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Pamphlet Series

No. 40

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# SDRs, Currencies, and Gold

## Sixth Survey of New Legal Developments

Joseph Gold

INTERNATIONAL MONETARY FUND

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Washington, D.C.

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## IMF PAMPHLET SERIES

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Sixth Survey of New Legal Developments

Joseph Gold

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## PREFATORY NOTE

This pamphlet is the sixth survey of developments in international and national monetary law and practice involving SDRs, currencies, and gold. These developments have occurred as the result of the Second Amendment of the Articles of Agreement of the International Monetary Fund, which became effective on April 1, 1978, or of the circumstances that led to that event. The developments are related mainly to three principles that are recognized by the present Articles: the SDR is to become the principal reserve asset in the international monetary system; members are free, now that the par value system has been abrogated, to choose their exchange arrangements and to determine the external value of their currencies; the role of gold in the international monetary system is to be gradually reduced.

Earlier surveys of legal developments that have been influenced by these three principles have appeared in the Fund's Pamphlet Series as Nos. 19, 22, 26, 33, and 36, and are referred to in this pamphlet by the appropriate number and date. A consolidated list of cases and a consolidated index of topics for the six surveys are included in this pamphlet (pages 135-48).

The opinions expressed in this pamphlet are those of the author, now Senior Consultant and formerly the General Counsel and Director of the Legal Department of the International Monetary Fund, and they do not necessarily represent the opinions of the Fund.

May 1983

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# SDRs, Currencies, and Gold

## Sixth Survey of New Legal Developments

### SDRs

#### Prescribed Holders

In Pamphlet No. 36 (1981), there was a discussion of the provisions of the Articles of Agreement of the International Monetary Fund and the decisions of the Fund that deal with the Fund's prescription of the entities that may hold and deal in special drawing rights (SDRs).<sup>1</sup> These "other holders" (i.e., other than members of the Fund and the Fund itself) may hold and deal in SDRs proper, which means SDRs that came into existence when allocated by the Fund to participants in the Special Drawing Rights Department. All members of the Fund have decided to be participants. Any entity, official or private, may enter into contracts under which the SDR is the unit of account. The SDR in this sense is not the SDR proper but is, as a minimum, the means of expressing a value by reference to the value of the SDR in terms of currency. Prescription by the Fund is not necessary for the use of the SDR as a unit of account. A decision by the Fund is necessary if the Fund itself agrees to undertake the burden or accept the benefit of an obligation denominated in SDRs, but a decision of this kind has nothing to do with prescriptions of other holders of SDRs.

Rights originating in contract and denominated in SDRs may be means of payment also. The Fund's authorization is not required for this function of the SDR.

Pamphlet No. 36 (1981) recorded that the Fund had prescribed nine holders of SDRs proper. The list has now grown to thirteen, but the list is not closed. The entities can be grouped into three classes:

- (i) four central banks and currency authorities
  - Swiss National Bank, Zurich
  - Bank of Central African States, Yaoundé
  - Central Bank of West African States, Dakar
  - East Caribbean Currency Authority, St. Kitts

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- (ii) three intergovernmental monetary institutions
  - Bank for International Settlements, Basle
  - Andean Reserve Fund, Bogotá
  - Arab Monetary Fund, Abu Dhabi
- (iii) six intergovernmental development institutions
  - Asian Development Bank, Manila
  - International Bank for Reconstruction and Development, Washington, D.C.
  - International Development Association, Washington, D.C.
  - Islamic Development Bank, Jeddah
  - Nordic Investment Bank, Helsinki
  - International Fund for Agricultural Development, Rome

For the entities in the last two of these three classes. SDRs are assets held as part of the portfolios of the holders. The SDRs do not function as reserve assets as they do when monetary authorities use holdings of SDRs in support of their currency.

The list includes both multilateral and regional organizations. It includes organizations that, like the Fund, are Specialized Agencies of the United Nations, as well as organizations that do not have this status.

