Exchange Control Regulations within the Meaning of the Bretton Woods Agreement: A Comparison of Judicial Interpretation in the United States and Europe

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INTRODUCTION

In July 1944, leaders from around the world gathered at the small town of Bretton Woods, New Hampshire, to redesign the world economic order in the wake of the Second World War. The delegates to the Bretton Woods International Monetary Conference drew up articles of agreement establishing the International Monetary Fund (IMF).1 Two principal purposes of the IMF Articles of Agreement [hereinafter the Bretton Woods Agreement], as set forth in article I of the treaty, are "[t]o promote international monetary cooperation [and] [t]o promote exchange stability."2 In order to further these twin goals, the Bretton Woods Agreement generally requires that each member state respect the foreign exchange laws of other IMF members.

This article analyzes certain aspects of article VIII, section 2(b) of the Bretton Woods Agreement. Article VIII, section 2(b) renders unenforceable those exchange contracts that involve the currency of an IMF member state and that violate the exchange control regulations of that state. This provision effectively gives extraterritorial effect to the currency control laws of member states by mandating the unenforceability of contracts that violate these laws.

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2. Id. art. I.
The first sentence of article VIII, section 2(b) of the Bretton Woods Agreement states:

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

The strength of this provision lies in its broad geographic reach: article VIII, section 2(b) completely bars the enforcement of an illegal exchange contract in any IMF member state.

Article VIII, section 2(b) of the Bretton Woods Agreement particularly deserves analysis because of its potential applicability to a wide range of private international agreements. This provision has been given internal effect in several countries, including the United States, 4 and probably has the full force of law in all IMF member states, even those that have not otherwise incorporated article VIII, section 2(b) into their domestic law. 5 Additionally, recent, rapid changes in political and economic regimes in many parts of the world may result in increased application of the Bretton Woods Agreement to invalidate private international contracts. As the cases discussed in this article illustrate, article VIII, section 2(b) has been invoked most often as a defense to the enforcement of contracts following sudden political change, drastic economic upheaval, or the nationalization of financial institutions, especially in developing countries. 6 The shift toward open markets in Central and Eastern Europe and the admission or readmission of some or all of the member nations of the Council for Mutual Economic Assistance (CMEA) 7

3. Id. art. VIII, sec. 2(b).
5. For a discussion of the views of various courts and commentators on the internal force of article VIII, section 2(b) of the Bretton Woods Agreement, see 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, 971 n.22 (1985) and accompanying text [hereinafter Note (1985)]. For a discussion of whether IMF interpretations of article VIII, section 2(b) of the Bretton Woods Agreement are binding on the courts of member countries, see Williams, Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement, 15 VA. J. INT’L L. 319, 329-32 (1975). See also Ebke, Article VIII, Section 2(b). International Monetary Cooperation, and the Courts, 23 INT’L LAW. 677, 683-84 (1989).
6. Such a result makes sense, inasmuch as the economic forces that encourage and accompany these changes often cause substantial capital flight and correlative currency controls. Cases discussed in this article, for example, resulted from political crises following World War II, Algerian independence, and revolutions in Cuba and Czechoslovakia, or from the drastic economic measures taken by Mexico and Costa Rica to lessen the burden of external debt payments.
into the IMF may also lead to increased application of the Bretton Woods Agreement in domestic litigation.\(^8\)

In order to determine whether article VIII, section 2(b) of the Bretton Woods Agreement prohibits the enforcement of a particular contract, a court must focus closely on two questions:

1. is the challenged contract an “exchange contract”? and
2. does the contract violate the “exchange control regulations” of a member state whose currency is involved in the contract?

Once a court finds that an exchange contract violates the exchange control regulations of a member state, the court should then determine whether the regulations were imposed consistently with the Bretton Woods Agreement.\(^9\)

Almost all of the legal literature concerning this subject focuses, as do the courts themselves, primarily on the interpretation of the term “exchange contract” in article VIII, section 2(b).\(^10\) Relatively little attention has been paid so far to the definition of “exchange control regulations.” The Bretton Woods Agreement itself defines neither term.

This article compares the various judicial interpretations of the term “exchange control regulations” as used in article VIII, section 2(b).\(^11\) With no clear interpretation by the IMF of article VIII, section 2(b), courts in IMF member states have differed in their application of this provision in determining the enforceability of contracts challenged under the treaty.\(^12\) This article

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\(^8\) It must be noted that, as of January 1, 1989, only 65 of the 151 members of the IMF had accepted the obligations of article VIII, sections 2, 3 and 4 of the Bretton Woods Agreement. Ebke, supra note 5, at 684 n.40. These member states undertake neither to impose restrictions on the making of payments and transfers for current international transactions nor to engage in discriminatory currency arrangements or multiple currency practices without IMF approval, as well as to assure the convertibility of their currencies.

\(^9\) Although article VIII, section 2(b) by its terms should require some determination of whether regulations are imposed consistently with the Bretton Woods Agreement, courts sometimes ignore this technical requirement. When the issue of consistency is raised, courts then face the subsidiary question of what test best ascertains whether exchange control regulations are consistent with the Bretton Woods Agreement. This question is addressed when appropriate in the case discussions that follow.


\(^11\) This article does not list the many possible types of exchange control regulations. The discussion below, however, does catalogue selected representative examples of exchange control regulations accepted as such by domestic courts interpreting article VIII, section 2(b) of the Bretton Woods Agreement. The application of a uniform purpose test to determine the nature of an exchange law in any given instance would preclude the need for such an exhaustive list.

\(^12\) Even if the IMF adopted a clear, workable definition of exchange control regulations outside the framework of the treaty, the uniform application of that definition would still depend on its acceptance by domestic courts adjudicating disputes over the enforceability of particular exchange contracts in member states. Cf. Ebke, supra note 5, at 695-96, 703-05 (judiciary should
argues that, in order to narrow the range of judicial applications of article VIII, section 2(b), courts in the various IMF member countries should adopt an explicit, uniform test based on the purpose of laws that affect the performance of exchange contracts. In particular, judicial reliance on a purpose test to identify exchange control regulations would lead to a greater convergence of national views on the proper application of the Bretton Woods Agreement to the enforceability of exchange contracts. Such uniformity of judicial interpretation of article VIII, section 2(b) is necessary to make the enforceability of private international business and financial agreements more predictable and certain.

I.

Exchange Control Regulations Defined

A. Range of Judicial Interpretation

Traditionally, courts in the United States and the United Kingdom have applied article VIII, section 2(b) narrowly, while most European courts have granted it a broader interpretation. This divergence of judicial interpretation might be explained by a number of factors. For example, members of the European Monetary System (EMS) highly value exchange stability and monetary cooperation. These countries historically favor exchange controls and have some interest in reciprocal respect for each other's currency laws. By contrast, the United States plays host to many international lenders and highly values free trade and the liberalization of international capital movements. The comparatively narrow view that U.S. courts have of article VIII, section 2(b) may reflect these values. However, the United Kingdom, which is also home to many large international creditors, has nonetheless traditionally relied heavily on exchange restrictions. Therefore, local bias in favor of creditors in the United States and the United Kingdom, rather than an historically favorable attitude toward exchange controls by the EMS nations, may better explain the international divergence in judicial interpretations of article VIII, section 2(b).

On a textual level, any divergence between courts in interpreting this provision of the Bretton Woods Agreement probably reflects greater disagreement on the meaning of exchange contracts than on the meaning of exchange control regulations. In fact, as the cases discussed below illustrate, there is relatively little divergence in the interpretation of article VIII, section 2(b) when courts focus on the nature and purpose of exchange control regulations implicated in a specific contractual dispute. Therefore, courts applying an
explicit purpose test could be expected to converge on a more uniform interpretation of the Bretton Woods Agreement. Because the adoption of a purpose test would be based, at least in part, on a basic economic rationale underlying article VIII, section 2(b) (i.e., that states must at times protect their national exchange reserves), this uniformity would, in turn, foster the values of international monetary cooperation that the Bretton Woods Agreement represents.17

B. The Purpose Test

Under the purpose test proposed in this article, the purpose of a foreign statute or regulation determines its characterization as an exchange control regulation. Specifically, an exchange control regulation is a law designed to protect a nation’s foreign exchange resources. It does not merely concern foreign currency. The law must be designed primarily to protect a nation’s exchange resources, whether gold, domestic currency, or reserves of foreign exchange. Absent this purpose, laws governing trade, establishing legal tender, or raising revenue, though they may necessarily affect supplies of exchange resources, do not constitute exchange control regulations.

C. Nonjudicial Sources of the Purpose Test

The purpose test may be derived from the cases that follow, but other sources lend credence to it. Professor F. A. Mann, for example, advocates reliance on the motive or purpose of a regulation to determine whether it constitutes an exchange control regulation under article 2 of the Bretton Woods Agreement. Mann argues that exchange control regulations must have as their purpose the protection of currency18 or “the protection of exchange resources.”19 According to Mann, “[i]t must be accepted as established that ‘exchange control regulations’ are only those provisions intended to maintain or enhance a country’s exchange reserves by monitoring exchange transactions as well as the transfer of assets or services.”20 Mann’s purpose test essentially mirrors the one employed, though not always consciously, by various courts in the cases discussed in this article.

In contrast, Sir Joseph Gold21 has criticized Professor Mann’s view as too narrow.22 Gold rejects the purpose test in favor of an analysis focusing

17. Id.
18. F. MANN, supra note 10, at 393.
19. Id. at 393 n.90.
21. Sir Joseph Gold is probably the foremost expert on the Bretton Woods Agreement and the use of exchange controls. He served the IMF for many years as general counsel and director of its legal department. On the importance of Sir Joseph Gold’s many contributions to this subject, see Ebke, supra note 5, at 679-81; see also 23 INT’L LAW. No. 4 (1989) (special issue on international monetary law devoted as a tribute to Sir Joseph Gold).
22. J. GOLD, supra note 20, at 475-82.
on the restrictive effects of an exchange control regulation once adopted.\textsuperscript{23} The IMF has adopted Gold's approach with regard to restrictions on payments and transfers under article VIII, section 2(a), but so far has not formally extended this approach to exchange control regulations under section 2(b).\textsuperscript{24}

Gold's formula, which gives considerable latitude to the IMF in determining whether a particular regulation could be subject to IMF approval under the Bretton Woods Agreement, has three important facets. First, he would find exchange control regulations in laws that are not necessarily called exchange controls on their face.\textsuperscript{25} Second, despite his rejection of Mann's purpose test, Gold acknowledges that the motive of an IMF member in enacting exchange control regulations is not wholly irrelevant. Yet, for Gold, the fiscal or economic purpose of the regulations is not determinative of their characterization under article VIII, section 2(b).\textsuperscript{26} Third, although economic motives might underlie exchange control regulations, Gold allows that political or national security motives might also be the driving force behind the enactment of such regulations.\textsuperscript{27} To the extent that the preservation of exchange resources can serve political or national security objectives \textit{as well as} economic ones, this aspect of Gold's formula is consistent with the purpose test. However, inasmuch as some laws are purely political in nature (e.g., monetary restrictions by one country against another irrespective of economic effects), Gold's view must be seen as too broad.\textsuperscript{28} Laws motivated solely by political considerations may be currency controls under local law,
but they should not be considered exchange control regulations deserving of extraterritorial enforcement under the Bretton Woods Agreement.

