspect of Article VIII, Section 2(b). In addition, the Fund is prepared to advise whether par-

ticular exchange control regulations are maintained or imposed consistently with the Fund Agreement."(6)

The Fund Interpretation of Article VIII, Section 2(b) Binds Member-States' Courts and Administrative Authorities

Whether this and other Fund interpretations are binding on the courts and administrative authorities of member countries is a matter of some controversy between Dr. Mann and Mr. Gold.

In Dr. Mann's view: members' courts are not bound in advance by Fund interpretations; "whether or not an interpretative decision" by the Board of Governors "is or is not legally correct may freely be considered and pronounced upon ... by any municipal tribunal, provided its decision does not constitute a breach of obligation within the meaning of Article XV ..."(1); and no question of binding effect can arise in regard to a decision by the Executive Directors since such a decision may be appealed to the Board of Governors or reviewed by an arbitration tribunal under Article XVIII(c).(2) Thus, a court may

---

(6) The Fund interpretation is also set forth in full in Appendix B hereto.

(1) Mann, op. cit. supra, 43 B.Y.I.L. p. 17. Under Fund Agreement, Article XV, § 2, "Compulsory withdrawal", if a member "persists in its failure to fulfill any of its obligations under this agreement ... that member may be required to withdraw from membership in the Fund...."

(2) Mann, op. cit. supra, 43 B.Y.I.L. pp. 12-13. Mann's view may be too restrictive, for Executive Directors' decisions should also be considered final and tantamount to decisions of the Governors if no appeal from a Directors' decision has been taken within the three-month time period prescribed by the 1969 amendment to Article XVIII (b).

decide whether or not an interpretation of a provision of the Fund Agreement is actually legally correct and therefore binding upon it. However, an interpretation by the Board of Governors under Article XVIII may be highly persuasive as to what the correct interpretation of such provision should be.(3) But only when a court decides which interpretation is legally correct is it bound. The court is bound not because it may endorse, as legally correct, a pertinent Fund interpretation, but because the court has determined on its own that its interpretation is legally correct and therefore binding upon it.(4)

By comparison Joseph Gold concludes that Article XVIII interpretations bind in advance the forums of member countries. He bases his conclusion, in the main, on a discussion of the pertinent authorities.(5) The leading authority, which he

---

(3) Mann 2nd ed., op. cit. supra, p. 385, n. 2; Mann 3rd ed., op. cit. supra, p. 439, n. 3.

(4) Accord with Dr. Mann's view, see J. C. Morris and others, eds., Dicey's Conflict of Laws, 8th ed. 1967, p. 898, where it is stated: "Whether this interpretation is binding on the courts is doubtful, but even if it is not, it has strong persuasive authority." Professor Nussbaum is even more categorical: "the Fund's power does not extend to private litigation in ordinary law courts". Nussbaum, op. cit. supra, p. 529 at n. 3, p. 542, n. 44.

Mann's argument is based upon the powerful common law analogues enabling courts to review rulings by administrative agencies. Mann, op. cit. supra, 43 B.Y.I.L. pp. 15-16.

(5) J. Gold, Interpretation by the Fund, 1968, IMF Pamphlet Series No. 11, pp. 31-42. In large measure this article supersedes Mr. Gold's earlier articles on the subject, listed supra, p. 31, n. 4.

discusses is International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables and Radio Inc., et al., an administrative proceeding before the United States Federal Communications Commission.(6)

The facts in that case were: in 1949 defendant cable companies proposed to adopt revised tariffs by which the Fund would be required to pay for its official telecommunications messages at rates equal to those payable by private parties.(7) Previously, the Fund had paid at the substantially lower rates which defendant companies applied to governmental messages sent from the United States to other countries. The Fund filed a complaint with the Federal Communications Commission in which it contended that the proposed revised rates were unlawful on the ground that so long as special governmental rates existed the Fund was entitled to those special rates. The Fund's case was based in large measure on a two step argument: Article IX, Section 7 of the Fund Agreement, which provides that "the official communications of the Fund shall be accorded by members the same treatment as the official communications of other members" (8); and on the Executive Directors' interpre-

---

(6) 22 Int. L. R. 705 (1953), 8 Radio Regulations 927 (1953), F.C.C. Docket No. 9362, F.C.C. Release No. 6-11 (April 8, 1953). The case is discussed in Gold (1962) op. cit. supra, pp. 20-27, 55-59.

(7) The facts are taken from 22 Int. L. R. pp. 705-706. The case is discussed in terms of the Fund but it applies equally to the Bank.

(8) Section 11 of the United States Bretton Woods Agreements

tation that this provision applies to "rates charged for official communications of the Fund".(9)

Defendant cable companies argued that Article IX, Section 7 applied to such matters as priorities and freedom from censorship but not to rates. Further, they argued, the Fund interpretation was not conclusive. Thus, placed squarely in issue was the question whether the Fund's interpretation bound the F.C.C. The F.C.C. decided that the application of the term "treatment" had been "conclusively determined" by the Executive Directors, that the interpretation was in effect "final" and that the United States and the F.C.C. were bound by that interpretation. The Commission stated:

> "We believe that the question as to the application of the term 'treatment' in the Bank and Fund Articles to rates has been conclusively determined by the Bank and Fund Executive Directors' interpretation, by unanimous vote, that the language in question applies to rates charged for official communications of the Bank and the Fund. Under the terms of the Bank and Fund Articles of Agreement, this interpretation, in effect, is final. This procedure for issuing interpretations binding member governments does indeed appear novel; but it also appears to point the way toward speedy, uniform and final interpretations ... The United States Government is therefore bound by the Executive Directors' inter-

---

(8) Continued.
Act gives "full force and effect" to this provision in the United States.

(9) Decision No. 534-3, February 20, 1950. Selected Decisions of the Executive Directors and Selected Documents, 5th Issue, 1971, pp. 114-115.

pretation of the term 'treatment' and is under an international obligation to act in conformity therewith."(10)

The Commission also rejected defendants arguments: that the interpretation was ultra vires because the question with which it dealt did not arise between members or between the Fund and a member but between the Fund and private parties; and that the interpretation lacked finality because it had not been referred to the Fund's Board of Governors.(11)

In further support of his view, Gold discusses four other cases, three from the United States and one from Luxembourg. He asserts these cases support his conclusion that the courts consider the Fund interpretation of Article VIII, Section 2(b) binding on them,(12) but, with deference, his arguments appear tenuous and two of the American cases cited were reversed on appeal.(13)

---

(10) 22 Int. L. R. at pp. 707-708; 8 Radio Regulation at p. 944.

(11) 22 Int. L. R. at pp. 708-709; 8 Radio Regulation at pp. 944-945.

(12) The cases are: Southwestern Shipping Corporation v. National City Bank of New York, 11 Misc. 2d 397, 173 N.Y.S. 2d 509 (Sup. Ct. N. Y. Co. 1958), reversed on appeal, discussed infra pp. 62-64; Theye y Ajuria v. Pan American Life Ins. Co., 154 So. 2d 450 (4th La. Cir. Ct. of Appeals, 1963) reversed on appeal; Société Filature et Tissage X. Jourdain v. Epoux. Heynen-Bintner, 22 Int. L. R. 725 (1958), Pasicrisie Luxembourgeoise (1957), p. 35, discussed infra, pp. 54-55, 101, 102, 135, and Banco do Brazil S.A. v. A.C. Israel Commodity Co., Inc., 12 N. Y. 2d 371, 190 N. E. 2d 235, 239 N. Y. S. 2d 872 (1963), discussed infra pp. 42-45.

(13) The Southwestern Shipping and Theye y Ajuria cases.

As noted, interpretations which are ultra vires or otherwise legally incorrect have no force or effect. Judicial and administrative authorities have jurisdiction to examine and decide such questions. The interpretation by the Executive Directors of Article VIII, Section 2(b) appears to be legally correct and well within the powers of the Fund. Also, that interpretation is final for all practical purposes inasmuch as that interpretation has stood unchallenged for more than twenty years. It is submitted that once a court or other tribunal has found that an interpretation is legally correct it should be bound to apply that interpretation by the obligation of the Fund Agreement and not by the force of its own determination. The one decision squarely in point - The All American Cables case - supports this conclusion.

Unfortunately the Fund interpretation of Article VIII, Section 2(b) gives little help in construing certain of the key terms of the first sentence of that provision - such terms as "exchange contracts", "currency" and "involve". But the Fund interpretation does provide a helpful clarification of the relation of Article VIII, Section 2(b) to private international law.(14) Although the Fund has not interpreted all the terms of the first sentance of Article VIII, Section 2(b), the courts are not excused from construing that sentence when

---

(14) J. Gold, The Fund Agreement in the Courts - IX (1967) 14 IMF Staff Papers 369 at p. 382 (hereinafter cited as "Gold (1967)").

necessary.(15)

The constructions and applications ascribed to the terms of the provision by the courts over the years will be discussed in the next part and otherwise throughout this essay.

---

(15) An initial reluctance to construe the sentence, expressed by Lord Justice Evershed in Kahler v. Midland Bank, Ltd. [1948] 1 All E. R. 811 at p. 819 discussed infra, pp. 117-118 and by the court in Cermak v. Bata Akciova Spolecnost, 80 N. Y. S. 2d 782 at p. 785 (Sup. Ct. N. Y. Co. 1948) has given way to a willingness on the part of the courts to construe the provision. See, for example, Sharif v. Azad [1967] 1 Q. B. 605, [1966] 3 All E. R. 785, [1966] 3 W. L. R. 1285, discussed infra, pp. 57-60 and Banco do Brazil S.A. v. A.C. Israel Commodity Co., 12 N. Y. 2d 371, 190 N. E. 2d 235, 239 N. Y. S. 2d 872 (1963), cert. denied, 376 U. S. 906, 84 S. Ct. 657, 11 L. Ed. 2d 605 (1964) discussed infra, pp. 42-45.

PART III

INTERPRETATION OF THE FIRST SENTENCE OF ARTICLE VIII, SECTION 2(b) OF THE FUND AGREEMENT: THE EFFECT OF EXCHANGE CONTROL REGULATIONS ON "EXCHANGE CONTRACTS WHICH INVOLVE THE CURRENCY OF ANY MEMBER"

"Exchange Contracts" Are Those Contractual Transactions Which Affect the Exchange Resources of Any Member of the Fund

The breadth of the threshold term "exchange contracts" has not been settled, but, according to the better view, that term includes all contractual relationships which affect the exchange resources of any Fund member.(1) Conflicting views stem from the obscurity of the term.(2) As the subject of the sentence in question, the importance of the term "exchange contracts" is apparent for it defines, in major part, the scope of Article VIII, Section 2(b).(3) The meaning of

---

(1) F. A. Mann, The Legal Aspect of Money, 3rd ed. 1971, pp. 441-442.

(2) J. Gold, The Fund Agreement in the Courts, 1962, p. 81 (hereinafter referred to as "Gold (1962)"); Mann 3rd ed., op. cit. supra, p. 440; Morris and others, eds., Dicey's Conflict of Laws, 8th ed. 1967, p. 899.

(3) Dr. Mann holds the view that the term "exchange contracts" defines the scope of the clause. Mann 3rd ed., op. cit. supra, p. 440. Although Mr. Gold lays greater emphasis on the phrase "which involves the currency of any member", he is in essential agreement with Dr. Mann on the meaning of the term. See, Gold, The Cuban Insurance Cases and The Articles of the Fund, 1966, IMF Pamphlet Series, No. 8, pp. 27-35 (hereinafter cited as "Gold (1966)").

both of the words "contract" and "exchange" are much discussed in the writings.(4) And, both words have independent and conjunctive importance to a proper interpretation of the term. Unfortunately, neither the travaux préparatoires nor the Fund interpretation of the sentence is conclusive on which construction is to be preferred.(5) Thus interpretation has been based, on the one hand, upon the economic policies sought to be implemented by the Fund Agreement and, on the other, upon the traditional legal technique of interpreting an agreement or a statute strictly according to its terms.(6) From these approaches three suggestions have emerged as to what is meant by "exchange contracts".

—The First Suggestion:
A Narrow Interpretation

The first of these suggestions holds that "exchange contracts" are contracts, as defined in law, which have as their immediate object the exchange of an international media of payment, usually the exchange of one currency for another.(7)

---

(4) Mann 3rd ed., op. cit. supra, p. 440; F. A. Mann, Money in Public International Law (1949) 26 B.Y.I.L. 279; Nussbaum, Money in the Law National and International, rev. ed. 1950, pp. 542-543.

(5) See supra, pp. 23-28.

(6) See, e.g., Independent Coal & Coke Co. v. United States, 274 U.S. 640, 47 S. Ct. 714, 71 L.Ed. 1270 (1927); 4 Williston on Contracts, 3rd ed. (Jaeger) 1961, Sec. 602A, pp. 325-334.

(7) This suggested interpretation probably originated with Professor Nussbaum, Exchange Control and the Interna-

This narrow construction of "exchange contracts" was endorsed and the broad construction was rejected by the New York Court of Appeals, in dicta, in Banco do Brazil S.A. v. A.C. Israel Commodity Co., Inc.(8)

---

(7) Continued.
tional Monetary Fund (1950) 59 Yale L. J. 421; also, Nussbaum, op. cit. supra, pp. 542-543. Similarly, R. M. Cabot, Exchange Control and the Conflict of Laws: An Unsolved Puzzle (1951) 99 U.P.L.R. 476 at p. 495. Nussbaum's suggestion has been carried forward in Morris, Dicey's Conflict of Laws, op. cit. supra, p. 899.

Compare, G. R. Delaume, Legal Aspects of International Lending and Economic Development Financing, 1967, p. 294: Whatever the merits of the respective interpretations of Article VIII, Section 2(b), it seems clear that international loans which call for payment of currency, including bonds, debentures and notes fall within the scope of that provision. But, compare the suggestion that life insurance contracts are not "exchange contracts". See, R. R. Paradise, Cuban Refugee Insureds and the Articles of Agreement of the International Monetary Fund (1965) 18 U. Fla. L. Rev. 29 at p. 56.

(8) Reported at, 12 N. Y. 2d 371, 190 N. E. 2d 235, 239 N. Y. S. 2d 872 (1963), cert. denied, 376 U. S. 906, 84 S. Ct. 657, 11 L. Ed. 2d 605 (1964). See also, 32 Int. L. R. 371 (1963). Reported below, 29 Misc. 2d 229, 215 N. Y. S. 2d 3 (Sup. Ct. N. Y. Co. 1961), 13 A. D. 2d 652, 216 N. Y. S. 2d 669 (1st Dept. 1961).

The case has been discussed and noted as follows: R. K. Baker, Extraterritorial Enforcement of Exchange Regulations (1963) 16 Stan. L. R. 202; J. Gold (1962) op. cit. supra, pp. 135-139; J. Gold, The Fund Agreement in the Courts - VIII (1964) 11 IMF Staff Papers 457 at pp. 468-476 (hereinafter this article is cited "Gold (1964)"); G. W. Pohn, Court Refuses to Put Export Import Contract Within Bretton Woods Agreement (1963) 15 Syracuse L. R. 100; P. Schiff, Conflict of Laws; International Law: Right of a Foreign Government to Maintain Action in Fraud and Deceit (1964) 49 Corn. L. Q. 660; F. Trickey, The Extraterritorial Effect of Foreign Exchange Control Laws (1964) 62 Mich. L. R. 1232; Bretton Woods Agreement Held Not To Provide Tort Action for Evasion of Foreign Exchange Control Laws (1963) 63 Col. L. R. 1334; Enforceability of Foreign Exchange Controls in the United States (1964) 59 Nw. U. L. R. 249.

In that case plaintiff, Banco, an instrumentality of the Brazilian Government, brought an action against defendant-coffee-importers, Israel, et al., alleging: that defendant-importers had conspired with Brazilian coffee exporters to evade Brazil's exchange control regulations; that the regulations required the exporters to surrender to Banco their rights to receive American dollars in return for Brazilian cruzeiros at the official rate of exchange - 90 cruzeiros to the dollar; that instead defendant-importers had agreed to pay American dollars directly to the exporters; that such dollars could be sold on the Brazilian free market at 220 cruzeiros to the dollar; and that the exporters' object was to obtain free market rates for dollars in Brazil and the importers' object was to obtain a purchase price for coffee lower than that established by Brazilian law.

Banco claimed damages against defendants in the amount of $1,800,000. That is, Banco claimed the difference between what it would have had to pay for the same number of dollars in the free market and what it would have paid for them if the exporters had been constrained by the regulations. The amount Banco claimed was equal to the total amount of the dollar proceeds of the exports in question.

At the outset of the action Banco attached defendant, Israel's New York property. Israel moved to vacate the attachment on the grounds that the complaint failed to state a cause of action. The Supreme Court, New York County, vacated the attachment and plaintiff, Banco, appealed. The Appellate

Division unanimously affirmed but without opinion, and Banco appealed once again. The New York Court of Appeals affirmed, 4-3, holding that the complaint failed to state a cause of action. In its opinion the Court set forth the views of Professor Nussbaum and those of Dr. Mann on the meaning of the term "exchange contracts" and indicated in dicta, a preference for a narrow construction of that term saying:

> "...We are inclined to view an interpretation of subdivision (b) of Section 2 that sweeps in all contracts affecting any members' exchange resources as doing considerable violence to the text of the section. It says 'involve the currency' of the country whose exchange controls are violated; not 'involve the exchange resources'. While noting these doubts, we nevertheless prefer to rest this decision on other and clearer grounds".(9)

The Court rested its decision on two grounds: first, it said that an obligation to withhold judicial assistance to secure the benefits of an exchange contract which violates Section 2(b) does not impose tort penalties on those who have fully executed such contracts; and second, it said that an instrumentality of the Brazilian Government may not sue in the New York courts to enforce what is clearly a revenue law. These grounds for the Court's decision and the effect and implica-

---

(9) 12 N. Y. 2d at pp. 375-376, 190 N. E. 2d at p. 236, 239 N. Y. S. 2d at p. 874.

Accord: dissent in Brill v. Chase Manhattan Bank, 14 A.D. 2d 852, 852, 220 N. Y. S. 2d 903, 904 (1st Dept. 1961) which stated that a cashier's check drawn on a Cuban branch of defendant, Chase Bank, issued in Cuba in return for Brill's deposit of Cuban pesos, if payable in dollars at the Chase Bank in New York "is what an exchange contract is", for it "represented a purchase of the equivalent amount of dollars for Cuban pesos".

tions of them are discussed in Part IV of this essay.(10)

Thus has the highest court of New York rejected the interpretation of "exchange contracts" as meaning those contracts which affect the exchange resources of a country.(11) The court has taken a purely linguistic approach to the provision and has ignored the broad international economic policy considerations which underlie Section 2(b) of Article VIII. It is suggested, therefore, that the Court's dicta should be accorded little force or effect as precedent.(12)

Similarly, the Court of Appeal (Oberlandesgericht) at Hamburg, Germany, decided in 1959 that the concept "exchange contracts" does "not cover per se the sale of goods for money."(13) In that case a German company sued for the price of a number of pinball machines sold to defendant, a resident of the Saar territory, which was then under French control. The Court found that no "exchange contract" was involved, saying that a contract for the sale of goods for money would not be classified as an exchange contract unless something more than a bare pecuniary obligation is established. By contrast in

---

(10) See infra, pp. 124-125.

(11) This interpretation is discussed infra, pp. 50-64.

(12) Gold (1962) op. cit. supra, p. 27 at n. 40.

(13) Entscheidungen zum Intersonalen Privatrecht, 1958-59, No. 135A. This case is stated and discussed in Gold (1964) op. cit. supra, pp. 457-465.

the Clearing Dollars Case decided in 1954 the Court, a Commercial Court in Hamburg,(14) assumed that an agreement between Belgium residents and a Hamburg firm for the purchase from the latter of 500 tons of sulphate of ammonia at 46 U. S. "Clearing Dollars" per 1,000 kilograms, payment to be made under Belgian-West German Clearing, was an "exchange contract".(15) Both these German cases should be compared with the later decision of the Supreme Court of Germany in the "maize refining" case(16) which embraced the more liberal interpretation of "exchange contracts".

The decision in Emek v. Bossers & Mouthaan(17) decided in 1953 by the Commercial Tribunal at Courtrai, Belgium also embraced a narrow construction. There Belgian plaintiffs sued Dutch defendants for damages for breach of an agreement regarding the exploitation of plaintiffs' method of manufacturing cork shoe soles. The Court, citing six reasons, rejected defendants' contention of the "absolute voidness" of the contract.(18) Among the six reasons the Court pointed out that

---

(14) 22 Int. L. R. 730 (1954). This case is discussed in Gold (1962) op. cit. supra, pp. 79-82.

(15) Other aspects of the decision in this case are discussed infra, pp. 69-70.

(16) Discussed infra. p. 54, n. 42.

(17) 22 Int. L. R. 722 (1953).

(18) See discussion of the meaning of "unenforceable", infra, pp. 96-102. This case is discussed in Gold (1962) op. cit. supra, pp. 79-82.

there was no general agreement by the authorities that the term "exchange contracts" included "a normal international contract involving commodities and payable in money".(19)

The term as narrowly defined describes only those contracts in which the exchange of currency or other international media of payment, gold, for example, is the object of international commerce. This interpretation excludes not only contracts involving securities or merchandise(20) but also conveyances of land, and transfers and assignments of tangibles and intangibles.(21)

Significantly, this interpretation is tantamount to the Fund Agreement description of "exchange transactions" between a member's currency and the currency of other members.(22) Inasmuch as Article VIII, Section 2(b) was originally drafted in terms of "exchange transactions",(23) but later revised to

---

(19) To similar effect is the statement of the District Court of Maastricht, Netherlands, in Frantzmann v. Ponijen (30 Int. L. R. 423 (1959), Nederlandse Jurisprudentie, 1960, No. 290 (in Dutch), Tijdschrift, VIII (1961), p. 190 (in English)) that a contract for the exchange of Indonesian currency for Dutch currency "constitutes an exchange contract within the sole meaning of this term". The Frantzmann case is discussed elsewhere in this essay, see infra, pp. 90, 112-113, 121-122; and it is also discussed in Gold (1962) op. cit. supra, pp. 113-118.

(20) Nussbaum, Money in the Law National and International, op. cit. supra, p. 543.

(21) Contrast, Mann 3rd ed., op. cit. supra, p. 440.

(22) Fund Agreement, Article IV, Sec. 3; Article IV, Sec. 4 (b); and see also Article XI, Sec. 2. Emphasis added.

(23) Proceedings and Documents of the United Nations Monetary

reach "exchange contracts",(24) it may be inferred that the use of "exchange contracts" in Article VIII, Section 2(b) shows that the draftsmen intended to convey a meaning different from that conveyed by "exchange transactions", used elsewhere in the Fund Agreement.(25)

From this difference in terms Professor Nussbaum concluded that it was "obvious" that "exchange contract" had a "narrower significance" than the term "exchange transactions".(26) But, it can likewise be asserted, and with equal force, that the use of the different term, "exchange contracts" was intended to convey a broader meaning than the term "exchange transactions". Thus the validity of Professor Nussbaum's conclusion seems to be subject to considerable doubt. One point is certain, however, a narrow construction denies effect to, rather than implements the broad economic policy of the Fund Agreement. Such narrow interpretation should, therefore, in the interests of international economic cooperation, be avoided.

---

(23) Continued.
and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, 2 vols. 1948 (hereinafter referred to as "Proceedings"), Doc. 32, p. 54. See, generally, supra, pp. 23-28.

(24) Unfortunately, no statement of the reasons for the change is given. Proceedings, op. cit. supra, Doc. 448, p. 808. See supra, p. 28.

(25) Mann 3rd ed., op. cit. supra, p. 441.

(26) Nussbaum, op. cit. supra, p. 542.

—The Second Suggestion:
Dr. Mann's Early View

A second suggested interpretation of the term "exchange contract" is open to criticism similar to that made of the first suggestion. Dr. Mann set forth this interpretation in 1947 but has now abandoned it.(27) He defined an exchange contract as a contract by which one of the parties promises to pay a sum of money in the currency of a country whose exchange control regulations prohibit the transaction. Dr. Mann gives this example: if by contract made in England, A, an American, promises to pay B, a Swiss, French francs in France and the contract is contrary to French exchange control regulations, then the contract is unenforceable in England. But the contract would probably be enforceable in England if, contrary to French but not to Belgian exchange control regulations, A promised to pay Belgian francs to B in France.(28)

This interpretation includes within the purview of Article VIII, Section 2(b) all contractual transactions for payment in the currency of the country where the contract is to be performed, if the contract is contrary to the exchange

---

(27) F. A. Mann, The Exchange Control Act, 1947 (1947) 10 Mod. L. R. 411 at p. 418. For statements of his later view see F. A. Mann, Money in Public International Law (1949) 26 B.Y.I.L. 279; and Mann, The Private International Law of Exchange Control Under the International Monetary Fund Agreement (1953) 2 I.C.L.Q. 102; and Mann 3rd ed., op. cit. supra, pp. 441-442. These views are discussed infra, pp. 50-53.

(28) F. A. Mann, The Exchange Control Act, 1947 (1947) 10 M. L. R. 411 at p. 418.

control regulations of that country. This suggested interpretation is, in some respects, broader than the first for it includes contracts which provide for the payment of currency otherwise than in return for a foreign currency and could include for example, contracts for the sale of goods. But excluded are two categories of contracts: 1) those for the sale of goods for gold, for securities, or for currencies of other countries where payment is to be made in the country whose foreign exchange resources are affected and whose exchange control regulations would be violated if payment was made in currency; and 2) contracts such as that referred to above calling for payment of Belgium francs in France.(29) This suggestion has been abandoned by its author,(30) criticized by other writers,(31) and disregarded by the courts.(32) It is properly criticized and disregarded for it is a restrictive definition which would not be easy for the courts to apply.

—The Third Suggestion:
A Broad Construction

The third suggestion is that "exchange contracts" are those contracts which "in any way affect a country's exchange

---

(29) Mann 3rd ed., op. cit. supra, p. 441.

(30) See supra, p. 49.

(31) See, Gold (1962) op. cit. supra, p. 54, n. 38.

(32) In Banco do Brazil S.A. v. A.C. Israel Commodity Co., Inc. supra, the majority noted this as a possible interpretation, 12 N. Y. 2d at p. 375, 190 N. E. 2d at p. 236, 239 N. Y. S. 2d at p. 874.

resources".(33) That is, an exchange contract is a contract which would, when performed, increase or decrease, in an economic sense, the amount of foreign exchange or other international reserves which are under the control of the country, whose "currency" is involved.(34)

This broad definition of the term "exchange contracts" includes: contracts for the exchange of one currency for another; transnational contracts for the sale or purchase of goods or services; and international loan agreements, including contracts providing for the transfer of securities from a resident to a non-resident. But, the term "contract" is a limiting one - it does not apply to claims arising ex delicto or to claims arising on the devolution of property. However, claims by the owner of a chattel against the possessor may be included since they are often founded on contract. (35)

---

(33) Mann 3rd ed., op. cit. supra, p. 441. See also, F. A. Mann, Money in Public International Law (1949) 26 B.Y.I.L. 259 at p. 279; F. A. Mann, The Private International Law of Exchange Control Under the International Monetary Fund Agreement (1953) 2 I.C.L.Q. 97 at p. 102. To the same effect, Gold (1966) op. cit. supra, pp. 25-27, 30-33; Gold (1965) op. cit. supra, p. 24; J. Gold and P. R. Lachman, The Articles of Agreement of the International Monetary Fund and Exchange Control Regulations of Member States (1962) 89 Journal du Droit International (Clunet) 666 at p. 674 (hereinafter cited "J.D.I. (Clunet)").

(34) The interpretation of the term "involve the currency" is discussed infra pp. 65-77.

(35) B. S. Meyer, Recognition of Exchange Controls After the International Monetary Fund Agreement (1953) 62 Yale

Further, this third suggested interpretation appears to be in accord with the first purpose of the Fund Agreement, "to promote international monetary cooperation".(36) Such interpretation does, however, make the word "exchange" superfluous, for the clause, "exchange contracts which involve the currency of any member", could have simply been drafted to read: "contracts which involve the currency of any member".(37) To thus ignore the important word "exchange" may be contrary to established principles of treaty interpretation,(38) but that flaw should not be fatal in light of the difficulty encountered in negotiating that provision and the need to achieve the overriding purposes of the Fund Agreement. And, this suggested interpretation presents other difficulties. For example, Mr. Gold queries: whether and should this definition reach a contract by non-residents of state A which calls for performance within state A in the currency of state A, but with assets from without state A, since at once on performance the foreign exchange resources of state A are increased with the purchase of

---

(35) Continued.
L. J. at pp. 887-888. Cf. Mann, Money in Public International Law, op. cit. supra, 26 B.Y.I.L. at p. 279, who states that the provision does not extend to claims by the owner of a chattel against the possessor and for this reason Article VIII, Section 2(b) was immaterial to the cases of Kahler v. Midland Bank Ltd. [1949] 2 All E. R. 621, [1950] A. C. 24 and Frankmann v. Zivnostenska Banka [1949] 2 All E. R. 671, [1950] A. C. 57. These cases are discussed infra pp. 115-118.

(36) Fund Agreement, Article I, (i).

(37) Mann 3rd ed., op. cit. supra, p. 441.

(38) See supra, pp. 21-23.

state A's currency by the payor and then depleted through the sale of state A's currency by the payee.(39) In any event, this liberal construction of "exchange contracts" has been adopted in a number of leading court decisions.

The earliest of these decisions is Lessinger v. Mirau decided in 1954 by the West German Court of Appeal (Oberlandesgericht) at Schleswig.(40) The facts are picturesque. In May, 1949, the parties, who were Austrian citizens, agreed that plaintiff, Lessinger, was to loan defendant, Mirau and one Karplus 30,000 Austrian shillings to try out a system of roulette in the casino at San Remo. In return, Lessinger was to receive thirty per cent of the profits but was not to share in any of the losses. Also, Mirau and Karplus "guaranteed" Lessinger 3,000 Austrian shillings a month. Lessinger in fact furnished Mirau and Karplus U.S. $1,000, the equivalent of 30,000 Austrian shillings. The payment was in violation of Austrian exchange control regulations. As might be imagined, Mirau and Karplus lost the money at the gambling tables and failed to make any repayment. Mirau thereafter took up residence in Germany.

