

1989

## Article VII, Section 2(b), International Monetary Cooperation, and the Courts

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### Recommended Citation

Werner F. Ebke, *Article VII, Section 2(b), International Monetary Cooperation, and the Courts*, 23 INT'L L. 677 (1989)

<https://scholar.smu.edu/til/vol23/iss3/7>

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# Article VIII, Section 2(b), International Monetary Cooperation, and the Courts

## I. Prologue

The rise of article VIII, section 2(b) of the Articles of Agreement of the International Monetary Fund (IMF)<sup>1</sup> is an unparalleled phenomenon in international law. The history of international law reveals no other provision that has had such an impact. In some forty years, the provision has carried along with it academics who were once dismissive and judges who once rejected, misunderstood, or overlooked it.<sup>2</sup> Article VIII, section 2(b) is no longer a conflict solution device associated solely with the Western Hemisphere countries. Instead, countries on every continent, including socialist and developing countries,<sup>3</sup> are

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1. See Articles of Agreement of the International Monetary Fund, Second Amendment, approved April 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 [hereinafter Articles of Agreement or Fund Agreement]. The first sentence of art. VIII, § 2(b) of the Articles of Agreement provides:

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

The original Articles of Agreement of the International Monetary Fund (Bretton Woods Agreement) took effect on December 27, 1945, the First Amendment on July 28, 1969, and the Second Amendment on April 1, 1978. See Gold, *Some Effects on Private Parties and Private Transactions*, in *PROSPECTS FOR INTERNATIONAL LENDING AND RESCHEDULINGS* 13-1, 13-2 (J. Norton ed. 1988) [hereinafter *INTERNATIONAL LENDING*]. The text of art. VIII, § 2(b) has remained the same in all three versions of the Articles of Agreement.

2. See generally W. EBKE, *INTERNATIONALES DEISENRECHT* (1989).

3. The People's Republic of China, Hungary, Romania, Vietnam, Yugoslavia and a number of other socialist countries in Africa, Asia, and Latin America are members of the International Monetary Fund. See R. EDWARDS, *INTERNATIONAL MONETARY COLLABORATION* 24-25 (1985). Poland, which was one of the original members of the IMF, became a member again in 1986. See IMF, *ANNUAL REPORT* 63 (1986). The Soviet Union participated in the Bretton Woods Conference, but did

now subject to article VIII, section 2(b), and many of them implement the provision judicially and administratively, though with substantial variations. Each year sees new court decisions reviewing article VIII, section 2(b) and new publications dealing with it. More and more frequently, arbitration tribunals, too, take article VIII, section 2(b) into consideration.<sup>4</sup> Most importantly, the Restatement (Third) of the Foreign Relations Law of the United States now includes a provision on the enforcement of foreign exchange controls that paraphrases article VIII, section 2(b).<sup>5</sup> As has been pointed out correctly,<sup>6</sup> this is a significant development at a time where exchange controls are revived by numerous countries as part of the effort to alleviate the burden of external debt and to defend international monetary and financial structures.<sup>7</sup>

When we deal with article VIII, section 2(b), we deal with a judicial oak that has grown from little more than a legislative acorn. Neither the drafters of the Articles of Agreement in 1944 nor the legislators of the IMF Member States, when giving effect under their domestic law to article VIII, section 2(b) foresaw, I suppose, the present state of the law with respect to article VIII, section 2(b). Recent years have witnessed a rapid increase in actions in which article VIII, section 2(b) has been invoked as a defense. Infrequent in the 1950s, such actions have, by 1989, ripened into a complex body of law. Article VIII, section 2(b) must, no doubt, rate as the most profoundly powerful instrument in the hands of

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not become a member of the International Monetary Fund or the International Bank for Reconstruction and Development (The World Bank). See 2 THE INTERNATIONAL MONETARY FUND 1945-1965 5, 514 (J. Horsefield ed. 1969) [hereinafter 2 IMF HISTORY].

4. See, e.g., Arbitration Award of March 23, 1981, Private Arbitration Tribunal, 131 JOURNAL DES TRIBUNAUX 727, 729 (1983). I should like to thank Philippe Malherbe, Esq., of Brussels, Belgium, for bringing this case to my attention. See also Gold, *The Iran-United States Claims Tribunal and the Articles of Agreement of the International Monetary Fund*, 18 GEO. WASH. J. INT'L L. & ECON. 537 (1985). For a detailed discussion of the arbitrability of art. VIII, § 2(b), see W. EBKE, *supra* note 2, ch. 2. See also J. LEW, APPLICABLE LAW IN INTERNATIONAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 405-409 (1978); Sandrock, *Are Disputes over the Application of Art. VIII Sect. 2(b) of the IMF-Treaty Arbitrable?*, 23 INT'L LAW. No. 4 (1989) (forthcoming).

5. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 822 (1988) [hereinafter RESTATEMENT]. For a critical analysis of the international monetary law provisions of the Tentative Final Draft (July 15, 1982) of the Restatement, see Gold, *The Restatement of the Foreign Relations Law of the United States (Revised) and International Monetary Law*, 22 INT'L LAW. 3 (1988).

6. Silkenat, *The Restatement and International Monetary Law: The Practitioner's Perspective*, 22 INT'L LAW. 31, 32 (1988).

7. While the trend toward liberalization of the regulations governing foreign exchange and capital transfers has continued in recent years and has been evident in both industrialized and developing countries, many countries maintain exchange systems that are not free of restrictions on payments and transfers for current international transactions and international capital movements, including restrictions on portfolio investments, direct investments, and resident and nonresident foreign exchange accounts. For a country-by-country analysis, see IMF, EXCHANGE ARRANGEMENTS & EXCHANGE RESTRICTIONS 63-540 (1988) [hereinafter EXCHANGE ARRANGEMENTS]. For a succinct overview of the decline of exchange controls during the first 25 years of the Fund's existence, see M. GARRITSEN DE VRIES, *THE IMF IN A CHANGING WORLD 1945-85*, at 30-39 (1986).

courts and administrative agencies<sup>8</sup> of the Member States of the IMF, designed to foster, within the Fund,<sup>9</sup> the institutional objectives of international monetary cooperation and collaboration at each stage of international business and finance transactions. Without belittling the role of the judiciary, it is fair to say that legal scholars have contributed greatly to the extraordinary development of the law as to article VIII, section 2(b). The emerging theories of the enforcement of foreign exchange controls under article VIII, section 2(b) demonstrate how influential and authoritative a force legal scholars can be in the evolution and further development of law.

A. ARTICLE VIII, SECTION 2(b), LEGAL  
SCHOLARSHIP, AND SIR JOSEPH GOLD

Sir Joseph Gold is probably the single most distinguished example of the seminal role that legal writers have played, and continue to play, in the intellectual upheaval of international monetary law. In more than 250 publications and numerous lectures, Sir Joseph has focused upon both the institutional<sup>10</sup> and the transactional<sup>11</sup> aspects of the international monetary system. While he has written and lectured extensively on all facets of international monetary law, Sir Joseph has made no secret of the fact that his true love has always lain with article VIII, section 2(b), the inherent conflict solution potential of which seems to have fascinated him professionally and academically from the very beginning of his career as an international civil servant.<sup>12</sup>

The question of whether and to what extent members and nonmembers of the IMF are to give effect to exchange controls maintained or imposed by other states has been a permanent practical as well as theoretical challenge to him. In his untiring endeavor to help shape the post-World War II law of enforcement of

8. Art. VIII, § 2(b) is controlling on both courts and administrative agencies of the IMF Member States. See Gold, *supra* note 1, at 13-61 n.5. Unfortunately, our knowledge of the practice of the Member States' agencies in relation to art. VIII, § 2(b) is rather limited, partly because of the lack of public reports of the agencies' activities with respect to the enforcement of exchange restrictions. For this reason, this essay analyzes only the practice of the courts of the IMF Member States.

9. Art. VIII, § 2(b) does not apply in the relations between members of the IMF and nonmembers. See G. DELAUME, *LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS* 72 (1988).

10. See, e.g., J. GOLD, *EXCHANGE RATES IN INTERNATIONAL LAW AND ORGANIZATION* (1988); J. GOLD, *LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS*, vol. 1 (1979), vol. 2 (1984) [hereinafter 1-2 *LEGAL AND INSTITUTIONAL ASPECTS*]. See also J. GOLD, *THE INTERNATIONAL SYSTEM OF PAYMENTS: KEYNES, CONVERTIBILITY, AND THE INTERNATIONAL MONETARY FUND'S ARTICLES OF AGREEMENT* (1981); J. GOLD, *VOTING AND DECISIONS IN THE INTERNATIONAL MONETARY FUND* (1972); J. GOLD, *THE STAND-BY ARRANGEMENTS OF THE INTERNATIONAL MONETARY FUND* (1970); Gold, *Developments in the International Monetary System, the International Monetary Fund and International Monetary Law Since 1971*, 174 *RECUEIL DES COURS* 107 (1982).

11. See, e.g., J. GOLD, *THE FUND AGREEMENT IN THE COURTS*, vol. 1 (1962), vol. 2 (1982), vol. 3 (1986) [hereinafter 1-3 *FUND AGREEMENT*].

12. Sir Joseph joined the IMF staff on October 21, 1946. See Gold, *Some Impressions of the Early Fund*, 21 *FIN. & DEV.* 23, 23 (1984).

exchange restrictions, Sir Joseph has always been aware that an evenhanded and impartial approach to the enforcement of restrictions on payments and transfers for current international transactions<sup>13</sup> and on international capital movements<sup>14</sup> is needed to effectuate the Fund's objective of international monetary cooperation and collaboration.<sup>15</sup>

In his first paper entitled *The Fund Agreement in the Courts*,<sup>16</sup> Sir Joseph attempted, on the basis of some early New York cases, to pierce the veil that covered article VIII, section 2(b). Shortly thereafter, the paper appeared in French in a prestigious French law review.<sup>17</sup> The second installment of *The Fund Agreement in the Courts*<sup>18</sup> was published in French as well.<sup>19</sup> More recently, some of Sir Joseph's articles on article VIII, section 2(b) have also been translated into languages other than French, including German<sup>20</sup> and Spanish.<sup>21</sup> As the body of law under article VIII, article 2(b) developed more rapidly, some European law reviews published abbreviated versions of more extensive studies of Sir Joseph in English,<sup>22</sup> which gave his views an even wider exposure.

13. Articles of Agreement, *supra* note 1, art. VIII, § 2(a), art. XXX(d).

14. Articles of Agreement, *supra* note 1, art. IV, § 1. For details of the IMF regime applicable to capital movements, see R. EDWARDS, *supra* note 3, at 394-96, 455-60; J. GOLD, INTERNATIONAL CAPITAL MOVEMENTS UNDER THE LAW OF THE INTERNATIONAL MONETARY FUND (1977).

15. Articles of Agreement, *supra* note 1, arts. I, IV, § 1. For thoughtful analyses of the development of international monetary cooperation, see D. CARREAU, SOUVERAINETE ET COOPERATION MONETAIRE INTERNATIONALE (1970); K. DAM, THE RULES OF THE GAME: REFORM AND EVOLUTION IN THE INTERNATIONAL MONETARY SYSTEM (1982). For an economic analysis of the future perspectives on international monetary cooperation, see De Grauwe, *What Are the Scope and the Limits of Fruitful International Monetary Cooperation in the 1980s?*, in INTERNATIONAL MONEY AND CREDIT: THE POLICY ROLES 375 (G. von Furstenberg ed. 1983).

16. Gold, *The Fund Agreement in the Courts*, IMF STAFF PAPERS 323-33 (1950-51).

17. Gold, *L'application des Statuts du Fonds Monétaire par les Tribunaux*, 60 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE [R.C.D.I.P.] 582 (1951).

18. Gold, *The Fund Agreement in the Courts—II*, IMF STAFF PAPERS 490-94 (1951-52).

19. Gold, *Récente Application des Statuts du Fonds Monétaire par les Tribunaux*, 13 ANNALES DE DROIT ET DE SCIENCES POLITIQUES 375-82 (1953).

20. See, e.g., Gold, *Das Währungsabkommen von Bretton Woods vom 22.7.1944 in der Rechtsprechung*, 19 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RabelsZ] 601 (1954); Gold, *Das Währungsabkommen von Bretton Woods vom 22.7.1944 in der Rechtsprechung—II*, 22 RabelsZ 601 (1957) [hereinafter *Währungsabkommen II*]; Gold, *Das Währungsabkommen von Bretton Woods vom 22.7.1944 in der Rechtsprechung—III*, 27 RabelsZ 606 (1962).