The narrower interpretation advocated in this article and by Professor Mann roughly matches the approach used by the United States in international negotiations. For example, in its reference terms for the General Agreement on Tariffs and Trade (GATT) Uruguay Round of negotiations, the United States defines exchange controls as "[t]he internal rationing of foreign currencies, bank drafts and other financial paper to stabilize balance of payments problems . . . ." This conception of exchange controls corresponds with the U.S. view regarding which exchange control regulations should be permissible under international law. The Restatement (Second) of the Foreign Relations Law of the United States approves the regulation of foreign exchange when "reasonably necessary . . . to protect the foreign exchange resources of the state." In addition, the new Restatement (Third) of the Foreign Relations Law of the United States includes a provision essentially paraphrasing article VIII, section 2(b) of the Bretton Woods Agreement. The new Restatement adopts the view that "[t]he principal purpose of most exchange controls . . . is economic regulation." This notion may limit access to foreign exchange. For this reason alone, a court adopting Gold's position would be forced to give extraterritorial effect to an otherwise offensive foreign exchange control law.

In contrast to Gold, Mann also criticizes the notion that financial controls taken solely for national security or foreign policy reasons are exchange control regulations. F. MANN, supra note 10, at 393 nn.90-91. *See supra* note 19 and accompanying text.


30. Reference Terms for the Uruguay Round (Dep't Comm. 1987).


32. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 822 (1988). For a discussion of the new section 822 and the presumed economic rationale behind article VIII, section 2(b) of the Bretton Woods Agreement, see Gold, supra note 23. Gold criticizes the purpose test because, in his view, laws that reduce a nation's reserves of foreign exchange can also be exchange control regulations. Gold's view is not necessarily inconsistent with the test advocated in this article (although it may conflict with Prof. Mann's view, discussed above). Any law designed to protect exchange resources is an exchange control regulation under the purpose test. Such protection may be effected by maintaining (most common), by increasing (often desired but impossible) or even by reducing (rare) national monetary reserves through exchange controls, depending on the economic circumstances in which the laws are enacted.

33. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 822, reporter's note 4. The authors of the Restatement also consider some currency laws that are motivated solely by national security concerns to be exchange control regulations. *Id*. The IMF may accept or reject these laws as consistent with the Bretton Woods Agreement. Cf. Sir Joseph Gold's view (exchange control regulations may be politically motivated), discussed and criticized *supra* notes 27-28 and accompanying text.
best be formulated, in accord with the approach of both Restatements, as the purpose test set forth above.34

This interpretation of exchange control regulations may also be inferred from the purposes of the Bretton Woods Agreement. The purpose of article VIII, section 2(b) is to ensure international recognition of exchange controls as sanctioned by the IMF.35 While consistent with the twin goals of promoting both exchange stability and international monetary cooperation, this provision impedes another goal set forth in article I, namely "the elimination of foreign exchange restrictions which hamper the growth of world trade."36 As a result, article VIII, section 2(b) is not typically construed to hinder contracts for the sale or purchase of merchandise, commodities, or services, except when such contracts are really "exchange contracts" or "monetary transaction[s] in disguise."37

Hence, legal tender laws or laws regulating trade generally should not be considered exchange control regulations. Courts should not interpret article VIII, section 2(b) so as to grant extraterritorial effect to currency controls designed to inhibit the free flow of goods and services across borders. Only those currency restrictions that are designed to protect foreign currency reserves or to support the value of domestic currency in accordance with IMF rules should be considered exchange control regulations within the meaning of the Bretton Woods Agreement.

II.
CASE LAW IN THE UNITED STATES

A. General Observations

Like courts in other countries, U.S. courts seldom recognize the purpose test as such, but they implicitly rely on this sort of analysis in their decisions. The failure of U.S. courts to create a general principle defining exchange control regulations leaves both the courts and private parties with little guidance when confronting article VIII, section 2(b) issues. Explicit adoption of a purpose test to define exchange control regulations would enhance the predictability of judicial enforcement of exchange contracts.

B. Cases Arising Prior to the Bretton Woods Agreement

Because the use, explicit or otherwise, of a purpose test to analyze foreign exchange laws predates the Bretton Woods Agreement, cases interpreting article VIII, section 2(b) should be read only after establishing the

34. See supra Part I. B.
36. Bretton Woods Agreement, supra note 1, art. I.
definitional foundation developed in cases arising prior to the Bretton Woods Agreement. At the beginning of the twentieth century, the U.S. Supreme Court recognized the validity of foreign exchange controls in American courts. *Ling Su Fan v. United States*\(^\text{38}\) concerned a currency control law in the Philippines, then under U.S. administration. The Court in *Ling Su Fan* respected the Philippine prohibition on the export of Philippine silver coins, saying "the power to coin money includes the power to prevent its outflow from the country of its origin."\(^\text{39}\) The Supreme Court's remark highlights the distinction between laws that merely concern currency (whether domestic or foreign) and laws that have as their purpose the preservation of national monetary resources.\(^\text{40}\) Any state may legitimately regulate money; only those laws that restrict transnational currency flows in order to maintain the supply or value of currency reserves are exchange controls.

Historically, U.S. courts have respected laws enacted to preserve a nation's supply of foreign exchange resources. For example, in *Egyes v. Magyar Nemzeti Bank*\(^\text{41}\) the Second Circuit Court of Appeals analyzed two Hungarian foreign exchange regulations enacted prior to the Second World War. First, under Hungarian Government Decree No. 6900 of 1931, issuers of Hungarian bonds were forbidden to make remittances abroad. Decree No. 6900 mandated that the issuers deposit pengoes (then the Hungarian national currency) with the Hungarian Central Bank for the benefit of bondholders. From these accounts, the pengoes would be credited to a Foreign Creditors' Fund, payable in pengoes.\(^\text{42}\) Second, under Hungarian Government Decree No. 1960 of 1935, the Cash Office for Foreign Creditors replaced the Foreign Creditors' Fund. After the enactment of Decree No. 1960, issuers made deposits directly to the Cash Office, bypassing the Central Bank.\(^\text{43}\)

The effect of these decrees was to severely limit the marketability of Hungarian bonds and to reduce their real value to investors. As a result of the decrees, the bonds were denominated in pengoes and payable only in Hungary. At that time, however, pengoes were practically worthless in world capital markets. In 1937, when the Central Bank offered to purchase the bonds at a discount and to pay bondholders in foreign exchange, the bondholders rejected the offer.\(^\text{44}\) After the War, the bondholders sued the Hungarian Central Bank for the value of the bonds held in the foreign investors' accounts. The *Egyes* court held that the Central Bank was not liable to the foreign depositors in the absence of any contract between them and the Bank

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\(^{38}\) 218 U.S. 302 (1910).

\(^{39}\) *Id.* at 311.

\(^{40}\) Not all laws that concern currency are designed to protect exchange reserves. A law establishing a nation's official currency, for example, relates to money but is not meant to control foreign exchange or to preserve that nation's currency supplies. Exchange control regulations may thus be regarded as a subset of all the laws that regulate money.

\(^{41}\) 165 F.2d 539 (2d Cir. 1948).

\(^{42}\) *Id.* at 540.

\(^{43}\) *Id.*

\(^{44}\) *Id.* at 541.

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because the Bank had merely acted in accordance with the Hungarian decrees.\textsuperscript{45} The U.S. court's holding legitimated in the United States these regulations designed to limit the flow of capital out of Hungary.\textsuperscript{46}

Another case, \textit{Naamloze Vennootschap Suikerfabriek "Wono-aseh" v. Chase National Bank of the City of New York},\textsuperscript{47} decided after the Bretton Woods Agreement, concerned facts arising before the Agreement and made no reference to it. The court in \textit{Naamloze} reaffirmed the validity in the United States of foreign exchange regulations, citing \textit{Ling Su Fan} and \textit{Egyes} and stating that "[c]ontrol of the national currency and of foreign exchange is a necessary attribute of sovereignty."\textsuperscript{48} Significantly, the U.S. District Court for the Southern District of New York in \textit{Naamloze} expressly advocated that a purpose test be used by U.S. courts for determining whether a law is a foreign exchange control.

The test developed in \textit{Naamloze} at first suggests a divergence between American and European courts in defining exchange control regulations, as discussed below. To the contrary, the \textit{Naamloze} court actually developed a purpose test akin to that underlying European interpretations of exchange control regulations.\textsuperscript{49} The U.S. court misapplied this test, however, by drawing too sharp a distinction between revenue laws and exchange controls.\textsuperscript{50} Specifically, the court in \textit{Naamloze} held that the forced purchase of government bonds denominated in local currency (under Indonesian Foreign Exchange Ordinance, 1940) was not a foreign exchange control regulation.\textsuperscript{51} Forced deposits in the local currency, however, would have been a foreign exchange control.\textsuperscript{52} Though both laws affected foreign currency, they had different purposes. The first was a means of raising government revenue. The second required the use of local currency to protect foreign currency reserves.\textsuperscript{53}

\textsuperscript{45.} \textit{Id.} at 540-41. Since the bondholders had entered into contractual agreements with the issuers, there was no privity between the investors and the Central Bank. The designation of the Cash Office for Foreign Creditors as the depository for foreign bondholders' accounts further weakened any claims against the Central Bank.

\textsuperscript{46.} \textit{Id.} at 541.

\textsuperscript{47.} 111 F. Supp. 833 (S.D.N.Y. 1953).

\textsuperscript{48.} \textit{Id.} at 845.

\textsuperscript{49.} \textit{See infra} Part III.

\textsuperscript{50.} In its ruling, the \textit{Naamloze} court distinguished between revenue measures and currency controls. According to the court:

\begin{quote}
Had the Netherlands Indies government acting under Foreign Exchange Ordinances provided that income received on foreign securities would be credited to the account of the beneficial owner in local currency rather than dollars, it would have been acting within its power [to control the national currency and foreign exchange]. . . . The obligatory purchase of government bonds with half the plaintiff's account balance in Indonesia is an act of a foreign government done within its own territory having no necessary relation to the foreign exchange law.
\end{quote}


\textsuperscript{51.} \textit{Id.} It was immaterial for the court's analysis that the government termed its revenue law a Foreign Exchange Ordinance.