Prescribed holders may enter into all the categories of operations and transactions involving SDRs that are available to members of the Fund. The terms and conditions on which prescribed holders may accept, hold, and use SDRs are the same for all these holders. The Fund's Annual Report for 1982 announced that prescribed holders have begun to engage in transactions and operations in SDRs.<sup>2</sup>

### **SDR as Unit of Account**

#### *Fund's Financial Activities*

A member's currency held by the Fund in accounts other than the General Resources Account is not subject under the Fund's Articles of Agreement to the principle of maintenance of value in terms of the SDR that applies to currency held in the Fund's General Resources Account.<sup>3</sup> The Fund has express or implied powers to invest holdings in accounts to which no obligation to maintain value is attached. The law or policy of the Fund is to invest these holdings in instruments or deposits denominated in

SDRs so that in effect value will be maintained, although not by the automatic obligation of the issuer of the currency that is invested. Sometimes, the concurrence of that member must be sought, but the agreement of the obligor with which the Fund invests is always necessary. Since 1978, the Fund has placed currency accruing to its Trust Fund in deposits denominated in SDRs with the Bank for International Settlements.<sup>4</sup> A similar form of investment was authorized in 1981 for the Subsidy Account associated with the Fund's Supplementary Financing Facility.<sup>5</sup>

Investment in this form is particularly important when the Fund borrows resources under a contractual obligation of the lender to lend amounts determined by reference to the SDR, undertakes an obligation to repay that is denominated in SDRs, and cannot use the borrowed resources immediately to finance transactions with members. If the resources are not used immediately in this way, their value in terms of the SDR may be less when the Fund does use them. The obligation in terms of the SDR of the member entering into a transaction with the Fund that is financed with the resources may not be equal to the repayment obligation undertaken by the Fund in borrowing. The Fund has negotiated borrowing to finance transactions under its Policy on Enlarged Access, and borrows resources under these agreements that are not immediately sold to members through the General Resources Account.<sup>6</sup> The Fund has established Borrowed Resources Suspense Accounts within the General Department but not within the General Resources Account in that Department. Resources borrowed to finance transactions under the Policy on Enlarged Access are transferred to these Suspense Accounts before they can be used for financing transactions.<sup>7</sup> Similarly, resources received in repurchases are transferred to the Suspense Accounts before the resources can be used in the repayment by the Fund of loans to it.<sup>8</sup> The Managing Director is authorized to invest currencies held in the Suspense Accounts in specified deposits or marketable obligations that must be denominated in SDRs.<sup>9</sup> Investment enables the Fund to match obligations in its roles as obligor under loans to the Fund and obligee as the result of transactions with members financed with borrowed resources.

### *International Conventions*

The SDR has been adopted as the unit of account in numerous international conventions or amendments of existing conventions that

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have been negotiated, as discussed in earlier surveys. Further treaties or amendments have been negotiated. The Protocol (of September 23, 1978) To Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on October 7, 1952 is one such convention.<sup>10</sup> Under the Protocol, the limits on liability for damage for each aircraft and incident are expressed in SDRs.<sup>11</sup> In judicial proceedings, the translation of amounts in SDRs into a member's currency is to be made according to the Fund's valuation for its own operations and transactions at the date of judgment. A nonmember determines the manner in which the calculation is made in its currency. If a nonmember's law does not permit application of the SDR, the nonmember may express the limits on liability in the amounts of "monetary units" specified by the Protocol. The "monetary unit" is defined in a way that corresponds to the definition of the Poincaré franc. The translation of amounts expressed in "monetary units" into the nonmember's currency is made according to the nonmember's law.<sup>12</sup> These provisions follow the precedent of the Montreal Protocols to the Warsaw Convention and Protocols to it<sup>13</sup> and not the later Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules),<sup>14</sup> because there is no express requirement that the recoveries in the nonmember's currency must approximate as closely as possible the real value of recoveries in members' currencies. The Protocol of September 23, 1978, like the Montreal Protocols, was negotiated under the auspices of the International Civil Aviation Organization (ICAO).

The present Central Office for International Railway Transport (OCTI), which does not have legal personality as an international organization, performs many functions connected with international rail services, including the facilitation of financial relations among the railways of contracting parties, most, but not all, of which are in Europe. The basic conventions that the Central Office administers are the International Convention Concerning the Carriage of Goods by Rail (CIM) and the International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV). The conventions apply to the transportation of goods, passengers, and luggage over the territories of at least two contracting parties. The Germinal franc is the unit of account in these conventions.