21. See, e.g., Gold, *Control de Cambios: Acto de Estado, Interés Público, Los Artículos del Convenio con el Fondo Monetario Internacional y Otras Complicaciones*, 6 REVISTA DEL TRIBUNAL FISCAL DE LA FEDERACION 1053 (1985); Gold, *Algunos Efectos de los Artículos del Convenio Constitutivo del Fondo Monetario Internacional en el Derecho Internacional Privado*, 14 ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 295 (1982).

22. See, e.g., Gold, *The International Monetary Fund and the International Recognition of Exchange Control Regulations: The Cuban Insurance Cases*, 1967 REVUE DE LA BANQUE 523; see also Gold, *The Bretton Woods Agreement of July 22, 1944 in the Courts—IV*, 38 RabelsZ 683 (1974). Gold, *Interpretation by the International Monetary Fund of its Articles of Agreement*, 16 INT'L & COMP. L.Q. 289 (1967).

In 1962, the IMF published the first collection of articles written by Sir Joseph between 1951 and 1962.<sup>23</sup> The concepts and problems to which article VIII, section 2(b) gives rise are exposed with such moderation and felicity of expression in these articles that they remain essential reading today, notwithstanding the wealth of writing which has succeeded them. In 1982 and 1986, the Fund published the second<sup>24</sup> and third<sup>25</sup> volume of *The Fund Agreement in the Courts*.

It is primarily because of the publication of selected essays in book form and the appearance of translations of some of his articles in European law journals that commentators and courts of IMF Member States outside the English-speaking world became familiar with Sir Joseph's work, his ideas and conclusions. In a remarkable and admirable effort, Sir Joseph in turn kept abreast with the multifarious developments of the jurisprudence and the legal literature with respect to article VIII, section 2(b) and carefully analyzed, and sometimes heavily criticized,<sup>26</sup> court decisions and arbitral awards that applied, or should have applied, article VIII, section 2(b).

Sir Joseph's broad-based comparative approach to the growing body of case law vividly illustrates that while they are distinct, the domains of legal science and practice complement each other. Sir Joseph is a living example of the proposition that legal science and practice are partners, and that their successful cooperation constitutes the best applied science and the best sort of legal theory.<sup>27</sup> His studies also evidence that, at least as far as the enforcement of exchange controls is concerned, comparative law as a method is far from having what has been called an identity crisis.<sup>28</sup>

## B. THE PURPOSE

My essay has a modest intent. Rather than plunging into the delicate issues that have arisen in connection with the interpretation of the elements of article VIII, section 2(b) by the courts of various IMF Member States and illustrating how the courts have tackled the enforcement problems that are common to most,<sup>29</sup> the essay explores how the fundamental inconsistency between the governmental recognition of the objectives which the IMF as an institution is to

23. 1 FUND AGREEMENT, *supra* note 11.

24. 2 FUND AGREEMENT, *supra* note 11.

25. 3 FUND AGREEMENT, *supra* note 11.

26. See, e.g., Gold, "Exchange Contracts," *Exchange Control, and the IMF Articles of Agreement: Some Animadversions on Wilson, Smithett & Cope Ltd. v. Terruzzi*, 33 INT'L & COMP. L.Q. 777 (1984).

27. See M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 10 (1985).

28. *Id.*

29. For a detailed analysis of the issues, see 1-3 FUND AGREEMENT, *supra* note 11. See also W. EBKE, *supra* note 2; R. EDWARDS, *supra* note 3, at 477-90; F. MANN, *THE LEGAL ASPECT OF MONEY* 372-401 (4th ed. 1982); Gianviti, *Le contrôle des changes étrangers devant le juge national (Part*

foster, and the judicial disregard of them by the courts of some IMF Member States in their interpretation of article VIII, section 2(b) can be overcome. In his publications and lectures, Sir Joseph has repeatedly bemoaned this inconsistency and has argued strongly in favor of uniformity of interpretation of article VIII, section 2(b).<sup>30</sup> He made this point particularly forcefully in two papers prepared for the conference on *Exchange Controls and External Indebtedness: Are the Bretton Woods Concepts Still Workable*,<sup>31</sup> which took place in April 1984 in Washington, D.C. under the auspices of the American Society of International Law.<sup>32</sup> It is, therefore, more than appropriate in this article, which is dedicated to Sir Joseph, to contribute to Sir Joseph's endeavor of advancing the institutional objectives of the Fund at the transactional level of international business and finance where article VIII, section 2(b) applies.

The primary objective of this essay is to suggest that article VIII, section 2(b) is not merely entrusted with the maintenance of the existing and future systems of exchange restrictions carrying the Fund's endorsement<sup>33</sup> and with preserving the smooth functioning of these systems by means of mutual recognition of the restrictions, but the Articles of Agreement in general and article VIII, section 2(b) in particular should also be used to encourage and stimulate progressive developments within the Fund and in the relations between IMF members and non-members toward an ever closer international monetary cooperation. While article VIII, section 2(b) as a principally transaction-related provision may not ultimately transform the institutional objectives of the Fund, it may well be able judicially to create a normative atmosphere within which an acceptance of the need for a coherent political, economic, and legal acceptance of the objectives of the IMF can grow, both institutionally and transactionally. It was the perception of the drafters of the Bretton Woods Agreement in 1944 that only global thinking and planning well ahead into the future can achieve a perspective on international

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I-II), 69 R.C.D.I.P. 479, 659 (1980); Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319 (1975); Note, *The Unenforceability of International Contracts Violating Foreign Exchange Regulations: Article VIII, Section 2(b) of the International Monetary Fund Agreement*, 25 VA. J. INT'L L. 967 (1985).

30. See, e.g., 3 FUND AGREEMENT, *supra* note 11, at 623-32.

31. Gold, *Exchange Controls and External Indebtedness: Are the Bretton Woods Concepts Still Workable?*, 7 HOUS. J. INT'L L. 1 (1984) [hereinafter *External Indebtedness*]; Gold, *Exchange Control: Act of State, Public Policy, the IMF's Articles of Agreement, and Other Complications*, 7 HOUS. J. INT'L L. 13 (1984) [hereinafter *Exchange Control*].

32. The papers presented at the Conference are published in 7 HOUS. J. INT'L L. 1 (1984).

33. The term "endorsement" includes both "approval" and "authorization." If an IMF Member State restricts payments and transfers for current international transactions within the meaning of art. XXX(d), it needs the approval of the IMF under art. VIII, sec. 2(a). If a restriction on payments and transfers on current international transactions has been maintained since the Member State joined the Fund, either in the original form of the restriction or with no more than the adaptation of it to changing circumstances, and if the Member State avails itself of the transitional arrangements of art. XIV, § 2, the restriction is authorized by the Articles of Agreement without the necessity for approval by the Fund. See *Exchange Control*, *supra* note 31, at 20.

monetary problems and prospects.<sup>34</sup> The same unconstrained reformist thinking is also needed within the courts and administrative agencies of the IMF Member States to revitalize the idea of international monetary cooperation and collaboration in connection with private international business and financial transactions. In this process of reform, there are, without question, still numerous undiscovered possibilities for enhancing the roles and perspectives of the law with respect to article VIII, section 2(b) and of lawyers in service to the future of international monetary law.

## II. The Raging Controversy: Macro Objectives versus Micro Motives

Before the gap that exists between the institutional objectives of the IMF and their implementation within international business and finance transactions is addressed, a closer look at article VIII, section 2(b) and the legal environment within which it operates may be helpful.

### A. THE REVOLUTION IN THE CONFLICT OF LAWS

Article VIII, section 2(b) is a truly revolutionary provision. It constitutes a radical departure from the traditional (pre-Bretton Woods) view of the courts of most countries, namely that exchange control regulations, like tax and penal laws, are entitled to recognition only in the territory of the state that promulgated them.<sup>35</sup> Under article VIII, section 2(b), by contrast, a court or administrative agency of an IMF member state may not disregard another Fund member's exchange controls even if an "exchange contract" is, by its terms or by virtue of the choice-of-law rules of the forum, not subject to the laws of the member state maintaining or imposing the controls.<sup>36</sup> Furthermore, a Fund member may

34. For details of the Bretton Woods Conference and its prehistory, see 1 IMF HISTORY, *supra* note 3, at 3-118; see also M. GARRITSEN DE VRIES, *supra* note 7, at 5-20; Gold, *Keynes and the Articles of the Fund*, 18 FIN. & DEV. 38 (1981).

35. The pre-Bretton Woods rule, never precisely analyzed but quite regularly followed, was derived from Lord Mansfield's famous dictum in *Holman v. Johnson*, 1 Cowp. 341, 58 Eng. Rep. 1120 (1775). For a more detailed exposition of the so-called "revenue rule," see A. LOWENFELD, THE INTERNATIONAL MONETARY SYSTEM 366-67 (2d ed. 1984).

36. This point was made very clear as early as 1949 in the Decision of the Executive Board of the IMF of June 10, 1949, which thus far is the only decision that interprets art. VIII, § 2(b). See Ex. Bd. Dec. No. 446-4 of June 10, 1949, in IMF, SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND 273-74 (12th issue 1986) [hereinafter SELECTED DECISIONS], reprinted in 14 Fed. Reg. 5208 (1949). In explaining art. VIII, § 2(b) in this decision, the Executive Board of the Fund stated, *inter alia*, 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.

SELECTED DECISIONS at 274. The decision of June 10, 1949 was issued under art. XVIII of the original Articles of Agreement (Bretton Woods Agreement) which, in amended form, is now art. XXIX.



not, as a general rule,<sup>37</sup> refuse to enforce another member's exchange controls on the ground that recognition of them would be contrary to the public policy (*ordre public*) of the forum.<sup>38</sup> Last, not least, article VIII, section 2(b) binds all members of the IMF, whether or not they are availing themselves of the transitional arrangements in accordance with article XIV, section 2.<sup>39</sup> Thus, even members that have notified the Fund that they are not yet prepared to undertake the obligations set forth in article VIII, sections 2, 3 and 4<sup>40</sup> are bound to recognize a defense based upon article VIII, section 2(b); provided, of course, the conditions of the provision are met. Where article VIII, section 2(b) applies, it preempts other statutory or judicially created principles of choice of law.<sup>41</sup>

Numerous international treaties reinforce the obligations assumed by the members of the IMF under the Articles of Agreement, including the obligations under article VIII, section 2(b). Thus, for example, the Friendship Treaty between the United States and the Federal Republic of Germany of 1954<sup>42</sup> provides that "no provision of the present Treaty shall be applied in such a manner as to alter arrangements applicable to either Party by virtue of its

37. An exception to the general rule should be recognized if, but only if, an exchange control regulation carrying the Fund's endorsement is applied, by the Member State that has maintained or imposed it consistently with the Fund Agreement, in a manner which is designed to discriminate, or in effect discriminates, against individuals or groups of persons on the grounds of race, color, creed, religion, nationality or age. See Ebke, Book Review, 42 JURISTENZEITUNG [JZ] 456, 456 (1987). In such cases, courts should, however, examine first whether art. VIII, § 2(b) applies. Only if all of the conditions of art. VIII, § 2(b) are met is there room for the further question of whether the particular exchange control regulation has been applied in a discriminatory manner that is so unacceptable to the forum as to warrant resort to public policy (*ordre public*). The case *J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975), cert. denied, 423 U.S. 866 (1975), is an unfortunate example of the proposition that courts of many IMF Member States tend to resort too easily and prematurely to public policy (*ordre public*) to cope with foreign exchange controls that are discriminatory or confiscatory in nature. See also 3 FUND AGREEMENT, *supra* note 11, at 415-17.

38. See Ex. Bd. Dec. No. 446-4 which states:

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

SELECTED DECISIONS, *supra* note 36, at 274.

39. See Ex. Bd. Dec. No. 446-4, *id.*, which, in pertinent part, states: "By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2."

40. As of January 1, 1989, 65 of the 151 members of the IMF have accepted their obligations under art. VIII, §§ 2-4, whereas 86 members are availing themselves of transitional arrangements under art. XIV, § 2. See Letter from Sir Joseph Gold to Werner Ebke (Jan. 5, 1989).

41. This point is made particularly clear in art. 3(2) of the new German Statute of Private International Law of July 25, 1986, 1986 Bundesgesetzblatt (German Official Gazette) [BGBl] I 1142.