\textsuperscript{52.} \textit{Id.}

\textsuperscript{53.} \textit{Id.}
Accordingly, by concentrating on the forced bond purchases, the U.S. court in *Naamloze* characterized Indonesian Foreign Exchange Ordinance, 1940, as a revenue measure and not as a foreign exchange control.\(^{54}\) In contrast, by focusing on the forced currency conversion, a Dutch court later characterized this same ordinance as an exchange control regulation consistent with the Bretton Woods Agreement.\(^{55}\) To the extent that the purpose of either law would have been to protect Indonesian foreign exchange resources, the Dutch court more correctly applied the purpose test. Consequently, the Dutch interpretation conforms with the majority of cases, both European and American.

The plaintiff in *Naamloze* had voluntarily given control of foreign securities to the bank, Escomptobank, N.V., which deposited cash and securities in its own name with Chase National Bank [hereinafter Chase] in New York.\(^{56}\) Escomptobank was an agency of the Netherlands Indies government, and later of the Indonesian government. The colonial government passed a foreign exchange ordinance converting one-half the plaintiff's Indonesian account balance to government bonds.\(^{57}\) This ordinance, the Foreign Exchange Ordinance, 1940, had the express object of "preventing injury to the country's foreign exchange position," although many of its provisions in no way affected foreign currency transactions.\(^{58}\) As the beneficial owner of the account, the plaintiff sought the funds in Escomptobank's Chase account. When the plaintiff sued Chase for the account, Chase impleaded Escomptobank.\(^{59}\) The plaintiff ultimately failed, but only because it had voluntarily given Escomptobank control of the funds and not because of any extraterritorial validity of the Indonesian laws.\(^{60}\) Had the *Naamloze* court correctly applied the purpose test, it would have been able to protect the bank without relying on the voluntary nature of the plaintiff's acts.

C. Cases Arising Under the Bretton Woods Agreement

American courts have been less than clear on precisely what constitutes an exchange control regulation under the Bretton Woods Agreement. Traditionally, they have rejected the Bretton Woods defense for other reasons and have addressed the exchange control regulation issue only in passing, if at all. Nonetheless, judicial decisions in the United States generally explore this issue more fully than do decisions of European courts. Moreover, there is a

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54. *Id.*
55. See Frantzmann v. Ponijen, 20 I.L.R. 423 (Dist. Ct., Maastricht, Neth. 1960), discussed *infra* in text accompanying note 156 and following. Even U.S. courts have recognized that exchange control regulations and revenue laws are not necessarily mutually exclusive. *See*, e.g., Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), discussed *infra* in text accompanying note 69 and following.
57. *Id.* at 840.
58. *Id.* at 836.
59. *Id.* at 835.
60. *Id.* at 845.
trend in recent American opinions toward a deeper examination of the issues raised by the Bretton Woods defense.

1. Early U.S. Interpretations of Article VIII, Section 2(b): The Cuban Insurance Cases

The Cuban insurance cases demonstrate the initial reluctance of American courts to define exchange control regulations. These cases from the early 1960's concerned Cuban nationals who resided in the United States following the ouster of the Batista regime by Fidel Castro. In one of the most notable of the Cuban insurance cases, *Pan American Life Insurance Co. v. Blanco*, a Cuban national sued for payments due under annuity contracts payable in U.S. dollars in New Orleans. The defendant insurance company asserted the Bretton Woods defense, among other defenses, claiming that two Cuban decrees barred enforcement of the life insurance policies in the United States. The first of the two decrees, No. 13 of 1948, required acceptance in Cuban pesos of all obligations paid in Cuba. The other decree, No. 568 of 1959, provided that any payments made to Cuban nationals had to be made in Cuba. The combined effect of these two decrees was to require that all payments to Cuban nationals be made in Cuba and in pesos. The Bretton Woods defense failed in *Pan American*, and the court ordered the insurance company to honor the annuity contracts.

The *Pan American* court used little analysis in recognizing the existence of Cuban exchange control regulations. Without expressly addressing the issue, the *Pan American* court assumed that the decrees were foreign exchange controls. If the court had applied the purpose test, then it would have found the decrees to be extra-territorially enforceable exchange controls. The purpose of the Cuban decrees was to keep pesos from leaving Cuba and, to the extent possible, to attract to Cuba dollars owed to Cubans. Insofar as the decrees were meant to protect Cuba's supply of foreign exchange, they functioned as exchange control regulations.

Suggesting that Cuba's exchange controls were not imposed consistently with the Bretton Woods Agreement, the court rejected the Bretton Woods defense in *Pan American*. The court reached this conclusion despite a legal opinion of the IMF general counsel that the Cuban decrees accorded with the

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61. 311 F.2d 424 (5th Cir. 1962).
62. Id. at 426.
63. In theory, payment could be offered legally in a currency other than pesos. In practice, however, debtors preferred to pay in pesos, which were cheap. Under the 1948 decree, the creditor was bound to accept pesos as payment.
64. 311 F.2d at 427.
Bretton Woods Agreement. The court provided no rationale for this finding, and it is difficult to imagine what other assurance the court sought. In the most recent U.S. decisions, a legal opinion of the IMF has been persuasive, if not controlling, authority that the exchange control regulations at issue conform with the Bretton Woods Agreement.

A different American court has examined the two Cuban decrees discussed in Pan American in greater depth. The Second Circuit Court of Appeals in Menendez v. Saks & Co. held that the Cuban currency control regulations mandating payment of Cuban debts in Cuba and in pesos were "currency control regulation[s]." The court in Menendez determined that, in general, "[c]urrency controls are but a species of revenue law," unenforceable in another nation in the absence of an international agreement, such as the Bretton Woods Agreement. The Menendez court delineated two types of currency control regulations: (1) regulations that require the surrender of foreign exchange to the government; and (2) regulations that prohibit contracting or payment in foreign currency. This definition, while not derived


66. 311 F.2d at 427. For a discussion of IMF certification of whether particular laws are exchange control regulations, see infra note 85 and text accompanying notes 114-17.

67. In another of the Cuban insurance cases, Pan American Life Ins. Co. v. Raji, 156 So. 2d 785 (D.C. Fla. 1963), the court rejected the Bretton Woods defense on the ground that, since the annuity contract was payable in dollars, it did not "involve the currency" of Cuba. Article VIII, section 2(b) of the Bretton Woods Agreement applies only to exchange contracts "which involve the currency" of a member country and violate "the exchange control regulations of that country." This result diverges from the majority of judicial opinion. Cf., e.g., Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870 (S.D.N.Y. 1983), discussed infra in text accompanying note 77; Braka v. Bancomer, 589 F. Supp. 1465 (S.D.N.Y. 1984), discussed infra in text accompanying note 87 and following. See also Williams, supra note 5; J. Gold, The Cuban Insurance Cases and the Articles of the Fund 30, 34 (IMF Pamphlet Series No. 8, 1966).


69. 485 F.2d 1355 (2d Cir. 1973).

70. Id. at 1366 n.14. Contra Naamloze Vennootschap Suikerfabriek "Wono-aseh" v. Chase Nat'l Bank of the City of New York, 111 F. Supp. 833 (S.D.N.Y. 1953) (exchange controls and revenue measures distinguished), discussed supra in text accompanying note 47 and following. The Menendez court's statement may be too broad, but Naamloze draws too sharp a distinction. See supra text accompanying notes 47-55.

71. Menendez, 485 F.2d at 1366, relying on Note, Foreign Exchange Control in American Courts, 26 ST. JOHN'S L. REV. 97 (1951). The author of the Note, however, cautions that "[t]hese categories are by no means constant and settled forms of foreign exchange control." Id. at 97 n.1. Compare F. MANN, supra note 10, and Williams, supra note 5, declaring that "[i]n general, exchange control regulations include: (a) those rules which require the observance of certain procedures before transnational payments may be made; (b) those rules which restrict payments on certain transactions; and (c) those rules which require that all or some specified part of foreign exchange be surrendered to a governmental authority in return for local currency at specified rates." Id. at 352 n.152. As a purely descriptive matter, this paradigm fits most of these
from the purpose test, is consistent with it and corresponds to some types of regulations found to be exchange controls in other cases. The Menendez court, however, rejected the Bretton Woods defense on other grounds. It held that, because Cuba was no longer a member of the IMF, the Bretton Woods Agreement did not call for extraterritorial enforcement of the Cuban decrees. 72

2. Toward a Purpose Test: The Extraterritorial Enforcement of Exchange Control Regulations Under Article VIII, Section 2(b) to Protect Foreign Exchange Reserves

Under the purpose test, even a law governing private conduct in international trade should be considered an exchange control regulation if its purpose is the protection of exchange resources. The Court of Appeals for the First Circuit endorsed such a rule in dictum in John Sanderson & Co. (Wool) Pty. Ltd. v. Ludlow Jute Co., Ltd. 73 The court in Sanderson addressed an exchange control regulation designed to prevent the diversion of Indian export earnings through private international sales agreements. The Indian Law, Rule No. 6 of the Foreign Exchange Regulation Act (Act VII of 1947), provided that the full export value of goods shipped out of India must be received from the country of the goods' final destination, unless otherwise permitted by the Indian Reserve Bank, and paid to the exporter within six months of the date of shipment. 74 This type of rule hindered the flow of capital out of India by preventing the shipment of deliberately undervalued goods to overseas middlemen. These foreign agents would retain the benefit of the discount on the goods by not remitting the full export value to the Indian exporter, depriving India of export income and foreign exchange. To the extent that the Indian government intended through Rule No. 6 to preserve export income in the form of foreign exchange, the rule constituted an exchange control regulation under the purpose test.

Although the First Circuit Court of Appeals made important observations concerning article VIII, section 2(b) in Sanderson, the facts and the peculiar procedural history of the case mitigate the precedential value of these observations. An Australian importer had brought an action in the United States to enforce an Australian judgment against a U.S.-based exporter of Indian jute. 75 The exporter had failed to claim the Bretton Woods defense during the Australian proceedings and so was precluded from litigating the

72. Menendez, 485 F.2d at 1366-67.
73. 569 F.2d 696 (1st Cir. 1978).
74. Id. at 699 n.2.
75. Id. at 699. Sanderson, an Australian importer, originally purchased jute from India, paying the American-based exporter the jute's full export value. The exporter paid Sanderson a commission on jute resales. With the permission of India's Reserve Bank, the commission was deducted from Sanderson's payments to the exporter. Later, under a renegotiated sales contract,
issue in the United States. The *Sanderson* court speculated, however, that article VIII, section 2(b) might well have provided a defense for the exporter in Australia, had it originally been raised there.\(^{76}\) The *Sanderson* court failed to reach the merits of the exporter's claim, raised as part of the Bretton Woods defense, that the Indian law was an exchange control regulation. The court indirectly accepted this view, however, even though the express subject of the Indian law was international trade in goods, not currency control.