Lessinger brought this action in the Provincial Court (Landgericht) at Lübeck.(41) He sought the equivalent in

---

(39) Gold (1966) op. cit. supra, pp. 30-33.

(40) 22 Int. L. R. 725 (1954), Jahrbuch für Internationales Recht, V (1955), p. 113. The case is discussed in Delaume, op. cit. supra, p. 298 and in Gold (1962) op. cit. supra, pp. 90-94.

(41) The Provincial Court (Landgericht) is the German court of first instance.

German currency of U.S. $1,000 plus interest. The Landgericht dismissed Lessinger's claim and he appealed. The Court of Appeal affirmed, and stated that both West Germany and Austria are parties to the Fund Agreement; that the loan contract was void under Austrian exchange control regulations; that Article VIII, Section 2(b) obligated the German courts to apply Austrian exchange control regulations and thus breach of the loan agreement did not give rise to a claim for repayment of the amount loaned because the agreement was an exchange contract within the meaning of Article VIII, Section 2(b). Regarding the meaning of the term "exchange contract" the court stated:

> "...Undoubtedly, the contract of loan is a contract in the sense of Article VIII... It is also an exchange contract within the meaning of this provision. For exchange contracts are contracts which...prejudice the currency of a member...This interpretation is the only one compatible with the purpose of the control of foreign exchange resources..."(42)

In 1956 the Tribunal d'Arrondissement de Luxembourg (Civil) decided Societe Filature et Tissage X. Jourdain v.

---

(42) 22 Int. L. R. at p. 727. A further aspect of the case denying recovery on a quasi-contractual theory is discussed infra, p. 121.

And, the Supreme Court of West Germany on May 26, 1962 (Wertpapier-Mitteilungen, No. 21, pp. 601-602), in an action for monetary compensation assumed that an agreement between plaintiff "finder" and defendant, Austrian sugar refiner, by which plaintiff was to receive "commission or goods" in respect of all maize processed by defendant for all German firms, with certain exceptions, was an exchange contract. This case is discussed in Gold (1964) op. cit. supra, pp. 465-468.

Epoux. Heymen-Bintner.(43) In that case the court declared that a contract by which Jourdain, a French firm, agreed to sell to Strange, a resident of Luxembourg, seven bales of poplin for 641,685 French francs "constitutes an exchange contract within the meaning of Article VIII, Section 2(b)" of the Fund Agreement. Thus the court held that a contract for the sale of merchandise in return for currency is an "exchange contract" and implicitly rejected the restrictive construction of that term.(44)

In 1961 the Court of Appeal (Cour d'Appel) at Paris (First Chamber) decided the important case of Moojen v. Von Reichert.(45) There the Court found that plaintiff, Moojen, was an "effective resident" of the Netherlands; that defendant, Von Reichert, was a citizen and resident of West Germany; that the corporation which was involved, the Gutenberg Corporation, was incorporated under French law and had its principal place of business in France; and that Moojen's contract of assignment and sale to Von Reichert of 230 of his shares in Gutenberg in return for payment in French francs was an exchange contract within Article VIII, Section 2(b) of the Fund Agreement.

---

(43) 22 Int. L. R. 727 (1956), Pasicrisie Luxembourgeoise (1957) p. 35. The case is discussed in Gold (1962) op. cit. supra, pp. 94-96.

(44) See supra, pp. 41-48.

(45) Revue Critique de Droit International Privé, vol. II (1962) p. 67, 89 Journal du Droit International (Clunet) (1962) p. 718. The case is discussed in Gold (1962) op. cit. supra, pp. 143-153.

The Court held the contract of assignment null and void, reasoning: The principal purpose of the Fund Agreement is not to "ensure the stability of money parities" but rather "to promote international monetary cooperation." Thus, it is necessary to examine whether the contract of sale can have a "detrimental effect" on the "currency resources" of the Netherlands, a Fund member. A contract of sale between a Dutch resident and a German resident "expressed in French francs" can "affect the Dutch economy" for the Netherlands has an interest in the repatriation of the foreign currency obtained from the sale of the shares. The court said:

> "But whereas the primary object of the Bretton Woods Agreement was 'to promote international monetary co-operation'; whereas it is accordingly necessary to ensure as efficient a co-operation as possible, to determine if the contract in question may have a detrimental effect on the financial situation of the Member State [the Netherlands] or, in other words, if it is liable to affect in any way the currency resources of that country;
>
> "Whereas it is beyond doubt in the present case that although the contract in dispute was expressed in French francs, it can affect the Dutch economy, it being in the interest of the Treasury of that country that its resident, having obtained a fair price for the shares of which he was the owner, should repatriate the currency obtained".(46)

The court went on to reject defendant, Von Reichert's further arguments: a) that a contract for the sale of shares

---

(46) 89 J. D. I. (Clunet) op. cit. supra, p. 725.

in a French corporation, with its place of business in France, for French francs did not constitute an exchange contract involving the currency of the Netherlands; and b) that Article VIII, Section 2(b) covers only exchange contracts that are contrary to exchange control regulations that affect transfers and paymehts for current, as distinguished from capital or other, international transactions.(47)

A further significant holding favoring the broad construction of "exchange contracts" is the 1966 English Court of Appeal decision in Sharif v. Azad.(48) In that case plaintiff, Sharif, sought to recover on defendant, Azad's, £ 300 check. Azad defended on the ground that the underlying transaction was illegal, void and unenforceable. He rested his defense on the facts that one Latif, a resident of Pakistan, came to England in 1964 for a short visit; that Latif, needing funds, obtained £ 300 from plaintiff, Sharif, and in return gave Sharif a check for 6,000 Pakistan rupees with the payee's name left blank; that Latif's check was drawn on a Pakistan bank; that Latif did not have permission from the Pakistan exchange control authorities to exchange rupees for sterling; thus delivery to Sharif by Latif of his rupee check was in contravention of Pakistan exchange control laws; that Sharif

---

(47) Id. P. 727. This point is discussed further infra, pp. 112-113.

(48) Reported at [1967] 1 Q. B. 605, [1966] 3 All E. R. 785, [1966] 3 W. L. R. 1285, 41 Int. L. R. 230 (1966).

had sold Latif's check to defendant, Azad, a travel agent, who paid Sharif with the check in issue - a post-dated check for £ 300; that Azad had inserted the name of his brother, who was living in Pakistan, as the payee in the Latif check; that the Pakistan authorities became suspicious and withheld payment on the Latif check; and that Azad had accordingly stopped payment on his check to Sharif. Sharif then sued on Azad's check.

The County Court gave judgment for Sharif and Azad appealed. The Court of Appeal unanimously dismissed the appeal, in effect affirming the judgment below. The Court of Appeal distinguished two contractual transactions: the first between Latif and Sharif and the second between Sharif and Azad. The Court held the first of these would have been unenforceable as a result of Article VIII, Section 2(b) of the Fund Agreement, which has the force of law in the United Kingdom. But the second transaction, although an "exchange contract" was not unenforceable under Pakistan law and thus was not unenforceable in the United Kingdom under Article VIII, Section 2(b). The Court said that Sharif could succeed on his claim, as it was based on the second transaction, for that exchange contract was not prohibited by Pakistan law.

In stating its decision, the Court gave the term "exchange contracts" a broad construction. Lord Justice Diplock stated that the term "should be liberally construed having regard to the objects of the Bretton Woods Agreement to protect the currencies of the states who are parties". He con-

tinued:

> "...I should be prepared to hold that the following were 'exchange contracts' viz., (1) the agreement between the plaintiff [Sharif] and Latif whereby the plaintiff agreed to pay Latif 300 pounds for the rupee cheque; (2) the agreement...whereby the defendant [Azad] agreed to issue...his cheque for 300 pounds in exchange for the rupee cheque...and (3) the contracts between Latif and the successive holders of the rupee cheque....
>
> "But not all these 'exchange contracts' were contrary to the provisions of the Foreign Exchange Regulations Act, 1947, of Pakistan...."(49)

And Lord Denning, Master of the Rolls, stated that in his view exchange contracts are "any contracts which in any way affect the country's exchange resources", saying in part:

> "The words 'exchange contracts' are not defined, but I think that they mean any contracts which in any way affect the country's exchange resources. The contracts with which we are concerned here are all clearly exchange contracts. They affect the exchange resources of Pakistan and England. If they offend against the currency regulations of Pakistan or England, they are unenforceable...."(50)

The language of the justices' opinions gives a broad sweep to the first sentence of Article VIII, Section 2(b). But the Court, in limitation of its own recognition of the policy of the Fund Agreement, did not implement the policy of the Pakistan exchange control regulations.(51) Rather, the

---

(49) [1967] 1 Q. B. at p. 618, [1966] 3 All E.R. at pp.789-790.

(50) [1967] 1 Q. B. at pp. 613-614, [1966] 3 All E.R. at p.787.

(51) If the transaction was stopped it was as a result of the action of the Pakistani authorities in withholding pay-

Court severed the illegal and unenforceable from the legal part of the transaction and enforced the latter.

There are no American decisions which clearly support a liberal interpretation of the term "exchange contract". However, two cases, both decided by the New York Court of Appeals, are of interest. The first is Perutz v. Bohemian Discount Bank in Liquidation.(52) In that case plaintiff's decedent, Perutz, a citizen and resident of Czechoslovakia, had been an employee of a predecessor of defendant bank, a Czechoslovakian corporation with its principal place of business in Prague. In 1938, Perutz became entitled to a pension of 6,000 Czech crowns per month payable at the bank's Prague office. He received his pension through October 1942 even though, in 1940, Perutz had left Czechoslovakia. He became a United States citizen in 1945 and died there in 1949.

Before he died Perutz commenced this action to recover the United States equivalent of 396,857 Czech crowns due him but paid into a blocked account at the bank in Prague, and he attached defendant bank's funds in New York. Czech regulations forbade payment in currency or foreign exchange to a non-resident unless licensed by proper authority and no li-

---

(51) Continued.
ment on the 6,000 rupee check and not as a result of the refusal of the court to enforce an exchange contract which was contrary to the Pakistan exchange control regulations.

(52) Reported at 304 N. Y. 533, 110 N. E. 2d 6 (1953); also, 22 Int. L. R. 715 (1953). Reported below at N.Y.L.J.,

cense had been obtained for payment to Perutz. On a stipulation of facts the Supreme Court dismissed the complaint and Perutz appealed.

The Appellate Division, 3-2, reversed and granted judgment to plaintiff for $7,937.14, the dollar equivalent of 396,857 Czech crowns. The bank appealed. The Court of Appeals unanimously reversed the Appellate Division, stating that the contract was governed by Czechoslovakian law and that the "Czechoslovakian currency control laws in question cannot here be deemed to be offensive. . .[as "contrary to our public policy"], since our Federal Government and the Czechoslovakian Government are members of the International Monetary Fund".(53)

Unfortunately, the Court made no express mention of Article VIII, Section 2(b) or of any other specific provision of the Fund Agreement. But it is argued that the case was decided on the basis of Article VIII, Section 2(b).(54) Therefore it follows that the contract involved was an exchange contract in that it affects the exchange resources of

---

(52) Continued.
Feb. 5, 1951, p. 440, col. 4 (Sup. Ct. N. Y. Co. 1951), reversed 279 App. Div. 386, 110 N. Y. S. 2d 446 (1st Dept. 1952). The Perutz case is noted: Use of Bretton Woods Agreement in Enforcement of Foreign Currency Restrictions by American Courts (1953) 53 Col. L. R. 747. The Perutz case is discussed in Meyer, op. cit. supra, 62 Yale L. J. pp. 899-900.

(53) 304 N. Y. at p. 537, 110 N. E. 2d at pp. 7-8. Brackets added.

(54) Gold (1962) op. cit. supra, pp. 52-54; Meyer, op. cit. supra, 62 Yale at pp. 899-900.

a country.(55) This interpretation has, however, become somewhat less tenable since the pronouncement of the New York Court of Appeals in Banco do Brazil S.A. v. A.C. Israel Commodity Co., Inc.(56)

The second New York Court of Appeals case bearing on the interpretation of the term "exchange contract" is Southwestern Shipping Corporation v. National City Bank of New York.(57) There plaintiff, Southwestern, brought the action to recover $37,222 paid by the defendant, Citibank, to one Anlyan, rather than, as promised, to Southwestern. The suit arose as follows: In 1951 Garmoja, an Italian concern, placed an order with Southwestern for 300 tons of fatty acid, for $37,222. Garmoja did not obtain the required importers' license to pay dollars. Instead, Garmoja arranged with Corti, another Italian concern (which had a license to pay dollars to Anlyan for the importation of rags) to deposit the lire equivalent of $37,222 in Corti's account at Credito Lombardo, an Italian bank. Credito

---

(55) An alternative interpretation of the case and the impact of the decision regarding conflict of laws and public policy are discussed elsewhere herein, pp.132-133, 150-151.

(56) See supra, pp. 42-45.

(57) Reported at 6 N. Y. 2d 454, 160 N. E. 2d 836, 190 N.Y.S. 2d 352 (1959), also, 28 Int. L. R. 539 (1959), cert. denied, sub nom., First National City Bank of New York v. Southwestern Shipping Corporation, 361 U. S. 895, 80 S. Ct. 198, 4 L. Ed. 2d 151 (1959). Reported below at 11 Misc. 2d 397, 173 N.Y.S. 2d 509 (Sup. Ct. N. Y. Co. 1958), aff'd, 6 A. D. 2d 1036, 178 N.Y.S. 2d 1019 (1st Dept. 1958).

The principal case is noted by R. S. Supowitz in (1959) 21 U. Pitt. L. R. 551 and discussed by Gold (1962) op. cit. supra, pp. 97-100, 102-108.

would transmit a credit for the dollar equivalent to Citibank in favor of Anlyan and Anlyan would assign the dollars to Southwestern. Anlyan made the assignment, Southwestern so notified Citibank and Citibank promised to pay Southwestern. Thereafter Garmoja paid 23,310,000 lire to Credito for Corti's account. The Italian exchange control authorities transferred $37,222 by cable to Citibank for Anlyan, with instructions to pay Anlyan. Citibank paid Anlyan instead of Southwestern as promised and Anlyan absconded with the funds.(58) Citibank refused to reimburse Southwestern and Southwestern brought suit.

After trial the Supreme Court of New York set aside a jury verdict for Southwestern on the grounds: that the agreement between Garmoja and Corti and the assignment by Anlyan to Southwestern were in violation of Italian exchange control regulations and were illegal; and that Southwestern was either the alter ego of, or agent for Garmoja. Thus the Court applied Article VIII, Section 2(b) and barred the suit. The Appellate Division unanimously affirmed, without opinion, and Southwestern appealed. The Court of Appeals, 5-2, reversed and gave judgment for Southwestern. In so doing it severed the illegal Garmoja - Corti agreement and Anlyan assignment

---

(58) In or about 1957 Anlyan's good fortune reached its peak. He won approximately $150,000 in the Irish Sweepstakes and gained considerable notice. But then his past caught up with him. In a case brought on his assignment and tried prior to the trial in the principal case, Southwestern sued and recovered $37,222 from him. Southwestern Shipping Corporation v. Anlyan, 5 Misc. 2d

from Citibank's obligation, "as a mere depository or transmittal - agent of the proceeds of the arrangement", to pay the $37,222 to Southwestern. By this means, the Court withheld implementation of Article VIII, Section 2(b) in a transaction clearly within the purpose of the Fund Agreement.(59)

Summary

This extensive discussion of the cases and authorities suggest the following conclusions regarding the meaning of the term "exchange contracts":

Of the three definitions which have been proposed of the term "exchange contracts" only the first and the third are advocated today. Contemporary authorities reject the first or narrow construction and favor the broad interpretation. In essence the broad interpretation is: exchange contracts are those contracts which affect the exchange resources of the member country whose currency is involved. But, the limits of the concept "affect" have not as yet been settled.

There is a good deal of case law on the meaning of the term "exchange contracts". Unfortunately, the courts are divided as to whether the broad or narrow interpretation is

---

(58) Continued.
842, 160 N. Y. S. 2d 674 (Sup. Ct. N. Y. Co. 1957), aff'd, 4 A. D. 2d 944, 168 N. Y. S. 2d 208 (1st Dept. 1957).

(59) The combined effect of the two cases, Southwestern v. National City Bank and Southwestern v. Anlyan resulted in a curious miscarriage of justice: Southwestern was handsomely rewarded for engaging in an illegal scheme. It recovered twice!

to be preferred. Recent decisions of European courts favor the broad interpretation, but decisions by Courts in the United States appear to favor the narrow view. It is submitted that the broad interpretation is to be preferred on ground of international financial and economic policy.

The Term "Involve the Currency" Should Also Be Construed in Its Broad, Economic Sense

For reasons similar to those supporting the conclusion that the term "exchange contracts" should be interpreted broadly, the phrase "involve the currency" should also be construed in a broad economic sense rather than in a narrow and legalistic way. Not only will a broad interpretation implement the economic considerations behind the adoption of Article VIII, Section 2(b) but a broad interpretation is implicit in the word, "involve".(1) "Involve" comprehends the ideas of "affecting", "relating to" and "being connected with" as well as the ideas of "including" or "containing".(2)

Two views as to the proper interpretation of the phrase have been suggested: A narrow view by Professor Nussbaum and a liberal view by Dr. Mann and Mr. Gold. As we have seen Professor Nussbaum has taken the position that "exchange contracts" are those contracts which have "international media of payment" as their exclusive object. Contracts involving

---

(1) See supra, p. 51. See also, Gold (1966) op. cit. supra, p. 27.

(2) Meyer, op. cit. supra, 62 Yale L. J. at p. 888.

goods, services or securities are excluded except where they are monetary transactions in disguise. According to Nussbaum's view, a currency is "involved" if the contract deals with or refers to "international media of payment".(3)

Dr. Mann, on the other hand, holds the view that "exchange contracts" are those contracts which affect the exchange resources of a country, and the currency "involved" is that of the country whose resources are affected.(4) Gold states that the currency of a Fund member is involved if performance of the contract would affect that member's exchange resources.(5)

---

(3) Nussbaum, op. cit. supra, pp. 542-544. To the same effect, J. C. Morris, and others, eds., Dicey's Conflict of Laws, 8th ed. 1967, p. 899: "the currency of a member is 'involved' if the contract refers to it".

The dictum of the majority of the New York Court of Appeals in the Banco do Brazil case discussed in detail supra, pp. 42-45 also supports the narrow construction of "involve the currency" and rejects Dr. Mann's broad interpretation. The court said (12 N. Y. 2d at pp. 375-376, 190 N. E. 2d at p. 236, 239 N. Y. S. 2d at p. 874): "We are inclined to view an interpretation of subdivision (b) of section 2 that sweeps in all contracts affecting any members' exchange resources as doing considerable violence to the text of the section. It says 'involve the currency' . . . not 'involve the exchange resources'." Thus the Court said that a contract between Brazilian residents and New York residents for the sale of coffee in New York for American dollars was not an exchange contract which involved the currency of Brazil within the meaning of Article VIII, Section 2(b) of the Fund Agreement.

(4) Mann 3rd ed., op. cit. supra, pp. 442-444.

(5) J. Gold, The International Monetary Fund and International Law, 1965, IMF Pamphlet Series, No. 4, (hereinafter referred to as "Gold (1965)"), p. 25; see also Gold (1962) op. cit. supra, pp. 92-93; Gold (1966) op. cit. supra, pp. 27-35.

To construe the phrase in this broad way immediately raises two important questions: what constitutes a country's exchange resources; and when may it be said that they are "affected".

—"Currency" Means Exchange Resources

As to the first question, a member's exchange resources may include assets of any type which belong to residents of that member. Thus the term "currency" includes gold and securities as well as currency and even land, moveables or intangibles.(6) By this broad construction barter transactions are caught, for the exchange of assets between a resident of a Fund member and a non-resident affects the composition of the total stock of assets of the Fund member potentially available for international transactions, that is, the exchange resources of that Fund member.(7) The following is an example of a barter contract which falls within the term "involve the currency". Hemp is an exchange resource of Bangladesh for its sale is an important means of obtaining "hard" foreign currencies. Hemp may be traded in return for foodstuffs or luxury items. These "sales" deplete the total stock of exchange resources of Bangladesh available for international

---

(6) Contra, Morris, Dicey's Conflict of Laws, op. cit. supra, p. 899: Article VIII, Section 2(b) does not apply "to transfers of property".

(7) See the "Maize Refining" case referred to supra, p. 54, n.42 where the contract was, in the alternative, a barter contract. See also, Meyer, op. cit. supra, 62 Yale L. J. at p. 889.

transactions since these are sales for items which will be consumed and not resold. Through these sales the exchange resources of Bangladesh are depleted and thereby affected.

Nor is it necessary that the quid pro quo for which the contract provides be expressed in the currency of that member of the Fund whose resident made the contract.(8) Thus, if a resident of one country undertakes to pay foreign currency to a non-resident, that country's exchange resources are affected for the resident must sell domestic currency or assets to pay for foreign currency in order to perform the contract.(9) Moojen v. Von Reichert, supra, decided by the Court of Appeal at Paris illustrates this point.(10) In that case Moojen, a resident of the Netherlands, entered into a contract to sell shares in a French corporation for French francs to a resident of Germany. The Court of Appeal held the contract to be an exchange contract which involved the currency of the Netherlands, because Moojen was a resident of the Netherlands and performance of the contract affected Dutch financial resources.(11)

---

(8) Gold (1965) op. cit. supra, p. 25.

(9) Likewise an undertaking to pay domestic currency creates a claim in the non-resident payee against the payor's country. Thus the exchange resources of the resident-payor's country are "affected". Ibid.

(10) The facts of the case are set forth at length, supra, pp. 55-56.

(11) 89 J. D. I. (Clunet) op. cit. supra, p. 725.

Similarly, in the Clearing Dollars Case decided in 1954 (12), the Hamburg Provincial Court (Landgericht) expressly found that the foreign exchange holdings, the currency, of Belgium were involved. There, defendants, Belgium residents, agreed with plaintiffs, a Hamburg firm, to purchase from the latter 500 tons of sulphate of ammonia at 46 U. S. Clearing Dollars per 1,000 kilograms. Defendants failed to obtain a Belgium import license and did not take up the goods. Plaintiffs sued for damages. The Court found that Belgian exchange reserves or currency were involved, stating:

> "The case at issue comes within the terms of this provision [Article VIII, Section 2(b)]. The present purchase contract is one which, if it were fulfilled, would involve the foreign exchange holdings or the currency of a member country, i.e., Belgium.
>
> * * *
>
> "There is no need to discuss the question whether the defendants could have resold the merchandise in transit trade, since the contract specifies payment under the Belgian/West German Clearing, thus involving Belgian foreign exchange reserves in any case."(13)

In so stating the Court also rejected plaintiffs' argument for a limited interpretation of "involve the currency"; namely, that Article VIII, Section 2(b) did not apply inasmuch as payment was to be made in Belgian francs and if the currency of payment was Belgian francs there was no "foreign exchange con-

---

(12) 22 Int. L. R. 730 (1955); otherwise unreported. The case is also discussed supra, p. 46 and infra, pp. 89-90, 99-100.

(13) 22 Int. L. R. at pp. 731-732.

tract" from the standpoint of Belgium.(14)

On the other hand, plaintiffs' argument in the Clearing Dollars Case for a limited construction of the term "involve" was put into effect by the Supreme Court of Austria in X v. Zagreb Bank.(15) The facts in that case go back to 1945 when plaintiff, then a resident of Zagreb, Yugoslavia, paid a sum of Yugoslavian currency to defendant, Zagreb Bank, which, on plaintiff's instructions, remitted it to a Vienna, Austria bank in order to open credits to pay for merchandise imports into Croatia. The funds were transferred with the approval of the Yugoslav exchange control authorities. In January, 1956, a portion of these credits remained unused and plaintiff, by that time claiming he was an Austrian resident, unsuccessfully demanded their return from the Vienna bank. That bank refused to pay unless the Zagreb Bank consented.

Thereafter, plaintiff brought suit requesting the Austrian court to order defendant, Zagreb Bank, to give its consent to the surrender of the balance to him by the Vienna bank or to assign to him the right to the sum. The Court of first instance rejected plaintiff's claim and the Court of Appeal affirmed on the basis of Article VIII, Section 2(b). The Supreme Court of Austria reversed and held for plaintiff,

---

(14) See Gold (1962) op. cit. supra, p. 84.

(15) Reported at 26 Int. L. R. 232 (1958), Juristische Blätter, 1959, pp. 73-74, 86 J. D. I. (Clunet) (1959) p. 868. The case is discussed in Gold (1962) op. cit. supra, pp. 109-112.

finding in effect that Yugoslavian assets and thus Yugoslavian currency was not involved. The Court reasoned that applicable exchange control law is determined by "the law applicable to property" and that the property involved was in Austria and was thus subject "solely to the domestic laws", saying:

> "...Similarly, the newer doctrine, which takes account of Article VIII, Section 2(b) ...provides merely that prohibition of payments based on alien foreign exchange laws must be taken into account only when the transfer of assets resulting from the payment is to occur (or at least also occur) within the territory of the restricting State since this State has the jurisdiction to control and regulate the assets located within its territory....
>
> "...The case under consideration, however, deals only with assets situated in a blocked account within this country. These assets stand in no relation to the Yugoslav foreign exchange provisions except for the fact that the defendant is subject to these provisions. The applicable foreign exchange law is... determined...[by] which law is applicable to the res concerned [which points in the case at hand solely to the domestic laws]...."(16)

Thus the Court neatly avoided the question of whether there was an exchange contract which involved the currency of Yugoslavia. Indeed there is no discussion of whether the currency or the exchange resources of Yugoslavia were "involved". But quite clearly Yugoslavia's currency and exchange resources were involved: Yugoslav funds had been transferred abroad by a Yugoslav resident.(17)

---

(16) 26 Int. L. R. at p. 233. Brackets added.

(17) A further aspect of this case regarding the scope of Article VIII, Section 2(b) is discussed infra, pp. 118-119.

One of the "Cuban insurance cases", Pan American Life Insurance Co. v. Raij, is also of interest here.(18) In that case plaintiff, Raij, a Cuban national residing in Cuba, had sought and was issued by defendant, Pan American, a 20-year endowment life insurance policy.(19) The policy provided that all payments by either party would be made in dollars in New Orleans. In November, 1960, Pan American refused a tender of premium and Raij, then residing in Florida, sought a declaratory judgment that his life insurance policy was still in effect. The Florida Circuit Court entered judgment for Raij and Pan American appealed. The District Court of Appeal affirmed per curiam. On petition for rehearing the Court dealt with the question of whether the transaction was governed by Article VIII, Section 2(b) of the Fund Agreement. The Court declared the provision inapplicable stating:

> "...[W]e were further of the opinion that the Bretton Woods Agreement pertained only to contracts 'involving the currency of any member' of the Fund and that an American contract, upon which payments were to be made to or by the appellant [Pan American]

---

(18) Reported at 156 So. 2d 785 (3d Fla. D.C. App. 1963). On further consideration the District Court of Appeal first quashed its affirmance, then reversed itself and let the affirmance stand, 164 So, 2d 204, cert. denied, 379 U. S. 920, 85 S. Ct. 275, 13 L. Ed. 2d 334 (1964). The case is discussed in Gold (1966) op. cit. supra, pp. 15-16.

(19) The Court stated that the policy in this case was similar in most material respects to the policy described in Pan American Life Insurance Company v. Recio, 154 So. 2d 197 (3d Fla. D. C. App. 1963) from which the description of the policy in the text is taken.

in United States currency, was not an unenforceable contract within [Article VIII, Section 2(b)]...."(20)

Clearly, however, the currency of Cuba is not involved only if the further fact is added; namely, that Raij, the insured, is not a Cuban resident. While Raij resided in Cuba the contract was an exchange contract because payments regarding the policy required the purchase and sale of pesos and dollars.(21)

To sum up: despite the uncertainty in the cases the better reasoned authority supports the view that the word "currency" should be interpreted to mean exchange resources.

—"Involved" Means Affected

The second question posed regarding the phrase "involve the currency" is: when may it be said that a country's exchange resources are "involved"? The basic test for determining whether the currency of a member is involved is: a) whether the contract is entered into by a resident of that member; or b) whether the contract deals with assets situated within that member's territory.(22) This test may be applied

---

(20) 156 So. 2d at p. 786.

(21) See Gold (1966) op. cit. supra, pp. 30, 34.

(22) Gold (1966) op. cit. supra, p. 34. Residence rather than nationality is the test because economic classification of balance of payments transactions distinguishes between residents and non-residents. Balance of Payments Concepts and Definitions, 1969, IMF Pamphlet Series, No. 10, pp. 4-6; Paul Høst-Madsen, Balance of Payments: It's meaning and uses, 1967, IMF Pamphlet Series, No. 9, pp. 1-2.

with ease to most transactions. And, under this test the currency in which payment is to be made and the geographic location at which the transaction is effected are irrelevant. The notion that a transaction should be subject to the law of the place where it physically takes place was abandoned during the drafting of Article VIII, Section 2(b).(23) Futhermore, under the test whether the exchange contract, if executed, would augment or diminish a country's exchange resources, so long as it would do one or the other, is also irrelevant.(24)

The test is more difficult to apply where, under applicable rules of public international law, a member's currency is involved because that member's exchange control regulations or other laws purport to reach parties or assets which are or may be beyond the legislative competence or jurisdiction of that member; or where there are questions of whether one party or another is a resident of a particular member country; or where the location of disputed intangible assets lies for purposes of determining application of exchange con-

---

(22) Continued.