42. See Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, Oct. 29, 1954, 7 U.S.T. 1839; T.I.A.S. No. 3593.

membership in the International Monetary Fund.”<sup>43</sup> The Code of Liberalisation of Current Invisible Operations of the Organisation of Economic Co-operation and Development (OECD)<sup>44</sup> and the OECD Code of Liberalisation of Capital Movements<sup>45</sup> contain comparable provisions. Similarly, the Treaty Establishing the European Economic Community (EEC)<sup>46</sup> of 1957 makes it perfectly clear that it does not intend to affect the obligations of the Community’s Member States arising from international agreements concluded before the entry into force of the EEC Treaty.<sup>47</sup> The Member States of the EEC have agreed, however, that to the extent that such agreements are not compatible with the EEC Treaty, they will take all appropriate steps to eliminate the incompatibilities.<sup>48</sup>

The multiple reinforcements of the obligations of the members of the IMF reflect the international acceptance of the significance of the macro objectives that the Fund is intended to foster. As set forth in article I of the Articles of Agreement, the IMF aims at promoting international monetary cooperation, facilitating the expansion and balanced growth of international trade, stability and equity in the exchanges, the convertibility of currencies, the availability of resources to give members the opportunity to correct imbalances in their balances of payments and shortening the duration and lessening the degree of disequilibrium in balances of payments.<sup>49</sup> Additionally, article IV, section 1 recognizes that it is an essential purpose of the international monetary system “to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth.”<sup>50</sup> It also recognizes

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43. *Id.* art. XII, § 2.

44. See CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS art. 4 (OECD 1988), which reads: “Nothing in this Code shall be regarded as altering the obligations undertaken by a Member as a Signatory of the Articles of Agreement of the International Monetary Fund or other existing multilateral international agreements.”

45. See CODE OF LIBERALISATION OF CAPITAL MOVEMENTS art. 4 (OECD 1988).

46. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter EEC Treaty].

47. *Id.* art. 234(1). The Federal Republic of Germany and the other five original Member States of the European Economic Community (i.e., Belgium, France, Italy, Luxembourg, and The Netherlands) accepted their obligations under art. VIII, §§ 2-4, on February 15, 1961. See 1 IMF HISTORY, *supra* note 3, at 481. See also M. GARRITSEN DE VRIES, BALANCE OF PAYMENTS ADJUSTMENT 1945-1986, at 31 (1987). Today, Greece and Portugal are the only EEC Member States that are availing themselves of transitional arrangements under art. XIV, sec. 2. See EXCHANGE ARRANGEMENTS, *supra* note 7, at 544-47.

48. EEC Treaty, *supra* note 46, art. 234(2). For a detailed analysis of the possibilities that the Commission and the Member States of the European Communities have to remedy violations by a member state of obligations arising under the EEC Treaty, see Ebke, *Enforcement Techniques Within the European Communities: Flying Close to the Sun with Waxen Wings*, 50 J. AIR L. & COM. 685 (1985).

49. See Articles of Agreement, *supra* note 1, art. I. For a more detailed discussion of the IMF’s objectives, see Gold, *Public International Law in the International Monetary System*, in PUBLIC INTERNATIONAL LAW AND THE FUTURE WORLD ORDER (Liber Amicorum in Honor of A.J. Thomas, Jr.) 15-1, 15-6 to -7 (J. Norton ed. 1987).

50. Articles of Agreement, *supra* note 1, art. IV, § 1.

as a principal objective of the IMF the "continuing development of the orderly underlying conditions that are necessary for financial and economic stability."<sup>51</sup> While the various purposes stated in article I and article IV, section 1 are to a considerable extent interdependent and overlapping and, in some cases, conflicting with each other, a principled and considered evaluation of each of them at the various stages of governmental, judicial, or administrative action or inaction will eventually contribute to the attainment of the purposes.<sup>52</sup>

#### B. THE KEY ELEMENT: "EXCHANGE CONTRACTS"

Despite their general acceptance of the need for international monetary cooperation and collaboration and their general support of the Fund's macro objectives, the members of the IMF are apt to be deflected by national interests. The events preceeding and immediately following the "closing of the gold window" in 1971<sup>53</sup> are classic examples in support of this proposition.<sup>54</sup> The deflection is not, however, confined to the institutional level of international monetary cooperation and collaboration. At the transactional level, too, the courts of the Member States occasionally have not been sympathetic to the macro objectives when, for the time being, they should have taken precedence over micro interests of the forum. While they seem to realize that the objectives of international monetary cooperation and collaboration may require, at least temporarily, enforcement of exchange restrictions that have been approved by the Fund or are authorized under the Articles of Agreement, national egoism and special interests, such as the desire to strengthen the domestic financial markets and to protect local creditors against exchange controls of other members, can become so dominant as to lead courts of the IMF Member States to take a rather restrictive view with respect to article VIII, section 2(b).<sup>55</sup> The current debate of whether international loan agreements are "exchange contracts" within the meaning of article VIII, section 2(b) vividly illustrates this point.

51. *Id.*

52. For a more detailed exposition of this view, see J. GOLD, *THE RULE OF LAW IN THE INTERNATIONAL MONETARY FUND* 5-7 (1980); see also Gold, *supra* note 1, at 13-70.

53. For a vivid description of the events, see A. LOWENFELD, *supra* note 35, at 113-43. See also Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443, 447-50 (1983).

54. See generally Gold, *The Legal Structure of the Par Value System*, 5 LAW & POL'Y INT'L BUS. 155 (1973); Gold, *Unauthorized Changes of Par Value and Fluctuating Exchange Rates in the Bretton Woods System*, 65 AM. J. INT'L L. 113 (1971); see also Gold, *Law and Reform of the International Monetary System*, 10 J. INT'L L. & ECON. 371, 389-92 (1975).

55. See Zamora, *Recognition of Foreign Exchange Controls in International Creditors' Rights Cases: The State of the Art*, 21 INT'L LAW. 1055 (1987). In reviewing U.S. cases that have favored a narrow interpretation of the phrase "exchange contracts," Professor Zamora concludes that "[t]his creditor-oriented view may be seen to strengthen U.S. financial markets, but it does not necessarily accord with the goal of international monetary cooperation that the Fund Agreement was intended to foster." *Id.* at 1065. See also *External Indebtedness*, *supra* note 31, at 10-11.

Although Judge Meyer, in his dissenting opinion in *Weston Banking Corp. v. Turkiye Garanti Bankasi*,<sup>56</sup> is sympathetic to a broad interpretation of the phrase "exchange contract," which would include international lending transactions, no court in the United States has adopted such a view.<sup>57</sup> It is well settled today in United States case law that loan agreements do not fall within the ambit of article VIII, section 2(b).<sup>58</sup> As a result, in international lending cases, exchange controls of IMF Member States cannot expect the protection in the United States that article VIII, section 2(b) was intended to grant even if the controls carry the Fund's endorsement. If it is determined that a transaction is not an "exchange contract," a court will normally proceed in accordance with traditional choice-of-law principles.<sup>59</sup> These principles were typically developed before international monetary cooperation and, consequently, are normally less favorable to foreign exchange controls than article VIII, section 2(b).<sup>60</sup>

The courts of the Federal Republic of Germany, by contrast, have traditionally been much more receptive to defenses based upon article VIII, section 2(b). The vast majority of the more than 25 article VIII cases that have been reported in Germany,<sup>61</sup> since Germany became a member of the IMF some 35 years ago,<sup>62</sup> favor a broad, debtor-oriented interpretation of article VIII, section 2(b), especially of its key words "exchange contract." As early as

56. *Weston Banking Corp. v. Turkiye Garanti Bankasi*, 442 N.E.2d 1195, 1204 (N.Y. 1982) (Meyer, J., dissenting).

57. See RESTATEMENT, *supra* note 5, § 822 comment b.

58. See, e.g., *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 570 F. Supp. 870, 900 (S.D.N.Y. 1983); see also *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866 (1975); *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 12 N.Y.2d 371, 239 N.Y.S.2d 872, 190 N.E.2d 235 (1963), *cert. denied*, 376 U.S. 906 (1964); *accord Note, supra* note 29, at 998-99. *Contra Santucci, Sovereign Debt Resolution Through the International Monetary Fund: An Alternative to the Allied Bank Decision*, 14 DEN. J. INT'L L. & POL'Y 1, 10 (1985); Williams, *supra* note 29, at 338.

59. RESTATEMENT, *supra* note 5, § 822 comment c.

60. See, e.g., Domke, *Foreign Exchange Restrictions (A Comparative Survey)*, 21 J. COMP. LEGIS. & INT'L L. 54 (1939); Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 HARV. L. REV. 30 (1942); see also Cabot, *Exchange Control and Conflict of Laws: An Unsolved Puzzle*, 99 U. PA. L. REV. 476 (1951).

61. The term "Germany" is used in this essay as an abbreviation for the Federal Republic of Germany, including West Berlin. The German Democratic Republic, like the Soviet Union, is not a member of the IMF.

62. Germany became a member of the IMF on August 14, 1952. See Gold, *The Group of Five in International Monetary Arrangements*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW 86, 98 n.65 (B. Cheng & E. Brown eds. 1988). See also Law Authorizing Membership of the Federal Republic of Germany in the International Monetary Fund and the International Bank for Reconstruction and Development of July 28, 1952, 1952 BGBI.II 637, 728. It is well settled today that art. VIII, § 2(b) is also binding on the courts and administrative agencies of West Berlin. See Judgment of July 8, 1974, Kammergericht [KG] (Court of Appeals), Berlin, 1974 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIET DES INTERNATIONALEN PRIVATRECHTS [IPRSpr] 364, 365. For a discussion of the negotiations between the Federal Republic of Germany and the IMF regarding the representation of West Berlin in the Fund, see J. GOLD, MEMBERSHIP AND NON-MEMBERSHIP IN THE INTERNATIONAL MONETARY FUND 418-22 (1974). For a thorough analysis of the legal status of Berlin, see I. HENDRY & M. WOOD, THE LEGAL STATUS OF BERLIN (1987).

1954, the Court of Appeals of the State of Schleswig-Holstein stated that only a broad construction of the phrase "exchange contract" is consistent with the objectives of the International Monetary Fund.<sup>63</sup> More recently, the Court of Appeals of Berlin, too, has made it very clear that only the broad reading of article VIII, section 2(b) "takes adequate account of the economic sense of the Fund Agreement."<sup>64</sup>

These and other recent cases are based upon the assumption that if the exchange controls of an IMF member state carry the Fund's endorsement, their efficacy should not be undermined by judicial disregard of them. Most contemporary commentators in Germany seem to share this view.<sup>65</sup> German case law supports the proposition that international contracts for the sale of goods or the rendering of services,<sup>66</sup> licensing agreements,<sup>67</sup> sureties (*Buergschaften*)<sup>68</sup> and guarantees (*Garantien*)<sup>69</sup> are "exchange contracts" within the meaning of article VIII, section 2(b). There is language in some recent cases that written acknowledgments of debts (*Schuldanerkenntnisse*),<sup>70</sup> international money collection agreements,<sup>71</sup> contracts for the international movement of capital<sup>72</sup> and even present gifts<sup>73</sup> may also be held to fall within the ambit of article VIII, section 2(b).

63. Judgment of Apr. 1, 1954, Oberlandesgericht [OLG] (Court of Appeals), Schleswig-Holstein, 1954-1955 IPRspr 463, 465.

64. Judgment of July 8, 1974, 1974 IPRspr at 366.

65. See Kohl, *Zur Anwendbarkeit von Art. VIII Abschnitt 2(b) des Abkommens von Bretton Woods*, 6 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 285, 286 (1986).

66. See, e.g., Judgment of Sept. 28, 1959, OLG, Hamburg, 1958-1959 IPRspr 547, 548; Judgment of Dec. 28, 1954, Landgericht [LG] (District Court), Hamburg, 1954-1955 IPRspr 467, 470; see also Judgment of June 24, 1970, Bundesgerichtshof [BGH], W. Ger., 1970 IPRspr 333, 334.

67. Judgment of July 5, 1978, OLG, Bamberg, 1978 IPRspr 309, 311.

68. Judgment of Mar. 11, 1970, BGH, W. Ger., 1970 IPRspr 327, 328; Judgment of Oct. 17, 1986, OLG, Munich, 32 RECHT DER INTERNATIONALEN WIRTSCHAFT/AUSSENWIRTSCHAFTSDIENST DER BETREIBSBERATER [RIW/AWD] 998, 999 (1986).

69. See Judgment of May 21, 1964, BGH, W. Ger., 1964-1965 IPRspr 574, 576 (suggesting that guarantees are "exchange contracts" if they are "very closely related" to the underlying debt); see also Judgment of July 11, 1961, KG, Berlin, 1966-1967 IPRspr 618.

70. See Judgment of Jan. 30, 1986, BGH, W. Ger., 1986 IPRspr 276, 278 (dictum).

71. In a recent decision, the Supreme Court of the Federal Republic of Germany has expressly left open the question of whether a money collection agreement is an exchange contract. See Judgment of Mar. 8, 1979, BGH, W. Ger., 1979 IPRspr 473, 476.