Moreover, a court sitting in an IMF member country should give effect to exchange control regulations of another IMF member country that limit the access of domestic debtors to that country's foreign currency reserves to satisfy foreign obligations. This type of protection of foreign exchange reserves closely fits the purpose-oriented definition of exchange control regulations. The District Court for the Southern District of New York implicitly adopted this analysis in *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*,\(^{77}\) in which the Bretton Woods defense nonetheless failed.

In *Libra Bank*, Banco Nacional, a private Costa Rican bank, sought protection from an international consortium of banks seeking to recover their share of principal amounts in a syndicated loan. Costa Rican banking laws required Central Bank approval of all foreign exchange transactions in order to preserve the country's scarce foreign exchange reserves.\(^ {78}\) Under the purpose test, these laws were exchange control regulations. Banco Nacional sought Central Bank authorization to make foreign debt payments and was denied. Because the Central Bank would not approve the repayment of external debts in foreign currency, and probably would not provide the foreign currency needed to satisfy these foreign debts, Banco Nacional was unable to pay Libra Bank.\(^ {79}\) Banco Nacional unsuccessfully asserted a defense based on a sales contract for less than half the full export value of goods was an exchange contract to the extent that the parties fraudulently sought to evade currency controls), discussed infra in text accompanying note 118 and cited with approval in *Sanderson*, 569 F.2d at 699.

\(^{76}\) Id. This idea relied on the broader notion of "exchange contract" under Australian law. Australia, the *Sanderson* court assumed, would follow British precedent under which sales contracts could be exchange contracts. See, e.g., Wilson, Smithett & Cope Ltd. v. Terruzzi, [1976] 2 W.L.R. 418 (C.A.), [1976] 1 All E.R. 817 (a sales contract for less than half the full export value of goods was an exchange contract to the extent that the parties fraudulently sought to evade currency controls), discussed infra in text accompanying note 118 and cited with approval in *Sanderson*, 569 F.2d at 699.

\(^{77}\) 570 F. Supp. 870 (S.D.N.Y. 1983).

\(^{78}\) Banco Nacional asserted that a resolution of the Central Bank of Costa Rica barred it from repaying the loan, since under the resolution the Central Bank would provide foreign currency only for repayments of external debt to multilateral agencies. Pursuant to a separate decree of the President and the Minister of Finance, payments of principal or interest on public external debt in foreign currency also required prior approval of the Central Bank. *Id.* at 875.

\(^{79}\) *Id.*
both on the act of state doctrine and on article VIII, section 2(b) of the Bretton Woods Agreement. The act of state defense failed because the court found that the Costa Rican decrees constituted an extraterritorial taking of the creditor banks’ right to repayment in New York under the loan agreement.81

Banco Nacional’s argument that article VIII, section 2(b) of the Bretton Woods Agreement prevented the enforceability of the loan agreement with the creditor banks failed for two reasons.82 First, the Libra Bank court held that a loan agreement was not an exchange contract. Second, the court held that, even if a loan agreement were an exchange contract, the Costa Rican currency regulations were inconsistent with the Bretton Woods Agreement. To reach this conclusion, the Libra Bank court must first have assumed that the Costa Rican resolution curtailing external payments in foreign currency operated as an exchange control regulation. Insofar as this portion of the holding relies on the resolution’s avowed purpose, the court’s analysis was consistent with the purpose test.

The Libra Bank court erred, however, even more than did the Pan American court,83 in holding that Costa Rica’s exchange control regulations were inconsistent with the Bretton Woods Agreement. In marked contrast to the European presumption that a member state’s exchange control regulations are consistent with the Bretton Woods Agreement,84 the court in Libra Bank placed the burden of proof on the defendant debtor to demonstrate this consistency. The court noted that the IMF offered in its 1949 Annual Report

80. The act of state doctrine prevents U.S. courts from inquiring into the validity of an act of a foreign state taken in its own territory. See Underhill v. Hernandez, 168 U.S. 250 (1897). Unlike sovereign immunity, the act of state doctrine reflects prudential rather than jurisdictional concerns. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); see also Callejo, 764 F.2d 1101, 1113 n.12 (5th Cir. 1985) discussed infra in text at note 100 and following. International law prescribes neither the rules of sovereign immunity nor the act of state doctrine. These aspects of U.S. law reflect comity between nations and, to a certain extent, separation of power principles. See the discussion of this subject in Callejo, 764 F.2d at 1114 nn.13, 14.


82. Libra Bank, 570 F. Supp. at 900-01. The court’s consideration of the Bretton Woods defense may be found in a Memorandum Opinion and Order published immediately following the main opinion.

83. Pan American, 311 F.2d 424, 427 (5th Cir. 1962), discussed supra in text accompanying note 61 and following.

to advise if particular exchange control regulations are "maintained or imposed consistently with the [Articles of] Agreement."

Absent proof of consistency, the court rejected the Bretton Woods defense. Even with such proof, however, it is unclear whether the Libra Bank court would have accepted the Bretton Woods defense, since the Costa Rican exchange control rules post-dated the loan agreement. In any event, Libra Bank exemplifies a narrower U.S. position in allowing the article VIII, section 2(b) defense, in general, and in defining exchange control regulations as consistent with the Bretton Woods Agreement, in particular.

3. Article VIII, Section 2(b) Analysis Following Braka and Callejo

Courts in the United States have slowly begun to show a greater readiness to apply article VIII, section 2(b), as evidenced by their closer examination of the nature and purpose of particular exchange control regulations. Since the Libra Bank decision, U.S. courts have no longer ruled exclusively in favor of American creditors on these questions; in two significant cases, article VIII, section 2(b) of the Bretton Woods Agreement was used to shield foreign debtors instead. Each of these cases, Braka v. Bancomer, S.A. and Callejo v. Bancomer, S.A., arose from the promulgation of exchange control regulations by Mexico and the subsequent nationalization of privately-owned Mexican banks. These cases concerned the complex interplay between sovereign immunity, the act of state doctrine, and the Bretton Woods Agreement.

The Mexican exchange controls at issue in both Braka and Callejo forced the conversion of domestic debts denominated in a foreign currency into pesos at a lower, official rate of exchange. Specifically, in 1982 the Mexican government took three significant steps to stabilize the Mexican peso and slow the drain of foreign exchange reserves, particularly U.S. dollars, out of Mexico. First, Mexico banned the use of foreign currency as legal tender. All domestic obligations, even those denominated in U.S. dollars, were to be

85. Libra Bank, 570 F. Supp. at 901. At least two commentators have called for the use of a private contract clause to provide for a determination by the IMF of the validity of a currency regulation. Ebenroth and Teitz, Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions, 19 INT'L L. W. 225 (1985). So long as the definition of "exchange contract" remains uncertain, however, the use of private contract to certify the validity of exchange control regulations offers little promise. It is also doubtful that the IMF would welcome such a flood of requests. The legal weight of such a determination is itself debatable, even in states that have incorporated the Bretton Woods Agreement into their internal law. But see Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985), discussed infra in text accompanying note 100 and following (U.S. court considered IMF opinion as persuasive authority); cf. Löffler-Belhrens v. Beermann, 1964-65 I.P. Rspr. No. 194, discussed infra in text accompanying note 183 and following (German court requested and accepted official IMF determination).

86. Libra Bank, 570 F. Supp. at 902.


88. See id. at 1101.

89. See Braka, 589 F. Supp. at 1467.
paid in Mexican pesos at current exchange rates. Next, the Mexican government set official currency exchange rates, which were used from that point on to value all debts denominated in foreign currency. Because the official rates were lower than then-prevailing market rates, holders of dollar-denominated certificates of deposit in Mexican banks suffered a reduction in the value of their investment.\footnote{The interest rate differential between the United States and Mexico was presumably too small to compensate for the lower real rate of return on the certificates of deposit after forced exchange at the official rate and payment in pesos.} Finally, Mexico nationalized its large, private banks, including Bancomer.

Before the enactment of these controls, many depositors from the United States held certificates of deposit with Bancomer. Deposited in Mexico, the certificates of deposit were denominated in U.S. dollars. At first, Bancomer made interest payments to depositors alternately through its Mexican offices and its affiliates in New York. Later, Bancomer agreed to make payments solely in Mexico. At all times the situs of the debts (where the certificates of deposit were legally payable) remained in Mexico.\footnote{Because the Mexican exchange control regulations applied only to domestic debts, determining the situs of the debt represented by each certificate of deposit was crucial to the court's decision. The situs of the deposits was also Mexico, even though Bancomer originally received the deposits at its New York agency. \textit{Braka}, 762 F.2d at 224-25. \textit{Cf. Callejo}, 764 F.2d at 1121-25 (Bancomer received deposits wired through U.S. correspondent banks and issued certificates of deposit when dollars were finally deposited in Bancomer branch in Nuevo Laredo, Mexico).} Prior to the maturity of the certificates of deposit, however, the Mexican government implemented the three-step program outlined above to preserve its foreign exchange reserves. The adverse impact of these Mexican exchange control regulations on foreign lenders, and especially on American depositors in Mexican banks, gave rise to litigation in the United States challenging the actions that Bancomer and other Mexican banks took to comply with the new rules.

The U.S. depositors in \textit{Braka}\footnote{\textit{Braka} v. Bancomer, S.A., 589 F. Supp. 1465 (S.D.N.Y. 1984), aff'd 762 F.2d 222 (2d Cir. 1985).} sued Bancomer in New York for payment in dollars of the certificates of deposit. The depositors lost on two grounds. First, the United States District Court for the Southern District of New York ruled that the act of state doctrine\footnote{See supra note 80.} barred the depositors' action. Second, Bancomer and the Mexican government successfully argued the Bretton Woods defense. The \textit{Braka} court focused solely on the exchange contract prong of article VIII, section 2(b) and all but ignored the question of whether the Mexican laws were exchange control regulations. At most, the \textit{Braka} court hinted at the purpose of the Mexican regulations by recognizing that Mexico promulgated them in reaction to a severe monetary crisis.\footnote{\textit{Braka}, 589 F. Supp. at 1472. \textit{Cf. Callejo}, 764 F.2d at 1116, discussed infra in text accompanying notes 110-12.} Instead of using an explicit purpose test, however, the \textit{Braka} court relied on a letter from the Director of the Legal Department of the IMF stating that the Mexican exchange control regulations did not violate the Bretton Woods
Under the purpose test, these Mexican laws were undeniably exchange control regulations, because they were designed to stabilize the Mexican peso and to protect Mexico's supply of foreign currency, especially U.S. dollars.