Thus residence of the parties may be of crucial importance. This was so in Moojen v. Von Reichert, supra, 89 J. D. I. (Clunet) (1962) p. 718 where the Court found that plaintiff, Moojen, was an "effective resident" of the Netherlands; therefore, Dutch currency was involved. Residence may also have been of importance in certain of the "Cuban Insurance Cases". Gold (1966) op. cit. supra, p. 34.

(23) Meyer, op. cit. supra, 62 Yale L. J. pp. 888-889. Also, see supra, pp. 23-28.

(24) Mann 3rd ed., op. cit. supra, p. 443.

trol regulations.

Unfortunately the public international law rules on legislative jurisdiction are not free from controversy.(25) Moreover, it is unclear whether the word "involve", interpreted broadly, requires a new international rule for the purpose of Article VIII, Section 2(b) which will implement the economic realities of international trade and finance or whether the traditional rules will suffice. In any event, at present it is clear that states have legislative competence to adopt exchange control regulations to regulate, within their own territory, transnational transfers of merchandise, services and securities.(26) And if a state with such regulations is a member of the Fund those transactions involve the currency of that member. That is, the currency of a member is clearly involved where the member regulates the transactions of its residents, or regulates transactions dealing with assets within its territory.(27) A far more difficult case is presented where the member purports to regulate non-resident parties or assets which are without its territory. As yet there have been no clarifying rulings on this point.

---

(25) See for example, American Law Institute, Restatement of the Law Second, Foreign Relations Law of the United States, 1965, Sections 17-36; F. A. Mann, The Doctrine of Jurisdiction in International Law, Recueil, Tome III (1964, I) pp. 9-162.

(26) Mann, op. cit. supra, Recueil, Tome 111 (1964, I) pp. 122-125.

(27) Gold (1966) op. cit. supra, p. 28.

Another area in which it is difficult to determine whether the currency of a member is "involved" is where there are issues as to the residence of a party or the location of an asset such as a debt.(28) It may seem that these issues should be resolved according to the "controlling law" of the transaction as determined by the private international law rules of the forum. In Moojen v. Von Reichert, previously discussed,(29) whether Moojen was a resident of France or of the Netherlands was a crucial issue. There the Court of Appeal of Paris, relying on the Fund's interpretation of the provision,(30) said that Article VIII, Section 2(b) imposed a governing law of its own and it was error to decide the question of residence according to the controlling law of the transaction as determined by applicable private international law.(31) But then the Court of Appeal held that the issue of

---

(28) The situs of a debt as a matter of private international law is a much debated issue. See Gold (1966) op. cit. supra, pp. 31-34.

(29) Supra, pp. 55-56, 68.

(30) The Fund's interpretation is set forth in full in Appendix B hereto and is discussed supra, pp. 29-33. Compare Frantsmann v. Ponijen, 30 Int. L. R. 423 (1959), Nederlandse Jurisprudentie (1960), No. 290 (in Dutch), Tijdschrift, VIII (1961) p. 190 (in English) and Gold (1962) op. cit. supra, pp. 82-86.

(31) 89 J. D. I. (Clunet) at p. 725. To this issue - Moojen's residence - the French Court of first instance had applied the private international law of the forum. Id. p. 723. The lower court decision is reported at 85 J. D. I. (Clunet) (1958) pp. 1050-1053.

The question of residence might have been important to the decision in Confederation Life Association v. Ugalde,

Moojen's residence was one of fact which it could and did decide for itself.(32) The Court found that Moojen was a resident of the Netherlands.(33)

The issue as to the situs of intangible assets is yet to be decided. On this point it is submitted that the governing rule should not be chosen according to traditional principles of private international law. Rather a new rule needs to be fashioned which implements the policy of Article VIII, Section 2(b).(34)

Despite these possible difficulties which may be encountered in determining whether a currency is "involved" it seems on balance that the appropriate test is two-sided: whether the contract is entered into by a resident of a member; or whether the contract deals with assets situated within a member's territory.

The Phrase "of Any Member" Means Member at the Date Enforcement is Sought

The Fund Agreement provides that both original members

---

(31) Continued. 164 So. 2d 1, 38 Int. L. R. 138 (Fla. 1964), cert. denied, 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186 (1964), discussed infra, pp. 154-155.

(32) Gold and Lachman, op. cit. supra, 89 J. D. I. (Clunet) at p. 764, argue that under the principle of comity of Article VIII, Section 2(b) the French courts should be foreclosed from deciding the question of residence since it had previously been decided in an earlier stage of the controversy by the courts in the Netherlands.

(33) 89 J. D. I. (Clunet) at p. 725.

(34) Compare Gold (1966) op. cit. supra, p. 32.

and those states later admitted to the Fund are members from the time of deposit of their "instrument" of acceptance.(1) Voluntary withdrawal from membership is effective on the date written notice of withdrawal is received by the Fund at its principal office.(2) Thus it was held in Stephen v. Zivnostenska Banka National Corporation(3) that a state whose currency is involved in an exchange contract must be a member of the Fund at the date of decision in order for its residents "to take advantage of one of the privileges of fund membership." And since Czechoslovakia had ceased to be a member of the Fund during the pendency of the action, plaintiffs were not precluded by Article VIII, Section 2(b) from attempting to place the New York assets of their debtor defendant, Czechoslovakian bank, in receivership. The Court stated:

> "No valid reason currently exists to frustrate our public policy...and thereby allow Czechoslovakia to take advantage of one of the privileges of fund membership when it is no longer a member...."(4)

Similarly, Cuban withdrawal from the Fund in 1964 was the primary reason that in a number of the "Cuban insurance cases"

---

(1) Fund Agreement, Article XX, Section 2(b).

(2) Fund Agreement, Article XV, Section 1.

(3) Reported at 140 N. Y. S. 2d 323 (Sup. Ct. N. Y. Co. 1955), aff'd mem., 286 App. Div. 999, 145 N. Y. S. 2d 310 (1st Dept. 1955). Also, 22 Int. L. R. 719 (1955).

(4) 140 N. Y. S. 2d at p. 326.

Article VIII, Section 2(b) was held inapplicable.(5)

By the logic of the Stephen case, if at the date of decision the state whose currency is involved is a member of the Fund, Article VIII, Section 2(b) applies although the state was not a member at the time of contracting or even when the action commenced.(6) This result is also supported by the purpose of the provision.(7)

---

(5) Pan American Life Insurance Company v. Blanco, 362 F. 2d 167 (5th Cir. 1966); Confederation Life Association v. Vega Y Arminan, 207 So. 2d 33 (3d Fla. D. C. App. 1968), aff'd mem., 211 So. 2d 169 (Fla. 1968), cert. denied, 393 U. S. 980, 89 S. Ct. 450, 21 L. Ed. 2d 441 (1968).

The Solicitor General of the United States in connection with the petition for certiorari to the United States Supreme Court in Pan American Life Insurance Co. v. Lorido, 19 Fla. Supp. 167, 154 So. 2d 200 (3d Fla. D. C. App. 1963), cert. denied Florida Supreme Court, 155 So. 2d 695 (S. Ct. Fla. 1963), stated: "Further review is not warranted with respect to the petitioner's other contention - that granting recovery to the respondent is contrary to Article VIII 2(b) of the [Fund Agreement].... Since Cuba is no longer a member of the Fund and since the date of proposed relief determines the applicability of Article VIII (2)(b), a decree granting recovery to the petitioner will not violate the provisions of the Agreement." Certiorari to the United States Supreme Court was also denied, 377 U. S. 990, 84 S. Ct. 1905, 12 L. Ed. 2d 1043 (1964), reh. denied, 379 U. S. 871, 85 S. Ct. 15, 13 L. Ed. 2d 77 (1964).

(6) Compare Mann 3rd ed., op. cit. supra, p. 444.

(7) See supra, pp. 22-23.

"Exchange Control Regulations" Are Those Laws Which Control the Movement of Currency, Property or Services in Order to Protect the Exchange Resources of a Country

The next phrase of Article VIII, Section 2(b) is: "and which are contrary to the exchange control regulations."(1) In general, exchange control regulations are enactments which control the transnational movement of currency, property or services with the purpose of protecting the financial resources of the controlling country.(2) The Fund has not promulgated a formal interpretation of the term "exchange control regulations." Thus whether a particular law is an exchange control regulation within Article VIII, Section 2(b) depends upon a proper construction of that term in the context of the Fund Agreement as a whole, for the phase to be explained is, "exchange control regulations . . . maintained or imposed consistently with this Agreement."(3)

---

(1) On the travaux préparatoires of "contrary" see supra, pp. 24-26. See also Meyer, op. cit. supra, 62 Yale L. J. at p. 890.

Mann raises the interesting question: "Is a contract contrary to exchange control regulations even if, according to its express or implied terms, it is to take effect only upon the repeal of the provision which creates the illegality?" Mann 3rd ed., op. cit. supra, pp. 445-446. He then suggests that the answer depends on the terms of the exchange control regulations against which the contract offends.

(2) Mann 3rd ed., op. cit. supra, p. 444; Meyer, op. cit. supra, 62 Yale L. J. at pp. 890-891. See supra, p. 14, n. 2.

(3) Gold (1964) op. cit. supra, p. 462.

Tariffs, trade restrictions, price control or trading with the enemy regulations are not exchange control regulations within the meaning of the provision.(4) Although it is usually clear whether a trade regulation or an exchange control regulation is involved, the title or designation of such a regulation is not controlling.(5)

Whether a law or rule is an exchange control regulation depends upon its technical character and not upon its affect.(6) To be an exchange control regulation the law must address itself to the financial aspects of an international transaction rather than to the transaction itself;(7) for example, restrictions on the making of payments, exchange surrender regulations, such as were involved in the Banco do Brazil case,

---

(4) Delaume, op. cit. supra, p. 294; Mann 3rd ed., op. cit. supra, p. 444. Cf. Brauer & Co. v. James Clark [1952] 2 All E. R. 497 on the factual similarity of trade regulations and exchange controls.

(5) See Re Helbert Wagg & Co. Ltd. [1956] Ch. 323 at pp. 351-352, [1956] 1 All E. R. 129 at p. 142. The case is discussed infra, p. 82.

(6) Gold (1964) op. cit. supra, p. 463. See also, Meyer, op. cit. supra, 62 Yale L. J. at pp. 890-891. A description of the nature and types of exchange controls is set forth in International Monetary Fund, First Annual Report on Exchange Restrictions, 1950, pp. 3-16. That and subsequest reports contain a country by country survey of such restrictions.

(7) Gold (1964) op. cit. supra, pp. 460-462, where he analyzes the similar Fund interpretation on the meaning of "restrictions on the making of payments and transfers for current international transactions" in Article VIII, Section 2(a). Dec. No. 144-(52/51) Selected Decisions of the Executive Directors, 5th issue 1971, pp. 94-95; IMF 1945-1965, op. cit. supra, vol. III, p. 257.

are classified as exchange control regulations.(8) Also, it must be remembered, Article VIII, Section 2(b) covers both payments on current international transactions and payments on capital transactions.(9)

Judge Upjohn said in Re Helbert Wagg & Co. Ltd.(10), a chancery case in which it was decided that a contractual obligation of a German firm to an English firm was validly discharged through payment of German currency to a German government office, that an exchange control law is a law passed with the "genuine intention" of protecting a country's economy. He stated:

> "...[T]his court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, i.e., a law passed with the genuine intention of protecting its economy... and for that purpose regulating...the rights of foreign creditors, and is not a law passed ostensibly with that object, but in reality with some object not in accordance with the usage of nations...."(11)

Again, exchange control regulations must be direct controls on international payments and not indirect controls on payments, such as tariffs and trade restrictions. The latter are governed by the General Agreement on Tariffs and Trade

---

(8) Supra, pp. 42-45, infra, pp. 124-125.

(9) See discussion on scope of application of Article VIII, Section 2(b) infra, pp. 112-113.

(10) Reported at [1956] Ch. 323, [1956] 1 All E. R. 129, [1956] 2 W. L. R. 183. The case is discussed by E. Lauterpacht (1956) 5 I. C. L. Q. 301; F. A. Mann (1956) 5 I. C. L. Q. 295; F. A. Mann (1956) 19 Mod. L. R. 307 and is noted in (1956) 50 A. J. I. L. 683.

(11) [1956] Ch. at pp. 351-352, [1956] All E. R. at p. 142.

(GATT)(12) and not by the Fund Agreement.(13) The categories are not mutually exclusive and a regulation may be both an exchange control regulation and a trade regulation at the same time.(14) Joseph Gold points out that the real issue in the Hamburg "Pinball Machine Case"(15) was whether the regulation involved was a trade restriction or whether it was an exchange control regulation.(16)

Exchange control regulations must also be distinguished from another class of laws: those generally designated as legal tender laws (cours légal and cours forcé). Cours légal are those rules which prescribe the currency that creditors

---

(12) General Agreement on Tariffs and Trade, U. S. Treaty and other International Acts Ser., No. 1700. See for example, Article XV, thereof.

(13) The distinction may be traced back to a division of functions between the U. S. Department of State which handled trade matters and the U. S. Department of the Treasury which dealt with monetary policy. See R. N. Gardner, Sterling Dollar Diplomacy, expanded ed. 1969, p. 74.

The United Nations Monetary and Financial Conference recommended to the governments which participated in the Conference that they "reach agreement as soon as possible on ways and means" to "reduce obstacles to international trade and in other ways promote mutually advantageous international commercial relations." Resolution VII, Final Act, Proceedings, op. cit. supra, Doc. 492, p. 927 at p. 941.

(14) Gold (1964) op. cit. supra, p. 463 where he sets forth an excerpt from the Report of a Special Sub-Group working on relations between the Fund and GATT regarding this overlap.

(15) Discussed supra, p. 45.

(16) Gold (1964) op. cit. supra, p. 460.

must accept in discharge of obligations within a particular country.(17) Cours forcé are those rules which declare that certain notes and coins issued by the monetary authority have the quality of legal tender.(18) In statute books cours légal and cours forcé may be found grouped together with exchange control regulations, but such rules by themselves are not exchange control regulations. As a general rule legal tender laws deal with the establishment and characteristics of a national currency, whereas exchange control regulations deal with the defense of a currency by conserving national resources.(19) The apparent lumping together, in the "Cuban insurance cases" of the Cuban legal tender laws and exchange control regulations for purposes of Article VIII, Section 2(b) was unwarranted.(20)

---

(17) Mann 3rd ed., op. cit. supra, pp. 38-44; Nussbaum, op. cit. supra, pp. 45-49.

(18) Ibid.

(19) Gold (1966) op. cit. supra, pp. 36-37. See also, Delaume, op. cit. supra, pp. 294-295.

(20) Compare the pre-trial stipulation in Pan American Life Insurance Co. v. Blanco, 221 F. Supp. 219, 225 (S. D. Fla. 1963) and the statement of the Supreme Court of Florida in Confederation Life Association v. Ugalde, 164 So. 2d 1, 2 (Fla. 1964).

In de Sayve v. de la Valdene, 124 N. Y. S. 2d 143, 153 (Sup. Ct. N. Y. Co. 1953) the court said regarding certain French cours forcé statutes: "it is here conceded that the French statutes here involved are not 'exchange control laws' of the type which the Bretton Woods Agreements now make enforceable." The de Sayve case is discussed in Delaume, op. cit. supra, p. 294.

A significant case illuminating the distinction between cours forcé rules and exchange control regulations is Loeffler-Behrens v. Beermann decided in 1965 by the Court of Appeal (Oberlandesgericht) at Karlsruhe, Germany.(21) There, the parties, both German citizens, met in Brazil in 1959. Plaintiff agreed to and did lend to the defendant about US$5,500 for business purposes. The loan and terms of repayment were evidenced by two promissory notes, which called for repayment in United States currency. On defendant's failure to pay, plaintiff sued on the notes in the Provincial Court (Landgericht) at Mannheim where defendant then resided.

The Provincial Court gave judgment for plaintiff and on appeal the Court of Appeal (Oberlandesgericht) affirmed. On that appeal, defendant had argued: that the two promissory notes were void under Article 2, Brazilian Decree No. 23,501 of November 27, 1933 which provided that it was "prohibited... in contracts to be fulfilled in Brazil, to stipulate payment in a currency that is not the national currency according to its legal value"(22); and that the notes were void under Article VIII, Section 2(b) of the Fund Agreement. The Court of Appeal rejected this argument on the ground that the regulations invoked were not exchange control regulations within

---

(21) Reported at International Privatrechtliche Rechtsprechung (I. P. Rspr.) 1964 and 1965, No. 194; discussed in Gold (1967) op. cit. supra, pp. 387-391.

(22) Gold (1967) op. cit. supra, p. 389.

the meaning of Article VIII, Section 2(b). The Court said:

> "...[T]he Brazilian foreign exchange regulations relevant to the case before the court are not opposed to a judgment ordering the defendant to pay U. S. dollars or deutsche mark, because they are not 'exchange control regulations' within the meaning of Article VIII, (2)(b)... This is to be inferred from the information provided by the Deutsche Bundesbank and by the Legal Department of the International Monetary Fund...."(23)

Significantly, the Provincial Court in the Beermann case, rather than a party, had approached the Fund, in line with the last sentence of the 1949 interpretation of Article VIII, Section 2(b) (24) for its view on whether the Brazilian law was an exchange control regulation within Article VIII, Section 2(b). The Fund, or, more precisely, the General Counsel of the Fund(25) stated in response that the term "exchange control regulations" does not include laws that are designed to ensure acceptance of paper currency as legal tender in the country of issue.(26) This statement by the Fund should be considered an authoritative ruling on the question addressed. (27)

---

(23) (Translation) 1. P. Rspr., 1964 and 1965, No. 194.

(24) The last sentence of the interpretation reads: "In addition, the Fund is prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement." The Fund interpretation is set forth in full in Appendix B hereto.

(25) Mr. Joseph Gold, whose writings are so frequently cited throughout this essay.

(26) Gold (1967) op. cit. supra, p. 398.

(27) Compare, for example, rulings by the Attorney General of the United States.

To conclude: exchange control regulations to which Article VIII, Section 2(b) applies are those laws or regulations genuinely concerned with the conservation of a country's economic resources and are directed to the financial aspect of an international transaction - whether a current or capital transaction. Included are rules restricting the making of payments as well as exchange surrender regulations. Excluded are tariffs, trade restrictions, price control and trading with the enemy regulations and legal tender laws, cours légal and cours forcé.

The meaning of the next phrase "of that member" is determined by the phrase previously considered, "which involve the currency of any member." Thus, one looks to the country whose exchange resources are affected, in deciding whether a contract contravenes its exchange control regulations. A contract may involve the currency of two countries and may offend the exchange control regulations of both.

Only Exchange Control Regulations which are "Maintained or Imposed Consistently" with the Fund Agreement Will be Given Effect

Much of importance to the application of Article VIII, Section 2(b) is packed into the next phrase: "maintained or imposed consistently with this Agreement." "Maintained" refers quite clearly to exchange control regulations which were in force when the Fund Agreement took effect on December 27, 1945.(1) Thus, Article VIII, Section 2(b) gives retroactive application to exchange control restrictions.(2) It follows that on becoming a member of or withdrawing from the Fund a country may retroactively render unenforceable or enforceable "exchange contracts." Moreover, a regulation "imposed" after accession to the Fund Agreement may, retroactively, make unenforceable a previously existing enforceable contract.(3)

But when is an exchange control regulation "consistent" with the Fund Agreement? The Fund has offered, in its 1949 interpretation of Article VIII, Section 2(b), "to advise

---

(1) IMF 1945-1965, op. cit. supra, vol. I, p. 118; Gold (1962) op. cit. supra, p. 65; Mann 3rd ed., op. cit. supra, p. 446; Nussbaum, op. cit. supra, p. 543. Article XIV, Section 2 of the Fund Agreement which deals with the transitional period states that "members may ... maintain ... restrictions on payments and transfers for current international transactions."

(2) Nussbaum, op. cit. supra, p. 543. See also, Mann 3rd ed., op. cit. supra, p. 446. Retroactive application raises an interesting constitutional issue in the United States. See Meyer, op. cit. supra, 62 Yale L. J. at pp. 879-880.

(3) Mann 3rd ed., op. cit. supra, p. 446; Meyer, op. cit. supra, 62 Yale L. J. at p. 883.

whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement".(4) In response to this offer the Fund has frequently been approached for and furnished advice on whether certain regulations are maintained or imposed consistently with the Fund Agreement.(5)

The Courts have also dealt with the issue. In the Clearing Dollars Case(6) the Commercial Court at Hamburg, Germany took the position that express approval by the Fund of the regulations was not required to establish that the regulations were consistent with the Fund Agreement; that only the general character of the regulations need be authorized by the Fund Agreement; and, that the general character was authorized could be inferred from the fact that similar exchange control regulations existed in many countries. The Court stated:

> "The Belgium foreign exchange control regulations have been maintained in conformity with the Bretton Woods Agreement. In this respect, it would be sufficient if their existence and

---

(4) IMF Annual Report, 1949, Appendix XIV, pp. 82-83; Selected Decisions of the Executive Directors and Selected Documents, 5th issue 1971, pp. 92-93. See other citations p. 30, n. 4. The interpretation is set forth in full in Appendix B hereto.

(5) See Gold (1962) op. cit. supra, p. 116; Gold (1966) op. cit. supra, p. 38. For the statement issued by the Fund in connection with certain of the "Cuban Insurance Cases" see Pan American Life Insurance Co. v. Blanco, supra, 221 F. Supp. 219 at pp. 224-225 (S. D. Fla. 1963). A Fund statement was also used in the Southwestern Shipping Case, supra. See Supreme Court opinion 11 Misc. 2d 397, 173 N. Y. S. 2d 509 (Sup. Ct. N. Y. Co. 1958).

(6) 22 Int. L. R. 730 (1954). For the facts of the case see supra pp. 45-46.

their nature have been approved by the International Monetary Fund... In view of the fact that similar foreign exchange regulations exist in nearly all countries, the answer must be in the affirmative."(7)

Moreover, only the portion of the regulations sought to be invoked need be consistent with the Fund Agreement.(8) In Frantzmann v. Ponijen the Court asserted, without analysis, that the Indonesian regulations involved were consistent with the Fund Agreement, saying: "The Foreign Exchange Ordinance, 1940, and the Foreign Exchange Control Rules of Indonesia must be regarded as exchange control regulations maintained consistently with the Agreement."(9)

Further, the Fund Agreement itself supplies examples of exchange control regulations which may be considered to be consistent with it: "such controls as are necessary to regulate international capital movements"(10); "restrictions on

---

(7) 22 Int. L. R. at p. 731. But cf. Emek v. Bossers & Mouthaan, 22 Int. L. R. 722 (1953), where the Commercial Tribunal of Courtrai, Belgium, stated that "maintained or imposed consistently with this Agreement" meant that the regulations "can only have legal validity after confirmation by the International Monetary Fund." 22 Int. L. R. at p. 724.

(8) Compare Mann's query whether any inconsistency, no matter how insignificant, would be fatal. Mann, op. cit. supra, 10 Mod. L. R. at p. 419.

(9) 30 Int. L. R. 423 at p. 424 (1959), Nederlandse Jurisprudentie 1960, No. 290 (in Dutch) Tijdschrift, VIII, (1961), p. 190 (in English). The Frantzmann case is discussed in more detail in this essay, supra, p. 47, n. 19 and infra, pp. 95, 112-113, 121-122 and the case is also discussed in Gold (1962) op. cit. supra, pp. 113-118.

(10) Fund Agreement, Article VI, Section 3.

the making of payments and transfers for current international transactions" provided approval of the Fund is obtained(11); and "restrictions on exchange transactions with non-members or with persons in their territories."(12)

There is an additional problem of whether restrictions are "consistent" with the Fund Agreement for those members of the Fund which have accepted the obligations of Article VIII, Sections 2, 3 and 4--at last count some thirty-five members--and many if not all of the other members(13); for, Article VIII, Section 2(a) provides that "no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions." However, the Fund members remain free to impose restrictions on the making of payments for capital transactions under Article VI, Section 3.(14)

Thus for those members who are bound by Article VIII the distinction between current transactions and capital transactions and whether this distinction is properly observed in

---

(11) Fund Agreement, Article VIII, Section 2(a).

(12) Fund Agreement, Article XI, Section 2.

(13) IMF Annual Report, 1971, p. 156; IMF Annual Report, 1972, p. 50. In addition to the 35 Article VIII members, many, if not all, of the other members are subject to the same restrictions. See infra, pp. 103-105.

(14) Article VI, Section 3 of the Fund Agreement states in part: "Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement

each member's restrictions on capital transactions may be of crucial importance in determining whether those restrictions are consistent with the Fund Agreement. For example, whether payments made with respect to life insurance policies are classified as current or capital may be of utmost importance. (15) This question was raised but not decided in certain of the "Cuban Insurance Cases."(16)

Some light is shed upon the meaning of "current transactions" by Article XIX (i) of the Fund Agreement. "Current transactions" are defined as "payments not for the purpose of transferring capital" including payments in connection with "foreign trade", "other current business", "normal short-term banking", "interest on loans", moderate amounts "for amortization of loans" and moderate "remittances for family living expenses". Article XIX (i) reads:

> "Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:
>
> (1) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;

---

(14) Continued.
of commitments...." See, Kraus v. Zivnostenska Banka, 187 Misc. 681, 685, 64 N.Y.S. 2d 208, 211 (Sup. Ct. N. Y. Co. 1946).

(15) Mann 3rd ed., op. cit. supra, p. 447.

(16) Gold (1966) op. cit. supra, pp. 37-45. Compare, Paradise, supra, 18 U. Fla. L. R. 29 at pp. 70-72.

(2) Payments due as interest on loans and as net income from other investments;

(3) Payments of moderate amount for amortization of loans or for depreciation of direct investments;

(4) Moderate remittances for family living expenses.

The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions."

The distinction between current and capital transactions is rooted in accounting history and theory and proper analysis must, therefore, take into account the economic and accounting concepts and policies at stake.(17) Of some help in this regard may be the Balance of Payments Manual which flags the difficulties to be encountered in attempting to classify transactions as current or capital.(18) Moreover, analysis should begin from the viewpoint of the country regulating the transaction for it is its own resources it seeks to protect.(19)

A further issue regarding the application of the phrase "maintained or imposed consistently" with the Fund Agreement

---

(16) Continued.

In Catz and Lips v. S. A. Union Versicherung, the Fifth Chamber of the Civil Tribunal at Antwerp, Belgium decided that a transfer of insurance money was a capital transfer under Article VI, Section 3. It is not clear whether life insurance proceeds were involved. 22 Int. L. R. 713 (1949), Jurisprudence du Port d'Anvers, Vols. 7-8 (1949), p. 321.

(17) Balance of Payments Manual, 3rd ed. 1961, pp. 1-19.

(18) Id., pp. 17-18, 23-24.

(19) Gold (1966) op. cit. supra, p. 39.

is whether the exchange control regulations sought to be imposed are within or beyond the legislative competence of the imposing country. The questions covered by that issue are similar to those discussed previously regarding the meaning of "currency involved" and will not be repeated here.(20)

A final issue, which was raised by Professor Nussbaum, may be stated: since Article XX, Section 2(a) requires that Article VIII, Section 2(b) be made a part of each member's national law, exchange control regulations should not be considered consistent with the Fund Agreement if the country seeking to impose those regulations has in some way failed to comply with the Fund Agreement. "In other words the 'consistency' requirement implies a reciprocity rule."(21) It must be agreed that there is a requirement that Article VIII, Section 2(b) be made part of national law and therefore implicit in the Fund Agreement is the principle of reciprocity.(22) But the reciprocity argument should be deemed conclusively satisfied when an applicant government deposits

---

(20) Supra, pp. 74-75. Cf. Mann 3rd ed., op. cit. supra, pp. 447-448 and citations p. 448, n. 2.

(21) Nussbaum, op. cit. supra, pp. 544-545. Accord: Mann 3rd ed., op. cit. supra, p. 447.

(22) Specifically, the reciprocal obligation stems from Article XX, Section 2(a) of the Fund Agreement which provides that each applicant government shall deposit an instrument "setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement."

The questions of reciprocity was posed but not decided

the instrument of acceptance in accordance with Article XX, Section 2(b) by which it represents that it has "taken all steps necessary" to "carry out all of its obligations" under the Fund Agreement. Moreover, it may or may not be necessary for a member to adopt enabling legislation to bring into effect as internal law the obligations of Article VIII of the Fund Agreement.(23) Finally, with respect to a complex multinational treaty, failure of one member to perform its obligations of whatever type should not release other members from a similar obligation.(24)

To summarize: to be consistent with the Fund Agreement exchange control regulations must be in conformity with the Fund Agreement, but express approval by the Fund of the regulations involved is unnecessary. Rather the general character of the regulations must be authorised and insignificant inconsistencies are not fatal. No court should be foreclosed from hearing and deciding whether given regulations are "maintained or imposed consistently with this Agreement."(25) And,

---

(22) Continued.
by the Court of Appeals for the Fifth Circuit in Pan American Life Insurance Co. v. Blanco, supra, 311 F 2d. 424 (5th Cir. 1962) at p. 427, n. 8 (first appeal).

(23) Such legislation was thought to be required, and has been adopted, in a number of countries including Canada, the United Kingdom and the United States. See statutes cited supra, p. 29, n. 1.

(24) Gold (1966) op. cit. supra, p. 47. Cf. Frantzmann v. Ponijen, supra, 30 Int. L. R. 423 at p. 425.

(25) Mann 3rd ed., op. cit. supra, p. 447. Compare the

exchange control regulations which are beyond the legislative competence of the enacting country are probably not consistent with the Fund Agreement. No "reciprocity rule" functions to relieve members from their obligations under Article VIII, Section 2(b). Finally, it should be remembered that application of the provision may involve difficult questions regarding the distinction between current and capital transactions.

