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The International Monetary Fund: Public and Private International Law Aspects

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When England devalues the pound sterling, the Dow Jones Average plummets, and stockholders squirm. When inflation diminishes the purchasing power of the dollar, housewives worry and headache powder sales increase. When the President discourages foreign travel, the natives get restless, and tourist travel abroad skyrockets. When Congress passes a surtax, savings accounts dwindle, and the future appears dismal. Thus few people are unaffected as authorities use words such as "shock," "fluctuation," and "unrest" to describe the world monetary scene.

Nor are the fiscal and monetary problems peculiar to the United States. Economic crises are international in scope, and frequently, the value of a nation's currency, especially that of a developing nation, is threatened and progress jeopardized. Operating at the heart of the world monetary system to alleviate and avert such economic crises is the International Monetary Fund (IMF). Although infrequently mentioned in the press, this giant "pawn shop," organized amidst the World War II fervor for international organization and co-operation, has added a new dimension to international law. Unlike many international organizations, the IMF has legal significance both in public and private international law. It is the latter aspect, of course, which gives the area practical relevance to the practitioner, but the broader, perhaps more esoteric, significance of the former should not be ignored.

Background and Purpose

The conditions and needs which catalyzed the organization of the IMF are summarized in the following statement by President Kennedy:

> The war torn nations of Europe and the Far East faced difficult tasks of reconstruction with depleted and inadequate capital resources. There was a need for redistribution of the financial resources and the financial strength of the free world. And there was an equal need to organize a flow of capital to the impoverished and under-developed countries of the world.[1]

Against this background and with the recognition that the insular policies of the past would have to yield to collaboration and coöperation, the

[1] H. Aufricht, The International Monetary Fund app. VII, at 111 (1964) (from an address by John F. Kennedy at the 1963 IMF Annual Meeting) [hereinafter cited as Aufricht].

Bretton Woods Agreement (hereinafter referred to as the Articles of Agreement or the Fund Agreement) was adopted at the United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, on July 22, 1944.[2] After twenty-two nations meeting the requirements specified in the Fund Agreement[3] had accepted it, the Agreement entered into force on December 27, 1945. As a result, a new institution having full juridical personality with the capacity to contract, to acquire and dispose of property and to institute legal proceedings came into existence.[4] More important, however, the member nations became subject to new rules of public international law, and the IMF acquired assets to assist members in observing the new rules.[5]

Until that time par values, exchange rates, and restrictions on payments and transfers were subject only to the caprice of each sovereign; now they were matters of international moment. The efficacy of the Articles is found in the obligations that each member undertakes in joining the IMF. A nation's commitment to these obligations is probably the single most vital factor in the operation of the IMF, for these obligations represent the rules of good conduct with respect to monetary policy, which have created an atmosphere conducive to growth and freedom.[6] Therefore, each member upon associating with the IMF must represent that it has accepted the Fund Agreement "in accordance with its law and has taken all steps necessary to enable it to carry out all its obligations"[7] under the Agreement. Thus, depending on the constitution and enabling legislation of each nation, the Articles in their entirety or specific provisions thereof become the law of that land.[8] On July 31, 1945, Congress

[2] *Id.* at 9.

[3] This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five percent of the total quotas set forth in Schedule A and when the instruments referred to in Section 2(a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

INTERNATIONAL MONETARY FUND, ARTICLES OF AGREEMENT art. XX, § 1 (1945) [hereinafter cited as ARTICLES OF AGREEMENT]. When the Articles actually entered into force twenty-two countries representing seventy-seven percent of the total quotas had accepted the Fund Agreement. AUFRICHT 20.

[4] ARTICLES OF AGREEMENT art. IX, § 2.

[5] J. GOLD, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL LAW 1 (1965) [hereinafter cited as IMF & INTERNATIONAL LAW]. The majority of pamphlets and materials referred to in this writing are publications of the IMF.

[6] J. Gold, THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS 1-2 (1965) [hereinafter cited as IMF & PRIVATE BUSINESS TRANSACTIONS].

[7] ARTICLES OF AGREEMENT art. XX, § 2(a).

[8] AUFRICHT 10.

enacted the Bretton Woods Agreements Act, which authorized the President to accept membership for the United States in the IMF and the International Bank for Reconstruction and Development (IBRD).[9]

As stated in Article I, the purposes of the Fund are to provide a means of collaboration and consultation concerning monetary problems; to encourage growth of international trade and productivity of the members, to promote exchange stability, to eliminate exchange restrictions; and to make resources available to eliminate maladjustments in the balance of payments. The somewhat limited scope of these purposes is illumined by reference to the broader scheme of which the IMF is a part, for it was contemplated that there would be three postwar economic institutions, namely, the IBRD, the IMF and a world trade organization. Under this arrangement, the IBRD would meet the needs of the countries for long range capital investment, the IMF would be concerned with short term problems such as balance of payments and currency stabilization, and the trade organization would promote international trade by reducing those obstacles that hindered international trade.[10] Although the trade organization as such has not come into existence, the General Agreement on Tariffs and Trade has partially filled the gap caused by the absence of an official organization. Whenever the Contracting Parties to the Agreement encounter monetary problems, they must consult with the IMF and accept its decision.[11] Thus, some degree of concord is achieved in the related fields of trade and payments.

The Obligations

Having applied for membership in the IMF, a member must establish a par value for its currency.[12] This obligation is essential to the operations of the IMF and a condition precedent to use of its assets by a member because in the philosophy of the IMF the par value régime is fundamental to the maintenance of exchange stability. A member may not resort to fluctuating rates of exchange to solve balance of payments problems.[13] Although this policy has been severely criticized by economists, the IMF has consistently held that irrespective of the persuasiveness of members'

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[9] In accepting the Articles of Agreement the United States specified that article IX, sections 2 through 9 and the first sentence of article VIII section 2(b) should have the force of law. United States Bretton Woods Agreements Act, 22 U.S.C. § 286 (1964).

[10] IMF & International Law 2-3.

[11] *Id.*

[12] Articles of Agreement art. IV, § 1.

[13] Aufricht 48.

arguments for fluctuating rates, it cannot give its approval.[14] Exceptions to the par value system, which presupposes single and fixed rates, are justifiable "only under special circumstances and for temporary periods."[15]

Traditionally, of course, the value of a nation's currency is a decision entirely within the discretion of each individual government. By undertaking to establish a par value in terms of gold or of a United States dollar of fixed gold content,[16] members have relinquished a degree of sovereignty.[17] The concession has not been total, however, for a proposed change in the par value can be made only by the member.[18] Although IMF consultation is necessary before making any change, only those changes greater than ten percent of the initial par value require IMF approval.[19] To obtain such approval the member must show that a fundamental disequilibrium[20] exists, which cannot be corrected by restructuring economic policies and utilizing fund assistance. If the IMF should withhold approval, the member is not bound by the decision and may proceed to institute the change without being accused of violating the treaty. However, the IMF may impose sanctions applicable to members that fail to perform obligations under the Agreement.[21]

Once the member establishes the par value, it is under a duty to enforce this rate of exchange in all transactions taking place in its territories that involve its own and another member's currency. It is not obligated, though, to maintain this exchange rate in transactions involving its own currency with that of a nonmember.[22] The means by which the exchange rate is maintained is left to the wisdom of each member,[23] but any variations must be within one percent for spot transactions and within margins established by the IMF for other transactions.[24]

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[14] *Id.*

[15] INTERNATIONAL MONETARY FUND, ANNUAL REPORT 62 (1962).