72. The question remained open in a recent case decided by the Supreme Court of Germany. See Judgment of Dec. 21, 1976, BGH, W. Ger., 1976 IPRspr 342, 345. Many commentators in Germany support the proposition that art. VIII, § 2(b) applies not only to restrictions on payments and transfers for current international transactions, but also to restrictions on capital movements. See, e.g., Coing, *Inlaendische Werte und auslaendisches Devisenrecht: Zur Anerkennung von Artikel VIII 2(b) des Abkommens von Bretton Woods*, 26 WERTPAPIERMITTEILUNGEN [WM] 838, 840-41 (1972); Kohl, *supra* note 65, at 287; Mann, *Der Internationale Waehrungsfonds und das Internationale Privatrecht*, 36 JZ 327, 329 (1981); Ruessmann, *Auslandskredite, Transferverbote und Buergschaftssicherung*, 37 WM 1126, 1127 (1983).

73. See Judgment of July 8, 1974, KG, Berlin, 1974 IPRspr 364, 366 (the court left open the question of whether the transaction in question was a present gift or a loan).

Although the German Supreme Court (*Bundesgerichtshof*) has never had an opportunity to rule on the issue of whether international law agreements are "exchange contracts" within the meaning of article VIII, section 2(b),<sup>74</sup> some lower German courts have held, or at least implied, that international loans are "exchange contracts." Thus, for example, the Court of Appeals of the State of Schleswig-Holstein, some 30 years ago, assumed without any discussion that international loans are within the purview of article VIII, section 2(b).<sup>75</sup> In a more recent case, the Court of Appeals of Berlin applied article VIII, section 2(b) to a transaction that, at least according to the plaintiff's complaint, was a loan.<sup>76</sup>

In light of its broad construction of the phrase "exchange contract" in other cases and the favorable view that it has taken generally toward debtors in exchange control cases falling within the ambit of article VIII, section 2(b), it is fair to assume that the *Bundesgerichtshof*, the highest German court in civil matters, is likely to hold that loan agreements are entitled to the protection granted by article VIII, section 2(b), if the conditions of the provision are met.<sup>77</sup> Legal advisors seem to agree that this is a possible scenario. As a result, the parties to international loan agreements hardly ever choose German law as law governing their contractual relationship,<sup>78</sup> even though Germany is a major international lender.<sup>79</sup>

International loan agreements are typically made subject to New York law and submitted to the jurisdiction of New York courts. The preference for New York

74. In a recent case, the Court expressly left the question open for future consideration. See Judgment of Dec. 21, 1976, 1976 IPRspr at 343.

75. See Judgment of Apr. 1, 1954, OLG, Schleswig-Holstein, 1954-1955 IPRspr at 463.

76. See also Judgment of July 8, 1974, 1974 IPRspr at 366. The defendant, on the other hand, claimed that the underlying transaction was a present gift.

77. The German legal literature is split on the issue. Some German commentators have argued that loan agreements are "exchange contracts." See, e.g., C. EBENROTH, *BANKING ON THE ACT OF STATE: INTERNATIONAL LENDING AND THE ACT OF STATE DOCTRINE* 43 (1985); Foerger, *Probleme des Art. VIII Abschn. 2b des Abkommens ueber den Internationalen Waehrungsfonds im Realkreditgeschaef*, 24 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 309, 310 (1971). *Contra* F. MANN, *supra* note 29, at 382, 384; Coing, *supra* note 72, at 841. Because of the lack of authoritative judicial guidance, some German commentators have refused to express an opinion on the issue in question. See, e.g., C. HINSCH & N. HORN, *DAS VERTRAGSRECHT DER INTERNATIONALEN KONSORTIALKREDITE UND PROJEKTFINANZIERUNGEN* 117 (1985); Bosch, *Vertragliche Regelungen in internationalen Kreditvertraegen als risikopolitisches Instrument: Erfahrungen im Licht der juengsten Laenderumschuldungen*, 1985 KREDIT UND KAPITAL 117, 140-41 (spec. issue no. 8).

78. See R. Tzeschlock, *Rechtswahlklauseln in internationalen Finanzierungsvertraegen unter Beruecksichtigung zwingender Eingriffsnormen* 1 (unpublished doctoral dissertation, University of Konstanz School of Law 1988).

79. See O'Brien, *Roles of the Euromarket and the International Monetary Fund in Financing Developing Countries*, in *ADJUSTMENT AND FINANCING IN THE DEVELOPING WORLD: THE ROLE OF THE INTERNATIONAL MONETARY FUND* 136, 141 (T. Killick ed. 1982). For the various approaches to external debt management, see, e.g., M. GARRITSSEN DE VRIES, *supra* note 47, at 187-278; *ADJUSTMENT POLICIES AND DEVELOPMENT STRATEGIES IN THE ARAB WORLD* (S. El-Naggar ed. 1987); *EXTERNAL DEBT MANAGEMENT* (H. Mehran ed. 1985); *EXTERNAL DEBT, SAVINGS, AND GROWTH IN LATIN AMERICA* (A. Martirena-Mantel ed. 1987).

does not, however, result from the creditor-oriented construction of article VIII, section 2(b) by the New York courts alone, but is facilitated by procedural and substantive measures taken by the New York legislature. In this context, it is desirable to keep in mind the New York legislation of 1984.<sup>80</sup> This legislation permits parties to substantial commercial contracts to stipulate the application of New York substantive law to the parties' rights and duties,<sup>81</sup> the parties' submission to the jurisdiction of the New York courts, and the entertainment of the case by the New York courts whether or not the forum-non-conveniens doctrine might, without this legislation, dismiss the action.<sup>82</sup>

The general aim of the 1984 legislation is to placate commercial interests, especially in New York City, with facilitated resort to New York substantive law and to the New York courts, at least where all parties agree to it, in cases involving contracts which, for want of New York contracts by more traditional measures, could not, even with the stipulation, assure either an application of New York substantive law or a resort to the New York courts.<sup>83</sup> If coupled with the creditor-oriented restrictive interpretation of article VIII, section 2(b), the generous and unorthodox<sup>84</sup> substantive and procedural rules of 1984 create an environment that is extremely favorable to creditors of major international commercial transactions. It is, however, the major transactions that typically are of utmost importance to countries that have balance-of-payments problems or lack adequate resources of foreign currency and therefore depend upon exchange restrictions and their recognition by the courts of other IMF Member States to lessen their problems.

80. For details, see D. SIEGEL, *NEW YORK PRACTICE* 5-6 (1978 & Supp. 1985).

81. Under N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989), if the minimum amount stated in this provision (i.e., \$ 250,000) is satisfied, the choice of New York substantive law is permissible notwithstanding the fact that the case's contacts with New York would otherwise not suffice under U.C.C. § 1-105(1) for an application of New York law.

82. See N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1989); N.Y. CIV. PRAC. L. & R. § 327(b) (McKinney Supp. 1989). In order for the New York courts to exercise jurisdiction without facing the doctrine of forum non conveniens, the case must be worth at least \$ 1 million.

83. See *Crédit Français International, S.A. v. Sociedad Financiera de Comercio, C.A.*, 128 Misc. 2d 564, 490 N.Y.S.2d 670, 676 (Sup. Ct. 1985), where the court stated:

New York, as a center of international trade and finance, has expressly recognized, as a service to the business community, that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed beforehand that our neutrality and expertise should govern their relationships. Just as the dollar has become the international standard for monetary transactions, so may parties agree that New York law is the standard for international disputes.

84. In cases other than substantial commercial contract cases, by contrast, New York courts have employed the forum non conveniens doctrine rather liberally. Thus, for example, it has been held that there can be a forum non conveniens dismissal in a case in which all parties are New York residents. See *Westwood Assoc. v. Deluxe Gen., Inc.*, 53 N.Y.2d 618, 438 N.Y.S.2d 774, 420 N.E.2d 966, *aff'd* 73 A.D.2d 572, 422 N.Y.S.2d 1014 (App. Div. 1979). It has also been said that an action may be ejected from a New York court on the grounds of forum non conveniens even if a more appropriate forum is unavailable. See *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied*, 105 S. Ct. 783 (1985).

## C. SOME POSSIBLE EFFECTS

The courts of those IMF members that are not as receptive to defenses based upon article VIII, section 2(b) as the German courts apparently assume that the economic, political, institutional and normative frame of the international monetary system will prove to be durable enough to cope with judicial decisions that may be seen to further private interests and give weight to micro motives of the forum, but do not necessarily accord with the macro objectives of the Fund. Yet, no matter how noble the motives of the judiciary may be, judges do not write for individual cases alone. When they decide actual cases in which the existence of exchange controls carrying the Fund's endorsement is raised as a defense, judges are contributing to the formation of a jurisprudence that will directly affect similar cases in the future, not merely the case before the court. Most importantly, the effects will not only be felt in the jurisdiction in which the decision was rendered. Instead, given the competition between and among the Member States of the IMF, the interpretation of article VIII, section 2(b) by the courts of one member state will almost inevitably affect the jurisprudence of other Member States.<sup>85</sup>

Recent English cases interpreting article VIII, section 2(b) are probably the best example in support of this point. In *Wilson, Smithett & Cope Ltd. v. Terruzzi*,<sup>86</sup> Lord Denning, M.R., sitting on the English Court of Appeal, endorsed the narrow interpretation of "exchange contracts." His qualifying statement that "monetary transactions in disguise" should be "caught by section 2(b)"<sup>87</sup> has not proved to be particularly helpful if viewed from the perspective of debtors, the Fund, and IMF Member States that have felt it necessary to impose exchange restrictions. Cases like *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*<sup>88</sup> and *Mansouri v. Singh*<sup>89</sup> demonstrate that the potential for public interest considerations that is seemingly inherent in the concept of "monetary transactions in disguise," has not been implemented by English courts with the macro objectives of the Fund in mind. On the contrary, as Sir Joseph has pointed out, English courts, like their American counterparts, have limited the scope of article VIII, section 2(b) "almost to the point at which the provision vanishes."<sup>90</sup>

There is certainly a chance that courts of other IMF Member States will resort to public policy (*ordre public*) to block the enforcement of judgments or arbitral awards that, because of their narrow creditor-oriented interpretation of article

85. For a more detailed exposition of the competition argument, see *External Indebtedness*, *supra* note 31, at 11.

86. [1976] 2 W.L.R. 418, 424 (C.A.); [1976] 1 All E.R. 817, 822.

87. *Id.*

88. [1982] 2 W.L.R. 1039; [1982] 2 All E.R. 720.

89. [1986] 2 All E.R. 619.

90. *External Indebtedness*, *supra* note 31, at 11.



VIII, section 2(b), are considered by the jurisdiction in which enforcement is sought to be so offensive to its own attitudes toward, and generally accepted perceptions of, international monetary cooperation as to warrant a denial of recognition.<sup>91</sup> The unsuccessful attempts of the British plaintiff in *Wilson, Smithett & Cope Ltd. v. Terruzzi*<sup>92</sup> to enforce his English judgment against the Italian defendant in Italy is the most prominent example in support of this proposition.<sup>93</sup> Yet, the procedural devise of public policy is not in and of itself strong and fundamental enough to ensure, on the part of all IMF Member States, compliance with the institutional objectives of the Fund in the interpretation of article VIII, section 2(b). Public policy is an "unruly horse" (Cardozo) and, in the cases under discussion here, its success depends almost entirely upon the situs of the property of the unsuccessful defendant. If the defendant's property is located, at least in part, in the state that rendered the judgment or the arbitral award, public policy becomes an absolutely blunt knife.

What is even more disturbing, from the Fund's perspective, is that the impact that restrictive interpretations of article VIII, section 2(b) may have is not limited to countries that are driven by the common desire to protect their attraction as financial centers or their interests as major capital exporters. Instead, restrictive interpretations of article VIII, section 2(b) by the courts of some IMF Member States may also spread gradually to countries that are in a completely different situation. The courts of these countries may, under similar or even different circumstances, use the creditor-oriented holdings of the courts of other Member States as a convenient argument in support of their own narrow interpretation of article VIII, section 2(b).

The process of mutual influence is facilitated by modern legal communication services and information devices such as LEXIS, WESTLAW, or JURIS. These services make it possible for interested persons to gain access to all pertinent cases and other relevant legal information without delay and irrespective of national boundaries. Due to the increased international legal exchange, language barriers that once might have been an unsurmountable obstacle to a comparative approach to the development of law are becoming more and more obsolete. As a result, court decisions that frame the law of the enforcement of exchange controls under article VIII, section 2(b) in one IMF member state are given much

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91. Virtually all legal systems will refuse recognition in the event that a judgment or arbitral award, for one reason or another, violates the forum's public policy. See, e.g., Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 21-23 (1988). See also RESTATEMENT, *supra* note 5, § 482(2)(d), § 488(2)(b). For a detailed analysis of the enforcement-of-judgment provisions of the Restatement, see Ebke & Parker, *Foreign Country Money Judgments and Arbitral Awards and the Restatement (Third) of the Foreign Relations Law of the United States: A Conventional Approach*, 24 INT'L LAW. No. 1 (1990) (forthcoming).