The earlier reluctance of some contracting parties to replace the Germinal franc with the SDR<sup>15</sup> was followed by an administrative decision of OCTI to apply the SDR, without the benefit of amendment of

the CIM and the CIV.<sup>16</sup> On May 9, 1980, agreement was reached on a new treaty, the Convention concerning International Transport by Rail (COTIF), under which the SDR will be substituted for the Germinal franc.<sup>17</sup> The proposed treaty has novel features in dealing with limits of liability. An intergovernmental Organization for International Transportation by Rail (OTIF) will be established for the first time, with its seat at Berne, and with five organs, among which the OCTI will act as executive and secretariat.<sup>18</sup> A Revision Commission is another organ, with powers that include authority to increase the limits of liability expressed in SDRs.<sup>19</sup> The procedural requirements for considering and for taking a decision to increase the limits on liability are not severe, although the effective date of a decision can be delayed by an objector. The consequence of delay is that when it comes to an end, the Convention will apply only among the members that do not object to the decision. It will be seen that the problem of the procedure for amending the limits of liability in a convention has not been confined to COTIF.

The Revision Commission can be convened by the OCTI on the initiative of OCTI or at the request of five members of the OTIF. The agenda for a meeting must be addressed to members not later than two months before the meeting. The quorum for a meeting is attained if a majority of all members is represented at the meeting. A member may represent other members, but not in excess of two. A proposed decision is adopted if supported by at least one third of the number of members present and voting, provided that the positive votes outnumber the negative votes.<sup>20</sup> A decision of the Revision Commission takes effect for all members of the OTIF on the first day of the twelfth month following the date on which the OCTI gives notice of the decision to all members, unless a third of the members object within four months of the date of notice. If a member objects within this period of four months and denounces the Convention (i.e., renounces its adherence) not later than two months before the date on which the decision is to take effect, the decision does not come into force until the denunciation by the objector becomes effective.<sup>21</sup>

The unit of account in the CIM<sup>22</sup> and the CIV,<sup>23</sup> which are now appended to the COTIF, is the SDR as defined by the Fund. The value of the currency of a member of the OTIF that is a member of the Fund is calculated according to the method of valuation applied by the Fund in its own operations and transactions. The value in terms of the SDR of the

## SDRS, CURRENCIES, AND GOLD

currency of a nonmember of the Fund is calculated according to the method determined by that country, but the calculation must arrive at a value approaching as closely as possible the real value as calculated in the currencies of members of the Fund. If the law of a nonmember of the Fund does not permit application of the SDR, the unit of account for that member is defined in gold in an amount equivalent to the Germinal franc. The criterion of equal real value applies to calculations in the currency of this country also.<sup>24</sup>

The efforts of the International Telecommunication Union (ITU) to adopt a unit of account that is appropriate to current conditions was discussed in Pamphlet No. 22 (1977).<sup>25</sup> The unit of account according to Article 30 of the ITU Convention was the Germinal franc. The Plenipotentiary Conference held in Nairobi in the fall of 1982 decided to modify Article 30. Under the amended provision, in the absence of special arrangements concluded between members, the monetary unit to be used in the composition of accounting rates for international telecommunication services and in the establishment of international accounts is either "the monetary unit of the International Monetary Fund" or "the gold franc," both as defined in the Administrative Regulations. A resolution of the Conference<sup>26</sup> recited that the Conference competent to revise these regulations could not be held until 1988, and that in the meantime transitional provisions were necessary for the application of Article 30. The resolution noted that the SDR was currently the monetary unit of the Fund. The Conference resolved, therefore, in effect, that the "parity" between the gold franc and the SDR shall be 3.061 Germinal francs = 1 SDR. This relationship is based on the definition of the Germinal franc and the former definition of the SDR in terms of gold.

The language referring in abstract terms to the monetary unit of the Fund and the decision to continue the use of the Germinal franc as an alternative unit of account were the result of positions taken by the U.S.S.R. and other nonmembers of the Fund.

### *Other Organizations*

In early 1981, the Vice President (Finance) of the African Development Bank, when asked whether borrowing in SDRs would lower the cost of funds, replied:

To borrow in SDRs would certainly be the best for us since we lend in SDRs. But the market is very narrow. Very few issues have been made. The SDR concept is still at an early state.<sup>27</sup>

● On February 5, 1982, the African Development Bank signed an agreement for an eight-year credit facility with a number of international banks in the amount of SDR 200 million.<sup>28</sup> The President of the Bank, a former Executive Director of the Fund, noted that this was the first agreement denominated in SDRs that had been entered into with an African financial institution.<sup>29</sup>