[16] The provision reads:

> The par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944.

ARTICLES OF AGREEMENT art. IV, § 1(a).

[17] IMF & PRIVATE BUSINESS TRANSACTIONS 2.

[18] ARTICLES OF AGREEMENT art. IV, § 5(b).

[19] *Id.* art. IV, § 5(c) (i) & (ii). *See also* AUFRICHT 45-46.

[20] ARTICLES OF AGREEMENT art. IV, § 5(a).

[21] IMF & INTERNATIONAL LAW 14.

[22] *Id.* at 13; ARTICLES OF AGREEMENT art. IV, § 4(b).

[23] The method most often used to maintain the exchange rate is for the member's monetary authorities to intervene in the exchange markets. IMF & PRIVATE BUSINESS TRANSACTIONS 3.

[24] ARTICLES OF AGREEMENT art. IV, § 3.

A second major obligation imposed upon members is to eliminate restrictions on the making of payments and transfers for current international transactions unless these restrictions are authorized by the Articles.[25] This undertaking is consistent with and reinforces one of the primary purposes of the IMF:

> To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.[26]

Ultimately, the desired effect of this obligation in relation to the IMF is to make the choice of currency in which settlements of current international transactions are made largely irrelevant.[27]

Under this provision, a government must refrain from attempts to limit or prohibit the use or availability of an exchange for current international transactions, but it may formulate a procedure which a citizen must follow to obtain the currency, provided the procedure is reasonable.[28] If a member refuses to allow its residents to make payment abroad in domestic currency for international transactions or to obtain foreign currency for such purposes, then the member is deemed to be imposing restrictions and thereby violating the Articles, unless the restriction is one approved by

[25] *Id.* art. VIII, § 2(a). It should be noted that members of the IMF can be divided into two classes depending upon the obligations which they have undertaken in joining. One class contains those members who have given notice under Article XIV, § 3 that they are able to undertake the stringent obligations of Article VIII, §§ 2, 3, & 4. The other group is composed of those members who joined under the transactional arrangements of Article XIV. The reason for having the second class was a recognition on the part of the IMF that some nations that would most need the benefits of membership were not in an economic position to remove the restrictions prohibited by the Fund Agreement. Therefore, under limited circumstances and careful scrutiny by the IMF, nations have been permitted to retain restrictions when necessary to preserve their balance of payments and the value of their currency. Since acceptance of Article VIII, § 4 determines whether a member's currency is convertible, it is expedient for a member to remove all restrictions preventing convertibility of currency as soon as feasible because repurchase transactions with the IMF must be in convertible currencies or gold. In this regard the IMF reserves the right to make representations to the member that conditions are favorable for removing restrictions. It should be emphasized that Article VIII is the standard for *all* members irrespective of which class they are in. If a member contemplates an action improper under Article XIV, then the action will be governed by Article VIII. IMF & PRIVATE BUSINESS TRANSACTIONS, 16-20.

[26] ARTICLES OF AGREEMENT art. I(iv).

[27] IMF & PRIVATE BUSINESS TRANSACTIONS 7.

[28] *Id.* at 8.

the IMF.[29] If the member, however, requires its residents to surrender the foreign exchange proceeds received in an international transaction for the equivalent in domestic currency, the requirement is a control and not contrary to the member's obligation.[30] Thus, a restriction is a direct governmental limitation that inhibits a resident in obtaining and using currency either domestic or foreign; whereas, a control is a legitimate procedure that the resident must follow to obtain the currency. If reasonable, a control does not in any way interfere with a resident's use of currency for a transaction, but merely allows the government to control foreign currency within its territories. Within this framework a system of free payments is maintained by allowing the country whose resident is receiving payment to designate the currency that is to be received while prohibiting the nation whose resident is the payor from placing any limitation on the currency that can be used for the payment.[31]

This obligation to avoid restrictions applies to restrictions on both payments and transfers. In IMF terminology payment means, as it does in other contexts, the tendering of money as the consideration for goods and services received. Any direct governmental interference with the resident's ability to obtain currency to make the tender is a restriction on payment. A restriction on payment, therefore, depends primarily on the character of the interference so that any action taken by a government will be a restriction on payment only if it is in the form of a direct limitation[32] on the availability of currency as, for example, requiring a license to obtain currency for current international transactions.[33] A transfer, on the other hand, concerns the use that the recipient makes of the currency after the payment has been made so that a restriction on a transfer is determined more by the character of the transaction itself. Thus, the conversion from one currency to another by a nonresident of the proceeds of a transaction is a transfer; therefore, the member cannot restrict this transaction, nor may the member prohibit the nonresident from using his proceeds for another current international transaction.[34] In addition to the effect on individuals receiving payment, this provision in a broader perspective means that a member government having a surplus in its

[29] *Id.* at 7.
[30] *Id.* at 8.
[31] *Id.* at 9.
[32] *Id.* at 10.
[33] *Id.*
[34] *Id.* at 11.

current account with another member will be able to use that surplus to meet its deficit with a third member.[35]

Finally, cognizance must be taken of the meaning of "current"[36] as used in the Articles, for the definition encroaches upon some categories that the economist would regard as capital in nature such as payments for amortization or depreciation of direct investments.[37] It should be noted, moreover, that members are expressly given the right to restrict capital transfers, though this right is qualified somewhat by the limitation that capital transfers cannot have the side effect of unduly delaying settlement of current transactions.[38]

In becoming a party to the Fund Agreement, a member further obligates itself to avoid discriminatory currency arrangements.[39] This type arrangement is the third class of exchange practices prohibited by the IMF, the other two being restrictions on payments and transfers for current international transactions and multiple currency practices, that is, using differing rates of exchange for a single currency.[40] Since the practices overlap, they are often difficult to distinguish in practice.[41] Although not all restrictions on payments and transfers for current international transactions or on multiple currency practices are discriminatory in nature,

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[35] IMF & INTERNATIONAL LAW 17.

[36] For purposes of transactions under the Articles the meaning of "current" is defined as follows:

> 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;
> (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.

ARTICLES OF AGREEMENT art. XIX(i).

[37] IMF & PRIVATE BUSINESS TRANSACTIONS 12-13.

[38] According to the Articles:

> 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 . . . .

ARTICLES OF AGREEMENT art. VI, § 3.

[39] *Id.* art. VIII, § 3.

[40] The par value system of the Fund Agreement anticipates not only a fixed rate of exchange but a unitary rate. IMF & PRIVATE BUSINESS TRANSACTIONS 5.

