Currencies

Surveillance over Exchange Rate Policies

Article IV, Section 3(*a*) of the Second Amendment provides that "The Fund shall oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations under Section 1 of this Article." Section 3(*b*) provides that, in order to fulfill its functions under Section 3(*a*), "the Fund shall exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies." The Fund adopted Decision No. 5392-(77/63) on April 29, 1977 in order to be able to perform its functions under Article IV, Section 3(*a*) and (*b*) of the Second Amendment as soon as it became effective.[122]

One feature of the decision is that if, between periodic consultations under Article IV, the Managing Director "considers that a member's exchange rate policies may not be in accord with the exchange rate principles" adopted by the Fund, he must raise the matter informally and confidentially with the member. In coming to this view, the Managing Director takes into account any views that may have been expressed by other members, which implies that the procedure makes provision for complaints.

If, after raising the matter with a member, the Managing Director concludes that there is a question of the observance of the principles, he must proceed to a confidential discussion under Article IV, Section 3(*b*). As soon as possible after the completion of such a discussion, and not later than four months after its initiation, the Managing Director must report to the Executive Board on the results of the discussion. If, however, the Managing Director is satisfied that the principles are being observed, he advises Executive Directors of his view informally and without a meeting of the Executive Board unless an Executive Director requests a meeting. A report on the discussion is included in the context of the next consultation under Article IV.[123]

It will be apparent that the procedure as described above is a circumspect one but that it is nevertheless based on the supposition that a member may not be observing the Fund's principles for the guidance of members' exchange rate policies. The procedure has not been abrogated or even modified, but it has been supplemented by another procedure that

was adopted by the Fund on January 22, 1979. Under the supplementary procedure, whenever the Managing Director considers that "a modification in a member's exchange arrangements or exchange rate policies or the behavior of the exchange rate of its currency may be important or may have important effects on other members," he initiates an informal and confidential discussion. If he considers after this discussion that "the matter is of importance," he must conduct a consultation with the member and report to the Executive Board, or informally advise Executive Directors, on the consultation as soon as circumstances permit.[124]

The second decision does not base the initiation of the procedure for which it provides on the possibility that the Fund's principles are not being observed. The basis for the procedure is the importance to a member itself or to other members of changes in the member's exchange arrangements or in its exchange rate policies or of the behavior of the exchange rate for its currency. The concept of the behavior of the rate is meant to refer to both movements in and immobility of the exchange rate.[125]

European Monetary System

Introduction

The Werner Plan of October 1970 contemplated the economic and monetary union of the members of the European Community (EC) by stages to be completed by 1980.[126] Only part of the plan was made effective. The arrangement that became known as the common margins arrangement or the "snake," which in its original form took effect on April 24, 1972, was the most notable achievement. The instability of exchange rates, particularly for the U.S. dollar, has given a fillip to European monetary coordination, which, it is hoped, may contribute to closer political ties.

The "snake" was responsible for the mention, in Article IV, Section 2(*b*) of the Second Amendment of the Fund's Articles, among permissible exchange arrangements, of "cooperative arrangements by which members maintain the value of their currencies in relation to the value of the

currency or currencies of other members." This language would apply equally to the exchange rate and intervention aspects of the European Monetary System (EMS), which supersede the "snake." The obligations imposed on members by Article IV apply to all members, but the specific principles that the Fund must adopt for the guidance of all members with respect to their exchange rate policies must "be consistent with cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members,"[127] as well as with other exchange arrangements that members choose to apply.

Concern that the instability of floating exchange rates and fluctuations that do not reflect underlying economic conditions might imperil the integration already achieved led to a series of initiatives and actions in the EC. The communiqué of the European Council, composed of the Heads of State and Government of the EC members, issued at Bremen after a meeting on July 6 and 7, 1978, supplied the proximate impetus for the creation of the EMS.[128] The annex to the communiqué contained five paragraphs outlining some main features of the EMS.

The European Council adopted a Resolution on December 5, 1978 regarding the establishment of the EMS, which came into being on March 13, 1979.[129] All members of the EC are members of the EMS, but the United Kingdom chose not to become a participant in the arrangements on exchange rates and intervention for the time being.[130] (The words "member" and "participant" in the discussion of the EMS that follows will be based on this distinction.) The Resolution permits a member of the EMS to become a participant at a later date if it does not participate at the outset.

The Introduction of the Resolution refers to the discussion at Bremen of a "scheme for the creation of closer monetary cooperation leading to a zone of monetary stability in Europe," and states that such a zone was regarded as "a highly desirable objective"[131] in support of which "a durable and effective scheme" was envisaged. The firm resolve was "to ensure the lasting success of the EMS by policies conducive to greater stability at home and abroad for deficit and surplus countries." The Resolution deals primarily with an initial phase but declares that there was a firm intention "to consolidate, not later than two years after the

start of the scheme, into a final system the provisions and procedures thus created." The final system would provide for the creation of a European Monetary Fund "as well as the full utilization of the ECU as a reserve asset and a means of settlement." The system would be based on adequate legislation at the Community and national levels.[132]

The legal character of the Council's Resolution of December 5, 1978 was the subject of a decision of the Constitutional Council of France on December 29, 1978 delivered as the result of a proceeding initiated by certain deputies of the National Assembly. They argued that a special Treasury account contained in the 1979 budget was inconsistent with the Constitution because it would be affected in 1979 by operations connected with the EMS. They relied on Article 52 of the Constitution, which requires the intervention of the President of the Republic for the conclusion of a treaty subject to ratification, and Article 53, which requires parliamentary action to ratify or approve a treaty involving the finances of the Government. The Constitutional Council decided that Articles 52 and 53 relate only to an international treaty or agreement having legal effects per se (*un traité ou accord international ayant par lui-même des effets juridiques*), and that the Resolution of December 5, 1978 was a political declaration (*une déclaration de caractère politique*) not within the reach of the two constitutional provisions.[133] The political character of the Resolution has been cited in response to questions that have been raised about legal and other aspects of the EMS that have not yet been clarified.

European Currency Unit (ECU)

At the center of the EMS is the European Currency Unit (ECU),[134] which functions as the common denominator for the exchange rate arrangements, the basis for calculating the "divergence indicator," the unit of account for the intervention arrangements and certain credit transactions of the European Monetary Cooperation Fund (EMCF),[135] and a means of settlement among the monetary authorities of members. At the outset, the ECU is equal in composition and value to the European Unit of Account (EUA), which consists of a basket of fixed amounts of all nine EC currencies. On March 13, 1979, the composition of the ECU was as follows:

Currencies	Amounts of currency	Percentage of total	ECU 1 = currency units (March 13, 1979)
Deutsche mark	0.828	33.0	2.51064
French franc	1.15	19.8	5.79831
Pound sterling	0.0885	13.3	0.663247
Netherlands guilder	0.286	10.5	2.72077
Belgian franc	3.66	9.6	39.4582
Luxembourg franc	0.14		
Italian lira	109.00	9.5	1,148.15
Danish krone	0.217	3.1	7.08592
Irish pound	0.00759	1.2	0.662638

The composition of the basket will not be changed automatically because of a change in the central rate of the currency of a participant or in the exchange rate of the currency of a nonparticipating member. The amounts of the currencies in the basket were to be reviewed, and, if necessary, revised within six months after entry into force of the EMS and at intervals of five years thereafter. The first review was carried out in September 1979, but no revision was made. The amounts of currencies may be revised, in addition, if the percentage share of any currency, based on exchange rates, has changed by 25 per cent or more and a review is requested. The Resolution does not define the parties that may make a request. Possibly, any participant, or the Commission, might be entitled to make a request.[136]

Revisions will be made in accordance with "underlying economic criteria" and "have to be mutually accepted." This language could be understood to mean that a revision can be made only with the agreement of all members. Two of the main, but not the only, data taken into account in determining the composition of the basket in the past have been gross national product and intra-EC trade. If it is decided that the specified amount of a currency should be changed, the amounts of all other currencies will be adapted so that the value of the ECU in terms of individual currencies, whether EC or other currencies, will be the same immediately before and immediately after the revision. In short, there will be a smooth transition on the occasion of a revision. If a revision were made in the composition of the ECU before it replaces the EUA in

all the legal instruments and activities of the EC in which the EUA is the unit of account, more than one unit of account would be in existence, although it is intended that eventually the same unit of account is to apply for all purposes of the EC. No authority seems to exist to alter the composition of the EUA. It might continue to apply for the purposes of outstanding transactions already entered into, for example by the European Investment Bank, even after the ECU replaces the EUA.

Certain similarities to arrangements for the method of valuation of the SDR will be apparent.[137] Examination of the composition of the SDR takes place at quinquennial periods and the transition to a revised basket must be made without immediate disturbance of the exchange rate of each currency in terms of the SDR. The Fund, however, has announced the formula according to which the composition of the basket constituting the SDR will be revised, although on each occasion revision in accordance with the formula may be countermanded by the Fund, but no formula for revising the ECU was incorporated in the Council's Resolution of December 5, 1978 or, so far, in any other instrument.

Exchange Arrangements and Intervention

A central rate is established in terms of the ECU for each participant's currency. As a result, a grid of bilateral ratios, sometimes called "bilateral parities," "bilateral central rates," or "bilateral exchange rates," is established among the currencies of all participants. The initial central rates were the same as those that existed for the currencies of the "snake" (deutsche mark, Netherlands guilder, Belgian franc, Luxembourg franc, and Danish krone). For the other participants, central rates were derived from the market rates of March 12, 1979 against the former "snake" currencies. The original central rates and intervention limits were modified for the first time as a result of a meeting of the finance ministers and central bank governors of participants in Brussels on September 23, 1979.

