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January 28, 1988

To: Members of the Executive Board

From: The Secretary

Subject: Legal Effects of Approval or Nonapproval of Exchange Restrictions by the Fund

Attached for consideration by the Executive Directors is a paper on the legal effects of approval or nonapproval of exchange restrictions by the Fund. In order to give Executive Directors more time to consider this paper, presently scheduled for discussion on Monday, February 22, 1988, it is proposed to schedule it at a later date. An updated tentative schedule of Executive Board meetings will be issued shortly.

Mr. Gianviti (ext. 8329), Mr. Elizalde (ext. 7796 for Part I), or Mr. Francotte (ext. 7798 for Part II) is available to answer technical or factual questions relating to this paper prior to the Board discussion.

Att: (1)

CONFIDENTIAL

INTERNATIONAL MONETARY FUND

Legal Effects of Approval or Nonapproval of Exchange Restrictions by the Fund

Prepared by the Legal Department

(In consultation with the Exchange and Trade Relations Department)

Approved by François Gianviti

January 27, 1988

Contents

Contents Page

Contents — Page

Introduction

At Executive Board Meeting 87/150 (10/28/87), the staff was requested to prepare a paper describing the effects of approval or nonapproval of exchange restrictions by the Fund under Article VIII, Section 2(a). 1/ The staff was asked in particular to examine (i) whether the Fund could authorize the use of its resources by a member imposing nonapproved exchange restrictions, and (ii) what would be the effect of approval of a member's exchange restrictions on the rights of creditors to seek the enforcement of their claims in the courts of other members.

Article VIII, Section 2(a) sets forth the principle that certain exchange restrictions may be imposed by members only with the prior approval of the Fund:

> "Subject to the provisions of Article VII, Section 3(b) and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions."

Before examining the effects of approval or nonapproval of these exchange restrictions, it is necessary to briefly describe the main elements of the Fund's approval jurisdiction with respect to such restrictions.

1. Scope of requirement of approval

Article VIII, Section 2(a) applies to certain exchange restrictions, that is, "restrictions on the making of payments and transfers for current international transactions." The Fund has clarified that the guiding principle in ascertaining whether a measure is an exchange restriction is "whether it involves a direct governmental limitation on the availability or use of exchange as such." 2/ On the basis of this criterion, a distinction has been made, for instance, between exchange restrictions and defaults (i.e., nonpayment of debts for

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1/ This paper discusses the effects of approval or nonapproval of exchange restrictions under Article VIII, Section 2(a). It does not deal specifically with multiple currency practices and discriminatory currency arrangements, which are subject to the approval of the Fund under Article VIII, Section 3. These measures generally involve exchange restrictions.

2/ Decision No. 1034-(60/27), adopted June 1, 1960, Selected Decisions, Thirteenth Issue, p. 298.

other reasons). 1/ Exchange restrictions are subject to approval; defaults are not. Accordingly, the Fund does not approve arrears as such, but may approve the exchange restrictions (if any) giving rise to arrears. 2/

Pursuant to Article VIII, Section 2(a), the requirement of approval by the Fund does not apply to exchange restrictions maintained by a member in accordance with Article XIV, Section 2 or imposed under Article VII, Section 3(b). Article XIV, Section 2 authorizes a member to maintain and adapt to changing circumstances the exchange restrictions that were already in effect when it became a member of the Fund. Article VII, Section 3(b) authorizes any member, after a currency has been declared scarce by the Fund pursuant to Article VII, Section 3(a), to impose limitations on the freedom of exchange operations in the scarce currency. The Fund has never declared a currency scarce.

By its terms, Article VIII, Section 2(a) only applies to restrictions on current payments; it does not apply to restrictions on capital movements. Members are authorized by Article VI, Section 3 to regulate capital movements, without the approval of the Fund. 3/ The Fund has decided that the freedom of members to regulate capital movements includes the possibility of discriminatory arrangements among members. 4/

1/ Nonpayment by a government of its own debt is a case of default, not an exchange restriction. It cannot be approved by the Fund. See "Review of Fund Policies and Procedures on Payments Arrears" EBS/80/190 (8/27/80), pp. 9 and 14. See also the discussion below on the meaning of exchange control regulations, pp. 45-49.

2/ See Decision No. 3153-(70/95), paragraph 1, adopted October 26, 1970, Selected Decisions, Thirteenth Issue, p. 300:

> "Undue delays in the availability or use of exchange for current international transactions that result from a governmental limitation give rise to payments arrears and are payments restrictions under Article VIII, Section 2(a), and Article XIV, Section 2. The limitation may be formalized, as for instance compulsory waiting periods for exchange, or informal or ad hoc."

3/ Article VI, Section 3 provides that "[m]embers 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 of commitments, except as provided in Article VII, Section 3(b) and in Article XIV, Section 2."

4/ See Decision No. 541-(56/39), adopted July 25, 1956, Selected Decisions, Thirteenth Issue, p. 156.

The concept of payments for current transactions is defined in Article XXX(d) as meaning:

"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; and

(4) moderate remittances for family living expenses." 1/

2. Form of approval

Approval is normally granted by the Fund by a formal decision. The Fund has, however, decided to follow a different procedure for the approval of restrictions imposed for security reasons. Thus, Decision No. 144-(52/51), adopted August 14, 1952, provides that restrictions notified to the Fund pursuant to that decision are approved for purposes of Article VIII, Section 2(a), unless the Fund informs the member within 30 days after receiving the notice that it is not satisfied that such restrictions are proposed solely to preserve national or international security. 2/

3. Policies of the Fund on approval

The Articles do not stipulate the criteria for approval by the Fund. Therefore, the determination of such criteria has been left to the discretion of the Fund, to be exercised in the light of the purposes of the Fund and, in particular, the purpose of "[assisting] in the establishment of a multilateral system of payments in respect of

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1/ Article XXX also empowers the Fund to determine, after consultation with the members concerned, whether specific transactions are to be considered current transactions or capital transactions.

2/ Selected Decisions, Thirteenth Issue, p. 292. The decision uses the terms "the Fund has no objection to the imposition of the restrictions," rather than the terms "the Fund approves" or "grants approval." All three formulations have the same legal effects. "Approval" is the term used in Article VIII, Section 2(a) and has been used consistently by the Fund since Executive Board Decision No. 3031-(70/37), adopted April 24, 1970.

current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade." 1/

Accordingly, the Fund has adopted several decisions on the criteria for approval of exchange restrictions. Thus, it has decided that it will grant approval of exchange restrictions imposed for balance of payments reasons "only where it is satisfied that the measures are necessary and that their use will be temporary while the member is seeking to eliminate the need for them." 2/ As regards measures requiring approval under Article VIII and maintained or introduced for nonbalance of payments reasons, the same decision indicates that "the Fund believes that the use of exchange systems for nonbalance of payments reasons should be avoided to the greatest possible extent, and is prepared to consider with members the ways and means of achieving the elimination of such measures as soon as possible." 3/

The Fund has also decided that it would not normally approve discriminatory exchange restrictions. 4/ Discrimination is understood as any differentiation in a member's restrictions as between other members. 5/

1/ Article I(iv).

2/ Decision No. 1034-(60/27), adopted June 1, 1960, Selected Decisions, Thirteenth Issue, p. 298, at p. 299.

3/ Ibid.

4/ See Decision No. 955-(59/45), adopted October 23, 1959, which states that "the Fund considers that there is no longer any balance of payments justification for discrimination by members whose current receipts are largely in externally convertible currencies," and "in the case of . . . countries [with a substantial portion of their current receipts still subject to limitations on convertibility, particularly in payments relations with state-trading countries], the Fund will be prepared to consider whether balance of payments considerations would justify the maintenance of some degree of discrimination, although not as between countries having externally convertible currencies." Selected Decisions, Thirteenth Issue, p. 297.

5/ With respect to nonmembers, Article XI, Section 2 provides: "Nothing in this Agreement shall affect the right of any member to impose restrictions on exchange transactions with non-members or with persons in their territories unless the Fund finds that such restrictions prejudice the interests of members and are contrary to the purposes of the Fund." Rule M-6 of the Fund's Rules and Regulations, adopted pursuant to Article XI, Section 2, provides:

> "The Fund deems that it would be prejudicial to the interests of members and contrary to the purposes of the Fund for a member to impose restrictions on exchange transactions with those non-members having entered into special exchange agreements under

With respect to exchange restrictions giving rise to external payments arrears, the Fund has adopted a decision complementing these decisions, in which it stated that its approval of such restrictions would be predicated on a satisfactory program for the elimination of the arrears which the member should be expected to submit when requesting the approval of the restrictions:

> "If payments arrears exist and approval of the restriction giving rise to them is requested by the member, the member should be expected to submit a satisfactory program for their elimination. Approval if given should be only for a temporary period and generally with a fixed terminal date. Because of the difficulty in surveillance, approval should be wherever feasible in terms of the level of arrears outstanding. The program for the elimination of the payments arrears should provide for a maximum permissible delay to which a payment or transfer could be subjected, together with a phased reduction in the outstanding level." 1/

4. Structure of paper

This paper is in two parts. Part I examines the effects of approval or nonapproval by the Fund of a member's exchange

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5/ (Cont'd from p. 4) the General Agreement on Tariffs and Trade, or with persons in their territories, which the member would not in similar circumstances be authorized to impose on exchange transactions with other members or persons in their territories. Therefore, pursuant to Article XI, Section 2, members should not institute restrictions on exchange transactions with such non-members, or persons in their territories, unless the restrictions (a) if instituted on transactions with other members, or persons in their territories, would be authorized under the Articles, or (b) have been approved in advance by the Fund. Requests for prior approval shall be submitted in writing with a statement of reasons."

Under Article XV, Section 6 of the GATT, any contracting party which is not and does not become a member of the Fund shall enter into a special exchange agreement with the Contracting Parties imposing on it obligations in exchange matters similar to those imposed by the Fund's Articles of Agreement on members of the Fund. The purpose of the special exchange agreement is to avoid the frustration of the objectives of the GATT by that contracting party as a result of actions in exchange matters.

1/ Decision No. 3153-(70/95), adopted October 26, 1970, Selected Decisions, Thirteenth Issue, p. 300, at p. 301.

restrictions on the relations between the Fund and the member. Part II discusses the effects of approval or nonapproval by the Fund on the recognition of a member's exchange restrictions by the courts of other members.

Unless otherwise indicated, the expression "exchange restrictions" will be used in this paper to refer to restrictions that are subject to Fund approval under Article VIII, Section 2(a). In the Articles and in this paper, a distinction is made between restrictions "imposed" under Article VIII, Section 2(a), which are subject to approval, and restrictions "maintained" under Article XIV, Section 2, which are not subject to approval.

I. Effects of Approval or Nonapproval of a Member's Exchange Restrictions on Relations between the Fund and the Member

Article VIII, Section 2(a) prohibits the imposition of exchange restrictions without the approval of the Fund. Therefore, unless they are approved by the Fund, exchange restrictions are inconsistent with the Articles of Agreement. Conversely, exchange restrictions, while they are approved by the Fund, are consistent with the Articles.

The distinction between "approved" and "nonapproved" exchange restrictions is important, inter alia, for the application of Article VIII, Section 2(b) of the Fund's Articles of Agreement, 1/ as well as of certain provisions of the General Agreement on Tariffs and Trade (GATT), in particular Article XV of that Agreement. 2/

With respect to the Fund's relations with a member imposing exchange restrictions, the main consequence of nonapproval by the Fund is that the member is in breach of an obligation assumed by it under

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1/ See Part II of this paper.

2/ Paragraph 2 of Article XV of the GATT provides that in all cases in which the Contracting Parties are called upon to consider or deal with problems concerning monetary reserves, balance of payments or foreign exchange arrangements, they shall consult fully with, and accept the determination of, the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the Fund. Similarly, paragraph 9 of the same Article provides that nothing in the GATT agreement "shall preclude: (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund. . . ."

the Articles. 1/ Whenever a member is in breach of an obligation, the Fund may take certain actions with respect to that member. Among those actions is a declaration of ineligibility to use the general resources of the Fund under Article XXVI, Section 2(a), which causes the suspension of the member's entitlement to use the Fund's general resources.

The Fund has discretion whether or not to take the actions at its disposal in the case of a member's noncompliance with its obligations under the Articles. However, inaction by the Fund does not cure the member's breach of obligation, which will remain until the member resumes full compliance with the Articles.

If the Fund does not take the actions available to it in the case of a member imposing exchange restrictions without Fund approval, and, in particular, if the Fund has not previously declared that member ineligible to use the general resources of the Fund, can the Fund, or must the Fund, nonetheless, deny the member's request to use the Fund's general resources? More generally, can or must the Fund deny access to its resources by members imposing exchange restrictions, whether approved or not approved?

Section A will discuss briefly the main actions available in case of a member's breach of obligation arising from the imposition of nonapproved exchange restrictions. Section B will consider whether the Fund can or must deny access to a member imposing exchange restrictions, and whether a distinction can or must be made between approved and nonapproved exchange restrictions.

A. Actions in response to the imposition of nonapproved exchange restrictions

This Section discusses only the actions that are most relevant in cases of breach of obligations by members arising from the imposition of nonapproved exchange restrictions. 2/

1/ Article VIII, Section 1 clearly states that "[i]n addition to the obligations assumed under other articles of this Agreement, each member undertakes the obligations set out in this Article." (Underscoring added.)

2/ For other possible actions in cases of breach of obligations in general, see "Overdue Financial Obligations to the Fund--Ineligibility to Use the General Resources and Subsequent Actions by the Fund--Legal Aspects" SM/86/102 (5/14/86).

1. Report by Managing Director

The Managing Director must report to the Executive Board any case in which it appears to him that a member is not fulfilling obligations under the Articles (Rule K-1).

2. Complaint

(a) Any member may complain to the Fund that another member is not complying with its obligations concerning exchange controls, discriminatory currency arrangements, or multiple currency practices. The Rules of the Fund's Rules and Regulations that establish norms to be followed by the Fund in these cases are Rules H-2 and H-3.

Rule H-2 establishes that the complaint "shall give all facts pertinent to an examination." For its part, Rule H-3 provides that "[u]pon receipt of a complaint from a member, the Executive Board shall make arrangements promptly for consultation with the members directly involved."

(b) A complaint may also be made by the Managing Director to the Executive Board.

3. Ineligibility and limitation

(a) When a member is in breach of an obligation under the Articles, it may be declared ineligible to use the general resources of the Fund by a decision of the Fund taken pursuant to Article XXVI, Section 2(a).

The scope of Article XXVI, Section 2(a) is broad, in that a member may be declared ineligible to use the general resources of the Fund for the nonfulfillment of any obligation, financial or nonfinancial, under the Articles. 1/ This includes the imposition of nonapproved exchange restrictions.

There are other grounds for a declaration of ineligibility in the Articles, that do not require a finding of breach of obligation. These provisions are Article V, Section 5, Article VI, Section 1(a) and

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1/ However, Article XXIII, Section 2(f) provides that "Article XXVI, Section 2 shall not apply because a participant has failed to fulfill any obligations with respect to special drawing rights."

Article XIV, Section 3. 1/ A common element among those provisions is that, because ineligibility in those cases is not based on a breach of obligation, the member may not subsequently be required to withdraw from the Fund.

Moreover, in two of these provisions (Article V, Section 5 and Article XIV, Section 3), ineligibility is predicated on a finding by the Fund that the member is pursuing policies inconsistent "with the purposes of the Fund."

Therefore, to take the example of a member with exchange restrictions inconsistent with Article VIII, Section 2(a), two cases must be distinguished.

In the first case, the exchange restrictions are subject to approval under Article VIII, Section 2(a), either because the member has accepted the obligations of Article VIII, or because, while availing itself of the transitional arrangements of Article XIV, Section 2, it has introduced new exchange restrictions. Unless those exchange restrictions are approved by the Fund, the member is ipso facto in breach of an obligation under the Articles and may be declared ineligible by the Fund under Article XXVI, Section 2(a).

In the second case, the member is only maintaining existing exchange restrictions under the transitional arrangements of Article XIV, Section 2. Nevertheless, if the Fund finds, after making representations to the member for the removal of those exchange restrictions, that "the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XXVI, Section 2(a)" (Article XIV, Section 3).

The differences between these two cases are (i) the possibility, in the first case, of a subsequent decision requiring the member to

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1/ Under Article V, Section 5, the Fund may limit or ultimately declare a member ineligible to use its general resources, whenever the Fund is of the opinion that the member is using those resources "in a manner contrary to the purposes of the Fund."

Article VI, Section 1(a) authorizes the Fund to declare a member ineligible to use its general resources if the member, after being requested by the Fund, fails to exercise appropriate controls to prevent the use of those resources to meet a large or sustained outflow of capital.

Article XIV, Section 3 allows the Fund to declare a member which is availing itself of the transitional arrangements under Section 2 of that Article ineligible to use the general resources of the Fund if the Fund, after representing to the member that conditions are favorable for the withdrawal of exchange restrictions, finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund.

withdraw from the Fund if it persists in its failure to fulfill its obligation, and (ii) the special requirement, in the second case, of a finding of inconsistency with the purposes of the Fund.

(b) As discussed in the staff paper "Overdue Financial Obligations to the Fund--Ineligibility to Use the General Resources and Subsequent Actions by the Fund--Legal Aspects" SM/86/102 (5/14/86), the main consequence that follows necessarily under the Articles from a declaration of "ineligibility to use the general resources of the Fund" is, as the phrase indicates, that the right of the member to use these resources is suspended. Thereafter, the member has no right to make purchases from the General Resources Account.

The suspension of the member's right continues until the Fund terminates the status of ineligibility for that member. However, under Article V, Section 4, the Fund "may, in its discretion, and on terms which safeguard its interests," authorize a purchase by a member that has been declared ineligible; in that case the Fund may require, as a condition of waiver, the pledge of collateral security by the member.

(c) The Fund, under its Rules and Regulations, has provided for somewhat more flexible actions that can be applied to a member in situations where the Executive Board is authorized by the Articles to declare the member ineligible to use the general resources of the Fund.

Rule K-2, for instance, provides that the Executive Board "may refrain from making the declaration [of ineligibility] and indicate the circumstances under which, and the extent to which, the member may make use of the general resources."

Rule K-4 authorizes the Executive Board to permit the resumption of the use of the general resources with or without special limitations, upon request by a member that is ineligible to use those resources, or whose use has been limited according to Rule K-2. 1/ Rule K-4 adds that if "the Executive Board decides not to permit such resumption, a written report shall be presented to the member stating what further action is required before such resumption will be permitted." Unlike Rule K-2, Rule K-4 has never been applied.

4. Compulsory withdrawal

"If, after the expiration of a reasonable period, the member persists in its failure to fulfill any of its obligations under [the

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1/ See also, as an illustration of this procedure, paragraph 6 of the Form of Stand-by or Extended Arrangements under the Enlarged Access Policy, Selected Decisions, Thirteenth Issue, p. 66 (Stand-by Arrangement) and p. 71 (Extended Arrangement).

Articles], that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the Governors having eighty-five percent of the total voting power" (Article XXVI, Section 2(b)). 1/

5. Communication and publication of views

Article XII, Section 8 gives the Fund authority "at all times . . . to communicate its views informally to any member on any matter arising under this Agreement." In exercising this authority, the Fund may inform a member that it is failing to fulfill its obligations and recommend policies that in the view of the Fund are more likely to help the member to resume compliance with those obligations.

The same provision authorizes the Fund "by a seventy percent majority of the total voting power" to go beyond the communication of its views and "publish a report made to a member regarding its monetary or economic conditions and developments which directly tend to produce a serious disequilibrium in the international balance of payments of members."

B. Effects of imposition of exchange restrictions on use of Fund resources

Different conditions apply to the use of the Fund's resources depending on whether they are held in the General Resources Account or the Special Disbursement Account. A purchase from the General Resources Account must be consistent with the Articles and the policies adopted under them (Article V, Section 3(b)(i) and (c)). A loan from the Special Disbursement Account must be consistent with the purposes of the Fund (Article V, Section 12(f)(ii)).

The existence of these conditions raises two questions.

The first question is whether, in the case of a member imposing (approved or nonapproved) exchange restrictions:

- a purchase from the General Resources Account would be inconsistent with the Articles or with policies adopted by the Fund;

- a loan from the Special Disbursement Account would be inconsistent with the purposes of the Fund.

1/ For a full analysis of the substantive and procedural requirements of compulsory withdrawal, see "Overdue Financial Obligations to the Fund--Ineligibility to Use the General Resources and Subsequent Actions by the Fund--Legal Aspects" SM/86/102 (5/14/86), pp. 10-18.

The second question is whether, in the General Resources Account or in the Special Disbursement Account, distinctions may or must be made between members imposing nonapproved restrictions and members imposing approved restrictions. If, for instance, it were found that access must be denied to members imposing nonapproved restrictions, the Fund could not authorize a purchase by such members without first approving their exchange restrictions.

These questions will be examined with respect to purchases from the General Resources Account (paragraphs 1-4) and loans from the Special Disbursement Account (paragraph 5).

1. General Resources Account - Principles and practice

a. Principles

In the General Resources Account, members have an entitlement to make purchases, subject to four conditions (Article V, Section 3(b)). 1/ One of the conditions is that "the member's use of the general resources of the Fund would be in accordance with the provisions of this Agreement and the policies adopted under them" (Article V, Section 3(b)(i)). Does this condition preclude a member imposing exchange restrictions from using the Fund's general resources, on the ground that this use would not be in accordance with the

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1/ Article V, Section 3. "Conditions governing use of the Fund's general resources

. . .

(b) A member shall be entitled to purchase the currencies of other members from the Fund in exchange for an equivalent amount of its own currency subject to the following conditions:

(i) the member's use of the general resources of the Fund would be in accordance with the provisions of this Agreement and the policies adopted under them;

(ii) the member represents that it has a need to make the purchase because of its balance of payments or its reserve position or developments in its reserves;

(iii) the proposed purchase would be a reserve tranche purchase, or would not cause the Fund's holdings of the purchasing member's currency to exceed two hundred percent of its quota;

(iv) the Fund has not previously declared under Section 5 of this Article, Article VI, Section 1, or Article XXVI, Section 2(a) that the member desiring to purchase is ineligible to use the general resources of the Fund."

Articles? Does the Fund have the power to adopt policies precluding such members from using the Fund's general resources? Should or could there be a distinction between approved and nonapproved exchange restrictions since only the latter are inconsistent with the Articles? 1/

b. Practice

An examination of the practice of the Fund shows that:

(i) The Fund has authorized purchases by members imposing nonapproved exchange restrictions; 2/

(ii) In the great majority of cases, however, the Fund has approved at the same time both the use of its general resources by members and the imposition of their exchange restrictions; 3/

(iii) In some of its policies on the use of its general resources, the Fund does not make any distinction between approved and nonapproved restrictions. For instance, the current formulation of performance criteria in the standard forms of stand-by and extended arrangements provides that purchases will be interrupted if the member "imposes [or intensifies] restrictions on payments and transfers for current international transactions." 4/ A resumption of purchases requires a waiver from the Fund; in practice, if the restrictions are approved, a waiver is granted. Similarly, the decision establishing the Extended Fund Facility provides: "The Fund will pay particular attention to the policy measures that the member intends to implement in order to mobilize resources and improve the utilization of them and to reduce reliance on external restrictions. . . ." 5/ (underscoring added);

(iv) In other policies, the Fund has established a direct linkage between the use of its resources and specified criteria on approval of exchange restrictions. Thus, with respect to payments arrears, the Fund has decided that its "financial assistance to

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1/ Restrictions maintained under Article XIV, Section 2 are consistent with the Articles; they are not subject to Fund approval (see Article VIII, Section 2(a)).