[41] *Id.* at 15.

a discriminatory currency arrangement is frequently in the form of a restriction or multiple currency practice.[42] To be within the purview of the prohibition, the arrangement must, however, have a direct relation to currency,[43] for the restriction is on discriminatory currency arrangements. If the arrangement directly affects trade, but not currency—for example, a limitation on imports—then it is not within the prohibition[44] even though such a limitation might affect the free flow of currencies. Further, since the right to restrict capital transfers is not expressly limited by this obligation, and interpretation by the IMF has not made them subject thereto, it appears that the arrangement must also be for a current transaction. In effect, therefore, it is possible for a member to discriminate by permitting capital transfers to or from some members but not to others.[45]

Although bilateral arrangements—arrangements between two nations usually containing reciprocity clauses—are most often the device used for discrimination, the obligation restricts both bilateral and unilateral discriminatory currency practices.[46] Furthermore, discriminatory bilateral arrangements are not limited to those merely between members of the IMF, but encompass arrangements between a member and nonmember that are discriminatory and adversely affect another member.[47] The IMF, in keeping with its purposes, has consistently encouraged members to refrain from engaging in bilateral practices and to establish as quickly as possible a system of multilateral payments.[48] Given the dual nature of discriminatory currency practices as being a restriction as well, it would be incumbent upon a member to collaborate with the IMF before imposing

[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 15-16.
[46] *Id.* at 16.
[47] IMF & INTERNATIONAL LAW 21-22.
[48] In one of its policy decisions the IMF stressed this need as follows:

> Fund policies and attitude on bilateral arrangements which involve the use of exchange restrictions and represent limitations on a multilateral system of payments are an integral part of its policy on restrictions. . . . [T]he Fund urges the full collaboration of all its members to reduce and to eliminate as rapidly as practicable reliance on bilateralism. . . . Unless this policy is energetically pursued by all countries . . . there is serious risk that widespread restrictions, particularly of a discriminatory character, will persist. . . . This whole problem is one not only for countries which maintain bilateral arrangements but also for other countries whose domestic and foreign economic policy may adversely affect the balance of payments of other members.

INTERNATIONAL MONETARY FUND, SELECTED DECISIONS OF THE EXECUTIVE DIRECTORS Decision No. 433-(55/42), at 76-77 (1965) [hereinafter cited as SELECTED DECISIONS].

such an arrangement. This duty to consult and collaborate with the IMF is paramount in all currency practices contemplated by a member, for it is the conduit leading to the fulfillment of all the other obligations, which are the essence of the Fund Agreement.

RESOURCES AND OPERATION

To assist members in performing their obligations under the Fund Agreement, the IMF maintains a pool of assets available for use by members either conditionally or unconditionally depending on the amount and nature of the transaction. These assets are derived primarily from the quota and subscription scheme prescribed by the Articles.[49] When a nation becomes a member of the IMF, it is assigned a quota expressed in a fixed number of American dollars. The member's subscription, which is the amount the government is to contribute to the IMF, is the same as the member's quota. Usually payment of the subscription is made by paying twenty-five percent of the quota in gold and the remaining seventy-five percent in the member's currency.[50] Once the subscription is paid, the IMF becomes the absolute owner[51] of the money and can administer it to pursue the purposes of the Fund Agreement. In the operations of the IMF, a member's quota also serves as the basis for determining the extent to which a member is eligible to get assistance and as a basis for the IMF's tranche policy.[52] A member's use of the IMF that does not increase the IMF's holdings of its particular currency above one hundred percent

[49] ARTICLES OF AGREEMENT Art. III.

[50] *Id.* art. III, § 3(b) & (c). After Malta became a member of the IMF on September 11, 1968, membership totaled one hundred and ten members, and the total of all members' quotas amounted to 21,182,450,000 dollars. 20 Int'l Fin. News Survey, Sept. 13, 1968, at 301. Art. III, § 2 provides for adjustments in members' quotas, and as of April 30, 1968, ninety-four members had increased their quotas pursuant to two Resolutions of the Board of Governors adopted March 31, 1965, one of which provided for a general increase of twenty-five percent for all members and special increases for sixteen members. INTERNATIONAL MONETARY FUND, ANNUAL REPORT 97 (1968) [hereinafter cited as 1968 ANNUAL REPORT].

[51] IMF & INTERNATIONAL LAW 22.

[52] The term "tranche" comes from the French *la tranche* meaning a slice or section. In IMF parlance the term is used to indicate the portion of the IMF's assets that a member is using in relation to its quota. The tranches are marked off at intervals of twenty-five percent of quota. To avoid confusion in understanding the concept of the tranche, the phrase "holdings of currency" should be emphasized. When a member subscribes its quota, the IMF's holdings of its currency is usually seventy-five percent of its quota. Thus, when a member purchases the currency of another member equal to twenty-five percent of the purchasing member's quota, the purchase increases the IMF's holdings of the purchasing member's currency to one hundred percent of quota.

of its quota is within the member's gold tranche.[53] Any use which increases the IMF's holdings of the member's currency above one hundred percent of the member's quota is within the credit tranche.[54] This use of the word "credit" should not be mistaken as implying a debtor-creditor relationship because the distinction in the terms used merely indicates that when a member is within its gold tranche it is availing itself of the funds only to the extent of its economic contribution to the IMF, but within the credit tranche it is using the IMF beyond its gold subscription.[55] Use of the IMF within the gold tranche is virtually automatic; whereas, within the credit tranche the criteria for the adequate safeguard required by Article I is much more rigid.[56]

When a member uses the IMF, a charge[57] is imposed for the use, and the money received therefor becomes part of the pool of resources disposable by the IMF. For the fiscal year ending on April 30, 1968, these service charges on drawings amounted to 7 million dollars, and the charges levied on the IMF's holdings of members' currencies in excess of their

[53] The gold tranche is so named because a member's use of the IMF's assets within this range does not exceed the member's gold subscription of its quota. If a member has a quota of 100 million dollars and has paid 75 million dollars in its own currency and the equivalent of 25 million dollars in gold and the IMF has sold 10 million dollars of the member's currency to another member, then a purchase by the member of 35 million dollars is within its gold tranche because the IMF's holdings of its currency have not been increased above one hundred percent of quota.

[54] If a member has a quota of 100 million dollars, 25 million dollars of which has been paid in gold and 75 million dollars of which has been paid in the currency of the member, and the IMF has not sold any of the member's currency, then a purchase by the member of 35 million dollars would be 25 million dollars within the gold tranche and 10 million dollars within the credit tranche.

[55] Gold, *The Next Stage in the Development of International Monetary Law: the Deliberate Control of Liquidity*, 62 AM. J. OF INT'L L. 365, 369 (1968) [hereinafter cited as *The Next Stage*].

[56] When the IMF first began operations, members were somewhat reluctant to request purchases from the assets because they feared that their requests for drawings would be refused. To dispel this fear and give the members assurance of assistance, the IMF announced a policy that made drawings within the gold tranche virtually automatic. A request for drawings was still subject to challenge, but any doubts as to the purposes for which the drawing was being made were to be resolved in favor of the member. This relaxed policy regarding gold tranche drawings has never been adopted with respect to credit tranche drawings. *Id.* at 370-71.