Margins of 2.25 per cent above and below the parity between each pair of the currencies of participants are observed as the limits for exchange transactions. At the outset, the margins may exceed 2.25 per cent but not 6 per cent for transactions involving a currency that was not in the "snake" when the EMS became effective. The wider margins are to be gradually reduced as soon as economic conditions permit. Italy has exercised the option of wider margins. Each of the participants informed

the Fund under Article IV, Section 2(*a*) of its Articles of their participation in the EMS and the upper and lower limits at which they would be required to intervene in the currencies of other participants. The Fund was informed of the changes that have been made in the original central rates and intervention limits, in accordance with the same provision of the Fund's Articles. There is no obligation for members of the Fund to consult with, or to obtain the approval of, the Fund before such changes are made. Nor are the changes subject to approval after the event. The value of the ECU in terms of the market rates of the currencies of all members of the EC is announced daily by the EC Commission.

The ECU as a common denominator for certain currencies may assist the drafters of monetary clauses. In a world of floating currencies, the absence of a common denominator may make it difficult to apply a clause drafted in terms of the appreciation or depreciation or the revaluation or devaluation of a currency. It may not be clear what standard is intended for determining whether these changes have taken place or for measuring them. Gold was a common denominator in the days of the par value system. The ECU serves this purpose among participants in the EMS but not in relation to the currencies of nonparticipants or nonmembers of the EC.

Central rates in terms of the ECU can be adjusted by "mutual agreement by a common procedure." A change in the central rate of one currency results in offsetting adjustments in the central rates of other currencies because the ECU is a fixed point of reference. All participants and the Commission will take part in the procedure for adjusting ECU central rates. It is not clear whether "mutual agreement" means unanimity,[138] although it could be argued that unanimity is implied because of the consequences of a change for all participants,[139] but imprecision in the Resolution may have been deliberate in order to impart flexibility into it. The Resolution, it has been noted, was intended to be a political document and not a meticulously drafted legal instrument. Whatever meaning is attributed to "mutual agreement," one meaning that would appear to be excluded is notification of a change made without an opportunity for prior discussion. Lacunae in the texts of the EMS may be filled and uncertainties clarified by operational and other decisions taken during the initial two years. The procedures followed in making the changes adopted so far suggest that consensus is an objective in practice whether or not it is a requirement in law.

Intervention at the boundary of the margins is obligatory and without limitation.[140] "In principle," intervention is conducted in the currencies of participating countries, but the phrase "in principle" is probably intended to avoid an absolute rule and to leave room for agreement on a harmonization of policies on intervention with the issuers of non-EC currencies. Intervention within the margins is not compulsory but is not precluded, and in some circumstances, for example when the "divergence indicator" gives the signal, may be appropriate. It would seem that intervention within the margins may take place in the currencies of participants or of other countries.

In an article in the *Monthly Report* of the Deutsche Bundesbank of March 1979, intervention is discussed as follows:

> In order to maintain the margins of fluctuation the participating central banks in principle intervene in the currencies of participants. Non-compulsory interventions, in particular "intramarginal" interventions in participating currencies before the buying and selling limit rates have been reached, are subject to prior concertation among the central banks. The rules are designed to ensure that the central banks act towards the same ends in the market and that the legitimate interests of all participating central banks are safeguarded. They are also intended to guarantee that the provisions of the Articles of Agreement of the International Monetary Fund and the decisions taken on a world-wide basis in accordance with these Articles are complied with in the framework of the European Communities.[141]

Normally, but not inevitably, the divergence indicator will provide an early warning before the intervention limits are reached.[142] The warning will be given when a currency crosses its "divergence threshold." The formula for calculating the divergence threshold of a currency is:

$$0.75 \times 2.25 \text{ (or up to 6 per cent)} \times \text{(1 minus the weight of the currency in the ECU basket)}$$

The divergence threshold was an element of compromise in the difference of opinion on the question whether intervention arrangements should be based on parities, as in the case of the "snake," or on a basket of currencies. An objection made to the latter solution was that a currency might be pushed to its upper limit without another currency sinking to its lower limit, so that the obligation of intervention would rest solely on the issuer of the former currency. Moreover, the issuer of that currency would have to decide which currency to buy when intervening and, by this action, which country it would force into involuntary indebtedness,[143] although a participant in this predicament might avoid

the problem of choice by intervening in U.S. dollars.[144] The proponents of the basket method argued that under the parity system two currencies always reached their intervention limits at the same time, and it was not possible to say with certainty which was responsible for this situation. They argued, furthermore, that this method placed heavier burdens on countries in balance of payments deficit than on those in surplus. Deficit countries had to find finance or to adopt deflationary policies, but surplus countries had only to deal with an increase in domestic liquidity. For the proponents of a basket method, the obligation of surplus countries in a parity system would be more symmetrical if, for example, the settlement of balances obtained by these countries when intervening were to be deferred and interest withheld or reduced.[145] The solution embodied in the EMS bases the obligation of intervention on bilateral parities but, on the basis of a basket, creates a presumption of the need to take corrective action by the issuer of a currency that is diverging from the Community average.[146]

A currency crosses its divergence threshold whenever the market rate of the currency deviates from its central rate in terms of the ECU by more than 75 per cent of the deviation from the central rate that would occur if the currency were at its lower or upper intervention limit against all other currencies in the ECU simultaneously. In this calculation, margins of 2.25 per cent are assumed for the Italian lira and the pound sterling. The adjustment shown in the formula for the divergence indicator of a currency is made in relation to the weight of the currency in the basket based on ECU central rates in order to eliminate the influence of the weight in determining whether the threshold has been crossed. The divergence indicator would not operate equitably among currencies unless this adjustment was made. The reason is that movements in the exchange rate of a currency with a heavy weight in the basket would shift the basket to a much greater extent than would a currency with a light weight. In the absence of adjustment, the latter currency would reach its threshold sooner than the former currency. Further adjustments are made if a currency for which the margins of 2.25 per cent are being observed moves across its threshold in order to determine whether the crossing results from movements by currencies with wider margins or no margins. Distorting influences resulting from such movements are to be ignored.

In the language that became familiar in the Committee of Twenty, the

divergence indicator is an objective indicator that creates a presumption that the monetary authorities of a particular country should take adjustment measures.[147] Article IV of the Fund's Articles and its decisions on surveillance contain no objective indicators. The Board of Governors has resolved, however, that "the Fund shall seek to gain further experience in the use of the objective indicators, including reserve indicators, on an experimental basis, as an aid in assessing the need for adjustment, but shall not use such indicators to establish any presumptive or automatic application of pressures."[148] Although intervention at the limit of the EMS margins is obligatory for participants, if a currency crosses its divergence threshold only a "presumption" arises that the issuer "will correct this situation by adequate measures." There is no obligation to take measures, although the United Kingdom proposed that an obligation should arise.[149] The divergence indicator may bring about greater symmetry, because a divergent currency might be strong or weak and because even a presumption may produce moral pressure.

The Fund's first decision on surveillance over the exchange rate policies of its members lists certain developments as among those that might indicate the need for discussion with a member. These developments can be regarded as presumptive evidence of the need to consider whether action is necessary, but none of the developments involves objective indicators.[150] The Fund's second decision, it has been seen, does not rest on any suggestion of possible inconsistency with the Fund's principles for the guidance of the exchange rate policies of members.

The Council's Resolution of December 5, 1978 mentions, as "adequate measures," "(a) diversified intervention (b) measures of domestic monetary policy (c) changes in central rates (d) other measures of economic policy." Exchange rate measures, therefore, are not the only corrective measures that are foreseen. The measures of domestic monetary policy are probably those that have a direct impact on the movements of funds and exchange rates, such as changes in interest rates. "Diversified intervention" suggests that a participant may intervene in a range of currencies so as to distribute the effect more equitably and not concentrate it on one participant even though the exchange rate for its currency is furthest away in the opposite direction from the currency of the intervenor. The phrase "diversified intervention" may refer also to intervention with non-EC currencies.

If, because of "special circumstances," corrective measures are not

taken, the reasons for inaction must be given to the other participants, especially in the course of the established procedures among central banks. If necessary, consultations will take place in the appropriate bodies of the EC, which would appear to be the Committee of Central Bank Governors, the Monetary Committee, the Economic Policy Committee, and the Council of Ministers. Consultations might take place successively in a number of these bodies. The provisions dealing with the divergence indicator were to be reviewed in the light of experience after six months. The review was carried out in September 1979, but no changes were made. It was agreed that the "questions regarding imbalances accumulated by divergent creditor or debtor countries" were to be studied as well. This language could be understood to refer either to the effects of intervention occasioned by divergence or, more broadly, to the effects of balance of payments surpluses and deficits.

Settlements and Very Short-Term Financial Facility

The Council Resolution deals also with certain financial arrangements as part of the exchange rate and intervention mechanisms. A "very short-term facility" is established for financing intervention in the currencies of participants by means of reciprocal lines of credit of unlimited amount. The claims and obligations resulting from intervention are recorded in ECUs in the books of the European Monetary Cooperation Fund (EMCF or FECOM as the French acronym) at the exchange rates ruling on the day on which the interventions are made. Settlements are made between central banks 45 days after the end of the month of intervention, but provision is made for certain postponements that may be made automatically or with the consent of creditors. Advance repayments are permissible.

