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Article VIII, Section 2(b) of the IMF Articles of Agreement and Public Policy

For more than thirty years Sir Joseph Gold and the present author have commented on each other's activities concerning the law of exchange controls. The present article returns to our very first exchange of ideas. In an article published in 1957¹ the present author had tried to limit what he thought to be rather sweeping statements in the Executive Directors' Interpretation of June 10, 1949,² of article VIII, section 2(b) of the IMF Articles of Agreement concerning the role of public policy (*ordre public*) in relation to exchange contracts. After having stated that by accepting the Fund Agreement members have undertaken to make the principle of unenforceability of exchange contracts effectively part of their national law, the interpretation continues:

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 of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement.

Resuming our position in his recent book, Gold appears to share our view that the main purpose of the interpretation is to rule out reliance on the public policy objection "simply because the regulations are those of another country."³ However, the present author, at least, does not deem reliance on this objection inadmissible against any exchange control regulation whatsoever emanating from another member country. The target of the interpretation was the attitude

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1. Seidl-Hohenveldern, *Probleme der Anerkennung ausländischer Devisenbewirtschaftungs-massnahmen*, VIII ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 82, 94–98 (1957).

2. II J. GOLD, THE FUND AGREEMENT IN THE COURTS 94 (1982) (Decision No. 446-4).

3. III J. GOLD, THE FUND AGREEMENT IN THE COURTS 746 (1986).

especially of Swiss courts, which were not ready to see much difference between an outright taking of an asset without indemnity and making the right to dispose of the asset concerned subject to exchange control regulations.⁴ Therefore, these courts held any reliance on a foreign exchange control regulation to be just as contrary to their public policy as a foreign confiscation. We must confess that from our own experience we felt much sympathy with this view. We can, however, see the advantage the IMF members hoped to achieve by a mutual recognition of their exchange control regulations. We, too, therefore deem it inadmissible to hold any such regulation per se contrary to the public policy of the forum State.

Nevertheless, we were and remain opposed to the interpretation if the latter intends to cover also cases “where a member might apply approved regulations in a discriminatory manner.”⁵ These words are a correct rendering by Gold of the gist of our argument and yet they are a source of misunderstanding. Gold seems to believe that our reference to “discrimination” intended to allude to discriminatory currency arrangements. He assumes that we would admit the rejection of any such discriminatory arrangement by recourse to the public policy argument, whether or not the arrangement concerned had been approved by the Fund pursuant to article VIII, section 3. As a matter of fact, we hold that in some, but not in all, instances of discriminatory currency arrangements, recourse to public policy arguments should be admissible—but what we had in mind in writing the quoted passage was something different. We believe that there may be instances where foreign exchange control regulations shall be just as much open to public policy objections as any other rules of foreign law. Article VIII, section 2(b) merely rules out holding any foreign exchange control regulation as such incompatible with the public policy of the forum. Yet, there may be instances where such a regulation will appear contrary to the public policy of the forum, for example, where it is used as a means of persecution. If it is possible to reject the requirement of the marriage law of a foreign State that the spouses have to obtain a marriage license, when such a requirement is used as a means of racial persecution, why should such a foreign State’s exchange control law be above such scrutiny? Gold quotes approvingly⁶ from the court’s opinion in *In re Helbert Wagg & Co. Ltd.*⁷ that effect must be given to exchange control measures where the law of the foreign State is the proper law of the contract or where the movable is situated within the territorial jurisdiction of the State. That, however, is subject to the qualifications that this court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, that is, a law passed with the genuine intention of protecting its economy in times of national stress and for that purpose regulating (inter alia) the rights of foreign creditors, and is “not a

4. R. OBERSON, *L'ORDRE PUBLIC EN MATIÈRE MONÉTAIRE* 43 (1956).

5. III J. GOLD, *supra* note 3, at 747 (commenting on the article mentioned *supra* note 1).

6. *Id.* at 489–90.

7. 1 All E. R. 129 (1956).

law passed ostensibly with that object but in reality with some object not in accordance with the usage of nations.’⁸

We share this view and venture to include the protection of basic human rights in the present-day usage of nations. However, the forum should go further than holding application of a foreign *law* contrary to the forum’s public policy in instances where a law of racial or political persecution is camouflaged as an exchange control law. The authorities of a persecutor State are just as likely to abuse an exchange control law, having obtained the Fund’s approval, to camouflage an act of persecution. Should the forum be unable to react by holding such *act* to be contrary to its public policy? Let us give an example. A foreign firm appoints a manager to look after its assets in the forum. The firm, as part of its employment contracts subject to the law of its seat State, grants a pension to these expatriate managers. With the approval of the Fund the seat State of the firm introduces exchange control legislation making payments to residents of the forum subject to a license. Whereas licenses are granted for pension payments to other former managers resident in the forum State, the firm cannot obtain such a license for the pension due its former manager *X*, who belongs to a race, class, religion, ethnic group, or political party that has become the target of persecution by the seat State of the firm. Should the firm indeed be entitled to rely on article VIII, section 2(b) and on its interpretation by the Fund as a defense against a claim by *X* brought in the forum State to satisfy his pension claim out of the assets of the firm in the forum?