Braka's lesson may not be immediately obvious. With a minimum of analysis, the Braka court held that the certificates of deposit were "exchange contracts" within the meaning of the Bretton Woods Agreement. The cases cited in the Braka opinion provide little support for this conclusion, and no other court has followed this portion of the Braka ruling. Several other cases, in both the United States and the United Kingdom, suggest that certificates of deposit, like loan agreements, may in fact not be exchange contracts at all. The precedential value of the Braka decision, therefore, does not stem from the Second Circuit Court's analysis regarding exchange contracts. Rather, the value of Braka lies in the court's implicit recognition that a complex program designed to preserve a nation's foreign exchange reserves constitutes an exchange control regulation under article VIII, section 2(b) of the Bretton Woods Agreement.

Callejo v. Bancomer, S.A., the second of the two major U.S. cases involving the 1982 Mexican exchange control regulations, is probably the most important American case concerning article VIII of the Bretton Woods Agreement. In Callejo the Fifth Circuit Court of Appeals, like the Second Circuit Court of Appeals in Braka, rejected the claims brought by U.S. holders of Bancomer certificates of deposit against the Mexican bank. The court in Callejo held that the act of state doctrine barred judicial inquiry in the United States into the validity of Mexico's exchange control regulations. 100

96. Braka, 589 F. Supp. at 1473, accord Callejo, 764 F.2d at 1119 n.26, discussed infra in text accompanying note 115. See also supra notes 65 and 85.


98. As discussed below, no claim was made in Callejo that the certificates of deposit were exchange contracts. The plaintiffs in Callejo asserted instead that the Mexican exchange control regulations improperly restricted "current international transactions" in contravention of article VIII, section 2(a) of the Bretton Woods Agreement. See discussion infra notes 103-05 and accompanying text.


100. 764 F.2d 1101 (5th Cir. 1985).

101. Id. at 1105. The Fifth Circuit Court of Appeals thus affirmed the district court's dismissal of the depositors' claims, but on different grounds. The district court in Callejo had dismissed the Callejos' claim for lack of jurisdiction, holding that the Foreign Sovereign Immunities Act [hereinafter the FSIA], 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982), rendered Bancomer (as an instrumentality of the Mexican government acting in its sovereign, not commercial capacity) immune from suit in the United States. The circuit court rejected this argument, stating that, under the FSIA, 28 U.S.C. § 1605(a)(2), sovereign immunity did not bar jurisdiction over Bancomer. Specifically, the depositors' cause of action for breach of contract arose as a result of "commercial activity," and thus fell under the commercial activity...
The court examined the Bretton Woods Agreement in the context of the treaty exception to the act of state doctrine.\textsuperscript{102} In this context, \textit{Callejo} turned on the court’s application of section 2(a), not section 2(b), of article VIII of the Bretton Woods Agreement.\textsuperscript{103} Section 2(a) forbids member states from imposing exchange control regulations on “current international transactions”\textsuperscript{104} without prior IMF approval.\textsuperscript{105} Because the court dismissed the case on domestic act of state grounds, the court declined to consider Bancomer’s alternative argument that article VIII, section 2(b) forced the dismissal of the case.\textsuperscript{106} The \textit{Callejo} court deemed section 2(b) to be “[i]n essence . . . an internationally imposed act of state doctrine.”\textsuperscript{107}

The Fifth Circuit Court of Appeals in \textit{Callejo} also adopted the purpose test to define the Mexican decrees as exchange control regulations. The \textit{Callejo} court recognized that, in promulgating the 1982 exchange control regulations, Mexico had sought to safeguard its foreign exchange resources.\textsuperscript{108} As mentioned in the discussion of \textit{Braka} above, the purpose of the Mexican laws was the preservation of the country’s supply of foreign exchange; the laws therefore constituted exchange control regulations under the purpose test. Perhaps unconsciously echoing early U.S. judicial opinion,\textsuperscript{109} the \textit{Callejo} court noted:

The power to issue exchange control regulations is paradigmatically sovereign in nature . . . [H]ere Mexico promulgated comprehensive, national decrees in response to a national monetary crisis. . . . Were we to disregard the exchange exception to foreign sovereign immunity. Because Bancomer acted in a commercial and not in a sovereign capacity, Mexico had a weak interest in immunity. In contrast, substantial harm to U.S. residents grew out of their longstanding relationship with Bancomer in the United States, and this harm strengthened U.S. interest in jurisdiction. 764 F.2d at 1106-1112.

102. \textit{Callejo}, 764 F.2d at 1116-21. Under the treaty exception, the act of state doctrine may not apply to bar a claim if there is “a treaty or other unambiguous agreement regarding controlling legal principles.” \textit{Id.} at 1117 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)). The treaty exception reflects the beliefs that a treaty can represent consensus on a particular norm of international law and that a court can apply this norm “to review foreign acts of state without engaging in the dubious practice of evaluating these acts against the potentially parochial norms of American public policy.” \textit{Callejo}, 764 F.2d at 1116.

103. Importantly, the notion of what constitutes an exchange control regulation is consistent throughout article VIII, section 2. The difference between section 2(a) and section 2(b) is that 2(a) protects certain transactions from undue regulation, while 2(b) allows extraterritorial regulation of exchange contracts.

104. The term “current international transaction” is defined in the Bretton Woods Agreement, art. XXX(d). The court addresses this subject and the distinction between current and capital transactions in \textit{Callejo}, 764 F.2d at 1117-19.

105. Bretton Woods Agreement, art. VIII, sec. 2(a).

106. \textit{Callejo}, 764 F.2d at 1120 n.27.

107. \textit{Id.} For the relationship between the act of state doctrine and article VIII, section 2(b), the \textit{Callejo} court cites \textit{Libra Bank}, 570 F. Supp. 870, 896 n.1.

108. \textit{Callejo}, 764 F.2d at 1116.

regulations by enforcing the Callejos' certificates of deposit, we would render nugatory the attempts by Mexico to protect its foreign exchange reserves.

The court in Callejo thus adopted the Braka court's characterization of Mexico's exchange control regulations as a sovereign response to a severe monetary crisis. As the Callejo court observed, stringent regulation of currencies and the flow of foreign exchange has been followed by all governments for hundreds of years, whenever the exigencies of international economics have required.

In addition, the Callejo court focused on whether the Mexican exchange control regulations were promulgated consistently with the Bretton Woods Agreement. While admitting that the Bretton Woods Agreement was facially ambiguous, the court determined that the Mexican exchange control regulations were imposed consistently with the Bretton Woods Agreement. Like the court in Braka, the Callejo court relied primarily on an official opinion of the IMF with regard to Mexico's exchange control regulations. By relying on the IMF's opinion, the courts in Braka and Callejo failed to enunciate a controlling legal principle that could enable another court, in a future case without an IMF opinion, to determine whether a particular law regulating foreign exchange conforms with the Bretton Woods Agreement.

As these cases illustrate, there is no generally accepted American rule to guide courts in determining whether an exchange control regulation has been imposed consistently with the Bretton Woods Agreement. Though the IMF may be the best source of legal authority about which exchange control regulations are consistent with the Bretton Woods Agreement, at best the IMF's opinion should only be considered persuasive authority. The IMF's

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110. Callejo, 764 F.2d at 1116. Consequently, the court rejected the Callejos' argument that the act of state doctrine did not preclude their claim. Bancomer's commercial activities in the United States were sufficient to invoke jurisdiction, rebutting the bank's sovereign immunity claim. In contrast, the Callejos' action called into question the validity of both Mexico's sovereign act of promulgating exchange control regulations and Bancomer's commercial acts in compliance with these regulations. The court believed it could not force Bancomer to disregard the Mexican laws without aggravating bilateral relations between the United States and Mexico; such a situation was a paradigm for the application of the act of state doctrine.


113. The court noted, somewhat reconditely, that "it is unclear to what extent the Fund Agreement is unclear." Callejo, 764 F.2d at 1118.

114. Id. at 1119-21.

115. Id. at 1119-20.

116. Naturally, to produce a more consistent application of article VIII, section 2(b), courts should first apply the purpose test to determine whether a foreign law is an exchange control regulation before turning to an IMF opinion about the law's nature or its consistency with the Bretton Woods Agreement.

117. See, e.g., Callejo, 764 F.2d at 1119 n.26, declining to endorse Sir Joseph Gold's opinion that article XXIX of the Bretton Woods Agreement makes IMF interpretations binding on signatory nations, including their courts. See also Restatement (Third) of the Foreign Relations Law of the United States § 822, comment c (1988) (IMF statement that a particular exchange control is maintained or imposed inconsistently with the Bretton Woods Agreement is conclusive; IMF statement that a particular exchange control is maintained or
conflicting institutional roles as international lender, national policy-maker, and global economic watchdog prevent it from offering consistent, objective evaluations of exchange control regulations on a case-by-case basis.

More broadly, the universal application of the purpose test advocated here would lead to an impartial and consistent working definition of what constitutes an exchange control regulation. As a result, private actors that may be subject to exchange controls would benefit from increased certainty about precisely which laws govern the enforceability of international contracts. Such a universal test may be derived both from the Bretton Woods Agreement itself and from judicial interpretations of exchange controls before and after the entry into force of the Bretton Woods Agreement. Some notion of the relevance of an exchange control regulation’s purpose already underlies many of these opinions. A comparison of the American cases discussed above and the European cases discussed below illustrates this aspect of current case law. Unless courts are aware of the purpose test and expressly rely on it in opinions interpreting article VIII, section 2(b) of the Bretton Woods Agreement, however, the precedential value of these cases will be limited.

III.
CASE LAW IN EUROPE

A. The European Approach Generally

In cases involving article VIII, section 2(b) of the Bretton Woods Agreement, courts in most European countries examine the nature of exchange control regulations in much less detail than do American courts. In England, for example, examination of section 2(b) focuses almost exclusively on the definition of exchange contracts; the courts must implicitly accept certain laws as exchange control regulations for their judgments, but they provide little or no analysis of their reasons for such a characterization. French courts, in comparison, impliedly adopt a purpose test to define exchange control regulations. Despite this attention to exchange control regulations, however, courts in France eviscerate article VIII, section 2(b) on public policy grounds. Dutch and German courts have clearly adopted the purpose test to define exchange control regulations. In each of these countries, a purpose test may be inferred from judicial interpretations of exchange control regulations.