92. [1975] 2 All E.R. 649; [1976] 1 All E.R. 817; [1976] 1 Q.B. 683; [1976] 1 Q.B. 703 (C.A.).

93. See Judgment of Dec. 13, 1984, Corte de cassazione [Corte cass.], 22 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [RIV. DIR. INT. PRIV.] 148 (1986); see also Judgment of June 2, 1984, Corte cass., 22 RIV. DIR. INT. PRIV. 121 (1986).

wider exposure today than one could expect some decades ago when the migration of legal ideas and their adoption by lawyers in their capacities as judges, attorneys, administrators or scholars may have been less common than it is today.<sup>94</sup>

This is not to suggest that many court opinions involving the novel issues of article VIII, section 2(b) reflect a considered and principled resort by court or counsel to foreign authorities. On the contrary, it appears that the American, British, and German cases dealing with article VIII, section 2(b) typically do not refer to judicial decisions of other IMF Member States. The courts do, however, rely upon them indirectly in that they generally rely heavily upon the pertinent writings of comparativists, including, for example, Sir Joseph Gold, Dr. F. A. Mann, and Professor Arthur Nussbaum whose conclusions are based upon careful broad-based comparative analyses. The controversy as to the meaning of the words "exchange contracts" itself rests, as is well known, upon the rival views of Professor Nussbaum<sup>95</sup> and Dr. Mann.<sup>96</sup>

Another example of the role of legal scholars in the shaping of article VIII, section 2(b) is the interpretation of the phrase "unenforceable."<sup>97</sup> In civil law systems, unlike the common law tradition, this phrase has no inherent meaning. It is therefore not surprising that the courts of civil law countries have relied upon comparative publications to discern the meaning of that phrase. For example, shortly after Germany's accession to the Fund, some lower German courts, relying upon Dr. Mann, held that "unenforceable" meant "legally void."<sup>98</sup> This view would preclude subsequent court proceedings by the plaintiff to enforce his claim once the exchange restrictions that barred the claim in the earlier proceeding had been withdrawn by the member state or ceased to be consistent with the Articles of Agreement. It was not until 1970, that the German Supreme Court had an opportunity to rule on the meaning of the word "unenforceable."<sup>99</sup>

94. See generally R. SCHLESINGER, H. BAADE, M. DAMASKA & HERZOG, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 5-17 (1988).

95. See Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421, 426 (1950); see also A. NUSSBAUM, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 542-43 (1950) [hereinafter MONEY].

96. See, e.g., F. MANN, *supra* note 29, at 377-79, 398-99; Mann, *The Private International Law of Exchange Control Under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97, 102 (1953); see also Gold & Lachman, *The Articles of Agreement of the International Monetary Fund and the Exchange Control Regulations of Member States (A Note on the Moojen Decision)*, 89 JOURNAL DU DROIT INT. 3, 7-8 (1962).

97. Articles of Agreement, *supra* note 1, art. VIII, § 2(b).

98. Judgment of Dec. 28, 1954, LG, Hamburg, 1954-1955 IPRspr 467, 470; accord Judgment of July 7, 1967, LG, Hamburg, 1966-1967 IPRspr 626, 627; see also Judgment of Feb. 27, 1969, OLG, Frankfurt, 1971 IPRspr 358, 361, *rev'd*, Judgment of Feb. 17, 1971, BGH, W. Ger., 1971 IPRspr 362, 363-64.

99. Judgment of Apr. 27, 1970, BGH, W. Ger., 1970 IPRspr 329, 330. In an earlier decision, the Court had used the cryptic phrase of "assurance of legal protection" to circumscribe the word "unenforceable." See Judgment of May 21, 1964, BGH, W. Ger., 1964-1965 IPRspr 574, 577.

Citing with approval, among others, one of Sir Joseph's German articles,<sup>100</sup> the Court rejected the view that "unenforceable" was suppose to mean "void." The court recognized that article VIII, section 2(b) did not require the courts to treat "exchange contracts" as "null and void." Instead, the Court held that, under German law, the phrase was to be regarded as a procedural requirement (*Prozessvoraussetzung*) with which the plaintiff must comply to be entitled to sue.<sup>101</sup>

The two examples illustrate the special ethical responsibility that the members of the small group of academic experts on the international monetary system have toward the individuals, institutions, and states that are affected by exchange restrictions.<sup>102</sup> They also demonstrate, however, that the judiciary's choice is not one between a "wholesale importation" or complete refusal of foreign ideas and views. The choice is more an eclectic one, depending on which of the many elements of article VIII, section 2(b) is at issue or what exactly is at stake.

In making the choice, courts do not seem to be influenced by the forum's history of exchange restrictions. That is to say, countries that have a history of exchange restrictions are among those most friendly to the provision, whereas countries that have no or virtually no history of exchange controls are among those least friendly to article VIII, section 2(b).<sup>103</sup> While American and German case law may give some credence to the proposition that there is a correlation between the judicial treatment of article VIII, section 2(b) and the forum's history of exchange restrictions,<sup>104</sup> recent English cases support the theory that there is no such correlation. Given a choice, English courts have taken a relatively narrow view on the provision despite the United Kingdom's long-

100. See Gold, *Währungsabkommen II*, *supra* note 20.

101. See Judgment of Apr. 27, 1970, 1970 IPRspr at 330. The Supreme Court has since repeatedly affirmed its procedural classification of the term "unenforceable." See, e.g., Judgment of Dec. 21, 1976, BGH, W. Ger., 1976 IPRspr 342, 343; Judgment of Feb. 17, 1971, 1971 IPRspr at 364. In a recent decision, the Court stated that the procedural classification is "now well settled." See Judgment of Mar. 8, 1979, BGH, W. Ger., 1979 IPRspr 473, 475. The lower courts share this view. See, e.g., Judgment of Oct. 17, 1986, OLG, Munich, 32 RIW/AWD 998, 999 (1986); Judgment of Feb. 16, 1983, OLG, Duesseldorf, 1983 IPRspr 307, 308, 309; Judgment of July 5, 1978, OLG, Bamberg, 1978 IPRspr 309, 310. The District Court of Hamburg followed the German Supreme Court in its Judgment of Feb. 24, 1978, LG, Hamburg, 1978 IPRspr 304, 305. For a discussion of the consequences of the Supreme Court's interpretation of the word "unenforceable," see *infra* notes 136-46 and accompanying text.

102. For a more detailed discussion of the ethical accountability of legal scholars with respect to novel issues and emerging legal theories, see Ebke & Griffin, *Lender Liability to Debtors: Toward a Conceptual Framework*, 40 SW. L.J. 775, 802 (1986).

103. See Gold, *supra* note 1, at 13-58 to -59.

104. The United States has never had a comprehensive system of exchange controls. See D. VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 30 (1986). Germany, by contrast, has a long history of exchange controls, starting with World War I. See, e.g., H. HARTENSTEIN, *DEISENNOTRECHT* (1935 & Supp. 1936); A. LENHOFF, *PRIVATRECHTLICHE PROBLEME DES DEISENNOTRECHTS* (1932); C. MUELLER, *GRUNDRISSE DER DEISENBWIRTSCHAFTUNG* (1938).

standing history of exchange controls.<sup>105</sup> It is therefore fair to conclude that, as a general rule, the choice-influencing considerations do not seem to be primarily subject to historical preferences or limitations, but rather to current perceptions of the economic, monetary, political and social intertwining of the IMF Member States and their judicial implementation at the transactional level where article VIII, section 2(b) applies.

#### D. JUDICIAL RESPONSIBILITY

In light of the foregoing discussion, it becomes evident that judges of the IMF Member States are ultimately responsible for effectively implementing the macro objectives of the Fund, regardless of the micro motives of the forum or the parties. To meet their special responsibility, judges need to bear in mind that the macro objectives of the IMF are to be taken into account when article VIII, section 2(b) is interpreted.<sup>106</sup> A too narrow construction of article VIII, section 2(b), especially of its key elements, may have a detrimental effect on the smooth functioning, on a day-to-day basis, of exchange controls that are approved by the Fund or authorized by the Articles of Agreement.

More importantly, because of inevitable leverage effects, restrictive interpretations also imperil the possibility of attaining the common objectives of the IMF as set forth in article I and article IV, section 1 of the Fund Agreement.<sup>107</sup> As the need for exchange controls increases, the number of cases in which the controls are raised as a defense is also likely to increase. Consequently, the judiciary's responsibility grows in proportion to the relative significance of the element of article VIII, section 2(b) that is being interpreted and the number of cases decided on the basis of a particular interpretation.

Regardless of how one looks at the responsibility of the judiciary and the perspectives of international monetary cooperation and collaboration, interpretations of article VIII, section 2(b) that do not accord with the Fund's overall objectives, impair the stability of the international monetary system and lessen not only the confidence in the judicial system of the country rendering the judgment, but also the respect for the Fund itself. Both those who advocate international monetary cooperation and a public-interest approach to article VIII, section 2(b) and who favor a system that stresses national sovereignty and the resorting to traditional, more creditor-oriented conflict-of-laws principles will agree that a gradual loss of confidence and respect will ultimately do more harm than good to monetary cooperation and collaboration; these constitute one of the pillars of the post-World War II international monetary system.

105. Gold, *supra* note 1, at 13-59.

106. R. EDWARDS, *supra* note 3, at 489-90.

107. See also *Exchange Control*, *supra* note 31, at 48, stating that "[t]he restrictive interpretation of [the] conditions [of art. VIII, § 2(b)] favored by some courts are unfortunate because they frustrate the objectives of the provision."

### III. The Transformation: Some Fundamental Problems

Conceptual problems, textual and contextual difficulties, and institutional limitations cast some doubts on whether the courts of the IMF Member States are actually in a position to meet their responsibility.

#### A. THE TWO-TIER CONCEPT OF INTERNATIONAL MONETARY COOPERATION

The tension that exists between the need to implement the macro objectives of the IMF and the temptation of the Member States' courts to give weight to the micro motives of the forum is rooted in the two-tier concept of international monetary cooperation as created by the Articles of Agreement. From the outset, the articles left it for the courts and administrative agencies of the Member States to give effect to the fundamental objectives of the Fund in the context of private international business and finance transactions and to seek the achievement of those objectives at the transactional level to the fullest extent.<sup>108</sup> The two amendments of the Articles of Agreement in 1969 and 1978<sup>109</sup> have not altered the separation of functions between the Fund and its Member States in this respect. The primary responsibility to ensure that the objectives of international monetary cooperation and collaboration are carried out in relation to exchange controls carrying the Fund's endorsement has remained with the courts and administrative agencies of the Member States, with virtually no sanctions of the Fund looming ahead if the courts fail to live up to the standards envisaged by the Articles of Agreement.<sup>110</sup> Conceptually, the courts and administrative agencies of the Member States have a *de facto* monopoly of ensuring compliance with the institutional objectives at the transactional level of international business and finance. In this regard, they are the sole guardians of the Articles of Agreement.

The fact that article VIII, section 2(b) is not directly applicable,<sup>111</sup> is consistent with the concept stated. By requiring that the Member States take the necessary steps to carry out or give effect, under their domestic law, to the provision, the Articles of Agreement underscore the special responsibility that the Member States and their courts have assumed regarding the implementation of the macro objectives of the Fund in connection with the enforcement of

108. See Ex. Bd. Dec. No. 446-4, reprinted in *SELECTED DECISIONS*, *supra* note 36, at 273-74.

109. See *supra* note 1.

110. See generally R. EDWARDS, *supra* note 3, at 39-42; Gold, *The "Sanctions" of the International Monetary Fund*, 66 AM. J. INT'L L. 737 (1972).