"Unenforceable" Means Ineffectiveness in the Forum

The last phrase of the first sentence of Article VIII, Section 2(b) is: "shall be unenforceable in the territories(1) of any member." Here the key word is "unenforceable". The Fund interpretation states the meaning of the term as follows:

> "Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained

---

(25) Continued.
62 Yale L. J. at p. 892, n. 136: A Fund "determination considered as an interpretation under Art. XVIII or as an approval or disapproval of the regulation involved would be conclusive."

As to whether the parties or the court should bear the burden of proving consistency or inconsistency see Delaume, op. cit. supra, p. 295.

(1) The word "territories" used in this phrase should be read to include not only members' metropolitan territories but also "all their colonies, overseas territories, all territories under their protection, suzerainty, or authority and all territories in respect of which they exercise a mandate." See, Article XX.

or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities or member countries, for example, by decreeing performance of the contracts or by awarding damages for their non-performance." (Emphasis added) (2)

Thus the Fund's view is that unenforceability means that the judicial or administrative authorities of one member will not implement an exchange contract that is contrary to the exchange control regulations of another member when those regulations are maintained or imposed consistently with the Fund Agreement. (3)

Some authorities have taken the view that "unenforceable" connotes "basically the same concept as that of unenforceability in Anglo-American law."(4) The apparent consequence of this view is that a defendant must plead and prove unenforceability before a court can declare an exchange con-

---

(1) Continued.
Section 2(g). See also Gold (1964) op. cit. supra, p. 464 referring to the "Pinball Machine case" which involved an attempted import into the Saar Territory then under French control.

(2) The Fund interpretation is set forth in full in Appendix B. A discussion of the interpretation may be found supra, pp. 29-33.

(3) See, Gold (1965) op. cit. supra, p. 23.

(4) Notably, A. van Campenhout (then General Counsel to the Fund), Note (1953) 2 A. J. C. L. 391; Morris, Dicey's Conflict of Laws, op. cit. supra, p. 900.

tract unenforceable.(5) This classical principle of practice should yield, however, to the policy of Article VIII, Section 2(b) of the Fund Agreement which is to protect the interests of members. That policy should not be subject to the accidental or intentional failure of litigants to plead and prove exchange control regulations of a foreign country.(6) If for no other reason, therefore, the Anglo-American meaning of "unenforceable" should be here rejected.

Again, "unenforceable" does not mean "illegal". For, the Bretton Woods conference rejected a proposed amendment to the Fund Agreement to render the making of an offending exchange contract an "offense".(7) Rather offending exchange contracts were made simply unenforceable and there have been no suggestions by the authorities that "unenforceable" means "illegality".

---

(5) See Emek v. Bossers & Mouthaan, supra, 22 Int. L. R. 722 at p. 724 (1953), otherwise unreported, where the Commercial Tribunal of Courtrai, Belgium refused to accept the absolute voidness of the contract because defendants had failed to "clearly prove that the latest law they invoke is the latest foreign legislation." Compare, In re Mason's Estate, 194 Misc. 308, 86 N. Y. S. 2d 232, 233-234 (Sur. Ct. N. Y. Co. 1948). The Mason's Estate case sets forth the classical view that foreign law must be pleaded and proved as a fact. This view has been modified in some jurisdictions in the United States. See, N. Y. CPLR, R 4511(b) and F. R. Civ. P., Rule 44.1. See Generally, R. B. Schlesinger, Comparative Law, 3rd ed. 1970, pp. 38-75.

(6) G. R. Delaume, De l'élimination des conflicts de lois en matière monétaire realisée par les statuts du Fonds Monétaire International et de ses limites (1954) 81 J.D.I. (Clunet) 356-360; Gold (1962) op. cit. supra, pp. 81-82, 85; Mann 3rd. ed., op. cit. supra, p. 448.

(7) Proceedings, op. cit. supra, Doc. 236, p. 334 and Doc.

In light of the foregoing, Dr. Mann "submits" that in "the context 'unenforceability' means ineffectiveness, invalidity, voidness in the forum." He continues, "this view ... means that a court or administrative authority will have the right and duty to refuse enforcement of the contract."(8) Earlier in his book he states: "Art. VIII (2)(b) is concerned with the effectiveness of contracts, that is to say with their initial 'validity' rather than the legality or possibility of their performance."(9) Gold takes issue with what appears to be Dr. Mann's view: "unenforceability means invalidity".(10) In support of his view Dr. Mann cites the Clearing Dollars Case,(11) Moojen v. von Reichert(12) and other cases.(13) In the Clearing Dollars Case the Provincial Court at Hamburg rejected for purposes of Article VIII, Section 2(b) the interpretation given the term "unenforceable" in Anglo-American law.

---

(7) Continued.
307, p. 502. See discussion of travaux préparatoires, supra, pp. 23-28.

(8) Mann 3rd. ed., op. cit. supra, pp. 448-449.

(9) Id. p. 435.

(10) Gold (1962) op. cit. supra, p. 61. See Mann 3rd. ed., op. cit. supra, p. 449, n. 1 for Mann's latest statement in the controversy.

(11) 22 Int. L. R. 730 (1954), otherwise unreported, (Landgerich at Hamburg, 1954). Other aspects of the case are discussed supra, pp. 44-45, 69, 70, 89-90.

(12) 89 J. D. I. (Clunet) 718, at p. 726, Cour d'Appel at Paris, 1961. Other aspects of the case are discussed supra, pp. 55-57, 68, 74, 76 and infra, pp. 113, 150.

(13) Mann 3rd. ed., op. cit. supra, p. 448, n. 5.

The Court held the contract ineffective but not invalid from its inception. The Court stated in pertinent part:

> "Thus, since the facts come within Article VIII, Section 2(b), the purchase contract concluded between the parties is ineffective. This follows from the term 'unenforceable'. While in Anglo-American Law this word has a specific significance and refers to contracts which are valid but with respect to which the debtor may plead that they have no binding force . . . such an interpretation cannot be placed on the word 'unenforceable' since more than 40 nations, which do not all come within the sphere of Anglo-American law, have adhered to the Agreement; moreover, it should not be left to the parties themselves to decide whether they wish to invoke exchange control regulations which exist in the public interest".(14)

The issue as to the exact meaning of the term "unenforceable" did not affect the outcome of that case.

By contrast in Moojen v. von Reichert the exact meaning of the term "unenforceable" did affect the outcome of the case. The Court of Appeal stated the issue:

> "Whereas lastly on the grounds that . . . the word 'unenforceable' [used by Article VIII], the respondents argue that the only sanction provided for would be the unenforceability of the contract in issue and not its nullity, adding that the claim thus deprived of judicial action would remain valid as a sort of natural obligation."(15)

The Court rejected this argument and declared that the contract in issue was unenforceable which means that the contract is a

---

(14) 22 Int. L. R. at p. 731.

(15) 89 J. D. I. (Clunet) at p. 727. Other aspects of the Moojen case are discussed elsewhere in this essay, see footnote 12, p. 99 for citations.

nullity. The Court said:

> ". . .[T]his distinction has to be ruled out, since the purpose of exchange control rules is to penalize certain transactions detrimental to the stability of the currency of a State, whether carried out or not, so long as they were entered into irregularly and not to permit either of the parties to rely in his discretion on the foreign regulations to paralyse the enforcement of the contract."(16)

The heart of the Court's response seems to support Dr. Mann's view that contracts falling within Article VIII, Section 2(b) must be treated as a nullity and not merely ineffective in the forum. Gold rejoins, however, that exchange control regulations do not invariably provide for the invalidity of contracts that are contrary to the regulations. Thus, he contends that the provision might be considered "as a kind of 'full faith and credit' clause."(17) If the courts of a member were requested to give a remedy on a contract which violated the exchange control regulations of another member, those courts, in classifying the contract as valid or invalid, could follow the lead of the foreign exchange control regulations involved.(18) While this refinement may be appealing from a theoretical point of view, it may well

---

(16) 89 J. D. I. (Clunet) at p. 727. See also Gold and Lachman, op. cit. supra, 89 J. D. I. (Clunet) at pp. 678-682. Compare the Jourdain case, supra, 22 Int. L. R. 725 (1956) where the Luxembourg Court refused to hold that there had been a discharge of an exchange contract because the alleged performance relied upon was contrary to French exchange control regulations.

(17) Gold (1962) op. cit. supra, p. 151.

(18) Ibid.

encounter practical difficulties in application. Rejection of this refinement will not impair operation of the policy of Article VIII, Section 2(b).

The preferred definition of "unenforceable" is "inoperative in the forum".(19) Article VIII, Section 2(b) bars the enforcement of claims arising from offending exchange contracts; such contracts are to be given no effect in the forum. (20) In sum, "unenforceable" should not be construed to mean initial invalidity and should not rely for its meaning on the particular exchange control regulation involved. The consequences which flow from these views will be discussed in the next part.(21)

---

(19) Meyer takes the view that "unenforceable" means that the contract will not be enforced but that the contract remains valid. Thus, if a party, such as a bank, through its right of setoff may enforce a contract by self-help, it may do so, and in any action against it, it should be sustained. Meyer, op. cit. supra, 62 Yale L. J. at p. 894. This line of argument seems to have been rejected by the Court in the Jourdain case, supra, p. 101 at n. 16.

(20) Mann 3rd ed., op. cit. supra, p. 450.

(21) See infra, pp. 105-111.

PART IV

THE SCOPE OF THE FIRST SENTENCE OF ARTICLE VIII, SECTION 2(b) OF THE FUND AGREEMENT

There remain, following our analysis of the interpretation of the first sentence of Article VIII, Section 2(b), five additional issues which, although suggested by the terms of the provision or other Articles bearing upon it, relate generally to the scope of the provision. These are: whether the provision binds all Fund members or only those which have accepted the obligations of Article VIII, Sections 2, 3 and 4; whether the provision affects exchange contracts at the time of making or at the time of performance; whether the provision applies to current and capital transactions alike or only to current transactions; whether the provision bars only recoveries based upon consensual transactions including quasi-contractual and similar actions as well as damages for breach of performance; and whether the provision has changed the principal of public international law that no country can enforce its public laws in the territories of another country.

Article VIII, Section 2(b) Binds All Members of the Fund

As of April 30, 1972 there were one hundred twenty members of the International Monetary Fund of which some thirty-five had accepted the obligations of Article VIII, Sections 2,

3 and 4.(1) The remaining eighty-five members were operating under transitional arrangements as provided for in Article XIV.(2) It might seem therefore, that only thirty-five of the Fund members are subject to the obligations of Article VIII, Section 2(b). But that is not the case. Article VIII, Section 2(b) applies to all members whether they are Article VIII or Article XIV members.(3) For the privileges of Article XIV are only exceptions to Article VIII. To a large extent then an Article XIV member is bound by Article VIII. And, once an Article XIV member has eliminated its exchange restrictions on current transactions it may not, as with Article VIII members, reimpose them without Fund approval.(4) Moreover, the Fund's interpretation states:

> "By accepting the Fund Agreement members have undertaken to make the principle [of Article VIII, Section 2(b)]. . . effectively part of

---

(1) Membership for four additional states was later approved. IMF Annual Report, 1972, p. 53. IMF Annual Report, 1971, pp. 155 & 156. In 1952 there were 51 Fund members of which 7 were Article VIII members and in 1965 there were 103 members of which 26 were Article VIII members. IMF 1945-1965, op. cit. supra, vol. II, p. 248. See also, supra, p. 7, n. 5 and accompanying text.

(2) Article XIV, Sections 2 and 3 are set forth in Appendix A hereto.

(3) Compare Article XIV, Section 2 ". . . Members shall . . . have continuous regard in their foreign exchange policies to the purposes of the Fund . . ." with Article XIV, Section 3 ". . . A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept [the obligations of Article VIII, Sections 2, 3 and 4]." See, Gold (1965) op. cit. supra, p. 18.

(4) See Fund Agreement, Article XIV, Sections 2 and 4 and Article VIII, Section 2.

their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2".(5)

As we have seen this interpretation should be binding on the courts and other tribunals of all members.(6) Moreover, nowhere has there been any disagreement with the Fund's 1949 interpretation that Article VIII, Section 2(b) applies to all Fund members, and, as Dr. Mann concludes: '"effective disagreement is now probably foreclosed."(7)

Article VIII, Section 2(b)
Applies When Performance
of a Contract is Sought

Dr. Mann has taken and continues to defend the view that Article VIII, Section 2(b) relates not to the performance but to the making of exchange contracts.(1) And he also states that that provision "gives international recognition to the original ineffectiveness of an exchange contract, but does not touch a contract which during its life becomes an exchange

---

(5) Decision No. 446-4, June 10, 1949. Selected Decisions, op. cit. supra, pp. 73-74. See other citations, supra, p. 30, n. 4. The Fund's interpretation is set forth in Appendix B hereto.

(6) See supra, pp. 33-39.

(7) Mann 3rd ed., op. cit. supra, p. 439.

(1) Compare, Mann 2d ed., op. cit. supra, pp. 386-387 with Mann 3rd ed., op. cit. supra, pp. 435-436. This view ties in with Dr. Mann's views on "unenforceable". See supra, pp. 99-102. Contra, G. R. Delume, Legal Aspects of International Lending and Economic Development Financing, 1967, p. 296.

contract contrary to regulations."(2) That is, Article VIII, Section 2(b) deals only with the making of exchange contracts and not with their performance. Dr. Mann supports this view with several arguments which will be dealt with seriatim.

First he argues: that a draft of Article VIII, Section 2(b) contained in the report of July 13, 1944 of Committee 1, referred to "exchange transactions . . . which evade or avoid" exchange regulations "shall not be enforceable"(3); that there "is no evidence" that the authors of the Fund Agreement intended to change the plain meaning of the words "evade or avoid" by finally casting the provision in different terms(4); and that evasion and avoidance by an exchange contract is possible only at the time of the making of the contract.(5)

The great weakness in this argument is the assertion that there "is no evidence" that the authors did not intend to change the plain meaning of the words "evade or avoid" by using the word "contrary" in the final draft. For, on the contrary, there is evidence that the authors intended to

---

(2) Mann 3rd ed., op. cit. supra, pp. 435, 442; F. A. Mann, The Private International Law of Exchange Control Under the International Monetary Fund Agreement (1953) 2 I. C. L. Q. 97 at pp. 106-107.

(3) Report of Committee 1 of Commission I of July 13, 1944. The Report contained three suggestions including the one referred to in the text. The travaux preparatoires of the first provision of Article VIII, Section 2(b) is discussed supra, pp. 23-28.

(4) Mann 3rd ed., op. cit. supra, p. 435.

(5) Ibid.

change the plain meaning of the words "evade or avoid". First, the authors did change the wording. Moreover, on July 13-14, 1944 the Drafting Committee at Bretton Woods was asked to reconcile the draft containing the evade or avoid wording with another proposed draft.(6) And, a working draft of the Fund Agreement dated July 16, 1944 eliminated the "evade or avoid" phrase.(7) Finally, it seems quite possible that a contract can evade or avoid exchange control regulations both when made and at the time of performance.(8)

Second, Dr. Mann argues that since the text of Article VIII, Section 2(b) speaks in the present tense, "contracts which . . . are contrary" to exchange control regulations, only contracts which are contrary to such regulations when formed are subject to Article VIII, Section 2(b).(9) Under this view contracts which are contrary to exchange control regulations at formation but not at the date of performance are unenforceable. Thus a court or other tribunal of a member country would be obliged to hold an exchange contract which affected the exchange resources of another member unenforceable in cases where the exchange regulations rendering the

---

(6) Proceedings, op. cit. supra, Doc. 370, p. 599.

(7) Id. Doc. 413, p. 671. Compare Gold (1962) op. cit. supra, pp. 63-64.

(8) Gold (1962) op. cit. supra, p. 64.

(9) Mann 3rd ed., op. cit. supra, pp. 435-436; Mann, op. cit. supra, 2 I. C. L. Q. at pp. 106-107.

contract ineffective at its formation had been repealed(10) or in cases where the contract might otherwise be enforceable in the regulating country. Such a result is absurd.

Again, under Dr. Mann's view, Article VIII, Section 2(b) would not apply if the contract when formed was consistent with applicable exchange control regulations even though such contract was contrary to those regulations when performance was sought. But such a result "cuts" against the policy of the provision: to protect the exchange resources of a country. And Perutz v. Bohemian Discount Bank in Liquidation(11) is opposed to Dr. Mann's view. In that case, the contract when made was consistent with Czechoslovakian exchange control regulations. It was the performance sought by Perutz; that is, payment in United States dollars which was contrary to Czech regulations and barred recovery. Moreover, by the use of the word "imposed" the authors of Article VIII, Section 2(b) seem to have intended application of that provision to pre-existing contracts through the introduction or alteration of reguations after an exchange contract was formed.(12)

From his reasoning Dr. Mann also concludes that "the question whether or not a contract is an exchange contract

---

(10) Of course a contract void by applicable regulations when made could not be "revived" by subsequent repeal of those regulations.

(11) 304 N. Y. 533, 110 N. E. 2d 6 (1953) discussed supra, pp. 60-62.

(12) Compare Gold (1962) op. cit. supra, pp. 65-66.

must be decided with reference to the time when it is made".(13) But this conclusion must also be rejected if his initial theory--that the provision deals only with the time when a contract is made--is rejected.

Dr. Mann does recognize, however, that a member would not have to treat an exchange contract as unenforceable if the country whose exchange control regulations were violated had ceased to be a member of the Fund prior to judgment.(14) This was so held in Stephen v. Zivnostenska Banka,(15) in Pan-American Life Insurance Co. v. Blanco(16) and in Confederation Life Association v. Vega y Arminan.(17)

---

(13) Mann 3rd ed., op. cit. supra, p. 442.

In this connection Dr. Mann also takes the view that Article VIII, Section 2(b) was at no time applicable to the insurance policies involved in the Cuban Insurance Cases, for, inter alia, at the "date of their conclusion the insurance contracts were not exchange contracts". (Mann 3rd ed., op. cit. supra, p. 444, n. 1.) It is submitted that this argument is not correct for the reasons set forth in the text.

(14) Mann 3rd ed., op. cit. supra, p. 444. Accord, Morris, Dicey's Conflict of Laws, op. cit. supra, p. 899, n. 69.

(15) 140 N. Y. S. 2d 323 (Sup. Ct. N. Y. Co. 1955), aff'd mem., 286 App. Div. 999, 145 N. Y. S. 2d 310 (1st Dept. 1955). The case is stated supra, pp. 78-79.

(16) 362 F. 2d 167 (5th Cir. 1966), second appeal. The case is set forth infra, pp. 167-170.

(17) 207 So. 2d 33 (3rd Fla. D. C. App. 1968). This case is referred to infra, pp. 129, 143. Compare, Johansen v. Confederation Life Association, 447 F. 2d 175 (2nd Cir. 1971) decided on the application of conflict of laws rules without reference to Article VIII, Section 2(b), since Cuba had some years before withdrawn from the Fund.

Third, Dr. Mann argues in support of his view that Article VIII, Section 2(b) is concerned solely with the initial validity of contracts: that his suggestion is in line with the purpose of the provision as defined by the heading of Section 2 of Article VIII, namely, "Avoidance of restrictions on current payments."(18) But, it is submitted the purpose of the provision is the protection of the exchange resources of member countries. The heading of Article VIII, Section 2 only describes the substance of subsection 2(a).(19) Moreover, Dr. Mann and the other authorities agree that Article VIII, Section 2(b) applies alike to current and to capital transactions.(20) Thus the heading of Article VIII, Section 2 gives only superficial support to Dr. Mann's conclusion.

Finally, Dr. Mann points out that "international payments" are dealt with separately in Article VI, Section 3 and in Article VIII, Section 2(a). From this he concludes that

---

(18) Mann 3rd ed., op. cit. supra, p. 436.

(19) Nussbaum, op. cit. supra, p. 542. Subsection 2(a) reads: "Subject to the provisions of Article VII, Section 3(b) [scarce currency], and Article XIV, Section 2 [transition period], no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions." As Meyer points out, the authors of the Fund Agreement brought Section 2(b) into Article VIII after the heading had been set (62 Yale L. J. at p. 882, n. 90). See, Frantsmann v. Ponijen, supra, 30 Int. L. R. at p. 424; and Mooijen v. von Reichert, supra, 89 J. D. I. (Clunet) at pp. 725, 727.

(20) Gold (1962) op. cit. supra, pp. 114, 147; Mann 3rd ed., op. cit. supra, p. 436, n. 1; Nussbaum, op. cit. supra, p. 542.

"therefore questions relating to the performance of a valid or enforceable contract, whether by payment or otherwise, are unlikely to come within the scope" of Article VIII, Section 2(b).(21) There is some bite to this argument, based as it is on a construction of the provisions of the Fund Agreement. But if Dr. Mann's view, that the provision applies at the time of contract formation, is preferred on this basis, the policy underlying Article VIII, Section 2(b)--to protect the exchange resources of member countries--will be undermined. Yet no policy of the two other articles he cites is erroded by interpreting Article VIII, Section 2(b) as applying to contracts at the time of performance.(22)

For all of the foregoing reasons, it is submitted, with respect, that Dr. Mann's view, that Article VIII, Section 2(b) applies only at the time of contract formation, must be rejected. For sound practical and policy reasons the provision must be construed as applicable to exchange contracts at the time of their performance.

---

(21) Mann 3rd ed., op. cit. supra, p. 436.

(22) Article VI, Section 3 permits regulation of capital transactions and provides in part that "members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions. . . ."

Article VIII, Section 2(a) permits those members assenting to it to impose regulations on current transaction only with Fund approval.

Article VIII, Section 2(b) Applies to Both Current and to Capital Transactions

There is some room for argument that Article VIII, Section 2(b) applies only to current transactions. Such argument finds support in the heading to Article VIII, Section 2 which, as we have noted, reads "Avoidance of restrictions on current payments". It seems clear, however, that the heading only describes the content of Article VIII, Section 2(a).(1) Also, it would be most unusual to give a greater international effect to regulations regarding current transactions than to those regarding capital movements.(2) And, the language of Section 2(b) makes no distinction between the two categories of transactions.(3) Further the travaux préparatoires of Article VIII, Section 2(b) shows that the authors regarded it as, among other things, a means of discouraging unwanted capital movements.(4) In Frantzmann v. Ponijen(5) the District Court at Maastricht, The Netherlands, decided, inter alia, that an Indonesian regulation relating to capital transfers is

---

(1) Nussbaum, op. cit. supra, p. 452. Subsection 2(a) is set forth supra, p. 110, n. 19.

(2) Ibid.

(3) Gold (1962) op. cit. supra, p. 114.

(4) Proceedings, op. cit. supra, Doc. 191, p. 230; Doc. 343, p. 576.

(5) 30 Int. L. R. 423 (1959), Nederlandse Jurisprudentie (1960), No. 290 (in Dutch), Tijdschrift, VIII (1961) p. 190 (in English). The case is discussed, supra, p. 47, n. 19, p. 89 and infra, pp. 121-122.

covered by Article VIII, Section 2(b).(6) Likewise, in Moojen, v. Von Reichert the Court of Appeal at Paris rejected defendants' argument that Article VIII, Section 2(b) applies only to regulation of current transactions.(7) The Court of Appeal stated:

> ". . .[I]t is further argued that . . . the concept expressed by the term 'exchange contract' . . . relates only to . . . transfers and payments for current international transactions;
>
> ". . .[I]t is deduced therefrom that as the assignment of shares . . . was neither a capital transfer . . . nor a . . . payment for current transactions . . . the said assignment was not in conformity with the Bretton Woods Agreements;
>
> "But whereas if reference is made to the whole of the text relied on and more particularly to their title, it appears . . . [to be] the contrary. . . ."(8)

Thus it is clear from the precedents and other authorities that Article VIII, Section 2(b) applies alike to current and to capital transactions.

Article VIII, Section 2(b) Bars Recoveries Based on Consensual Transactions Including Certain Actions in Quasi-Contract

—Consensual Transactions

Article VIII, Section 2(b) is directed to the unenforce-

---

(6) 30 Int. L. R. at p. 424.

(7) 89 J. D. I. (Clunet) pp. 725, 727. The case is stated and discussed, supra, pp. 55-57, 68, 76, 100-101.

(8) 89 J. D. I. (Clunet) at pp. 725-727. See also, Gold and Lachman, op. cit. supra, 89 J. D. I. (Clunet) at pp. 676-678.

ability of exchange contracts which involve the currency of any member. The provision essentially bars enforcement of contracts, that is, enforcement of consensual obligations. It is immaterial whether the action in which the question is raised is an action between the parties to the contract.(1) Undoubtedly, the purpose in limiting the provision to contract cases was to exclude from the reach of Article VIII, Section 2(b) actions not based on consensual action. Thus the area in which arguments against the extraterritorial application of foreign laws might be made was limited.(2) Clearly, actions in tort are excluded as well as certain quasi-contractual actions such as, for example, those for the return of stolen funds. Whether other claims are excluded, such as actions in rem, claims by an owner of a chattel against its possessor, and foreign judgments will depend upon whether those claims are founded on contract.(3)

---

(1) Meyer, op. cit. supra, 62 Yale L. J. at pp. 887, 894-895.

(2) Meyer, op. cit. supra, 62 Yale L. J. at p. 887.

(3) Compare, Mann 3rd ed., op. cit. supra, p. 437, "actions in rem, actions in tort, quasi-contracts, actions for the enforcement of obligations arising ex lege or of a judgment are exclusively governed by the general rules" of private international law, with the more flexible approach set forth in Meyer, op. cit. supra, 62 Yale L. J. at pp. 887-889. And, see the decision of the German Federal Supreme Court, October 11, 1956, BGHZ 22, 24 at p. 31 where it is said that an action to enforce a judgment is not governed by Article VIII, Section 2(b). Also, compare the decision of the United States Supreme Court in Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961).

Of interest here are two English cases decided by the House of Lords a few years after the conclusion of the Fund Agreement. The cases are: Zivnostenska Banka National Corporation v. Frankman(4) and Kahler v. Midland Bank, Ltd.(5) In the Frankman case, plaintiff sought to recover certain debentures of the Skoda Works, Ltd., a Czechoslovakian corporation or the value of the debentures and damages. The debentures had been issued in sterling in London. They were on deposit in the London branch of the Prague bank. Plaintiff was their acknowledged owner. Defendant bank claimed that it was unable to deliver the debentures by reason of Czech exchange control regulations. Certainly delivery of the debentures or their value would have adversely affected the exchange resources of Czechoslovakia.

---

(3) Continued.

In Indonesia v. Brummer, 30 Int. L. R. 25 (1959) the Court refused to open up a judgment based upon a contract unenforceable under Article VIII, Section 2(b). And in Soliator for the Affairs of His Majesty's Treasury v. Bankers Trust Co., 304 N. Y. 282, 170 N. E. 2d 444 (1952) the New York Court of Appeals denied to the British Government the right to recover the funds of a British subject in defendant's bank which had vested in the British Government pursuant to the British Exchange Control Act of 1947.

(4) Reported at [1949] 2 All E. R. 671, [1950] A. C. 57. Reported below, Frankman v. Anglo-Prague Credit Bank (London Office) [1948] 1 All E. R. 337, [1948] 1 K. B. 736 (King's Bench); Frankman v. Anglo-Prague Credit Bank [1948] 2 All E. R. 1025, [1950] A. C. 57 (Court of Appeal). The case is discussed in Gold (1962) op. cit. supra, pp. 16-17 and in Meyer, op. cit. supra, 62 Yale L. J. p. 900.

(5) Reported at [1949] 2 All E. R. 621, [1950] A. C. 24. Reported below at [1948] 1 All E. R. 811. Discussed in

The Court of King's Bench found for defendant and, relying on Article VIII, Section 2(b), rejected plaintiff's claim that the Czech regulations involved were revenue or penal laws and unenforceable in England. On Appeal, the Court of Appeal reversed on the ground that the immediate obligation was governed by English, not Czech, law and therefore the bank must deliver the debentures to plaintiff.

The defendant bank appealed to the House of Lords which allowed the appeal, and set aside the judgment of the Court of Appeal, restored the judgment of the Court of King's Bench and dismissed the action.(6) But the House of Lords' decision turned upon the application of English private international law to the contract involved. The House of Lords said that the parties intended that Czechoslovakian law should govern the making and performance of the contract.(7) Therefore, defendant prevailed. Dr. Mann explains this and the Kahler(8) decision as not governed by Article VIII, Section 2(b) since they were actions in detinue based upon property rights for the recovery of property. Yet both cases turned on questions of contract. It is submitted, therefore, that these actions come within the scope of Article VIII, Section 2(b) and that

---

(5) Continued.
Gold (1962) op. cit. supra, pp. 18-19 and in Meyer, op. cit. supra, 62 Yale L. J. p. 901.

(6) [1949] 2 All E. R. at p. 685.

(7) [1949] 2 All E. R. at pp. 674, 677, 679, 683, 684.

(8) Infra, pp. 117-118.

the proper rationale for the court's decisions is that the rights of the respective plaintiffs arising from the contractual transactions involved were unenforceable by virtue of Article VIII, Section 2(b).

In Kahler v. Midland Bank, Ltd.(9) plaintiff shareowner, Kahler, sought, in contract or in detinue, delivery of certain share certificates of a Canadian company which the defendants, Midland Bank, held for safekeeping but in an account with a Czech bank, not in account with Kahler. In defense Midland Bank argued that without the consent of the Czech bank in whose account it held the shares it could not deliver the certificates to Kahler. The Czech bank could not give its consent in view of the Czechoslovakian exchange control regulations. Long before the action, Kahler had deposited the share certificates with the Czech bank for safekeeping.