B. The United Kingdom

A leading English case interpreting article VIII, section 2(b) of the Bretton Woods Agreement is Wilson, Smithett & Cope Ltd. v. Terruzzi.\textsuperscript{118} In this case, three lord justices wrote separate opinions affirming the lower court’s rejection of the Bretton Wood defense. The lord justices cursorily discussed
exchange control regulations, dwelling instead on the exchange contract prong of the article VIII, section 2(b) test.\textsuperscript{119} The lord justices in \textit{Terruzzi} briefly explained the particular Italian exchange control regulations that were alleged to govern the exchange contract. Under these exchange control regulations, Italian citizens needed a license to incur certain foreign obligations.\textsuperscript{120} The purpose of the Italian rules seems to have been the preservation of Italian exchange resources, since the exchange control regulations were originally enacted in order to prevent Italians from exporting capital and to protect Italy's monetary resources.\textsuperscript{121} Under the purpose test, therefore, the \textit{Terruzzi} court should have identified the Italian laws as exchange control regulations. The justices did not address this subject and instead rejected the Bretton Woods defense on an exchange contract analysis.\textsuperscript{122}

The English judgment in \textit{Terruzzi} restricts the scope of article VIII, section 2(b) so narrowly as possibly to offend the policy of international monetary cooperation embodied in the Bretton Woods Agreement.\textsuperscript{123} Subsequently, the Italian courts refused to enforce the British judgment against Terruzzi in Italy;\textsuperscript{124} concurrence in that decision would effectively

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\textsuperscript{119} The justices held that the words "exchange contracts" in article VIII, section 2(b) of the Bretton Woods Agreement meant contracts to exchange the currency of one country for the currency of another and could not be construed as including all contracts that in any way affected a country's exchange resources. Thus, the court declared that a metals contract was not an exchange contract. [1976] 2 W.L.R. at 424.

\textsuperscript{120} \textit{Id.} at 421.

\textsuperscript{121} The laws were finally repealed this year because the relative strength of Italy's economy and currency has at last rendered such controls unnecessary. N.Y. Times, Apr. 28, 1990, at 17, col. 6.

\textsuperscript{122} Had the court used a purpose test, however, the result in the case would have been the same. Consequently, \textit{Terruzzi} may imply that an argument to use the purpose test to define exchange control regulations in a difficult case would be accepted by an English court in the future. This question remains open.

In this case, the defendant, Terruzzi, was an Italian investor who bought and sold zinc and copper on the London Metal Exchange (LME). Terruzzi speculated on the LME through the plaintiffs, who were members of the LME. Acting through these brokers and dealers, the defendant sold zinc short expecting zinc prices to fall. When zinc prices continued to rise, Terruzzi could not cover his short position. Pursuant to their contract, the London metals brokers asked him to provide a "margin" of £50,000 to cover partially the debit position he carried on their books. When Terruzzi failed to satisfy the margin call, the brokers closed out his open position and brought an action against Terruzzi for the debit balance of £195,022.

According to Lord Denning, the Bretton Woods Agreement did not demand English enforcement of the Italian laws, even if they constituted exchange control regulations. Admittedly, Terruzzi carried out the transactions in "plain breach" of the Italian exchange control regulations, because he did not obtain the requisite Italian license to incur obligations under the metals contracts in England. Nonetheless, the court determined that the contracts for the purchase and sale of metals were not "monetary transactions in disguise," that is, not exchange contracts; only exchange contracts that violated Italian exchange control regulations would have been unenforceable in England under the Bretton Woods Agreement. [1976] 2 W.L.R. at 420-422.

\textsuperscript{123} \textit{See} Ebke, \textit{supra} note 5, at 691-92.

have forced Terruzzi to breach the Italian exchange control regulations,\textsuperscript{125} laws that should have been enforceable in the United Kingdom through the Bretton Woods Agreement.

In a second English case, \textit{United City Merchants (Investments) Ltd. v. Royal Bank of Canada},\textsuperscript{126} the court enforced only that portion of a sale and purchase agreement that constituted a legitimate commercial transaction. The court deemed the remainder of the agreement to be an exchange contract violative of exchange control regulations that restricted the ability of private parties to take currency out of Peru, protecting the national supply of foreign exchange.\textsuperscript{127} Without acknowledging a purpose test, the court in \textit{United City Merchants} characterized the Peruvian laws as exchange control regulations. The court focused primarily on the nature of the contract out of which the \textit{United City Merchants} dispute arose. Writing an opinion in which all four other lord justices concurred, Lord Diplock narrowly interpreted the term exchange contract in article VIII, section 2(b) of the Bretton Woods Agreement as excluding a letter of credit to the extent that it represented a legitimate commercial transaction.\textsuperscript{128}

In \textit{United City Merchants}, the buyer and sellers of manufacturing equipment for a glass-fibre forming plant had entered an agreement collateral to a contract of sale, under which the sellers would transfer one-half of the payments they received in U.S. dollars under the documentary credit to the buyer’s account in the United States.\textsuperscript{129} The invoice price for the sale, in U.S. dollars, represented twice the sellers’ original quotation for the sale price. The English sellers of the equipment agreed to this scheme.\textsuperscript{130} The object of this arrangement was to enable the buyer, a Peruvian company, to exchange Peruvian currency for the excess amount in U.S. dollars available through the buyer’s U.S. subsidiary.\textsuperscript{131} Thus, in violation of the Peruvian exchange control regulations, the Peruvian buyer was to be able to export Peruvian currency to the United States and illegally exchange it for U.S. dollars.\textsuperscript{132}

\textsuperscript{126} [1982] 2 W.L.R. 1039 (H.L.), [1982] 2 All E.R. 720.
\textsuperscript{127} [1982] 2 W.L.R. at 1051.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id. Similar underinvoicing in order to circumvent Indian exchange control regulations was the target of a Bretton Woods challenge in \textit{John Sanderson & Co. (Wool) Pty. Ltd. v. Ludlow Jute Co. Ltd., 569 F.2d 696 (1st Cir. 1978), discussed supra in text accompanying notes 73 and following. In an example of international jurisprudential cross-fertilization, the U.S. Circuit of Appeals for the First Circuit in \textit{Sanderson cited United City Merchants with approval for the English court’s treatment of the collateral payment agreement under the glass-fibre equipment supply contract as part sales contract and part exchange contract. Id. at 699.}
\textsuperscript{132} \textit{United City Merchants, [1982] 2 W.L.R. at 1051.}
Because article VIII, section 2(b) precluded the enforcement in the United Kingdom (a signatory of the Bretton Woods Agreement) of an exchange contract involving Peruvian currency that violated Peruvian exchange control regulations, the court in United City Merchants refused to enforce the letter of credit insofar as it constituted a disguised exchange contract. The court enforced only that portion of the letter of credit that represented a genuine commercial transaction. 

Terruzzi and United City Merchants reflect the almost exclusive focus of the English courts on the definition of exchange contracts, with little or no analysis of exchange control regulations under article VIII, section 2(b). Thus, these cases provide but minimal guidance for determining the characterization and extra-territorial application of exchange controls in the United Kingdom under the Bretton Woods Agreement.

C. France

Three cases applying article VIII, section 2(b) of the Bretton Woods Agreement illustrate French judicial opinion on the enforceability of exchange contracts that are challenged in France as violative of foreign exchange control regulations. Unlike the English cases discussed above, each of these cases addresses the nature and extraterritorial effect of the exchange control laws, rather than the characterization of the contracts in question as exchange contracts. As discussed below, French courts broadly define the term exchange contract, but surprisingly they give no correspondingly broad application to article VIII, section 2(b).

In In re Kosek, la première chambre civile de la Cour de cassation (the first of three civil sections of France's highest court of ordinary jurisdiction) enforced a contract to export a sum equal to US$30,000 (in 1948) from Czechoslovakia in direct contravention of Czechoslovak capital restrictions. The court enforced the contract, admittedly illegal under Czechoslovak law, despite a Bretton Woods challenge. The Czechoslovak exchange control regulations at issue in Kosek restricted the exportation of capital, including foreign currency, by Czechoslovak citizens. These laws were designed to

133. Without elaborating on the Peruvian exchange control regulations, Lord Diplock split the contract in two parts. He enforced the portion that represented a legitimate commercial transaction on the grounds that it was not an exchange contract. To the extent that the buyer and sellers' agreement represented a "monetary transaction in disguise," however, it was an exchange contract involving Peruvian currency and contrary to Peruvian exchange control regulations. Thus, Lord Diplock held that the contract was enforceable only up to the amount of the actual sales price. That portion of the contract that represented overinvoicing was unenforceable in England. Id.

134. French law incorporates the Bretton Woods Agreement. See Judgment of May 29, 1972, Cass. civ. comm., Fr. (Arrêt No. 388; Pouvoir No. 71-10.951); Meyer, supra note 35, at 897.

135. Judgment of Oct. 16, 1967, Cass. civ. 1re, Fr. (Arrêt No. 746; Pouvoir No. 65-12.879). In the absence of official names for French cases, the author has cited them according to the names of the litigants or matter for clarity.
maintain Czechoslovakia's monetary reserves, which were seriously threatened in the aftermath of World War II. The French court acknowledged that the Czechoslovak laws constituted exchange control regulations. The court determined that the laws were inconsistent with the Bretton Woods Agreement, but refused to invalidate the contract under article VIII, section 2(b).

Kosek concerned a security dispute arising out of two private contracts, one in 1948 and another in 1951. In 1948, Jiry Janda, a Czechoslovak citizen, entrusted US$30,000 in Prague to Osvald Kosek, a naturalized citizen of the United States. They orally agreed that Kosek would take Janda's money out of Czechoslovakia to circumvent Czechoslovak restrictions limiting the exportation of capital. In 1951, the two parties entered into a written agreement recognizing that Kosek had created a trust account for the benefit of Janda in France. In an effort to reclaim the money supposedly deposited in the trust account, Janda placed a lien on certain real property owned by Kosek and requested a writ of attachment on Kosek's paintings. When Kosek died in New York in 1960, the French court appointed Michel Basso, le greffier (clerk) au Tribunal de grande instance de Nice, as the executor of Kosek's estate. Basso, acting to clear Kosek's estate of these encumbrances and of the underlying debt, refuted the validity of Janda's agreements with Kosek on the basis that the alleged contracts were unenforceable in France under article VIII, section 2(b) of the Bretton Woods Agreement.

The Kosek court rejected both of Basso's arguments. First, Basso stressed that although the contract violated Czechoslovak and not French law, it would be contrary to French public policy to enforce a contract entered into deliberately to circumvent a law of a foreign sovereign. The court rejected this argument, however, because Czechoslovakia had failed to adhere to the Bretton Woods Agreement. Second, Basso asserted that, even if Czechoslovakia did not adhere to the Bretton Woods Agreement it had signed, Czechoslovakia's 1955 rescission of its membership in the IMF postdated the contract between Janda and Kosek. Hence, the Bretton Woods Agreement should bar French enforcement of the 1948 and 1951 contracts. The court held, however, that the Czechoslovak prohibition of capital exports by that country's citizens implicitly violated the Bretton Woods Agreement. Thus, despite the finding that there was an exchange contract contrary to the exchange control regulations of a member state at the time the contract was formed, Czechoslovak regulations were held to be imposed inconsistently with the Bretton Woods Agreement and thus had no extraterritorial effect in France.

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136. The court used the term “réglementation des changes” for exchange control regulations. Id.