The Treaty and Charter of the East African Development Bank were amended and re-enacted by agreement among Kenya, Tanzania, and Uganda, with effect on July 23, 1980.<sup>30</sup> The main purposes of the amendment and re-enactment were to provide for a broader regional membership in the Bank and for more extensive powers and activities. No change was made in the unit of account, which therefore remained equivalent to 0.124414 gram of fine gold (Article 3, paragraph 1), and no change was made in references to par values (Article 25). Practical problems were managed by a decision that the Uganda shilling, in which accounts were kept, was equal to 0.711239 of the unit of account. The Uganda shilling was pegged to the SDR. The Treaty and Charter were amended again on August 7, 1981 to substitute the SDR as the unit of account after the Uganda shilling ceased to be pegged.<sup>31</sup>

### *Commercial Transactions*

The use of the SDR as a unit of account in commercial transactions can promote the use of the SDR in financial transactions, and the reverse is also true. There is a growing amount of published information about the use of the SDR in financial transactions,<sup>32</sup> but little information is available so far about the use of the SDR in commerce. The Statement of Financial Accounting Standards No. 52 of the Financial Accounting Standards Board in the United States, issued in December 1981, on the subject of Foreign Currency Translation, suggests that the use of the SDR as a unit of account is of sufficient importance, or potential importance, to warrant mention. The following definition of "Foreign Currency" appears in the Glossary:

A currency other than the functional currency of the entity being referred to (for example, the dollar could be a foreign currency for a foreign entity).

## **SDRS, CURRENCIES, AND GOLD**

Composites of currencies, such as the Special Drawing Rights on the International Monetary Fund (SDRs), used to set prices or denominate amounts of loans, etc., have the characteristics of foreign currency for purposes of applying this Statement.<sup>33</sup>

Another development of interest is the revision of 1980 in "Lloyd's Standard Form of Salvage Agreement—No Cure—No Pay," which is referred to as "LOF 1980." This form of contract has been developed over considerable time, and the present version is intended to respond to current technical, economic, and legal conditions. Clause 21 of the form provides that

The Contractor shall be entitled to limit any liability to the Owners of the subject vessel and/or her cargo bunkers and stores which he and/or his Servants and/or Agents may incur in and about the services in the manner and to the extent provided by English law and as if the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 were part of the law of England.<sup>34</sup>

The Convention<sup>35</sup> has not yet become effective, but the provisions of the Convention under which liability is limited to amounts of SDRs are incorporated in LOF 1980.

The amendment of the Convention of the International Telecommunication Union noted above means that the SDR is a unit of account not only for the official administrations to which the Convention applies but also for recognized private operating agencies.

### **SDR and Nonmembers of Fund**

In the negotiation of new treaties or amendments of existing treaties in which the SDR is to be the unit of account, nonmembers of the Fund have often insisted on the inclusion of a second monetary unit, which has been defined in relation to gold. Some nonmembers have alleged that there were difficulties under their domestic law in applying the SDR, but the problems may have been more political than legal. These nonmembers may have thought that there was an incongruity in giving effect under their domestic law to the unit of account of an international organization to which they do not belong and which establishes the method of valuation of the unit of account by a process of decision in which they have no voice.<sup>36</sup>

A Working Group of the United Nations Commission on International Trade Law (UNCITRAL), which met in Vienna in January 1982,



recommended to the Commission that, in the preparation of future international conventions and of revisions of existing conventions in which there are provisions on the limitation of liability, the unit of account should be the SDR and an alternative monetary unit should not be available. At this meeting, the delegate of the U.S.S.R. announced that his country was prepared to accept the SDR in future conventions without supporting the inclusion of another monetary unit defined in terms of gold. This new attitude enabled the Working Group to recommend that the SDR should be the sole unit of account.<sup>37</sup>

The acceptance of the SDR by the U.S.S.R. would raise the problem of valuing the ruble in terms of the SDR. In addition, the question might arise of including a qualification that was included in the Convention on the Carriage of Goods by Sea as adopted at Hamburg in March 1978.<sup>38</sup> Under that qualification, if a nonmember calculates the limits of liability in its currency on the basis of the SDR or if a nonmember makes the calculation on the basis of the alternative monetary unit because the nonmember's law does not permit application of the SDR, the nonmember must ensure that, as far as possible, the calculation of the limits in its own currency yields "the same real value" as calculations by members in their currencies on the basis of the SDR. Provisions of this kind have become common, and the COTIF, discussed above, is only one of many conventions in which they appear.