[57] The charge for the purchase of another member's currency is levied at the uniform rate of three-fourths of one percent in addition to the parity price. The IMF may increase the charge to one percent or reduce it to not less than one-half percent. In addition, charges are levied on the average daily balances of a member's currency in excess of its quota. The rates for these charges vary depending upon the percentage above the quota and the length of time that the holdings remain in excess of quota. ARTICLES OF AGREEMENT art. V, § 8(a) & (c).

quotas came to 82 million dollars.[58] If the necessity arises for the IMF to replenish its currency holdings, there are two ways in which this may be accomplished. One is by selling gold to the member whose currency is sought. The other is by borrowing member currencies.[59] The IMF may borrow either from a member or a nonmember, but only member currencies can be borrowed from the nonmember.[60] Under the General Arrangements to Borrow, which the IMF first entered into in 1962 with eight members and the central banks of two others, the IMF has the capacity to supplement its resources up to 6 billion dollars in the currency of ten industrial member countries.[61] The importance of this arrangement to the operations of the IMF is illustrated by the fact that in the month of June 1968 the IMF was able to raise 881 million dollars through the General Arrangements to Borrow to meet pressing demands by members.[62]

At the present time there are three different arrangements by which members use the IMF's resources. These are the Drawing Rights, the Stand-by Arrangements and the Compensatory Financing Arrangement.[63] Subject to the approval of the required number of members, a fourth

[58] 1968 ANNUAL REPORT 105, 107.

[59] IMF & INTERNATIONAL LAW 26.

[60] *Id.* For example, Switzerland is not a member of the IMF; therefore, the IMF may borrow a member currency, such as United States dollars, from Switzerland, but it cannot borrow *Swiss* currency.

[61] The ten countries are Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States. 1968 ANNUAL REPORT 107. The General Arrangements to Borrow was renewed in 1966 and reviewed again in 1968 at which time it was agreed by the participating members that the Arrangement should continue unchanged until October 1970. Address by Pierre-Paul Schweitzer, Managing Director of IMF, 1968 Annual Meeting IMF Bd. of Governors, Sept. 30, 1968.

[62] Address by Pierre-Paul Schweitzer, *supra* note 61.

[63] The Compensatory Financing Decision, which was formulated in 1963 and greatly expanded in 1966, "aims at offsetting the consequences of a temporary shortfall in export earnings, whether due to fluctuation in prices or other factors." Address by Pierre-Paul Schweitzer before the Economic and Social Council of the U.N., Dec. 5, 1968. The 1966 amendment to the Compensatory Financing Decision provides for drawings made under the compensatory facility to be separated from other drawings so that they will not be included in determining the member's ability to draw under the normal policies controlling use of the IMF's resources. [These policies will be discussed subsequently in this paper.] The amended decision also provides for reclassification of purchases made previous to the amendment as compensatory facility drawings. Such a reclassification of course increases the member's ability to make drawings under the normal policies. The significance of this decision is manifested by the purchase of 220 million dollars under the Compensatory Financing Decision by twelve members during the fiscal year ending April 30, 1968. 1968 ANNUAL REPORT 19, 98.

arrangement, the Special Drawing Rights, will be in effect.[64] To avail itself of the IMF's resources, the member must show that the purpose for which the assistance is sought is in keeping with the purposes outlined in the Articles, and in all cases the use must be temporary.[65] Thus, built into all transactions are provisions to keep the resources revolving.

Drawing Rights

What has in IMF terminology come to be called the Drawing Rights is referred to in the Articles of Agreement by the terms "purchase" and "repurchase." Because of the nature of the transaction, no usual legal labels such as a loan or purchase and sale are strictly applicable, but an exchange transaction is the one to which it bears the closest resemblance.[66] The member purchases currency from the IMF in return for its own currency, and within a given period of time, usually five years, the member must repurchase its own currency.[67] To make the repurchase a member must use either gold or the convertible currency[68] of other members. But the currency of a member cannot be utilized for the repurchase if IMF holdings of its currency would be increased beyond seventy-five percent of its quota.[69] Obviously, therefore, the repurchase does not have to be made with the same currency purchased. If the IMF has sold currency of the member scheduled to make repayment so that the holdings of that member are below seventy-five percent of its quota, this sale extinguishes *pro tanto* the requirement to repurchase to the extent that the holdings

[64] ARTICLES OF AGREEMENT arts. XXI-XXXII (proposed amends. 1968), *found in* 1968 ANNUAL REPORT 157-68 [hereinafter cited as Proposed Amends.].

[65] The temporary nature of any use of the IMF's assets is central in its philosophy, for otherwise its underlying purposes to assist countries with balance of payments difficulties and to give stability to currency while encouraging the free flow of currency and trade would be thwarted. Evidence that the temporary nature is fundamental is found in the proposed amendment to Article I(v) which adds the word "temporarily" so that the section reads: "To give confidence to members by making the Fund's resources temporarily available to them under adequate safeguards. . . ." Proposed Amend. art. I(v).

[66] *The Next Stage* 366.

[67] Articles of Agreement art. V, §§ (2) & (7). *See also* Gold, *The Law and Practice of the International Monetary Fund with Respect to "Stand-By Arrangements,"* 12 INT'L & COMP. L.Q. 1, 3 (1963).

[68] Convertible currencies refers to the currencies of members who are not availing themselves of the transitional arrangements under Article XIV, § 2 and the currencies of such nonmembers as the IMF may specify. ARTICLES OF AGREEMENT art. XIX(d). For an explanation of the meaning of the transitional arrangements, see note 25 *supra.*

[69] *The Next Stage* 367.

of the member's currency are below seventy-five percent of its quota.[70] For example, if member A has purchased an amount equal to twenty-five percent of its quota, and the IMF has sold to member B currency of A equal to fifteen percent of A's quota, then A is required to repurchase only the remaining ten percent above its quota.

Limits on the member's use of the IMF are expressed both in terms of quantity and time. One limit is imposed on the basis of total outstanding net use of the funds.[71] Under this policy a member may not increase the IMF's holdings of its currency beyond two hundred percent of its quota.[72] Under certain circumstances the IMF may permit larger purchases, but it is not readily inclined to do so. The other limit is expressed in terms of time. In the absence of a waiver by the IMF, in any twelve month period ending with the date of the purchase, a member can purchase currencies only in an amount equal to twenty-five percent of its quota.[73] It has been common practice, however, for the IMF in recent years to grant a waiver permitting larger purchases,[74] especially if the twenty-five percent represents the gold tranche of the member. Before making a purchase, the member is expected to consult with the IMF regarding the choice of currency, and in making the decision, the IMF considers factors such as the strength of the balance of payments and reserve positions of members along with the relative levels of the IMF's holdings of those currencies.[75]

Stand-By Arrangements

Although not expressly provided for in the Fund Agreement, one vital and functional procedure of the IMF is the stand-by arrangements.

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[70] Gold, *supra* note 67, at 3.

[71] *The Next Stage* 368.