137. Id.

138. In the words of the court, “[L]a Tchécoslovaquie ... n'avait pas adhéré à cet accord; ... [alors] les effets de la réglementation des changes de cet Etat ne pouvaient être reconnus en France et que par ce seul motif, [la Cour d'appel] a justifié sa decision sur ce point. ...” Id.
In *Daiei Motion Picture Co., Ltd. v. Zavicha*,¹³⁹ la chambre commerciale de la Cour de cassation ignored Japanese exchange control regulations, which would have precluded the enforcement of an international exchange contract, at least partially on the basis of French public policy (*ordre public*). The court's decision rested on contractual notions of good faith and fair dealing rather than on a detailed analysis of the Bretton Woods provision. Insofar as the high court considered article VIII, section 2(b), however, the *Daiei Motion Picture Co.* decision is striking. Although recognizing that Japanese exchange control regulations hindered performance of the contract, the court consciously ignored them. The court interpreted the term exchange contract very broadly and nevertheless held the contract enforceable. At worst, *Daiei Motion Picture* typifies French parochialism in applying the Bretton Woods Agreement. At best, this case illustrates that the broad reading French courts give to the term exchange contract in no way ensures a correspondingly broad application of article VIII, section 2(b), in its entirety.

The plaintiff in *Daiei Motion Picture Co.* acted as the agent in France for a Japanese motion picture distribution company, Daiei Motion Picture Co., Ltd. [hereinafter Daiei]. Under his contract with the Japanese company, the plaintiff, Zavicha, agreed to arrange the distribution of Daiei films in France. He also agreed to purchase for Daiei the rights to various French films for Japanese release. The contract, completed in Paris on September 1, 1966, apparently called for compensation and reimbursements payable by Daiei in yen to Zavicha in France. The following month, Zavicha began performance under the terms of the agency agreement, incurring substantial promotional costs on Daiei's behalf.¹⁴⁰

At the time the contract in *Daiei Motion Picture Co.* was made, Japanese foreign exchange rules required government authorization for the export of large amounts of Japanese currency. These exchange control regulations were probably intended to permit the Japanese central bank to monitor and protect Japan's monetary resources. While the court in *Daiei Motion Picture Co.* did not expressly address the purpose of the Japanese rules, a purpose test would have resulted in their characterization as exchange control regulations within the meaning of article VIII, section 2(b). Daiei informed Zavicha of difficulties it had encountered in complying with the Japanese exchange control regulations in February 1967. Daiei represented these difficulties to Zavicha as just minor problems, implying that government authorization of the yen transfers pursuant to the exchange control regulations would be forthcoming. On June 5, unable to gain Japanese government authorization for the yen transfers, Daiei repudiated ¹⁴¹ the contract.

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¹⁴⁰. *Id.*
¹⁴¹. The court stated that "*[la] société [Daiei] rompit unilatéralement ce contrat." *Id.* The verb *rompre* literally means to break or break off.
The French high court enforced the Daiei contract, even though it was an exchange contract involving the currency of an IMF member country — Japan — and contrary to Japanese exchange control regulations. The court's only justification for directly disregarding the Bretton Woods Agreement was fairness: Daiei acted wrongly in repudiating the contract and was therefore not entitled to the protections offered under French and international law pursuant to the Bretton Woods Agreement. Specifically, la Cour de cassation adopted the holding of la Cour d'appel de Paris, implicitly accusing Daiei Motion Picture of acting fraudulently (1) by misrepresenting the difficulty of securing Japanese government authorization for the yen transfers, and (2) by failing to work hard enough to obtain such authorization. The court accused Daiei of using Japanese administrative difficulties as a pretext for severing its business relationship with Zavicha.

The most troubling aspect of the Daiei Motion Picture Co. opinion is the court's reliance on a domestic public policy argument to frustrate the application of article VIII, section 2(b). In order to uphold French public policy, la Cour de cassation ignored the weight properly given to the Japanese exchange control regulations under the terms of the Bretton Woods Agreement. No other recent decision expressly follows the high court's holding in Daiei Motion Picture Co. that public policy vitiates article VIII of the Bretton Woods Agreement. Indeed, France's membership in the IMF and acceptance of article VIII status should mean that article VIII, section 2(b) reflects, rather than contradicts, French public policy. Most commentators and the IMF

142. Id.
143. In fact, it is quite likely that Daiei was unable, in good faith, to gain Japanese government authorization to export yen. The court discussed no other incentive Daiei might have had to repudiate the distribution agreement. It is equally likely, however, that, in order to maintain its relationship with Zavicha, Daiei misrepresented the likelihood of the Japanese government approving the overseas yen payments.
144. The court admits as much in its reliance on "l'ordre public." Judgment of Mar. 7, 1972, Cass. civ. com., Fr. (Arrêt No. 189; Pouvoir No. 70-13.454). Notably, courts in the United States and the United Kingdom have not refused to follow the Bretton Woods Agreement on the basis of public policy. This approach probably reflects the better view that courts should not invoke public policy arguments to disregard the policy announced by the legislature in ratifying the Bretton Woods Agreement or in incorporating it into domestic law.
145. Daiei Motion Picture Co. could be recast in terms of quasi-contract. Even in the absence of an enforceable contract, however, public policy should not justify French disregard of the Japanese exchange control regulations. Generally actions for the recovery of the value of performance rendered in reliance on another party's promise to pay fall within the scope of article VIII, section 2(b) of the Bretton Woods Agreement. See Williams, supra note 5, at 370-72.
146. See, e.g., J. Gold, Interpretation by the Fund 10-12 (1968); Note (1985), supra note 5, at 971-76. See also J. Gold, 2 The Fund Agreement in the Courts 94 (1982); J. Gold, 3 The Fund Agreement in the Courts 746 (1986); Ebke, supra note 5, at 683-84; but cf. Seidl-Hohenveldern, Article VIII, Section 2(b) of the IMF Articles of Agreement and Public Policy, 23 INT'L L. 957 (1989) (public policy inadmissible against exchange control regulations, provided the purpose of the regulations is protection of the national economy).
itself\textsuperscript{147} firmly state that a member country's courts may not ignore another member's exchange control regulations on the grounds that they are "contrary to the public policy of the forum."\textsuperscript{148} In this respect, \textit{Daiei Motion Picture Co.} is incorrectly decided.

Another French case arising under facts similar to those in \textit{Kosek} illustrates the extreme position the French courts have taken in consciously disregarding the provisions of article VIII, section 2(b) in deference to public policy or fairness. In \textit{Constant v. Lanata},\textsuperscript{149} \textit{la Cour de cassation} again held that the Bretton Woods Agreement did not preclude the enforcement in France of an exchange contract. The lower court in \textit{Constant, la Cour d'appel} (appellate court) \textit{d'Aix-en-Provence}, had applied article VIII, section 2(b) of the Bretton Woods Agreement to protect a trustee, Marcel Octave Lanata, who apparently misappropriated exchange funds from the trustor, Lucien Constant. \textit{La Cour de cassation} reversed the lower court's judgment and remanded the case to \textit{la Cour d'appel de Nîmes}.\textsuperscript{150} \textit{Constant} involved Algerian exchange controls that, similar to the Czechoslovak controls in \textit{Kosek}, restricted the transfer of capital out of the country.

Essentially, Lanata used the Algerian exchange control laws as a pretext to defraud Constant. Given Lanata's culpable conduct, the high court refused to apply these laws and rejected his claimed Bretton Woods defense. In 1964, by means of a trust, Constant authorized Lanata to send in French francs the exchange value of 420,000 Algerian dinars from Algeria to France.\textsuperscript{151} As security for this amount, Lanata remitted to Constant a postdated check drawn on a Marseillaise bank. Lanata failed to deliver the money in France. Constant presented the check in Marseilles, but the bank refused to honor it because there were insufficient funds in Lanata's account.\textsuperscript{152} When Constant brought an action in France against Lanata for the entrusted amount, Lanata claimed that Algerian exchange control regulations barred the transfer. Lanata asserted that, since both France and Algeria were IMF member countries,\textsuperscript{153} and the contract to exchange and export


\textsuperscript{149}. Judgment of June 18, 1969, Cass. civ. Ire, Fr. (Arrêt No. 413; Pouvoir No. 67-12.690).

\textsuperscript{150}. It is common French practice for the high court (\textit{la Cour de cassation}) to remand a case to a different lower court (\textit{une cour d'appel}) than the one in which the case was first argued on appeal.


\textsuperscript{152}. \textit{Le chèque "ne fût pas payé faute de provision."} Judgment of June 18, 1969, Cass. civ. Ire, Fr. (Arrêt No. 413; Pouvoir No. 67-12.690).

\textsuperscript{153}. France adopted the Bretton Woods Agreement in 1945 as an original signatory. J.O. 8590 (Dec. 27, 1945); L. TR. & ACC. FR. 360-61. Algeria adopted it shortly after independence.
currency was contrary to Algerian currency controls, the exchange contract was unenforceable in France.

Reversing the appellate court, the high court rejected Lanata's argument. In the court's opinion, the Algerian currency restrictions did not prevent Lanata from performing pursuant to the contract. Rather, Lanata used the laws merely as a pretext to misappropriate Constant's funds. Consequently, article VIII, section 2(b) of the Bretton Woods Agreement did not bar the enforcement of the contract in France. Although the lower court in Aix-en-Provence had embraced Lanata's Bretton Woods defense, the high court failed to explain the relevant Algerian currency regulations in any detail. *La Cour de cassation* differed from *la Cour d'appel* primarily in its allocation of the risk that Lanata would breach Constant's trust. *La Cour d'appel* had blamed Constant for imprudently entrusting Lanata to transfer, possibly illegally, so large a sum of money;\(^{154}\) *la Cour de cassation* instead imposed on the trustee, Lanata, the cost of his illicit conduct.\(^{155}\)

One may infer two generalizations from these French cases. First, the French analysis of exchange control regulations is compatible with the purpose test. Second, despite this proper, though implicit, acceptance of the purpose test to define exchange control regulations, the French courts tend to apply article VIII, section 2(b) too narrowly. The courts err by relying excessively on French public policy and on the incompatibility of certain exchange controls with the Bretton Woods Agreement.

**D. The Netherlands**


154. The relevant portion of the opinion of *la Cour d'appel* is reprinted in the opinion of *la Cour de cassation*, as follows: "*[la Cour d'appel a réjeté la demande en paiement de Constant . . . . [C'est à dire] 'la restitution de la somme par lui imprudemment confiée à Lanata.'*" Judgment of June 18, 1969, Cass. civ. Ire. Fr. (Arrêt No. 413; Pouvoir No. 67-12.690).