2/ See Appendix I. In some of these cases, the restrictions were subsequently approved during the period of the arrangement.

3/ See Appendix II.

4/ Paragraph 4(d) of the standard forms of stand-by or extended arrangements, Selected Decisions, Thirteenth Issue, pp. 65 and 70. Under this formulation, purchases are not interrupted by the lapse of approval of existing restrictions.

5/ Decision No. 4377-(74/114), adopted September 13, 1974, paragraph II.1, Selected Decisions, Thirteenth Issue, p. 34.

members having payments arrears should be granted on the basis of performance criteria or policies with respect to the treatment of arrears similar to the criteria or policies . . . for the approval of the payments restrictions" and "should provide for the elimination of the payments arrears within the period of the stand-by arrangement." 1/

It appears, therefore, that the Fund has exercised broad discretion in assessing the effect of the imposition of exchange restrictions on the use of its general resources, and that the consistency or inconsistency of a member's exchange restrictions with the Articles does not determine the consistency or inconsistency of the member's use of the Fund's resources with the Articles or the policies of the Fund.

A possible conclusion could be that the coexistence within the Articles of provisions on the imposition of exchange restrictions and provisions on the use of the Fund's resources is fortuitous. The Fund, in its "jurisdictional" and "financial" activities, would exercise two completely separate and unrelated functions. The only link in the Articles would be that the imposition of nonapproved exchange restrictions could give rise to a declaration of ineligibility, but this would not be different from the breach of any other obligation under the Articles.

It can be demonstrated, however, that there is clear evidence in the Articles of a link between those two functions (paragraph 2) and that the Fund's discretion, albeit broad, is not unlimited (paragraph 3).

2. General Resources Account - Link between use of resources and exchange restrictions in the Articles

The existence of a link between the jurisdictional and financial functions of the Fund can be found in (a) the provisions setting forth the purposes of the Fund (Article I), (b) the provisions on the conditions of use of the Fund's general resources (Article V, Section 3), and (c) provisions on exchange restrictions (Article VI, Section 1 and Article XIV, Sections 2 and 3).

1/ Decision No. 3153-(70/95), adopted October 26, 1970, paragraph 4, ibid., pp. 301-302.

a. Purposes of the Fund

The last sentence of Article I provides: "The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article." This provision applies to the decisions and policies on approval of exchange restrictions as well as to the decisions and policies on the use of the Fund's resources.

One of the purposes of the Fund, as stated in Article I(iv), is

> "[t]o 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."

The term "elimination" extends to all exchange restrictions, whether approved or nonapproved, whether imposed under Article VIII, Section 2(a) or maintained under Article XIV, Section 2.

Even more relevant to the question is Article I(v):

> "To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."

This provision demonstrates that the use of the Fund's general resources is only a means of achieving certain ends, and in particular to avoid the imposition or maintenance of exchange restrictions by members facing balance of payments problems. Again, as in Article I(iv), no distinction is made between different categories of exchange restrictions.

b. Conditions of use of general resources

The relevant provisions are Article V, Section 3(a), (b), and (c). 1/ These provisions require that, when assistance is provided

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1/ Article V, Section 3. "Conditions governing use of the Fund's general resources

(a) The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their

by the Fund, the solution of the member's balance of payments problem be consistent with the Articles (Section 3(a)), that the use of the general resources be in accordance with the Articles (Section 3(b)), and that the proposed purchase be consistent with the Articles (Section 3(c)).

The condition of consistency with the Articles includes, for instance, a requirement of consistency with Article VI, Section 1 which prohibits the use of the Fund's general resources "to meet a large or sustained outflow of capital" (except through reserve tranche purchases; Article VI, Section 2).

Consistency with the Articles also includes consistency with the purposes of the Fund. As early as 1948, the Fund interpreted the phrase "consistent with the provisions of this Agreement" in Article V, Section 3, to mean "consistent both with the provisions of the Fund Agreement other than Article I and with the purposes of the Fund contained in Article I." 1/ The subsequent amendments of Article V, Section 3 do not affect this interpretation.

Therefore, the existence or intended imposition of exchange restrictions is relevant when assessing the consistency with the Articles of a member's use of the Fund's general resources. As indicated above, the Fund does exercise discretion in this assessment and is not precluded from authorizing a purchase by a member whose restrictions remain nonapproved. The legal basis and scope of the Fund's discretion will be examined below. 2/

1/ (Cont'd from p. 15) balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.

(b) [The text of this provision appears on page 12.]

(c) The Fund shall examine a request for a purchase to determine whether the proposed purchase would be consistent with the provisions of this Agreement and the policies adopted under them, provided that requests for reserve tranche purchases shall not be subject to challenge."

1/ Decision No. 287-3, adopted March 17, 1948, Selected Decisions, Thirteenth Issue, p. 24. A specific reference to the purposes of the Fund in connection with the use of the general resources can be found in Article V, Section 5. Whereas Article V, Section 3 governs the conditions for a purchase, Article V, Section 5 applies while the purchase is outstanding, and a finding of use contrary to the purposes of the Fund could lead to a declaration of ineligiblity.

2/ See pp. 18-21.

c. Provisions on exchange restrictions

The most important provision of the Articles on exchange restrictions (Article VIII, Section 2(a)) does not establish any specific link between the consistency of a member's exchange restrictions with the Articles and its access to the Fund's general resources. The most probable explanation is that such a link is established by Article XXVI, Section 2(a), under which the imposition of nonapproved exchange restrictions, as a breach of obligation, could result in a declaration of ineligibility.

Other provisions are quite explicit, however, on the link between the existence of exchange restrictions and the use of the Fund's general resources. Thus, under Article VI, Section 1, "the Fund may request a member to exercise controls to prevent [the] use of the general resources" for a large or sustained outflow of capital; failure by the member to exercise such controls may lead to a declaration of ineligibility. Article XIV, Section 2 confirms that there may be a need, in some cases, for exchange restrictions: before withdrawing restrictions maintained under that provision, members should be "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 general resources of the Fund." 1/ Thus, the temporary maintenance of such restrictions may be necessary in order to avoid an excessive use of the Fund's resources by the member. Another risk is that members availing themselves of Article XIV, Section 2 might retain their restrictions when they are no longer jusfified; the Fund would then have the power to make representations for the removal of those restrictions and, following these representations, "[i]f the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XXVI, Section 2(a)" (Article XIV, Section 3). Both in Articles VI and XIV the declaration of ineligibility is not based on a breach of obligation. It is either a protection of the Fund's resources (Article VI, Section 1) or an incentive for the member to abandon its restrictions (Article XIV, Section 3). The last sentence of Article XIV, Section 3 (quoted above) shows a direct link between the maintenance of restrictions and the use of the Fund's general resources through the purposes of the Fund.

1/ See also Decision No. 1034-(60/27), adopted June 1, 1960, paragraph 2, Selected Decisions, Thirteenth Issue, pp. 298-99.

3. General Resources Account--Discretion of the Fund in its decisions and policies on use of its resources

The decisions and policies of the Fund on the use of its general resources are taken within the framework of the Articles, and in particular Article I which sets forth the purposes of the Fund. Therefore, (a) although these provisions are such that the Fund must exercise discretion in the adoption of its decisions and policies, (b) the Fund's discretion is not unlimited.

a. Need for discretion

The Fund, in giving effect to its purposes, has to exercise judgment and determine priorities. As recognized in the White Plan, 1/ the various purposes in the outline of the Plan, which in one way or another are reflected today in Article I of the Articles of Agreement,

> "are to a considerable extent interdependent and overlapping and in some instances may even represent apparently conflicting tendencies. . . . The fact that some of the objectives may be at times harmonious and at other times conflicting, indicates that the management of an international stabilization fund cannot be reduced to a matter of simple rules. The successful operation of the Fund calls for constant examination of a large variety of pertinent factors and the continual evaluation of various effects which might be expected to follow any particular action or failure to act." 2/

The formulation of the last sentence of Article I ("The Fund shall be guided . . .") reflects the need for flexibility in the implementation of the Fund's purposes. They are ends to be attained, not rules to be applied.

1/ See White Plan, in The International Monetary Fund 1945-1965, Vol. III: Documents (1969), p. 46.

2/ More recently, Sir Joseph Gold, recognizing the same conflicting tendencies, wrote that "[i]t is dangerous to claim that any purpose is inherently paramount to other purposes. . . . The Articles intend that the appropriate weight shall be given to each of the purposes in the different situations in which members may find themselves. In a situation of disequilibrium in the balance of payments, restrictions on payments and transfers associated with trade may be an appropriate measure for the time being." The Fund Agreement in the Courts, Vol. III (1986), p. 367.

More specifically, in the case of exchange restrictions, if the purpose of elimination in Article I(v) had to be given immediate and unqualified effect, both the transitional provision of Article XIV, Section 2 and the Fund's power of approval under Article VIII, Section 2(a) would be incomprehensible. Even more incomprehensible would be, in Article XIV, Section 2, the implication that members should not withdraw restrictions until they are satisfied that the withdrawal will not have such a negative effect on their balance of payments that it would unduly increase the member's use of the Fund's resources.

Therefore, when Article V, Section 3(a), (b), and (c) require that the solution of the member's problems, the use of the Fund's resources and the requested purchase be consistent with the Articles, it does not mean that a member imposing exchange restrictions cannot qualify for assistance. Nor does it mean, although it is less obvious, that a member's request for assistance must be denied if the Fund does not approve the exchange restrictions. Otherwise, the existence of a breach of obligation would be a form of automatic ineligibility, without a prior declaration of ineligibility by the Fund. Both Article XXVI, Section 2(a), and Article V, Section 3(b)(iv) (i.e., condition of eligibility, which is distinct from the condition of consistency of use) would be irrelevant in the case of exchange restrictions. Moreover, while the condition of eligibility may be waived under Article V, Section 4, the condition of consistency of the use of the Fund's resources with the Articles cannot be waived. The only remedy would be to approve the member's restrictions, in order to authorize the purchase.

b. Scope of discretion

The discretion of the Fund in its decisions and policies on the use of its general resources is not unlimited. It must be exercised within the framework of the Articles, including the purposes set forth in Article I.

(i) Although the Articles do recognize the possible need for exchange restrictions, the principle is that they should be eliminated or avoided. Their elimination is one of the purposes of the Fund (Article I(iv)). Their avoidance is an obligation of members (Article VIII, Section 2(a)). 1/ Even in the case of members maintaining exchange restrictions for a transitional period, the Fund

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1/ Members should aim at eliminating the exchange restrictions they may maintain under the transitional arrangements of Article XIV, Section 2. They must eliminate the restrictions they have imposed after joining the Fund, and avoid introducing new exchange restrictions, except with the approval of the Fund.

may find the restrictions inconsistent with its purposes and declare the member ineligible to use its general resources (Article XIV, Section 3).

When the Fund provides assistance to members from its general resources for the correction of maladjustments in their balance of payments, it is also with a view to avoiding or eliminating exchange restrictions (Article I(v)). Therefore, when the Fund, in accordance with Article V, Section 3, examines a member's request for use of the general resources, this examination must extend to the member's exchange restrictions (existing or contemplated), and, when determining the consistency of the member's proposed purchase with the Articles, the Fund must take into account the purpose of avoidance or elimination of exchange restrictions.

(ii) Taking into account that purpose does not necessarily lead to the conclusion that all exchange restrictions should be eliminated or avoided as a condition of use of the Fund's general resources. The temporary imposition of certain restrictions may be needed for the implementation of the member's program. The Articles recognize that there may be a need for the maintenance of exchange restrictions as a means of protecting a member's reserves and preventing an excessive use of the Fund's general resources (Article XIV, Section 2). 1/ The same consideration may lead the Fund to request a member to impose capital controls (Article VI, Section 1). It should also guide the Fund when granting approval under Article VIII, Section 2(a). 2/

Therefore, when approving a member's request for use of its general resources, the Fund should be prepared to approve the exchange restrictions that are necessary for the implementation of the member's program.

Approval in this context would be a recognition of the need for such measures. It would also be a means of ensuring the effectiveness of the Fund's financial assistance and of safeguarding the general resources of the Fund, in accordance with the provisions of Article I(v) and Article V, Section 3(a), which govern the policies on use of the Fund's general resources for balance of payments problems. These policies "will assist members to solve their balance of payments

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1/ On the concept of need in Article XIV, Section 2, see Decision No. 1034-(60/27), adopted June 1, 1960, paragraph 2, Selected Decisions, Thirteenth Issue, p. 298, at p. 299.

2/ The criterion in Decision No. 1034-(60/27) for approval of members' restrictions imposed for balance of payments reasons is "that the measures are necessary and that their use will be temporary while the member is seeking to eliminate the need for them." Selected Decisions, Thirteenth Issue, p. 299.

problems in a manner consistent with the provisions of this Agreement and . . . will establish adequate safeguards for the temporary use of the general resources of the Fund" (Article V, Section 3(a)) (underscoring added).

If the Fund does not approve the exchange restrictions, the member must remove them. However, when the exchange restrictions are necessary for the implementation of the program, their untimely removal would weaken the program, and the objective of the Fund's financial support, which is to assist the member in the resolution of its balance of payments problem, would not be achieved. Failure by the member to achieve the goals of the program may result in delays in making repurchases, thereby affecting the temporary character of the use of the general resources of the Fund.

Even if the nonapproved restrictions are retained, the program *can be weakened by judicial actions against residents of the member* for the enforcement of exchange contracts contrary to those exchange restrictions. As those exchange restrictions would be nonapproved, they would be imposed inconsistently with the Fund's Articles of Agreement, and as such could not be raised as a defense in foreign courts for the nondischarge of obligations under Article VIII, Section 2(b). 1/ The result could be a channeling of the Fund's resources to certain foreign creditors rather than a use in accordance with the program of the member supported by the resources of the Fund.

4. General Resources Account--Effects of exchange restrictions--Conclusions

The legal effects of the imposition or maintenance of exchange restrictions on the use of the Fund's general resources can be summarized as follows:

(i) The Fund may authorize the use of its general resources by a member imposing or maintaining exchange restrictions, even when they are imposed without the approval of the Fund;

(ii) The Fund may adopt policies on the use of its general resources, or decisions on individual requests for purchases, denying access to its general resources to members imposing exchange restrictions that the Fund is not prepared to approve, or maintaining restrictions that are inconsistent with its purposes; 2/

1/ See Part II, A.1, pp. 26 et seq.
2/ See Article XIV, Section 3.

(iii) When examining a member's request for use of its general resources, the Fund must examine the member's exchange restrictions (existing or contemplated), taking into account the purpose, under the Articles, of avoidance or elimination of exchange restrictions.

5. Special Disbursement Account

Under Article V, Section 12(f)(ii), the Fund may use assets held in the Special Disbursement Account "for operations and transactions that are not authorized by other provisions of this Agreement but are consistent with the purposes of the Fund." The reference to the purposes of the Fund gives at least as much discretion to the Fund in these operations or transactions as in the transactions of the General Resources Account. The Fund's discretion is even greater in this case because Article I(v) and Article V, Section 3(a) do not apply to the Special Disbursement Account: the linkage in Article I(v) between use of resources and avoidance of restrictions applies only to the Fund's general resources; similarly, the requirement of safeguard of the Fund's resources applies to the General Resources Account (Article I(v) and Article V, Section 3(a)), and not to the Special Disbursement Account.

The Regulations for the Administration of the Structural Adjustment Facility within the Special Disbursement Account do not require the elimination of restrictions as a condition for assistance under the Facility. Judgment may be exercised by the Fund in the light of its purposes. In practice, policies similar to those on use of the general resources have been applied.

II. Effects of Approval or Nonapproval of a Member's Exchange Restrictions on Their Recognition by Courts of Other Members

This part examines the effects that the approval or nonapproval of a member's exchange restrictions may have on the recognition of these restrictions by the courts of other members. It does not deal with the question of recognition of a member's restrictions by its own courts. 1/

1/ The courts of some countries do not give effect to a provision of domestic law if it is contrary to the country's international obligations. In such cases, the courts would not enforce a domestic exchange restriction that has not been approved by the Fund.

The concept of recognition of foreign law (including exchange restrictions) includes all possible ways in which a court will take into account this foreign law in a case being adjudicated by that court. Such a recognition may be extensive or limited. In some cases, for instance, the court will actually apply the foreign law to solve an issue submitted to it; in other cases, it will take the foreign law into account only for the purpose of determining whether it creates an impediment to the performance of an obligation under a contract, thereby legally excusing the nonperformance ("force majeure"). Between these two extremes, there are other forms of recognition, including, as explained below, the form of recognition contemplated in the first sentence of Article VIII, Section 2(b).

Whether, and, if so, to which extent, a foreign law is to be recognized by a court is determined by a body of rules generally referred to as rules of private international law (or doctrine of conflict of laws). These are rules of domestic law, which vary from country to country. No attempt can be made here to describe such rules in detail. For the purpose of this paper, certain basic propositions may, however, be formulated with respect to rules of private international law applicable to exchange control regulations of foreign countries:

1. Under rules of private international law, contracts are governed by the law that is determined to be the "proper law of the contract" (lex contractus). A law may be determined by a court to be the lex contractus because it was chosen by the parties to the contract as the governing law, or for some other reason (for instance, because it is the law of the country with which the contract has the closest contacts). The lex contractus generally governs most of the issues related to the contract. Some issues are, however, governed by another law. For instance, the issues concerning the modalities of the performance, as distinct from the substance, of the contract are usually decided in accordance with the law of the country where the contract is to be performed (lex loci solutionis).

2. The law of the country of performance may also be relevant on other grounds. For instance, in some legal systems, a court will invalidate or refuse to enforce a contract the performance of which is prohibited under the law of the country where it must be performed (lex loci solutionis). In this case, the lex loci solutionis operates as an exception to the application of the lex contractus.

3. In many countries, the courts refuse to enforce certain so-called "public" or "political" laws of other countries, in particular revenue laws (e.g., tax laws) and criminal laws. This does not mean that forms of recognition other than enforcement are precluded. There are some countries, however, where such laws will not be given any legal effect.

4. As a general rule, a foreign law will not be applied or otherwise given effect in cases where this would produce results incompatible with the public policy ("ordre public") of the forum (i.e., the country of the court). While the concept of public policy of the forum is not uniformly defined in all countries, its scope tends to be limited to fundamental principles of the country. In some legal systems, the recognition of a foreign law may also be refused on the grounds that it is contrary to a treaty or other rule of international law.

5. In a few countries, courts will also apply the Act of State doctrine or similar concepts, whereby the courts do not test the validity of, or otherwise pass judgment on, the acts of a foreign country. 1/

These rules of private international law are applicable to all foreign laws generally, including exchange control regulations.

As regards the recognition of exchange control regulations, the approach of the courts in many countries has changed since the second world war. Initially, courts were reluctant to give effect to foreign exchange control regulations, finding that they did not form part of the lex contractus or the lex loci solutionis, or invoking the public policy of the forum or the "public law" nature of the regulations. More recently, however, courts have tended increasingly to give effect to foreign exchange control regulations as part of the lex contractus 2/ or the lex loci solutionis 3/ and to consider that such regulations are

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1/ The Act of State doctrine is applied in particular in the United States. It has been described as follows in Section 469 of the draft Restatement of the Foreign Relations Law of the United States (6th Tentative Draft, 1985): "Subject to a controlling act of Congress or international agreement, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there."

2/ In England: Kahler v. Midland Bank, Ltd. [1950] AC 24; in France, decision of the Cour de cassation of 6 February 1973 in Benchara v. Sellam, Clunet (1975), p. 66, (compare with the earlier decision of the Cour de cassation of 16 October 1967 in Basso v. Janda, RCDIP (1968), p. 661); in the United States, Perutz v. Bohemian Discount Bank in Liquidation 110 NE 2d 6 (NYCA, 1953) and French v. Banco Nacional de Cuba 23 NY 2d 46 (NYCA, 1968); see also, in the Netherlands, the decision of the Hoge Raad of 17 April 1964 in N.V. Assurantie Maatschappij de Nederlanden van 1845 v. Indonesian Corporation P.T. Escomptobank, 13 Netherlands International Law Review (1966), p. 58.

3/ See, for instance, in France: Benchara v. Sellam, Clunet (1975), p. 66, and, in the United Kingdom, Zivnostenska Banka National Corporation v. Frankman [1950] AC 57.

not inherently contrary to the public policy of the forum. 1/ In some countries, however, the courts continue to be reluctant to give effect to the exchange control regulations of foreign countries. 2/

As explained in more detail below, between members of the Fund, Article VIII, Section 2(b), first sentence, has modified some of these rules of private international law. Thus, within its scope, this provision mandates the recognition of other members' exchange control regulations that are consistent with the Fund's Articles, regardless of whether they are part of the lex contractus or the lex loci solutionis, and it does not permit courts to refuse to recognize these regulations on the ground that they are contrary to the public policy of the forum. Moreover, under the second sentence of Article VIII, Section 2(b), members may agree to cooperate even further in the recognition of exchange control regulations that are consistent with the Fund's Articles.

The effects of the Fund's approval (A) or nonapproval (B) of a member's exchange restrictions on their recognition by the courts of other members will be examined successively.

A. Effects of approval

This section discusses the effects of approval by the Fund of a member's exchange restrictions on their recognition by other members' courts under both the first and the second sentences of Article VIII, Section 2(b) (paragraphs 1 and 2).

It also examines the question of whether members are subject, under the Articles, to a general duty to cooperate with the Fund beyond the requirement of Article VIII, Section 2(b), first sentence, 3/ and discusses the effects that approval of exchange restrictions would have on the recognition of these restrictions if such a duty were found to exist (paragraph 3).

Finally, it briefly describes the main effects that approval of the Fund may have under domestic rules of private international law outside the scope of Article VIII, Section 2(b) (paragraph 4).

1/ See, in the United States, Perutz v. Bohemian Discount Bank in Liquidation 110 NE 2d 6 (NYCA, 1953) and, in the United Kingdom, Kahler v. Midland Bank, Ltd., cited above, at p. 27, per Lord Simonds.

2/ See, for instance, in Germany, the decision of the Bundesgerichtshof of 17 December 1959, NJW (1960), p. 1101 and of 4 April 1970, NJW (1970), p. 1507; in Austria, decision of the Oberster Gerichtshof of 30 April 1953, Clunet 1957, p. 1014; and in Switzerland, the decision of the Tribunal Federal of 28 February 1950, Annuaire suisse de droit international (1951), p. 234.

3/ This question was raised by some Executive Directors.

1. Article VIII, Section 2(b), first sentence 1/

The first sentence of Article VIII, Section 2(b) imposes an obligation of cooperation on members with respect to the exchange control regulations of other members, provided that these regulations are consistent with the Articles. The 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."