111. Article VIII, § 2(b) is not directly applicable in the sense that it is to be regarded in courts as equivalent to an act of the legislature. Rather, each member must ensure that the provision is binding under its own law in accordance with the representation of original members under the Articles of Agreement, *supra* note 1, art. XXXI, § 2(a), or in accordance with the corresponding representation of other members under the resolutions that admit them to membership in the IMF. See Gold, *supra* note 1, at 13-57, 13-94.

exchange restrictions.<sup>112</sup> To enable the courts to fulfill their difficult task, the Executive Board of the IMF<sup>113</sup> has made it clear that it will lend its assistance regarding the interpretation of article VIII, section 2(b) and that it is "prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement."<sup>114</sup> In addition, the Articles of Agreement confer upon the Executive Board the power to interpret the Articles of Agreement.<sup>115</sup> As early as 1949, the Board adopted Decision No. 446-4, which clarifies the provision in a number of important respects.<sup>116</sup> While the Executive Board has always been well aware of its power to interpret, the Board has been very reluctant to use this power. The Decision of 1949 is the only one that interprets article VIII, section 2(b), although other decisions have an indirect bearing on certain aspects of the provision.<sup>117</sup>

The reluctance of the Fund to use its interpretative power should not come as a surprise to those who are familiar with the nature, scope and requisites of interpretations within the meaning of article XXIX.<sup>118</sup> The issuance of an interpretation is a political step<sup>119</sup> to which the Fund seems to resort only under special circumstances.<sup>120</sup> Given the political sensibilities of the Member States, it is no wonder that it has always been thought to be a measure for which there must be a special reason. In this context, one should also keep in mind that most members of the Executive Board are economists and bankers, rather than

112. Not all members of the IMF seem to have taken the necessary steps to carry out or give effect under their law to art. VIII, § 2(b). See, e.g., Gold, *Australia and Article VIII, Section 2(b) of the Articles of Agreement of the International Monetary Fund (IMF)*, 57 AUSTL. L.J. 560 (1983). For a brief discussion of the legal position of art. VIII, § 2(b) in Mexico, see 3 FUND AGREEMENT, *supra* note 11, at 177-78. The legal status of art. VIII, § 2(b) is also questionable in Sweden where the legislature does not seem to have given effect to the provision. For details, see M. BOGDAN, SVENSK INTERNATIONELL PRIVAT- OCH PROCESSRÄTT 71 n.8 (3d ed. 1987).

113. For the composition, powers, and functions of the Executive Board, see 2 LEGAL AND INSTITUTIONAL ASPECTS, *supra* note 10, at 386-90.

114. See Ex. Bd. Dec. No. 446-4, reprinted in SELECTED DECISIONS, *supra* note 36, at 274. For a discussion of the Fund's information practice, see 3 FUND AGREEMENT, *supra* note 11, at 633-60. The Court of Appeals of Karlsruhe, Federal Republic of Germany, is, as far as can be seen, one of the few courts that have requested the Fund to provide an official statement that exchange restrictions of Member States were in accordance with the Articles of Agreement. See Judgment of Dec. 15, 1965, OLG, Karlsruhe, 1964-1965 IPRspr 583, 586; see also 1 IMF HISTORY, *supra* note 3, at 210-11. In a more recent case, the District Court of Hamburg, too, has made an inquiry concerning the compatibility of certain Ethiopian exchange restrictions with the Fund Agreement. See Domex, S.A. v. Schlueter, Doc. No. 62 O 226/75. Shortly after the Fund's reply, the parties settled the case out of court. See Letter from the presiding judge of the 12th Commercial Law Court, District Court of Hamburg, to Werner Ebke (Apr. 13, 1987).

115. See Articles of Agreement, *supra* note 1, art. XXIX. For details, see R. EDWARDS, *supra* note 3, at 37-39.

116. See *supra* notes 35-39 and accompanying text.

117. Gold, *supra* note 1, at 13-59, 13-68.

118. For a comprehensive analysis of the law of Fund interpretations under the original Articles of Agreement of 1944, see J. GOLD, INTERPRETATION BY THE FUND (1968).

119. 1 LEGAL AND INSTITUTIONAL ASPECTS, *supra* note 10, at 302-13.

120. J. GOLD, *supra* note 118, at 3, 61.

lawyers, and that they do not seem to regard themselves as charged with the task of creating, adapting, or even applying international monetary law.<sup>121</sup> The result is that there appears to be a greater emphasis upon political, economic, and administrative measures than upon legal aspects. One should also recall that the Executive Board's decisions are not considered to be binding on the courts of the Member States, but are viewed by most courts as "persuasive" authority only.<sup>122</sup> Accordingly, the Board cannot be certain that its interpretation will ultimately reach the desired result.

Under those circumstances, the relative reluctance of the Executive Board to adopt official interpretations is understandable. It would also seem to be legally acceptable as there is no absolute obligation on the part of the Board to issue a decision, even if it becomes apparent that article VIII, section 2(b) is not interpreted uniformly throughout the Fund. As a general rule, the Executive Board needs to weigh the desirability of the adoption of an interpretation against the chances that the courts of the Member States will actually implement it. Courts that have taken a restrictive view, with respect to article VIII, section 2(b), do not seem to be prepared to give great weight to even official interpretations of the Fund if adherence to them would be contrary to the perceived interests of the forum. Conversely, it is rather unlikely that the Fund will, in the foreseeable future, issue an interpretation to clarify article VIII, section 2(b) and to harmonize the law of enforcement of exchange restrictions.

Consequently, changes of the law with respect to article VIII, section 2(b) are not likely to be initiated by the Fund, but will have to come, if at all, from the courts of the Member States as the guardians, in relation to private international transactions, of the Articles of Agreement. Only if it is shown that the courts are unable or unwilling to provide a coherent, fund-wide solution to the problem of bridging the gap between the major objectives of the Fund and the actual interpretation of article VIII, section 2(b), will there be a need for searching for alternatives.

## B. LANGUAGE, HISTORY, AND OTHER COMPLICATIONS

Unfortunately, article VIII, section 2(b) itself does not facilitate the desirable movement toward uniformity of interpretation on the basis of the Fund's macro objectives. The language of the Articles of Agreement in general and of article VIII, section 2(b) in particular has contributed much to the disparity of interpretations. For example, the phrase "exchange contracts" is not a term of

121. See Gold, *International Law and the IMF*, 14 FIN. & DEV. 35, 37 (1977).

122. See, e.g., *Callejo v. Bancomer*, 764 F.2d 1101, 1119 n.26 (5th Cir. 1985); *Braka v. Bancomer*, 589 F. Supp. 1465, 1473 (S.D.N.Y. 1984); MONEY, *supra* note 95, at 529, 542 n.44. But see also 1 FUND AGREEMENT, *supra* note 11, at 22-27, 55-59; B. KLEINER, INTERNATIONALES DEVISENSCHULDRECHT 154 n.177 (1985); J. GOLD, *supra* note 118, at 31-42; Gold, *supra* note 1, at 13-63; Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L.J. 867, 883 (1953).

art, neither in the civil law system nor in the common law tradition.<sup>123</sup> Like other similarly broad terms of multilateral treaty law, the words "exchange contracts" derive their contours in and through national judicial processes. In the International Monetary Fund, unlike, for example, in the European Communities,<sup>124</sup> there is no court or comparable institution to which private parties can resort and that could ensure, with authoritative force, uniformity of interpretation and effective compliance with the macro objectives of the Fund in the interpretation of article VIII, section 2(b) by the courts of the Member States. The search of the courts of the IMF members for the "true" meaning of the phrase "exchange contract" is complicated by the fact that English is the only authentic language of the Fund Agreement.<sup>125</sup> Accordingly, a comparison of various versions of the Agreement, which is a commonly accepted method of interpretation of multilateral treaties,<sup>126</sup> would not seem to be particularly helpful where, as in the IMF, there is only one authentic text.<sup>127</sup> This conclusion would seem to be accurate despite the fact that some Fund members that share the same language have mutually agreed upon a particular translation.<sup>128</sup>

Yet, it is not only the language of article VIII, section 2(b) that causes problems. The context and the specific location of article VIII, section 2(b) in the Articles of Agreement, too, are somewhat puzzling<sup>129</sup> and add little to confirm the meaning of the phrase "exchange contract." The true import of the phrase could perhaps more easily be ascertained if it were known what the drafters of the Bretton Woods Agreement in 1944 intended to do and what their aims were.<sup>130</sup> Regrettably, the historical background of article VIII, section 2(b), the *travaux préparatoires*, and the changes in substance sought to be effected by the drafters at Bretton Woods are not entirely clear.<sup>131</sup>

The textual and contextual difficulties make it at least partially doubtful whether the national influence can be totally overcome in the implementation of

123. *But see In re United Rys. of Havana & Regla Warehouses*, [1961] A.C. 1007.

124. For details of the role and functions of the Court of Justice of the EEC, see Ebke, *supra* note 48, at 713-715.

125. See Rules and Regulations of the International Monetary Fund, R. C-13, reprinted in BY-LAWS, RULES AND REGULATIONS, INTERNATIONAL MONETARY FUND 24 (43d issue 1986).

126. See, e.g., Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27, p. 289, art. 33(2) (1969) [hereinafter Vienna Convention]; see also W. BISHOP, INTERNATIONAL LAW 174-75 (3d ed. 1971).

127. Cf. Vienna Convention, *supra* note 126, art. 33(2), which reads as follows: "A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree." For comments on the treaty on treaties, see, e.g., Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1971).

128. *But see* 2 LEGAL AND INSTITUTIONAL ASPECTS, *supra* note 10, at 6 (suggesting that a "second language can contribute to a compromise even when there is only one authentic language, as in the Fund"). For some recent translations, see 3 FUND AGREEMENT, *supra* note 11, at 628-32.

129. See R. EDWARDS, *supra* note 3, at 477.

130. See Vienna Convention, *supra* note 126, art. 32.

131. On the history of the drafting of art. VIII, § 2(b), see 2 FUND AGREEMENT, *supra* note 11, at 429-38.



article VIII, section 2(b), in both the civil law and the common law traditions. Even within the same legal tradition where traces of common genes exist, there are numerous manifestations of mutations and acquired differences.

In their endeavor to shape the law, with respect to article VIII, section 2(b), the courts of the IMF Member States resort to their own methods of construction and rely upon translations of the provision into their own language. This is done even though article VIII, section 2(b), like other provisions of multilateral treaty law, should be interpreted "autonomously" on the basis of the authentic text and by means of the comparative method.<sup>132</sup> Accordingly, in effect, the elements of article VIII, section 2(b) live in and through the law of the Member States. Yet, even if they would apply the methods of autonomous and comparative interpretation and rely exclusively upon the authentic text, courts would still have to transform the various elements of article VIII, section 2(b) into legal concepts of the forum to give effect to the provision.

Consequently, there is always the danger that article VIII, section 2(b), in the hands of disparate courts of different legal cultures, will develop along divergent and uneven lines. This could occur even if the judges endorse the shared values of the IMF.<sup>133</sup> An inherently consistent and coherent system of law, with respect to the enforcement of exchange restrictions within the Fund, would thus seem to be more a goal than reality; even if the interpretation is strictly teleological or, to use a phrase of Sir Joseph, based upon the "economic rationale"<sup>134</sup> of the Articles of Agreement.

German case law provides a ready example in support of this proposition. German courts, without question, are among those courts that have gone out of their way, in their interpretation of article VIII, section 2(b), to give effect to the macro objectives of the IMF. The broad, debtor-oriented interpretation of the words "exchange contracts" is perhaps the best evidence.<sup>135</sup> There are, however, numerous manifestations of substantial mutations in comparison with the law of other IMF Member States. The mutations obviously result from the transformation of the various elements of article VIII, section 2(b) into German law. As has been pointed out, German courts, after trial and error, have come to the conclusion that the phrase "unenforceable," which has no inherent meaning in the German legal system, is best effectuated under German law if viewed as a "precondition to suit," rather than a defense.<sup>136</sup> As a result, the plaintiff has

132. See *Exchange Control*, *supra* note 31, at 47.

133. For a discussion of similar problems within the European Communities, see Ebke, *Les techniques contentieuses d'application du droit des Communautés européennes*, 22 *REVUE TRIMESTRIELLE DE DROIT EUROPEEN* 209, 221 (1986).