The position taken by the delegate of the U.S.S.R. in the Working Group was modified somewhat in the plenary meeting of the Commission held in New York in July 1982. Representatives of the U.S.S.R. declared that units of account other than the SDR might be acceptable for the purpose of a particular convention. The representative of another nonmember of the Fund was uncertain whether his authorities could agree to the use of the SDR as a unit of account under their law. In view of these statements, the Commission adopted a decision in which the SDR is endorsed as "a preferred unit of account for many conventions, particularly for those of global application," but is not the only possible unit of account.<sup>39</sup> The decision and the form of the provision on a universal unit of account recommended for inclusion in future conventions or revisions of conventions is reproduced in Appendix A of this pamphlet.

The model provision entitled Universal Unit of Account and annexed to the UNCITRAL decision is one that is intended for conventions in which only the SDR is to be the unit of account. The position of a nonmember of

the Fund is recognized by providing that the nonmember may determine how the equivalence between its currency and the SDR is to be calculated, but that determination must ensure, as far as possible, recovery by a claimant of the same real value as is expressed in SDRs. In its report, however, UNCITRAL explains that its preference for the SDR does not preclude the possibility that a diplomatic conference drafting a convention might prefer the solution incorporated in the Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules). Under that Convention, a nonmember of the Fund whose law does not permit application of the SDR may declare that the limits on liability in its territory will be expressed in a "monetary unit," which is defined in an amount of gold that corresponds to the definition of the Poincaré franc. The amounts of monetary units are determined by the ratio between the "monetary unit" and the gold value of the SDR as defined by the First Amendment of the Fund's Articles (i.e., 1 monetary unit = SDR 1/15).<sup>40</sup>

The position of the U.S.S.R. on the amendment of Article 30 of the ITU Convention, as discussed above, departed from the view expressed by the U.S.S.R. at the meeting of the Working Group of UNCITRAL in January 1982, although the position can be reconciled with the acceptable but not preferred solution endorsed at the meeting of the Commission in July 1982. It appears that the various ministries of a country do not always give uniform instructions to representatives of the country at all international conferences.

### **Units of Account and Constant Purchasing Power**

Pamphlet No. 36 discussed the work conducted under the auspices of UNCITRAL, with the assistance of observers from the staff of the Fund, on a unit of account that would have constant purchasing power and could be incorporated in conventions containing provisions on the limitation of liability.<sup>41</sup> The Working Group studying the problem had recommended that adjustments for inflation could be made either in accordance with a price index suitable for the convention in which it would be included or through a revision committee that would follow an accelerated procedure for considering amendments to increase the limits of liability under the convention.

The plenary session of UNCITRAL in July 1982 decided to adopt, with some modifications, the recommendations of the Working Group.<sup>42</sup> The

Commission decided to request the General Assembly of the United Nations to recommend the use of provisions in future conventions or revised conventions that would give effect to one of the alternative techniques advanced by the Working Group. The alternatives are reproduced in Appendix A under the headings of Sample Price Index and Sample Amendment Procedure for Limit of Liability.

The provision on a "sample price index" takes no position on what would be a suitable index. The decision of the Commission suggests that the negotiators of a future convention or amendment should consider "the nature of the intended price index and the institution to be charged with its preparation, revision and calculation." It is proposed also that there should be a margin of tolerance within which adjustments should not be made because of changes in the index. The emergence in treaty practice of provisions for special meetings to consider the adaptation of treaties in present conditions has been noted elsewhere.<sup>43</sup>

The report of UNCITRAL recognizes that some states will not ratify a convention that contains a provision on indexing. The recommendation of a price index is without precedent so far in treaty practice.<sup>44</sup> The greater likelihood is that provisions will be adopted along the lines of those in the COTIF for the revision of limits expressed in SDRs.

## Currencies

### Surveillance Over Exchange Rate Policies

#### *Review of Surveillance*

Under the Articles, the Fund must oversee the international monetary system in order to ensure its effective operation and must also oversee the compliance of each member with its obligations regarding exchange arrangements.<sup>45</sup> In order to fulfill these functions, the Fund must exercise firm surveillance over the exchange rate policies of members and must adopt specific principles for the guidance of all members with respect to these policies. Members, when requested by the Fund, must consult with it on their exchange rate policies.<sup>46</sup> The Fund had adopted two decisions in 1977 and 1979 in which it set forth the principles for guidance and the procedures for surveillance.<sup>47</sup> The Fund has reviewed these matters, and on April 9, 1982 adopted the decision set forth in Appendix B.