155. "*Lanata n'a pas été mis dans l'impossibilité d'exécuter le mandat salarié dont il avait été chargé, soit par l'effet de la réglementation des changes en vigueur en Algérie, soit par tout autre cas fortuit ou de force majeur, mais . . . il a, au contraire, detourné à son profit les fonds à lui confiés.*" Id.


https://scholarship.law.berkeley.edu/bjil/vol8/iss1/4
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of the City of New York 157 but reached the opposite conclusion. The Dutch court in Frantzmann decided that rules under this set of Indonesian foreign exchange ordinances, requiring, in effect, the conversion of foreign currency into Indonesian currency, constituted exchange control regulations.158

In particular, the Dutch court examined Indonesian Foreign Exchange Control Ordinance, 1940, and the subsequent Foreign Exchange Control Rules of Indonesia.159 The court focused especially on the Foreign Currency Order (Deveizenordonnantie), 1940, which provided that a contract violating the regulations implementing the Foreign Exchange Control Ordinance and Rules was void under Indonesian law and unenforceable under article VIII, section 2(b) of the Bretton Woods Agreement.160 The Indonesian implementing regulations required a license from the Indonesian Foreign Exchange Control Institute for the type of currency exchange contract at issue in this case.161 Without a license, the Indonesian law forced the conversion of certain debts into rupiahs, the local currency.162 As discussed above, the Naamloze court had disregarded its own finding that the law was expressly aimed at preserving the country’s foreign exchange position163 and held the regulation to be a revenue measure.164 In contrast, the Dutch court in Frantzmann implicitly recognized the broad purpose of the Indonesian exchange controls.165

The plaintiff in Frantzmann sought recovery on a promissory note, given in Indonesia in return for a sum of Indonesian rupiahs, to pay the plaintiff 5000 Dutch guilders.166 The court determined that this contract for the exchange of Indonesian currency for Dutch currency "constitutes an exchange contract within the sole meaning of this term."167 By trying to execute the exchange contract without first seeking a license to convert the rupiahs into guilders, the creditor violated the Foreign Exchange Ordinance and Rules.168 Lacking the required license, the plaintiff could not recover on the note, since

158. Id. at 424.
159. Id.
160. Id.
161. Id.
162. Id.
164. Id. at 845.
165. Without further analysis, the court characterized the rules as follows: "The Foreign Exchange Control Ordinance, 1940, and the Foreign Exchange Control Rules of Indonesia must be regarded as exchange control regulations maintained consistently with the Bretton Woods Agreement." Frantzmann, 30 I.L.R. at 424.
166. Id. at 423; Williams, supra note 5, at 371 n.261.
168. Frantzmann, 30 I.L.R. at 424.
it was an exchange contract contrary to Indonesian exchange control regulations.\textsuperscript{169} Article VIII, section 2(b) precluded enforcement of the note in the Netherlands.

\textit{E. Federal Republic of Germany}

A leading German case interpreting article VIII, section 2(b) of the Bretton Woods Agreement is the \textit{Clearing Dollars Case}.\textsuperscript{170} In this case, the Commercial Court (Chamber 12 for Commercial Affairs of the \textit{Landgericht}) of Hamburg expressly adopted the purpose test to define exchange control regulations as the phrase is used in the Bretton Woods Agreement.\textsuperscript{171} The \textit{Clearing Dollars} court explained that the Belgian laws at issue in the case constituted exchange control regulations because their “object . . . [was] the proper husbanding of the country’s foreign exchange resources in accordance with the intentions of article VIII, section 2(b).”\textsuperscript{172} The \textit{Landgericht} also addressed in \textit{Clearing Dollars} whether the Belgian currency controls were imposed consistently with the Bretton Woods Agreement.

In \textit{Clearing Dollars} Belgian residents contracted in 1954 to purchase 500 tons of sulphate of ammonia from a Hamburg firm for 46 U.S. “Clearing Dollars” per ton.\textsuperscript{173} Interested in preventing the drain of capital in the form of clearing dollars from Belgium, the Belgian government denied an import license for the sulphate of ammonia.\textsuperscript{174} The government thus prevented settlement under Belgian-West German clearing, forcing the Belgian buyers to abrogate the purchase agreement.\textsuperscript{175} Unable to import the chemicals without a license, the Belgians refused to pay the Hamburg firm for the sulphate of ammonia.\textsuperscript{176}

The Belgians argued in \textit{Clearing Dollars} against German enforcement of the contract on the grounds that the purchase agreement, calling for payment to be made under Belgian-West German clearing, was an exchange contract\textsuperscript{177} that violated Belgian exchange control regulations. In examining the Belgian exchange controls, the \textit{Landgericht} recognized their purpose. The \textit{Clearing Dollars} court also noted that laws of the same general character

\textsuperscript{169} Id.
\textsuperscript{171} \textit{Clearing Dollars}, 22 I.L.R. at 731.
\textsuperscript{172} Id.
\textsuperscript{173} \textit{Id.} at 730.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} The Hamburg \textit{Landgericht} agreed with the Belgian buyers that the purchase agreement calling for payment in clearing dollars (which necessarily involved conversion from Belgian currency) constituted an exchange contract to which article VIII, section 2(b) applied. \textit{Id.} at 731. \textit{Clearing Dollars} represents the middle range of the German interpretation of exchange contracts, which typically is broader than American or British interpretations.
“exist in nearly all countries.”178 From this fact, the court inferred that the Belgian regulations were imposed in conformity with the Bretton Woods Agreement.179 Because “their nature had been approved by the International Monetary Fund,”180 the court required no express IMF approval of the particular Belgian regulations.181 On this basis, the Hamburg Landgericht refused to enforce the purchase agreement.182

When the nature of a regulation affecting foreign currency was in doubt, one German court sought and accepted official clarification. The Oberlandesgericht (appellate court) in Karlsruhe held in Löffler-Behrens v. Beermann183 that a Brazilian law184 requiring the use of local currency to satisfy a contractual obligation payable in Brazil was not an exchange control regulation.185 Information provided to the Oberlandesgericht in Karlsruhe at its request by the Legal Department of the IMF and by the Deutsche Bundesbank indicated that the Brazilian decree was not an exchange control regulation.186

The facts in Beermann were as follows.187 A German citizen agreed to loan US$5,000 to another German citizen, in Brazil. When the debtor failed to pay, the creditor sued on the notes in the Landgericht (the ordinary court of first instance) in Mannheim, where the debtor then resided.188 The debtor sought protection under the Bretton Woods Agreement, since the notes calling for repayment in U.S. currency were contrary to a Brazilian decree requiring the payment in Brazilian cruzeiros of all debts due in Brazil.189 At least in effect, the Brazilian laws in Beermann resemble the Cuban laws at issue in the Cuban insurance cases discussed in part II.C., above.

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178. Id.
179. Id.
180. Id.
181. Id.
182. Id. On the meaning of “unenforceable” in article VIII, section 2(b), see Ebke, supra note 5, at 693-94, 700-02.

Sir Joseph Gold has discussed the meaning of unenforceability under German law, as follows:

Unenforceability under article VIII, section 2(b) does not mean that contracts contrary to exchange control regulations are void. The language of the official German translation of the provision (“kann . . . nichts geklagt werden”) [citation omitted] indicates that recognition of the exchange control law of a member in the territory of another member does not go beyond unenforceability. [Citation omitted] The court rejected Dr. F. A. Mann’s view that unenforceability means ineffectiveness, invalidity, or nullity.


183. 1964-65 I.P. Rspr. No. 194, discussed in Williams, supra note 5, at 355-56.
184. Article 2, Brazilian Decree No. 23,501 of November 27, 1933 [hereinafter Braz. Dec.].
186. Id.
187. Id.
188. Id.
The Beermann decision rests firmly on the distinction between exchange control regulations, which are direct controls on international payments, and cours force, which are rules that "declare that certain notes and coins issued by the monetary authority have the quality of legal tender."\textsuperscript{190} At first blush, this holding appears narrower than many American decisions.\textsuperscript{191} Some commentators, for example, have criticized the confusion of exchange controls with cours force in the Cuban insurance cases.\textsuperscript{192} However, Beermann applied a purpose test, similar to the one underlying many U.S. decisions, to define exchange control regulations.

A purpose analysis might even reconcile Beermann with the Cuban insurance cases. Under the purpose test, the Cuban decrees were exchange control regulations; the Brazilian decree was not. The Cuban exchange control regulations were enacted in order to preserve Cuba's national monetary resources by restricting the rights of foreign creditors. Suppose that the object of the Brazilian decree was to ensure that Brazilian currency would be universally treated as the legal tender in Brazil (cours force). Alternatively, the purpose might have been to prescribe the currency that creditors must accept (cours legal), which is much closer to the form of the Cuban currency decrees. In any case, the 1933 Brazilian decree probably was a legal tender law. It was not designed to protect Brazilian foreign exchange resources; by preventing the payment of dollars to a Brazilian creditor, the decree had the effect of reducing Brazilian exchange resources. Seen from the perspective of the purpose analysis, the German and American cases are consistent.

CONCLUSION

The comparison of judicial decisions in the United States and Europe concerning the meaning of exchange control regulations yields two discoveries. First, the purpose rather than the effect of a law governing foreign exchange transactions should determine its characterization as an exchange control regulation. Second, when examined in light of this purpose test, judicial interpretation of the concept of exchange control regulations is already remarkably similar in various countries, despite the range in interpretation of the term exchange contracts. This second discovery undermines somewhat the traditional view, mentioned above, that U.S. courts apply article VIII, section 2(b) of the Bretton Woods Agreement more narrowly than do courts in other member states.

Uniform reliance on a purpose test to define exchange control regulations would mitigate the otherwise uneven application of article VIII, section 2(b) of the Bretton Woods Agreement that results from dissimilar judicial

\textsuperscript{190} Williams, supra note 5, at 354.

\textsuperscript{191} See, e.g., Pan American Life Ins. Co. v. Blanco, 311 F.2d 424 (5th Cir. 1962), discussed supra in text accompanying note 61 and following; Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), discussed supra in text accompanying note 69 and following.

\textsuperscript{192} See, e.g., Williams, supra note 5, at 355.
interpretations of exchange contracts. International judicial consensus on the interpretation of all the terms of article VIII, section 2(b) would further the consistent application of the Bretton Woods Agreement in IMF member states. Such a consensus might also further the goals of international monetary cooperation on which the IMF was founded. Unfortunately, courts usually fail to focus on the exchange control regulations implicated in a Bretton Woods challenge. In order to facilitate greater consistency, therefore, courts should consider more closely the exchange control regulations involved in each case, paying close attention to their intended purpose.

Whatever conformity the cases discussed here bear in relationship to each other still must be considered accidental. They provide little certainty or predictability about judicial interpretation of exchange control regulations in the future. Courts, legislators and private international actors would each benefit from an express definitional test clarifying precisely which laws constitute exchange control regulations. Only these laws apply extraterritorially to block the enforcement of exchange contracts. The purpose test, if universally adopted, would serve these goals without significantly disturbing the jurisprudence of those countries whose courts have already considered cases arising under article VIII, section 2(b) of the Bretton Woods Agreement.