134. Gold, *supra* note 1, at 13-73. See also Vienna Convention, *supra* note 126, art. 31(1) which reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

135. See *supra* notes 63-77 and accompanying text.

136. See *supra* note 101 and accompanying text; see also 3 *FUND AGREEMENT*, *supra* note 11, at 262-87.

the burden of proving that the exchange restrictions invoked by the defendant are inconsistent with the Fund Agreement or that article VIII, section 2(b) does not apply for other reasons.<sup>137</sup>

The courts of most other IMF members, by contrast, are of the opinion that article VIII, section 2(b) provides a defense.<sup>138</sup> Accordingly, the burden of proving that the exchange restrictions in question are maintained or imposed consistently with the Articles of Agreement and that all other conditions of the provision are satisfied lies with the defendant.<sup>139</sup> As a further consequence of the procedural classification of the word "unenforceable," German courts are required, as a matter of law, to take cognizance of article VIII, section 2(b).<sup>140</sup> Thus, a German court needs to apply the provision *ex officio* once the parties have stated substantiated facts that may give rise to an application of article VIII, section 2(b), even if it is not raised as a defense by the defendant. This view is in stark contrast to the law of most IMF Member States that treat "unenforceability" as a defense, where the parties would seem to be able to set aside application of the provision at their discretion.<sup>141</sup>

Apart from the burden of proof, the procedural implementation of the term "unenforceable" by the German courts can have rather detrimental consequences for the plaintiff. The single most unfortunate consequence from the plaintiff's point of view, no doubt, is that an "exchange contract" that did not violate foreign exchange restrictions when entered into can become "unenforceable" as a result of subsequent modification or introduction of exchange restrictions. For, as "preconditions to suit" must be met at the time of the "last hearing" (*letzte muendliche Verhandlung*) of the case by the court,<sup>142</sup> any change in the exchange control laws of IMF Member States, other than Germany, between the making of the contract and the "last hearing" can render the contract "unenforceable."<sup>143</sup>

137. See Judgment of Apr. 27, 1970, BGH, W. Ger., 1970 IPRspr 329, 332.

138. See 3 FUND AGREEMENT, *supra* note 11, at 781.

139. See, e.g., *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 570 F. Supp. 870, 901-02 (S.D.N.Y. 1983); see also *Weston Banking Corp. v. Turkiye Garanti Bankasi, A.S.*, 57 N.Y.2d 315, 456 N.Y.S.2d 684, 442 N.E.2d 1195 (Ct. App. 1982) (The Court stated, that "there is no proof, in this record, that if the debt were not restructured, the bank would be barred from repaying the plaintiff in Swiss francs as required by the terms of the note." 456 N.Y.S.2d at 689 [emphasis added]).

140. See Judgment of Apr. 27, 1970, 1970 IPRspr at 332.

141. See also Gold, *supra* note 1, at 13-62 to -63.

142. See Judgment of Mar. 8, 1979, BGH, W. Ger., 1979 IPRspr 473, 475.

143. See Judgment of Apr. 19, 1962, BGH, W. Ger., 1962-1963 IPRspr 523. In this case, the Court applied art. VIII, § 2(b) to a contract that was entered into on Mar. 1, 1948, and allegedly violated Austrian exchange controls. *Id.* at 523-24. Austria did not join the Fund until August 27, 1948, however. See 2 IMF HISTORY, *supra* note 3, at 904. The flip side of the "last hearing" rule is, of course, that an "exchange contract" that did violate foreign exchange controls when made, but did not violate them at the time of the last hearing, is enforceable. See Judgment of Feb. 17, 1971, BGH, W. Ger., 1971 IPRspr 362-64; see also Judgment of Mar. 8, 1979, 1979 IPRspr at 475;

If one recalls that, in Germany, it takes an average of 41.4 months, from the filing of a law suit with the district court, for an appeal case to be decided by the Federal Supreme Court,<sup>144</sup> it becomes evident that plaintiffs run a substantial risk that their claims may become, at least temporarily, unenforceable. This risk goes much beyond the risk that creditors have to assume in other IMF Member States.<sup>145</sup> The risk is aggravated, under German law, by the fact that the statute of limitations does not fall when the plaintiff brings an action that is eventually dismissed as "unenforceable," even if the contract at issue was unenforceable when made.<sup>146</sup> As a result, the statute of limitations may bar subsequent court proceedings by the creditor-plaintiff in enforcing his claim against the defendant if the exchange restrictions that precluded his previous action from being heard by the court, are withdrawn, cease to be consistent with the Articles of Agreement or become otherwise inapplicable *after* the statutory period of limitations has lapsed.<sup>147</sup> There does not seem to be any other jurisdiction in which article VIII, section 2(b) may have similar harsh effects on the outcome of "exchange contract" cases.

Whether or not one endorses the consequences as desirable,<sup>148</sup> the substantive and procedural consequences of the German Supreme Court's transformation of the phrase "unenforceable" into German law vividly illustrate that, because of preexisting legal conditions and conceptual features of the law of the Member States, uniformity of interpretation is difficult to accomplish, regardless of whether or not the judges are supportive of the Fund's objectives. A certain interpretation by a court of a member state of any given element of article VIII, section 2(b) may, in that state, have inevitable legal consequences with respect to a number of related issues of substantive or procedural law, affect the understanding of other elements of the provision and lead to results that differ fundamentally from the law of other members.

Under those circumstances, is a coherent solution of the problem of the extraterritorial recognition of exchange restrictions under article VIII, section 2(b) likely to come from the courts of the Member States? The transformation problems discussed thus far would seem to require a negative response to the

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Judgment of Dec. 21, 1976, BGH, W. Ger., 1976 IPRspr 342, 346. *Accord* L. HINSCH & N. HORN, *supra* note 77, at 118.

144. See RECHTSPFLEGE FACHSERIE 10, REIHE 2 (ZIVILGERICHTE UND STRAFGERICHTE) 109 (Statistisches Bundesamt ed. 1986). It takes an average of 10.1 months, from the filing of an appeal or the granting of a writ of certiorari, for an appeal case to be decided by the Supreme Court. *Id.* For further details, see Fuchs-Wissemann, *Zur Geschäftsbelastung der ordentlichen Gerichtsbarkeit*, 65 DEUTSCHE RICHTERZEITUNG 386 (1987).

145. See 3 FUND AGREEMENT, *supra* note 11, at 778-81.

146. See GERMAN CIVIL CODE (BÜRGERLICHES GESETZBUCH) of August 18, 1896, 1896 REICHSGESETZBLATT (German Official Gazette) 195, § 212(1) (as amended).

147. *But see* GERMAN CIVIL CODE, *supra* note 146, § 209(1), § 212(2). *See also* Judgment of July 3, 1980, BGH, W. Ger., 78 Entscheidungen des BGHs in Zivilsachen [BGHZ] 1, 5 (1981).

148. Except for the statute-of-limitations problem and the burden-of-proof issue, the holdings of the German courts would seem to be perfectly consistent with the macro objectives of the Articles of Agreement.

question. The overall institutional conditions and perspectives of the Fund do not seem to allow a more favorable answer.

### C. INSTITUTIONAL CONDITIONS AND PERSPECTIVES

The IMF, created in the mid-1940s as an economic and political necessity, seeks to link 151 sovereign states of different sizes, cultural heritages, wealth and aspirations. Its Member States seek to accomplish the objectives set forth in article I and article IV, section 1 of the Fund Agreement under constantly changing political, economic, monetary and social conditions in all parts of the world. Given the multifarious differences and the diversity of outlooks represented in the Fund, the institutional objectives cannot be easily attained.

The Fund of the 1980s is acting as an aggregation of sovereign states intergovernmentally pursuing their own national interests under a common roof. They do not act as members of an international monetary organization whose policies are designed, and should be accepted, as a preferable supranational alternative to national monetary policies. The outlook of the Fund is perhaps too closely associated with sustaining particular positions and principles, reflecting a strong sense of national identity and a preference for national as opposed to supranational and institutional interests. This approach results in a constant attempt to seek achievable goals that are compatible with the perceived interests of the Member States. Such an approach leaves behind the idea of arriving at a single set of common objectives without first focusing upon the perceived national interests of the Member States having major stakes in the Fund and corresponding voting powers.<sup>149</sup>

The institutional conditions seem to be so influential at times as to preclude the courts of some IMF Member States from concentrating on building a more ambitious supranational consensus concerning the shape and implementation of article VIII, section 2(b); even for those judges who endorse the objectives of the Fund and the purposes of article VIII, section 2(b) and accept the need for a purpose-oriented interpretation of the provision as a prerequisite to realizing those objectives. As a result, the judiciary places stress upon technical solutions and familiar concepts of domestic law that take account of perceived interests of the forum and frequently appease local creditors, but disregard the normative goals and overall political ends. It is not surprising that the legal advisors of the defendants in *Allied Bank International v. Banco Credito Agricola de Cartago*<sup>150</sup>

149. On the voting powers of the Fund's Member States, see Gold, *Weighted Voting Power: Some Limits and Some Problems*, 68 AM. J. INT'L L. 687 (1974). See also J. GOLD, *VOTING AND DECISIONS IN THE INTERNATIONAL MONETARY FUND* (1974); Gold, *The Origins of Weighted Voting Power in the Fund*, 18 FIN. & DEV. 25 (1981).

150. 566 F. Supp. 1440 (S.D.N.Y. 1983), *vacated*, 757 F.2d 516 (2d Cir. 1984), *cert. denied*, 473 U.S. 934 (1985). For an excellent discussion of this case, see Rendell, *The Allied Bank Case and Its Aftermath*, 20 INT'L LAW. 819 (1986). For a thorough analysis of the withdrawn decision, 733 F.2d 23 (2d Cir. 1984), see C. EBENROTH, *supra* note 77, at 45-60; Ebenroth & Teitz, *Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions*, 19 INT'L LAW. 225 (1985).

and *Libra Bank Ltd. v. Banco de Costa Rica*<sup>151</sup> are more confident in advancing the Act of State doctrine, notwithstanding the uncertainties surrounding it, than they are in dealing with article VIII, section 2(b).<sup>152</sup>

As technical solutions gain the upper hand, policy and public interest considerations become less and less important, and the urgently needed steps toward the development of a coherent, internationally acceptable, and monetarily sound interpretation of article VIII, section 2(b) are simply not done. Under those circumstances, it is no wonder that the idea that there is an international public policy in relation to exchange restrictions, even when article VIII, section 2(b) does not apply,<sup>153</sup> falls into oblivion.

One can only speculate how a more international attitude of the judiciary toward article VIII, section 2(b) would have affected the law of extraterritorial recognition of exchange restrictions within the Fund. It would seem to be certain, however, that a more international approach to article VIII, section 2(b) would ease, at least to a degree, the pressures inherent in the Fund's two-tier system of international monetary cooperation.<sup>154</sup> In such a system, conflicts or unforeseeable events create a tension among competitive pressures that are escalating in a period of severe imbalances of balances of payments of some, but not all, Member States, where the need to employ exchange restrictions on payments and transfers for current international transactions as well as capital movements becomes inevitable. Under those circumstances, many more nationally-minded courts seem to be tempted to view a purpose-oriented interpretation of article VIII, section 2(b) as a luxury rather than a necessity. Cases such as *Allied Bank International v. Banco Credito Agricola de Cartago*<sup>155</sup> and *Libra Bank Ltd. v. Banco de Costa Rica*<sup>156</sup> are ready examples. "But how," Sir Joseph has asked, "do loan contracts differ from deposit contracts with banks in the interpretation of the provision? The attorneys for banks, supported by U.S. official opinion, argued that article VIII, section 2(b) applied to deposit contracts when the banks resisted enforcement of the contracts that were affected by the U.S. exchange control regulations that froze Iranian assets."<sup>157</sup>

151. 676 F.2d 47 (2d Cir. 1982), *on remand*, 570 F. Supp. 870 (S.D.N.Y. 1983). For a thoughtful analysis of this case, see C. EBENROTH, *supra* note 77, at 61-82.

152. See *Exchange Control*, *supra* note 31, at 47. See also Buxbaum, *The Effect of Foreign Moratorium Orders on Bank Loans and Certificates of Deposits: The Act of State Defense*, in INTERNATIONAL LENDING, *supra* note 1, at 27-1, 27-4 to -10.

153. See *Exchange Control*, *supra* note 31, at 40. See also generally J. GOLD, *THE FUND AND NON-MEMBER STATES: SOME LEGAL EFFECTS* (1966).

154. See *supra* notes 109-10 and accompanying text.

155. 566 F. Supp. 1440 (S.D.N.Y. 1983), *vacated*, 757 F.2d 516 (2d Cir. 1984), *cert. denied*, 473 U.S. 934 (1985).

156. 676 F.2d 47 (2d Cir. 1982), *on remand*, 570 F. Supp. 870 (S.D.N.Y. 1983).

157. *External Indebtedness*, *supra* note 31, at 11. For details of the United States Iranian assets control regulation, see, e.g., Edwards, *Extraterritorial Application of the U.S. Iranian Assets Control Regulation*, 75 AM. J. INT'L L. 870 (1981).

The observations underlying Sir Joseph's question strongly support our proposition that, given a choice, courts will almost without exception opt for a solution that is consistent, or perceived to be consistent, with the forum's attitude toward international monetary cooperation, the perceived interests of the forum, and the judiciary's understanding of the interrelationship that exists between the macro objectives of the IMF and the interpretation of article VIII, section 2(b). If this proposition is accurate, it becomes evident that sweeping changes of the law, with respect to article VIII, section 2(b), cannot be expected to come from the judiciary. A fundamental reform of the law can only come from the governments and the legislators of the Member States. Such a reform requires some fundamental changes in perceptions, attitudes, conduct, expectations and, perhaps, the Articles of Agreement.