1/ For the convenience of the reader, the citations of the books and articles referred to in this section are provided hereunder: Carreau, Souveraineté et coopération monétaire internationale (1970); Delaume, Legal Aspects of International Lending and Economic Development Financing (1967); Edwards, International Monetary Collaboration (1985); Gianviti, "Réflexions sur l'article VIII, section 2b) des Statuts du Fonds monétaire international," in Revue critique de droit international privé (hereinafter RCDIP) (1973), pp. 471-487 and 629-661; "Le contrôle des changes étranger devant le juge national," in RCDIP (1980), pp. 479-502 and 659-703; "Le blocage des avoirs officiels iraniens par les Etats-Unis (executive order du 14 novembre 1979)" in RCDIP (1980), pp. 279-303; Gold, The Fund Agreement in the Courts, Vol. I (1962), Vol. II (1982) and Vol. III (1986); Hjerner, Främmande Valutalag och Internationell Privaträtt (1956-57); Krispis, "Money in Private International Law" in 120 Recueil des cours de l'Académie de droit international (1967), pp. 195-311; Meyer, "Recognition of Exchange Controls after the International Monetary Fund Agreement," in 62 Yale Law Journal (1953), pp. 867-910; Mann, The Legal Aspect of Money (4th ed., 1982); Nussbaum, Money in the Law, National and International (2nd ed., 1950); Nussbaum, "Exchange Control and the International Monetary Fund," in 59 Yale Law Journal (1949-50), pp. 421-30; Philip, "Den Internationale Valutafond og Dansk Ret," in Nordisk Tidsskrift for International Ret, Vol. 23 (1953), pp. 12-21; Schneider, "Problems of Recognition of the Carter Freeze Order by the German Courts," in 9 International Business Lawyer (1981), pp. 103-108; Schwab, "The Unenforceability of International Contracts Violating Foreign Exchange Regulations: Article VIII, Section 2(b) of the International Monetary Fund Agreement" in 25 Virginia Journal of International Law (1985), pp. 967-1005; Seidl-Hohenveldern, "Probleme der Anerkennung ausländischer Devisenbewirtschaftsungmassnahmen," in 8 Österreichische Zeitschrift für Öffentliches Recht (1957-58), pp. 82-105; Treves, Il controllo dei cambi nel diritto internazionale privato (1967); Williams, "Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement" in 15 Virginia Journal of International Law (1975), pp. 319-96.

The applicability of that provision is predicated on the consistency with the Articles of the exchange control regulations that have been infringed. For those regulations that consist of restrictions on payments and transfers for current international transactions, consistency requires the approval of the Fund under Article VIII, Section 2(a); 1/ in the absence of such an approval, Article VIII, Section 2(b), first sentence would not apply.

This provision is not a model of clarity and it raises a number of questions of interpretation. Some of these questions have been addressed by the Fund in its authoritative interpretation of 1949. 2/ Many others, particularly those relating to the meaning of terms used in the provision, have not been interpreted by the Fund, so that the task of resolving these questions has been left to the courts of the members. As a result, a number of sometimes very different interpretations have been proposed by legal scholars and applied by the courts, so that the application of Article VIII, Section 2(b), and the recognition of exchange control regulations that follows from it, is not uniform among members. A greater measure of uniformity among members would be achieved if the Fund adopted an authoritative interpretation of aspects of Article VIII, Section 2(b) that have, so far, been left to the courts of members.

Accordingly, the following subdivisions examine:

- the authoritative interpretation of Article VIII, Section 2(b), first sentence, adopted by the Fund in 1949;

- the main elements of Article VIII, Section 2(b), first sentence; and

- the possibility of a further interpretative decision of the Fund concerning Article VIII, Section 2(b), first sentence.

a. The authoritative interpretation by the Fund of Article VIII, Section 2(b), first sentence

The Fund has, under Article XXIX(a), 3/ the authority to decide on questions of interpretation of the provisions of the Articles arising between any member and the Fund or between any members. Pursuant to that authority, the Fund adopted, in 1949, a decision

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1/ Unless they are maintained under the transitional arrangements of Article XIV, Section 2 or imposed in accordance with Article VII, Section 3(b); see paragraph 1 of the Introduction.

2/ Decision No. 446-4, adopted June 10, 1949, Selected Decisions, Thirteenth Issue, p. 290.

3/ Article XVIII(a) prior to the Second Amendment.

interpreting the first sentence of Article VIII, Section 2(b). 1/ The decision reads as follows:

"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 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 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

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1/ Decision No. 446-4, adopted June 10, 1949, Selected Decisions, Thirteenth Issue, p. 290. Questions pertaining to the meaning of certain terms of Article VIII, Section 2(b) were subsequently addressed by the General Counsel in a letter to the Central Bank of the Netherlands of March 5, 1951 attached as Appendix B of "A Commentary on Article VIII, Section 2(b)," Legal Department paper No. 36 (3/23/51). These views did not purport, however, to be or reflect an authoritative interpretation of the Articles by the Fund.

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."

The salient points of this decision, which is binding on Fund members, can be summarized as follows:

(1) Unenforceability of a contract means that the authorities of members may not lend their assistance to the performance of the contract. For instance, a member's court must not order the specific performance of the contract, nor grant damages for nonperformance. The decision does not suggest that the authorities of members are under an obligation to prevent the voluntary performance of the contract by the parties; rather it indicates that these authorities have a passive obligation not to assist a party in obtaining the performance of the contract.

(2) While there could have been room for doubt under the text of Article VIII, Section 2(b), the decision appears to clarify the point that the provision applies to exchange contracts that are contrary to foreign, and not domestic, exchange control regulations. 1/ It follows that if a member's exchange control regulations provide, for

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1/ Indeed, while Article VIII, Section 2(b) itself refers to the unenforceability in the territories of "any" member, the interpretative decision specifies that, under the provision, it is the assistance of the judicial and administrative authorities of "other members" that must be declined. See, on this, Gold, op. cit., Vol. I, p. 66; Gianviti, op. cit., RCDIP (1973), p. 479. In fact, the French translation of Article VIII, Section 2(b) published as an annex to France's Bretton Woods legislation specifically referred to unenforceability "in the other members' territories." (Annex A to Law No. 45-0138 of 26 December 1945, Journal Officiel, 27 December 1945, p. 8590.)

instance, only for criminal sanctions, 1/ the courts of that member are not bound to apply the sanction of unenforceability in addition to these criminal sanctions. This conclusion is based on the purpose of the provision which is to impose an obligation of international cooperation on members.

(3) Article VIII, Section 2(b) applies to all members, including members availing themselves of the transitional arrangements of Article XIV. The interpretative decision disposed, therefore, of a possible argument to the contrary that would have been based on a literal reading of Article XIV, Section 1. 2/

(4) The courts of members may not decline to recognize the exchange control regulations of other members on the grounds that these regulations are not part of the law which governs the contract or its performance or that such a recognition would be contrary to the public policy ("ordre public") of the forum (i.e., of the country of the court). Before the Articles of Agreement became effective, courts in some countries declined to recognize the exchange control regulations of other countries, for instance, because such a recognition was perceived as offensive to fundamental principles of the forum, and as such contrary to its public policy. In other countries, courts would give effect to such regulations only if they were part of the law determined by the courts to be applicable to the contract under their rules of private international law (e.g., they formed part of the "lex contractus" or the "lex loci solutionis"). 3/ The authoritative interpretation by the Fund determined that, within the framework of Article VIII, Section 2(b), the exchange control regulations of a member would have to be recognized by the courts of other members notwithstanding these rules of domestic law.

1/ See, for instance, in Japan, the decision of the Supreme Court in Tomita v. Inoue, cited in Gianviti, op. cit., RCDIP (1973), p. 479.

2/ Under Article XIV, Section 1, "[e]ach member shall notify 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." It could, therefore, have been argued that members are not subject to Article VIII, Section 2(b) as long as they continue to avail themselves of the transitional arrangements of Article XIV. This would have been an inadequate interpretation of Article XIV, however, as that provision was meant to exempt Article XIV members from the financial burdens of the obligations of convertibility of Article VIII, Sections 2(a), 3 and 4, but not of the provision of Article VIII, Section 2(b); see, on this, Gianviti, op. cit., RCDIP (1973), p. 477 and "Unenforceability of Exchange Contracts under Article VIII, Section 2(b)" Staff Memorandum No. 291 (11/9/48), p. 7.

3/ See Staff Memorandum No. 291 (11/9/48), pp. 4-5.

b. Examination of the main concepts of Article VIII, Section 2(b), first sentence

The first sentence of Article VIII, Section 2(b) has given rise both to an abundant legal literature and to a number of judicial decisions in different countries. It would not be feasible to discuss all the issues that may arise in connection with this provision in a paper which cannot be, and does not purport to be, exhaustive.

The application of Article VIII, Section 2(b), first sentence requires that several conditions be met. These conditions, which define the scope of the provision, consist of three elements: an act (an exchange contract that involves the currency of a Fund member), a rule (an exchange control regulation maintained or imposed consistently with the Articles), and a relationship between the act and the rule (the contract must be contrary to the regulations and must involve the currency of the member to whose regulations it is contrary). The latter part of the provision specifies a sanction (the contract shall be unenforceable in the territories of any member).

(1) The act

Article VIII, Section 2(b) applies to "exchange contracts which involve the currency of any member."

(a) Exchange contracts

More than any other element of the provision, the concept of exchange contract has been the focus of attention of courts and scholars. 1/ A number of different interpretations have emerged, ranging from the very broad to the very narrow. The three main interpretations are: 2/ (i) a broad one under which exchange contracts are any contracts that affect a country's exchange resources; (ii) a narrow one that confines exchange contracts to contracts for the exchange of the currency of a country against the currency of another; and (iii) an intermediate

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1/ The various interpretations of the terms of Article VIII, Section 2(b), and in particular of the terms "exchange contracts," have traditionally been developed by legal scholars rather than the courts, as the courts in each country have tended to adopt one or the other of the interpretations already proposed. Also, in many cases, courts have been content to simply state whether they regarded a given contract as an exchange contract or not, leaving it to commentators to analyze the implicit legal reasoning or policies supporting the decision; see Schwab, op. cit., pp. 975-76.

2/ Other interpretations have been proposed. For instance, it has been suggested that "exchange contract" means any contract for the exchange of goods, services or money; see Meyer, op. cit., p. 887 and Carreau, op. cit., pp. 459-60.

interpretation that includes all contracts providing for payments or transfers of "exchange."

(i) The broad interpretation defines exchange contracts as contracts which in any way affect a country's exchange resources. 1/ Exchange contracts so defined include all sorts of contracts, such as loans, bank deposits, sales of goods or services, and even barter.

This broad interpretation has been adopted by the French and German courts. 2/ Thus, the Court of Appeal of Paris applied Article VIII, Section 2(b) in Soc. Daiei Motion Picture v. Zavicha to a contract for the distribution of movies between a French resident and a Japanese motion picture company, 3/ and, in Anna de Boer, widow Moojen, wife of Cats v. Ducro, epoux von Reichert & SARL Guttenberg, to a contract of sale of company shares. 4/ In the latter case, the Court held, in reply to the contention by the defendants that the sale of the shares was not an exchange contract in the sense of Article VIII, Section 2(b), that:

> ". . . whereas the primary object of the Bretton Woods Agreements was 'to promote international monetary cooperation'; whereas it is accordingly necessary, in order to ensure as efficient a cooperation as possible, to determine if the contract in question may have a detrimental effect on the financial situation of the member state or, in other words, if it is liable to affect in any way the currency resources of that country." (Translation) 5/

The same broad interpretation of the terms "exchange contracts" has been applied by German courts. Thus, the Federal Supreme Court (Bundesgerichtshof) has held that a commission contract with respect to the refining of maize, 6/ obligations deriving from bills

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1/ See Mann, op. cit., p. 385; see also Williams, op. cit., p. 344. This was the view adopted by the General Counsel in his letter to the Central Bank of the Netherlands of March 5, 1951 already referred to, at p. 3.

2/ See also the decision of the District Court ("Tribunal d'Arrondissement") of Luxembourg in Societe Filature et Tissage X Jourdain v. Epoux Heynen-Bintner of 1 February 1956, which held that a contract of sale of goods was an exchange contract within the meaning of Article VIII, Section 2(b), Pasicrisie Luxembourgeoise (1957), pp. 36-39; on this case, see Gold, op. cit., Vol. I, pp. 94-96.

3/ Paris 14 May 1970, RCDIP (1974), p. 486.

4/ Paris 20 June 1961, Clunet (1962) p. 718.

5/ Ibid., at p. 725.

6/ Decision of 9 April 1962, WM 1962, p. 601, discussed in Gold, op. cit., Vol. II, pp. 18-21 and in Edwards, op. cit., p. 486.

of exchange 1/ and other contracts affecting a country's exchange resources 2/ are within the meaning of exchange contract. This interpretation has been followed by courts of appeal as well. 3/ Thus, the Court of Appeal of Berlin has stated that:

> "The notion of an exchange contract is not confined to currency exchange transactions in the narrow sense. Only a wide interpretation takes account of the economic purpose of the treaty. Currency interests are always affected where the currency reserves of a country are involved." (Translation) 4/

(ii) The narrow interpretation, which was first proposed by Professor Nussbaum, 5/ equates the terms "exchange contracts" with contracts for the exchange of the currency of a country against the currency of another country. Therefore, contracts such as those

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1/ Decision of 27 April 1970, AWD 1970, 272.

2/ See the decisions of 21 December 1976, WM 1977, p. 332 and of 8 March 1979, WM 1979, p. 486; see also the cases referred to in Mann, op. cit., p. 386 and Schneider, op. cit., p. 103.

3/ E.g., Court of Appeal of Munich, decision of 17 October 1986, RIW 1986, p. 998 and Court of Appeal of Berlin, decision of 8 July 1974, IPRspr 1974, No. 138; contra, Court of Appeal of Hamburg, decision of 7 July 1959, discussed in Williams, op. cit., p. 335.

4/ Decision of 8 July 1974, IPRspr 1974, No. 138, as translated by Mann, op. cit., p. 387.

5/ Op. cit., Yale Law Journal (1949-50), pp. 421 et seq. and op. cit., Money in the Law, pp. 542-43; see also Hjerner, op. cit., pp. 43-46 and p. 698. The reasoning underlying Professor Nussbaum's interpretation has been severely criticized. It has been said that the article in which he articulated his understanding of some of the provisions of the Articles, including Article VIII, Section 2(b), was "flawed by a number of errors that detract from any claim to superiority on the subject of the Articles," Gold, op. cit., Vol. III, p. 347. With respect to the discussion of Article VIII, Section 2(b) more specifically, Professor Nussbaum's citation of the legislative history of the provision as supportive of his interpretation has been challenged. Thus, Professor Nussbaum, noting that the terms "exchange transactions" had been used in an early draft of the provision instead of the phrase "exchange contracts," argued that the purpose of the change must have been to limit the scope of the provision rather than expand it. While the record of the Bretton Woods Conference is not fully explicit on this point, it appears that the purpose of the changes in the draft provision, including the use of the terms "exchange contracts" instead of "exchange transactions," was to remove the provision from the context of par values, in order to broaden, not narrow, its scope; see Gianviti, op. cit., RCDIP (1973), pp. 474-75 and 644, and Meyer, op. cit., p. 882. In addition, Professor Nussbaum's statement has been labeled as "obscure" (Gold, op. cit., Vol. III, p. 348), because, while arguing that the terms exchange contracts had a narrower meaning

involving goods or securities are not exchange contracts in the sense of Article VIII, Section 2(b), except where they are "monetary transactions in disguise." 1/

This interpretation was endorsed by the English Court of Appeal in 1976 in Wilson, Smithett & Cope Ltd. v. Terruzzi. 2/ The House of Lords confirmed it in 1982 in United City Merchants (Investments) Ltd. v. Royal Bank of Canada:

> "My Lords, I accept as correct the narrow interpretation that was placed upon the expression 'exchange contracts' in this provision of the Bretton Woods Agreement by the Court of Appeal in Wilson, Smithett & Cope Ltd. v. Terruzzi [1976] Q.B. 683. It is confined to contracts to exchange the currency of one country for the currency of another; it does not include contracts entered into in connection with sales of goods which require the conversion by the buyer of one currency into another in order to enable him to pay the purchase price." 3/

In the light of these decisions, the issue now appears to be settled in the United Kingdom. For instance, in the recent case of Libyan Arab

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5/ (Cont'd from p. 33) than the terms "exchange transactions," in effect he went on to interpret these two phrases as synonymous: "As was seen, 2(b) was originally drafted in terms of 'exchange transactions'. Obviously 'exchange contract' was supposed to have a narrower significance. This gives at least some hint at interpretation. Exchange transactions are generally understood to mean transactions which have as their immediate object 'exchange', that is, international media of payment. The meaning of 'exchange contracts' cannot be broader. However, national enactments on exchange control often invalidate unlicensed contracts not directly concerned with international media of payments, such as unlicensed contracts for sale of foreign securities, or contracts for import or export particularly where the price is determined in foreign currency. Totalitarian governments--and one has to remember that Poland and Czecoslovakia are members of the Fund--will go to great lengths to extend their control. It cannot be the meaning of the Agreement that the other member countries have to carry out such policies. The criteria of 'exchange contract' must be gathered from the Agreement itself. The latter is exclusively concerned with the handling of international media of payment as such. Therefore, contracts involving securities or merchandise cannot be considered as exchange contracts except where they are monetary transactions in disguise." Nussbaum, op. cit., Yale Law Journal (1949-50), pp. 426-27.

1/ Ibid., at p. 427.

2/ [1976] 1 All ER 817. The broad interpretation proposed by Dr. Mann had been endorsed by Lord Denning in the prior case of Sharif v. Azad [1967] 1 QB 605, in which he had stated, regarding the terms "exchange contracts": "I think they mean any contracts which in any way affect the country's exchange resources." Ibid., at pp. 613-14.

3/ [1982] 2 All ER 720, at p. 729, per Lord Diplock.

Foreign Bank v. Bankers Trust Co., 1/ which involved a bank deposit, the issue of the applicability of Article VIII, Section 2(b) was not raised.

The English courts have qualified, however, the restrictiveness of their interpretation. Thus, they have held that contracts that are not by nature exchange contracts, such as sales of merchandise, should be assimilated to exchange contracts if they are "monetary transactions in disguise," thereby endorsing Professor Nussbaum's qualification. 2/ Also, they have found, at least when considering whether there is an exchange transaction in disguise, that a series of different contractual relationships could properly be regarded as forming, as a whole, an exchange contract subject to unenforceability under Article VIII, Section 2(b), even where none of them separately constituted an exchange contract. 3/

The courts of the United States also have generally expressed a preference for a narrow interpretation of the concept of exchange contract. For instance, in Banco do Brasil, S.A. v. AC Israel Commodity Co. Inc., 4/ the New York of Court of Appeals, while not settling the issue, showed an inclination to consider the broad interpretation as too sweeping.

Later, in Zeevi v. Grindlays Bank (Uganda) Ltd., 5/ the same Court actually applied the narrow interpretation when it held that a letter of credit was not an exchange contract, as did the Federal District Court for the Southern District of New York in Libra Bank Ltd. v. Banco Nacional de Costa Rica, 6/ by finding that an international loan is not an exchange contract. Unlike the English courts, the U.S. courts have so far not been inclined to aggregate several contractual relationships for the purpose of Article VIII, Section 2(b). 7/

1/ Queen's Bench Division (Commercial Court), 2 October 1987, as yet unreported.

2/ Terruzzi, dec. cit., [1976] 1 All ER 817 at p. 823; United City Merchants, dec. cit., [1982] 2 All ER 720, in which Lord Diplock said: "As was said by Lord Denning M.R. in his judgment in the Terruzzi case at p. 714, the court in considering the application of the provision should look at the substance of the contracts and not at the form. It should not enforce a contract that is a mere 'monetary transaction in disguise.'" Ibid., at p. 729.

3/ See, in particular, the Court of Appeal's decision in United City Merchants, [1981] 3 All ER 142. See also Gold, op. cit., Vol. III, p. 58 and Schwab, op. cit., pp. 986-88. This rule of combination of contracts has been criticized by Dr. Mann, notwithstanding that it relaxes the restrictiveness of the interpretation of exchange contract, op. cit., pp. 389-91.

4/ 239 NYS 2d 872 (1963).

5/ 371 NYS 2d 892 (1975).

6/ 570 F. Sup. 870 (1983).

7/ See, for instance, Southwestern Shipping Corp. v. National City of New York, 190 NYS 2d 352 (NY, 1959); Schwab, op. cit., p. 989.

There is also a decision by a lower court in Belgium supporting the narrow interpretation. 1/

As these courts have often failed to disclose the rationale for their interpretation, it is unclear whether their application of Professor Nussbaum's interpretation necessarily implies their endorsement of his argumentation. One reason that has been mentioned in some court decisions is that the broad interpretation gives the terms "exchange contract" a meaning too remote from their ordinary meaning. For instance, in the Libra case, the U.S. District Court interpreted the terms "exchange" and "exchange contracts" as follows:

> ". . . As the provision is presently written, however, a broad interpretation of 'exchange contracts', sufficiently expansive to include international loans, does violence to the text of the section. See 33 C.J.S. § 1(b) (1942) ('The word exchange is generally regarded as synonymous with barter, swap, or trade and it is distinguishable from compromise, lease, or loan.') (emphasis added). See also Black's Law Dictionary 505 (5th ed. 1979) (defining exchange to mean '[t]o barter; swap. To part with, give or transfer for an equivalent.'); Ballentine's Law Dictionary 428 (3rd ed. 1969) (defining exchange as '[a]n exchange of the money of one country for the money of another at a rate which depends upon the respective values of the two currencies in the money markets of the world.')" 2/

Another reason may have been the courts' mistrust for a provision perceived to be too protective of the interests of states and too disruptive of the contractual expectations of the individuals, 3/

1/ Emek v. Bossers and Mouthaan, Commercial Court of Kortrijk, 9 May 1953, Rechtskundig Weekblad (1953/54), Col. 1693 and 22 International Law Reports (1955), p. 722. A decision of a lower court in the Netherlands is also often cited as endorsing the narrow interpretation (Frantzmann v. Ponijen, District Court of Maastricht, 25 June 1959, Nederlandse Jurisprudentie (1960), p. 290). It appears, however, that this decision did not purport to sanction this interpretation and that the confusion has been caused by an incorrect transcript of a crucial word of the decision in the law reports in which the decision was published.

2/ 570 F. Sup. 870, at p. 899.

3/ See, for instance, Terruzzi, in which Lord Denning stated that: "So far from there being any mischief, it seems to me that it is in the interest of international trade that there should be no restriction on contracts for the sale and purchase of merchandise and commodities; and that they should be enforceable in the territories of the members." [1976] 1 All ER 817, at p. 822. See also Zeevi, in which, the Court of Appeals of New York alluded, although not directly with respect to

particularly in the cases where the exchange control regulations that would have been protected by the application of Article VIII, Section 2(b) exhibited some objectionable features, such as discriminatory rules. 1/ It should be noted, in this respect, that in view of the Fund's policy not to approve discriminatory exchange restrictions, 2/ the protection of Article VIII, Section 2(b) would extend to discriminatory regulations only in cases where approval is not required by the Articles (capital controls under Article VI, Section 3, and exchange restrictions maintained under Article XIV, Section 2).

In some cases, a perception by courts that the broad interpretation is not consistent with accepted rules of interpretation appears to have contributed to their rejection of that interpretation. Thus, it is an accepted principle of interpretation that terms are supposed to be interpreted in a way that does not render them meaningless. As discussed below, those who follow the broad interpretation of exchange contract tend to understand the terms "involve the currency" in Article VIII, Section 2(b) as meaning "affect the exchange resources" of the country. Accordingly, under that interpretation, the term "exchange" in "exchange contracts" adds nothing to the provision, which is not in keeping with the principle referred to above. 3/

An additional problem raised by the broad interpretation is that it gives the term "exchange" in "exchange contract" the same meaning as the term "currency" in "involve the currency," namely the meaning of exchange resources. Arguably, if the drafters had intended the concepts of "exchange" and "currency" to be synonymous in Article VIII, Section 2(b) they would not have used two different terms.

Also, some courts may have endorsed the narrow interpretation because they understood the purpose of Article VIII, Section 2(b)

3/ (Cont'd from p. 36) Article VIII, Section 2(b), to the need not to frustrate the legitimate expectations of the parties in order to protect the position of the financial markets of New York; see Gianviti, op. cit., RCDIP (1980), p. 671.

1/ See Gold, op. cit., Vol. II, p. 272.