Settlements under the very short-term financial facility and under the other credit mechanisms referred to later are carried out by the debtor's use in the first instance of any of the creditor's currency that the debtor holds, but the central bank can hold only working balances of the currencies of other participants within limits laid down by the Committee of Central Bank Governors. These limits can be exceeded only with the consent of the central bank of the issuer of the currency held. The rest of a settlement may be made wholly or partly in ECUs, provided that a creditor is not obliged to accept ECUs in excess of 50 per cent of the claim that is being settled. The purpose of this limit is to discourage any

undue concentration of ECUs in the hands of some central banks. The limit resembles the provisions of the First Amendment of the Fund's Articles that were designed to counteract the risk of imbalance in the SDR scheme as a result of tendencies to engross or to discard SDRs. The safeguards were considered less necessary in the drafting of the Second Amendment.[151] Any balance remaining after transfer of the creditor's currency and ECUs must be settled in reserve assets in accordance with the composition of the debtor's reserves denominated in SDRs and in currencies at the end of the month preceding the settlement. The debtor and creditor central banks may agree on some other form of settlement. Gold is not an obligatory means of settlement.

The value of assets denominated in SDRs (which would include reserve tranches in the Fund as well as SDRs) and in currencies that are used in settlement is calculated in ECUs on the basis of the daily rates for the ECU. The debtor central bank may choose which of these assets it will provide in settlement. Gold may be used in settlement if the price proposed by the debtor central bank is acceptable to the creditor central bank.

If the debtor central bank no longer possesses ECUs and wishes to obtain some for settlement, it must apply in the first instance to central banks that have accumulated ECUs in excess of the amounts for which they have contributed reserves. This provision also is designed to prevent a maldistribution of ECUs. If ECUs have not been obtained as a result of this approach, they may be obtained directly from the EMCF in return for gold and U.S. dollars in the proportions in which they are held by the debtor central bank.

The central bank of each participant was required to contribute to the EMCF 20 per cent of its gold holdings and gross U.S. dollar reserves as at February 28, 1979. Holdings of SDRs were not included in this arrangement.[152] The Resolution refers to the "deposit" of reserves with the EMCF, but the substantive provisions of the Agreement of March 13, 1979 among the Central Bank Governors that establish the operating procedures for the EMS use the word "contribution."[153] The EMCF credits the central bank of a participant with an amount of ECUs corresponding to its contribution. The central bank of a nonparticipant may make a similar contribution in return for ECUs. The United Kingdom exercised this option in July 1979. The SDR differs from the ECU in that the SDR is not allocated against a counterpart in any form

provided by the participant in the Special Drawing Rights Department of the Fund that receives the allocation.

The contributions of gold and dollars "take the form of three-month revolving swaps against ECUs," which may be unwound with two working days of notice. The value of the gold portion of the contribution is determined by the average of the prices, translated into ECUs, that were recorded daily at the two London fixings during the previous six calendar months, but not exceeding the average price of the two fixings on the penultimate working day of the period. This formula avoids the risk that gold might be valued in excess of a recent market price. The value of the U.S. dollar portion is determined by the market rate prevailing two working days prior to the value date.

Each central bank concludes a contract with the EMCF setting forth the arrangements for the "delivery" of the gold and U.S. dollars to the EMCF and for the management of these assets insofar as it is entrusted to the central bank. The precise legal nature of the "deposits" or "contributions" has not been announced.

No attempt was made to classify the SDR according to traditional legal categories when the First Amendment of the Fund's Articles was negotiated. There was tacit agreement that the SDR was an instrument *sui generis* and that its legal character could be understood only by reference to its own characteristics and uses. The same course may have been followed for the "contributions" required by the EMS. That word may have been chosen because it is not a classical legal term of art. It is also possible that the same legal analysis was not available under the national laws of all participants. There appear to have been both legal and political difficulties in solving the problem of contributions.

An elucidation of the contributions must take account of the fact that there is no final transfer of the ownership of contributed assets to the EMCF and that the EMCF is not able to use them.

> As the choice of swaps indicates, a final transfer of parts of the central banks' gold and dollar reserves to the EMCF during the initial phase is not intended. For any final transfer of reserves of the Bundesbank to the EMCF or to the planned European Monetary Fund, a legal basis would have to be created in the joint view of the Federal Government and the Bundesbank.[154]

The central banks bear the risks of fluctuations in the price of the gold and in the exchange rate of the dollars they contribute, and they earn interest on their investments of the dollars. The central banks do not

show the contributed assets as part of their reserves. The ECUs they hold are shown as part of their reserves.

The probable explanation of the legal character of the contribution is that ownership of the contributed assets passes to the EMCF for the period of the swap, and that the statement in the quotation above that there is no final transfer to the EMCF emphasizes the retransfer of ownership to the central banks that takes place, at least notionally, at the end of each swap period, and that would take place ultimately if the swaps were not renewed. A transfer of ownership is the normal consequence of a swap. The participants would need authority under their laws to pass ownership but they may have this authority because the contributions are not "final" in the sense that ownership must be restored to the central banks at the end of the period of a swap and when swaps are no longer renewed. Another way of explaining this analysis is that participants may have the authority to make spot sales of assets against ECUs combined with forward purchases of the assets against ECUs. Risk connected with the assets and profits derived from the investment of them would pass normally to the EMCF, but there may be no difficulty about an agreement to displace these consequences in order that risk and profit shall be for the account of the central banks. The EMCF is not entitled to dispose of contributed assets, but an agreement to this effect also is conceivable although the right to dispose of assets is a normal incident of the ownership of them. The undertaking of forward sales of the assets by the EMCF may create a lien of sorts on the assets that prevents the EMCF from disposing of them freely.

Theoretically, another possible legal solution that might have been adopted in order "to have and have not," to recall a Hemingway title, would be along the following lines. A participating central bank establishes on its books that the EMCF has made a general deposit with the bank of the assets the bank contributes in return for ECUs issued by the EMCF. Under a general (or "irregular") deposit, ownership of the deposited assets vests in the depository, which may merge them with other assets of a like kind. The depository has an obligation to return not the deposited assets but an amount of assets equivalent to them. The concept is in contrast to the concept of a special deposit (or simply "deposit") under which the depository has possession or custody, but not ownership, of the deposited assets. The depositor retains ownership of the assets.[155]

If the creation of a general deposit for the benefit of the EMCF was taken to imply, as a first step, the transfer of the ownership of gold and U.S. dollars to the EMCF, followed, as a second step, by the general deposit of these assets by the EMCF with the central bank, the central banks would need authority under their national laws to transfer ownership of the assets as the implied first step. It can be assumed that this authority exists because it has been seen that the legal technique of swaps involves a transfer of ownership to the EMCF for the period of each swap.

The Fund adopted the technique of general deposits of gold in 1965 in connection with its fourth general review of quotas. Gold held by two depositories under earmark for the Fund, that is, on special deposit, was transferred to general deposit with the two depositories. The purpose of this arrangement was to counteract the decline in the gold reserves of the United States and the United Kingdom as a result of their sales of gold to other members of the Fund to enable them to pay the gold portions of the subscriptions due in connection with increases in their quotas. The general deposits were demand deposits in accordance with which the Fund was entitled at any time to require the transfer of gold to an earmarked account.[156] In view of this right, the Fund subdivided its "gold with depositories" in its balance sheet into "bars" and "general deposits."[157]

If the legal technique of general deposits had been followed for the contributions, the arrangement would have differed somewhat from the Fund's general deposits. The Fund showed its claims under the general deposits it had made with depositories as part of its assets, and the two reserve centers showed the physical gold bars as part of their assets. The Fund could not have shown both the claims and the bars as its assets. On the hypothesis of the technique of general deposits, the central banks as depositories with which general deposits of assets had been made by the EMCF, and as recipients of ECUs, would be able, if they wished, to show both the deposited assets and the ECUs as part of their reserves. The EMS, however, was not intended to result in an increase in reserves, so that the technique of general deposits would not have been satisfactory if the central banks concluded that they must show both the assets on deposit and the ECUs as part of their reserve holdings. The central banks show only the ECUs in their reserves, which is further evidence in support

of the legal analysis that has been advanced above as the probable explanation of the arrangement.

Under the EMS, neither the EMCF nor the central banks can make free use of the assets that are contributed by the central banks. If a participant wishes to meet a decline in its U.S. dollar reserves, it is not entitled to use the dollars it has contributed unless it unwinds the swap *pro tanto* and returns the ECUs to the EMCF for dollars. The original volume of ECUs exceeds 23 billion. At the beginning of each quarter, when the swaps are renewed, the central banks and the EMCF make the necessary adjustments to ensure that each central bank's contribution continues to represent at least 20 per cent of its gold and U.S. dollar reserves as recorded on the last working day of the preceding quarter. Another purpose of the adjustment of the contribution on renewal of the swap is to take account of any changes in the price of gold or in exchange rates for the dollar that have occurred since the initial contribution or last adjustment.

ECUs may be used in intra-EC settlements in accordance with the provisions as described earlier. The central banks may transfer ECUs to one another, but not to other entities, in transactions unrelated to settlements, against U.S. dollars, EC currencies, SDRs, or gold. For the purpose of meeting a decline in its U.S. dollar reserves, a central bank may obtain U.S. dollars against ECUs from the EMCF between periodic adjustments of ECU balances by unwinding a swap transaction. The operations referred to in the two preceding sentences may not be entered into for the sole purpose of altering the composition of a central bank's reserves. This qualification resembles the provision in the Fund's Articles under which a participant in the Special Drawing Rights Department is expected not to use its SDRs in a transaction with a transferee designated by the Fund unless the participant needs to use reserves and is not making the transfer for the sole purpose of changing the composition of its reserves.[158] The qualification does not apply, however, to transactions entered into by agreement between two participants,[159] so that in this respect transfers of SDRs may be made more freely than transfers of ECUs.