The decision adopts no new principles. It approves the continuation of existing procedures for surveillance, in which the procedures for consultation with members are the main element, in the light of the Managing Director's summing up of the discussion by the Executive Board that preceded the decision. The Managing Director is Chairman of the Executive Board.<sup>48</sup>

The summing up notes the view of a number of Executive Directors that the Fund's function of surveillance could be made more effective. Greater effectiveness, the Managing Director states, depends on the full cooperation of members. This cooperation should take place on three distinct levels.

(a) A common view or understanding should be reached on the analytical framework within which exchange rate issues and requirements can be discussed. Several Executive Directors had mentioned, among the matters on which a better assessment was required, the role of exchange rates in the adjustment process and the adequacy or appropriateness of different exchange rate regimes as well as the adjustment of those regimes when necessary. (The Articles give each member freedom to choose its exchange arrangements, except for the maintenance of the value of its currency in terms of gold<sup>49</sup> and the imposition of multiple currency practices or discriminatory currency arrangements.<sup>50</sup> The Fund can grant approval of the second and third of these practices but not the first.) The Managing Director notes also the suggestion that the Fund needed a better understanding of the functioning of the European Monetary System (EMS), the currency intervention that it entailed, and the relationship between EMS members and other countries.<sup>51</sup>

(b) Members should agree to discuss with the Fund, and in the Fund, the aspects of the policies they choose that have or can have an adverse impact on other countries. (The phrase "in the Fund" can be read to mean that discussions are held not only within the institution but also at the headquarters of the Fund, according to established procedures, and not solely in the field with a mission consisting of members of the staff of the Fund. Discussion "in the Fund" gives Executive Directors an opportunity to express the views of members when the Fund is considering which of a member's policies are having, or could have, adverse effects on fellow members.)

(c) It was important for members to cooperate "by taking seriously into account, in their national process of decision-making," the views

expressed and conclusions reached by the Executive Board under (a) and (b) above. Seven of the numerous other topics in the Managing Director's summing up are noted in sections (i) to (vii) that follow. These sections contain important clarifications of both the constitutional law of the Fund and its practice under the law.

(i) A number of Executive Directors<sup>52</sup> held the view that in the exercise of surveillance there remained some asymmetry between members that use the Fund's resources and those that do not, or between small countries and major industrial countries. The Managing Director stressed the Fund's efforts to treat members on a uniform basis, but an evenhanded approach did not mean that consultations with members could be perfectly symmetrical, because the situations of members were not symmetrical. A country that is dependent on the use of the Fund's resources is more likely to be the object of active surveillance by the Fund than one not in need of financial assistance, but that fact induced special efforts by the Fund to achieve an evenhanded treatment among categories of members when making its appraisals and recommendations.<sup>53</sup>

(ii) It was agreed that for surveillance to be really effective, it had not only to be exercised in relation to members individually but had also to be looked at in a multilateral context. The Fund's exercise on the World Economic Outlook<sup>54</sup> (conducted by the Executive Board and by the Interim Committee of the Board of Governors on the International Monetary System) was a helpful method of integrating individual judgments or assessments into a more collective framework.

An idea that had been mentioned in connection with a multilateral context was the possibility of holding, within the framework of the Fund, informal discussions with or on the industrial countries as a group or with those whose currencies are included in the SDR basket. The phrase "with or on" can be read to contemplate alternative procedures. Under one procedure, but not necessarily under the other, the discussions could be held collectively with those members that constituted the special group, perhaps under a special procedure. The mention of informal discussions suggests a special procedure. Under the alternative, the Executive Board could discuss the position of all members of the group simultaneously.