[72] The Fund Agreement states:

> A member shall be entitled to buy the currency of another member from the Fund in exchange for its own currency subject to the following conditions:
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> . . .
>
> (iii) The proposed purchase would not cause the Fund's holdings of the purchasing member's currency to increase by more than twenty-five percent of its quota during the period of twelve months ending on the date of the purchase nor to exceed two hundred percent of its quota. . . .

ARTICLES OF AGREEMENT art. V, § 3(a) (iii).

[73] *Id.*

[74] *The Next Stage* 368.

[75] *Id.* at 374. It is interesting to note that United States drawings on the IMF have totaled 1,840 million dollars, but the effect has been offset partially by the sale of United States dollars to other members. Therefore, the drawings have always been less than the country's 1,290 million dollar gold subscription. In October, 1968, the United States' net drawings were within 270 million dollars of repayment. IMF Memorandum, Oct. 30, 1968, at 1.

When a member applies to use drawing rights, the assistance is to be received immediately. Frequently, however, a country may not need additional resources at once, but may need them in the future, or what is more important, may need the assurance of future assistance to obtain current credit from another source.[76] Recognizing this need for assurance to give confidence to development planning, the IMF, on October 1, 1952, issued a general policy decision establishing stand-by arrangements as a practice of the IMF.[77] Though revised and modified subsequently, the stand-by arrangement has remained a prime method for obtaining assistance. The flexibility of the instrument makes the stand-by arrangement attractive for varied purposes such as "to sustain confidence in currencies under pressure because of international emergencies, to provide additional resources to members during seasonal difficulties, to support programmes intended to stabilize economies [and] to provide backing for currency reforms. . . ."[78]

In determining whether to enter into a stand-by arrangement, the standards applied are usually the same as those applied when a member wishes to exercise an immediate drawing right. Once the arrangement is granted, however, the IMF agrees to forgo review of a request to make a purchase when it is submitted by the member.[79] It is this last concession, of course, which gives the member the assurance anticipated by the stand-by arrangement.

The period of a stand-by arrangement is normally twelve months, and renewals are fairly common practice although a request for a renewal is treated as an application *de novo*.[80] Once a drawing is made under the stand-by arrangement, use of the currency drawn is generally three years so that the overall strain on the liquidity of the IMF is four years[81] from the date the arrangement was entered into. Just as with an immediate drawing, the member is under a duty to repurchase its own currency, but there is a revolving right under the stand-by arrangement, which increases the member's ability to make further drawings under the arrangement when repurchase is made.[82] The benefits of the revolving right do not accrue, however, when repurchase is made for a drawing right exer-

[76] Gold, *supra* note 67, at 4.
[77] *Id.*
[78] *Id.* at 5.
[79] *Id.* at 16.
[80] *Id.* at 7.
[81] *Id.* at 23.
[82] *Id.* at 8, 13.

cised prior to the date the stand-by arrangement was entered into.[83] Also, a sale of the member's currency by the IMF to another member discharges to that extent the obligation to repay under the stand-by arrangement, but does not augment the member's right to make purchases.[84]

The success and utility of the stand-by arrangement has been particularly manifest in the case of developing countries. Since the stand-by arrangement was first instituted in 1952, over four-fifths of the exchange transactions with these countries have been in the form of stand-by arrangements.[85] By using this arrangement, developing countries can weather periods of stress and restore balance in their economy without suffering a slow down in development. At the same time the basic development plan is preserved and opportunities for additional resources at home and abroad arise because stability is restored.[86] This statement should not be taken to minimize the importance of these arrangements for other countries. As the United Kingdom's drawing of 1,400 million dollars under a stand-by arrangement in November, 1967, to meet a gold crisis[87] indicates, the benefits of this arrangement aid both the developed and the underdeveloped nations.

Special Drawing Rights

The most recent development in the IMF that would provide members with additional resources is the program of proposed special drawing rights. The creation of this provision entails an amendment to the Fund Agreement, which has been presented to and accepted by the Board of Governors and must now be accepted by three-fifths of the members having four-fifths of the total voting power to go into force.[88] Motivation for drafting the proposal stemmed from the growing conviction on the part of monetary authorities that as the volume of international economic activity grows, international liquidity must also grow; otherwise the lack of reserves would have a contractionary effect on international economic activity because governments would introduce restrictive policies.[89] Thus, a deliberate means to assure sufficient liquidity in the form of reserves was needed.

[83] *Id.* at 10-13.
[84] *Id.* at 9-10, 24.
[85] Address by Pierre-Paul Schweitzer before the Economic and Social Council of the U.N., Dec. 5, 1968.
[86] *Id.*
[87] 1968 ANNUAL REPORT 19.
[88] ARTICLES OF AGREEMENT art. XVII(a).
[89] *The Next Stage* 375.

In terms of operation, special drawing rights and drawing rights are quite dissimilar. The special drawing rights will be administered by the IMF through a special drawing account[90] separate and apart from the general account, which is the pool of assets used for drawing rights and stand-by arrangements. In fact, with special drawing rights there will be no pool of assets supplied by subscriptions. There will, however, be a quota for each member equal to the member's quota in the general account, and this quota will be the basis on which special drawing rights will be allocated to all participants.[91] A decision to allocate special drawing rights requires an eighty-five percent vote of the total voting power,[92] and in making the decision to submit the proposed allocation to a vote the IMF must consider the overall long-term balance of payments situation to determine if there is an actual need to create new reserve assets.[93]

Once the allocation has been made, the participant may use its special drawing rights for the purposes stated in the section headed "Requirement of Need."[94] In utilizing its special drawing rights, the member obtains the currency directly from another member designated by the IMF

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[90] "All operations and transactions involving special drawing rights shall be conducted through the Special Drawing Account. All other operations and transactions of the Fund authorized by or under this Agreement shall be conducted through the General Account." Proposed Amend. art. XXII, § 1.

[91] *The Next Stage* 392.

[92] Proposed Amend. art. XXIV, § 4(d).

[93] The considerations governing allocations and cancellations of special drawing rights are stated in the following proposal:

(a) In all its decisions with respect to the allocation and cancellation of special drawing rights the Fund shall seek to meet the long-term global need, as and when it arises, to supplement existing reserve assets in such manner as will promote the attainment of its purposes and will avoid economic stagnation and deflation as well as excess demand and inflation in the world.

(b) The first decision to allocate special drawing rights shall take into account, as special considerations, a collective judgment that there is a global need to supplement reserves, and the attainment of a better balance of payments equilibrium, as well as the likelihood of a better working of the adjustment process in the future.

Proposed Amend. art. XXIV, § 1(a) & (b). *See also The Next Stage* 393, 395.

[94] This section states:

> [A] participant will be expected to use its special drawing rights only to meet balance of payments needs or in the light of developments in its official holdings of gold, foreign exchange, and special drawing rights, and its reserve position in the Fund. . . .