A participant is not required to maintain its holdings of ECUs at 20 per cent of its gold and U.S. dollar reserves or in any other volume. There is nothing resembling the obligation to reconstitute holdings of SDRs,[160] but reconstitution has been unpopular with many participants,

and the obligation has been reduced in the Fund as an improvement in the characteristics of the SDR. It has been seen, however, that participants in the EMS are bound to maintain their contributions of gold and U.S. dollars at the level of 20 per cent of these reserves by means of periodic adjustments. A participant's balance of ECUs is adjusted in accordance with the adjustment of its contribution.

In this discussion of the EMS, the comparison made from time to time between provisions governing the SDR and the ECU justifies the comment that the ECU is further evidence of a substantial inheritance of experience in the development of international monetary law. This comment refers both to similarities and deliberate dissimilarities.

Interest is paid or received by central banks on the amount by which their holdings of ECUs are below or above the amount of ECUs received from the EMCF against the contribution of reserves. The rate of interest is equal to the interest payable for the use of the very short-term facility, namely, the average of the official discount rates of all EC central banks weighted in accordance with their shares in the ECU basket.

Unless there is unanimous agreement to the contrary, the swaps of gold and U.S. dollars against ECUs are to be unwound at the end of the transitional period of two years. In the liquidation that then takes place, the net users of ECUs must bring their holdings up to the level of ECUs received in return for their contributions, which is referred to as the level of their "forward sales" of ECUs under the swaps. The net accumulators must transfer the excess of their ECUs over their forward sales, either by direct transfers or through the EMCF, to the net users. These transfers are to be made in exchange for the currency of the net accumulator or in accordance with any other arrangements agreed upon between the parties, or against the transfer of reserve assets in proportion to the composition of the reserves of the net user as determined by the provisions governing settlements arising from intervention. Once again, therefore, gold is not an obligatory means of settlement.

There are no express provisions under which a participant can withdraw from the EMS before its liquidation or have temporary leave of absence, although proposals of this kind were made.[161] The legal position may be an illustration of Agnes Allen's Law: "Almost anything is easier to get into than out of."[162] Withdrawals from the "snake," however, did occur.

Credit Mechanisms

The Council's Resolution of December 5, 1978 deals with existing credit mechanisms, namely, the short-term monetary support (STMS) and the medium-term financial assistance (MTFA). They will be maintained during the initial period of two years but considerably enlarged. They provide substantial resources to support the functioning of the exchange rate system and to deter speculation. The STMS provides credit to EC central banks for the financing of temporary balance of payments deficits without conditionality. The MTFA is available if an EC member is in balance of payments difficulties or seriously threatened with the prospect of difficulties. Credits are subject to conditionality and may be made for longer periods than under the STMS.

These two facilities are to be consolidated into a single fund in the final phase of the EMS. Nothing is said about the composition of, or the principles that will govern, this eventual fund, but the Resolution refers to the ECUs issued in exchange for the contributions of participants as "an initial supply of ECUs." The Annex to the Bremen communiqué referred also to ECUs issued against the currencies of EC members.[163]

External Relations

The Council Resolution declares that the "EMS is and will remain fully compatible with the relevant articles of the IMF agreement." It may be assumed that this declaration is a statement of both fact and intention.

The Resolution also declares that "the durability of the EMS and its international implications" require the coordination among participants of exchange rate policies with respect to countries not in the EC and, as far as possible, concerted understandings ("concertation") with the monetary authorities of these countries. Harmonized policy on intervention in the currencies of nonmembers, particularly the U.S. dollar, is undoubtedly an objective of this provision.

The Resolution provided that European countries with "particularly close economic and financial ties" to the EC may participate in the exchange rate and intervention mechanisms.[164] It would seem that these mechanisms include the very short-term facility, but not the credit facilities, and that there is no authority to invite the participation of third countries in the credit facilities. Sweden and Norway participated in the "snake" for certain periods. European countries having particularly close

economic and financial ties to the EC that participate in the exchange rate and intervention mechanisms will do so on the basis of agreements that the central banks would enter into. The central banks of the non-EC European countries entering into these agreements would then be able to hold ECUs and deal in them. Although non-EC members could hold ECUs, countries outside Europe would not be eligible to hold ECUs.

"Reciprocal consultation" will take place within the framework of the EC on "important decisions concerning exchange rate policy between countries participating and any country not participating in the system." This provision refers to EC members that do not participate in the exchange rate and intervention mechanisms. According to the structure of the provision, the consultation would relate to important decisions of exchange rate policy involving the nonparticipant and not to other important decisions.

EMS and "Snake"

There are substantial differences between the EMS and the former "snake,"[165] some of which are as follows:

(i) The creation of the ECU is a central feature of the EMS that had no parallel in the "snake."

(ii) Central rates are expressed in relation to the ECU, while in the "snake" the rate for each currency was expressed in terms of the other participating currencies.

(iii) The common procedure for the revision of central rates by mutual agreement involves not only participants but also the Commission.

(iv) The "divergence indicator" is a new phenomenon.

(v) At the outset of the EMS, the margins for exchange transactions involving a currency not in the "snake" at that date may be wider for a time than was permissible in the "snake."

(vi) The ECU is used in settlements arising from intervention, but there was no comparable means of settlement in the "snake." The rules for settlement differ in other respects.

(vii) The use of gold in "snake" settlements was formally abolished as from July 1975, but provision has been made for it in EMS settlements. In addition, the contribution of gold creates a new use for gold in practice, and the formula for the valuation of gold produces a statistical increase in reserves.

The financial support systems were established before the "snake" and were open to all EC members, but they have been greatly enlarged by the EMS.

Fluctuating Exchange Rates

Currency, Escalation, Hardship, and Other Protective Clauses

General practices with respect to the allocation of exchange risks are being followed or are being developed in particular fields of business. In some fields, the practices antedate the present fluctuation of currencies. For example, the practice of the World Bank, which is discussed later in this pamphlet, and of other international development banks is to pass on to borrowers from these institutions the risks that the banks undertake in raising the resources to lend. This practice is followed because of requirements in the charters. In other fields of business, the present fluctuation of currencies has led to a new consideration of the treatment of exchange risks or to a revision of past practices.

One study notes that fluctuating exchange rates have led to an increasing use of protective clauses in bills of lading and charter parties that provide for the adjustment of the amounts to be paid because of changes in the exchange values of currencies.[166] Even if these currency clauses are not always contained in bills of lading, the risk of fluctuation is taken into account by liner conferences in adopting tariffs. Sometimes, tariffs are based on a unit of account, or a "currency adjustment factor" (CAF) is applied. The CAF may be based on the relationship between the currency in which tariffs are expressed and other currencies within the conference (or the more important of them) and on "weighting factors."

The parties to a charter party may not always be able to agree on the exact adjustment to be made as a result of fluctuations in exchange rates. They may then agree on some form of currency hardship clause, as discussed in Pamphlet No. 22.[167]

"Escalation clauses" are another form of protective clause. The shipowner may be relieved from performance or may be able to claim increased payment if cost developments, including those resulting from changes in exchange rates, make it economically unreasonable to hold him to performance as originally agreed upon between the parties. The adjustment of amounts payable, which may involve de-escalation as well as escalation, may be determined by means of one of various possible

formulae involving real costs or an index or may be left to negotiation. In some jurisdictions, however, these formulae may give rise to legal problems, including those connected with indexation.

Escalation clauses drafted in the past may provoke disputes in current conditions, which suggests the need for modification of former practice in the drafting of new clauses. In an English case decided in January 1976,[168] one of the members of the Court of Appeal said:

> Once again we are faced with having to consider the consequences of the present chronic instability of currencies in relation to a contract made some seven years ago in happier financial days, when the problems to which this case gives rise were not problems against which these parties thought it necessary expressly to guard themselves.[169]

In this case, the German owner of a vessel had chartered her under a time charter to a U.S. corporation in January 1969 for a period ending about January 1, 1973, which was prolonged in April 1972 for a further period of two years. The hire was payable monthly in advance in U.S. dollars. The payments of wages by the owner to the officers and crew were mainly in deutsche mark. The charter party contained the following clause:

> The Charter hire of U.S. Cents 23.5 . . . is based on wages including social insurances and working conditions in force on delivery of the Vessel, as per Agreement between German Shipowners' Association on one side and Officers' and Crew's Unions on the other side in respect to the trade for which the Vessel is chartered. Any increase or decrease will be added to or deducted from the above mentioned hire as far as Owner has to bear such increase or will benefit from a decrease as from delivery, until the end of this Charter Party.[170]

On May 9, 1971 the deutsche mark was allowed to float, and it appreciated progressively against the U.S. dollar. A dispute arose because the additional payments to officers and crew in deutsche mark had to be translated into U.S. dollars as additions to hire.

It was held that the escalation clause was not a protective clause that was intended to deal with changes in exchange rates as such, but was confined to the additional costs of wages. The owner argued nevertheless that the rate of exchange between the deutsche mark and the U.S. dollar should be the rate prevailing at the time of each monthly payment. This contention did not succeed. It was held that the appropriate rate of exchange was the one ruling at the date whenever wages were changed. The rate continued to apply until the next change in wages.