2/ See p. 4 above.

3/ *Lord Denning, who had previously endorsed the broad interpretation* of Dr. Mann in Sharif v. Azad, rejected it in Terruzzi after referring to Dr. Mann's admission that, under his interpretation, the word "exchange" is redundant in Article VIII, Section 2(b); [1976] 1 All ER 817, at p. 821.

to be confined to remedying one type of problem that had been prevalent before the Articles, namely speculation in foreign currency. 1/

The narrow interpretation, however, has itself been criticized by some courts and scholars. It has thus been claimed that, by restricting the scope of Article VIII, Section 2 (b) essentially to exchange transactions, 2/ this interpretation fails to give effect to the economic purpose of the provision, which is to afford protection to members' exchange resources. 3/ In this connection, it may be noted

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1/ In Wilson, Smithett & Cope Ltd., v. Terruzzi [1976] 1 All ER 817, at p. 822, Lord Denning stated that:

> "I have no doubt that [the lawyers who took part in drafting the Bretton Woods Agreement] had in mind an evil which was very much in evidence in the years after the first World War. It is strikingly illustrated by the notorious case of Ironmonger & Co. v. Dyne in which a lady ... speculated in foreign currency . . . The case is important for present purposes because it shows the great mischief which can be done by such speculations . . .
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> The mischief being thus exposed, it seems to me that the participants at Bretton Woods inserted art VIII, s 2(b), in the agreement so as to stop it. They determined to make exchange contracts of that kind--for the exchange of currencies--unenforceable in the territories of any member. I do not know of any similar mischief in regard to other contracts, that is contracts for the sale or purchase of merchandise or commodities. Businessmen have to encounter fluctuations in the price of goods, but this is altogether different from the fluctuations in exchange rates. So far from there being any mischief, it seems to me that it is in the interest of international trade that there should be no restriction on contracts for the sale and purchase of merchandise and commodities; and that they should be enforceable in the territories of the members."

2/ Dr. Mann has noted that "exchange contracts in Nussbaum's sense hardly ever occur in ordinary life, but on the whole are the privilege of bankers who, as authorized dealers, are in many countries independent of individual exchange control licences," Mann, op. cit., p. 385. See also Gianviti, op. cit., RCDIP (1973), p. 631 and RCDIP (1980), p. 673, and Meyer, op. cit., p. 886.

3/ See, for instance, the decision of the Court of Appeal of Berlin of 1 July 1974, already referred to above, that stated that "only a wide interpretation takes account of the economic purpose of the treaty" (translation); IPRspr 1974, No. 138. See also Gianviti, op. cit., RCDIP (1980), pp. 673-74; Mann, op. cit., p. 386.

that, under general principles of interpretation of treaties, while provisions in treaties must be interpreted in accordance with the ordinary meaning of their terms, this ordinary meaning is to be determined in their context and in the light of the object and purpose of the treaty. 1/

The narrow interpretation has also been found less than satisfactory because it gives the terms "exchange contracts" in Article VIII, Section 2(b) the same meaning as the terms "exchange transactions" as they appeared, inter alia, in the par value provisions of Article IV prior to the Second Amendment. 2/ Under usual methods of interpretation, the use of a different terminology for two terms is normally taken to evidence an intention to give these terms different meanings.

Moreover, the context in which a term is used is relevant for its interpretation. In Article IV of the original Articles, "exchange transactions" were "between the currencies of members" (Section 3) or "between [a member's] currency and the currencies of other members" (Section 4(b)). Both formulations unambiguously showed that, in Article IV, an exchange transaction could only be an exchange of currencies, that is, a contract involving two currencies. In Article VIII, Section 2(b), the wording is different, as reference is made only to one currency: "Exchange contracts which involve the currency of any member." One could infer from this comparison that an exchange contract is not necessarily an exchange of currencies.

1/ The Vienna Convention on the Law of Treaties provides that "[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 the light of its object and purpose." (Art. 31(1)).

2/ See Gianviti, op. cit., RCDIP (1973), p. 631 and Mann, op. cit., p. 385. The terms "exchange transactions" have had different meanings in different provisions of the Articles. In some provisions, including Article IV prior to the Second Amendment and Schedule C of the present Articles, the terms "exchange transactions" clearly refer to exchanges of currencies. Thus, prior to the Second Amendment, Article IV, Section 3 stipulated that "[t]he maximum and the minimum rates for exchange transactions between the currencies of members taking place within their territories shall not differ from parity . . ." and Article IV, Section 4(b) specifically referred to "exchange transactions between [a member's] currency and the currencies of other members. . . ." Paragraphs 5 and 8 of Schedule C of the present Articles similarly contain provisions that relate to exchange transactions in the sense of exchanges of currencies. In other provisions of the Articles, in contrast, the terms "exchange transaction" mean, not an exchange of currencies, but a payment or transfer for a transaction. For instance, Article VIII, Section 6 and Article XI, Section 2 both refer to "restrictions on exchange transactions" in the sense of restrictions on international payments or transfers.

Another objection to the narrow interpretation of exchange contracts is based on the legislative history of the Articles of Agreement: during the Bretton Woods negotiations, as a result of a compromise between different proposals for international cooperation against breaches of members' exchange regulations, the draft provision which was to become Article VIII, Section 2(b) was transferred from a provision on par values (draft Article IX, Section 3), in which it had been incorporated in an early proposal, to a provision on exchange restrictions (Article VIII, Section 2). 1/ Thus, the 1951 paper of the Legal Department providing a commentary of Article VIII, Section 2(b) for the information of the Executive Board stated, with respect to Professor Nussbaum's definition:

> "The conclusion that 'exchange contracts' was intended to have a narrower meaning than 'exchange transactions' is quite unsupported. A better argument could be made for the opposite view. 'Exchange transactions' was the phrase used when the provision was so drafted as to apply to violations of the parity rule. 'Exchange contracts' was adopted when the proposal was changed so as to refer to violations of exchange control regulations. Exchange control regulations deal with much more than the rates for transactions." 2/

(iii) In view of the perceived shortcomings of both the narrow and the broad interpretations, an intermediate interpretation has been proposed that purports to give broader effect to the economic purposes of the provision than the former, without denying meaning to the word "exchange" as the latter does. Under this interpretation, the term "exchange" in the expression "exchange contracts" has the same meaning as in "exchange control regulations." It should not be understood as characterizing the nature of the contract as an exchange of currencies, but rather as identifying the type of asset which is the subject matter of at least one of the obligations under the contract. Therefore, an exchange contract is a contract providing for a payment or transfer of "exchange." As for the precise meaning of the term "exchange," it may be inferred from the scope of exchange control regulations. In those regulations, the term "exchange" is used not only in the sense of foreign exchange, but also in the sense of any monetary assets used for international payments or transfers. 3/

1/ See Gold, op. cit., Vol. III, p. 768. The legislative history of Article VIII, Section 2(b) is summarized in Appendix III.

2/ Legal Department paper No. 36, (3/23/51), at p. 10. See also the letter of the General Counsel to the Central Bank of the Netherlands of March 5, 1951, p. 3.

3/ See, for instance, Article VIII, Section 4(b)(iii), where "exchange regulations" of a member affect the conversion of official balances of its own currency. On the dual meaning of "exchange" as referring to both domestic currency and foreign currencies, see Gold, op. cit., Vol. III, p. 483.

Accordingly, an exchange contract within the meaning of Article VIII, Section 2(b) is a contract providing either for a payment or transfer of foreign exchange, or for an international payment or transfer of (foreign or domestic) monetary assets. 1/

According to Sir Joseph Gold, "[i]n the expression 'exchange contracts,' the meaning that has been attributed here to 'exchange' is means of payment," 2/ and exchange contracts are defined as "contracts under which international payments or transfers are to be made, whatever else must be rendered or done under the terms of the contracts." 3/

Therefore, contracts that do not involve any payment or transfer of money, such as contracts of barter, are not exchange contracts, whereas they would qualify as such under the broad interpretation described above. In contrast, contracts of loans, 4/ exports, sales of merchandise, and contracts for services, which are not considered as exchange contracts under the narrow interpretation, would be exchange contracts under this interpretation.

(b) Involve the currency

In practice, the interpretation given to the terms "involve the currency" has been largely dictated by the meaning attributed to "exchange contract." Thus, when "exchange contract" has been interpreted to mean "contract for the exchange of currencies," it has been held that the currencies involved were the currencies that were exchanged; 5/ in contrast, when either the broad or the intermediate interpretations of exchange contract described above has been followed, "involving the currency" of a member has been understood to mean "affecting its exchange resources." 6/

1/ Gianviti, op. cit., RCDIP (1973), p. 634 and RCDIP (1980), pp. 672-73; Treves, op. cit., pp. 295-96, who draws argument, in particular, from the dual meaning of "exchange" in the expression "bill of exchange:" either permutatio pecuniae or distantia loci; Philip, op. cit., p. 15.

2/ Gold, op. cit., Vol. III, p. 356.

3/ Gold, op. cit., Vol. III, p. 788.

4/ Delaume, op. cit., p. 294: "it seems clear that transactions involving bonds, debentures, notes or similar forms of securities, and international loans in general which call for the payment of currency, fall within the scope of Article VIII, Section 2(b)."

5/ Nussbaum, op. cit., Yale Law Journal (1949-50), p. 427; see also Banco do Brasil, dec. cit., 239 NYS 2d 872, at p. 874.

6/ For instance, in the Daiei case referred to above, the Court of Appeal of Paris held that Article VIII, Section 2(b) does not "make any distinction between the exchange contracts to which it applies; . . . it thus is sufficient that they be contracts involving the currency of

The arguments presented with respect to each of these interpretations have mirrored those developed with respect to the meaning of "exchange contract." For instance, the interpretation under which "involves the currency" means "affects the exchange resources" has been rejected by some courts as inconsistent with the ordinary meaning of the terms:

> "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.'" 1/

In contrast, the other interpretation ("currencies exchanged") has been regarded as unsatisfactory, because it fails to pay due regard to the economic purpose of Article VIII, Section 2(b). 2/ In addition, it has been pointed out that this interpretation is apt to produce results that even its advocates have regarded as anomalous. 3/ For

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6/ (Cont'd from p. 41) a member state, that is, contracts the execution of which affects the exchange resources of that state, according to the definition most often given and already accepted in the case law" (translation), RCDIP (1974), at p. 489. See, also, Gold, op. cit, Vol. III, p. 789; Gianviti, op cit., RCDIP (1980), p. 675; Williams, op. cit., p. 345. This interpretation was also approved by the General Counsel in his letter to the Central Bank of the Netherlands of March 5, 1951 (at p. 3). Professor Edwards stands as an exception in this regard as he recommends a broad interpretation of exchange contract but a restrictive one of "involve the currency." Thus, he proposes that a currency be regarded as involved if it is provided for in the contract (expressly or implicitly) as the currency of payment or if the payment or transfer of that currency is in fact necessary to the performance of the contract; Edwards, op. cit., p. 488.

1/ Banco do Brasil, dec. cit., 239 NYS 2d 872, at p. 874 (1963).

2/ See Gold, op. cit., Vol. III, p. 699: "This version is not a defensible reading of an economic provision in the central treaty of the international monetary system. A member's balance of payments is affected whatever is the currency in which the contractual obligation of, or owed to, a resident is to be discharged by payment to, or receipt from, a nonresident." See also Mann, op. cit., p. 391 and Legal Department paper No. 36 (3/23/51), p. 11.

3/ Thus, Professor Nussbaum acknowledged some problems with respect to the provision as interpreted by him, as he wrote: "The situation is complicated by the fact that Article VIII, Section 2(b)(i) contemplates only exchange regulations of that member whose currency is involved. Here, again, an inaccuracy seems to have occurred. To give an instance, French control regulations would come under the rule only if French francs are involved. But the draftsmen of the Agreement should have envisaged rather French transactions in non-French, say English

instance, if a resident of Member A made a payment to a resident of Member B in Member C's currency, neither the currency of Member A nor the currency of Member B would be "involved," but Member C's currency would. Therefore, the exchange control regulations of both the payor's and the payee's countries could be circumvented under Article VIII, Section 2(b) by using the currency of a third country which has no exchange controls, or, at least, has no exchange controls that apply to contracts between residents of other countries. The result of that interpretation of "involve the currency" would be to restrict in practice the benefit of Article VIII, Section 2(b) to the members whose currencies are most used, which are those least likely to impose regulations. 1/

The interpretation whereby a member's currency is involved when its exchange resources are affected raises various questions of interpretation, such as how to determine when a member's exchange resources are affected. Several criteria could be used for that purpose. For instance, a member's exchange resources could be said to be affected in the cases where the performance of the exchange contract would be made with resources located in the member's territory, 2/ because the

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3/ (Cont'd from p. 42) currency. Of course, if English pounds are bought in France, the provision would be devoid of any actual effect . . ." op. cit., Yale Law Journal (1949-50), pp. 428-29. The 1951 paper of the Legal Department stated in this respect: "Nussbaum regards it as absurd, therefore, that the provision should have been confined to contracts for the transfer of domestic currency. However, this reasoning might also lead to the conclusion that the suggested interpretation of the currency 'involved' is incorrect." Legal Department paper No. 36 (3/23/51), p. 11. See, also on this point, Gianviti, op. cit., RCDIP (1973), p. 646.

1/ See Gold: "Furthermore, because the greater proportion of international payments is made in a few internationally acceptable currencies, such as the U.S. dollar, the exchange control regulations that the courts would have to heed according to the mistaken version of the currency "involved" would be the regulations of members most unlikely to be imposing regulations. The exchange control regulations to be heeded would not be those imposed by the poorer members most likely to be protecting their balances of payments by controlling payments and transfers in U.S. dollars and other commonly used currencies in short supply in their troubled economies." Gold, op. cit., Vol. III, p. 699.

2/ This test appears to have been endorsed by the German Supreme Court in its decisions of 21 December 1976 and 30 January 1986, in which it held that the regulations of a foreign state could be taken into account only if the payment had to be made with resources located in the territory of that state, WM 1977, p. 332, and WM 1986, p. 600; see, on the first case, Gold, op. cit., Vol. II, pp. 272-77 and Gianviti, op. cit., RCDIP (1980), p. 675.

economy of a country depends on the quantity and nature of the resources in its territory, including those that enter and leave it. 1/ Under another criterion, a member's exchange resources would be affected when its balance of payments would be modified by the performance of the contract. 2/ This means that the currency of the member would be involved if the payor is a resident of that member and the payee is a nonresident, or vice-versa. 3/ A third criterion would be the residence of either the payor or the payee in the member's territory, even if the contract does not provide for an international payment or transfer. The Moojen case, decided by the Court of Appeal of Paris, provides an example of judicial application of the residence test. 4/ A yet broader test would include both the test of situation of the resources and the test of residence of the parties, as alternative criteria. 5/ This test would capture some exchange contracts that have an effect on the economy, such as certain transactions between residents or between nonresidents, that would not be included under the balance of payments test. 6/

It would follow from this interpretation of involvement of the currency ("affect the exchange resources"), that Article VIII, Section 2(b) would require a court to declare a contract unenforceable only in cases where a close contact exists between the contract and the member imposing the regulations. Indeed, for the provision to apply, either the contract would have to be performed with resources

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1/ See Gianviti, ibid.

2/ Gold, op. cit., Vol. III, p. 789.

3/ The balance of payments test is slightly broader as there are "rare instances, which are determined by established principles of balance of payments accounting, [when] a currency can be involved under contracts that provide for payments and transfers between two residents or between two nonresidents." Ibid.

4/ Dec. cit., Clunet (1962), p. 724.

5/ Williams, op. cit., pp. 349-51; Gianviti, op. cit., RCDIP (1980), pp. 676-78.

6/ "The contact criteria used by exchange control regulations are thus broader than those for the balance of payments. A sale of foreign currencies by a resident to another resident is governed by the exchange control system, but it is not captured by the balance of payments, because it is assumed that the recipient will ultimately sell the foreign currency to obtain local currency. The balance of payments expresses a statistical, approximative, truth. It is true that, generally, only transactions between residents and nonresidents give rise to transfers of goods, services and funds between the territories of states. The law, however, cannot be content with statistical truths. When a resident fraudulently exports foreign currency, it does not matter whether he does it on his own account, on account of another resident or to make a payment to a nonresident: the effect on the economy is the same." (Translation) Ibid., p. 677.

located in this member's territory or one of the parties to the contract would have to be a resident of that member. 1/

In contrast, under the other interpretation that understands "currency involved" to refer to the currency used as medium of payment under the contract, the only necessary link under Article VIII, Section 2(b) between the member imposing the regulations and the contract would be that payment under the contract be in that member's currency. Accordingly, the courts of a member might be required to give effect to another member's exchange control regulations that purport to apply to all transactions in its currency wherever concluded and by whomsoever concluded. 2/

(2) The rule

Article VIII, Section 2(b) applies to exchange control regulations that are maintained or imposed consistently with the Articles. The concepts of exchange control regulations and of consistency with the Articles are discussed in turn.

(a) Exchange control regulations

There appears to be a significant measure of agreement on most issues related to this concept among scholars and, to the limited extent to which they have arisen in the context of judicial proceedings, among courts as well.

Thus, it is accepted that not all regulations that somehow affect payments qualify as exchange control regulations. 3/ For instance, trade restrictions, such as import prohibitions, are clearly not exchange control regulations even though they indirectly affect the

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1/ See, for instance, Gold, op. cit., Vol. II, p. 71: "the currency of a member is undoubtedly involved where the member regulates the transactions of its residents or transactions dealing with assets within its territory"; see also ibid., p. 76.

2/ This potential outcome appears to have led some authors to suggest that the courts could decline, within the context of Article VIII, Section 2(b), to give effect to certain regulations on the grounds that the member that issued them did not have jurisdiction under international law to edict them: Gold, op. cit., Vol. III, p. 792; see also Mann, op. cit., p. 396.

3/ The terms "exchange control regulations" include not only formal regulations, but also administrative practices; see Krispis, op. cit., p. 292.

incidence of payments by precluding the conclusion of transactions that could give rise to such payments. 1/

A distinction must also be made between exchange control regulations and other monetary laws, such as laws governing the status of a currency as legal tender or as a unit of account in contractual obligations. 2/

Thus, in Loefller-Behrens v. Beerman, 3/ the Court of Appeal of Karlsruhe decided that a Brazilian decree that, inter alia, declared void any agreement on payment in gold or foreign currency or aiming at the nonrecognition of the enforced rate of exchange for the Brazilian paper currency was not an exchange control regulation in the sense of Article VIII, Section 2(b). 4/

It has also been observed that the concept of exchange control regulations does not encompass confiscatory measures, 5/ even when the assets that are confiscated are foreign exchange assets. 6/ It follows that such regulations are not protected under Article VIII, Section 2(b).

1/ Accordingly, trade restrictions are not exchange control regulations even if they are introduced for purposes related to the exchange resources (e.g., limitation on imports for the purpose of husbanding the monetary reserves of the country); see Gold, op. cit., Vol. III, p. 480 and Gianviti, op. cit., RCDIP (1973), p. 639.

2/ See Gold, op. cit., Vol. II, pp. 78-79, Vol. III, pp. 765, 767-68 and 792; Gianviti, op. cit., RCDIP (1973), pp. 639-41; Williams, op. cit. p. 354.

3/ 1964-65 IPRspr No. 194; see Gold, op. cit., Vol. II, pp. 116-20.

4/ In so taking this decision, the court made reference to an opinion of the General Counsel of the Fund that it had before it. The court had requested the Fund to advise it as to whether the Brazilian decree was an exchange control regulation maintained or imposed consistently with the Articles. The Executive Board had approved a reply by the General Counsel that stated in part: "The Articles do not contain a definition of 'exchange control regulations.' However, in my opinion, 'exchange control regulations' do not include laws that have been designed solely to ensure the acceptance of paper currency as legal tender in the country of issue and not to protect the country's exchange resources. The Brazilian decree appears to be of that character." "Inquiry under Article VIII, Section 2(b)" EBD/65/146 (9/13/65), Attachment C, p. 1.

5/ Gold, op. cit., Vol. III, p. 490 and Gianviti, op. cit., RCDIP (1973), p. 642.

6/ Gianviti, ibid.

There seems to be broad agreement that the concept of exchange control regulation in Article VIII, Section 2(b) wholly encompasses the concept of exchange restriction in Article VIII, Section 2(a), but that it is also broader than that concept. 1/ In particular, it covers regulations on capital transactions, 2/ as well as regulations on current transactions that are not exchange restrictions, such as surrender requirements.

Views differ, however, on other significant issues relating to the concept of exchange control regulation. One such issue is whether regulations that are prompted by considerations other than the preservation of financial resources, such as so-called "trading with the enemy" regulations and, in certain circumstances, freezes of assets, are exchange control regulations in the sense of Article VIII, Section 2(b). Those who define the concept of exchange control regulations in terms not only of their object but also of their motivation have argued that such measures are outside of the concept because they are motivated by security reasons rather than by the need to safeguard the country's financial resources. 3/ Others, who, in contrast, consider that the object alone, and not the purpose, of the regulations is the relevant criterion, conclude that security regulations are within the scope of Article VIII, Section 2(b) and, therefore, must be recognized under that provision. 4/ Since all exchange restrictions are, as explained above, generally regarded as falling within the definition of exchange control regulations, it may be concluded that the Fund has implicitly rejected the interpretation that excludes security restrictions from the scope of Article VIII, Section 2(b), by

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1/ Gold, op. cit., Vol. II, p. 410; Gianviti, op. cit., RCDIP (1980), p. 666; Edwards, op. cit., p. 480 (who refers to several communications of Fund officials to that effect).

2/ Gold, op. cit., Vol. III, p. 791; Gianviti, op. cit., RCDIP (1973), pp. 475 and 643-45; Williams, op. cit., pp. 367-68; Edwards, op. cit., p. 480; Nussbaum, op. cit., Yale Law Journal (1949-50), p. 426. The case law appears to hold uniformly the same view; see, for instance, Moojen v. Von Reichert in France, dec. cit., Clunet (1962), p. 718, and Frantzmann v. Ponijen in the Netherlands, dec. cit., 30 ILR (1959), p. 423.

3/ Mann, op. cit., p. 393; Williams, op. cit., p. 353; Krispis, op. cit., p. 293; Delaume, op. cit., p. 294.

4/ Gold, op. cit., Vol. III, pp. 485 and 791; Gianviti, op. cit., RCDIP (1980), pp. 291 and 666-67; see, also, on this question Edwards, op. cit., pp. 480-81.

asserting its jurisdiction over such restrictions under Article VIII, Section 2(a). 1/

While of great potential significance, the issue of whether a government default on its external debt, when arising from a statute or other legal provision, may be characterized as an exchange control regulation has not given rise to extensive discussion, 2/ and has apparently not been raised in the context of any court proceedings involving Article VIII, Section 2(b). 3/ If such statutes or other provisions were characterized as exchange control regulations, exchange contracts contrary to them would be unenforceable, and the resulting governmental defaults would no longer be actionable by creditors in foreign courts.

While the Fund has not addressed the issue of whether such provisions giving rise to defaults constitute exchange control regulations under Article VIII, Section 2(b), it has concluded that they do not constitute exchange restrictions under Article VIII, Section 2(a). 4/ The rationale for this conclusion is that, while a government is able to restrict payments to be made by other parties under its jurisdiction, it cannot be understood to "impose an exchange restriction" on itself without violence to both the language of Article VIII, Section 2(a) and the guiding principle enunciated by the Fund under that provision: 5/

> "The distinction between governmental defaults and restrictions avoids a strained understanding of the 'guiding principle' for determining what are restrictions under Article VIII, Section 2: 'a direct governmental limitation on the availability or use of exchange as such.' To obliterate the distinction in some circumstances and hold that a government could restrict the discharge of its own obligations to make payments would mean that the government could impose a direct governmental limitation on itself. The result would not be consistent with the natural meaning of the guiding principle." 6/

1/ Decision No. 144-(52/51), adopted August 14, 1952, Selected Decisions, Thirteenth Issue, p. 292. The first sentence of the decision states specifically: "Article VIII, Section 2(a), in conformity with its language, applies to all restrictions on current payments and transfers, irrespective of their motivation and the circumstances in which they are imposed."