Proposed Amend. art. XXV, § 3(a). Under this provision if a member is not in deficit in its balance of payments but is losing gold to other members, it may still use special drawing rights to prevent the loss of gold. 1968 ANNUAL REPORT app. I, Annex B, Outline § V, 1(c), at 172.

to receive equivalent special drawing rights.[95] Although there is a provision stating that the member can obtain currency through the special drawing account,[96] this means simply that the IMF will arrange for the transfer.[97] By going through the special drawing account, the participant, of course, has the assurance that the transferee is a proper one under the rules of designation.[98] The member designated to receive special drawing rights is under a legal obligation to accept the special drawing rights and provide therefor an equivalent amount of a currency convertible in fact.[99] Thus, the member using special drawing rights receives currency, and the member providing the currency receives special drawing rights as the *quid pro quo*.[100] Under this arrangement a member is assured that it will be able to use its special drawing because the IMF designates the recipient, and the participant so designated is obligated to provide the currency upon pain of forfeiting its right to any use of special drawing rights.[101]

As with all arrangements under the the IMF, it is contemplated that a member's use of special drawing rights will be for a limited time only, usually five years. Consequently, there is a provision for reconstituting special drawing rights,[102] which is analogous to that for repurchase under the drawing rights provisions.[103] The most usual way for reconstituting special drawing rights will be for the participant needing to reconstitute to accept special drawing rights from other members in return for its currency.[104] Underlying the reconstitution policy is the principle that a

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[95] Proposed Amend. art. XXV, § 2.

[96] 1968 ANNUAL REPORT app. I, Annex B, Outline § V, 1(b), at 172.

[97] *The Next Stage* 390.

[98] *Id.* Under the proposed amendments the IMF insures that a member will be able to use its special drawing rights by designating participants to provide currency for specified amounts of drawing rights. In making the designation, the IMF is to consider such factors as the participant's balance of payments and gross reserve position, the overall balance of distribution of holdings of special drawing rights, and the need of the participant to reconstitute its special drawing rights. Proposed Amend. art. XXV, § 5(a).

[99] Proposed Amend. art. XXV, § 4.

[100] *The Next Stage* 385.

[101] The severity of this sanction reveals the fundamental nature of the duty to receive drawing rights and provide currency. With other improper actions under the special drawing rights the sanction is merely to forfeit use of special drawing rights accrued after the infringement rather than forfeiture of all use. *Id.* at 386; 1968 ANNUAL REPORT app. I, Annex B, Outline § VIII, 2, at 173.

[102] Proposed Amend. art. XXV, § 6; 1968 ANNUAL REPORT app. I, sched. G, at 168-69.

[103] *The Next Stage* 387.

[104] *Id.*

member's use of special drawing rights on the basis of the five preceeding years shall not exceed seventy percent of its average net cumulative allocation during this period.[105]

Just what the future actual effect of this new provision will be is subject to conjecture, for at this juncture the new facility is not even established. The potential significance, however, is summed up in the following statement from the 1968 Annual Report:

> The broad impact of the new facility will be that it will permit the Fund to assure an appropriate level of international reserves in the light of the needs of the world economy, by supplementing the existing reserve assets in the form of gold and reserve currencies. For the first time, therefore, the total stock of reserves and its rate of growth will reflect deliberate international decisions rather than being determined solely by the availability of gold for official reserves and the accumulation of balances in reserve currencies. . . . [T]he Fund will become a major source for the supply of both unconditional and conditional liquidity.[106]

THE FUND AGREEMENT AND LEGAL PROCEEDINGS

By accepting the Articles of Agreement, members bind themselves to certain obligations. These undertakings are applicable not only to the member governments but also to citizens and corporations within a member's territory. Thus far the discussions in this paper have dealt with the public international law aspects of the IMF; its significance in private international law also deserves consideration. As would be expected, it is in this area that the Articles have most frequently been an issue in litigation. Litigation under the Articles cannot be discussed, however, without first mentioning the significance of Article XVIII since in some instances it may be decisive of the case.

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[105] 1968 ANNUAL REPORT append. I, Annex B, Outline § V, 4(b)(i), at 173. The formula may also be expressed as follows:

> A participant's net cumulative allocation of rights on any date is the total of all rights allocated to the participant up to the date in question, minus any of its rights that have been cancelled. A participant's average holdings of special drawing rights during a five-year period should not be less than thirty percent of the average during the same period of the participant's net cumulative allocation as thus defined.

The Next Stage 387.

[106] 1968 ANNUAL REPORT 16. For a detailed analysis of economic policies and the significance of the special drawing rights, see Comment, *Legal Problems of International Monetary Reform,* 20 STAN. L. REV. 870 (1968).

The Interpretative Power Under Article XVIII

In the Articles of Agreement the one provision that is probably unique among international organizations is the power of the IMF to interpret its own charter. Article XVIII provides:

> (a) Any question of interpretation of the provisions of this 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. . . .
> (b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. . . .[107]

With most other international organizations, final interpretation is vested in some external agency, but with the IMF the same organ, the Executive Directors, that has many other functions and responsibilities also interprets the Agreement.[108] One reason for such an arrangement was the recognition that another tribunal would not have expertise in the matters that would be the subject of interpretation.[109]

Supplementing the obligation of members to collaborate with the IMF, the Executive Directors have issued many interpretations elucidating various complexities of the IMF. However, very few of these decisions have been made under the express provisions of Article XVIII. This does not mean that decisions made outside Article XVIII are less important, but it does perhaps indicate a desire on the part of the Executive Directors to maintain flexibility since such decisions are informal and have less aura of finality.[110]

Of all the decisions issued by the Executive Directors the one that has provoked the most discussion among lawyers and had the greatest influence in private international law is the interpretation of Article VIII, section 2(b), the first sentence of which states:

> 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.[111]

[107] ARTICLES OF AGREEMENT art. XVIII(a) & (b).
[108] Gold, *The Interpretation by the International Monetary Fund of its Articles of Agreement*, 3 INT'L & COMP. L.Q. 256, 257 (1954).
[109] *Id.* at 258.
[110] *Id.* at 259, 264.
[111] ARTICLES OF AGREEMENT art. VIII, § 2(b).

The interpretation explains that parties who enter into a contract that violates the above provision cannot "receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts."[112] Such contracts are not to be implemented by judicial authorities either by decreeing performance or awarding damages for nonperformance. Further, the interpretation states that acceptance of the Fund Agreement means that a member has undertaken to make the principle a part of its national law; consequently, when a party to a contract violative of Article VIII, section 2(b), seeks to enforce it, the tribunal cannot ignore the exchange control regulations of another country on the ground that such regulations are contrary to the public policy of the forum.[113] Moreover, the tribunal likewise cannot enforce the contract on the ground that under the private international law of the forum, the law of the country imposing the exchange regulations is not the law governing the exchange contract or its performance.[114] Although this interpretation has, potentially, wide ramifications when applied in the courts, its impact has not been overwhelming.

Attention should also be given to the binding effect of these interpretations upon the courts and quasi-judicial bodies in the United States. In *International Bank for Reconstruction and Development v. All America Cables and Radio, Inc.*,[115] the question of whether the word "treatment" in Article IX, section 7 embraces rates was submitted to the IMF for interpretation. The Executive Directors declared that "treatment" did include rates charged for official communications,[116] and the Federal Communications Commission in deciding the case held that the interpretation of the IMF was binding upon the parties. This holding is particularly interesting since Article XVIII, granting the Executive Directors power to interpret the articles, was not given the force of law in the United States Bretton Woods Agreements Act.[117] The Commission, however, reasoned that since the United States had resorted to the interpretation procedure in Sections 12 and 13 of its Bretton Woods Agreements Act, the United States at least by implication felt bound by such interpre-

[112] SELECTED DECISIONS Decision No. 446-4 (June 10, 1949), at 73-74.