The answer may be less certain in the all too frequent cases where economic misery and persecution go hand in hand. If the foreign exchange situation of the State concerned is so bad that this State is unable to grant any license for pension payments, should the fact that *X* qualifies as persecutee entitle him to have his pension claim satisfied whereas the claims of his nonpersecuted colleagues should fail? If their aversion to persecution should lead the courts of the forum State to arrive at that result, would not such a judgment encourage other residents of the persecutor State to pose as persecutees in order to circumvent its exchange control regulations? The courts of the forum would then have the unenviable burden of establishing the real motives of the claimants and of the State concerned in each individual case. This task would be just as difficult as distinguishing between genuine seekers of political asylum and “economic refugees,” persons emigrating from a country mainly in order to improve their economic situation, but also to escape from an oppressive regime that has caused the economic ruin of the country concerned.

Like Gold⁹ we believe that some inquiry into the motives behind the enactment and the handling of exchange control regulations is permissible and

8. *Id.* at 130.

9. III J. GOLD, *supra* note 3, at 486–87 (relying on the Fund’s Decision No. 144–(52/51)).

may lead in certain cases to disregarding the effect of such regulations as contrary to the forum's public policy. Gold is right to point out that the Fund may approve, or at least not object to, discriminatory currency arrangements, prompted not by economic considerations but by reasons of national or international security. The United States' measures against Iran adopted in 1980 fall into this category. Gold quotes sources doubting whether the economic threat mentioned by the U.S. Administration side by side with the threat to U.S. security were indeed as serious as alleged.¹⁰ Gold sees the dilemma that such discriminatory currency arrangements will cause to a third State.¹¹ On the one hand, respect of such measures will embarrass its relations with the target State. On the other hand, if the courts of the forum State hold such measures contrary to its public policy the country having adopted the discriminatory measure for security reasons will feel offended by this disregard of its security interests. The solution of this quandary is clear at least as far as it concerns a permanently neutral State. Such a State's public policy will militate against recognition of such discriminatory measures as a valid defense to claims of payment. We do not believe that the Fund's interpretation against reliance on public policy arguments should indeed prevent the courts of a permanently neutral State from declaring recognition of such acts of economic warfare incompatible with that State's public policy of protecting its policy of neutrality.

Like Gold¹² we consider article VIII, section 2(b) to be a shield and not a sword. This article does not grant extraterritorial effect to other rules usually figuring in exchange control regulations side by side with the rules on the nonenforceability of contracts incompatible with the regulations concerned. These other rules oblige domestic holders of foreign assets to declare them to the exchange control authorities. Property of such assets is then vested in these authorities, either automatically or as a sanction for the holder's failure to declare such assets. Claims to enforce these rules either directly or indirectly have been disregarded. Rejection of such claims is based on the principle of territoriality of foreign penal or revenue laws. Recourse to public policy arguments thus becomes redundant.¹³ It would lead too far to discuss in the present context the problem whether the territoriality of public law did authorize Austrian courts to hold that a Yugoslav exchange control measure cannot prevent payments from an account in an Austrian bank owned by a former resident of Yugoslavia or whether article VIII, section 2(b) should have obliged the Austrian court to respect the

10. II J. GOLD, *supra* note 2, at 364-65.

11. III J. GOLD, *supra* note 3, at 488.

12. *Id.* at 384; *cf.* Solicitors for the Affairs of H.M. Treasury v. Bankers Trust Co., 304 N.Y. 282, 107 N.E.2d 488 (1952); Solicitors for the Affairs of H.M. Treasury v. Bankers Trust Co., 304 N.Y. 296, 107 N.E.2d 455 (1952).

13. I. SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 118 (1989).

decision of the Yugoslav exchange control authorities to refuse to issue the license necessary for this transaction under Yugoslav exchange control law.¹⁴