(iii) The paragraphs on the role of the Managing Director in surveillance deserve special attention. The two basic decisions of the Fund on the principles and procedures of surveillance have already allotted central

functions to the Managing Director. The document under discussion gives further definition to a creative role for him:

[T]he Managing Director must...formulate proposals to the Executive Board about how surveillance or adjustment should be conducted. At this level, he must not serve simply as a conduit for the views of the membership—which are often divergent—but must exercise some independence in synthesizing these views and making proposals that, in his view, will best serve the membership as a whole. It is understood, of course, that such proposals must be expressed in a way that does not impinge on the sovereign right of members to make policy.<sup>55</sup>

(iv) The Managing Director responded also to the request of a number of Executive Directors for clarification of the role of Executive Directors in the consultation process and their role, and perhaps that of the Executive Board itself, in the briefing stage before a mission begins the consultative process. The Managing Director stated that the role of the Executive Board is clearly defined by the Articles, which provide that the Managing Director and the staff conduct the ordinary business of the Fund under the direction of the Executive Board.<sup>56</sup> The ordinary business includes consultation missions. The Executive Board, he continued, has the power and the responsibility to adopt policies and to establish procedures for the conduct of consultations and negotiations with members, but the conduct of the consultations and negotiations themselves is the responsibility of the Managing Director and staff.<sup>57</sup>

The Managing Director described the role of the individual Executive Director as follows:

The individual Executive Director plays a different but very important role in the consultation process. He is obviously responsible for presenting and explaining the views of his countries during Board discussions; but there are also many ways in which he can play a particularly useful intermediary role at an earlier stage by helping the staff mission to understand the policies and views of his countries and vice versa...<sup>58</sup>

This statement is one of the few authoritative examinations of the role of individual Executive Directors, although the subject has been raised from time to time in connection with some particular feature of the Fund's activities.<sup>59</sup> The Articles are silent on this subject, partly because of the novel position of Executive Directors as officers of the Fund<sup>60</sup> appointed or elected by members, but officers who, unlike the Managing Director and staff, do not "owe their duty entirely to the Fund and to no other

authority" in the discharge of their official functions.<sup>61</sup> How an Executive Director achieves a balance between his relationship to the Fund and to members of his constituency is left to the Executive Director himself.

(v) The Managing Director declared that there was "general agreement"<sup>62</sup> that reports by the staff should continue to cover trade issues in supporting the efforts of the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade (GATT), but without ignoring the respective jurisdictions of the two organizations. The Annual Report of the Fund for 1982<sup>63</sup> explains that the role of consultations under Article IV is not confined to relationships between the Fund and members. Consultations, and especially the reports resulting from them, have an important function in the Fund's relations with other international organizations, such as the GATT, the International Bank for Reconstruction and Development (World Bank), and the Organization for Economic Cooperation and Development (OECD).<sup>64</sup> For members, too, consultation reports can be useful in the conduct of their external relations.<sup>65</sup>

(vi) The last paragraph in the Managing Director's statement deals with the information that members must supply to the Fund. The Articles have always declared that the Fund may require members to provide it with such information as the Fund deems necessary for the effective discharge of its duties.<sup>66</sup> The Second Amendment declares, in addition, that each member must provide the Fund with the information necessary for the Fund's surveillance of the member's exchange rate policies.<sup>67</sup> Furthermore, each member must notify the Fund promptly of any changes in its exchange rate arrangements.<sup>68</sup>

In his summing up, the Managing Director emphasized the importance of timely and comprehensive information. The normal period for the provision of information about changes in exchange arrangements should be no more than three days after the date of a change.

The comprehensive information to be supplied should include information by members about their intervention policies if members maintain flexible exchange rate regimes, as well as information by other members about developments in their pegged or managed arrangements. The Fund is to be kept up to date on policies conducted by members or actions taken by them affecting their exchange arrangements. In clarifying the need for full information and the obligation to supply it, the summing up should dispose of reluctance to provide certain kinds of information. The Fund must receive details of the composite of currencies to which a member

pegs its currency or which the member treats as a set of indicators for the adjustment of the external value of its currency. Between 1975 and 1981, there had been a marked shift in pegging from single currencies to composites,<sup>69</sup> and the statement reflects this development. The statement also reflects the view that the obligation to supply information is the same for all categories of members in the classification of exchange arrangements.<sup>70</sup>

(vii) Aspects of the summing up that appear to be concerned solely with procedure or taxonomy may have normative implications. For example, the section that deals with the frequency of consultations could affect the period for which restrictions, multiple currency practices, or discriminatory currency arrangements are approved if the Fund were to grant approval until the next consultation.<sup>71</sup> The Fund's current practice, however, is to grant approval for periods of approximately one year, although the decision of March 20, 1981 on multiple currency practices, which is discussed elsewhere in this pamphlet, makes this practice subject to the caveat of "the cycle of consultations under Article IV."<sup>72</sup> The classification of exchange arrangements affects the kind of information that members may be required to provide.<sup>73</sup>