[113] *Id.* at 74. For a discussion of the effect of giving some Articles, but not all, the force and effect of law, see Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421, 422-23 (1950).

[114] SELECTED DECISIONS Decision No. 446-4 (June 10, 1949), at 74.

[115] 17 F.C.C. 450, 466-67 (1953).

[116] SELECTED DECISIONS Decision No. 534-3 (Feb. 20, 1950), at 93-94.

[117] Gold, *supra* note 108, at 268.

tations.[118] Thus the broad base for the decision in this case was that the United States through an executive agreement authorized by Congress had accepted the Articles, including Article XVIII; consequently, under the supremacy clause of the Constitution the Articles became the law of the land.[119]

Further support for the Commission's position is found in the *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. United States),[120] decided by the International Court of Justice. There the United States agent in oral argument argued that France had not complied with the compulsory requirement of Article XVIII as the party seeking to justify action on the bases of the Agreement by requesting an interpretation of the IMF's European Recovery Program decision.[121] By making this argument, the United States, therefore, by implication represented that it would be bound by such an interpretation.

Court Decisions Applying the Articles

Before the Bretton Woods Conference, most courts, either on the basis of public policy or on application of the private international law of the forum, refused to give recognition to foreign exchange control law.[122] As nations joined an international organization designed to create monetary stability and eliminate exchange restrictions that hamper economic development, it was realized, however, that there were times when balance of payments positions made it necessary for exchange control regulations to be imposed. Consequently, under the terms of the Agreement in Article VIII(2)(b), the members collaborated to give effect to fellow members' exchange control regulations.[123] But in spite of the interpretation of this article issued by the IMF, the decisions have not been uniform in their results and have produced legal debate.[124]

This lack of consistency in deciding cases, despite striking similarities in fact situations, may be attributable to several factors. First of all, as with other innovations in the law, the judiciary has been hesitant to

[118] J. GOLD, THE FUND AGREEMENT IN THE COURTS 56-57 (1962) [hereinafter cited as THE FUND AGREEMENT IN THE COURTS].

[119] Gold, *supra* note 108, at 268.

[120] [1952] I.C.J. 176.

[121] Oral Argument of the Agent for the United States, 2 Case Concerning Rights of Nationals of the United States of America in Morocco, I.C.J. Pleadings 261 (1952).

[122] THE FUND AGREEMENT IN THE COURTS 9-10.

[123] *Id.* at 11.

[124] Gold, *supra* note 108, at 263.

abandon its traditional interpretations and constructions. Thus, even when the Agreement has been raised as a defense, the courts often have applied narrow constructions, which circumvent application of the Agreement. For example, in *Cermak v. Bata Akciovia Spolecnost*,[125] where the assignees of a money claim owing to them from a Czechoslovakian corporation brought an action to recoup the money, and warrants of attachments were levied upon the credit balance which the defendant had with Guaranty Trust Company, the defense was raised that under the Foreign Exchange Regulations in force in Czechoslovakia, the defendant was prohibited from making any payment to a nonresident without a license. The New York Supreme Court held, however, that the plaintiffs could recover. The court treated the license requirement as a penal law and stated that the Fund Agreement did not abrogate the rule that "[t]he courts of no country execute the penal laws of another."[126] The court further held that the plaintiffs could recover under their attachments because the Czechoslovakian Exchange Control Law could not prevent an adjudication of defendant's liability, and then directed Guaranty Trust to pay the credit balance to the plaintiffs. It is arguable that since the court found in fact that the license had been obtained, it would have been a more accurate treatment of the Agreement to say that the contract did not violate the exchange control laws and that the law of New York, which was the place of performance, governed.

Probably the most blatant example of a court's applying a traditional precedent to the detriment of the Fund Agreement was in *Southwestern Shipping Corp. v. National City Bank*,[127] where an Italian importer, needing to pay American dollars but not having the required license, made a deal with an Italian importer having such a license to deposit the money in the National City Bank of New York in the name of one Anlyan. Anlyan was to make an assignment to Southwestern Shipping, and did in fact make the assignment, which was revoked before payment. When the Bank paid Anlyan, he absconded, and Southwestern Shipping brought the action against the Bank. Although the trial court's decision that the suit was barred by both New York common law and Article VIII(2)(b)[128] was affirmed by the Appellate Division,[129] the New York Court of Appeals

[125] — Misc. —, 80 N.Y.S.2d 782 (Sup. Ct. 1948).
[126] *Id.* at —, 80 N.Y.S.2d at 784.
[127] 11 Misc. 397, 173 N.Y.S.2d 509 (Sup. Ct. 1958).
[128] *Id.*
[129] Southwestern Shipping Corp. v. National City Bank, 6 App. Div. 2d 1036, 178 N.Y.S.2d 1019 (1958).

reversed on the ground that the Bank was merely the depository of the proceeds of an illegal contract and thus could not raise the defense of illegality of contract as a basis for refusing to perform.[130] The effect of the decision was, of course, that one member of the IMF gave effect to a contract evading the exchange control laws of another.[131] The reasoning of the dissent, that this was a single transaction that would exclude the Bank from the exception regarding depositories, would have been a more satisfying result with respect to the Fund Agreement.

Not all the cases have done this injustice to the Articles. In *Perutz v. Bohemian Discount Bank in Liquidation*,[132] plaintiff's intestate had worked for a Czechoslovakian bank before coming to the United States. By the terms of a contract with defendant's predecessor bank, the intestate was entitled to a pension from the bank beginning in 1940. A previous judgment had granted plaintiff's intestate all amounts due and owing up to October 31, 1942, and this action was to recover the amounts due and owing under the same contract from November 1, 1942, to the date of the action. To pay the amounts the bank had to obtain a license from the Foreign Exchange Control Authorities. The Appellate Division, using the same reasoning of the court in *Cermak*, held that the plaintiff could have judgment because under Czechoslovakian law or any other law the plaintiff could have judgment without the license having been issued, although execution of the judgment might not be obtainable.[133] Further, the judgment could be satisfied out of defendant's New York account, which had been attached, since foreign currency regulations could have no control over funds within the jurisdiction of the New York court. To hold otherwise would give undue extraterritorial effect to foreign law. On further appeal, the Court of Appeals[134] reversed, holding that the contract was governed by the law of Czechoslovakia, the place where it was made and to be performed. The defendant had performed the contract as permitted by that law, and thus the New York courts were bound to give effect to the exchange control regulation because both the United States and Czechoslovakia were parties to the Fund Agreement.

Although the case rests upon the Articles of Agreement, it illustrates

[130] Southwestern Shipping Corp. v. National City Bank, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352, *cert. denied*, 361 U.S. 895 (1959).

[131] THE FUND AGREEMENT IN THE COURTS 106-08.