The Fund's interpretation concerning the effect of public policy on the enforceability of exchange contracts merely envisages the possibility of public policy arguments being used in order to prevent reliance on article VIII, section 2(b) to be set aside. In exceptional circumstances, however, public policy arguments might militate in favor of recognizing exchange control legislation even in situations where such legislation would not be applicable under the forum's conflict rules.¹⁵ The first decision of the Court of Appeals in the *Allied Bank* case¹⁶ required respect of Costa Rica's moratorium law by a U.S. policy to support the reconstruction of Costa Rica's economy—even where the parties had not relied on article VIII, section 2(b). This decision could not be upheld in view of a brief of the U.S. Attorney General as *amicus curiae* stating that U.S. public policy did not go so far.¹⁷ Some authors¹⁸ have regretted the lack of international solidarity shown by the outcome of this litigation. Hahn¹⁹ has suggested that it be left to the Fund to decide in any given case whether or not the Articles of the Fund require recognition of another member State's exchange control legislation. Actually the Fund is willing to give such interpretations upon the request of a domestic court.²⁰ Up to the present, however, only very few such requests have been submitted by a court. In these cases the court concerned acted on its own initiative. It seems at least doubtful whether many other courts will follow this example unless compelled to do so by law. It seems even more doubtful whether legislators would be willing to enact a law rendering obligatory the obtention of such a preliminary ruling. Such a law would have to be similar to article 177 of the Treaty establishing the European Economic Community. We doubt that States would be ready to sacrifice on a worldwide level so important a part of their sovereignty.²¹

Yet, the idea of reciprocity may militate in favor of such recognition. After all, nearly all States can envisage the possibility of running into economic difficulties that could compel them to introduce exchange control regulations. They thus

14. *Contra* III J. GOLD, *supra* note 3, at 588 (disagreeing with Austrian Supreme Court opinion of July 2, 1958).

15. II J. GOLD, *supra* note 2, at 222.

16. *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 23 I.L.M. 742 (1984).

17. III J. GOLD, *supra* note 3, at 424–25.

18. Seidl-Hohenveldern, *Umschuldung und internationales Privatrecht*, in *FESTSCHRIFT FÜR GERHARD KEGEL* 621 (Musielak & Schurig eds. 1987).

19. Ebenroth & Teitz, *Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions*, 19 INT'L LAW. 254 (1985); Hahn, *Zahlungsmoratorium ausserhalb des Verbotsstaates kein 'Act of State.'* 38 ZEITSCHRIFT FÜR DAS GESAMTE KREDITWESEN 892, 937 (1985).

20. II J. GOLD, *supra* note 2, at 144; III J. GOLD, *supra* note 3, at 286; J. GOLD, *INTERPRETATION BY THE FUND* 46 (IMF Pamphlet Series No. 11, 1968).

21. I. SEIDL-HOHENVELDERN, *supra* note 12, at 163.

could deem it to be to their advantage to recognize today another country's exchange control regulations even insofar as they provide for the transfer to the State of assets that its residents hold abroad. Such a State could hope that by acting in this way today other countries tomorrow will be willing to recognize its own regulation providing for such a transfer. Even at present, the notion of reciprocity has led to a certain change of attitude in respect to exchange control regulations in general. In the early days of the Fund, article VIII, section 2(b) was held to be a privilege mutually granted by the Member States. A non-Member State or a State having left the Fund could no longer count on such respect for its exchange control regulations.²² Gradually, however, such respect appears to be granted also to exchange control regulations of non-Member States. Their rules, too, will no longer be held to be per se contrary to the public policy of the forum State. Austria maintains a sizeable amount of commercial relations with Czechoslovakia, a nonmember country. Yet, there are no reported Austrian decisions excluding the application of Czechoslovak exchange control regulations for that reason.

This development is symptomatic of the tendency signalled by Gold that the fundamental postulates that underlie the obligations resulting from the Fund Agreement may affect also nonmembers. Writing in 1966²³ Gold did not want to go so far as to claim that these rules have become part of customary international law. Writing in 1986²⁴ Gold refers to the possibility of an opinion being created by the existence of article VIII, section 2(b) to hold recourse to public policy no longer justifiable under these circumstances. We may thus feel justified to assume that this rule has made progress on its way to becoming part of customary international law. We welcome this development, always provided recourse to public policy shall remain admissible within the narrow limits set out above.

22. III J. GOLD, *supra* note 3, at 531; J. GOLD, THE FUND AND NON-MEMBER STATES: SOME LEGAL EFFECTS 30-32 (IMF Pamphlet Series No. 7, 1966) [hereinafter J. GOLD, NON-MEMBER STATES] (quoting approvingly *Stephen V. Zivnostenska Banka*, 31 Misc. 2d 45, 140 N.Y.S.2d 323, *aff'd*, 286 A.D. 999, 145 N.Y.S.2d 310 (1955); *Pan-American Life Ins. Co. v. Lorido*, 19 Fla. Supp. 167 (11th Cir. Ct. 1962), *aff'd*, 154 So. 2d 200 (Fla. App.), *cert. denied*, 155 So. 2d 695 (Fla. 1963), *cert. denied*, 377 U.S. 990 (1964)).

23. J. GOLD, NON-MEMBER STATES, *supra* note 21, at 24.

24. *Id.* at 566.