Another study[171] deals with the desirability of an international

secondary mortgage market but acknowledges that the development of such a market is severely constrained by the fluctuation of exchange rates because of the risk they represent for the investor. A number of countries have chartered public institutions to direct funds into the housing programs of developing countries. In the United States, the function is performed by the Office of Housing within the Agency for International Development (AID). AID guarantees investments by U.S. lenders on condition that contracted repayments are in U.S. dollars or that the host country in which the investment is made guarantees that repayments will be adjusted for any changes in the exchange value of the currency of repayment. If the host country fails to honor the guarantee, AID is obligated under the guarantee it gives and must make payment to the investor in U.S. dollars. As a result of the protection the host country arranges for itself when giving a guarantee, the burden of exchange risk rests always on the borrower.

The first truly multilateral international institution in the field, the Inter-American Savings and Loan Bank (BIAPE), was chartered in 1975 in Venezuela as a result of the efforts of the savings and loan systems of the Western Hemisphere. The initial members and contributors of capital, in whose countries BIAPE will operate, are 14 countries in the Western Hemisphere. BIAPE is considering the question of the protection of investors, and it is likely that BIAPE will require the central bank of the host country to repay the loan in U.S. dollars or to guarantee repayment in that currency.

The study concludes that an effective market cannot be created if the full burden of exchange risk is borne by the borrower or by the investor. The study recommends that the governments or central banks of the countries of the borrower and investor should undertake the risk, or a substantial part of it, and that a multilateral international organization established for this purpose would be even more preferable.

A clause providing that a particular currency shall be the currency of account or payment may be adopted by the parties as a protective clause.[172] Events may make it more onerous than the parties expected. In a case decided in Argentina, the parties to a loan contract, relying on a stable relation between the peso and the U.S. dollar that existed when the contract was entered into, agreed on repayment in dollars or the equivalent in Argentine currency. By the time of maturity, the peso had depreciated severely, so that the obligation of the borrower in pesos was

much more burdensome than had been expected. The National Court of Civil Appeals denied the borrower's claim to relief based on the plea of *imprévision*, because the use of the U.S. dollar clause showed that the parties had foreseen the risk of fluctuation in the exchange rate. The case is notable because the Argentine courts have shown an activism in monetary matters comparable to that of the English courts in the *Miliangos* chain of cases and because the Argentine courts have relied on *imprévision* and other doctrines to moderate the rigor of the nominalist principle.[173]

Some publicity has been given to a clause under which the exporter can call for the currency of the importer as an alternative currency if the currency of account and the primary currency of payment depreciates after the date of entry into the contract. In those circumstances, the exporter has the option of payment in the alternative currency at the rate of exchange when the contract was made or payment of an equivalent amount in the currency of account at the exchange rate prevailing at the date of payment.[174]

The SDR may be considered by parties a unit of account that is preferable to any currency because the composition of the SDR basket makes it more stable than individual currencies. Parties may also conclude that the SDR as a unit of account will be an equitable method of allocating exchange risks between them. The difficulties that may arise in adopting the SDR as the unit of account in a particular industry are illustrated by the experience of the International Air Transport Association (IATA).[175]

Protection by Operation of Law

Governments or international organizations may adopt legal measures to protect private parties against movements in exchange rates. Measures of this kind may be related directly to these movements or indirectly because they are related to certain consequences that follow from these movements. The OECD Exchange Guarantee Agreement, at the international level, and the "convertible lira" accounts of Turkey, at the national level, can be regarded as examples of the first kind of measure and exemptions from changes in the monetary compensatory amounts of the common agricultural policy an example of the second kind.

The Agreement concerning an Exchange Guarantee, in which 18 members of the Organization for Economic Cooperation and Develop-

ment participated, became effective on January 1, 1973 when the European Monetary Agreement was terminated. The purpose of the Agreement was to provide an exchange guarantee for the working balances, up to an agreed limit, held by a central bank with another participating central bank in the currency of the latter. The initial period of the Agreement was three years. During this period there was only one occasion on which adjustments were made under the guarantee. These adjustments followed changes in the exchange rates of certain currencies in February 1973. When the Agreement was reviewed in 1975, the parties agreed that, to quote a BIS report, "the arrangements had little practical value under the system of floating rates," but the Agreement was prolonged nevertheless for three years from January 1, 1976 to December 31, 1978, although with the provision that no new claims or liabilities should arise unless the Agreement was reanimated. The prolongation was, therefore, largely a suspension of the operation of the Agreement. No adjustments were made during this period. The Agreement expired on December 31, 1978, and the participating central banks agreed that any balances then outstanding were to be settled without adjustment.[176]

In 1975, Turkey revived an earlier practice under which commercial banks were authorized to open demand and deposit accounts for the benefit of Turkish nationals working abroad and nonresidents. The deposits are made with foreign exchange, denominated in "convertible liras," and carry an exchange rate guarantee. The Central Bank indemnifies the commercial bank against any loss suffered on the withdrawal of the deposit in the form of foreign exchange.[177] The guarantee applies only to deposits made before March 1, 1979 and is subject to conditions with respect to the character and use of the deposits. The terms of this arrangement have been influenced by the fluctuation of exchange rates under present exchange arrangements, but the main motive is to attract foreign exchange and not to give protection against the movements of exchange rates.

Arrangements involving exchange rate guarantees by monetary authorities can involve discriminatory currency arrangements affecting payments and transfers for current international transactions or multiple currency practices, for which the approval of the Fund is still required notwithstanding the freedom of members to choose their exchange

arrangements under Article IV of the amended Articles. Article VIII, Section 3 provides as follows:

> *Avoidance of discriminatory currency practices*
> No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1 to engage in, any discriminatory currency arrangements or multiple currency practices, whether within or outside margins under Article IV or prescribed by or under Schedule C, except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force, the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 3 of that Article shall apply.

The Turkish arrangement does not constitute a multiple currency practice because a special rate of exchange is not involved in the exchange guarantee. The convertible lira account is adjusted in accordance with movements in exchange rates, and the Central Bank's exchange guarantee is made effective by applying the official rate of exchange in calculating the equivalence between Turkish currency and the foreign exchange withdrawn by a depositor.

The law of the European Community contains certain principles that are designed to protect private interests against various actions of the EC, including actions based on fluctuations in exchange rates. One of the principles is that the legitimate expectations of private contracting parties must be protected by the EC institutions. Sometimes, this principle is made explicit in regulations, and sometimes, when not made explicit, it is relied on by contracting parties as a general principle of law in the EC. Changes in the law of the EC relating to the common agricultural policy and monetary compensatory amounts that result from fluctuations in exchange rates have given rise to provisions to protect contracting parties against losses under contracts in existence at the time of a change or to assertions by them that they are entitled to protection. The decision of cases involving these matters has constituted a substantial proportion of the work of the European Court of Justice. Litigants relying on the principle of protection have had little success. One reason has been the effect of the doctrine that the purpose of monetary compensatory amounts is to protect the functioning of the common organization of the agricultural market, and that this purpose takes precedence over the principle of protecting the interests of private parties. Another reason has been the finding that a prudent trader at the time of entering into a

contract would have foreseen the possibility of the change in the law that occurred and would have taken steps to protect himself.[178]

Regulation (EEC) No. 974/71 in its original form[179] directed a member of the EC to impose monetary compensatory amounts if, for the purpose of commercial transactions, it allowed the exchange rate of its currency to fluctuate by a margin wider than the one permitted by international rules, but under the Regulations that were relevant in *Fratelli Zerbone S.n.c. v. Amministrazione delle Finanze dello Stato*[180], a case discussed later in this pamphlet, this direction was not to apply to imports effected under contracts concluded before December 19, 1971 and registered before December 28, 1971 or proved by official documents to have been concluded in this period. December 19, 1971 was the day after the Smithsonian agreement was reached and Decision No. 3463-(71/126) of the Fund on central rates and wider margins[181] was adopted. This exemption, however, was to "apply only to the extent necessary to allow the contract to be executed under the conditions which would have existed if the monetary measures" that produced a change in exchange rates and led to the imposition or modification of monetary compensatory amounts had not been taken. (The word "executed" in this context meant "performed.") The European Court of Justice decided in the *Zerbone* case on January 31, 1978 that the regulation was directly binding on national authorities and that they were not entitled to adopt binding conditions that would determine the circumstances in which the exemption did or did not apply. The relevant date for determining whether the exemption applied to a commercial transaction was the date of importation or exportation of the goods and not the date of payment.

The purpose of the exemption was to ensure that monetary compensatory amounts would not produce economic consequences that would not have occurred had the monetary measures not been taken. If an Italian importer contracted to buy U.S. dollars to pay for imports at a rate of exchange prevailing before December 19, 1971, the importer should not be required to pay monetary compensatory amounts. In such circumstances, the importer could not get the benefit of the depreciation of the U.S. dollar in relation to the lira, in contrast to the circumstances in which he contracted to obtain the necessary U.S. dollars at an exchange rate prevailing after December 19, 1971. In the latter circumstances, he would be able to sell the goods profitably at a price lower than the one aimed at by the common organization of the market.