The trial court, MacNaghten, J., gave judgment for plaintiff, Kahler, and defendants, Midland Bank, appealed. The Court of Appeal reversed and held for Midland Bank and Kahler appealed. The House of Lords, 3-2, dismissed the

---

(9) [1949] 2 All E. R. 621, [1950] A. C. 57. The Kahler case was distinguished on its facts by the court in In re Maria Liebl's Estate, 201 Misc. 1092, 106 N. Y. S. 2d 705 (Sur. Ct. Kings Co. 1951). In a companion case In re Thersie Liebl's Estate, 201 Misc. 1102, 106 N. Y. S. 2d 715 (Sur. Ct. Kings Co. 1951) the Court characterised the Czechoslovakian exchange control law involved in the Liebl and Kahler cases as confiscatory and fiscal "laws of a foreign country which we, as well as the English, are traditionally disposed to ignore."

appeal, in effect affirming the Court of Appeal, on the theory that there was no contract between Kahler and the Midland Bank and Kahler had failed to establish his right to possession of the share certificates.

Again, however, the decision, although correct, should have been based upon Article VIII, Section 2(b): plaintiff, Kahler, should have been barred from recovery because the English courts had to give effect to the Czech regulations. It is submitted that the Frankman and Kahler cases should be considered as within the scope of the provision and not without it simply because property rights were also involved. The essential relationships were contractual and governed by Article VIII, Section 2(b).

Similarly, it is submitted that the Supreme Court of Austria erred in its decision in X v. Zagreb Bank(10). The plaintiff moved from Yugoslavia to Austria and sought the return to him for his own use of the balance of a certain bank account. That account had been opened in Vienna some years before, with the approval of the Yugoslav exchange control authorities, for the purpose of paying for imports into Yugoslavia. The defendant bank refused to turn over the balance arguing that it was prohibited by Yugoslavia law from

---

(10) The facts are stated in more detail supra, pp. 70-71. The case is reported at 26 Int. L. R. 232 (1958), Juristische Blätter, 1959, pp. 73-74, 89 J. D. I. (Clunet) p. 868 (1959). The case is discussed in Gold (1962) op. cit. supra, pp. 109-112.

doing so and that the Austrian Courts were bound to enforce that law by Article VIII, Section 2(b). But the Supreme Court of Austria rejected defendant's argument and decided the case on the law applicable to property, saying:

> ". . . The applicable foreign exchange law is . . . determined . . . [by] which law is applicable to the res concerned [which points in the case at hand solely to the domestic laws where the balance was on deposit]. . . ."(11)

By fragmenting the transaction and focusing on the "property" aspect of the case, the Court frustrated the purpose of Article VIII, Section 2(b) thus indicating that those willing to migrate may be able to avoid legitimate exchange control regulations.(12)

—Quasi-Contract Claims

Also held to be within the scope of Article VIII, Section 2(b) are actions in quasi-contract for the recovery of sums paid in consideration of expected performance under an exchange contract.

---

(11) 26 Int. L. R. at p. 233. Brackets added.

(12) This result is contrary to the result in White v. Roberts, 33 Hong Kong Law Reports 231, 19 Int. L. R. 27 (1949); the Jourdain Case, 22 Int. L. R. 727 (1956), Pasicrisie Luxembourgeoise (1957) p. 35; The Clearing Dollars Case, 22 Int. L. R. 730 (1954); and Peruta v. Bohemian Discount Bank in Liquidation, 304 N. Y. 533, 110 N. E. 2d 6 (1953).

If the rule laid down in the Zagreb Bank Case became generally accepted, then evasion of legitimate exchange control regulations would be facilitated for those willing to migrate. Gold (1966) op. cit. supra, p. 23.

Thus in White v. Roberts(13), one of the earliest cases decided under Article VIII, Section 2(b), the plaintiff, White, and a partnership of the defendant, Roberts, and a person named Baeten had been foreign exchange brokers in Shanghai. White, on behalf of his clients, had entered into a number of contracts with the partnership in Shanghai under which White paid Chinese currency in return for payment by the partnership of specified foreign currency to a named person in another country. In 1948, White and Roberts, on fear of discovery, moved to Hong Kong where White brought action on twelve of the contracts made in Shanghai on which the partnership had defaulted by failing to provide the stipulated foreign currency.

White sought approximately one million Hong Kong dollars had and received by the partnership on the contracts, or damages for breach of contract. In defense Roberts relied upon, among other things, Article VIII, Section 2(b). White replied that the provision did not bar the quasi-contractual right to recover money paid under an unenforceable exchange contract. The Court rejected White's contention, and stated that it was "immaterial whether plaintiff [White] relies on the breach of contract or on an action for money had and received." The Court said:

---

(13) 33 Hong Kong Law Reports 231, 19 Int. L. R. 27 (1949). The case is discussed in Gold (1962) op. cit. supra, pp. 87-90.

"Lastly, I do not agree with the contention of Counsel for the plaintiff that, because Article VIII section 2(b) of the Bretton Woods Agreements states only that the Court will not enforce exchange contracts contrary to the laws of a foreign country, I ought not to hold that plaintiff should not succeed in an action for money had or received. It is immaterial in such a case whether plaintiff relies on the breach of contract or on an action for money had and received: if the circumstances of the case show that there was illegality, then in my view he cannot succeed."(14)

The Court went on to hold that the contracts were illegal under certain Chinese exchange control regulations which were applicable and "this Court ought to do nothing to enforce them both on the grounds of public policy and because of the provisions of Article VIII section 2(b) of the Bretton Woods Agreements".(15)

A similar result was reached by the Court of Appeal (Oberlandesgericht) in Schleswig, Germany in Lessinger v. Mirau(16). The court decided that plaintiff seeking repayment of a loan of U.S. $1,000 could not recover either on the contract or on a theory of unjust enrichment. And, in Frantsmann v. Ponijen(17) the District Court of Maastricht, the

---

(14) 33 Hong Kong Law Reports at p. 282, 19 Int. L. R. at p. 35.

(15) 33 Hong Kong Law Reports at p. 282, 19 Int. L. R. at pp. 35-36.

(16) 22 Int. L. R. 725 (1954), Jahrbuch für Internationales Recht, V (1955) p. 113. The case is discussed supra, pp. 53-54.

(17) 30 Int. L. R. 423 (1959), Nederlandse Jurisprudentie (1960) No. 290 (in Dutch), Tijdschrift, VIII (1960), p. 190 (in English). The case is discussed supra p. 47, n. 19, pp. 89, 112-113.

Netherlands, decided that where plaintiff's claim is based upon an unenforceable exchange contract plaintiff cannot succeed by reformulating the claim as one for unjust enrichment. The court stated:

> "In acting as alleged by the plaintiff, the defendant has not gone beyond the limits of a breach of obligation in such a way as to be subject to a natural obligation to the extent that her obligation was not wholly void, and therefore the plaintiff cannot succeed on his subsidiary claim."(18)

The conclusion reached by these courts in the three cases discussed promotes the general policy of the provision to discourage the making of contracts in disregard of exchange control regulations. For, to permit a quasi-contractual recovery may be tantamount to the enforcement of the contract that is unenforceable.(19) For example, if A receives sterling from B and promises to pay dollars to B in violation of English exchange control regulations, an action by B in quasi-contract in the United States for the sterling had and received by A would result, if successful, in a judgment in dollars.(20)

But, to bar the quasi-contractual recovery in some cases

---

(18) See Gold (1962) op. cit. supra, p. 118. In the Frantzmann case plaintiff sought recovery on a note, given in Indonesia in return for a sum of Indonesian rupiahs, to pay plaintiff $5,000 Dutch guilders.

(19) See Gold (1962) op. cit. supra, pp. 93-94; Gold (1966) op. cit. supra, pp. 48-49.

(20) Cf. Boissevain v. Weil [1950] A. C. 327, [1950] 1 All E. R. 728 (House of Lords) particularly [1950] A. C. 327 at p. 341. That case was not concerned with Article VIII, Section 2(b) but with British exchange control regulations.

might be highly unfair. In the White, Lessinger and Frantzmann cases discussed above, all defendants received substantial wind-falls. Thus, as may be imagined, there is some case law favoring quasi-contractual recovery.(21) And, as Dr. Mann points out the Fund Agreement does not require respect for and application of exchange control regulations except to the extent of Article VIII, Section 2(b)--that is, to the extent that certain exchange contracts are unenforceable.(22)

Article VIII, Section 2(b) may not be held to bar all quasi-contractual recoveries for the provision does not void exchange contracts, it merely renders them unenforceable. Moreover, in these actions involving claims for quasi-contractual recovery policies of justice collide most directly with the policy of Article VIII, Section 2(b). Thus, the choices are difficult and the solutions may not be wholly satisfactory.

---

(21) In Varas v. Crown Life Insurance Co., 83 Montg. Co. L. R. 71 (1963) the court denied recovery of the cash surrender value of a life insurance policy but held that plaintiff could recover in quasi-contract the value of the premiums. This decision was reversed on appeal (204 Pa. Super. 176, 203 A. 2d 505 (1964), cert. denied, 382 U. S. 827, 86 S. Ct. 62, 15 L. Ed. 2d 72 (1965)). See decision of French Cour de Cassation, June 18, 1969, Rev. Critique, 1970, p. 467; Mann 3rd ed., op. cit. supra, pp. 437 and 449, n. 2 where the decision in White v. Roberts, supra, is criticized.

(22) Mann 3rd ed., op. cit. supra, p. 438.

Article VIII, Section 2(b) Has Not Abrogated The Rule of International Law Which Prohibits Enforcement by a Country of its Public Laws in Another Country

Finally, it should be noted that the adoption of the first sentence of Article VIII, Section 2(b) did not abrogate the well established and universally accepted principle of public international law that: no country can enforce its prerogative rights or public laws within the territory of another country. (1) Under this principle a country cannot maintain an action to enforce its foreign exchange control regulations in the courts of another country.(2) Thus the New York Court of Appeals in a 4-3 decision stated in Banco do Brazil S.A. v. Israel Commodity Co., Inc. that because the authors of the Fund Agreement provided that exchange contracts which are contrary to members exchange control regulations maintained or imposed consistently with the Fund Agreement are "unenforceable", the authors by implication made unavailable the method of enforcement of foreign exchange controls by direct suit brought by the aggrieved government in the courts of another country. The Court said:

---

(1) See Morris, Dicey's Conflict of Laws, op. cit. supra, Rule 21, p. 163; Mann 3rd ed., op. cit. supra, pp. 428-430; F. A. Mann, Prerogative Rights of Foreign States and the Conflict of Laws (1955) 40 Transactions of the Grotius Society 25.
See discussion infra, p. 131.

(2) Banco do Brazil S.A. v. Israel Commodity Co., Inc. 12 N. Y. 2d 371, 190 N. E. 2d 235, 239 N. Y. S. 2d 875,

". . .[U]se of the unenforcibility device for effectuation of its [the Fund Agreement] purposes impliedly concedes the unavailability of the more direct method of enforcement at the suit of the aggrieved government. . . ."(3)

Thus, Article VIII, Section 2(b) of the Fund Agreement has not abrogated the Rule of international law prohibiting enforcement by one country of its public laws within the territories of another.

---

(2) Continued.
30 Int. L. J. 371 (1963), discussed supra, pp. 42-45, infra, p.173, n.33 and herewith. See also, Bulgaria v. Takvorian (1961) to be reported in International Law Reports, summarized in (1966) J.D.I. (Clunet) 437; Solicitor for the Affairs of H. M. Treasury v. Bankers Trust, 304 N. Y. 282, 107 N. E. 2d 448 (1952); Indonesia v. Brummer, 30 Int. L. R. 25 (1959), Nederlandse Jurisprudentie, 1960, No. 149 (in Dutch).

(3) 12 N. Y. 2d 377 at p. 377, 190 N. E. 2d 235 at p. 237, 239 N. Y. S. 2d 872 at p. 872, cert. denied, 376 U. S. 906, 84 S. Ct. 657, 11 L.Ed. 2d 605 (1964). See discussion infra, p. 131.
The dissent took the position that the Fund Agreement had in effect changed the principle of public international law so that the action would lie. Chief Judge Desmond stated: "Refusal to entertain this suit does violence to our national policy of co-operation with other Bretton Woods signatories." 12 N. Y. 2d at pp. 378-379, 190 N. E. 2d at p. 238, 239 N. Y. S. 2d at pp. 876-877.

PART V

THE EFFECT OF THE FIRST SENTENCE OF ARTICLE VIII, SECTION 2(b): ON THE DOCTRINE OF PUBLIC POLICY REGARDING EXCHANGE CONTROL; ON THE PRIVATE INTERNATIONAL LAW OF EXCHANGE CONTROL; AND ON THE "ACT OF STATE" DOCTRINE

Three interrelated topics are discussed in this Part: Public policy regarding exchange control; the private international law of exchange control; and the application of the "act of state" doctrine to exchange control. The common core of the issues raised in this Part has been generated by the adoption of Article VIII, Section 2(b) and much interesting law has developed.

With the Adoption of Article VIII, Section 2(b) Public Policy Has, In General, Been Eliminated as a Bar to the Application of Foreign Exchange Control Regulations in Member's Forums

From at least Lord Mansfield's time, it has been a general rule of Anglo-American law that, in the absence of treaty provisions to the contrary, the courts lack jurisdiction to entertain actions for the enforcement, either directly or indirectly, of penal, revenue or public laws of a foreign state or of a law founded upon an "act of a foreign state".(1) But

(1) See Lord Mansfield's statement in Holman v. Johnson, 1 Comp. 341, 343, 98 E. R. 1120, 1121 (Kings Bench 1775):

exchange control regulations are neither penal nor revenue laws.(2) Nevertheless, prior to the adoption of the Fund Agreement and in the absence of a binding treaty, foreign exchange control regulations were not and are not, as a general rule, given recognition in the courts of Anglo-American and

---

(1) Continued.
"no country ever takes notice of the revenue laws of another."

Banco do Brazil S.A. v. Israel Commodity Co., 12 N. Y. 2d 371, 190 N. E. 2d 235, 239 N.Y.S. 2d 872, 30 Int. L. R. 371 (1963), cert. denied, 376 U. S. 906, 84 S. Ct. 657, 11 L. Ed. 2d 604 (1964); The Antelope, 23 U. S. (10 Wheat.) 66, 122-123, 6 L. Ed. 268, 282 (1825)(Marshall, C. J.); Government of India v. Taylor [1955] A. C. 491, 504-505, 1 All E. R. 292, 295-296, (House of Lords); Huntington v. Attrill, 146 U. S. 657, 671, 13 S. Ct. 224, 229, 36 L. Ed. 1123, 1129 (1892); Huntington v. Attrill [1893] A. C. 150, 157 (House of Lords); King of Italy v. DeMedici [1918] 34 T. L. R. 623 (Chan. Div.); Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 120 N. E. 198 (1918); State of Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357 (1921); Morris and others eds., Dicey's Conflict of Laws, 8th ed. 1967, Rule 21, pp. 160-168; Freutel, Exchange Control, Freezing Orders and the Conflict of Laws (1942) 56 Harv. L. R. 30; H. Lauterpacht, Oppenheim's International Law, 8th ed. 1955, vol. I, § 144a, pp. 327-330.

(2) Zivnostenska Banka v. Frankman [1950] A. C. 57, 72 [1949] 2 All E. R. 671, 676 (Lord Simonds). Freidmann, Foreign Exchange Control in American Courts (1951) 26 St. John's L. R. 97 at pp. 113-114.

An early decision in which a court refused to enforce an exchange control law on the ground that it was a foreign revenue law is the interesting case of Boucher v. Lawson, 1 Cas. T. H. 85, 95 E. R. 53 (Kings Bench 1734). There, Lord Hardwicke, in a suit for breach of contract to ship gold from Portugal, refused to give effect to a Portuguese law forbidding the export of gold. Lord Hardwicke's language indicates that, as was to be expected in that period, he would have regarded no Portuguese law as relevant, whatever its nature. See also, Cermak v. Bata Akciova Spolecnost, 80 N. Y. S. 2d 782, 784-785 (Sup. Ct. N. Y. Co. 1948), aff'd mem., 275 App. Div. 1030,

West European countries.(3) A reason often cited for this non-recognition is that such regulations are against the public policy of the forum state.(4) However, the broad proposi-

---

(2) Continued.
91 N. Y. S. 2d 835 (1st Dept. 1949); In re Maria Liebl's Estate, 201 Misc. 1092, 106 N. Y. S. 2d 705 (Sur. Ct. Kings Co. 1951).

In In re Theresie Liebl's Estate, 201 Misc. 1102, 106 N. Y. S. 2d 715 (Sur. Ct. Kings Co, 1951) the court said that "under the circumstances herein described, these currency regulations become the fiscal laws of a foreign country which we, as well as the English, are traditionally disposed to ignore." 201 Misc. at p. 1105, 106 N.Y.S. 2d at p. 718. In both Liebl cases the court, unfortunately, made no mention of Article VIII, Section 2(b) of the Fund Agreement.

(3) Cabot, Exchange Control and the Conflict of Laws: An Unsolved Puzzle (1951) 99 U. P. L. R. 476; Morris Dicey's Conflict of Laws, op. cit. supra, Rule 155, pp. 894-902; Domke, Trading with the Enemy in World War II, 1943, Ch. 20; Domke, Foreign Exchange Restrictions (A Comparative Study) (1939) 21 J. Comp. Leg. (3rd Ser.) 54; Freutel, op. cit. supra, 56 Harv. L. R. 30; Friedmann, op. cit. supra, 26 St. John's L. R. 97; F. M. Mann, The Legal Aspect of Money, 3rd ed., 1971, pp. 400-406 (hereinafter referred to as "Mann 3rd ed."); Nussbaum, Money in the Law National and International, rev. ed. 1950, pp. 446 et seq.; Wolf, Private International Law, 2nd ed. 1950, pp. 472-476.

(4) Mann 3rd ed., op. cit. supra, pp. 400-406. As Professor Mann points out, p. 402, no American Court has refused to enforce foreign exchange control regulations on the ground that those regulations were contrary to American public policy. In French v. Banco National de Cuba, 23 N. Y. 2d 46, 242 N. E. 2d 704, 295 N. Y. S. 2d 433 (1968) the court said that exchange control practices are "recognized as a normal measure of government." 23 N. Y. 2d at pp. 63 and 88, 242 N. E. 2d at pp. 715, 731, 295 N. Y. S. 2d at pp. 449, 470. The French case is discussed infra, pp. 162-167. In Egyers v. Magyar Nemzeti Bank, 115 F. 2d 539 (2nd Cir. 1948) Judge Clark said in dictum, p. 541: "In view of all that has happened in the world it seems profitless to characterise the currency manoeuvres of foreign governments as unconscionable."

tion that, in the absence of the Fund Agreement, exchange controls are incapable of international recognition for reasons

---

(4) Continued.

See also, Confederation Life Association v. Vega y Arminan, 207 So. 2d 33 (3rd Fla. D. C. App. 1968), aff'd mem., 211 So. 2d 169 (Fla. 1968), cert. denied, 393 U. S. 980, 89 S. Ct. 450, 21 L. Ed. 2d 441 (1968); Pan-American Life Insurance Co. v. Blanco, 362 F. 2d 167, 42 Int. L. R. 149 (5th Cir. 1966); Confederation Life Association v. Ugalde, 164 So. 2d 1, 38 Int. L. R. 138 (Fla. 1964), cert. denied, 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186 (1964); Theye y Ajuria v. Pan American Life Insurance, 245 La. 755, 161 So. 2d 70, 38 Int. L. R. 456 (1964), cert. denied, 377 U. S. 997, 84 S. Ct. 1922, 12 L. Ed. 2d 1046 (1964), rehearing denied, 379 U. S. 872, 85 S. Ct. 20, 13 L. Ed. 2d 79 (1964), see also, 2 I. L. M. 950 (1963); Varas v. Crown Life Insurance Co., 204 Pa. Super 176, 203 A. 2d 505 (Sup. Ct. Pa. 1964), cert. denied, 382 U. S. 827, 86 S. Ct. 62, 15 L. Ed. 2d 72 (1965); Cermak v. Bata Akciova Spolecnost, 80 N. Y. S. 2d 782 (Sup. Ct. N. Y. Co. 1948), aff'd mem., 275 App. Div. 1030, 91 N. Y. S. 2d 835 (1st Dept. 1949) (avoided effect of exchange control law); Stern v. Pesti Magyar Kereskedelmi Bank, mem., 278 App. Div. 811, 105 N. Y. S. 2d 270 (1st Dept. 1951), aff'd mem., 303 N. Y. 881, 105 N. E. 2d 106 (1952) (avoided effect of exchange control law); Sabl v. Laenderbank, 30 N. Y. S. 2d 608 (Sup. Ct. N. Y. Co. 1941), aff'd mem., 266 App. Div. 832, 43 N. Y. S. 2d 270 (1st Dept. 1943); David v. Veitscher Magnesitwerke, 348 Pa. 335, 35 A. 2d 346 (1944) (avoided effect of exchange control law); Kraus v. Zivnostenska Banka, 187 Misc. 681, 64 N. Y. S. 2d 208 (Sup. Ct. Queens Co. 1946) (upheld effect of exchange control law); Warfel v. Zivnostenska Banka, 260 App. Div. 747, 23 N. Y. S. 2d 1001 (1st Dept. 1940), rev'd on other grounds, 287 N. Y. 91, 38 N. E. 2d 382 (1941) (upheld effect of exchange control law); South American Petroleum Corporation v. Columbian Petroleum Co., 177 Misc. 756, 31 N. Y. S. 2d 771 (Sup. Ct. N. Y. Co. 1941) (avoided effect of exchange control law).

And, see the cases, where claims to refunds for ships passage purchased in Germany and where the ships failed to sail, in which German law was applied and the refunds were denied: Branderbit v. Hamburg-American Line, 29 N. Y. S. 2d 488 (N. Y. C. Mun. Ct. 1941), reversed, 21 N. Y. S. 2d 588 (Sup. Ct. App. Term 1941), aff'd mem., 266 App. Div. 1018, 45 N. Y. S. 2d 188 (2nd Dept. 1943); Eck v. Nederlandsch Amerikaansche Stoomvaart, 44 N. Y. S. 2d 622 (N. Y. C. City Ct. 1943), reversed, 183 Misc. 691,

of public policy is no longer supportable.(5) For, exchange controls are usually imposed in order to protect a country's exchange resources, just as trade restrictions are imposed to control the movement of goods. Since trade restrictions are recognized internationally, exchange controls, which are imposed to restrict the movement of currency resources, must also be given international effect.(6)

---

(4) Continued.
52 N. Y. S. 2d 367 (Sup. Ct. App. Term 1944); Loewenhardt v. Compagnie Generale Transatlantique, 20 A. M. C. (Part I) 735 (Sup. Ct. App. Term 1942); Ornstein v. Compagnie Generale Transatlantique, 31 N. Y. S. 2d 524 (N. Y. C. Mun. Ct. 1941), aff'd mem., 52 N. Y. S. 2d 243 (Sup. Ct. App. Term 1942); Rosenblueth v. Nederlandsch Amerikaansche Stoomvaart, 27 N. Y. S. 2d 922 (Sup. Ct. App. Term 1941), aff'd mem., 262 App. Div. 1005, 30 N. Y. S. 2d 843 (1st Dept. 1941); Schlein v. Nederlandsch Amerikaansche Stoomvaart, 34 N. Y. S. 2d 720 (Sup. Ct. App. Term 1942); Steinfink v. North German Lloyd Steamship Co., 176 Misc. 413, 27 N. Y. S. 2d 918 (Sup. Ct. App. Term 1941); Zimmern v. Nederlandsch Amerikaansche Stoomvaart, 177 Misc. 91, 28 N. Y. S. 2d 824 (Sup. Ct. App. Term 1941).

But, in Kassel v. Nederlandsch Amerikaansche Stoomvaart, 177 Misc. 92, 24 N. Y. S. 2d 450 (Sup. Ct. App. Term 1940) where defendant was under contractual obligation to make a refund, the refund was allowed. The Kassel case was followed in Baer v. United States Lines, 178 Misc. 1016, 37 N. Y. S. 2d 7 (N. Y. C. Mun. Ct. 1942), reversed, 180 Misc. 456, 43 N. Y. S. 2d 212 (Sup. Ct. App. Term 1943), and in Spiegel v. United States Lines, 178 Misc. 993, 37 N. Y. S. 2d 31 (N. Y. C. Mun. Ct. 1942). The Branderbit, Steinfink and Kassel cases are noted by D. S. Moore in (1942) 27 Corn. L. Q. 267-270.

(5) Meyer, Recognition of Exchange Controls After the International Monetary Fund Agreement (1953) 62 Yale L. J. 867 at pp. 870-871.

(6) See Mann 3rd ed., op. cit. supra, pp. 403-404.

The proposition that foreign exchange control regulations should not, in the absence of a treaty to the contrary, be enforced if the regulations offend the public policy of the forum is not to be confused with the well settled principle of public international law that no country can, by direct action, enforce its foreign exchange control regulations within the territory of another country.(7) This public international law principle was not abrogated by adoption of the Fund Agreement.(8)

With the adoption of the Fund Agreement, embodying Article VIII, Section 2(b), the argument against recognition of exchange controls on grounds of public policy cannot prevail so long as the exchange controls are maintained or imposed consistently with the Fund Agreement.(9) That the public

---

(7) On the general principle see supra, pp. 124-125. See also, citations next footnote.

(8) Banco do Brazil S.A. v. Israel Commodity Co., Inc. 12 N. Y. 2d 371, 190 N. E. 2d 235, 239 N. Y. S. 2d 872, 30 Int. L. R. 371 (1963), cert. denied, 376 U. S. 906, 845 S. Ct. 657, 11 L. Ed. 2d 605 (1964). The Banco do Brazil case is discussed supra, pp. 42-45; Bulgaria v. Takvorian (1961) to be reported in International Law Reports, summarized in (1966) J. D. I. (Clunet) 437; Solicitor for the Affairs of H. M. Treasurer v. Bankers Trust, 304 N. Y. 282, 107 N. E. 2d 448 (1952); Indonesia v. Brunner, 30 Int. L. R. 25 (1952), Nederlandse Jurisprudentie, 1960, No. 149 (in Dutch).

(9) The argument has been advanced that since so many of the countries of the world are members of the Fund and adhere to the Fund Agreement the public policy argument should no longer be applicable even between non-member states or member and non-member states. Mann 3rd ed., op. cit. supra, p. 400.

policy argument was laid to rest upon adoption of the Fund Agreement is clear from the Fund interpretation of Article VIII, Section 2(b) which provides that no tribunal of a member country will refuse recognition of the exchange control regulations of another member on the ground that they are contrary to the public policy of the forum if such regulations are maintained or imposed consistently with the Fund Agreement. Thus the interpretation states:

> "An obvious result of the foregoing undertaking [by members to make Article VIII, Section 2(b) an effective part of their national law] is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. . . ."(10)

As seen above this interpretation should be binding, in the proper circumstances, upon the tribunals of member countries. (11)

In Perutz v. Bohemian Discount Bank in Liquidation(12)

---

(10) IMF Annual Report 1949, Appendix XIV, pp. 82-83; Selected Decisions of the Executive Directors and Selected Documents, 5th Issue, 1971, pp. 92-93; U. S. Fed. Reg. 5208-5209 (1949); XL Revue Critique de Droit International Prive 586-587 (1951); The International Monetary Fund 1945-1965, ("IMF 1945-1965"), 3 vols. 1969, vol. III, pp. 256-257.

(11) Supra, pp. 33-39.

(12) 304 N. Y. 533, 110 N. E. 2d 6 (1953). The Perutz case is discussed supra, pp. 60-62 and infra, pp. 148-149.

the New York Court of Appeals quickly disposed of plaintiff, Peruts's argument that the Czechoslovakian exchange control regulations which were involved were contrary to United States public policy. The Court stated that the Czechoslovakian currency control laws cannot be deemed contrary to public policy since both the United States and Czechoslovakia are members of the Fund, saying:

> ". . . Our courts may . . . refuse to give effect to a foreign law that is contrary to our public policy . . . But the Czechoslovakian currency control laws in question cannot here be deemed to be offensive on that score, since our Federal Government and the Czechoslovakian Government are members of the International Monetary Fund. . . ."(13)

Again, rejection of the "contrary to public policy" argument was even more pointed in In the Matter of Brecher-Wolf.(14)

---

(13) 304 N. Y. at p. 537, 110 N. E. 2d at p. 7.

Cf. Catz & Lips v. S. A. Union Versicherung, 22 Int. L. R. 713 (1949), Jurisprudence du Port d' Anvers, Vols. 7-8 (1949) p. 321 where the court denied recovery to a Dutch firm which had begun suit on certain insurance claims against a Czechoslovakian company by attachment of the Czech company's funds held in Belgium. In denying recovery the court relied on Article VI of the Fund Agreement and a Dutch-Czech convention of November, 1946 in the furtherance of the Fund Agreement, but failed to cite or rely upon Article VIII, Section 2(b) of the Fund Agreement. The Catz & Lips case is discussed in: J. Gold, The Fund Agreement in the Courts, 1962, pp. 30-32 (hereinafter referred to as "Gold (1962)"); and Meyer, op. cit. supra, 62 Yale L. J. pp. 902-903. The case is noted in 22 Int. L. R. 914-915.

(14) 22 Int. L. R. 718, Title Claim No. 41668, Docket No. 1698 (1955) U. S. Dept. of Justice, Office of Alien Property.