2/ See, however, Gold, op. cit., Vol. III, p. 506.

3/ Ibid., p. 507.

4/ See "Review of Fund Policies and Procedures on Payments Arrears" EBS/80/190 (8/27/80), p. 14. See also Gold, op. cit., Vol. III, pp. 497 et seq.

5/ Gold, op. cit., Vol. III, p. 502.

6/ Ibid., p. 500.

It may be concluded, by analogy, that a government could not be understood to "regulate" itself any more than it can "restrict" itself, so that regulations resulting in governmental defaults cannot be regarded as exchange control regulations. If, however, such regulations were considered to be exchange control regulations, they would not be subject to the Fund's approval jurisdiction under Article VIII, Section 2(a) because they are not exchange restrictions. Therefore, they would automatically meet the condition of consistency with the Articles for purposes of Article VIII, Section 2(b). 1/

(b) Maintained or imposed consistently with the Articles

Under Article VIII, Section 2(b) only those exchange control regulations that are maintained or imposed consistently with the Articles are protected. 2/

An exchange control regulation is maintained or imposed consistently with the Articles if it is either authorized by the Articles or approved by the Fund. 3/ The Articles expressly authorize members to regulate international capital movements (Article VI, Section 3). They also authorize members that continue to avail themselves of the transitional arrangements of Article XIV to maintain and adapt restrictions on payments and transfers for current international transactions that

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1/ It is on account of this result that Sir Joseph Gold concludes that regulations giving rise to governmental defaults are not exchange control regulations:

"The question formulated in this way brings to light the question whether regulations prescribing the nonperformance of governmental obligations are nevertheless exchange control regulations within the meaning of Article VIII, Section 2(b) even though the regulations do not impose restrictions. An affirmative answer would produce the anomaly that the regulations, as exchange control regulations, would be consistent with the Articles. The anomaly would be that governmental defaults were consistent with the Articles. The effect would be that regulations excluded from the concept of restrictions, because the Fund cannot be assumed to have the power to approve governmental failures, would be considered to be authorized by the Articles as exchange control regulations and entitled to the protection of Article VIII, Section 2(b). This sequence is sufficient to demonstrate that the regulations are not exchange control regulations." Ibid., pp. 506-507.

2/ "Maintained" refers to the regulations already in force at the time the country became a Fund member; "imposed" refers to regulations introduced subsequently; see Gianviti, op. cit., RCDIP (1973), p. 635; Gold, op. cit., Vol. III, p. 708.

3/ Gold, op. cit., Vol. III, p. 793.

were in effect when they became Fund members (Article XIV, Section 2). 1/ Since, under Article VIII, Section 2(a), the Fund's approval is required for a member to impose restrictions on the making of payments and transfers for current international transactions, the Articles also implicitly authorize exchange control regulations that do not fit this definition. For instance, members are authorized to impose regulations that, while regulating such payments and transfers, do not restrict them (e.g., surrender requirements) or that restrict, not the making, but rather the receipt, of such payments. 2/ In contrast, the regulations that fall within the scope of Article VIII, Section 2(a) are consistent with the Articles only if, and while, approved by the Fund.

The prevailing view is that exchange control regulations that are authorized by the Articles, or, when approval is required, are approved by the Fund, are by definition consistent with the Articles. 3/

Article VIII, Section 2(b) determines the consequences of the consistency of an exchange control regulation with the Articles. It does not confer on the Fund either a separate power to approve exchange control regulations, or a power to decide whether or not the consequences prescribed in the provision (unenforceability of exchange contracts) will apply. Therefore, if an exchange restriction is approved under Article VIII, Section 2(a), it is not necessary for the Fund to specify, in the decision on approval, that Article VIII, Section 2(b) will apply. Nor would it be possible to decide that it will not apply.

1/ See also Article VII, Section 3(b), which authorizes a member whose currency has been declared scarce by the Fund, "after consultation with the Fund, temporarily to impose limitations on the freedom of exchange operations in the scarce currency," and Article XI, Section 2, which recognizes "the right of any member to impose restrictions on exchange transactions with nonmembers or with persons in their territories unless the Fund finds that such restrictions prejudice the interests of members and are contrary to the purposes of the Fund."

2/ Gold, op. cit., Vol. III, p. 399.

3/ See Legal Department Paper No. 36 (3/25/51), p. 13; see also Gold, op. cit., Vol. III, p. 793: "The Fund cannot declare regulations to be inconsistent with the Articles if they are authorized by the Articles or while they remain approved by the Fund." One scholar has, however, argued that the Fund should not treat exchange control regulations authorized by the Articles, such as capital controls, as automatically consistent with the Articles and should rather make an assessment of the country's regulations, "taking into account both the specific provisions of the IMF Agreement and the purposes stated in Article I and Article IV, Section 1." Edwards, op. cit., p. 483.

The condition of consistency with the Articles applies to the particular exchange control regulation that is not observed by the exchange contract which is sought to be enforced. It is, therefore, not relevant, for the purpose of the application of Article VIII, Section 2(b) to an exchange contract, whether there are other unrelated exchange control regulations that are not consistent with the Articles. 1/ Accordingly, the practice of the Fund has been to advise courts and litigants on the consistency of specified regulations, and not on the consistency of the whole body of exchange control regulations of members.

Another question that has arisen is whether the exchange control regulations must, in order to be protected under Article VIII, Section 2(b), be consistent with the Articles at the time the contract contrary to them is concluded or at the time it is to be enforced. While some scholars have suggested otherwise, 2/ the prevalent view is that the regulations must be consistent with the Articles--which means, for measures subject to Article VIII, Section 2(a) that they must be approved--at the time the court decides on the enforceability of the exchange contract, regardless of their consistency or inconsistency at the time the contract was concluded. 3/ This conclusion is reflected in the practice of the Fund which is to advise courts and litigants on the current state of consistency with the Articles, and not on the situation at the time the contract was concluded.

A further question is whether certifications from the Fund on the consistency of exchange control regulations with the Articles are binding on the courts to which they are presented. Some scholars have claimed that these certifications are not more than a guide for the courts, which are "entitled and bound to investigate independently." 4/ Others have taken the opposite view that courts should not consider themselves "competent, in either the legal or the ordinary sense of the word, to make a finding of consistency or inconsistency with the Articles in opposition to the Fund's ruling." 5/ Yet other authors draw a distinction between two elements of the certification: the judgment by the Fund on the particular issue of the consistency with

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1/ Gold, op. cit., Vol. III, pp. 772 and 795; Gianviti, op. cit., RCDIP (1980), p. 665; Williams, op. cit., p. 357. Dr. Mann, although his view on this point is not entirely clear, also agrees that "it is not each single provision that has to be consistent with the Agreement." Mann, op. cit., p. 395.

2/ See, for instance, Mann who has stated that Article VIII, Section 2(b) is concerned with the "initial validity" of contracts and that, therefore, a contract that is fully effective at the time of its conclusion cannot become unenforceable subsequently; ibid., p. 377.

3/ Gianviti, op. cit., RCDIP (1973), p. 653; Gold, op. cit., Vol. II, p. 142.

4/ Mann, op. cit., p. 395.

5/ Gold, op. cit., Vol. III, p. 793.

the Articles itself would not be subject to question by the courts; in contrast, the understanding by the Fund of the substance of the regulations that underlies this judgment of the consistency would not be binding on the courts. 1/ While in practice courts do not generally specify whether they regard themselves bound by the Fund's certifications of consistency presented to them, there does not appear to be any case in which a court has challenged such a certification.

(3) The relationship between the act and the rule

Under Article VIII, Section 2(b), a member's exchange control regulations must be related in two respects to an exchange contract for the contract to be unenforceable. First, the contract must be contrary to the regulations. Secondly, the contract must "involve the currency" of the particular member to whose exchange control regulations it is contrary. While this latter condition is rather straightforward, once the concept of "involvement of currency" has been defined, 2/ the condition of contrariness deserves some elaboration.

It is sufficient for the condition of contrariness to be met that the exchange contract breach a mandatory rule prescribed by the exchange control regulation of the member whose currency is involved;

1/ Gianviti, op. cit., RCDIP (1973), p. 486: "The opinions and certifications of the Fund pertaining to the consistency of an exchange control regulation with the Articles are not interpretations taken pursuant to Article [XXIX]. They are, therefore, not binding on that basis. Besides, the view they express is based on the knowledge that the Fund has of its members' legislations, which may give rise to delicate issues of interpretation of the local law or require an examination of the administrative practice of states, because the written 'regulation' is not always that which is applied. Nevertheless it is only the effective application that matters. In all these matters, the Fund cannot claim to be infallible. It does not seem possible therefore to regard these opinions and certifications as binding on the courts insofar as the substance of the regulation involved is at stake. In contrast, when its substance is undisputed and the only question to be resolved is that of its consistency with the Articles, a certification approved by the Executive Board of the Fund does not appear subject to question." (Translation). See also Edwards, who argues that "[t]he court should treat itself as bound by the Fund's determination, unless there is good reason to believe that the Fund was not fully informed of the member's currency practices or that there were irregularities in the process by which the Fund made its determination." Edwards, op. cit., p. 482.

2/ This condition derives clearly from the text of Article VIII, Section 2(b), which refers to "exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member. . . ." (Underlining added.)

it is not relevant, in this regard, which sanction, civil or criminal, applies under the law of the member to a breach of these regulations. 1/

An issue that has prompted considerable debate is whether the condition of contrariness should be judged at the time of the conclusion of the contract or at the time its performance is sought. 2/ Some scholars have argued that Article VIII, Section 2(b) deals with the "initial validity" of contracts, so that unenforceability should be judged at the time of the conclusion of the contract. 3/ In their view, to conclude otherwise would put an unacceptable strain on equity and on the need for reliability in international trade. 4/ A better and more widely supported interpretation, however, is that the conditions for the unenforceability of an exchange contract, including that of contrariness, must be asserted as of the time its performance is sought (rather than its conclusion). 5/ In support of this view, it has been claimed that "it is not contracts, but the performance of obligations

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1/ Gold, op. cit., Vol. III, p. 764; Gianviti, op. cit., RCDIP (1973), p. 650; contra, Nussbaum, who claims that unenforceability is required under Article VIII, Section 2(b) only if the regulations render the exchange contracts contrary to them void, op. cit., Yale Law Journal (1949-50), p. 429.

2/ The issue of whether the consistency of the exchange control regulations must be judged at the time of conclusion or at the time of performance of the contract was discussed above.

3/ Mann, op. cit., pp. 377-79; Seidl-Hohenveldern, op. cit., pp. 98-100. This rule is, however, not necessarily applied in a symmetrical manner. For instance, Dr. Mann considers that, while an enforceable exchange contract cannot be vitiated, and thereby become unenforceable, on account of the subsequent adoption of exchange control regulations, an exchange contract unenforceable at the time of its conclusion is cured by a modification of the regulations removing the impediment prior to the performance. In Dr. Mann's analysis, the lifting of exchange controls is tantamount to the granting of a license authorizing the exchange contract retroactively as of the date of its conclusion; op. cit., p. 379.

4/ See Mann, ibid., p. 379.

5/ Gianviti, op. cit., RCDIP (1973), pp. 651-52; Gold, op. cit., Vol. III, pp. 798-99; Edwards, op. cit., pp. 478-79; Krispis, op. cit., pp. 296-97; Delaume, op. cit., p. 296; Meyer, op. cit., p. 894; and other references cited in Gold, op. cit., Vol. III, p. 778 footnote 122. See also Legal Department paper No. 36 (3/23/51), p. 14, which stated that "[t]he rationale of the provision would demand that the exchange control regulations at the date of the contemplated enforcement of a contract should be decisive. . . . The provision would apply to contracts entered into before the adoption of regulations . . . There is no lack of legal argument to support this. In private international law, if a contract is subject to a particular system of law, this is taken to be the law from time to time and not simply the law as of the date of making the contract (See Dicey's Conflict of Laws (1950), p. 638)."

under them that affects the balance of payments or exchange resources," so that "unenforceability produces the obviously sensible result that when a member no longer seeks protection for its balance of payments, other members are no longer required to give protection." 1/ Accordingly, Article VIII, Section 2(b) is taken, under this interpretation, to apply to exchange contracts in existence at the time of the introduction of the exchange control regulations, unless, of course, because of transitional provisions, these regulations do not apply to such contracts. 2/

A similar issue arises when one of the parties to the exchange contract changes his place of residence between the time of the conclusion of the contract and the time of its enforcement. If, for instance, the payor becomes a resident of a country that has exchange controls regulating the payment by its residents under such contracts, would these exchange control regulations be protected against the enforcement of this contract under Article VIII, Section 2(b)? If the questions of contrariness of the contract with the regulations and involvement of the member's currency were judged at the time of the conclusion of the contract, the regulations would not be given effect under Article VIII, Section 2(b), since at that time the payor was not a resident of that country. If, as submitted above, contrariness and involvement of the member's currency are assessed at the time the performance of the contract is sought, the regulations would be apt to be protected under Article VIII, Section 2(b) against the enforcement of that contract. 3/

(4) The sanction

The sanction enunciated in Article VIII, Section 2(b) is that exchange contracts "shall be unenforceable in the territories of any member." The meanings of the terms "shall be" and "unenforceable" are discussed separately below. 4/

(a) Unenforceable

An important characteristic of Article VIII, Section 2(b) is that it does not compel members to apply the sanctions prescribed in the exchange control regulations that have not been observed; rather it specifies itself the sanction for the contrariness,

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1/ Gold, op. cit., Vol. II, p. 141.

2/ Gianviti, op. cit., RCDIP (1973), pp. 651-52; Gold, op. cit., Vol. III, p. 799.

3/ Gianviti, op. cit., RCDIP (1973), p. 654.

4/ As regards the terms "in the territories of any member," it was explained in connection with the 1949 authoritative interpretation by the Fund that Article VIII, Section 2(b) applies to foreign, and not domestic, exchange control regulations; see above p. 29.

namely, unenforceability. 1/ In other words, Article VIII, Section 2(b) imposes an obligation of recognition of other members' exchange control regulations that falls short of a duty to apply these regulations.

Unenforceability does not mean voidness or voidability: it does not affect the existence of the obligations derived from the exchange contract, only their execution. 2/ Neither does Article VIII, Section 2(b) prohibit the voluntary performance of these obligations; 3/ it merely precludes their enforcement by other members, that is, as the Fund's interpretation of 1949 has clarified, their implementation by their judicial or administrative authorities. 4/

It is generally considered that unenforceability affects the whole exchange contract and not just the elements in it that are contrary to the exchange control regulations. 5/ It has been suggested in an English decision, however, that Article VIII, Section 2(b) does not preclude the enforceability of the part of the exchange contract that is not contrary to the exchange control regulation. 6/

1/ Members, while not obliged to apply the sanctions provided for in the exchange control regulations, are not prohibited from doing so by Article VIII, Section 2(b), provided, of course, that the application of these sanctions does not detract from the unenforceability of the contract.

2/ Gianviti, op. cit., RCDIP (1973), p. 655; Gold, op. cit., Vol. III, p. 797; Williams, op. cit., pp. 362-64; Edwards, op. cit., p. 478; Delaume, op. cit., pp. 296-97; Meyer, op. cit., p. 894. Dr. Mann has, however, argued that, while unenforceability does not mean illegality, it should be understood as meaning "ineffectiveness, invalidity or voidness." Op. cit., pp. 398-99. The Court of Appeal of Paris also declined to distinguish unenforceability from voidness in Moojen; dec. cit., Clunet (1962), at p. 726.

3/ Gianviti, op. cit., RCDIP (1973), p. 481; Edwards, op. cit., p. 479. See p. 29 above.

4/ Decision No. 446-4, adopted June 10, 1949, Selected Decisions, Thirteenth Issue, p. 290.

5/ Gianviti, op. cit., RCDIP (1973), p. 656; Mann, op. cit., p. 397. It would follow that, if the part of the contract that is contrary to the regulations has already been performed by the parties, the other obligations under the contract, though not themselves contrary to them, will be unenforceable nevertheless; Gold, op. cit., Vol. III, p. 797; Mann, op. cit., pp. 397-98.

6/ The Court of Appeal held in United City Merchants that "the courts of a country which was a party to the Bretton Woods Agreement ought to do their best to promote both international comity and international trade, and that duty could in the circumstances best be carried out by enforcing that part of the contract which did not offend against the law of Peru and refusing to enforce that part of it which was a

Pursuant to the Fund's interpretation of Article VIII, Section 2(b), the court must not enforce the contract either in kind or by granting damages for the nonperformance of the contract. 1/ Accordingly, the granting of damages for reasons other than the nonperformance of the contract has not been taken to be prohibited by Article VIII, Section 2(b). 2/

(b) Shall be

Two issues arise in connection with the use of the term "shall" in Article VIII, Section 2(b).

The first issue is whether the applicability of Article VIII, Section 2(b) in judicial proceedings should be left to the initiative of the litigants. It is generally considered that if the litigants fail to invoke Article VIII, Section 2(b), the court may, and indeed should, apply the provision on its own initiative. 3/ In the United Kingdom, it was stated in a decision of the House of Lords that:

> "If in the course of the hearing of an action the court becomes aware that the contract on which a party is suing is one that this country has accepted an international obligation to treat as unenforceable, the court must take the point itself, even though the defendant has not pleaded it, and must refuse to lend its aid to enforce the contract." 4/

6/ (Cont'd from p. 55) disguised monetary transaction." [1981] 3 All ER 142, at p. 143. This statement was made obiter dictum, which means that it was not necessary for the decision to be reached.

1/ Decision No. 446-4, adopted June 10, 1949, Selected Decisions, Thirteenth Issue, p. 290.

2/ Gianviti, op. cit., RCDIP (1973), pp. 656-57; Gold, op. cit., Vol. II, pp. 189 et seq and Vol. III, pp. 217 et seq. See, for instance, Daiei, dec. cit., RCDIP (1974), p. 436 in which the Court of Appeal of Paris, while holding the contract unenforceable under Article VIII, Section 2(b) because the necessary license had not been obtained, granted damages on grounds of tort ("responsabilite quasi-delictuelle"), because the defendant had failed inter alia to take possible steps to have the license issued.

3/ Gold, op. cit., Vol. III, p. 60; Gianviti, op. cit., RCDIP (1973), p. 656; Mann, op. cit., p. 397; Delaume, op. cit., p. 295.

4/ United City Merchants (Investments) Ltd. v. Royal Bank of Canada [1982] 2 All ER 720, at p. 729, per Lord Diplock; see also Batra v. Ebrahim, The Times (London), May 3, 1977, p. 11; and, in Germany, the decision of 27 April 1970 of the Federal Supreme Court, AWD 1970, p. 272.

The second issue is whether the term "shall" indicates that Article VIII, Section 2(b) imposes a mandatory rule from which members may not derogate by other treaties. Two subsidiary questions then arise. First, assuming an actual conflict of treaties between Article VIII, Section 2(b) and another treaty, how would this conflict be resolved? Secondly in what circumstances would there be such a conflict of treaties?

(i) An actual conflict of treaties would be resolved by the courts in accordance with applicable rules on conflict of treaties. Under the Vienna Convention on the Law of Treaties of 1969, when a treaty specifies that it is subject to an earlier or later treaty, the provisions of this other treaty prevail; in the absence of such a clause, the conflict is resolved in favor of the later treaty. 1/

There appear to be few court cases in which the question of a conflict with Article VIII, Section 2(b) has arisen. One such case is the decision of the District Court of The Hague in N.V. Assurantie Maatschappij de Nederlanden van 1845 v. Indonesian Corporation P. T. Escomptobank, 2/ in which the court resolved an apparent conflict between Article VIII, Section 2(b) and a later treaty between the Netherlands and Indonesia in favor of the latter:

> "Escomptobank further invoked the Agreement concluded at Bretton Woods in July 1944. . . . This Agreement establishes an obligation on the part of the contracting States to recognize each other's foreign exchange control legislation. This provision was superseded by the Financial and Economic Agreement entered into by the Netherlands and Indonesia at the Round Table Conference. This Agreement regulated foreign exchange control matters but it has been unilaterally broken by Indonesia. Consequently, a Netherlands court has no obligation to take into account agreements previously made with Indonesia concerning foreign exchange control." 3/

Another judicial decision that has been mentioned in this context is a decision by the Court of Appeal of Reims which refused to give effect to the exchange control regulations of Algeria on the grounds that they were contrary to the bilateral treaty of Evian between France and Algeria. 4/ Since the court did not refer to Article VIII,

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1/ Article 30.

2/ 13 Netherlands International Law Review (hereinafter NILR) (1966), p. 58; see, on this case, Gold, op. cit., Vol. II, pp. 120-23 and Gianviti, op. cit., RCDIP (1980), p. 680.

3/ As reported in the decision of the Hoge Raad (Supreme Court) of 14 April 1964 in the same case, 13 NILR (1966), p. 61.

4/ Reims, 25 October 1976, Clunet (1979), pp. 99-106; see Gianviti, op. cit., RCDIP (1980), p. 680.

Section 2(b), it is not clear, however, whether this decision involved an issue of conflict of treaties. It is possible, indeed, assuming that the court was familiar with Article VIII, Section 2(b), that it concluded that the provision did not apply in the circumstances of the case.

The solution to the question of conflict of treaties does not, however, mean that the noncompliance by the state with its obligation under the treaty that was not applied is legally excused. As the Vienna Convention on the Law of Treaties makes clear, the rules on conflict of treaties are "without prejudice . . . to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty." 1/

(ii) The second question is whether all treaties between members that are incompatible with Article VIII, Section 2(b) should necessarily be regarded as inconsistent with the Articles.

At least three interpretations of Article VIII, Section 2(b) appear conceivable in this connection:

First, it could be argued that Article VIII, Section 2(b) does not allow for any exception to its rule and that a treaty inconsistent with Article VIII, Section 2(b) is prohibited. Therefore, if the courts of a member were to apply the provisions of this treaty rather than Article VIII, Section 2(b) it would have to be concluded that that member had failed to comply with its obligations under the Articles in the sense of Article XXVI, Section 2(a).

It might be noted, in connection with this first interpretation, that the second sentence of Article VIII, Section 2(b) contemplates agreements to make other members' exchange regulations "more effective"--which presumably means more effective than they already are pursuant to the rule of unenforceability in the first sentence--but not agreements that would render them "less effective," which would be the result of treaties discarding the rule of unenforceability of Article VIII, Section 2(b).

Under a second interpretation, the rule of unenforceability in Article VIII, Section 2(b) would be of such a nature that its benefit could be waived by the member whose regulations it protects. The conclusion by such a member of a treaty inconsistent with Article VIII, Section 2(b) would constitute a form of implicit waiver.