Where, as in the *Zerbone* case, the importer arranged for payment to the exporter in U.S. dollars under an irrevocable letter of credit, the applicability of the exemption would be determined by the rate of exchange that was the basis for the importer's liability to the bank issuing the letter of credit.[182]

In *British Beef Company Ltd. v. International Board for Agricultural Produce*, decided by the European Court of Justice on June 30, 1978,[183] one question in the case was whether, by failing to exempt from the increase in monetary compensatory amounts those exporters who had concluded sales contracts before the date when the regulation in question was promulgated, a breach had been committed of the legal principle that the Community institutions must protect the legitimate expectations of private parties insofar as protection was compatible with the overriding requirements of the public interest. Regulation No. 2424/76 (October 5, 1976) of the Commission of the European Community, which was in issue, had made no express exemption for existing contracts. The normal practice was to maintain monetary compensatory amounts for a full week, so that changes applied only as from the next week. The Commission had proposed a change in the representative rate for sterling that was to take effect on October 11, 1976, and while waiting for the Council's decision the Commission adopted a regulation of October 1, 1976 to take effect on October 4, 1976, maintaining unchanged the monetary compensatory amounts fixed with effect from September 27, 1976 for the pound sterling. The Council rejected the proposal, and therefore the Commission on October 5, 1976 adopted Regulation No. 2424/76 altering the monetary compensatory amounts to conform with the recent depreciation of the pound sterling. The regulation was to take effect on October 6, 1976, but traders could request that the change should apply to them with effect from October 4, 1976. The refusal of the court to grant a remedy in these circumstances suggests that where there was a currency, in this case sterling in 1976, that was fluctuating rapidly and traders could not be unaware of the uncertainties typical of the situation and of the possibility that monetary compensatory amounts might be fixed at unusual times, traders could not legitimately expect that existing monetary compensatory amounts would be maintained. One author has suggested that in view of this decision it may be doubted whether a trader can ever have a legitimate expectation when currencies are floating that existing rates for monetary compensatory amounts will be maintained.[184]

In *N.G.J. Schouten B.V. v. Hoofdproduktschap voor Akkerbouwprodukten*, decided on December 14, 1978,[185] the issue before the European Court of Justice was whether a regulation of the Commission under which monetary compensatory amounts were not to be adjusted in accordance with temporary downward movements in the exchange rates of the pound sterling and the Irish pound was valid. The validity of the regulation was challenged on the basis of other regulations of the Council and of principles of legal certainty and equality drawn from the Treaty of Rome. The decision of the court illustrates the predominance of the public over the private interest. Another interesting feature of the decision is that it accepts a concept of "unrepresentative" rates of exchange.

Regulation No. 974/71 of the Council of May 12, 1971, as amended, provided that if, for the purposes of commercial transactions, a state allowed the exchange rate of its currency to fluctuate by a margin wider than that permitted by international rules in force on May 12, 1971, a member state whose currency appreciated beyond the margin was to charge on imports and grant on exports, and a member whose currency depreciated beyond the margin, was to charge on exports and grant on imports, the monetary compensatory amounts referred to in paragraph (2) of the Regulation. Under the relevant part of paragraph (2), the monetary compensatory amounts were to be equal to the average percentage difference between central rates and the spot market rates of a currency in relation to each of the currencies in the "snake" as recorded over a chosen reference period. Paragraph (3) provided for determination by the Commission of adjusted monetary compensatory amounts in line with the average percentage difference between the rates referred to if it changed by at least 1 point from the preceding determination. The chosen reference periods ran from Wednesday to the following Tuesday. The monetary compensatory amounts based on a reference period took effect on the Monday following the Tuesday that marked the end of the reference period. Under Regulation No. 1380/75, the spot market rates of members of the "snake" against the pound sterling and the Irish pound were the average rates recorded each working day at noon on the foreign exchange markets of these two Community members.

During the period June 2–8, 1976, the two currencies depreciated because of speculative movements, so that the difference for that week from the percentage that was the basis for the preceding determination was

2.69 points. The Commission decided on June 11, 1976 (Regulation No. 1356/76) to make no adjustments in the monetary compensatory amounts, however, because the situation recovered rapidly toward the end of the period. The monetary compensatory amounts applicable to the period beginning June 7, 1976 were to apply during the period beginning June 14, 1976.

An exporter of cereals from the Netherlands to the United Kingdom, which had received payment in sterling, objected to Regulation No. 1356/76. The exporter pointed out that payment was often made a short time after the date of importation. During the reference period the exporter would sell sterling in order to guard against depreciation of the currency between the reference period and the export period. An exporter entering into transactions would calculate the monetary compensatory amounts that it assumed would be applicable as from June 14, 1976 on the basis of exchange rates in the reference period June 2–8, 1976. The classification of movements as speculative could be determined only after the event, so that the exporter could not adjust its calculations on the assumption that some movements were speculative. Moreover, states had allowed their currencies to fluctuate because of the possibility of speculative movements, and the organization of the market was threatened by such movements. If the Commission's action was valid, exporters would always be subject to risks that would be imposed in accordance with unspecified and arbitrary criteria. This situation would be inconsistent with the principle of legal certainty. The exporter argued also that the principle of equality before the law had been flouted by the action of the Commission because it related only to two currencies and not to other Community currencies, so that merchants exporting to other countries, like Italy and France, were not affected.

The court concluded that Regulation No. 974/71

> may be interpreted as meaning that the exchange rates taken into account in order to establish the difference referred to must be assessed on the basis of economically justified criteria, and that consequently it was open to the Commission to leave out of account rates which it considered to be unrepresentative.[186]

The court did not accept the argument based on legal certainty because the system of monetary compensatory amounts was intended to serve the public interest in the proper organization of the market and not to give traders an exchange guarantee or to indemnify them against loss.

The court also rejected the argument based on equality before the law. There was no principle that monetary compensatory amounts cannot be altered in relation to a currency, if there is an economic justification for that alteration, because there is no similar economic justification for an alteration in relation to another currency.

Council Regulation No. 974/71 has been modified and augmented by a number of Regulations designed to give expression to the principle of protecting private contracting parties from changes in monetary compensatory amounts resulting from monetary developments. Commission Regulation No. 1608/74 of June 26, 1974 is an example of this tendency. It introduced flexibility into the system of monetary compensatory amounts by authorizing member states to apply a "natural justice" clause. Article I reads as follows:

> Where monetary compensatory amounts are introduced or increased as a result of the fixing or the amendment of the central rate or of the representative rate of the currency of a member-State used in the context of the common agricultural policy, or where the decision of a member-State to permit its currency to float in relation to the currencies of the member-States where the fluctuation of the rate of exchange is kept within a maximum spread of 2.25%, the member-State in question shall be authorized to waive, on a discretionary basis, the monetary compensatory amount or so much thereof as corresponds to the increase.

According to the recitals in the preamble of the regulation, the benefit of the clause to ensure natural justice had to be granted or withheld on the basis of an examination of the facts of each case in the light of the loss suffered by the trader involved. Administration of the regulation was entrusted to each state, and the Commission had only limited power to restrict the discretion of a state. The European Court of Justice, in a decision of May 10, 1978, refused to hold the Commission liable to indemnify a trader in circumstances in which the French authorities had denied an exemption and the Commission had made an informal intervention alleged by the trader to have induced the French authorities to withhold the exemption.[187]

Sharing of Exchange Risks

The concept of a sharing of risks resulting from changes in exchange rates is a development that differs from protective clauses and protection by operation of law because the sharing of risks seeks not to relieve a party of exchange risks but to impose on it no more than an equitable

share of these risks. The topic is discussed in the Annual Report of the World Bank for 1979.[188] The Report notes that, over the last decade, the Bank has diversified the sources of its borrowing. It has moved away from its former heavy reliance on the private capital market in the United States and has moved to the capital markets of other countries, including the Federal Republic of Germany, Switzerland, and Japan.

Diversified borrowing by the Bank has led to unequal risks for borrowers from the Bank because of changes in the exchange rates of the currencies that the Bank borrows and lends. The Bank passes on to borrowers the currencies the Bank borrows and the exchange risks associated with them.[189] Changes in exchange rates, for the most part, have increased the burden of debt service for borrowers from the Bank in terms of both the national currency of the borrower and the U.S. dollar. Commitments under loan agreements are denominated in U.S. dollars. But movements in exchange rates have imposed uneven burdens among borrowers, at least in the short run. The Report continues:

> Several methods to equalize exchange rate risks among borrowers have been suggested: currency pooling, differentiation of interest rates, and change in currency allocation. After thorough investigation of the options, it was concluded that equity could be best achieved by the adoption of the first of these methods. Pooling is a concept that aims to solve the perceived inequities created under the present system by a change in accounting procedures.
>
> The pooling system would assure the equalization among borrowers of the currency risk exposure of all loans included in the system. Participation in this scheme might be especially helpful to smaller borrowers whose balances outstanding are not large enough (or disbursements frequent enough) to permit a kind of "natural" pooling to operate.
>
> Adoption of a currency pooling system was approved by the Executive Directors of the Bank during the past fiscal year, and its design and implementation are currently scheduled to be completed by July 1, 1980.[190]

It should be explained that loan agreements have been denominated in U.S. dollars because the agreements are not fully funded when commitments are made, with the result that the Bank cannot undertake to make disbursements under an agreement in specified currencies. The borrower undertakes to repay the Bank in the amount of each currency that is disbursed under an agreement. The Bank has the discretion to determine which currencies it will disburse and the order in which it will recall them in repayments.[191]

A system of "pooling" exchange risks could be based on a unit of account in which loan agreements would be denominated and on the

basis of which the necessary calculations would be made. A central record could be kept of outstanding loans in terms of both units of account and the currencies disbursed whenever necessary. Any difference in exchange value between the total of currencies disbursed as outstanding loans and the total of outstanding loans in units of account could be debited or credited to the account of each borrower in proportion to the outstanding amount, in units of account, of the loan that it had received. Under some such procedure, a borrower could share with all other borrowers the exchange risk to which it was exposed during the life of the loan agreement, that is, from the date of the first disbursement to the date of the final installment of repayment.