In the Brecher-Wolf case the United States Attorney General had found that certain shares of a Montana corporation belonged to E, a citizen and resident of Germany, whereupon the shares were vested in the Attorney General under United States enemy property legislation. B, a United States citizen, contested the vesting. She claimed that the shares had been sold to her by E in February 1941 when both E and B were resident in Germany. In resisting B's claim it was contended that the sale from E to B was illegal and null under German exchange control legislation which had been adopted in 1931 and subsequently reenacted. The Director of the Office of Alien Property held that, under private international law, the sale by E to B was governed by German law and that the German exchange control law was not, as B argued, confiscatory or penal and therefore against United States public policy. In rejecting B's claim, the Director stated:

> "An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b), seeks to enforce such a contract, the tribunal of a member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement (International Monetary Fund Interpretation, issued July 14, 1949, 14 Fed. Reg. 5208).
>
> * * *
>
> ". . . It is sufficient to point out that by adherence to the [Fund] Agreement, the United States has taken the position that foreign currency controls are not inherently penal or

confiscatory and that recognition of such controls is not offensive to public policy."(15)

To the same effect is the decision in Societe Filature et Tissage X. Jourdain v. Epoux. Heynen-Bintner(16) where the court decided that enforcement of the judgment of the court of another Fund member could not be refused because the judgment was based upon the foreign exchange control legislation of that other member country. Thus the Court stated:

". . . [T]he domestic courts are bound by the Fund Agreement and may not refuse to apply exchange control regulations of a member of the Fund which have been created or are being maintained in accordance with this Agreement, for the reason that they go against internal public policy. . . ."(17)

From the foregoing it is clear that the domestic courts and other tribunals of a Fund member may not refuse to apply the exchange control regulations of another member which are maintained or imposed consistently with the Fund Agreement on the ground that such regulations are contrary to the public policy of the forum.

In an unusual case, however, if application of a member's exchange control regulations would be confiscatory or discrim-

---

(15) 22 Int. L. R. at pp. 718-719.

(16) 22 Int. L. R. 727 (1956), Pascrisie Luxembourgeoise, 1957, p. 35.

(17) 22 Int. L. R. at p. 729. Accord: Emek v. Bossers & Mouthaan 22 Int. L. R. 722 (1953); Frantzmann v. Fonijen, 30 Int. L. R. 423 (1959) Nederlandse Jurisprudentia, 1960, No. 290 (in Dutch), Tijdschrift, VIII (1961) p. 190 (in English); Lessinger v. Hiram, 22 Int. L. R. 725 (1954).

inatory in effect a court might refuse to enforce such regulations on the ground that the effect of enforcement is contrary to the public policy of the forum.(18) This appears to be the rationale of Indonesian Corporation P. T. Escomptobank v. N. V. Assurantie Maatschappij de Netherlanden Van 1845.(19) In that case Netherlanden Van 1845 (the N. Corporation) owned all the shares of five Indonesian companies. One of these subsidiary companies had a number of accounts in U. S. dollars, sterling, Hong Kong dollars, Malayan dollars and Netherlands

---

(18) Friedmann, op. cit. supra, p. 114; Mann 3rd ed., op. cit. supra, p. 434. See: Re Helbert Wagg [1956] 1 All E. R. 129, 142, [1956] 2 W. L. R. 183, [1956] Ch. 323, at pp. 351-352 discussed supra, p. 82; The Wagg case is discussed by E. Lauterpacht (1956) 5 I. C. L. Q. 301; Mann (1956) 5 I. C. L. Q. 295; F. M. Mann (1956) 19 Mod. L. R. 307 and is noted in (1956) 50 A. J. I. L. 683; In re Maria Liebl's Estate, 201 Misc. 1092, 106 N. Y. S. 2d 705 (Sur. Ct. Kings Co. 1951); In re Theresie Liebl's Estate, 201 Misc. 1102, 106 N. Y. S. 2d 715 (Sur. Ct. Kings Co. 1951)(in neither of the Liebl cases did the court consider or discuss the impact of Article VIII, Section 2(b) of the Fund Agreement); Marcu v. Fischer, 65 N. Y. S. 2d 892 (Sup. Ct. N. Y. Co. 1946). Compare, Sulyok v. Penzintezeti Kozpont Budapest, 304 N. Y. 704, 107 N. E. 2d 604 (1952), modifying and affirming, 279 App. Div. 528, 111 N. Y. S. 2d 75 (1st Dept. 1952). Compare also, Banque de France v. Supreme Court of State of New York, 287 N. Y. 483, 41 N. E. 2d 65 (1942) and Feuchtwanger v. Central Hanover Bank & Trust Co., 288 N. Y. 342, 43 N. E. 2d 434 (1942) where purported exchange control regulations were denied extraterritorial effect because they contained confiscatory measures.

(19) The Netherlands Supreme Court, Hoge Road, 1964, 40 Int. L. R. 7 (1964), Nederlands Tijdschrift voor Internationaal Recht, 13, No. 1 (1966), pp. 58-70 (in English). The case is discussed by Gold, The Fund Agreement in the Courts-IX (1967) 14 IMF Staff Papers 391-397.

guilders with an Indonesian bank, the Escomptobank. In 1959 that subsidiary assigned its claim against Escomptobank to the N. Corporation. Thereafter the N. Corporation attached the assets of Escomptobank in the Netherlands and brought an action for payment of the balances.

Escomptobank defended arguing that the subsidiaries had been nationalized by certain Indonesian decrees; that the Netherlands courts could not review the legality of Indonesia's acts of state; that the assignment violated Indonesian exchange control laws because a license had not been obtained; and that the Netherlands courts must recognize Indonesian exchange control regulations since both Indonesia and the Netherlands adhered to the Fund Agreement.

The District Court of The Hague gave judgment for the N. Corporation and dismissed Escomptobank's arguments. Escomptobank appealed to the Court of Appeal of The Hague, which upheld the decision of the District Court. The Court of Appeal stated, among other things, that it would disregard acts of state which were inconsistent with international law when contested between private parties. The Indonesian nationalizations had been without compensation, were discriminatory and had apparently, been politically motivated. Escomptobank appealed once more, but in vain. The Supreme Court of the Netherlands dismissed the appeal. The Supreme Court found it unnecessary to deal with the relationship of the act of state doctrine to international law. Rather the Court stated:

". . . Netherlands public policy does not tolerate that foreign measures enacted to prejudice Netherlands interests. . . be accorded legal effect in this country.

* * *

". . . Netherlands public policy . . . likewise does not, in a case such as the present one, allow acceptance of the failure to observe the Indonesian foreign exchange control provisions to constitute a bar to the validity of such an assignment."(20)

Thus the Netherlands Supreme Court refused to recognize the effects of the Indonesian nationalization decrees on the ground that to do so would be repugnant to Netherlands public policy. There thus appears to be a residual area where foreign exchange control regulations may be disregarded under certain conditions as contrary to the public policy of the forum.(21)

It is submitted, however, that the proper basis for refusing enforcement of such regulations is that they are not "consistent" with the Fund Agreement, that is such regulations are not in keeping with the purposes of the Fund.(22) Similarly, some authorities have suggested that if the courts of a Fund member are called upon to enforce the exchange control regulations of another member, and those regulations are not maintained or imposed consistently with the Fund Agreement, the public policy of the forum state as manifest by the Fund

---

(20) 40 Int. L. R. at pp. 14-15.

(21) See Judge Keating's dissent in French v. Banco Nacional de Cuba, discussed infra, pp. 165-166.

(22) See discussion of "consistent" supra, pp. 88-96.

Agreement might require that such regulations be disregarded. (23)

To summarize: (1) prior to the adoption of the Fund Agreement and in the absence of a treaty, foreign exchange control regulations were not and are not, as a general rule, given judicial recognition--to do so might be against the public policy of the forum state; (2) Article VIII, Section 2(b) of the Fund Agreement abrogated this general rule for Fund members--this is clear from the Fund interpretation; (3) if the application of a member's exchange control regulations were confiscatory in effect a court might refuse to enforce such regulations in a particular case as contrary to the public policy of the forum; and (4) if the courts of a Fund member are called upon to enforce exchange control regulations of another member which regulations are not consistent with the Fund Agreement the public policy of the Forum state might require that such regulations be disregarded.

---

(23) Cf. Gold, The Fund and Non-Member States, 1966, IMF Pamphlet Series No. 7, p. 32; Mann 3rd ed., op. cit. supra, p. 434. Gold goes a step further and suggests that perhaps the Fund Agreement requires that the exchange control regulations of non-members should never be enforced in the forums of members on the ground that such regulations are per se contrary to public policy. See Gold (1962) op. cit. supra, pp. 139-142 and the German case there discussed.

The First Sentence of Article VIII, Section 2(b) Has Been Superimposed Upon the Private International Law of Exchange Control

Courts and counsel often analyze cases involving foreign exchange control regulations in terms of traditional rules of private international law. This analysis is closely related to that followed where foreign exchange control regulations are denied effect for reasons of public policy. The following brief exposition of the private international law rules applied prior to or in the absence of the adoption of the Fund Agreement should set the stage for a discussion of the rules which have been superimposed by the first sentence of Article VIII, Section 2(b).

By traditional legal analysis and in the absence of an effective choice of law by the parties determination of the law applicable to a given contract entails two steps. First, a court must decide what body of law governs. Choice of law principles of the forum regarding an issue in contract must be consulted. Thus, courts in the United States will, as a general rule, apply the law of the place with the "most significant relationship" to the contract; that is, a choice of the applicable law is made after an analysis or evaluation of the specific conflicting rules and of the relative interests of the different legal systems that have some connection with the case at bar.(1) In England and other common law jurisdic-

(1) A. L. I. Restatement of the Law Second, Conflict of Laws

tions the courts apply the "proper law of the contract."(2) In practice the United States and English rules ordinarily yield similar results.(3) Once the country whose law governs has been determined the second step in the analysis must be taken: to decide what effect the governing law, including applicable exchange control regulations will have on the contract issue.

From this analysis a number of rules which may apply in the absence of a treaty or other agreement to the contrary have evolved. They may be summarized as follows:

1. If the law of a foreign country including its exchange control regulations governs the contract and by those regulations the contract is

---

(1) Continued.
Second, 1969, Sections 6, 188. See, Auten v. Auten, 308 N. Y. 155, 124 N. E. 2d 99, 140 N. Y. S. 2d (1954); Matter of Havemeyer, 17 N. Y. 2d 216, 217 N. E. 2d 26, 270 N. Y. S. 2d 197 (1966). For a summary of the United States rules regarding foreign exchange control regulations see Meyer, op. cit. supra, 62 Yale L. J. at pp. 670-678.

(2) Morris, Dicey's Conflict of Laws, op. cit. supra, Rule 127, pp. 691-725. For a summary of the English conflicts rules regarding foreign exchange control regulations from a comparative point of view, see Mann 3rd ed., op. cit. supra, pp. 399-430.

(3) J. Prebble, Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws (1973) 58 Corn. L. R. 433 at p. 438; W. Reese, Contracts and the Restatement of Conflict of Laws, Second (1960) 9 I. C. L. Q. 531 at p. 541.

invalid in the forum.(4) And, if the contract is governed by the law including exchange control regulations of a foreign country and those regulations are repugnant to the public policy of the forum, then the contract will not be enforced in the forum.(5)

Further, a contract, governed by and valid under the law of country A, may be voidable in country B as contrary to its public policy, if it is to be performed in country B and performance of the contract would violate B's exchange control

---

(4) Delaume, Legal Aspects of International Lending and Economic Development Financing, 1967, p. 298. Restatement Second, Conflict of Laws, Section 200; Morris, Dicey's Conflict of Laws, op. cit. supra, Rule 132, pp. 754-767. See also, In re Banque des Marchands de Moscou [1954] 1 W. L. R. 1108; Etler v. Kertesz, 26 D. L. R. 2d 209 (C. A. Ontario 1961). Cf. In re Sik's Estate, 205 Misc. 715, 129 N. Y. S. 2d 134 (Sur. Ct. N. Y. Co. 1954) where the court found the governing law to be that of New York State. The Sik Estate case is discussed infra, pp. 151-154.

Also, compare Confederation Life Association v. Conte, 254 So. 2d 45 (3rd Fla. D. C. App. 1971), cert. denied, 261 So. 2d 177 (Fla. 1972), cert. denied, 41 U. S. L. W. 34 (February 27, 1973) where the court affirmed summary judgment awarding the proceeds of an insurance policy to plaintiff. The court stated that plaintiff may sue "in a jurisdiction other than where the policy was issued or is to be performed." (254 So. 2d at p. 46)

The rule stated in the text follows from application of the conflicts principle, lex loci contractus, that is that the law governing the contract is the law to be applied.

(5) A. L. I., Restatement of the Law, Second, Conflict of Laws, Section 187, Comment a, Morris, Dicey's Conflict of Laws, op. cit. supra, Rule 128, pp. 725-740. Cf. Brill v. Chase Manhattan Bank, 14 A. D. 2d 852, 220 N. Y. S. 2d 903 (1st Dept. 1961). See discussion of public policy argument supra, pp. 126-139.

regulations.(6) Or, a contract may be against the public policy of the forum "if the real object and intuition of the parties [to the contract] necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country."(7)

2. Where the law of a foreign country governs a contract, the forum will give effect to such of the foreign exchange controls of that country which regulate the manner of payment, the suspension of and the performance of the contract and similar provisions.(8) It is unclear whether a debtor may

---

(6) Professor Mann asserts that such a contract is void ad initio. Mann 3rd ed., op. cit. supra, p. 408. Cf. Boissevain v. Weil [1950] A. C. 327, [1950] 1 All E. R. 728 (House of Lords).

(7) Foster v. Driscoll [1929] 1 K. B. 470, 521 per Sankey L. J.; Hesslein v. Matzner, 19 N. Y. S. 2d 462, 464 (N. Y. C. City Ct. 1940); Regazzoni v. K. C. Sethia (1944) Ltd. [1958] A. C. 301 (House of Lords); Morris, Dicey's Conflict of Laws, op. cit. supra, Rule 128, pp. 725-729, Rule 155, pp. 894-896.

(8) Imperial Life Assurance Co. of Canada v. Colmeneres, 62 D. L. R. 2d 138 (S. Ct. 1967).

De Beeche v. The South American Stores (Gath & Chaves) Ltd. [1935] A. C. 148 (House of Lords); St. Pierre v. South American Stores (Gath & Chaves) Ltd. [1937] 3 All E. R. 349 (Ct. App.); Re Helbert Wagg & Co. Ltd. [1956] Ch. 323, [1956] 1 All E. R. 129, discussed herein supra, p. 82; Rossano v. Manufacturers Life Ins. Co. [1963] 2 Q. B. 352.

See also, Blanco v. Pan American Life Insurance, 221 F. Supp. 219 (S. D. Fla. 1963), aff'd, 362 F. 2d 167 42 Int. L. R. 149 (5th Cir. 1966); Confederation Life Association v. Ugalde, 164 So. 2d 1, 38 Int. L. R. 138 (Fla. 1964), cert. denied, 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186 (1964); Confederation Life Association v. Vega y Arminan, 207 So. 2d 33 (3rd Fla. D. C. App.

invoke in defense the exchange control regulations of a country as the governing law where both he and the creditor are outside that country and the debtor is not contractually bound to perform in that country but may and perhaps must perform

---

(8) Continued.
1968), aff'd mem., 211 So. 2d 169 (Fla. 1968); Konstantinidis v. Tarsus, 248 F. Supp. 280, 287 (S. D. N. Y. 1965), aff'd mem., 354 F. 2d 240 (2nd Cir. 1965); Theye y Ajuria v. Pan American Life Insurance Co., 245 La. 755, 161 So.2d 70, 38 Int. L. R. 456 (1964), cert. denied, 377 U. S. 977, 84 S. Ct. 1922, 12 L. Ed. 2d 1046 (1964), rehearing denied, 379 U. S. 872, 85 S. Ct. 20, 13 L. Ed. 2d 79 (1964) see also, 2 I. L. M. 950 (1963); Varas v. Crown Life Insurance Co., 204 Pa. Super 176, 203 A. 2d 505 (1964), cert. denied, 382 U. S. 827, 86 S. Ct. 62, 15 L. Ed. 2d 72 (1965).

Many of the older cases from United States jurisdictions were decided according to the now discarded conflicts principle that the lex loci solution--the law of the place of contractual performance--is determinative. See, e. g., Central Hanover Bank & Trust Co. v. Siemens & Halske A.G., 15 F. Supp. 927 (S. D. N. Y. 1936), aff'd mem., 84 F. 2d 993 (2nd Cir. 1936), cert. denied, 299 U. S. 585, 57 S. Ct. 110, 81 L. Ed. 431 (1936); David v. Veitscher Magnesitwerke, 348 Pa. 335, 35 A. 2d 346 (1944); Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp., 302 N. Y. 342, 98 N. E. 2d 466 (1951); Jacobson v. Warszychi, 275 App. Div. 795, 88 N. Y. S. 2d 909 (1st Dept. 1949); Kraus v. Zivnostenska Banka, 187 Misc. 681, 64 N. Y. S. 2d 208 (Sup. Ct. Queens Co. 1946); Netherlands v. Federal Reserve Bank of New York, 79 F. Supp. 966 (S. D. N. Y. 1948); Sabl v. Laenderbank, 30 N. Y. S. 2d 608 (Sup. Ct. N. Y. Co. 1941), aff'd mem., 266 App. Div. 832, 43 N. Y. S. 2d 270 (1st Dept. 1943); Stern v. Pesti Magyar Kereskedelmi Bank, mem., 278 App. Div. 811, 105 N. Y. S. 2d 352 (1st Dept. 1951), aff'd mem., 303 N. Y. 881, 105 N. E. 2d 106 (1952); Spitz v. Schlesische Kreditanstalt A.G., 119 N. Y. L. J. 267, col. 6 (Sup. Ct. West. Co. 1948); South American Petroleum Corporation v. Colombian Petroleum Co., 177 Misc. 756, 31 N. Y. S. 2d 771 (Sup. Ct. N. Y. Co. 1941); Werfel v. Zivnostenska Banka, 260 App. Div. 747, 23 N. Y. S. 2d 1001 (1st Dept. 1940), rev'd on other grounds, 287 N. Y. 91, 38 N. E. 2d 382 (1941). See also, Cermak v. Bata Akciova Spolecnost, 80 N. Y. S. 2d 782 (Sup. Ct. N. Y. Co. 1948), aff'd mem., 275 App. Div. 919, 90 N. Y. S. 2d 680 (1st Dept. 1949).

outside of that country.(9) Also, it is unclear what the result should be if the country whose exchange control regulations are invoked provides no method of payment, but only that the obligation remains suspended.(10)

3. Even if a contract is governed by the law of country A, no effect will be given to the exchange control regulations of A in the courts of country B if application of such regulations would interfere with the performance of the contract as contemplated by the parties.(11) But the existence of such regulations at the time the contract is made may influence the construction given the contract or the determination of the intent of the parties.(12) And, if under a contract governed

---

(9) See Rossano v. Manufacturers Life Insurance Co. [1963] 2 Q. B. 352.

(10) Compare, French v. Banco Nacional de Cuba 23 N. Y. 2d 46, 295 N. Y. S. 2d 433, 242 N.E. 2d 704 (1968) discussed infra, pp. 162-167. See also Mann 3rd ed., op. cit. supra, p. 416.

(11) Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie A.G. [1939] 2 K. B. 678, [1939] 2 All E. R. 782.

Central Hanover Bank & Trust Co. v. Siemens & Halske A.G., 15 F. Supp. 927 (S. D. N. Y. 1936), aff'd mem., 84 F. 2d 993 (2nd Cir. 1936), cert. denied, 299 U. S. 585, 57 S. Ct. 110, 81 L. Ed. 431 (1936); Pan American Securities Corporation v. Fried, Krupp A.G., 256 App. Div. 955, 10 N. Y. S. 2d 205 (2nd Dept. 1939). Cf. Regazzoni v. K. C. Sethia (1944) Ltd. [1958] A. C. 301 (House of Lords); noted, Mann (1958) 21 Mod. L. R. 130.

(12) See citations to note 10 immediately above. See also additional authorities cited in Mann 3rd ed., op. cit. supra, p. 418, n. 3. Compare Ralli v. Companie Naviera Sota y Aznar [1920] 2 K. B. 287.

by the law of the forum money is payable in another country and subsequently enacted exchange control regulations of that country make payment impossible,(13) such enactment may shift the place of performance to a country in which performance is possible.(14)

4. Unless there are specific laws to the contrary the legal tender of a country which seeks to impose exchange control regulations can be used to discharge all debts which are expressed in the currency of that country even though payable outside of its territory.(15)

5. Lastly, there is a split of authority as to whether foreign exchange control regulations which interfere with the possession of property in the forum state may be disregarded on the ground that the regulations are confiscatory in nature. (16)

---

(13) See, Ralli v. Compania Naviera Sota y Aznar [1920] 2 K. B. 287.

(14) Mann 3rd ed., op. cit. supra, p. 420. This may be the only way to explain the court's ruling with respect to the Zabaleta claim in Pan American Life Insurance Company v. Blanco, 362 F. 2d 167, 168, 170, 171-172 (5th Cir. 1966), discussed infra, pp. 169-170.

(15) Marrache v. Ashton [1943] A. C. 311, [1943] 1 All E. R. 276 (House of Lords); The Marrache case is discussed in Gold (1962) op. cit. supra, pp. 2-3. See also, Mann 3rd ed., op. cit. supra, pp. 418-423; Nussbaum, Money in the Law National and International, rev. ed. 1950, pp. 485-489.

(16) Kahler v. Midland Bank [1949] 2 All E. R. 621, 65 T.L.R. 663, [1950] A. C. 24 (House of Lords); Zivnostenska Banka v. Frankman [1949] 2 All E. R. 671, [1950] A. C. 57. See also, N.V. Suikerfabriek "Wona-Aseh" v. Chase

This body of principles regarding the private international law of exchange control and their refinements are applicable between non-Fund members and also between members and non-Fund members. These rules may be applied in the absence of a rule under Article VIII, Section 2(b) of the Fund Agreement. And, these rules may be persuasively significant where a court is called upon to fashion a new rule consistent with the policy and scope of the first sentence of Article

---

(16) Continued.
National Bank, 111 F. Supp. 833 (S.D.N.Y. 1953).

To the contrary: In re Maria Liebl's Estate, 201 Misc. 1092, 106 N. Y. S. 2d 705 (Sur. Ct. Kings Co. 1951); In re Theresie Liebl's Estate, 201 Misc. 1102, 106 N.Y.S. 2d 715 (Sur. Ct. Kings Co. 1951). In the Maria Liebl case the court distinguished the Kahler case. In the Theresie Liebl case the court characterized the Czechoslovakian exchange control law involved as confiscatory and fiscal and refused to give it extraterritorial effect. This position is contrary to Section 198, A.L.I., Restatement (Second) Foreign Relation Law, 1965, which states:

> "Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice...if it is reasonably necessary in order to control the value of the currency to protect the foreign exchange resources of the state."

See also, Loeb v. Bank of Manhattan, 18 N. Y. S. 2d 497 (Sup. Ct. N. Y. Co. 1939); Bercholz v. Guaranty Trust Company of New York, 180 Misc. 1043, 44 N. Y. S. 2d 148 (Sup. Ct. N. Y. Co. 1943); Marcu v. Fisher, 65 N. Y. S. 2d 892 (Sup. Ct. N. Y. Co. 1946). And, see Bank voor Handel en Scheepvaart N.V. v. Slatford [1952] 1 All E. R. 314, [1953] 1 Q. B. 248, 260, per Devlin, J. "Generally property in England is subject to English law and to none other." The Slatford case was reversed on appeal on other grounds [1952] 2 All E. R. 956, [1953] 1 Q. B. 248, 279.

VIII, Section 2(b).(17)

With the adoption of the Fund Agreement the law of the currency, that is, the law of the country whose economic resources are involved, has been superimposed upon these case developed principles.(18) This was made clear by the Fund interpretation of Article VIII, Section 2(b). The interpretation states, in pertinent part, that an exchange contract which is contrary to the exchange control regulations of a member will be treated as unenforceable "notwithstanding that under the private international law of the forum", the law under which the exchange control regulations are maintained or imposed is "not the law which governs the exchange contract or its performance." Thus:

> ". . . It . . . follows that . . . [exchange] contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which

---

(17) See supra, p. 77.

(18) Meyer, op. cit. supra, 62 Yale L. J. at p. 896. See also, Morris, Dicey's Conflict of Laws, op. cit. supra, Rule 155, p. 899; Mann 3rd ed., op. cit. supra, p. 399.

Mann refers to the controlling law as the lex patrimonii (Report of the 45th Conference of the International Law Association (Lucerne), 1952, p. 242). The lex patrimonii is to be distinguished from the lex monetae, the law of the currency. It is the lex patrimonii, not the lex monetae, which has supplanted the lex loci solutionis and the lex loci contractus as the applicable law. See Mann 3rd ed., op. cit. supra, pp. 445-446.

governs the exchange contract or its performance."(19)

Because the purpose of Article VIII, Section 2(b) is the international recognition of such exchange controls as the Fund Agreement sanctions, a limitation has now been placed upon the rights a country has under private international law to select applicable law.(20) Specifically, Article VIII, Section 2(b) as interpreted by the Fund now makes it mandatory for a forum to refuse to enforce a contract, which falls within the terms of that provision, without regard to the law of the place with the most significant relationship or its proper law and without regard to the place of its performance.(21)

Thus, Article VIII, Section 2(b) establishes that: the courts or other tribunals of a Fund member must refuse to enforce an exchange contract if that contract involves the currency of another member and is contrary to the exchange control regulations of that other member. The law of the member whose currency is involved must be recognized as the law governing the contract for the purposes prescribed by Article VIII, Section 2(b).

---

(19) IMF Annual Report 1949, Appendix XIV, pp. 82-83; Selected Decisions of the Executive Directors and Selected Documents, 5th Issue, 1971, pp. 92-93; U. S. Fed. Reg. 5208-5209 (1949); XL Revue Critique de Droit International Privé 586- 587 (1951); IMF 1945-1965, op. cit. supra, vol. III, pp. 256-257.

(20) Meyer, op. cit. supra, 62 Yale L. J. at p. 896.

(21) Morris, Dicey's Conflict of Laws, op. cit. supra, Rule 155, p. 899.

Article VIII, Section 2(b) also establishes the rule that the exchange control regulations of the member whose currency is involved must be recognized without any necessity to show that its system of law is the law governing the contract under the private international law of the forum.(22)

That the traditional rules of private international law have been superseded by the first sentence of Article VIII, Section 2(b) was recognized in Moojen v. Von Reichert.(23) There the Court of Appeal of Paris after discussing both Article VIII, Section 2(b) and the Fund interpretation stated:

> ". . . [I]t results from these texts that the Court cannot deny any effect to these Dutch decisions . . . [founded upon Dutch exchange control regulations] on the grounds that they are contrary to French international public policy or [for the reason] that foreign courts failed to observe the rules of French conflicts of laws. . . ."(24)

On the other hand despite the Fund interpretation, the courts in the United States have been more inclined to adhere to traditional conflicts analysis. In Perutz v. Bohemian Discount Bank in Liquidation(25) the New York Court of Appeals

---

(22) Gold, The Cuban Insurance Cases and the Articles of the Fund, 1966, IMF Pamphlet Series No. 8, pp. 21-23.

(23) 89 Journal du Droit International (Clunet) (1962) p. 718 (hereinafter referred to as "J. D. I. (Clunet)") Revue Critique de Droit International Privé, vol. II (1962) p. 67.

(24) J. D. I. (Clunet) p. 725 Revue Critique de Droit International Privé, vol. II (1962) p. 70. Accord: Clearing Dollars Case, 22 Int. L. R. 730 (1954). See Gold (1962) op. cit. supra, pp. 82-83.

(25) 304 N. Y. 533, 110 N. E. 2d 6 (1953). The facts and other facets of this case are discussed supra, pp. 60-62, 132-133.

said: that a contract made in a foreign country by citizens of that country who intended the contract to be performed in that country is governed by the laws of that country; and that since the defendant Bank had performed the pension contract in accordance with Czechoslovakian law, plaintiff could not recover in the New York courts. The court stated:

> "A contract made in a foreign country by citizens thereof and intended by them to be there performed is governed by the law of that country. . . .
>
> * * *
>
> ". . . [T]he defendant bank had been performing its pension obligation to Arthur Peruts and to the plaintiff as his administratrix in accordance with Czechoslovakian law and, since that law controlled the transaction in issue, our courts ought not to apply any different rule in this case. . . ."(26)

The principle set forth in the Peruts case was carried a step further in In re Sik's Estate.(27) There, Denes made a claim against the New York estate of the deceased Sik based upon an agreement made during the German occupation of Yugoslavia, where both Denes and Sik had been residents. Under the contract Sik promised to pay dollars from his New York account to Denes at a specified rate of exchange as soon as possible after the war in return for advances of Yugoslav

---

(26) 304 N. Y. at p. 537, 110 N. E. 2d at pp. 7-8.

(27) 205 Misc. 715, 129 N. Y. S. 2d 134 (Sur. Ct. N. Y. Co. 1954). Noted, M. H. Cardozo, ed., International Law in the New York Courts - 1954 (1955) 40 Corn. L. Q. 567 at p. 552.

currency which Denes had made to Sik. In response to Denes' claim Sik's administrator contended that the contract was in violation of the exchange control regulations of Yugoslavia and was therefore void. These exchange control regulations had been in force for about a decade before the occupation, and were not substantially changed during or immediately after the end of the occupation. However, expert witnesses disagreed on whether, at the time of the contract, these laws remained operative or had become inoperative although not repealed. The laws provided that for a contract of the kind between Denes and Sik the consent of the Yugoslav Minister of Finance was necessary. This consent had not been sought at the time of the making of the contract because the lawful authorities were in exile, and it would have been disastrous for the parties to apply for consent to the German occupation authorities.