Arguably, the question of whether the benefit of Article VIII, Section 2(b) can be waived depends on whether that provision confers a

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1/ Article 30(5).

benefit on the particular member whose regulations it protects or on the membership of the Fund at large: a member could waive the protection of Article VIII, Section 2(b) if that provision were for its own benefit, but not if it were for the benefit of the other members as well. While Article VIII, Section 2(b) protects predominantly the interests of the member whose regulations are involved, it appears also to protect, indirectly, all other Fund members. Indeed, a waiver of Article VIII, Section 2(b) by a member could lead to a worsening of its balance of payments, which in turn might prompt the member to request the use of the resources of the Fund and perhaps to impose exchange restrictions on other Fund members. Accordingly, a waiver of the benefit of Article VIII, Section 2(b) does not appear possible. 1/

Under a third possible approach, Article VIII, Section 2(b) would be interpreted as not precluding the conclusion of other bilateral or multilateral treaties among members in those cases where a different interpretation would lead to manifestly absurd or unreasonable results. This approach would be consistent with prevailing rules of interpretation of treaties. 2/ This proposition may be best explained by an illustration. Under the Articles, members have retained their freedom with respect to capital movements: they are allowed to restrict them, as the decision of the Fund of July 25, 1956 recognized explicitly, 3/ and they are, of course, free to liberalize them. Accordingly, Fund members may conclude a treaty providing for the prohibition of restrictions on such movements. As such, this treaty would in no way be inconsistent with the Fund's Articles. Yet, if the prohibited restrictions were to be disregarded by the courts of the parties to the treaty, either because of a provision in the treaty or because of a requirement of domestic law, there would be a conflict with Article VIII, Section 2(b). Indeed, while Article VIII, Section 2(b) would direct the courts to give effect to such regulations by declaring unenforceable any exchange contract contrary to them, the violation of the other treaty would force these courts to disregard the same regulations. If Article VIII, Section 2(b) were regarded in these

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1/ The concept of a waiver would also be difficult to reconcile with the proposition that the obligation of Article VIII, Section 2(b) is owed by each member to the Fund; see, on this analysis, "Suspension of Membership in the Fund - Legal Aspects" SM/87/229 (8/25/87), pp. 22-23.

2/ The Vienna Convention on the Law of Treaties authorizes, as a rule of interpretation of treaties, recourse "to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, . . . when the interpretation according to Article 31 [containing primary rules of interpretation] . . . leads to a result which is manifestly absurd or unreasonable." (Article 32)

3/ Decision No. 541-(56/39), adopted July 25, 1956, Selected Decisions, Thirteenth Issue, p. 156.

circumstances as requiring the unenforceability of exchange contracts notwithstanding the other treaty, it would mean that members would be prohibited by the Articles to conclude treaties pursuing a liberalization of capital movements. It would appear that such an interpretation of Article VIII, Section 2(b) is, in the light of the purposes of the Fund, manifestly absurd or unreasonable. Indeed, this interpretation would clearly contradict the well-established proposition that members retain, under the Articles, their freedom with respect to capital movements.

c. Possible further interpretation by the Fund

In 1949, the Fund adopted an authoritative interpretation of some aspects of the first sentence of Article VIII, Section 2(b). It would be open to the Fund to adopt an authoritative interpretation of other elements of that provision.

(1) Rationale for a further interpretation

The discussion in the previous section of the various interpretations of the concepts in Article VIII, Section 2(b) discloses an unsatisfactory situation. Many uncertainties prevail as to the proper meaning to be attached to these concepts, and the application of the provision by the members of the Fund is far from uniform. As a result, each member determines to a large extent the scope of its obligation under Article VIII, Section 2(b). Moreover, it is possible that an exchange control regulation of a member will be recognized, under that provision, by the courts of one member and not by those of another member. Therefore, the burden associated with the obligation arising from the provision is not evenly borne within the membership of the Fund.

There is increasing awareness of this nonuniform application of Article VIII, Section 2(b), which could lead to the following developments:

- members, or their courts, that have so far given a broad scope to their obligation under Article VIII, Section 2(b) might modify their interpretation of the provision as other members give a significantly narrower scope to their obligation under the provision;

- the members whose restrictions, although consistent with the Articles, are not given significant effect by other members under Article VIII, Section 2(b) might attempt to compensate the lack of effectiveness of these restrictions by imposing additional exchange restrictions or by seeking additional use of Fund resources and other financing;

- the creditors facing exchange restrictions may try to avoid the risks of unenforceability of their claims that derive from Article VIII, Section 2(b) by insisting on the inclusion in the loan

contracts of a clause giving exclusive competence to the courts of members that apply a narrow interpretation of the provision.

In view of this situation, more uniformity among members in the application of Article VIII, Section 2(b) would appear desirable. This could be achieved by the adoption by the Fund under Article XXIX of an authoritative interpretation of Article VIII, Section 2(b) 1/ addressing issues that were not dealt with in the 1949 interpretation. 2/ Since an interpretation would be binding on all Fund members, it would necessarily be conducive to a more uniform application of Article VIII, Section 2(b). Broader uniformity might in turn contribute to strengthen the role of the approval jurisdiction of the Fund under Article VIII, Section 2(a). Indeed, under existing circumstances, the Fund is not in a position clearly to evaluate the significance of its approval of exchange restrictions under Article VIII, Section 2(a). This is because, while nonapproval of an exchange restriction subject to such approval necessarily withholds the protection of Article VIII, Section 2(b) for that restriction, the granting of approval does not necessarily ensure the benefit of that protection, since other conditions must be met, in addition to consistency of the restriction with the Articles, for Article VIII, Section 2(b) to apply. Arguably, greater uniformity with respect to the applicability of these other conditions would tend to increase the significance of the only condition that is controlled by the Fund, namely, consistency with the Articles.

(2) Possible scope of interpretation

Several different approaches would be conceivable for such an interpretation. For instance, the Fund could attempt to make an all-encompassing interpretation of the first sentence of Article VIII, Section 2(b) by enunciating some broad guiding principles. Alternatively, it could focus on the most important concepts contained in the provision, such as "exchange contract," "involvement of the currency" and "exchange control regulation."

From a different perspective, the interpretation of any given concept could be exhaustive or limitative. With respect to the concept

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1/ The Executive Board may adopt an authoritative interpretation by a majority of votes cast. The interpretation may be challenged, within three months, by any member. In that case, the matter is referred to the Board of Governors, whose decision is final.

2/ When the authoritative interpretation of Article VIII, Section 2(b) was adopted in 1949, there had been only limited experience with respect to the application of that provision by the courts of members, and it may not have been anticipated at that time that so widely different interpretations of the provision would be applied by the courts of members. This may explain why that interpretation clarified only a few selected issues relating to Article VIII, Section 2(b).

of "exchange contract," for instance, the Fund could either enunciate a general definition of the concept or provide a list, which need not be exhaustive, of certain types of contracts that would have to be regarded as falling within the scope of the concept.

(3) Essential elements of a further interpretation

If a substantial measure of uniformity among members is to be achieved in the application of Article VIII, Section 2(b), clarification of at least three key expressions of the provision would be necessary. These are "exchange contracts," "involve the currency" and "exchange control regulations." 1/

The central concept in Article VIII, Section 2(b) is "exchange": it appears in both "exchange contracts" and in "exchange control regulations" and, through these two expressions, is also relevant to ascertain the meaning of "involve the currency." A clear understanding of this concept is therefore crucial to an interpretation of these three expressions.

(a) The concept of "exchange" in Article VIII, Section 2(b)

According to general principles of interpretation of treaties, terms that appear in treaties must be given the ordinary meaning that they have in the context in which they are used. As the term "exchange" has several meanings, none of them can be characterized as ordinary in all circumstances: for instance, it does not have the same sense in "foreign exchange" and in "contract of exchange of goods." The proper meaning of the term can, therefore, be ascertained only by examining the context in which it is used.

Even in the Fund's Articles and decisions, "exchange" has different meanings. In the context of Article IV, for instance, "exchange" clearly connotes an exchange of currencies (conversion). Thus, Article IV, Sections 3 and 4 of the Articles, prior to the Second Amendment, explicitly referred to "exchange transactions between the currencies of members" and to "exchange transactions between [a member's] currency and the currencies of other members." 2/ Similarly, the word "exchange" in "exchange arrangement" and "exchange rate" in the present Article IV also connotes a conversion of currencies.

1/ Other issues would also have to be considered, such as the date as of which the conditions of (i) involvement of a member's currency by an exchange contract, (ii) contrariness of the contract to the member's exchange control regulations, and (iii) consistency of the regulations with the Articles must be assessed. The relevant date would be that on which performance of the contract is sought (see pp. 51, 53-54 above).

2/ See also paragraphs 5 and 8 of Schedule C of the present Articles.

There are other provisions of the Articles, however, in which "exchange" has a different meaning. Thus, "exchange restrictions," as the expression appears in both the title of Article XIV, Section 2 and in Article I(iv) and is often used to describe the restrictions on payments and transfers contemplated in Article VIII, Section 2(a), are not confined to restrictions on conversions of currencies. The same is true of the "restrictions on exchange transactions" contemplated in Article VIII, Section 6 and Article XI, Section 2. Similarly, in order to ascertain whether a measure is a restriction on payments and transfers under Article VIII, Section 2(a), the guiding principle adopted by the Fund is whether there is a direct governmental limitation "on the availability or use of exchange as such." "Exchange" in this sentence refers to international means of payment; it designates a certain type of monetary asset rather than a conversion of currencies. 1/

Given these two meanings of the term "exchange" (i.e., conversion of currencies and international means of payment), its precise meaning in the context of Article VIII, Section 2(b) must be ascertained in the light of all relevant considerations, taking into account in particular the legislative history of the provision, its inclusion in Article VIII, and the fact that the term "exchange" is used twice in Article VIII, Section 2(b): in the expressions "exchange contract" and "exchange control regulations."

(i) Legislative history

The origin of Article VIII, Section 2(b) can be traced to three rather different proposals tabled at the Bretton Woods Conference in July 1944. 2/ The first proposal, referred to as Alternative A, had been put forward jointly by the U.S. and the U.K. delegations; it provided for the unenforceability of exchange transactions (i.e., conversions of currencies) that avoided or evaded members' exchange regulations:

> "Exchange transactions in the territory of one member involving the currency of any other member, which evade or avoid the exchange regulations prescribed by that other member and authorized by this Agreement, shall not be enforceable in the territory of any member." 3/

1/ The term "availability" in the guiding principle shows that restrictions on conversions of currencies are within the concept of "exchange restriction."

2/ See the summary of the legislative history of Article VIII, Section 2(b) in Appendix III.

3/ Section 3(c) of Alternative A of Joint Statement IX, 2, Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944 (1948), hereinafter Proc. and Doc., Vol. I, pp. 54-55. An Alternative B later proposed by the U.K. delegation was formulated in identical terms

The obligation to cooperate under that proposal was, therefore, confined to the unenforceability of black market operations involving conversions of other members' currencies. When that proposal was first discussed at Bretton Woods, it was concluded that it disclosed various difficulties of a legal nature and it was referred to the Drafting Committee for further work.

A second proposal made shortly thereafter by the Polish delegation would have required members to cooperate with other members in order to control capital movements. 1/ It was not pressed, however, because it was found to be subsumed in a third, broader, proposal presented by one of the committees of the Bretton Woods Conference. This third proposal (Alternative C), which purported to replace Alternative A, provided that:

> "Exchange transactions in the territory of one member involving the currency of any other member which are outside the prescribed variations set forth in (a) above [parities] shall not be enforceable in the territory of any member.
>
> Each member agrees to cooperate with other members in their efforts to effectuate exchange regulations prescribed by such members in accordance with this Agreement."

Clearly, Alternative C went substantially beyond the proposal in Alternative A. Alternative A confined the obligation to cooperate to a specific form of cooperation (i.e., unenforceability) and to a specific type of operation (i.e., conversions of currencies involving another member's currency). In contrast, Alternative C, in addition to prescribing such an obligation in its first sentence, also called, in its second sentence, for a cooperation among members "to effectuate exchange regulations" of other members. This obligation was limited neither to any particular form of cooperation nor to any particular type of act that might be contrary to the exchange regulations. The only qualification was that the exchange regulations had to be in

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3/ (Cont'd from p. 63) except that the phrase "shall not be enforceable in the territory of any member" was replaced by "shall be an offense in the territories of all members," Proc. and Doc., Vol. I, p. 334.

1/ This proposal prescribed an obligation for members:

> "To cooperate with other member countries in order to enable them to render really effective such controls and restrictions as these countries might adopt or continue, with the approval of the Fund, for the purpose of regulating international movements of capital." (Proc. and Doc., Vol. I, p. 230)

Provisions on cooperation with respect to capital movements had been contained in the White Plan of April 1942 (revised in July 1943) and in the Canadian Plan of July 1943, but had not been included in the Joint Statement of Experts of April 1944.

accordance with the Articles. Yet another difference between the proposals was that the concept of "exchange regulations," which appeared in both alternatives, was of a much broader scope in Alternative C than in Alternative A. While, in Alternative A, exchange regulations were, in substance, confined to members' regulations regarding exchange rates, they included, in Alternative C, a much wider variety of regulations. For instance, the record shows that "exchange regulations" in Alternative C included, although were not limited to, regulations on capital movements. 1/

In the absence of a clear consensus in favor of either proposal, the task of reconciling them was entrusted to the Drafting Committee. The Drafting Committee then produced Article VIII, Section 2(b) as it now stands.

While no record is available of the final stage of negotiations within the Drafting Committee on Article VIII, Section 2(b), it is clear that the version of the provision that was ultimately endorsed constitutes a compromise solution between Alternatives A and C. From this it may be concluded that Article VIII, Section 2(b), being broader in scope than Alternative A, is not confined to conversions of currencies.

(ii) Incorporation of the provision in Section 2 of Article VIII

The legislative history shows that all three proposals to which Article VIII, Section 2(b) can be traced were initially part of a set of provisions, some of which were ultimately incorporated in Article VIII and others in Article IV. Specifically, Alternatives A and C were both part of a draft subsection which dealt with par values (draft Article IX, Section 3). 2/ In the final version prepared by the Drafting Committee, however, the clause on unenforceability of exchange contracts (formerly draft Article IX, Section 3(c)) was severed from the rest of the provision (formerly draft Article IX, Section 3(a) and (b)): while the former was inserted in Article VIII as Article VIII, Section 2(b), the latter was transferred to Article IV, which dealt with par values. This, combined with the substitution of "exchange contracts" for "exchange transactions," indicates that Article VIII, Section 2(b) in its final form was not, in contrast with earlier proposals, a provision confined to "exchange transactions" in the sense of conversions of currencies and that, therefore, "exchange contract" in Article VIII, Section 2(b) is not a synonym of "exchange transaction" in Article IV.

1/ As explained above, the reason for not pressing the proposal by Poland for an obligation to cooperate with respect to capital controls was that such an objective was already covered by Alternative C; Proc. and Doc., Vol. I, p. 542.

2/ The third proposal (i.e., for cooperation with respect to capital controls) had been presented as draft Article IX, Section 8; it was, therefore, separate from the rules on par values.

Not only was the provision on unenforceability of exchange contracts not transferred to Article IV together with the rest of the provision, but it was incorporated in the same section of Article VIII (i.e., Section 2) as the provision on exchange restrictions subject to the Fund's approval. The fact that the provision was made part of that section instead of a separate section underscores the relationship between Article VIII, Section 2(a) and Article VIII, Section 2(b). This proximity, therefore, also points to an interpretation of "exchange" in Article VIII, Section 2(b) that is not confined to conversions of currencies, but that encompasses the concept of international payments and transfers that appears in Article VIII, Section 2(a).

This conclusion that Article VIII, Section 2(b) is not confined to conversions of currencies is reinforced by a change in the formulation of the provision, which took place in the final stage of the discussion. The terms "maintained or imposed consistently with this Agreement" replaced the reference in Alternative A to exchange regulations "authorized by this Agreement." The expression "maintained or imposed consistently" introduces a distinction which is reflected in several provisions of the Articles dealing with exchange restrictions. 1/ Therefore, the similarity of terms suggests that the regulations referred to in Article VIII, Section 2(b) include the restrictions or controls on payments and transfers contemplated in other provisions of the Articles.

(iii) The use of "exchange" in Article VIII, Section 2(b)

The term "exchange" appears twice in the first sentence of Article VIII, Section 2(b): in "exchange contract" and in "exchange control regulations." 2/ It is an accepted method of interpretation that a term that is used several times in the same provision should be given the same meaning in that provision, unless the context clearly requires otherwise. The meaning of the term "exchange" may be easier to apprehend in "exchange control regulations" than in "exchange contract," because the terminology of "exchange control regulations" is a familiar one in domestic legal systems. Even though domestic legal systems may diverge in some respects on the scope of their exchange control regulations, it is clear that such regulations are not confined to exchanges of currencies, but include as well a variety of other situations, such as the acquisition, holding and use of foreign exchange, and the use of domestic currency in international payments and transfers. Since the concept of "exchange" in "exchange control regulations" is not restricted to conversions of currencies, it can be concluded, in accordance with the principle of interpretation described above, that it is not so limited in "exchange contract" either.

1/ For instance, the term "impose" appears in both Article VIII, Section 2(a) and in Article VII, Section 3(b) and the term "maintain" is used in Article XIV, Section 2.

2/ It also appears in the phrase "exchange control regulations" in the second sentence of the provision.

(b) The meanings of "exchange control regulation" and "exchange contract"

The meanings to be attributed to "exchange control regulation" and "exchange contract" may be derived from the understanding of the concept of "exchange" developed above. Thus, exchange control regulations may be regarded as including the regulations pertaining to the acquisition, holding or use of "exchange" as such, and exchange contracts as contracts providing for the payment or transfer of "exchange." In both expressions, "exchange" would be understood to mean either foreign exchange, or any monetary assets (including domestic currency) when used in international payments or transfers. Accordingly, a contract providing for a payment or transfer of foreign exchange 1/ would be an exchange contract even when the payment or transfer is purely domestic (e.g., a loan between two residents that is payable or repayable in foreign currency). Moreover, a contract providing for an international payment or transfer (i.e., a payment between a resident and a nonresident, or a transfer of funds from one country to another) would also be an exchange contract, regardless of whether the payment or transfer is to be made in foreign exchange. 2/

While exchange contract so interpreted is not confined to contracts that have as their immediate object a conversion of currencies, a conversion would still be implied in most instances. Indeed, international payments or transfers normally carry the implication of a conversion: by the payor when the payment or transfer is to be made in a currency other than his own currency, as he normally needs to obtain the necessary foreign exchange; or by the payee when the payment or transfer is to be made in the payor's currency, as the payee is expected to convert the currency received into his own currency.

(c) The meaning of "involve the currency"

The terms "involve the currency" in Article VIII, Section 2(b) must, like the other terms of the provision, be interpreted in their context. In the proposals at the Bretton Woods Conference that provided for the unenforceability of exchange transactions in the sense of exchanges of currencies (such as Alternative A), a member's currency would have been regarded as "involved" if it were one of the currencies exchanged under the transaction.

While the phrase "involve the currency" was retained in Article VIII, Section 2(b), its meaning must be ascertained in the

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1/ This definition includes but is not limited to conversions of currencies.

2/ For instance, international loans or bank deposits, export and import contracts.

light of the modifications that were incorporated in the final version of the provision, and, in particular, the changes from "exchange transactions" and "exchange regulations" to "exchange contracts" and "exchange control regulations." As explained above, these latter concepts have a broader scope than the former.

In view of this, it may be concluded that the "currency involved" is not necessarily the currency to be paid or transferred under the contract. An interpretation of the "currency involved" as being the currency to be paid or transferred would unduly restrict the scope of Article VIII, Section 2(b), because it would exclude contracts providing for payments or transfers of foreign exchange. Yet such contracts are even more important, from the standpoint of exchange control regulations, than contracts for payments or transfers of domestic currency, as they have an immediate effect on a country's exchange resources. Not only would such an interpretation create an incentive for stipulating payment in foreign exchange, 1/ but it would also deny the benefit of Article VIII, Section 2(b) to members that need it most, that is, those whose currencies are the least used in international transactions.

Therefore, a better interpretation would be that an exchange contract involves a member's currency when the performance of the contract would affect the exchange resources of that member. In order to determine whether a contract has such an effect, certain criteria may be found in the practices followed by members when enacting their exchange control regulations. Jurisdiction is usually asserted both in rem, that is, over assets situated within the member's territories, and in personam, that is, over residents of the member's territories. The location of assets is a normal basis of jurisdiction. Residence is often used as a basis of jurisdiction for purposes of certain types of economic legislation, such as taxation; the distinction between residents and nonresidents of a country is recognized in the Fund's Articles as a relevant criterion for determining the scope of exchange control regulations (Article XI: "persons in their territories"), and in the practice of the Fund for defining the concept of "international" transactions; it is also used in balance of payments statements which reflect a country's international economic transactions. 2/

Accordingly, the currency of a member would be involved within the meaning of Aricle VIII, Section 2(b) when either the performance of the contract is to be made from assets located in the member's territory, or a resident of the member is a party to the contract.

1/ More specifically, there would be an incentive for stipulating payment in the currency of a member that does not impose exchange control regulations or whose regulations do not apply to the contract.

2/ See Balance of Payments Manual, (4th ed., 1977), paragraph 26, p. 10.

2. Article VIII, Section 2(b), second sentence

The second sentence of Article VIII, Section 2(b) complements the rule contained in the first sentence by permitting members to expand their cooperation with respect to their exchange control regulations beyond the form of cooperation contemplated in the first sentence. The provision reads as follows:

> "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."

a. Scope of the authorization to cooperate

To the extent that it authorizes members to cooperate with respect to exchange control regulations consistent with the Articles beyond the rule of unenforceability contained in the first sentence, the provision was arguably not necessary. 1/ Indeed, since no other provision in the Articles, including the first sentence of Article VIII, Section 2(b), purported to prohibit such a form of cooperation, members would have retained the power to so cooperate even in the absence of a provision expressly recognizing this right. It follows that, even though the provision authorizes expressly only cooperation by mutual accord, it should not be regarded as prohibiting, a contrario, cooperation by unilateral action. Thus, members may enact statutes that provide for the recognition of other members' regulations consistent with the Articles and their courts may give effect to such regulations in accordance with their rules of private international law.

b. Possible forms of cooperation

The first sentence of Article VIII, Section 2(b) prescribes that members must cooperate with other members by declining to enforce in their territories certain contracts which are contrary to these other members' exchange control regulations that are consistent with the Articles. There are several ways in which members could, either unilaterally or by agreement, cooperate beyond the requirement of the first sentence of Article VIII, Section 2(b). For instance:

(i) Members could provide for a more severe sanction than unenforceability. Exchange contracts could be regarded as void instead of simply unenforceable, or criminal sanctions could be applied in addition to civil sanctions, in case of breach of such regulations.

1/ The question of whether members may give effect, by agreement or unilaterally, to other members' exchange control regulations that are inconsistent with the Articles is discussed below, pp. 74-78.

(ii) The form of recognition of these regulations could go beyond the recognition implied in the first sentence of Article VIII, Section 2(b). As explained above, unenforceability of contracts as contemplated in the first sentence is a form of recognition of exchange control regulations that falls short of the full applicability of these regulations including the sanctions that they prescribe. Thus, members could agree that their respective regulations shall be applicable by their courts. Also, the courts of a member may, in accordance with their rules of private international law, apply another member's exchange control regulations as part of the proper law of the contract. It would follow that, subject to other applicable rules of private international law, 1/ these courts would apply the sanctions stipulated in these exchange control regulations.

(iii) Members could also give effect to the exchange control regulations of other members notwithstanding that the conditions of the first sentence of Article VIII, Section 2(b) (other than consistency with the Articles) are not met, for example when the contract that is contrary to the regulations is not an "exchange contract" or when the currency of the member maintaining the regulations is not "involved."