[132] 279 App. Div. 386, 110 N.Y.S.2d 446 (1952), *rev'd*, 304 N.Y. 533, 110 N.E.2d 6 (1953).

[133] *Id.*

[134] Perutz v. Bohemian Discount Bank in Liquidation, 304 N.Y. 533, 110 N.E.2d 6 (1953).

a second reason why there has not been uniformity in applying the Fund Agreement, namely, the failure of the courts to identify precisely the basis of decisions. The opinion in *Perutz* leaves room for speculation as to whether the decision is predicated on the narrow basis of Article VIII (2)(b) or whether it rest on the broader basis of the general treaty obligation.[135] In the latter circumstance, the court would be giving wider recognition to foreign exchange control regulations than is necessarily demanded by the limited scope of "exchange contracts" under Article VIII(2)(b).[136] A similar criticism could be made of *Kolovrat v. Oregon*,[137] the only case involving the Articles of Agreement to be decided by the United States Supreme Court to date. One authority has elucidated three possibilities for the *ratio decidendi*[138] of the case. Confronted with this equivocal opinion, state courts lack clear direction in cases concerned with the Fund Agreement.

Finally, a third possible reason for variation in the cases is the failure of the Fund Executive Directors to make a more definitive interpretation of Article VIII(2)(b). Merely knowing that a member's

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[135] THE FUND AGREEMENT IN THE COURTS 52-53. *See also* Meyer, *Recognition of Exchange Controls after the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953), for a discussion supporting the argument that the decision was predicated on Article VIII, § 2(b).

[136] THE FUND AGREEMENT IN THE COURTS 52.

[137] 366 U.S. 187 (1961). Here the Court gave effect to the Fund Agreement by holding that Oregon could not refuse payment of the intestate's estate to his only heirs and next of kin, who were residents of Yugoslavia, on the basis of an Oregon statute that directed that such estates would escheat to the state unless under similar circumstances the foreign government would make payment to a United States citizen in the United States. The Court rejected the argument that the foreign exchange control laws of Yugoslavia could preclude the meeting of the condition.

[138] The possibilities set forth were:

(1) [that] even if the Yugoslav authorities were to restrict transfers of Yugoslav inheritances to U.S. heirs in the United States, this restriction would be consistent with the Fund Agreement, for which reason Oregon could not prevent the petitioners from succeeding to the Oregon inheritance;

(2) [that] the petitioners must succeed on their petition because the Yugoslav exchange control regulations in existence were consistent with the Fund Agreement, the Fund Agreement prevented the exercise of the controls in such a way as to restrict the transfers of inheritances, and the Yugoslav authorities were observing this rule by not in fact restricting them;

(3) [that] the petitioners were entitled to succeed because the Yugoslav authorities were not restricting transfers of inheritances to U.S. heirs in the United States, and because the exchange control regulations in existence were consistent with the Fund Agreement.

THE FUND AGREEMENT IN THE COURTS 131-134.

judicial bodies cannot on the basis of *ordre public* give effect to a contract violative of the Article leaves much room for judicial discretion on numerous issues. For example, must the party sued be a party to the contract; at what point in time is the article applicable—when the contract is made or when enforcement is sought; what is an exchange contract; what contracts involve currency transactions; does unenforceability include damages for conduct in making or performing the contract.[139] All these questions and others are left for judicial determination in each case. From time to time several of these issues[140] have been dealt with by courts in the United States, but the body of law pertaining thereto is by no means solidified. The one possible exception to this statement is with respect to the time when effect is to be given to Article VIII(2)(b). At least three cases[141] have disallowed a defense based on the Fund Agreement because the country having the exchange control law had withdrawn from the IMF since the making of the contract. Thus, by implication at least, the crucial time is when the parties seek enforcement.[142] This still leaves open the question of enforceability where the member joins the IMF after the contract was made. But if the same logic were applied, the Fund Agreement would have retroactive effect; the burden of risk would fall on the parties and the contract would be unenforceable.

CONCLUSION

How courts will interpret and construe the Articles of Agreement in the future is elusive of prediction. The assumption may be made, however, that as productivity and trade throughout the world increase, the volume of litigation will also increase. Courts accustomed to the comfortable

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[139] For a discussion of these problems, see Mann, *The Private International Law of Exchange Control Under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97 (1953).

[140] In Banco Do Brasil, S.A. v. A. C. Israel Commodity Co., 29 Misc. 229, 215 N.Y.S.2d 3 (Sup. Ct. 1961), *aff'd*, 13 App. Div. 2d 652, 216 N.Y.S.2d 669, *aff'd*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964), the court dealt with the question of whether the Article can be the basis for a cause of action as well as a defense. It should be noted, moreover, that in every case, though not necessarily expressed, the court must make a determination as to whether the foreign exchange law and the contract are the type contemplated by the Articles of Agreement.

[141] Pan-American Life Ins. Co. v. Blanco, 362 F.2d 167 (5th Cir. 1966); Confederation Life Ass'n v. Vega y Arminan, 207 So. 2d 33 (Fla. 1968); Stephen v. Zivnostenska Banka Nat'l Corp., 31 Misc. 45, 140 N.Y.S.2d 323 (Sup. Ct.), *aff'd*, 286 App. Div. 999, 145 N.Y.S.2d 310 (1955), *aff'd*, 3 N.Y.2d 862, 145 N.E.2d 24, 166 N.Y.2d 309 (1957), *appeal dismissed*, 356 U.S. 22 (1958).

[142] THE FUND AGREEMENT IN THE COURTS 77-78.

doctrine of *ordre public* will be faced with applying and construing the Articles of Agreement under which nations have relinquished the protection of the public policy of the forum to the larger world policy of monetary cooperation. The hope must be, therefore, that courts as well as nations will not lose sight of the Fund Agreement's paramount purposes to establish exchange stability and equilibrium in balance of payments, with the ultimate aim of eradicating human distress resulting from economic chaos.

SARAH E. PARKER

Survey of the United States Supreme Court Decisions Affecting Labor-Management Relations During the 1967-1968 Term

INTRODUCTION

The labor law decisions of the Supreme Court during the 1967-1968 term were significant primarily in their attempt to reconcile the rights of individuals with the power of those interests controlling collective bargaining groups. Throughout the opinions institutional power, whatever its form, is closely examined by the Court when such power appears to infringe upon individual or minority rights. In addition, the cases last term show an increased willingness on the part of the Court to enlarge the power of those agencies and officials who traditionally safeguard the rights of union members.

Also decided by the Court last term were two opinions specifically aimed at employer actions, one case presenting a first amendment question in the area of picketing, an opportunity, which the Court declined, to settle the conflict between section 4 of the Norris-LaGuardia Act[1] and section 301 of the Labor Management Relations Act.[2] A total of twelve labor law opinions were rendered by the Court, and this comment will present an analytical digest of them.

UNION ELECTIONS

The Supreme Court heard three cases last term involving the interpretation of Title IV of the Labor-Management Reporting and Disclosure

[1] Norris-LaGuardia Act, § 4, 29 U.S.C. § 104 (1964).
[2] 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).