On the basic question whether the contract was valid the Court held this was to be determined by the law which the parties intended to have govern their contract, provided that there was a reasonable connection between that law and the contract.(28) The Court then found that New York law applied and stated: that under New York law the contract was valid; that when performance of a contract violates the law of a

---

(28) Compare, Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft, 166 Misc. 509, 510, 2 N. Y. S. 2d 80, 81 (Sup. Ct. Kings Co. 1938); Kleve v. Basler Lebens-Versicherungs-Gesellschaft, 182 Misc. 776, 45 N. Y. S. 2d 882 (Sup. Ct. N. Y. Co. 1943).

friendly country, it is illegal; that the contract would violate Yugoslavian law only if made without a license; that if the exchange control regulations were in effect when the contract was made, application for a license could not have been made because the authorities could not function; and thus failure to obtain a license did not make the contract unenforceable in New York. The Court said:

> "It is argued that because the United States and Yugoslavia are members of the International Monetary Fund established by the Bretton Woods Agreement Act, we must recognize and uphold the foreign exchange regulations. (See Perutz v. Bohemian Discount Bank in Liquidation . . .) It is a general rule of law that a bargain, the performance of which involves a violation of the law of a friendly nation, is illegal. (Restatement of Contracts, § 592; 6 Williston on Contract § 1749) However, the contract made in Yugoslavia would violate the regulations only if it were made without the license from or permission of the Minister of Finance. Even if the regulations were still in effect, it was impossible to make the appropriate application because the authorities were not able to function. Under such circumstances, failure to obtain a license before making the contract does not render the contract unenforceable. . . The objectant [Denes] is no longer a resident of Yugoslavia. The decedent [Sik] died during the persecution and his estate is under the supervision of this court. It is not necessary now to obtain permission of the foreign government to pay the claim which is valid under our law."(29)

Although the Court reached a result which avoided the effect of the Yugoslavian exchange control regulations, it endorsed, by implication, the principle that contracts which

---

(29) 205 Misc. at pp. 719-720, 129 N. Y. S. 2d at pp. 138-139.

violate the exchange control regulations of another Fund member, "a friendly nation" are unenforceable. Thus the rationale of the Sik case represents an approach which is close to the application of the principles of the Fund's interpretation of Article VIII, Section 2(b).

Again, the Supreme Court of Florida came close to the proper application of Article VIII, Section 2(b) in Confederation Life Association v. Ugalde.(30) There plaintiff Ugalde brought an action to recover the cash surrender value of an insurance policy. The policy required that all payments be paid in Havana, Cuba. The trial court granted summary judgment for plaintiff and the Florida District Court of Appeal affirmed. Defendant, Confederation Life, appealed. The Supreme Court of Florida reversed stating that the policy was covered by Cuban law; that the Cuban laws "are not violative of United States policy"; and that the Florida Courts are "obligated" by the Fund Agreement to apply the Cuban currency control laws. The Court stated:

> "The Cuban laws relating to the establishment of currency control are similar to those which have been enacted in this country with respect to our own currency and are not violative of United States policy. The Florida Courts are obligated by the International Monetary Fund Agreement to apply the cited Cuban laws to the contract here involved."(31)

---

(30) 164 So. 2d 1, 38 Int. L. R. 138 (Fla. 1964), cert. denied, 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186 (1964).

(31) 164 So. 2d at p. 2. The Ugalde case was held controlling

The Court reversed the decision of the District Court of Appeal and directed that the complaint be dismissed. In reversing, the Court spoke in terms of the obligation under the Fund Agreement to apply Cuban law. Thus full implementation in American courts of Article VIII, Section 2(b) appears to be at hand.

The traditional private international law principles governing exchange control regulations may be briefly summarized as follows: (1) a contract invalid under applicable foreign law is invalid in the forum; (2) where a contract is governed by foreign exchange controls, not repugnant to the public policy of the forum, the forum will give effect to the controls regulating the manner of payment suspension and performance of the contract and similar provisions; (3) the forum will not give effect to governing foreign exchange control regulations if

---

(31) Continued.
in Sun Life Assur. Co. of Canada v. Klawans, 137 So. 2d 230 (3rd Fla. D.C. App. 1963), aff'd in part, rev'd in part on rehearing, 162 So. 2d 702 (3rd Fla. D.C. App. 1963), quashed and remanded, 165 So. 2d 166 (Fla. 1964), rev'd and remanded with directions to dismiss, per Ugalde decision, 162 So. 2d 704 (3rd Fla. D.C. App. 1964); Crown Life Ins. Co. v. Calvo, 151 So. 2d 687 (3rd Fla. D. C. App. 1963), judgment quashed, 164 So. 2d 813 (Fla. 1964), reversed and remanded with directions to dismiss, per Ugalde decision, 163 So. 2d 345 (3rd Fla. D.C. App. 1964), cert. denied, 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186 (1964); Trujillo v. Sun Life Assur. Co. of Canada, 166 So. 2d 473 (3rd Fla. D.C. App. 1964); Confederation Life Ass'n v. Brandao, 173 So. 2d 515 (3rd Fla. D.C. App. 1964).

their application would interfere with the performance of the contract as contemplated by the parties; (4) in the absence of specific laws to the contrary the legal tender of a country whose exchange control regulations govern a contract can be used to discharge the contract if expressed in that currency and payable outside of that country; and (5) foreign exchange control regulations which interfere with possession of property in the forum state may be disregarded on the ground that the regulations are confiscatory in nature.

To superimpose upon these traditional rules a new set of rules having as their primary purpose the effective transnational enforcement of Fund members' exchange control regulations is the clear intent of the Fund Agreement. This intent is manifest in the 1949 Fund interpretation. But the Fund interpretation has been only partially successful in ending the traditional private international law approach to the enforceability of exchange contracts. Indeed a number of courts have been slow to grasp and apply the new rule that: exchange control regulations of a Fund member whose currency is involved must be recognized as the law governing the contract for the purposes prescribed by Article VIII, Section 2(b).

The First Sentence of Article VIII, Section 2(b) Displaces the Act of State Doctrine

We have seen that under the first sentence of Article

VIII, Section 2(b) only exchange control regulations of a member which are consistent with the Fund Agreement will be given extraterritorial effect.(1) The question has been raised, however, whether in view of the landmark decision of the United States Supreme Court in Banco Nacional de Cuba v. Sabbatino,(2)

---

(1) See supra, pp. 88-96.

(2) 376 U. S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). The Sabbatino decision set off a number of legal controversies and a flood of learned writings. See, L. Henkin, Act of State Today: Recollections in Tranquility (1967) 6 Col. J. T. L. 175.

The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 (Blad v. Bamfield, 3 Swans. 604, 36 E. R. 992) and began to emerge in the jurisprudence of the United States in the late eighteenth and early nineteenth centuries (see, Ware v. Hylton, 3 U. S. (3 Dall.) 199, 230, 1 L. Ed. 568, 581-582 (1796); Hudson v. Guestier, 8 U. S. (4 Cranch) 293, 294, 2 L. Ed. 625 (1808); The Schooner Exchange v. M'Faddon, 11 U. S. (7 Cranch) 116, 135, 136, 3 L. Ed. 287, 293 (1812); L'Invincible, 14 U. S. (1 Wheat.) 238, 253, 4 L. Ed. 80, 84 (1816); The Santissima Trinidad, 20 U. S. (7 Wheat.) 283, 336, 5 L. Ed. 454, 467 (1822)) is found in Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897), where Chief Justice Fuller speaking for a unanimous Court stated:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." (168 U.S. at p. 252, 18 S. Ct. at p. 84, 42 L. Ed. at p. 457).

None of the cases decided by the Supreme Court since the Underhill case, in which the act of state doctrine was directly or peripherally involved, manifest any

courts in the United States are now compelled to recognize foreign exchange control regulations of non-Fund members whether or not such regulations are consistent with the Fund Agreement.(3) For, in the Sabbatino case the Supreme Court stated that the courts "will not examine the validity of a taking of property within its own territory by a foreign government", absent "a treaty or other unambiguous agreement regarding controlling legal principles", saying:

> ". . . [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."(4)

---

(2) Continued.
retreat from Underhill. See, American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909); Oetjen v. Central Leather Co., 246 U.S. 297, 38 S. Ct. 309, 62 L.Ed. 726 (1918); Ricaud v. American Metal Co., 246 U.S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918); Shapleigh v. Mier, 299 U.S. 468, 57 S. Ct. 261, 81 L. Ed. 355 (1937); United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L. Ed. 1134 (1937); United States v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942). On the contrary in the Oetjen and Ricaud cases the doctrine as announced in Underhill was reaffirmed in unequivocal terms.

The act of state doctrine is discussed in the A. L. I. Restatement of The Law Second, Foreign Relations Law of the United States, Ch. 3, Title C, Sections 41-43.

(3) R. R. Paradise, Cuban Refugee Insureds and the Articles of Agreement of the International Monetary Fund (1965) 18 U. Fla. L. R. 29 at pp. 66-67 and 74-75.

(4) 376 U. S. at p. 428, 84 S. Ct. at p. 940, 11 L. Ed. 2d at pp. 823-824.

Thus the Supreme Court decided that the judicial branch should not adjudicate the validity of the expropriation by the Cuban government of the property interest of a Cuban corporation in a shipment of sugar even though the expropriation was alleged to have been in violation of international law. As a result of the Supreme Court's decision in the Sabbatino case, the United States Congress enacted legislation which reversed at least in part that decision. This legislation is popularly known as the "Hickenlooper Amendment". It provides that no court in the United States shall decline to make a determination in which a claim to property is asserted based upon a taking by an act of a foreign state in violation of the principles of international law, and reads in part:

> ". . .[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . ." (5)

---

(5) 22 U.S.C. 2370, subd.(c), par. 2; 78 U.S. Stat. 1009, 1013 (1964), as amended, 79 U.S. Stat. 653 (1965).

The constitutionality of the Hickenlooper Amendment was sustained in Banco National de Cuba v. Farr, 243 F.Supp. 957 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956, 88 S. Ct. 1406, 20 L. Ed.2d 298 (1968).

For a digest of foreign cases presented to the United States Congress in support of the

The most recent case to be decided by the United States Supreme Court regarding application of the act of state doctrine is First National City Bank v. Banco Nacional de Cuba.(6)

In that case plaintiff, Banco, sought the return of the value of excess collateral pledged with defendant, FNCB, which FNCB sought to offset against the value of its property in Cuba expropriated by Cuba without compensation. The District Court applied the Hickenlooper Amendment and granted summary judgment on the counterclaim. The Court of Appeals for the Second Circuit reversed but the Supreme Court reversed the Court of Appeals holding that the act of state doctrine did not bar FNCB's counterclaim. The decision, however, is less than satisfactory in that the court did not deliver a majority opinion. Three justices joined in endorsing the so-called

---

(5) Continued.
Hickenlooper Amendment see W. H. Reeves, The Sabbatino Case and The Sabbatino Amendment: Comedy - or Tragedy - of Errors (1967) 20 Vand. L. R. 429, Appendix II, pp. 541-563.

(6) 406 U. S. 759, 92 S. Ct. 1808, 32 L. Ed. 2d 466 (1972). For previous opinions in the case see: 270 F. Supp. 1004 (S.D.N.Y. 1967), granting summary judgment for Banco Nacional; this decision of the District Court was reversed and remanded, 431 F. 2d 394 (2d Cir. 1970); the decision of the Second Circuit was vacated and remanded for reconsideration, 400 U. S. 1019, 91 S. Ct. 581, 27 L. Ed. 2d 630 (1971); the Second Circuit on remand from the Supreme Court affirmed its original decision, 442 F. 2d 530 (2d Cir. 1972) and the Supreme Court again granted certiorari. The Supreme Court's decision on this second review is the one discussed in the text. See, A. F. Lowenfeld, Act of State and Department of State: First National City Bank v. Banco Nacional De Cuba (1972) 66 A. J. I. L. 795.

"Bernstein exception" to the act of state doctrine.(7) Under this exception, the three justices said, whether an act of state met the standards of international law could be adjudicated in the courts of the United States if the Executive Branch, which is charged with primary responsibility for foreign affairs, has expressly represented to the Court that the "application of the act of state doctrine" in the case "would not advance the interests of American foreign policy."(8) Here the State Department had so represented. Accordingly, judicial examination could be made of the legal issues raised by the act of the foreign state within its own territory. Justice Douglas concurred in the result stating that the act of state doctrine did not apply.(9) Justice Powell concurred in the judgment but rested his concurrence on a narrow construction of the act of state doctrine, in effect holding that the act of state doctrine did not apply.(10) The other four

---

(7) The opinion was written by Justice Rehnquist and joined in by Chief Justice Berger and Justice White.

The "Bernstein exception" stems from the case of Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F. 2d 375 (2nd Cir. 1954) in which the Department of State furnished a letter expressing no objection to judicial consideration on the merits on a pre-World War II taking of property by the German Government.

(8) 406 U. S. at p. 768, 92 S. Ct. at p. 1813, 32 L. Ed. 2d at p. 482.

(9) 406 U. S. at pp. 770-773, 92 S. Ct. at pp. 1814-1816, 32 L. Ed. 2d at pp. 484-485.

(10) 406 U. S. at pp. 773-776, 92 S. Ct. at pp. 1816-1817, 32 L. Ed. 2d at pp. 485-487.

justices, Brennan, Steward, Marshall and Blackmun dissented in an opinion written by Justice Brennan. They asserted that the act of state doctrine barred FNCB's counterclaim.(11) Despite the doubts as to the validity of the "Bernstein exception" the act of state doctrine remains in effect. And, under the Sabbatino decision the act of state doctrine applies in the absence of a treaty or other unambiguous agreement stating controlling legal principles. The Fund Agreement is a treaty--although not wholly free of ambiguity--which most likely applies instead of the act of state doctrine.(12) Thus the Fund Agreement controls the enforcement of foreign exchange control regulations of Fund members in the courts in the United States.

A leading American case in which the Court considered the application of the act of state doctrine to foreign exchange control regulations is French v. Banco Nacional de Cuba.(13) In that case plaintiff, French, had acquired from her assignee, Ritter, certificates issued by defendant, Banco Nacional de Cuba ("Banco"), which provided that upon surrender of the

---

(11) 406 U. S. at pp. 776-796, 92 S. Ct. at pp. 1817-1827, 32 L. Ed. 2d at pp. 487-498.

(12) Doubts have been expressed as to whether the Fund Agreement does in fact override the act of state doctrine. See, Paradise, op. cit. supra, 18 U. F. L. R. at pp. 66-67.

(13) 23 N. Y. 2d 46, 242 N. E. 2d 704, 295 N. Y. S. 2d 433 (1968); noted: (1967) 57 Geo. L. J. 1299; (1969) 33 Albany L. R. 418-427; V. R. Koven (1970) 11 Harv. I. L. J. 212-228.

certificates and delivery of a certain amount of Cuban pesos to Banco, Ritter would receive "a check on New York for an equal amount of United States dollars, exempt from the Tax on Exportation of Money". Ritter had acquired these certificates in June 1959. In July 1959 the Cuban Currency Stabilization Fund issued "Decision No. 346", which was aimed at stopping the flow of foreign currency reserves from Cuba. The Decision suspended "for the time being" the proceeding of the type of tax exemption certificates received by Ritter "until reorganization of the system of exemptions." The New York Court of Appeals regarded this "Decision" as an exchange control regulation. In July 1959 after imposition of Decision 346 Ritter tendered a certificate with an appropriate amount of pesos to Banco and the certificate was redeemed. Decision No. 346 was not invoked. In December 1959 Ritter tendered the balance of his certificates and the appropriate amount of pesos for redemption in United States Dollars, but this time Banco refused to redeem the certificates citing as its reason for refusal the mandate of the Decision.

French, Ritter's assignee, commenced this action on the certificates in late 1960 in New York Supreme Court and obtained a judgment in the amount of $150,000 against Banco. Banco appealed but the Appellate Division affirmed, 3-2,(14) and rejected Banco's argument that Decision No. 346 had the

---

(14) 27 A. D. 2d 530, 275 N. Y. S. 2d 567 (1st Dept. 1966).

force of law and was an act of state of the Government of Cuba to which United States courts would not deny legal effect. Again Banco appealed--this time with success. For, the New York Court of Appeals reversed, 4-3, and held that French's claim was barred.

The Court of Appeals stated: that Decision No. 346 was an act of state and that the refusal by Banco, an instrumentality of the Sovereign Cuban Government, to redeem the certificates also constituted an act of state; thus the Court was barred from further inquiry concerning Banco's action and French's cause must fail, unless the Hickenlooper Amendment applied, then inquiry could be made as to whether Banco's action met the standards of customary international law; that the Hickenlooper Amendment did not apply because there was no "property" or proceeds of property which were allegedly "confiscated or taken" from Ritter by the Cuban Government; (15) that under conflicts rules the certificates-contracts--were governed by Cuban law; that the Amendment does not cover alleged breach of contract; and that even if the Hickenlooper Amendment applied "the present refusal of the Cuban Government to surrender American dollars in order to protect its dollar

---

(15) It was clear to the majority that an exchange control regulation which alters the value or character of money to be paid in satisfaction of a contract is not a confiscation or taking. 23 N. Y. 2d at p. 55, 242 N. E. 2d at p. 710, 295 N. Y. S. 2d at p. 442.

reserves, though harsh in its effect, would . . . seem to be within the limits of international legality."(16)

Judge Keating, in dissent, stated that under the Hickenlooper Amendment the act of state doctrine does not apply where the act of state in question is a confiscation of property in violation of international law and assuming that Decision No. 346 applied to Ritter's certificates, such application was an unlawful confiscation, and, therefore, the act of state doctrine did not apply and French should be allowed to recover. Judge Keating reasoned that under established rules of international law a taking of property may occur by depriving the owner of all benefit to the property without first divesting him of legal title;(17) that while Decision No. 346 may have been necessitated initially by Cuba's need to protect its foreign exchange resources, the Decision did not remain permanently valid under international law especially since Cuba's present monetary policies are inconsistent

---

(16) 23 N. Y. 2d at p. 64, 242 N. E. 2d at p. 716, 295 N. Y. S. 2d at p. 450.

(17) Restatement Second, Foreign Relations Law of the United States (1965) § 192; Corn Products Refining Co. Claim, 22 Int. L. R. 333, 334 (U. S. Int.'l Claims Comm. (1954). See also, Art. 2(b) United States - Polish Claims Settlement Agreement, 1960, 2 USTIOIA 1953, TIAS No. 4545, 384 UNTS 169, 55 A.J.I.L. 540 (1961).

with the Fund Agreement; (18) that eight years of no payments or substitute arrangements for adequate compensation establishes a deprivation of the benefits of property--an unlawful confiscation of Ritter's contractual rights under the certificates; and that Ritter's contractual rights are "property" within the meaning and intent of the Hickenlooper Amendment. (19)

The effect of the decision in the French case is to make enforceable in the courts of a Fund member a confiscatory exchange control regulation of a non-Fund member. Through application, in the French case, of the act of state doctrine a contract, which was said to be contrary to an exchange control regulation of a non-Fund member, was held unenforceable in a Fund

---

(18) Judge Keating stated that the Cuban regulation "might be justified when currency regulations of a country are in accord with the principles" of the IMF "even though the enacting country is not a member [of the IMF] or has subsequently withdrawn", as had Cuba in 1964 (compare Gold cited supra, p. 139, n. 23). By Article VI, Section 3 of the Fund Agreement "no member may exercise these [foreign exchange] controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments."

(19) Judge Keating's dissent, in which Judges Burke and Scileppi joined is set forth in 23 N. Y. 2d at pp. 76-93, 242 N. E. 2d at pp. 723-734, 295 N. Y. S. 2d at pp. 460-473.

Judge Burke also wrote a dissenting opinion in which he pointed out that whether the act of state doctrine applied in the case at bar was a question of fact; that the trial court had found that the act of state doctrine did not apply as a matter of fact; and that such finding of fact should not be reversed on appeal (23 N. Y. at pp. 68-76, 242 N. E. 2d at pp. 719-723, 295 N. Y. S. 2d at pp. 453-460).

member's courts even though the foreign exchange control regulation was not consistent with the Fund Agreement. Thus, the French case decision is contrary to the asserted rule that the courts of member countries should not enforce the exchange control regulations of non-Fund members.(20)

By contrast to the decision in the French case the act of state doctrine was held inapplicable in the "Cuban Insurance Case", Pan American Life Insurance Company v. Blanco.(21) There four separate causes were consolidated for purposes of trial and appeal: Blanco, Conill, Diego, and Zabaleta. All were based on claims under insurance policies. The policies in the Blanco, Conill and Diego cases were payable in the United States. The policy in the Zabaleta case had been amended in 1952 to provide that all payments including premiums and benefits are "payable in the national currency of Cuba, in Havana, Cuba." At the time of the Castro takeover all claimants in all the cases became exiled residents in the United States. Following demand for various benefits under the policies, Blanco, Conill, Diego and Zabaleta brought actions for declaratory relief in the United States District Court in Florida. The district court granted judgment for

---

(20) See supra, p. 139, n. 23.

(21) 362 F. 2d 167 (5th Cir. 1966) second appeal. See District Court opinion 221 F. Supp. 219 (S. D. Fla. 1963) and first appeal, 311 F. 2d 424 (5th Cir. 1962).

plaintiffs and defendants appealed.(22)

In affirming defendants' liability(23) the Court of Appeals stated: that the "matters connected with the performance" of the policies, except for the Zabaleta policy, "are regulated by the law prevailing at the place of performance", citing the Ugalde case;(24) that the Cuban Government by its laws and decrees passed subsequent to the date of the policy could have no effect upon the pre-existing obligations under the policies, "by the act of state doctrine or otherwise"; that the contractual rights of Blanco, Conill and Diego were not expropriated and probably could not have been; and that even if Cuba were still a Fund member, the Fund Agreement "would not be applicable to contracts such as the insurance policies here involved."(25) Therefore Blanco, Conill and Diego may recover on their policies.

To this point the Court's analysis is sound. But the Court then permitted Zabaleta to recover. Regarding the Zabaleta claim the Court states, without analysis, that Pan

---

(22) Blanco v. Pan American Life Ins. Co., Conill v. Pan American Life Ins. Co., Lorido y Diego v. American Nat'l Ins. Co., and Zabaleta v. Pan American Life Ins. Co., 221 F. Supp. 219 (S. D. Fla. 1963).

(23) Confederation Life Association v. Ugalde, 164 So. 2d 1, 38 Int. L. R. 138 (Fla. 1964), cert. denied, 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186 (1964). The Ugalde case is discussed supra, pp. 154-155.

(24) The Court remanded the Diego and Zabaleta cases for determination of the amounts due and owing.

(25) See supra, pp. 77-79.

American's position that the Cuban expropriation laws have absolved it from performance under the policy is "as we have said in discussing the other cases" unsound and Zabaleta "should be permitted to maintain her action and should recover".(26)

There may be justification for the decision on the Zabaleta claim but not under the rationale of the Blanco, Conill and Diego cases--that the law of the place of performance should prevail. For, at first the Court had excluded the Zabaleta case from the application of this rationale. Zabaleta's recovery may be justified on the ground that the Cuban decrees were in violation of international law and thus the decrees as acts of state were not applicable under the Hickenlooper Amendment, but this reasoning does not seem to have been what the Court based its decision on as is evident from the subsequent decision in Oliva v. Pan American Life Insurance Company.(27) Rather, the Zabaleta decision may be justified on the theory that, for practical purposes, performance in Havana was impossible and therefore the place of performance shifted to the United States(28). This theory is

---

(26) 362 F. 2d at p. 172.

(27) 448 F. 2d 217 (5th Cir. 1971) discussed infra, pp.170-172.

(28) See supra, p. 146 at n.14. The fact that Zabaleta was entitled to judgment measured by the dollar value of the pesos she was entitled to is not repugnant to this theory. Such measurement was not a substitute for performance in Cuba. It was merely the most accurate means by which to determine the amount of Pan American's obligation. See also, discussion supra, p. 77 regarding the situs of a debt.

supported by the facts that Cuba had confiscated Pan American's Cuban assets and that, in any event, Pan American could not make payment in Havana in pesos as contracted. And since the place of performance had shifted the purported confiscation could not reach Zabaleta's contractual rights, which are transitory, and thus the act of state doctrine was not controlling.

Interestingly, the ruling on the act of state doctrine with respect to the Zabaleta claim in the Blanco case was followed in the recent "Cuban Insurance Case" of Oliva v. Pan American Life Insurance Company.(29) In that case plaintiff, Oliva's decedent, Pedro Menendez, brought actions to recover on life and fire insurance policies issued to Menendez in Cuba. By amendment the life insurance policy had been made payable in Cuba. And, in 1958, part of Menendez property was destroyed by fire, giving rise to a claim under Menendez' fire policy. This claim on the fire policy was unsettled when

---

(29) 448 F. 2d 217 (5th Cir. 1971). The case had been in litigation for some ten years. See the earlier decisions in this case, sub nom. Menendez Rodriguez v. Pan American Life Ins. Co., and Vento Jaime v. Pan American Life Ins. Co., 311 F. 2d 429 (5th Cir. 1962), rehearing denied, 311 F. 2d 437 (5th Cir. 1962) and Menendez v. Aetna Ins. Co., 311 F. 2d 437 (5th Cir. 1962), rehearing denied, 311 F. 2d 437 (5th Cir. 1962). The Supreme Court granted certiorari, vacated the judgment of the Fifth Circuit Court of Appeals and remanded the case for further consideration in light of the Sabbatino case (376 U. S. 779, 781, 84 S. Ct. 1130, 1131, 12 L. Ed. 2d 82 (1964)). After further consideration of the case the Fifth Circuit remanded the case to the District Court "for its determination of the applicability of the Act of State doctrine". Rodriguez v. Aetna Ins. Co., 340 F. 2d 708 (5th Cir. 1965). It is the decision on appeal from the subsequent District Court determination which is discussed in the text.

Menendez left Cuba and it was purportedly confiscated by the Cuban Government. The United States District Court, in granting summary judgment for Oliva, decided that the act of state doctring was inapplicable. The Court of Appeals for the Fifth Circuit affirmed that decision. It said that the act of state doctrine did not preclude recovery in that Oliva's contractual rights were not expropriated and probably could not have been. The Court stated:

> ". . . The claim of Mrs. Zabaleta in Blanco is identical to the life insurance case here. We follow Blanco and hold that the act of state doctrine does not preclude recovery. We likewise believe that on the principles leading the Court to the decision in Blanco, the fire insurance case is indistinguishable from that of Mrs. Zabaleta. This case too deals not with the seizure of tangible property within Cuba but with an attempted expropriation of Oliva's contractual rights. These rights 'were not expropriated and probably could not have been. . . .'"(30)

The Court rests its decision on the theory that Menendez' contractual rights were not and probably could not have been expropriated even though those rights were exercisable in Cuba, and even though by the conflict of laws rule adopted in Blanco the law of Cuba, the place of performance, governed. By Cuban law Menendez' property in Cuba had been confiscated. But, the Court reasoned, Menendez' contractual rights had not

---

(30) 448 F. 2d at p. 220. The Court stated in a footnote that the parties had agreed that the Court need not consider the effect on the act of state doctrine of the Hickenlooper Amendment and therefore the Court did not discuss that point. 448 F. 2d at p. 220, n. 3.

been confiscated for those rights followed him to the United States. Thus neither the act of state doctrine nor the Hickenlooper Amendment was applicable. The most plausible rationale for this decision is that Menendez' contract rights were transitory and Cuba's act of state did not reach those rights since he was in the United States. Further, the place of performance of the contracts of insurance and hence the governing law was shifted to the United States because of the impossibility of performance in Cuba.(31)

This rationale which supports the decisions in the Zabaleta and Oliva cases is preferable to the effect of the decision in the French case. For, the French case makes foreign exchange control regulations of a non-Fund member, whether or not consistent with the Fund Agreement, enforceable in the Courts of a Fund member. Thus, exchange control regulations of non-Fund members inconsistent with the Fund Agreement will be given effect in the New York courts while inconsistent exchange control regulations of Fund members will not.(32) And, "consistent" exchange control regulations of non-Fund members will surely be enforced under the French case rationale whereas enforcement of exchange control regulations

---

(31) See supra, p. 146. To a similar effect to the Oliva case is Pan-American Life Insurance Company v. Recio, 154 So. 2d 197 (3rd Fla. D.C. App. 1963).

(32) See Kolovrat v. Oregon, 366 U. S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961), discussed in Gold (1962) op. cit. supra, pp. 128-135, 139.

of Fund members which are consistent with the Fund Agreement is more problematical.(33) See, for example, the decisions in Southwestern Shipping Corporation v. National City Bank(34) and Sharif v. Azad.(35) Nor should the Courts of Fund members enforce consistent non-Fund member exchange control regulations unless and until it becomes the accepted view that the Fund Agreement states the law on extraterritorial enforcement of exchange control regulations without regard to whether or not a country is a member of the Fund.(36)

---

(33) Indications in Banco do Brazil S.A. v. A.C. Israel Commodity Co., 12 N. Y. 2d 377, 190 N. E. 2d 235, 239 N. Y. S. 2d 872 (1963), cert. denied, 376 U. S. 906, 84 S. Ct. 657, 11 L. Ed. 2d 605 (1964), are that the Court will hold unenforceable contracts which violate foreign exchange control regulations of Fund members, but leaves the scope of Article VIII, Section 2(b) in doubt. The Banco do Brazil case is discussed supra, pp. 42-45, 124-125.

One of the consequences of the application of the act of state doctrine in a case involving exchange control regulations would be to foreclose determination of the ultimate question of the consistency of such regulations with the Fund Agreement. Id.

(34) 6 N. Y. 2d 454, 160 N. E. 2d 836, 190 N. Y. S. 2d 352, 28 Int. L. R. 539 (1959), cert. denied, sub nom., First National City Bank of New York v. Southwestern Shipping Corporation, 361 U. S. 895, 80 S. Ct. 198, 4 L. Ed. 2d 151 (1959).

(35) [1967] 1 Q. B. 605, [1966] 3 All E. R. 785, [1966] 3 W. L. R. 1285, 41 Int. L. R. 230 (1966).

(36) Settlement of this point must await judicial decision for "only the imprimatur of a court is capable of attesting the jural quality of international law". P. C. Jessup, Has the Supreme Court Abdicated One of its Functions? (1946) 40 A. J. I. L. 168 at p. 172.

To conclude: the first sentence of Article VIII, Section 2(b) will apply in place of the act of state doctrine in the courts in the United States, and exchange control regulations of Fund members consistent with the Fund Agreement should be given effect. However, under the act of state doctrine, exchange control regulations of non-Fund members may also be enforced in United States courts even when those regulations are not consistent with the Fund Agreement. It is submitted that such regulations should not under any doctrine be given effect in any courts if they are confiscatory or if they are not of the type of regulations which are considered to be consistent with the Fund Agreement.