The Bank's Report deals with another problem created by movements in exchange rates. The operations of development finance companies (DFCs) differ in many respects from those of other borrowers from the Bank.[192] DFCs are financial intermediaries that raise and relend capital for investment. They avoid exchange risks, which are assumed either by subborrowers or by the government. Subborrowers had become reluctant to assume foreign liabilities in currencies that would not be specified when they undertook their commitments and that might have no relationship to their activities. The objective of the Bank in lending through DFCs to encourage productive investment in the private sector was being frustrated.

As an interim measure, the Bank has decided to alter its disbursement procedures under existing or new loans to DFCs that are bound by law to pass on the full foreign exchange risk to subborrowers. Since March 15, 1979 each disbursement is made half in U.S. dollars and half in one of three currencies, the deutsche mark, the Swiss franc, or the Japanese yen. "This procedure does not, of course, eliminate the foreign exchange risk, but it does, however, reduce the effect of fluctuations among foreign currencies and, consequently, provides a firmer basis for entrepreneurs to assess the profitability of their enterprises."[193] This interim procedure will be reviewed when the pooling system goes into effect. The question whether the same procedure is to apply when a government undertakes the full foreign exchange risk is still undecided.[194]

Judgments in Foreign Currencies

The floating of sterling has revolutionized certain aspects of English monetary law. These changes have been made by, or have resulted from,

the decision of the House of Lords in *Miliangos v. George Frank (Textiles) Ltd.*,[195] which has been discussed in the earlier pamphlets in this series.[196] In that case, judgment was expressed in Swiss francs in respect of a debt payable in that currency. It was also decided that if a debt in foreign currency is paid in sterling, the rate of exchange is the rate at the date of payment. If the debt is to be enforced by judgment, the rate of exchange, in principle, is again the date of payment. For practical reasons, however, the date when the court authorizes enforcement is taken to be the date of payment in determining the rate of exchange. The judgment cannot be enforced unless an amount in sterling is stated, and therefore the latest practicable date is chosen. The principle, however, remains that the rate of exchange at the date of payment is the appropriate rate.

The *Miliangos* case continues to inspire new developments in English monetary law. For example, the decision of the Court of Appeal[197] in *The Despina R* case has been affirmed by the House of Lords.[198] A collision occurred off Shanghai between two Greek ships, one of which was owned by the plaintiff, a Liberian company with a head office in Greece. The vessel was managed by a company that had its principal place of business in the State of New York. After the collision, repairs were carried out at Shanghai, Yokohama, and Los Angeles and were paid for in the local currency. Other expenses resulting from the collision were discharged in the same currencies, apart from a small amount that was paid in sterling. All payments in U.S. dollars by the managers on behalf of the plaintiff were made from a U.S. dollar account in New York. The renminbi, yen, and sterling in which payments were made were obtained with U.S. dollars from the New York account. The main issue in the case was the currency in which the English court should award damages in tort against the defendant, the Swedish owner of the other vessel involved in the collision. The three possibilities were the currency in which the expense or loss was immediately sustained ("the expenditure currency"), the currency in which the loss was effectively felt or borne by the plaintiff because of the currency in which it normally operated or with which it had the closest connection ("the plaintiff's currency"), or sterling.

Before the *Miliangos* case, judgment would have been given in sterling. The House of Lords in *The Despina R* case decided that the *Miliangos* case had made it possible to adopt the most equitable solution, the plaintiff's currency as the currency of judgment, even though, unlike the

case of debt, it was not reasonable to assume that the parties had contemplated that damages in tort would be available in a particular currency.

The House of Lords has also affirmed[199] the judgment of the Court of Appeal in another case[200] that damages can be awarded in a foreign currency for breach of contract. A French corporation, with its place of business in Paris, chartered a vessel on time charter from the Swedish owner. The cost of hire and other items were payable in U.S. dollars. The contract was governed by English law. The charterer shipped a cargo of onions from Valencia to Brazil, which was damaged because of a failure of refrigeration during the voyage. The charterer settled the claim for damage to the cargo in Brazilian cruzeiros, which the charterer purchased with French francs, the currency with which it conducted its business. The owner accepted liability to the charterer because of the breach of the warranty of seaworthiness in the charter.

The issue in the case was whether judgment should be expressed in French francs, Brazilian cruzeiros, U.S. dollars, or sterling. The House of Lords held that the *Miliangos* case had made it possible to give judgment for a breach of contract in a currency other than sterling. The House of Lords explained the present state of the law as follows: If contracting parties have agreed on a particular currency as the currency of account and payment in respect of all transactions arising under the contract, judgment should be given for damages in that currency. But although a currency is specified for the discharge of obligations under a contract, it does not necessarily follow that the parties have agreed that damages for breach of the contract should be given in the same currency. The obligation to pay hire and other amounts in U.S. dollars in this case did not mean that damages for breach had to be awarded in dollars. If the contract fails to provide a decisive answer to the question of the currency intended by the parties for this purpose, the currency should be the one that most truly expresses the plaintiff's loss. That currency is not necessarily the one in which the loss is immediately sustained. The currency that will most effectively compensate the plaintiff must be taken to be the one that was within the contemplation of the parties in entering into the contract. In the present case, the currency was the French franc. Although the contract was governed by English law, the contract had no connection with sterling.

As a consequence of the floating of sterling, there is now the highest

judicial authority in English law for the expression of judgments, in appropriate circumstances, in foreign currency for the recovery of debt, damages for breach of contract, and damages for tort. The desire to treat plaintiffs equitably in circumstances in which the exchange value of sterling fluctuates is illustrated by other cases in which the courts have found that the money of payment was a foreign currency. In one case decided by the Court of Appeal,[201] it was argued unsuccessfully that although the money of account for the payment of demurrage under a charter party was the U.S. dollar, sterling was the currency of payment, because the freight was payable in London in sterling and because the contract was governed by English law. The court did not accept this argument and held that, in adopting the U.S. dollar as the money of account and in not providing for payment in sterling, the parties must be taken to have agreed that the U.S. dollar was the money of payment.

Again, in order to treat plaintiffs fairly, the Court of Appeal decided in this and in two other cases that if sterling was used to discharge demurrage payable in U.S. dollars, the appropriate rate of exchange was the one prevailing at the date of payment and not the rates of exchange ruling on the dates when the bills of lading were issued, the demurrage was incurred, or the calculation of demurrage was completed. All of these other rates of exchange would have been less advantageous to the plaintiffs than the rate of exchange on the date of payment because of the depreciation of sterling against the U.S. dollar over the whole period. The court came to its conclusion even though the charter parties provided that for freight the rate of exchange was the one ruling on the bill of lading date.[202]

The *Miliangos* case may affect the law relating to the enforcement by the courts of one country of judgments delivered by the courts of other countries. These judgments will be expressed normally in the currency of the country of the original forum. Enforcement in the second jurisdiction may be governed by the judge-made law or the statutory law of that jurisdiction, or enforcement may be possible under both forms of law, although statutory law may provide a simpler and more expeditious procedure.[203] Whatever the principles of law may be for the enforcement of a foreign judgment, they must include a principle for determining the rate of exchange at which the currency of the judgment is to be translated into the currency of the second forum if the judgment is to be discharged in that currency. If the principle of the *Miliangos* case is followed, either

because judge-made or statutory law now permits, or is adapted to permit, this solution, the judgment in the second forum can be expressed in the currency of the first judgment and the exchange rate prevailing at the date of payment will apply if the obligation is discharged in the currency of the second forum.

In England, the enforcement of foreign money judgments is possible under both judge-made law and statutory law.[204] The basic rule under both has been that the amount payable under the original judgment is expressed in sterling on the basis of the rate of exchange prevailing at the date of the original judgment.[205] It has been said that there is no reason why the principle of the *Miliangos* case cannot be followed in England in an action to enforce a foreign judgment under the principles of English judge-made law, and even under statutory law as well if this solution is not precluded by legislation.[206]

In some legal systems, the money judgments of a foreign system are enforceable if reasonable reciprocity is accorded under the foreign system. It has been said of one legal system, for example, that "[i]n determining the availability of reciprocity, no formal and narrow measure of value should be applied, and a negative factor in one respect may be compensated for by a positive factor in another."[207] Under this test, it is possible that a legal system that applies the *Miliangos* solution will not insist on a reciprocal application of that solution by the foreign system.

The principle of the *Miliangos* case has been followed in Scotland. The case was one in which the cause of action was based on a debt contracted in deutsche mark.[208] The court held that a case decided in 1824, in which it was concluded that judgment in respect of a debt in U.S. dollars could be given only in sterling calculated at the rate of exchange at the date the action was brought, was decided in conditions different from those now prevailing. The court held that it was now "free to consider, in the context of the age of floating currencies and rapidly fluctuating exchange rates, the true objectives of our law."[209]

The revolution in English law produced by the *Miliangos* case has provoked a natural interest in other jurisdictions in which it has not yet been established that judgments can be expressed in a currency foreign to the forum.[210] For example, one author, in discussing the position in Canada, doubts that the *Miliangos* case could be followed by the courts because the pre-*Miliangos* English common law rule has been given

statutory form by section 11 of Canada's Currency and Exchange Act:

> [A]ny statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.