3. Recognition under a general duty to cooperate with the Fund?

As explained above, the first sentence of Article VIII, Section 2(b) imposes on members an obligation of cooperation with respect to other members' exchange control regulations that are consistent with the Articles. This obligation of cooperation is not unlimited, however, and no duty to cooperate arises under the first sentence of Article VIII, Section 2(b) when the conditions for the application of that provision are not met. The question could arise, in those cases, whether members would have to recognize other members' exchange control regulations on a different legal basis, other than Article VIII, Section 2(b), such as a general duty to cooperate with the Fund. This could occur in the context of a stand-by arrangement granted to a member when the financing gap of the program supported by the stand-by arrangement is, at least partly, filled by the maintenance of external payments arrears by the member. If the member's creditors sought to obtain enforcement of their claims in the courts of other members, these courts would have to refrain from enforcing these claims only if the conditions under Article VIII, Section 2(b) are met. For instance, Article VIII, Section 2(b) would not apply if the creditors' claims are not characterized as exchange contracts involving the member's currency by the courts of these other members. 2/ Moreover,

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1/ For instance, such rules typically provide that the courts of a country do not enforce foreign criminal sanctions.

2/ As discussed above, international loan contracts would not normally be regarded as exchange contracts by the U.S. and English courts, whereas they would be so construed by German and French courts.

regardless of the interpretation of the terms "exchange contract" by these courts, the provision would not apply with respect to external payments arrears that are not caused by exchange control regulations. In this connection, it will be recalled that governmental defaults do not appear to constitute exchange control regulations in the sense of Article VIII, Section 2(b). 1/ It would follow that a member's program, to the extent that it is financed by governmental arrears, would not benefit from the protection of Article VIII, Section 2(b).

The enforcement of the creditors' claims by other members might, however, affect the viability of this program even in cases where Article VIII, Section 2(b) does not apply. The question could arise, in this connection, whether these other members should nevertheless refrain from enforcing these claims, pursuant to a general duty to cooperate with the Fund. The argument would be that the enforcement of the claims could jeopardize the viability of the program of a member that the Fund has decided to support by granting that member a stand-by arrangement.

One scholar has suggested that a general obligation of collaboration with the Fund may indeed exist:

> "It is submitted that today all states of the world have a legal obligation to refrain from deliberately disrupting the world's monetary and banking system or deliberately frustrating decisions taken by the membership of the International Monetary Fund in good faith for the development of the international monetary system. For the vast majority of the countries of the world, countries that are members of the IMF, this general fundamental obligation of customary law is a necessary corollary to the specific treaty commitments accepted through membership in the IMF. Indeed, it can be said to flow from the customary law concept of pacta sunt servanda -- that treaties are to be performed in good faith." 2/

1/ See pp. 48-49 above.

2/ Edwards, op. cit., p. 648. It will be noted that Professor Edwards refers to decisions taken by the "membership of the International Monetary Fund." It must be assumed that this phrasing does include decisions taken by organs of the Fund and, in particular, decisions of the Executive Board, even though these are not, strictly speaking, decisions of the members. It will also be noted that the duty to cooperate with the Fund formulated by Professor Edwards appears to preclude only deliberate obstruction against Fund decisions, and only if it frustrates decisions taken by the Fund "for the development of the international monetary system." It is not clear in the light of this latter reference to the development of the international monetary system whether the duty "not to deliberately frustrate decisions" of the Fund would encompass decisions by the Fund granting the use of its resources, e.g., under stand-by arrangements.

While members are undoubtedly free to cooperate with the Fund to support the effectiveness of Fund's policies and decisions, and may in fact be expected to do so, it is doubtful whether they are under a legal obligation to cooperate with the Fund to that effect under the Articles. The recognition of such a duty to cooperate would have far-reaching consequences in the Fund. In particular, it would empower the Fund to impose in fact new obligations on members by decisions which otherwise would have required amendments to the Articles. Indeed, even though the decisions themselves would not create new obligations, members would be obliged, pursuant to such a general duty to cooperate, to act consistently with them. Should they fail to do so, the Fund could find them in breach of their obligation to cooperate, declare them ineligible, and even compel them to withdraw under Article XXVI, Section 2.

The following considerations suggest that members are not subject to such an obligation under the Articles. First, there is no specific provision in the Articles imposing such a broad obligation on members. Rather, the Articles contain several provisions setting out specific obligations to cooperate, such as Article VIII, Section 2(b) and Article IV, Section 1. 1/ Under the former provision, members must cooperate with the Fund with respect to other members' exchange control regulations consistent with the Articles; under the latter, they must collaborate with respect to exchange arrangements and exchange rates. 2/ Thus, these provisions specify the scope of each member's obligation to collaborate. Arguably, if members were found to be subject, in addition, to a general obligation to cooperate with the Fund, the scope of which would be determined by the Fund, these provisions would be meaningless.

As regards more specifically cooperation with respect to other members' exchange control regulations, it would be meaningless for Article VIII, Section 2(b) to specify the conditions in which the obligation applies (e.g., the existence of exchange control regulations consistent with the Articles, and of an exchange contract involving the member's currency), if members were obliged, under a broader duty, to cooperate even when these conditions are not met. The recognition of such a duty would also be inconsistent with the text of the second sentence of Article VIII, Section 2(b) which provides, not that members "shall," but that they "may" cooperate beyond the requirement of the first sentence.

1/ See also Article VIII, Section 7 (obligation to collaborate regarding policies on reserve assets) and Article XXII (obligation to collaborate in order to facilitate the effective functioning of the SDR Department and the proper use of the SDR).

2/ Article IV, Section 1 provides that "each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates."

4. Recognition under domestic legal systems

As explained above, members' courts may, pursuant to the second sentence of Article VIII, Section 2(b), give effect to other members' regulations that are consistent with the Articles even when Article VIII, Section 2(b) first sentence does not apply. In practice, courts have, in accordance with their rules of private international law, given effect to foreign exchange control regulations mainly in two types of cases: first, when the regulations are part of the law determined by the court to be the proper law of the contract, for instance because the parties have chosen this law to be the governing law of the contract (lex contractus); secondly, when the regulations form part of the law selected by the court to resolve legal issues pertaining to the performance of a contract, on the grounds that these issues should be decided under the law of the place where the contract must be performed (lex loci solutionis).

It does not seem that, in doing so, courts have taken into account the question of approval or nonapproval of such regulations by the Fund. In fact, in most cases, the courts do not appear to have been aware of whether the regulations were maintained or imposed consistently with the Articles or not. 1/

B. Effects of nonapproval

This section examines the effects of nonapproval:

- under the first and second sentences of Article VIII, Section 2(b);

- under a general duty to cooperate with the Fund, if any; and

- under domestic legal principles.

1. Article VIII, Section 2(b), first sentence

As discussed above, one of the conditions for the applicability of the first sentence of Article VIII, Section 2(b) is that the

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1/ The question of the consistency of the regulations with the Articles seems to have been raised only in cases where the question of the application of Article VIII, Section 2(b) was raised. For instance, in the recent English case of Libyan Arab Foreign Bank v. Bankers Trust Company (Queen's Bench Division (Commercial Court), 2 October 1987, as yet unreported), which involved certain exchange control regulations of the United States, neither the question of the applicability of Article VIII, Section 2(b), nor that of the consistency of the regulations with the Articles, was raised by the litigants or by the court.

exchange control regulations to which the contract is contrary be maintained or imposed consistently with the Articles. It follows that when a member imposes exchange restrictions that, while subject to the approval of the Fund, are not approved, other members are under no obligation under this provision to give any effect to these restrictions in their territories.

2. Article VIII, Section 2(b), second sentence

The second sentence of Article VIII, Section 2(b) raises two main questions in connection with the recognition of exchange restrictions that are inconsistent with the Articles: first, does it imply an obligation not to cooperate for the purpose of making such restrictions effective and, secondly, if there is such an obligation, what is its scope?

a. Existence of an obligation not to cooperate

The second sentence of Article VIII, Section 2(b) sets forth a rule permitting members to cooperate, but it also sets a limitation to the permission:

> "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." (Underlining added.)

It has been explained above that, as a permissive rule, the provision was not necessary. In contrast, it seems that permitting members to cooperate to make their exchange control regulations more effective "provided that" these regulations are consistent with the Articles 1/ prohibits, *a contrario*, any such cooperation for regulations that are inconsistent with the Articles. 2/ Indeed, the condition of consistency with the Articles, if it were not so understood to limit the member's right to cooperate to regulations that are consistent with the Articles, would appear meaningless.

b. Scope of obligation not to cooperate

The language in the provision refers to cooperation "by mutual accord." This raises the question of whether the provision

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1/ The other condition, i.e., that the measures adopted by members in the context of this cooperation also must be consistent with the Articles, appears to simply clarify that the second sentence of Article VIII, Section 2(b) was not meant to make any exception to the other provisions of the Articles.

2/ See Gianviti, op. cit., RCDIP (1973), p. 472 and RCDIP (1980), p. 678.

prohibits only cooperation by agreements (such as treaties, for instance) or whether it also forbids unilateral actions by a member taken to support the exchange control regulations of another member. In this connection, a convergence of several members' "unilateral" actions giving effect to each other's exchange control regulations may evidence a form of "mutual accord" under Article VIII, Section 2(b), even if no treaty or other formal agreement has been concluded.

This is a question of much practical significance, because one form that such cooperation by unilateral action by a member could take under the second sentence of Article VIII, Section 2(b) is assistance provided by the judicial authorities of the member. Under an interpretation of the second sentence of Article VIII, Section 2(b) prohibiting cooperation by unilateral action in favor of regulations inconsistent with the Articles, the courts of members would have to refuse to recognize such regulations in cases adjudicated by them, even if their rules of private international law would otherwise have warranted their recognition. 1/

While the language of the provision does not refer to cooperation by unilateral action, it is not clear whether this omission evidenced an intention to authorize such a form of cooperation. The legislative history of the provision does not provide an answer to this question. There are, therefore, two possible interpretations.

On the one hand, it could be argued that the provision should be interpreted in accordance with its terms: since it expressly forbids only cooperation by mutual accord in support of inconsistent regulations, it should be concluded that other forms of cooperation for such regulations are permitted. It could be contended, in this connection, that a provision imposing an obligation on members, as the second sentence of Article VIII, Section 2(b) does, should be interpreted restrictively rather than extensively, especially when its legislative history does not clearly support the broader interpretation. Arguably, also, the drafters of the provision would have made it clear that cooperation by unilateral action was prohibited if this had been their intention. 2/ Also, as cooperation by unilateral action, while not

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1/ There appears to be no judicial decision on that issue, perhaps in part because the courts of some countries would not, in any case, give effect to a member's exchange restrictions that are inconsistent with the Fund's Articles, on the grounds that their rules of private international law preclude the recognition of a foreign statute or regulation that is contrary to international law. On this point, see p. 79 below.

2/ This could have been achieved either by mentioning expressly this form of cooperation in the text of the provision (e.g., "members may, by mutual accord or unilaterally, cooperate . . . provided that . . .") or by using a terminology broad enough to cover this type of cooperation (e.g., "members may cooperate . . . provided that . . .)"

frequent, was not inexistent at the time the Articles were signed, 1/ the omission of any reference to such a form of cooperation cannot be regarded as necessarily unintentional.

On the other hand, it could be argued that while the language of the provision refers only to cooperation by mutual accord, other forms of cooperation in support of regulations inconsistent with the Articles should be regarded as prohibited as well. The main argument in support of this interpretation would be that a provision prohibiting one form of cooperation while authorizing another would appear illogical as it would render the provision largely ineffective: regardless of the technique resorted to, the effects of the cooperation would be essentially the same. As regards the textual argument, it is possible that the provision referred only to cooperation by mutual accord because this was the only significant form of cooperation existing at the time the Articles were signed. As explained above, on the whole, the rules of private international law prevalent at the time

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1/ Indeed, while, in principle, courts were reluctant to recognize other countries' public laws, and in particular revenue laws, there had been several court decisions prior to 1944 that had recognized the exchange control regulations of other countries. For instance, in England, it had been held that a contract would be invalid in the forum insofar as it was unlawful under the law, including the exchange control regulations, of the country in which the contract had to be performed: De Beeche v. South American Stores [1935] AC 148 (per Sankey LJ, at p. 156) and Rex v. International Trustee for the Protection of Bondholders [1937] 1 AC 500, at 519; see also St. Pierre v. South American Stores [1937] 3 All ER 349. This form of recognition appears to have reflected a principle of cooperation derived from the concept of comity of nations (see Rex v. International Trustee cited above; see also Ralli Brothers v. Compania Naviera Sota y Aznar [1920] 1 KB 287 per Scrutton LJ (at p. 300) and Foster v. Driscoll [1929] 1 KB 471, per Sankey LJ (at p. 518)). In France, a court had refused to consider as valid a payment that had been made in contravention to the German exchange control regulations, Paris 26 March 1936, Banque des Pays dit Europe Centrale v. Banque Francaise commerciale et financière, RCDIP (1936), p. 487 with note by Niboyet. In the United States also, foreign exchange control regulations appear to have been recognized by the courts at least in some circumstances. Thus, as a U.S. court stated in 1965, "[i]t is true, however, that even prior to the [Articles of Agreement] foreign exchange control regulations were held to be applicable in suits in the United States. This is in line with our public policy to prevent evasion of currency obligations in the nation where the obligation is payable." 203 A2d 505, at p. 510 (Penn., 1965).

tended to disregard foreign exchange control regulations. 1/ A reference to such a form of cooperation may, therefore, have been regarded as superfluous.

Under this interpretation, the second sentence of Article VIII, Section 2(b) emerges as the symmetrical complement of the first sentence: the first sentence would impose an obligation on members to give effect to the other members' exchange control regulations when they are consistent with the Articles, and the second sentence would impose an obligation on them not to give effect to these regulations when they are inconsistent with the Articles. The scope of the prohibition under the second sentence would, however, be broader than the obligation under the first sentence, since it would not be limited to cases where there is an exchange contract involving the member's currency.

It should be noted that not all forms of recognition by courts of foreign exchange control regulations should necessarily be regarded as a form of cooperation under the second sentence of Article VIII, Section 2(b). As explained above, recognition in this context refers to all the ways in which the regulations could be taken into account: they range from applying the regulations as part of the applicable law to merely acknowledging their existence as an impediment to the performance of a contractual obligation, which on the basis of a defense in the nature of "force majeure" or "act of the prince" may legally excuse the nonperformance. In this connection, it could be argued that, under the interpretation prohibiting cooperation by unilateral action, the recognition of the existence of regulations for purposes of determining whether the failure by a debtor to discharge its obligation is to be excused is not a form of cooperation and would, therefore, not be prohibited.

Cooperation by unilateral action has become much less exceptional than it was when Article VIII, Section 2(b) was drafted. Indeed, in most domestic legal systems, foreign laws, including exchange control regulations, are increasingly given effect by courts. As a result, the question of whether the second sentence of Article VIII, Section 2(b) should be understood to preclude cooperation by unilateral action with respect to exchange control regulations inconsistent with the Articles has taken an importance it did not have forty years ago. In light of

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1/ For instance, in a 1953 paper informing the Executive Board on a court decision involving Article VIII, Section 2(b), the staff recalled that "[b]efore the Fund Agreement took effect, the law in many, and perhaps in most, countries was that the courts of X would refuse to recognize the exchange control regulations of Y. This attitude was largely the result of the aggressive character of the exchange control regulations of the 'thirties.'" "Article VIII, Section 2(b)--Perutz v. Bohemian Discount Bank" SM/53/14 (2/12/53), p. 1.

this, the need for an authoritative interpretation by the Fund of this provision might be considered at this time.

3. Nonrecognition under a general duty to cooperate with the Fund?

The question of the existence, under the Articles, of a general duty to cooperate with the Fund as regards exchange control regulations that are maintained or imposed consistently with the Articles has already been examined. 1/ It was concluded that there does not seem to be such an obligation. A different conclusion does not appear warranted regarding exchange control regulations that are not maintained or imposed consistently with the Articles.

As noted above, there are two possible interpretations of the second sentence of Article VIII, Section 2(b). Under one interpretation, a recognition of foreign exchange control regulations inconsistent with the Articles is prohibited. In that case, it would seem pointless to invoke a general duty to cooperate with the Fund in order to conclude that other members should not give effect to such regulations, since the second sentence of Article VIII, Section 2(b) would already prohibit it. Under the other interpretation of the second sentence of Article VIII, Section 2(b), the recognition of such regulations is not prohibited. While, in that case, a broad duty to cooperate with the Fund would have some significance, it is unclear how the Fund would be able to conclude at the same time that a duty to cooperate beyond the requirement of Article VIII, Section 2(b) first sentence cannot be derived from the second sentence of Article VIII, Section 2(b) and yet that such a duty to cooperate arises under the Articles taken as a whole.

Even if such a duty were found to exist, it would not necessarily be clear in all cases how members would be expected to behave in order to meet the requirements of this duty. It will be recalled that the hypothetical example that was discussed 2/ involved a member's program supported by a stand-by arrangement financed in part by external payments arrears incurred by the member. Assuming that the arrears result from an exchange restriction that the Fund has declined to approve, for instance because it is discriminatory, how would other members be required to cooperate with the Fund if the creditors were to seek enforcement of the claims before their courts? Should they support the Fund's policy of not approving discriminatory exchange restrictions and, therefore, ensure that their courts do not recognize the restrictions? Or should they uphold the Fund's decision to grant the member a stand-by arrangement and, accordingly, make sure that their courts do not, by enforcing the creditors' claims, jeopardize the viability of the program supported by the arrangement?

1/ See pp. 70-72 above.
2/ See pp. 70-71 above.

4. Nonrecognition under domestic legal systems

As discussed above, it is not entirely clear whether the second sentence of Article VIII, Section 2(b) prohibits the recognition by the courts of a member of another member's exchange control regulations that are inconsistent with the Articles.

Clearly, if that provision were interpreted to preclude the recognition of such regulations, the courts of members would be obliged to take into account the absence of approval of the regulations by the Fund in cases litigated before them.

Under the other interpretation--whereby members are not prohibited to give effect to such regulations by unilateral action--the courts of members would still be permitted, although not compelled, to take the absence of approval by the Fund into account. There appears, however, to be no court decision that has specifically referred to the absence of approval by the Fund to refuse to give effect to another member's regulations when Article VIII, Section 2(b), first sentence did not apply. There are nevertheless at least two types of rules of private international law under which the absence of approval by the Fund could be relevant. They relate, respectively, to the conditions of consistency of foreign law with international law and of consistency with the policy of the forum.

a. Consistency with international law

In some countries, the rules of private international law provide that a foreign law that has been determined to be applicable in a given case may be applied by the courts only to the extent that this law is consistent with international law. Since the Articles of Agreement are part of international law, inconsistency with the Articles (which would be the result of a nonapproval by the Fund of exchange restrictions subject to approval) would necessarily imply inconsistency with international law. It would follow that the courts of these countries, if made aware of the inconsistency of the regulations with the Articles, might decline to recognize these regulations in the context of the proceedings before them. 1/

1/ It is also conceivable that the absence of approval by the Fund would result in the inapplicability of the Act of State doctrine in the United States. As explained in the introduction to this Part, under this doctrine, the courts in some countries must refrain from examining the validity of certain acts of foreign states done within their territories. While the term "act" is not necessarily unambiguous, it seems possible to understand it as including laws and regulations, including exchange control regulations (see Gold, op. cit., Vol. III, p. 404). It is, therefore, possible that the Act of State doctrine

b. Policy of the forum

Courts in many countries tend to take into account the policy of their own country (i.e., of the forum) in determining whether, and to what extent, they should give effect to the law of another country.

For instance, in most domestic legal systems, a foreign law will not be given effect by a court insofar as it is incompatible with fundamental principles of the forum. This is the doctrine generally referred to as exception of public policy (ordre public). It will be recalled that, before the Articles of Agreement came into effect, courts often refused to give effect to foreign exchange control regulations on this particular ground and that, as explained by the 1949 authoritative interpretation of the Fund, such an objection cannot be raised anymore within the context of the first sentence of Article VIII, Section 2(b). When that provision does not apply, however, the exception of public policy is still available to courts with respect to foreign exchange control regulations. It follows that the courts of a member might conceivably refuse to give effect to another member's nonapproved exchange restrictions on the grounds that their inconsistency with the Articles makes their recognition incompatible with the member's public policy. This appears unlikely, however, in view of the fact that public policy is generally an instrument to safeguard only fundamental principles of the forum.

In some countries, the courts will take their own country's interests into account even when these interests cannot be characterized as fundamental principles of that country. Normally, in such cases, courts pay regard only to the interests of their own country; 1/

1/ (Cont'd from p. 79) would be applied in favor of such regulations of other states. The applicability of the doctrine is, however, subject to certain conditions. In the United States, for instance, an Act of Congress has specified that the doctrine does not apply in some cases of acts of foreign states that are in the nature of a confiscation or a taking of property done in violation of international law (Hickenlooper Amendment of 1964, 22 USC § 2370(e)(2)). Insofar as exchange control regulations may be characterized as acts of confiscation or of taking of property, the Act of State doctrine might be held inapplicable to them, on the ground that they are in violation of international law, if, while subject to approval by the Fund, they are not approved.

1/ In a system of federation of states, like the United States, courts also take into account the interests of their own state. For instance, in Zeevi v. Grindlays Bank (Uganda) Ltd. 371 NYS 2d 892, at pp. 898-99 (New York, 1975), the Court of Appeals of New York made reference to the interests of the State of New York in a case involving another country's exchange control regulations:

> "New York has an overriding and paramount interest in the outcome of this litigation. It is a financial capital of

it is conceivable, however, that courts would give some consideration to the interests of another country or that of an international organization of which the country is a member, at least insofar as their interests are consistent with the interests of the forum. Two recent judicial decisions in the United States appear relevant in this context.

In the case of Allied Bank International v. Banco Credito Agricola de Cartago, et al, the U.S. Court of Appeals for the Second Circuit considered the question of whether certain acts of Costa Rica, including decrees that in effect imposed a moratorium on the payment of its external debt, were consistent with the policy of the United States. As a result of these actions, certain Costa Rican banks had defaulted on their debts to foreign commercial banks.

In a first decision (of April 23, 1984), 1/ the Court dismissed the creditor banks' claims on the grounds that the acts of Costa Rica were fully consistent with the law and policy of the United States and that, therefore, "comity requires that the actions should be given effect in United States courts." This conclusion of the court was based on certain actions of the executive and legislative branches of the United States, namely a certification to Congress by the President, a concurrent resolution of the House of Representatives and the signing of a Paris Club Agreed Minute.

The plaintiff, Allied Bank International, petitioned for rehearing of that decision and the U.S. Department of Justice filed a brief with the Court as amicus curiae in support of this petition, "[b]ecause the panel's decision is based on a misunderstanding of the policy of the United States." 2/ In this amicus curiae, the Justice Department elaborated on the policy of the United States with respect to the resolution of the international debt problem. In particular, the brief stated that:

> "the United States has supported a five-point strategy to deal with the debt service problem:
>
> (1) economic adjustment by borrowing countries designed to stabilize their economies and restore sustainable external positions;

1/ (Cont'd from p. 80) the world . . . In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected. Since New York has the greatest interest and is most intimately concerned with the outcome of this litigation, its laws should be accorded paramount control over the legal issues presented . . ."

1/ 733 F.2d 23 (1984).

2/ Justice Department's brief, p. 1.