#### **IV. The Future of Article VIII, Section 2(b)**

The preceding discussion shows that the question of the future of the law of enforcement of exchange restrictions under article VIII, section 2(b) will be settled ultimately by the cumulative weight of both the choices and decisions of the judiciary and the institutional conduct of the IMF Member States. In this context, it is worth noting that, because of increasing economic and monetary difficulties, the Member States, like their courts, more and more frequently seem to feel a sense of helplessness and futility about their capacity to influence the conduct of other Member States and their courts for the sake of the common objectives as set forth in article I and article IV, section 1 of the Fund Agreement. These feelings result in an increasing willingness of at least some courts not to conform, in their interpretation of article VIII, section 2(b), with the goals of international monetary cooperation and collaboration. This occurs even though they may well realize and recognize that even minor deviations from the Fund's objectives in the interpretation of article VIII, section 2(b) tend to lessen public and private confidence in international monetary cooperation and collaboration and that this lack of confidence in turn endangers the possibilities of achieving the Fund's objectives as set forth in the Articles of Agreement.

While sharing a basic acceptance of the need for international monetary cooperation and collaboration, the comparative studies of Sir Joseph<sup>158</sup> shows that the judges of the IMF Member States do not share a common orientation toward most issues to which article VIII, section 2(b) gives rise. A possible exception is a shared and reciprocal acceptance of the necessity of some kind of common perspective on the problems and prospects of the extraterritorial enforcement of exchange controls. But even this fundamental assumption is not always uniformly supported. On matters of substance, the potential realm of agreement has been frequently demonstrated to be rather limited. In the courts of

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158. See, e.g., 1-3 FUND AGREEMENT, *supra* note 11.

many Member States, national pressures and egotism appear to be so great as to become the dominant actors.

Under those circumstances, the reality of the IMF and, more importantly, the idea of international monetary cooperation and collaboration is at the disposal of national forces determining the outcomes of exchange control cases. Upon reflection, however, it would seem that the courts that implement the Fund's objectives at the transactional level to the fullest extent, especially when working together, actually are best situated to exert a variety of pressures, both political and legal, which can close the gap between the macro objectives of the IMF and the micro motives of the forum. Obedience to law exemplifies respect for the Fund, for the international monetary system, and for the common goals of the IMF members. Respect for the law of the Fund in general and article VIII, section 2(b) in particular should thus be more than a platitude.<sup>159</sup>

#### A. THE GOAL: HARMONIZATION

Our observations lead us to the fundamental question of how much uniformity is achievable under the regime of article VIII, article 2(b) and how much flexibility is acceptable. Uniformity as an objective of article VIII, section 2(b) has been more often stated than explained. While there has been some discussion at the theoretical level of uniformity in interpretation as a policy, there has been surprisingly little critical analysis of means and ways for its achievement and the practical and conceptual difficulties involved. One must, of course, distinguish between the nature of article VIII, section 2(b) as a conflict solution device<sup>160</sup> and the need for uniformity in its interpretation.

Courts and commentators would agree that not all cases can be expected to be adjudicated by the courts of the IMF Member States with exactly the same result; i.e., in complete harmony with the holdings of the courts of all other Member States. This is impossible given numerous textual and contextual difficulties inherent in article VIII, section 2(b), the multifarious differences between the substantive and procedural laws of the 151 Member States of the IMF, and the need to transform the elements of the provision into the law of the member state to give legal effect to the provision.<sup>161</sup> Some court decisions may go beyond the

159. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1981).

160. In Germany, as in other IMF Member States, there is some discussion as to whether art. VIII, § 2(b) is a conflict-of-laws provision or a substantive provision of public international law. The controversy should not be overestimated. Accord Siehr, *Auslaendische Eingriffsnormen im inlaendischen Wirtschaftskollisionsrecht*, 52 *RabelsZ* 40, 70 n.141 (1988). But see also 3 FUND AGREEMENT, *supra* note 11, at 568-79. Sir Joseph is of the opinion that "[t]he provision is probably not a rule of private international law." *Id.* at 801. The answer to the problem depends upon the law of each member state. Under German law, for instance, art. VIII, § 2(b) should be viewed as both a choice-of-law rule, which preempts special statutory choice-of-law provisions as well as general conflict-of-laws principles, and as a substantive provision with procedural implications.

161. For details, see *supra* note 111.

bounds of tolerance, but more often than not, one can accept a matter of difference in result. In view of the transformation problems discussed, it is hard to defend a certain interpretation as the inevitable and only reasonably possible way to settle the many issues presented by article VIII, section 2(b). Different views often lead to different results. But this does not make any given interpretation of article VIII, section 2(b) necessarily unreasonable, unfair or unjust. Accordingly, the goal of article VIII, section 2(b) cannot be uniformity, but harmonization on the basis of the objectives of the IMF as set forth in article I and article IV, section 1.

The need for a harmonization of the law of extraterritorial recognition of exchange controls within the IMF is not an argument for any particular interpretation of article VIII, section 2(b) under any particular circumstances, nor for the need of universal agreement as to what interpretation should apply. Conversely, the fact that we have failed to achieve universal agreement on the interpretation of article VIII, section 2(b) is not an argument for the continued application of the different interpretations that have developed in the IMF Member States in the forty-four years of the provision's existence. If one is willing to agree that judges can differ as to how article VIII, section 2(b) should be interpreted, it becomes evident that one needs to start thinking about what are the objectives of article VIII, section 2(b) in light of article I and article IV, section 1, how those objectives can be clarified so as to ensure Fund-wide implementation, and how the process of clarification can best be effectuated within the Fund. Without a basic agreement among the IMF Member States and their courts as to the exact objectives of article VIII, section 2(b), any judicial choice or decision will be arbitrary, capricious, and result-oriented.

Many of the elements of article VIII, section 2(b) become clear as the existing body of case law unfolds. However, without a Fund-wide clarification of the *ratio legis*, the selection among the various interpretations is bound to be more or less coincidental. As a result, the elements of article VIII, section 2(b) become mere *topoi*. Article VIII, section 2(b) vests in the courts of the Member States some interpretative power. The exercise of the interpretative power is a function not only of what the provision says, but also what the Fund and its members expect the courts to do in light of the objective of international monetary cooperation and collaboration.

In this context, it should be noted that the law, with respect to the enforcement of exchange controls, can be harmonized within the Fund without the help of a uniform interpretation of article VIII, section 2(b). The necessary harmonization can also be accomplished when a court applies general choice-of-law principles, rather than article VIII, section 2(b); provided, of course, the general conflict rules are as public interest-oriented as article VIII, section 2(b).

If the courts of the Member States recognize that public policy exists to enforce exchange controls carrying the Fund's endorsement and shape their general choice-of-law principles in accordance with this policy, they would



contribute to a harmonization of the law of extraterritorial recognition of foreign exchange controls within the Fund envisaged by article VIII, section 2(b). This approach, no doubt, would require courts to wipe the slate clean of all the traditional (pre-Bretton Woods) conflict-of-laws principles and theories and start afresh. Such an approach would not necessarily assume that the traditional principles were based on such mistaken assumptions and unachievable or undesirable objectives as to make them substantially useless in the light of today's better understanding of the monetary intertwining which cannot be disentangled without self-inflicted hardship and the need for international monetary cooperation and collaboration.

The better understanding today is, it seems to me, certain. Whether the traditional conflict rules can and will be disregarded is, however, less certain.<sup>162</sup> Accordingly, a Fund-wide objective-oriented solution of the problem of extraterritorial recognition of exchange restrictions should come from within the Fund. The solution would seem to require not only a simple reorientation on the part of those who have favored a restrictive, creditor-oriented interpretation of article VIII, section 2(b), but a concerted action of all Member States, which should include the possibility of a revision of article VIII, section 2(b). However, such a revision would be acceptable only if it would result in a new provision that goes beyond the smallest common denominator.

## B. FINAL THOUGHTS

The present essay illustrates the difficulties that the courts of the IMF Member States face when they attempt to implement article VIII, section 2(b) in a way

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162. See, e.g., RESTATEMENT, *supra* note 5, § 822 comment c, which states that "[i]f an exchange control regulation is determined not to be maintained or imposed consistently with the Articles of Agreement, a court would normally proceed in accordance with the pre-Bretton Woods approach to exchange controls. . . ." *Id.* But see also Judgment of Nov. 26, 1986, BGH, W. Ger., 1986 IPRspr 418. In this child support case, the German Supreme Court, applying general conflict-of-laws principles, held that a parent who is residing in the Federal Republic of Germany is to fulfill his child support obligations toward his child residing outside of Germany in a way consistent with the exchange control regulations of the child's country of residence. In the case at hand, this was Czechoslovakia which is not a member of IMF. *Id.* at 423. The Czech regulations required that foreign parents pay the child support to their child residing in Czechoslovakia in freely convertible currency. The child in Czechoslovakia was not to receive the foreign currency, but rather its "equivalent value" in local currency or in the form of certificates which entitle the bearer to shop in special stores carrying Western merchandise. *Id.* at 422. The German Supreme Court considered the question of whether the Czech law violated the public policy (*ordre public*) of the forum, but concluded that it was not "evidently contrary to [the forum's] perceptions of justice with respect to the law of child support." *Id.* at 423. This holding is in conformity with the new German Statute on Private International Law of 1986, *supra* note 41. According to art. 18(1) of the statute, child support is subject to the law of the place of the "habitual residence" of the child. The court made it perfectly clear, however, that its decision should not be cited in support of the general proposition that German courts will automatically recognize the exchange control regulations of countries that are not members of the IMF, if the regulations in question do not violate German public policy. 1986 IPRspr at 422. Instead, the issue will be decided on a case-by-case basis.

that is consistent with the institutional objectives of the Fund. While there is room for criticism of many of the decisions involving article VIII, section 2(b), it should be admitted that, in view of the complexity of article VIII, section 2(b) and all the uncertainties surrounding the provision, the courts of the IMF Member States, by and large, have done remarkably well. As David Pannick recently stated in his challenging, critical study of the English and American judicial systems, "[j]udges do not have an easy job. They repeatedly do what the rest of us seek to avoid: make decisions."<sup>163</sup> One might add, it is almost always easier to criticize a decision than to create one. A lawyer who wishes to gain the respect of his peers, clients, and students needs, however, to produce work that is rooted in a careful and deliberate scrutiny of underlying conditions and consequences.<sup>164</sup> Unfortunately, judges very often have no choice but to approach article VIII, section 2(b) with a view to the perceived interests of the forum rather than with the economic rationale of the Articles of Agreement in mind.

Legal writers, by contrast, are in a position to examine the theoretical, historical, and economic foundations on which the law rests, to introduce new thoughts into the legal discussion, to analyze carefully article VIII, section 2(b) from a comparative point of view and to put the provision in the broader perspective of the international monetary system as a whole. Academics, however, are not in a position to determine which of their views will ultimately prevail. The implementation of a thought is largely in the hands of lawyers who, in their capacities as legislators, judges, and administrators, understand that law must contribute to, rather than hinder, the solutions of the problems today and prospects for tomorrow.

Sir Joseph deserves thanks for his unfailing efforts to lay the ground for a future-oriented, public interest approach to the extraterritorial recognition of exchange restrictions within the Fund. Courts that traditionally have been more sympathetic to private or local interests in their interpretation of article VIII, section 2(b), one hopes, will reorient their thinking and reconsider their views in light of Sir Joseph's work. Because of the supranational character and multilateral nature of the Articles of Agreement, judges need to understand that they can no longer feel champions of their own legal system (which, as every lawyer knows, is the best in the world) and adhere to traditional (pre-Bretton Woods) principles even though those principles have been substituted by new, internationally accepted rules of law. They need to be willing to overcome the limitations of their national training and acquired legal language as only this will

163. D. PANNICK, JUDGES 1 (1987).

164. For a more detailed exposition of this view, see Ebke, *Transnational Investments and Germany's Value-Added Tax: A Statute in Search of Purpose*, in CURRENT TOPICS IN U.S.-GERMAN TAX AND COMMERCIAL LAW (Liber Amicorum in Honor of Otto L. Walter) 207, 227-28 (H. Conston ed. 1988).

enable them to focus upon the conceptual framework of the Articles of Agreement in general and the economic and monetary significance of article VIII, section 2(b) in particular. As this essay has demonstrated, the sweeping changes of the law, with respect to article VIII, section 2(b), that may be necessary in a number of IMF Member States, will have to come from an amendment of the IMF Articles of Agreement or from other concerted action of all concerned.<sup>165</sup> Such concerted action will become increasingly necessary in an electronically linked, global financial market.

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165. *Accord Zamora*, *supra* note 55, at 1082.