PART VI

SUMMARY AND CONCLUSIONS

SUMMARY

Set forth in Parts I through V of this essay is a descriptive analysis of the bankground, genesis, interpretation and application of the first sentence of Article VIII, Section 2(b) of the Articles of Agreement of the International Monetary Fund. Litigation involving interpretation and application of that Section has generated a new body of rules which govern or should govern the extraterritorial enforcement of exchange control regulations. In this part the major points discussed and analyzed in the earlier Parts are summarized. Thereafter the conclusions reached are stated.

The Background for the Fund and for Article VIII, Section 2(b)

1. The Fund Agreement was designed to ameliorate aspects of the economic chaos which characterized the international economy during the Great Depression of the 1930's: competitive currency devaluations, excessive trade barriers, bilateral trade arrangements, multiple currency practices, and restrictive exchange control regulations.

2. The Fund was conceived in the early 1940's a product of British and United States designs for the postwar world. That conception drew in large measure upon Keynes' Plan for an "International Clearing Union" and upon the American, "White Plan". The International Monetary Fund represents a compromise

between the two plans, but its legal structure is based in large measure upon the White Plan.

3. The Fund Agreement sought in a positive way to deal with the nationalistic policies which crippled international commerce during the Depression. The Agreement: (a) transformed exchange rates from a matter of national concern and policy to a matter of international concern; and (b) established a system of fixed exchange rates at the center of the system. With the breakdown over the past two years of the system of fixed exchange rates serious efforts to create a new order, a new system of international monetary cooperation has been undertaken.

4. An ultimate objective of the Fund Agreement has been the elimination of exchange control regulations on current transactions. Despite this objective certain controls are permitted:

(a) on current transactions during a transitional period;

(b) when a Fund member's currency becomes scarce;

(c) at all times on capital movements under Article VI of the Fund Agreement; and

(d) when directed toward non-member countries.

Through Article VIII, Section 2(b) the Fund Agreement attempts to unify the treatment these controls receive in the courts and other tribunals of Fund member countries.

Interpretation of the First Sentence of Article VIII, Section 2(b)—The Tools

1. The Fund Agreement is a fundamental charter which creates an international legal order; and its first purpose is "to promote international monetary cooperation."

2. The purpose of the first sentence of Article VIII, Section 2(b) of the Fund Agreement is to provide support for a member's currency by upholding and enforcing that member's exchange control regulations which are consistent with the Fund Agreement.

3. Article VIII, Section 2(b) sets forth one of the general obligations of Fund members. That obligation binds all members of the Fund.

4. Article VIII, Section 2(b) should not be construed narrowly. Rather it should be construed so as to implement the purposes of the Fund and of the provision itself.

5. Recourse to the travaux préparatoires of the first sentence of Article VIII, Section 2(b) may be had to confirm the interpretation of that provision or to determine its meaning where the terms are ambiguous or obscure or where other ways of interpretation lead to a meaning which is manifestly absurd or unreasonable.

6. The Fund's interpretation of the first sentence of Article VIII, Section 2(b) sets forth three fundamentally important principles:

First, the judicial or administrative authorities in a

member country must not implement the obligations of an exchange contract which are contrary to the exchange control regulations of another member maintained or imposed consistently with the Fund Agreement.

Second, those authorities may not ignore the exchange control regulations of another member in such a case on the ground that the regulations are contrary to the public policy of the forum.

Third, such authorities may not ignore the exchange control regulations of another member in such a case on the ground that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

7. The Fund interpretation of Article VIII, Section 2(b) binds member-states' courts and other tribunals once they have satisfied themselves that the interpretation was properly made and is within the authority conferred by the Fund Agreement.

The Interpretation of the First Sentence of Article VIII, Section 2(b) of the Fund Agreement

The First sentence of Article VIII, Section 2(b) provides:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

"Exchange Contracts"

1. Three possible interpretations of the term "exchange contracts" have been suggested due to the ambiguity of the term and to the lack of clarifying travaux préparatoires.

First, the term has been defined narrowly to mean, "contracts which have as their immediate object the exchange of an international media of payment", usually the exchange of one currency for another. This definition has been widely rejected as unduly restrictive and contrary to the first purpose of the Fund Agreement despite the support of some decisions and authors.

Second, an "exchange contract" has been defined as a contract by which one of the parties promises to pay a sum of money in the currency of a country whose exchange control regulations prohibit the transaction. Again, this definition is overly restrictive. It has been rejected by its author, Dr. Mann and adopted by neither court nor commentator.

Third, "exchange contracts" is interpreted as those contracts which in any way affect a Fund member's exchange resources. This broad definition encompasses contracts which would, when performed, increase or decrease, in an economic sense, the amount of foreign exchange or other international reserves which are subject to the control of the country whose currency is involved.

2. The third definition is preferred despite the fact that it makes the word "exchange" superfluous, for it imple-

ments the first purpose of the Fund Agreement: "to promote international monetary cooperation". Moreover, this definition is supported by the weight of decisional and doctrinal authority. It is preferred by both Dr. Mann and Mr. Gold.

3. The third definition makes Article VIII, Section 2(b) applicable to: (a) contracts for the exchange of one currency for another; (b) transnational contracts for the sale or purchase of goods or services; and (c) international loan agreements. Article VIII, Section 2(b) does not apply to claims arising ex delicto or to claims arising on the devolution of property.

"Involve The Currency"

4. The term "involved the currency" should also be construed in its broad, economic sense. The phrase should thus be interpreted to mean, "affect the exchange resources by the performance which is sought".

5. "Exchange resources" includes assets of any type which belong to residents of the country. They may be currency, gold, securities or other intangibles, moveables or even land.

6. The test of whether a country's currency is "involved" is twofold: (a) whether the contract is entered into by a resident of that country; or (b) whether the contract deals with assets situated within that country's territory. That is, whether the contract deals with assets which are subject to the legislative jurisdiction of the country and whether the

country has properly exercised that jurisdiction. The currency of payment is not a test by which to determine whether a currency is involved.

7. A member's currency is not involved in contracts between non-residents which do not require the transfer of assets which are within the legislative jurisdiction of that member.

"Of Any Member"

8. The phrase "of any member" means member of the Fund at the date on which enforcement is sought of an exchange control regulation. The benefits of Article VIII, Section 2(b) cease to be available to a country once it withdraws from the Fund, even with respect to contracts entered into when the country was a member. Thus, Article VIII, Section 2(b) does not render "exchange contracts" invalid but only unenforceable.

"Exchange Control Regulations"

9. Exchange control regulations are those laws which control the movement of currency, property or services in order to protect the exchange resources of a country. Exchange control regulations include:

(a) those rules which require the observance of certain procedures before international payments may be made;

(b) those rules which restrict payments on certain transnational transactions; and

(c) those rules which require that all or

some specified part of foreign exchange be surrendered to a governmental authority in return for local currency at specified rates.

Such rules relate to both current international payments and capital transfers.

10. Whether a regulation is an exchange control regulation depends upon whether it is addressed to the financial aspects of an international transaction. And, it must have the "genuine intention" of protecting the country's economy.

11. Exchange control regulations, within the meaning of Article VIII, Section 2(b), do not include tariffs, trade restrictions, price controls or trading with the enemy regulations.

12. Nor, do exchange control regulations include those rules which prescribe the currency that creditors must accept in discharge of obligations within a particular country, cours legal. Nor do they include cours forcé, or the rules which declare that certain notes and coins issued by the monetary authority have the quality of legal tender.

"Maintained or Imposed Consistently"

13. Only exchange control regulations which are maintained or imposed consistently with the Fund Agreement will be given effect. Article VIII, Section 2(b) may give retroactive application to exchange control regulations and it may, retroactively, make unenforceable a previously existing enforceable contract.

14. An exchange control regulation is consistent with the Fund Agreement if it is in general conformity with the Fund Agreement or is similar in effect to those of other members. Insignificant inconsistencies are not fatal. Express approval by the Fund of the regulations involved is unnecessary, but the Fund has offered to advise whether certain regulations are maintained or imposed consistently with the Fund Agreement.

15. Exchange control regulations which are beyond the legislative competence of the enacting country are not consistent with the Fund Agreement. And, enforcement of Article VIII, Section 2(b) does not depend upon proof to the forum that the member whose exchange control regulations are to be imposed is furnishing the forum country reciprocal treatment under that or other provisions of the Fund Agreement.

16. For those Fund members which have accepted the obligations of Article VIII, whether restrictions on the making of payments relate to current or to capital payments may be crucial, because prior approval of the Fund is required before restrictions on the making of payments on current transactions may be made.

"Unenforceable"

17. Unenforceable means that the judicial or administrative authorities of one member will not implement an exchange contract that is contrary to the exchange control regulations of another member when those regulations are maintained or imposed consistently with the Fund Agreement.

18. Unenforceable does not connote the same concept as that of unenforceability in Anglo-American law. Thus, it should not be left to defendant to plead and prove unenforceability before a court can declare an exchange contract unenforceable.

19. The preferred definition of unenforceable is inoperative in the forum. The term should not be construed to mean illegality or initial invalidity of the contract and should not rely for its meaning on the particular exchange control regulation involved.

The Scope of the First Sentence of Article VIII, Section 2(b)

—Binding Nature of Article VIII, Section 2(b)

1. Article VIII, Section 2(b) binds all Fund members, whether they are "Article VIII members" or "Article XIV members". The Fund interpretation of Article VIII, Section 2(b) makes this clear.

—Article VIII, Section 2(b) Applies to Performance of a Contract

2. For sound practical and policy reasons Article VIII, Section 2(b) must be construed as applicable to exchange contracts at the time of their performance. If the provision applied only to contracts which are contrary to exchange control regulations when formed, then Fund members' courts would be obliged to hold that:

(a) an exchange contract which affected

the exchange resources of another member is unenforceable where the exchange regulations involved have been repealed; and

(b) an exchange contract which affected the exchange resources of another member is enforceable where such contract was made before otherwise applicable exchange control regulations were adopted.

3. A Fund member does not have to treat an exchange contract as unenforceable if the country whose exchange control regulations were violated had ceased to be a Fund member prior to judgment.

—Article VIII, Section 2(b) Covers Current and Capital Transactions

4. Article VIII, Section 2(b) applies alike to current and to capital transactions. Interpretation of the Section as a matter of treaty construction, the travaux préparatoires and decisional authority all support this conclusion.

—Article VIII, Section 2(b) Bars Recoveries Based on Consensual Transactions

5. Article VIII, Section 2(b) bars enforcement of contracts, that is, enforcement of consensual obligations. Actions in tort and in quasi-contract for the return of stolen funds are not covered, nor are actions relating to the devolution of property. But all claims founded on contract are covered.

6. Article VIII, Section 2(b) does cover actions in quasi-contract for the recovery of sums paid in consideration of expected performance under an exchange contract which is unenforceable under that provision.

—Article VIII, Section 2(b) and Enforcement of Foreign Country Public Laws

7. Article VIII, Section 2(b) has not abrogated the rule of international law which prohibits enforcement by a country of its public laws within the territory of another country.

Article VIII, Section 2(b) and: Public Policy; Private International Law; and The "Act of State" Doctrine

—The Adoption of Article VIII, Section 2(b) and Public Policy Against Extraterritorial Enforcement of Exchange Control Regulations

1. Prior to the adoption of the Fund Agreement and in the absence of a treaty, foreign exchange control regulations were not and are not, as a general rule, given judicial recognition--to do so might be against the public policy of the forum state.

2. Article VIII, Section 2(b) of the Fund Agreement abrogated this general rule for Fund members--this is clear from the Fund interpretation.

3. If the application of a member's exchange control regulations were confiscatory in effect a court might refuse to enforce such regulations. Such refusal should be made if based upon a finding that such regulations were not consistent

with the Fund Agreement, and not on the ground that such regulations were contrary to the public policy of the forum.

4. If the courts of a Fund member are called upon to enforce exchange control regulations of another member which regulations are not consistent with the Fund Agreement the public policy of the forum state might require that such regulations be disregarded.

—Article VIII, Section 2(b) Has Been Superimposed Upon the Private International Law of Exchange Control

5. The traditional private international law principles governing exchange control regulations may be briefly summarized as follows:

(a) a contract invalid under applicable foreign law is invalid in the forum;

(b) where a contract is governed by foreign exchange controls, not repugnant to the public policy of the forum, the forum will give effect to the controls regulating the manner of payment, suspension and performance of the contract and similar provisions;

(c) the forum will not give effect to governing foreign exchange control regulations if their application would interfere with the performance of the contract as contemplated by the parties;

(d) in the absence of specific laws to the

contrary the legal tender of a country whose exchange control regulations govern a contract can be used to discharge the contract if expressed in that currency and payable outside of that country; and

(e) foreign exchange control regulations which interfere with possession of property in the forum state may be disregarded on the ground that the regulations are confiscatory in nature.

6. The clear intent of the Fund Agreement is to superimpose upon these traditional rules a new set of rules having as their primary purpose the effective transnational enforcement of Fund members' exchange control regulations. This intent is manifest in the 1949 Fund interpretation.

7. The Fund interpretation has been only partially successful in ending the traditional private international law approach to the enforceability of exchange contracts. A number of courts have been slow to grasp and apply the new rule that: exchange control regulations of a Fund member whose currency is involved must be recognized as the law governing the contract for the purposes prescribed by Article VIII, Section 2(b).

8. The application of exchange control regulations under Article VIII, Section 2(b) does not depend upon a ruling that such regulations are part of the law governing the contract involved.

9. Even though an exchange contract is not subject to Article VIII, Section 2(b), it may, through application of the rules of private international law, be subject to foreign exchange control regulations if those regulations are a part of the governing law. This result might occur, for example, where the governing law was that of a non-Fund member.

—Article VIII, Section 2(b) Displaces the Act of State Doctrine

10. The act of state doctrine holds that every sovereign country is bound to respect the independence of every other sovereign country and that, in the absence of a treaty, the courts of one country will not sit in judgment on the acts of another country done within its own territory. This doctrine has been limited in its applicable scope in the United States by the "Hickenlooper Amendment" which provides, in substance, that no court in the United States shall decline to make a determination giving effect to the principles of international law in which a claim to property is asserted based upon a taking by an act of a sovereign country.

11. The Fund Agreement is a treaty and will apply in place of the act of state doctrine. Thus, exchange control regulations of Fund members otherwise enforceable under the Fund Agreement should be given extraterritorial effect.

12. It is submitted that the act of state doctrine should not be applied in such a way as to give effect to foreign exchange control regulations of non-Fund members especially

where those regulations are confiscatory in nature or where such regulations are not consistent with the Fund Agreement and, therefore, are unenforceable under Article VIII, Section 2(b). To give such effect to those regulations implements a policy which is contrary to that manifest by the Fund Agreement.

CONCLUSIONS

This essay suggests a number of conclusions regarding treaty preparation and interpretation, the application of the terms of an international agreement to disputes by domestic courts and the practice of law involving international transactions. Those conclusions are now set forth.

Today efforts are underway to revise and recast the international monetary arrangements which were agreed upon at Bretton Woods, New Hampshire nearly thirty years ago and are embodied in the Articles of Agreement of the International Monetary Fund. In light of the more than twenty-five years of experience of extraterritorial enforcement of exchange control regulations under the first sentence of Article VIII, Section 2(b) of the Fund Agreement, it is evident that the present wording of that provision--despite the clarification set forth in the 1949 Fund Interpretation--is open to and has engendered, among jurists and scholars, serious differences of opinion as to its proper interpretation, scope and application. In addition, it is clear that in order to change ingrained rules of private international law and to achieve

consistent application of a rule established by treaty provision, such provision must be specific and free from ambiguity. Therefore, as a part of the far reaching revision of the Fund Agreement it is suggested that the first sentence of Article VIII, Section 2(b) be amended to read as follows:

> "Contracts which affect the exchange resources of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

Issuance by the Fund of an appropriate interpretation or explanation of this suggested amendment to Article VIII, Section 2(b) might facilitate its implementation.

The principles discussed in this essay are in some measure applicable beyond the limits of extraterritorial enforcement of exchange control regulations. For example, it is now clear that, as a general rule, treaty provisions by which well established rules of domestic law are to be modified or displaced must be clear and specific. This is particularly true where important international policy is at stake or where enforcement of a treaty provision in a case between private litigants could provide a wind-fall to one party to the great detriment of the other, for the court charged with responsibility for adjudicating the dispute may be inclined to deny full implementation to the treaty provision in order to avoid a harsh result. And, it is clear that an important new body of law is being established regarding the extraterritorial enforcement of domestic laws.

Finally, it should be noted that as a result of contemporary law on exchange control no responsible lender or borrower will enter into a loan agreement without being fully satisfied that the proposed transaction has been approved by the appropriate exchange control authorities. Many contemporary loan documents expressly state that all consents and authorizations essential to the validity of the loan agreement have been obtained as required by controlling exchange control regulations.(1) Thus, in the great majority of instances the rule set down by Article VIII, Section 2(b) is respected.

-finis-

---

(1) See, G. R. Delaume, Legal Aspects of International Lending and Economic Development Financing, 1967, p. 301.

Epilogue

Subsequent to the completion of the text of this essay the issue has been raised whether the breakdown in the pegged exchange rate system, which is at the heart of the Fund Agreement, will influence enforcement of Article VIII, Section 2(b) in the forums of Fund members. Although no response to this issue may be made with complete certainty there are some guideposts.

First, it is a well established principle of international law that a material breach of a treaty by one of the parties entitles the other parties to invoke the breach as a ground for terminating the treaty or suspending its operation, but where a party fails to exercise the right to terminate the treaty remains in full force and effect.(1) Second, whether this rule applies in the case of a multilateral treaty such as the Fund Agreement which contains provisions for withdrawal from the IMF is unclear.(2) In any event, none of the Fund

---

(1) Charlton v. Kelly, 229 U. S. 447, 473, 33 S. Ct. 945, 954, 57 L. Ed. 1274, 1285 (1913); In re Thomas, 23 Fed. Cas. 927 (C.C.S.D.N.Y. 1874); The Blonde [1922] 1 A. C. 313; Ware v. Hylton, 3 U. S. (3 Dall.) 199, 261, 1 L. Ed. 568, 595 (1796); A.L.I., Restatement Second, Foreign Relations Law of the United States, 1965, § 158; H.W. Briggs, The Law of Nations, 2d ed. 1952, pp. 915-916, I. Brownlie, Principles of Public International Law, 1966, p. 497.

(2) See Brownlie, op. cit. supra, p. 497. Article XV of the Fund Agreement deals with withdrawal from membership in the Fund. Section 1 of that Article confers on members a right to withdraw voluntarily, but the Fund Agreement is silent on the question of terminating all rights and obligations under the Fund Agreement.

members has, on account of the breakdown of the exchange rate system, taken any steps to terminate its membership in the Fund or its rights and obligations under the Fund Agreement. Rather, efforts are underway to create a new international monetary order and to amend the Fund Agreement.(3) Thus, the Fund Agreement including Article VIII, Section 2(b) remains in effect. Nor to date have there been any judicial decisions which reflect a change in attitude toward enforcement of Article VIII, Section 2(b) on the part of the judicial or administrative authorities of Fund members.

On July 31, 1973 the Executive Directors of the International Monetary Fund unanimously appointed Dr. H. Johannes Witteveen of the Netherlands as the new Managing Director of the Fund. Dr. Witteveen will succeed Pierre Paul Schweitzer on September 1, 1973.(4)

---

(3) N.Y. Times, Aug. 1, 1973, p. 51, cols. 6-8, p. 53, cols. 1-5.

(4) N.Y. Times, Aug. 1, 1973, p. 51, cols. 6-8, p. 53, cols. 1-5.

APPENDIX A

Article VIII, Section 2(b)

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Article XIV, Sections 2 and 3

Section 2. Exchange restrictions

In the post-war transitional period members may, notwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances (and, in the case of members whose territories have been occupied by the enemy, introduce where necessary) restrictions on payments and transfers for current international transactions. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the Fund; and, as soon as conditions permit, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability. In particular, members shall withdraw restrictions maintained or imposed under this Section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the resources of the Fund.

Section 3. Notification to the Fund

Each member shall notify the Fund before it becomes eligible under Article XX, Section 4(c) or (d), to buy currency from the Fund, whether it intends to avail itself of the transitional arrangements in Section 2 of this Article, or whether it is prepared to accept the obligations of Article VIII, Sections 2, 3, and 4. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept the above-mentioned obligations.

APPENDIX B

Unenforceability of Exchange Contracts: Fund's Interpretation of Article VIII, Section 2(b)

The following letter shall be sent to all members:

The Board of Executive Directors of the International Monetary Fund has interpreted, under Article XVIII of the Articles of Agreement, the first sentence of Article VIII, Section 2(b), which provision reads as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.

The meaning and effect of this provision are as follows:

> 1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreasing performance of the contracts or by awarding damages for their non-performance.
>
> 2. By accepting the Fund Agreement members have undertaken

to make the principle mentioned above effectively part of their national law. This applied to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2.

An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

The Fund will be pleased to lend its assistance in connection with any problem which may arise in relation to the foregoing interpretation or any other aspect of Article VIII, Section 2(b). In addition, the Fund is prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement.

BIBLIOGRAPHY - TABLE OF CITATIONS

CASES

INTERNATIONAL COURT OF JUSTICE

AUSTRIA

BELGIUM

CANADA

CASES

ENGLAND

CASES

ENGLAND (Continued)

CASES

FRANCE

GERMANY

CASES

UNITED STATES

State Courts

CASES

UNITED STATES (Continued)

State Courts

UNITED STATES (Continued)

State Courts

UNITED STATES (Continued)

State Courts

UNITED STATES (Continued)

State Courts

CASES

UNITED STATES (Continued)

State Courts

UNITED STATES (Continued)

State Courts

UNITED STATES (Continued)

State Courts

CASES

UNITED STATES (Continued)

Federal Courts

CASES

UNITED STATES (Continued)

Federal Courts

CASES

UNITED STATES (Continued)

Federal Courts

UNITED STATES (Continued)

Federal Courts

TREATIES

TREATIES

OTHER TREATIES

LEGISLATION

Canada

United Kingdom

United States

BOOKS, PAMPHLETS AND ARTICLES

BOOKS and PAMPHLETS

Author	Title	Page References
Aufricht, H.,	The International Monetary Fund, Legal Bases, Structure, Functions, 1964	6, 7, 8, 10, 11, 13, 21, 29
Brierly, J.L.,	The Law of Nations, 6th ed. 1963 (Sir Himphrey Waldock)	22
Brownlie, I.,	Principles of International Law, 1966	23
Delaume, G.R.,	Legal Aspects of International Lending and Economic Development Financing, 1967	42, 53, 81, 84, 96, 105, 142
Domke, M.	Trading with the Enemy in World War II, 1943	128
Gardner, R.N.,	Sterling Dollar Diplomacy, expanded ed. 1969	4, 5, 83
Gold, J.,	Interpretation by the Fund, 1968, IMF Pamphlet Series No. 11	31, 34
Gold, J.,	The Cuban Insurance Cases and the Articles of the Fund, 1966, IMF Pamphlet Series, No. 8 ("Gold (1966)")	20-21, 30, 40, 51, 65, 66, 72, 73, 74, 75, 76, 77, 84, 89, 92, 93, 95, 119, 122, 139, 150

BOOKS and PAMPHLETS (Continued)

Author	Title	Page References
Gold, J.,	The Fund Agreement in the Courts, 1962 ("Gold (1962)")	27, 28, 31, 35, 40, 42, 45, 46, 47, 50, 53, 55, 61, 62, 66, 70, 76, 88, 89, 90, 98, 99, 101, 107, 108, 110, 112, 115, 116, 118, 120, 122, 133, 139, 146, 150, 172
Gold, J.,	The International Monetary Fund and International Law, 1965, IMF Pamphlet Series No. 4	6, 12
Gold, J.,	The International Monetary Fund and Private Business Transactions, 1965, IMF Pamphlet Series, No. 3 ("Gold (1965)")	15, 21, 51, 66, 97, 104
Gold, J.,	The Reform of the Fund, 1969, IMF Pamphlet Series No. 12	12
Horsefield, J. Keith ed.	The International Monetary Fund 1945-1965, 3 vols. 1969 ("IMF 1945-1965")	3-4, 5, 7, 22, 24, 25, 30, 81, 88, 104, 132, 149
Hgst-Madsen, P.,	Balance of Payments: It's meaning and uses, 1967, IMF Pamphlet Series, No. 9	73
Johnson, H.G.,	The World Economy at the Crossroads, 1965	6

BOOKS and PAMPHLETS (Continued)

Author	Title	Page References
Keynes, J.M.,	Proposals for an International Clearing Union, April 1943 (Cmd. 6437)	24
Keynes, J.M.,	"Proposals for an International Currency (or Clearing) Union "February 11, 1942	24
Lauterpacht, M.,	Oppenheim's International Law, 8th ed. 1955	20, 23, 127
Mann, F.A.,	The Legal Aspect of Money, 2nd ed. 1953 ("Mann 2nd ed.")	27, 29, 34, 105
Mann, F.A.,	The Legal Aspect of Money, 3rd ed. 1971 ("Mann 3rd ed.")	5, 12, 27, 34, 40, 41, 47, 48, 49, 50, 51, 52, 66, 74, 79, 80, 84, 88, 92, 94, 95, 98, 99, 102, 105, 106, 107, 109, 110, 111, 114, 123, 124, 128, 130, 131, 136, 139, 141, 143, 145, 146, 148
Morris, J.C., and others, ed.,	Dicey's Conflict of Laws, 8th ed. 1967	34, 40, 42, 66, 67, 93, 109, 126, 127, 128, 141, 142, 143, 145, 146

BOOKS and PAMPHLETS (Continued)

Author	Title	Page References
Nussbaum, A.,	Money in the Law National and International, rev. ed. 1950	5, 8, 12, 20, 28, 29, 30, 34, 41, 42, 47, 48, 66, 84, 88, 94, 110, 112, 128, 146
Schlesinger, R.B.,	Comparative Law, 3rd ed. 1970	98
Weil, G.L. and Davidson, I.,	The Gold War, 1970	20
Williams, J.H.,	Postwar Monetary Plans, 3rd ed. 1947	4, 5, 20
	Williston on Contracts, 3rd ed. (Jaeger) 1961	41
Wolf,	Private International Law, 2nd Ed. 1950	128
	A.L.I. Restatement of the Law Second, Conflict of Laws	140-141, 142
	A.L.I. Restatement of the Law Second, Foreign Relations Law of the United States, 1965	75, 147, 158, 165
	Balance of Payments Concepts and Definitions, 1969, IMF Pamphlet Series, No. 10	73
	Balance of Payments Manual, 3rd Ed. 1961	93

Author	Title	Page References
	Establishment of a Facility Based on Special Drawing Rights in the International Monetary Fund and Modification in the Rules and Practices of the Fund. A Report of the Executive Directors to the Board of Governors Proposing Amendment of the Articles of Agreement	12
	Hearings before the House Committee on Banking and Currency on H. R. 3211, 79th Cong. 1st Sess. (1945)	4
	Hearings before the Senate Committee on Banking and Currency on H. R. 3314, 79th Cong. 1st Sess. (1945)	4
	IMF, First Annual Report on Exchange Restrictions, 1950	81
	IMF, Twenty-Third Annual Report on Exchange Restrictions, 1972	14
	International Financial Statistics, July 1973, No. 7	7, 9
	International Financial Statistics, May 1973, No. 5	14
	International Monetary Fund Annual Report of the Executive Directors for the Fiscal Year Ended April 30, 1949	30, 89, 132, 149

BOOKS and PAMPHLETS (Continued)

Author	Title	Page References
	International Monetary Fund Annual Report of the Executive Directors for the Fiscal Year Ended April 30, 1971	91, 104
	International Monetary Fund Annual Report of the Executive Directors for the Fiscal Year Ended April 30, 1972	7, 9, 22, 91, 104
	Long-Term Monetary Reform: A Proposal for an Improved International Adjustment Process, 1972 (Panel on International Monetary Policy of the American Society of International Law)	6, 14
	Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, 2 vols. 1948 ("Proceedings")	3, 24, 25, 26, 27, 28, 47-48, 48, 98-99, 107, 112
	Reform of the International Monetary System, 1972 (Report of the Executive Directors to the Board of Governors)	6
	Report of the 45th Conference of the International Law Association (Lucerne), 1952	148

BOOKS and PAMPHLETS (Continued)

Author	Title	Page References
	Selected Decisions of the Executive Directors and Selected Documents, 5th Issue, 1971	30, 61, 89, 105, 132, 149
	United Nations Monetary and Financial Conference Final Act and Related Documents (1944) Dept. of State Publication 2187	3

ARTICLES

ARTICLES (Continued)

ARTICLES (Continued)

ARTICLES (Continued)

ARTICLES (Continued)

ARTICLES (Continued)

Author	Title	Page References
Trickey, F.,	The Extraterritorial Effect of Foreign Exchange Control Laws (1964) 62 Mich. L. R. 1232	42
van Campenhout, A.,	Note (1953) 2 A. J. C. L. 391	97
	Bretton Woods Agreement Held Not to Provide Tort Action for Evasion of Foreign Exchange Control Laws (1963) 63 Col. L. R. 1334	42
	Editor's Note (1971) 65 A. J. I. L. 112	1
	Enforceability of Foreign Exchange Controls in The United States (1964) 59 Nw. U. L. R. 249	42
	[notes on French v. Banco National de Cuba] (1967) 57 Geo. L. J. 1299; (1969) 33 Albany L. R. 418; V.R. Koven (1970) 11 Harv. I. L. J. 212	162
	Use of Bretton Woods Agreement in Enforcement of Foreign Currency Restrictions by American Courts (1953) 53 Col. L. R. 747	61

MISCELLANEOUS