(2) an International Monetary Fund (IMF) adequately equipped to help borrowers design adjustment programs and provide balance of payments financing on a temporary basis while adjustment programs take effect;

(3) readiness of monetary authorities in creditor countries to provide short-term liquidity support, when essential to assist selected borrowers that are formulating adjustment programs with the IMF;

(4) encouragement to private markets to provide prudent levels of financing to borrowing countries in the process of implementing IMF-supported adjustment programs; and

(5) resumption of sustainable, non-inflationary economic expansion and maintenance of open markets, both in the industrial countries and in developing countries facing debt problems." 1/

On rehearing, 2/ the Court concluded that, in the light of the government's elucidation of its position, the interpretation of United States' policy in the earlier decision was wrong and that Costa Rica's acts were not consistent with the law and policy of the United States. In reaching this conclusion, the Court made reference to the Fund's approach to the international debt problem:

"Our interpretation of United States policy, however, arose primarily from our belief that the legislative and executive branches of our government fully supported Costa Rica's actions and all of the economic ramifications. On rehearing, the Executive Branch of the United States joined this litigation as amicus curiae and respectfully disputed our reasoning. The Justice Department brief gave the following explanation of our government's support for the debt resolution procedure that operates through the auspices of the International Monetary Fund (IMF). Guided by the IMF, this long established approach encourages the cooperative adjustment of international debt problems. The entire strategy is grounded in the understanding that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable. Costa Rica's attempted unilateral restructuring of private obligations, the United States contends, was inconsistent with this system of international cooperation and negotiation and thus inconsistent with United States policy.

The United States government further explains that its position on private international debt is not inconsistent with either its own willingness to restructure Costa Rica's inter-

1/ Ibid., pp. 4-5
2/ 757 F.2d 516 (1985).

governmental obligations or with continued United States aid to the economically distressed Central American country." 1/

A second case in which reference was made to the so-called "policy" of the Fund is A.I. Credit Corp. v. The Government of Jamaica, decided on 20 August 1987. 2/ The case involved a nonpayment by Jamaica of principal on a debt that had been previously rescheduled. The District Court for the Southern District of New York referred to the Allied Bank case:

> "The Second Circuit's decision in Allied Bank International v. Banco Credito Agricola de Cartago . . . is on point. That case, like the one before us, arose from an international lending scheme. . . . The Court took into account the International Monetary Fund (IMF) policy 'that while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable. . . .'" 3/

The Court also responded to an argument of Jamaica that was in effect based on policy. Jamaica had claimed that a decision in favor of the plaintiff would have a devastating effect for it and had produced, in support of that assertion, a copy of a communication of the Fund to the Governor of the Bank of Jamaica. The Court stated in this respect that:

> "We have been advised by defendant that our holding could have a devastating financial impact on the Government of Jamaica due to the sharing and default provisions contained in the 1984 and 1987 Agreements. But it is not the function of a federal district court in an action such as this to evaluate the consequences to the debtor of its inability to pay nor the foreign policy or other repercussions of Jamaica's default. Such considerations are properly the concern of other governmental institutions. When counsel for Jamaica first raised these concerns with the Court at a pretrial conference, we urged Jamaica to seek the intervention of such concerned governmental agencies that might wish to communicate their views to the Court. No such intervention has occurred. 5/

5/ The sole communication that has been furnished to the Court is a copy of an IMF Official Message to the Governor of the Bank of Jamaica dated July 30, 1987, which reads in pertinent part: '[o]n the basis of the information available to us, a judgment against a debtor country in this kind of case could

1/ Ibid., at pp. 519-20.
2/ 666 F. Sup. 629 (1987).
3/ Ibid., at pp. 632-33.

create problems for the implementation of the international debt strategy that is supported by member governments of the International Monetary Fund.'" 1/ (Underlining supplied.)

The Court went on to grant summary judgment in favor of AICCO.

1/ Ibid., at p. 633.

Summary of Paper and Issues for Consideration

I. Summary of Paper

A. Consistency or inconsistency of exchange restrictions with the Articles

1. The imposition by a member of restrictions on the making of payments and transfers for current international transactions ("exchange restrictions"), as defined in Article XXX, is a breach of obligation under the Fund's Articles, unless the restrictions are approved by the Fund.

2. Approval of exchange restrictions imposed by a member is granted under Article VIII, Section 2(a).

3. Exchange restrictions maintained by a member under the transitional arrangements of Article XIV, Section 2 are not subject to approval by the Fund.

4. Similarly, controls on capital movements may be imposed by a member without the approval of the Fund (Article VI, Section 3).

5. Exchange restrictions approved by the Fund under Article VIII, Section 2(a) are consistent with the Articles. Exchange restrictions maintained under Article XIV, Section 2, and controls on capital movements imposed under Article VI, Section 3, being authorized by the Articles, are also consistent with the Articles.

6. The Fund has adopted policies on the approval of exchange restrictions. The general principle is that an exchange restriction may be approved if it is needed for balance of payments reasons and is nondiscriminatory and temporary. The Fund has also adopted a decision on approval of exchange restrictions for security reasons.

B. Exchange restrictions and use of Fund resources

1. The Fund may authorize the use of its general resources by a member maintaining or imposing exchange restrictions, even when their imposition has not been approved by the Fund.

2. When examining a member's request for use of its general resources, the Fund must examine the member's exchange restrictions (existing or contemplated), taking into account the purpose of the Fund, under the Articles, of avoidance or elimination of exchange restrictions.

3. The Articles recognize that there may be a need for members to impose exchange restrictions temporarily. Article VIII, Section 2(a) confers on the Fund the power to approve exchange

restrictions. Therefore, when approving a member's request for use of its general resources, the Fund should be prepared to approve the exchange restrictions that are necessary for the implementation of the member's program. Approval of these exchange restrictions by the Fund would be a recognition of the need for such measures. In the absence of approval, the protection of Article VIII, Section 2(b) would not extend to such restrictions, and judicial actions against residents of the member could weaken the implementation of its program.

4. The Fund may adopt policies on the use of its general resources, or decisions on individual requests for purchases, denying access to its resources to members imposing exchange restrictions that the Fund is not prepared to approve, or maintaining restrictions that are inconsistent with its purposes.

C. Exchange restrictions and Article VIII, Section 2(b)

1. Article VIII, Section 2(b), first sentence, imposes an obligation on each member not to enforce exchange contracts involving any other member's currency when these contracts are contrary to the exchange control regulations of that member and the regulations are consistent with the Articles.

2. When the Fund approves a member's exchange restrictions under Article VIII, Section 2(a), a necessary effect is the application of Article VIII, Section 2(b) to exchange contracts involving the member's currency that are contrary to these restrictions. Article VIII, Section 2(b) determines the consequences of the consistency of an exchange control regulation with the Articles. It does not confer on the Fund either a separate power to approve exchange control regulations, or a power to decide whether or not the consequences prescribed in the provision (unenforceability of exchange contracts) will apply. Therefore, if an exchange restriction is approved under Article VIII, Section 2(a), there is no need to specify, in the decision on approval, that Article VIII, Section 2(b) will apply. Nor would it be possible to decide that it will not apply.

3. Article VIII, Section 2(b), second sentence authorizes members to recognize other members' exchange control regulations that are consistent with the Articles, beyond the requirement of the first sentence of the provision.

II. Issues for consideration

1. The Fund has adopted an authoritative interpretation of certain aspects of the first sentence of Article VIII, Section 2(b) in 1949. Other aspects, including the meaning of terms in the provision, have not been clarified by the Fund. The task of interpreting them has been left to the courts of members.

2. As a result, each member has freely determined the scope of its obligation under Article VIII, Section 2(b). The courts of members have interpreted the provision in sometimes very different ways, in particular as regards the concept of "exchange contract" and whether it includes international loans.

3. A consequence of this lack of uniformity is that a member's exchange control regulations may be recognized under Article VIII, Section 2(b) in the territories of some members, and not in those of other members. Therefore, the burden associated with the obligation arising from the provision is not evenly borne within the membership of the Fund.

4. In these circumstances, the first question is whether the Fund wishes to promote more uniformity in the interpretation of Article VIII, Section 2(b). The last paragraph of the 1949 authoritative interpretation stated: "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)."

5. If the answer to the first question is in the affirmative, the second question would be how to promote more uniformity. Different procedures, with different legal consequences, may be envisaged.

(a) At the level of the staff, views may continue to be expressed as to the proper interpretation of Article VIII, Section 2(b), both in publications and in official communications. In some cases, the staff has expressed personal views on this matter in communications approved by the Executive Board (e.g., letters from the General Counsel). In contrast with findings of consistency or inconsistency of exchange control regulations with the Articles, these statements on the meaning of Article VIII, Section 2(b) are not intended to be made on behalf of the Fund. They are not authoritative interpretations of the Articles, but might mistakenly be regarded as such by the recipients and others.

(b) At the level of the Executive Board, a decision could be made to exercise the power of interpretation conferred upon the Board by Article XXIX. This power could be exercised either ad hoc, that is, in response to individual inquiries in connection with particular problems, or ex ante, that is, by taking the initiative of an interpretation that would be communicated to all members as was done for the 1949 interpretation. These interpretations would be binding on member countries, including their administrative and judicial authorities.

Only the adoption of an authoritative interpretation under Article XXIX would ensure--to the extent of the interpretation--uniformity of application of Article VIII, Section 2(b).

6. The purpose of Article VIII, Section 2(b) is to ensure that certain interests prevail over others. Therefore, any application of this provision by a court and any interpretation by the Fund will necessarily affect the exercise of certain creditor rights. The effect will be temporary, however, because Article VIII, Section 2(b) can only postpone the performance of contracts. In the specific case of restrictions evidenced by arrears, the intended effect of approval would be to improve prospects for an orderly settlement of arrears.

7. The staff proposes that consideration be given by the Executive Board to the adoption of an authoritative interpretation of Article VIII, Section 2(b), which would include the following elements:

(a) an "exchange contract" is a contract providing either for a payment or transfer of foreign exchange, or for an international payment or transfer (i.e., a payment between a resident and a nonresident, or a transfer of funds from one country to another);

(b) "exchange control regulations" are regulations pertaining to the acquisition, holding or use of foreign exchange as such, or to the use of domestic or foreign currency in international payments or transfers as such;

(c) a member's currency is "involved" by a contract when either the performance of the contract is to be made from assets located in the member's territory, or a resident of the member is a party to the contract;

(d) the date as of which the conditions of (i) involvement of a member's currency by a contract, (ii) contrariness of the contract to a member's exchange control regulations, and (iii) consistency of the regulations with the Fund's Articles of Agreement must be assessed is the date on which performance of the contract is sought.

8. In the light of the Executive Board discussion of this paper, the staff would prepare a further legal paper with a proposed decision. This decision could be adopted by a majority of the votes cast.

TABLE

I. Cases of Access to Fund's General Resources by Members Imposing Nonapproved Exchange Restrictions 1984-1987

(Other than Bilateral Payments Agreements with Restrictive Features Subject to Approval Under Article VIII, Section 2(a))

Country	Type of Arrangement/ Nonapproved Restrictions	Date of Approval
Mauritania	Stand-by arrangement - broken cross rates - restrictions evidenced by external payments arrears	4/12/85
Bangladesh	Stand-by arrangement - margin requirement on import letters of credit giving rise to multiple currency practice - dual exchange market	12/2/85
Nepal	Stand-by arrangement - limitation on the use of certain foreign currencies for effecting withdrawals by nonresidents of foreign currency deposits	12/23/85
Zambia	Stand-by arrangement - restrictions evidenced by external payments arrears - overall foreign exchange budget - multiple currency practice arising from the maintenance of counterpart deposit scheme for external payments arrears - limitations on personal remittances	2/21/86
The Gambia	Stand-by arrangement - restrictions evidenced by external payments arrears - multiple currency practice arising from cost to purchasers of foreign exchange of counterpart deposits required for arrears	9/17/86

Country	Type of Arrangement/ Nonapproved Restrictions	Date of Approval
Philippines	Stand-by arrangement - exchange restriction arising from limitation on the remittance of certain dividends in connection with debt to equity conversion scheme	10/24/86
China, People's Republic of	Stand-by arrangement - multiple currency practice arising from exchange tax on remitted profits of some joint ventures	11/12/86
Morocco	Stand-by arrangement - restrictions evidenced by external payments arrears	12/16/86
Costa Rica	Stand-by arrangement - restrictions evidenced by external payments arrears	10/28/87

II. Cases of Access to Fund's General Resources by Members Maintaining Bilateral Payments Agreements With Restrictive Features Subject to Approval Under Article VIII, Section 2(a)(1984-1987)

Bangladesh
Ecuador
Egypt
Ghana
Nepal
Sierra Leone
Sudan
Turkey
Zaire

Cases of Access to Fund's General Resources by Members Maintaining Exchange Restrictions Approved by the Fund at the Time of Granting Approval of Request for Use of General Resources (1984-1987)

Hungary	Stand-by	1/13/84
Sierra Leone	Stand-by	2/3/84 1/
Yugoslavia	Stand-by	4/18/84
The Gambia	Stand-by	4/23/84
Peru	Stand-by	4/26/84
Sudan	Stand-by	4/30/84 effective 6/25/84 1/
Jamaica	Stand-by	6/8/84
Zambia	Stand-by	7/18/84
Ghana	Stand-by	8/27/84 1/
Philippines	Stand-by	12/14/84
Argentina	Stand-by	12/28/84 2/
Kenya	Stand-by	1/9/85
Somalia	Stand-by	1/25/85
Ecuador	Stand-by	3/11/85 1/
Costa Rica	Stand-by	3/13/85 3/
Dominican Republic	Stand-by	4/15/85
Madagascar	Stand-by	4/23/85
Zaire	Stand-by	4/24/85 1/

Country	Type of Arrangement	Date of Approval
Yugoslavia	Stand-by	4/29/85
Chile	EFF	7/15/85
Jamaica	Stand-by	7/17/85
Guinea	Stand-by	2/3/86
Zaire	Stand-by	4/28/86 1/
Bolivia	Stand-by	6/19/86
Nigeria	Stand-by	12/12/86
Burundi	Stand-by	8/8/86
Ecuador	Stand-by	8/15/86 1/
Tanzania	Stand-by	8/28/86
Mexico	Stand-by	9/8/86
Madagascar	Stand-by	9/17/86
Ghana	Stand-By	10/15/86 1/
Sierra Leone	Stand-by	11/14/86 1/
Mexico	Stand-by	11/19/86
Argentina	Stand-by	7/23/87 1/2/
Jamaica	Stand-by	3/2/87
Zaire	Stand-by	5/15/87 1/
Egypt	Stand-by	5/15/87 1/
Somalia	Stand-by	6/29/87

Country	Type of Arrangement	Date of Approval
Guinea	Stand-by	7/29/87
Ghana	EFF	11/16/87 1/

1/ Except restrictive features of bilateral payments agreements with other members of the Fund.

2/ Except for the discriminatory exchange restrictions arising from the different minimum foreign financing terms for most imports other than capital goods, depending on the type of goods and country of origin, EBS/84/251 (12/3/84) and Supplement 1 (12/26/84), and EBS/87/155, Supplement 1 (7/10/87).

3/ Except a restriction with respect to a particular bank loan, EBS/85/31 (2/5/85) and Supplement 1 (3/12/85).

Summary of Legislative History of Article VIII, Section 2(b)

1. One of the five separate proposals for an international monetary institution circulated before the Bretton Woods Conference, the White Plan of April 1942, proposed a broad provision aimed at gaining cooperation between members in order to control capital flights; this would be achieved by members accepting the following obligations:

> "Each country agrees (a) not to accept or permit deposits or investments from any member country except with the permission of that country, and (b) to make available to the government of any member country at its request all property in form of deposits, investments, securities, of the nationals of member countries, under such terms and conditions as will not impose an unreasonable burden on the country of whom the request is made." 1/

In justification of this proposal, it was noted:

> "This is a far-reaching and important requirement. Its acceptance would go a long way toward solving one of the very troublesome problems in international economic relations, and would remove one of the most potent disturbing factors of monetary stability. Flights of capital, motivated either by prospect of speculative exchange gain, or desire to avoid inflation, or evade taxes or influence legislation, frequently take place especially during disturbed periods. Almost every country, at one time or another, exercises control over the inflow and outflow of investments, but without the cooperation of other countries such control is difficult, expensive, and subject to considerable evasion." 2/

2. Following revision, the White Plan proposal, as submitted in 1943, stated:

> "Each member country of the Fund undertakes the following:
>
> ...
>
> 4. To cooperate effectively with other member countries when such countries, with the approval of the Fund, adopt or

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1/ "Preliminary Draft Proposal for a United Nations Stabilization Fund and a Bank for Reconstruction and Development of the United and Associated Nations (April 1942)," International Monetary Fund, 1945-1965, Vol. III: Documents (1969), pp. 37-82, at p. 66.

2/ Ibid.

continue controls for the purpose of regulating international movements of capital. Cooperation shall include, upon recommendation by the Fund, measures that can appropriately be taken, such as:

(a) Not to accept or permit acquisition of deposits, securities, or investments by nationals of any member country imposing restrictions on the export of capital except with the permission of the government of that country and the Fund;

(b) To make available to the Fund or to the government of any member country such information as the Fund considers necessary on property in the form of deposits, securities and investments of the nationals of the member country imposing the restrictions." 1/

3. In the meantime, Canada decided to offer its own draft plan. By the terms of the Canadian Plan,

"[E]ach member country shall undertake the following:

. . .

3. To co-operate effectively with other member countries when such countries, with the approval of the Union, adopt or continue controls for the purpose of regulating international movements of capital.

DETAILED PROVISIONS

REGARDING 3--CO-OPERATION IN ENFORCING APPROVED EXCHANGE CONTROLS ON CAPITAL MOVEMENTS

Co-operation shall include ... measures that can appropriately be taken

(a) not to accept or permit acquisitions of deposits, securities or investments by residents of any member country imposing restrictions on the export of capital except with the permission of the government of that country and the Union;

(b) to make available to the Union or to the government of any member country full information on all property in the form of deposits, securities and investments of the residents of that country; and

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1/ "Preliminary Draft Outline of a Proposal for an International Stabilization Fund of the United and Associated Nations (Revised July 10, 1943)," ibid., pp. 83-96, at pp. 95-96.

(c) such other measures as the Union may recommend." 1/

4. The Joint Statement by Experts on the Establishment of an International Monetary Fund, the negotiating document at the Bretton Woods Conference, did not incorporate such a broad provision on cooperation regarding capital flight. In contrast, it contained a proposal to be inserted in the provision dealing with par values--for an obligation on each member "[n]ot to allow exchange transactions in its market in currencies of other members at rates outside a prescribed range based on the agreed parities." 2/ In addition, Section 3(c) of Alternative A of Joint Statement IX, 2 ("Alternative A") introduced the following provision:

> "(c) Exchange transactions in the territory of one member involving the currency of any other member, which evade or avoid the exchange regulations prescribed by that other member and authorized by this Agreement, shall not be enforceable in the territory of any member." 3/

In the view of Committee 1 of Commission I, the discussion of Section 3(c) of Alternative A "disclosed various difficulties of a legal

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1/ "Tentative Draft Proposals of Canadian Experts for an International Exchange Union (July 12, 1943)," ibid., pp. 103-18, at pp. 117-18.

2/ Proc. and Doc., Vol. I, p. 54.

3/ Ibid., pp. 54-55.

Joint Statement IX was headed "Obligations of Member Countries." The preceding part of Joint Statement IX, 2 stated:

> "2. Not to allow exchange transactions in its market in currencies of other members at rates outside a prescribed range based on the agreed parities.
>
> Alternative A
>
> & Section 3. Foreign Exchange Dealings Based on Par Values.
>
> (a) The Fund shall prescribe maximum and minimum rates for exchange transactions in the currencies of members, which shall not differ by more than ___ percent from parity.
>
> (b) Each member undertakes, through appropriate measures authorized under this Agreement, not to permit within its jurisdiction an appreciation or depreciation of the exchange value of its own currency in terms of gold beyond the range prescribed under (a) above. A member whose monetary authorities in fact freely buy and sell gold within the prescribed range, to settle international transactions, shall be deemed to be fultilling (sic) this undertaking."

nature," and it was referred, on July 6, 1944, to the Drafting Committee with instructions to defer its report. 1/

5. Soon thereafter, some further suggestions were tabled:

(a) One suggestion by the Polish delegation was to complement the provisions on obligations of member countries with a further one on cooperation with respect to capital movements, as follows:

> "SECTION 8. To cooperate with other member countries in order to enable them to render really effective such controls and restrictions as these countries might adopt or continue, with the approval of the Fund, for the purpose of regulating international movements of capital." 2/

(b) The United Kingdom, in turn, proposed different wording for Section 3, paragraph (c), according to which the phrase "shall not be enforceable in the territory of any member" would be replaced by "shall be an offense in the territories of all members" ("Alternative B"). Thus, paragraph (c) would read:

> "(c) Exchange transactions in the territory of one member involving the currency of any other member, which evade or avoid the exchange regulations prescribed by that other member and authorized by this Agreement, shall be an offense in the territories of all members." 3/

Under this proposed alternative, members would have to treat the evasion or avoidance of exchange regulations of other members as offenses, resulting in criminal, and not merely civil, sanctions. 4/

6. The Drafting Committee in turn submitted new language for the consideration of the full Committee. In so doing, the Drafting Committee noted that: "There was some feeling in the Committee in favor of an undertaking on the part of member countries to cooperate in dealing with illegal exchange transactions milder than is provided either in Alternative A or B." A new Article IX, Section 3(c) was therefore submitted to the full Committee as a third alternative ("Alternative C"):

1/ Ibid., p. 217.
2/ Ibid., p. 230.
3/ Ibid., p. 334.
4/ While referred to the Drafting Committee, that Committee referred the proposal to the full Committee, because it contained "matters of legal substance, and is, therefore, not within the competence of a drafting committee." Ibid., p. 344.

"Article IX, Section 3

(c) Exchange transactions in the territory of one member involving the currency of any other member which are outside the prescribed variation from parity set forth in (a) above shall not be enforceable in the territory of any member country.

Each member agrees to cooperate with other members in their efforts to effectuate exchange regulations prescribed by such members in accordance with this Agreement." 1/

7. On July 12, 1944, Committee 1 of Commission I considered Poland's proposal for cooperation with respect to capital movements and considered that it should not be pressed since the objective of the proposal was already covered by Alternative C. 2/

8. When the issue was discussed by Commission I on July 13, 1944, the consequences of the differences between the three drafts were explored. The U.S. delegate pointed out that Alternative C, as proposed by the Drafting Committee, should not be read as imposing on members additional obligations, beyond those under Alternative A(b), with respect to the maintenance of exchange rates. In particular, it had been contemplated that offending transactions, such as black market operations, should be rendered unenforceable, and that there was no need to go beyond that. 3/ Upon reference to the Special Committee on Unsettled Problems (Special Committee), that Committee on July 14, 1944, recommended that the Drafting Committee be asked to reconcile the differences between its proposal and Alternative A "to indicate that there is no intent of imposing criminal rather than civil penalties." 4/

9. The Second Report of the Drafting Committee of Commission I set out the completed Draft Articles of Agreement. 5/ In this document, the language of Article VIII, Section 2(b) assumed its present formulation. 6/ The Drafting Committee informed the Commission that: "All the material contained in this report has been approved in principle by the Commission at previous sessions. The present report contains, however, a new formulation of certain provisions ... [including] Paragraph (b) of Section 2 of Article VIII ..., dealing with the enforceability of exchange contracts contrary to the exchange control regulations of members." 7/

1/ Ibid., p. 502.
2/ Ibid., p. 542.
3/ Informal Minutes, Commission 1, United Nations Monetary and Financial Conference at Bretton Woods, July 1944, p. 43.
4/ Proc. and Doc., Vol. I, p. 605.
5/ Ibid., pp. 765-808.
6/ The provisions obliging members to respect par values in international transactions were moved to Article IV; ibid., p. 771.
7/ Ibid., p. 808.