The author recommends a change in the law, drawing attention to the fluctuation of the Canadian dollar and the advantages that the *Miliangos* solution would provide for Canada's international trade.[211] A commentator on Australian law has concluded that "there are no insuperable obstacles to Australian courts following the example of the House of Lords and giving judgment in foreign currencies."[212] The legal situation in the United States is referred to in Pamphlet No. 22.[213]

Article 74 of the UNCITRAL draft Convention on bills of exchange and promissory notes recognizes that these instruments may be drawn or provide for payment in a currency other than that of the place of payment, but the article does not require that the principles of the *Miliangos* case should be applied on a default. It has been suggested, however, that the draft makes it possible for courts to depart from any inconsistent prior practice and to apply the *Miliangos* solution.[214]

In a period of rapidly fluctuating exchange rates, the *Miliangos* solution can have considerable impact if the payee is able to object to a delay in payment even though it is only modest. The principle of the *Miliangos* case can have even greater effect if there are more protracted delays, for example because of restrictions imposed by the monetary authorities to which the payor is subject and which do not provide him with a defense. The International Monetary Fund applies a policy, however, of discouraging arrears of payments in respect of current international transactions.[215]

Some contracts have provided that if a court awards judgment in a currency other than the one in which amounts are payable under the contract, the debtor must make good any deficiency resulting from a variation in the exchange rate between the two currencies that occurs between the date at which the contractual currency is translated by the judgment into the judgment currency and the date of payment in discharge of the judgment debt.

Amendment of Monetary Legislation: Currencies and Gold

The Report of the Executive Board on the Proposed Second

Amendment of the Articles of Agreement of the Fund draws the attention of members to the possible need to amend their legislation on exchange arrangements as a result of the modification of the Articles.[216] The earlier surveys in this series of pamphlets have noted examples of the amendment of the monetary legislation of some members.[217] Other countries have amended, or are proposing to amend, their monetary legislation. As is to be expected, the amendments do not conform to any single model, although some provisions are borrowed from abroad. The Netherlands has adopted an Act of May 25, 1978 in respect of the exchange rate of the guilder.[218] The Act of November 18, 1964 on the Par Value of the Guilder,[219] under which the par value was expressed in grams of fine gold, is repealed. Procedures are adopted and authority is granted, subject to the observance of pertinent provisions in or under international agreements to which the Netherlands is a party, for the adoption of rules regarding exchange arrangements for the guilder as contemplated by Article IV, Section 2 of the Articles of the Fund. The Minister of Finance is authorized to suspend application of the rules in whole or in part if and for as long as developments in the exchange market make suspension necessary.

The Minister may prescribe that the Netherlands Bank shall observe the limits he sets for exchange rates in the Bank's transactions in foreign currencies. For currencies for which he does not establish limits, he may make indicative limits known to the Bank.

If the Fund determines under Article IV, Section 4 of its Articles that a system of exchange arrangements based on stable but adjustable par values can be introduced, and the Netherlands authorities conclude that it is desirable to establish a par value for the guilder, legislation will be proposed for that purpose, but the authorities may take the necessary measures to observe a par value before legislative action is completed if they consider that immediate action is desirable.

Monetary legislation in a number of countries has abrogated the definition of the par value of the currency in terms of gold and has substituted a provision that establishes a national monetary unit and the fractions into which it is divided. This formulation is considered to be an abstract definition of the currency that would permit flexible practice and place no obstacle even in the way of an eventual par value for the currency as a result of action on the international plane.

The Federal Council of Switzerland proposed, in a message of February 27, 1978, to amend the National Bank Law of December 23, 1953 and as part of the amendment to abrogate Article 19(2), which requires that 40 per cent of the notes in circulation must be backed with gold and that this minimum amount of gold must be kept in Switzerland. The Federal Council did not propose to abrogate Article 19(1) of the law, under which the notes in circulation must be backed fully by gold coins, gold bullion, and other specified balance sheet assets, without prescribing an amount of gold. On June 23, 1978 the gold cover amounted to approximately 55 per cent of the notes in circulation.[220] The value of the Swiss franc in terms of gold as established by Decree of the Federal Council on May 9, 1971 is 0.21759 gram of fine gold. The National Bank was relieved in 1954, under the authority of Article 22 of the National Bank Law, of its obligation to redeem banknotes with Swiss gold coins or with gold bars under Article 21. The Federal Council supported its proposal to abrogate Article 19(2) on the ground that it could not be thought that banknotes would ever again be redeemed in gold, and that the requirement to keep the gold in Switzerland was too restrictive for the purposes of safekeeping. At its sessions on June 13–14, 1978, the National Council approved the proposed amendment in full. The Council of Cantons, however, resolved on October 25, 1978 to retain Article 19(2) but to approve the rest of the proposed amendment of the Law. On August 1, 1979, the proposed amendment took effect with this exception.

In an interview in September 1979, Professor Leo Schürmann, Vice President of the National Bank, was asked why the National Bank Law retained the provision under which the Bank could still be required to redeem banknotes at the continuing legal value of the Swiss franc in terms of gold.[221] He is reported to have replied that the Swiss monetary structure had been somewhat unsettled by the decision to suspend the official convertibility of the U.S. dollar and by the move to flexible exchange rates, but that the contours of a new international monetary system were not yet discernible. The view that gold was a vestige of an obsolete system had to be contrasted with the substantial amount of gold held in monetary reserves. In these circumstances, the Swiss legislature had been well advised not to tackle the question of gold for the time being.[222] In October 1978, however, Dr. Fritz Leutwiler, the President of the Swiss National Bank, is reported to have announced that it would be necessary to revalue the Bank's holdings of gold.[223]

Continuing Legal Effects of Par Values

Par values established under the Articles of Agreement before the Second Amendment have been abrogated by that amendment, but it does not follow that the former par values have been deprived of all legal effect. They may be preserved by legislation for certain practical purposes.[224] In the case of Switzerland, a nonmember of the Fund, a value in terms of gold has been retained because it is said that the contours of a new international monetary system are not yet discernible. Furthermore, par values can continue to affect the outcome of litigation in national and international tribunals in which the relevant facts relate to a situation before the Second Amendment was adopted. *Fratelli Zerbone S.n.c. v. Amministrazione delle Finanze dello Stato*, decided by the European Court of Justice on January 31, 1978, is a case of this kind.[225] It can be assumed that the result would have been the same even if the court had delivered its judgment on or after April 1, 1978, when the Second Amendment took effect. An Italian undertaking, Zerbone, raised a number of legal objections to the imposition of monetary compensatory amounts by Italy on the import of frozen meats into Italy under contracts concluded before December 19, 1971. The main source of authority for the imposition of the monetary compensatory amounts was Regulation No. 974/71 of the Council of May 12, 1971, Article 1, paragraph 1 of which created this authority "if, for the purposes of commercial transactions, a Member state allows the exchange rate of its currency to fluctuate by a margin wider than the one permitted by international rules . . . ."[226] The court decided that there was authority to impose the monetary compensatory amounts.

Italy had established a par value under the Articles of the Fund of Lit 625 per U.S. dollar. In accordance with the Fund's Decision No. 3463-(71/126) of December 18, 1971[227] on central rates and wider margins and with the Smithsonian agreement, Italy declared a central rate of Lit 581.50 to the U.S. dollar of 1944 and availed itself of the wider margins of 2¼ per cent. The court held that this action was within the scope of Regulation No. 974/71, because the central rate and wider margins permitted the exchange rate for the lira to fluctuate beyond the margins of 1 per cent around the parity resulting from the par value established by Italy under the Articles of the Fund, and therefore beyond the margins permitted by the international rules of the Fund.[228]

The court's decision is in accordance with the Fund's own conclusion

that before the Second Amendment a par value established under the Articles continued to exist under the Articles until a new par value was established.[229] Furthermore, if the margins around parities consistent with the Articles were not being observed, the exchange rates for a currency were not validated because they were in conformity with Decision No. 3463-(71/126), even though some observers thought that these rates were valid under the Articles.[230] This proposition was indeed advanced by the plaintiff. The decision was intended to provide the means for limiting the disorder of an unregulated floating of currencies. The court referred to margins of 1 per cent around parity as the margins that were consistent with the Articles and ignored Decision No. 904-(59/32) of the Fund.[231] By that decision, the Fund, relying on its authority to approve multiple currency practices,[232] approved margins of 2 per cent around parity in certain circumstances. The fluctuation of a currency in accordance with that decision was "permitted by international rules" within the meaning of Regulation No. 974/71.

Gold

Obligations Involving Gold

The Second Amendment of the Articles has abolished the former official price of gold and all the former obligations of members and the Fund to pay or to receive gold in normal operations and transactions under the Articles. Nevertheless, that price can still produce certain consequences under the Articles. For example, if the Fund sells gold at a price above the former official price, the proceeds equivalent to the official price and the balance of the proceeds are posted to different accounts.[233] Furthermore, the Fund has an obligation to complete the distribution of a portion of its gold to countries that were members of the Fund on August 31, 1975 and to sell a further portion for the benefit of developing countries that were members on that date.[234] In addition, the former official price would be a factor in the distribution of the Fund's holdings of gold in a liquidation of the Fund.[235]

The obligations of the Fund referred to above do not exhaust the obligations of the Fund with respect to gold. For example, the Fund, in all its policies and decisions relating to gold, must be guided by the objectives of promoting better international surveillance of international