### *Versailles Communiqué*

The Heads of State and Government of Canada, France, the Federal Republic of Germany, Italy, Japan, the United Kingdom, and the United States, who met at Versailles on June 4–6, 1982, issued a communiqué in which they announced their dedication to an increase in growth and employment, in the expectation that this progress should help to bring about more stable exchange rates. They recognized that intensified economic and monetary cooperation was essential. They would work, therefore, toward a constructive and orderly evolution of the international monetary system by a closer cooperation among the authorities representing the currencies of North America, Japan, and the European Community in pursuing medium-term economic and monetary objectives. In this respect, the Seven announced that they had committed themselves to the undertakings contained in the statement attached to the communiqué.<sup>74</sup> The attachment, which is reproduced in Appendix C of this pamphlet, reiterated elements of Article IV and the Fund's principles for the guidance of the exchange rate policies of members, but paragraph 3



advanced an idea that had been adumbrated by the Managing Director in his summing up on surveillance:

We are ready to strengthen our cooperation with the IMF in its work of surveillance; and to develop this on a multilateral basis taking into account particularly the currencies constituting the SDR.

The Fund's Interim Committee responded to this declaration in the communiqué it issued on September 4, 1982:

In the view of the Committee, full cooperation by all members was essential for the success of the Fund's efforts to promote increased international stability. In this connection, the Committee was pleased to note the policy declaration relating to the Fund's surveillance responsibilities and its efforts to foster stability that was included in the Statement on International Monetary Undertakings issued at the Versailles Summit Meeting of last June.<sup>75</sup>

The Managing Director, in presenting the Thirty-Seventh Annual Report of the Executive Board to the Board of Governors at the 1982 Annual Meeting in Toronto, welcomed the Versailles statement on surveillance:

[T]he statements of policy relating to Fund surveillance that resulted from the summit at Versailles last June are encouraging. On that occasion, the major industrial countries stated an intention to strengthen their cooperation with the Fund in its surveillance work and to develop this on a multilateral basis. It is of great importance, not only for these countries themselves, but also for the rest of the world, that this commitment be carried out effectively. It is now up to the major industrial countries to take the necessary action. The Fund, for its part, will, of course, assist these countries in bringing about the desired closer convergence of their economic policies.<sup>76</sup>

In his concluding remarks, the Managing Director announced that "the process of enhanced economic and monetary cooperation that was agreed upon at Versailles has already begun."<sup>77</sup>

## **Multiple Currency Practices**

### *Jurisdictional Issues Under Second Amendment*

Under Article VIII, Section 3, a member may not engage in or permit any of its fiscal agencies to engage in multiple currency practices without the approval of the Fund, unless the practice is authorized by the Articles. The provision favors a unified exchange system on the hypothesis that it contributes to the most efficient allocation of domestic resources,

adjustment of the balance of payments, and the expansion and balanced growth of international trade.<sup>78</sup> The Fund has always understood the necessity for approval to mean approval before a practice is instituted. The necessity for approval has not been rescinded by the words "other arrangements of a member's choice" that a member can apply under Article IV, Section 2(b)(iii), even though Article VIII, Section 3 provides that approval is not required for multiple currency practices that are authorized by the Articles. If that view were not adopted, members would be able by unilateral action to negate the obligation imposed on members by Article VIII, Section 3 and render it wholly ineffectual. An interpretation of the Articles must give effect to all relevant provisions.

Moreover, the "choice" of exchange arrangements that a member may make under Article IV must be "consistent with the purposes of the Fund and the obligations of Section I" of Article IV. Under Section I, a member undertakes to "avoid manipulating exchange rates...in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members." Multiple currency practices continue to be subject to approval by the Fund because they could be inconsistent with this undertaking. Finally, although multiple currency practices may be justifiable as temporary expedients, in essence they are incompatible with the purpose of the Fund "[t]o assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade."<sup>79</sup>

It has never been suggested that a member's freedom to choose exchange arrangements under Article IV of the Second Amendment authorizes the imposition of multiple currency practices without the Fund's approval. The question whether Article XIV, Section 2 permits some members to adapt or introduce multiple currency practices without the need for approval by the Fund was posed under the original Articles. Article XIV, Section 2 establishes transitional arrangements to which members may have recourse before undertaking to perform in full the obligations set forth in Article VIII, Sections 2, 3, and 4. A member availing itself of the transitional arrangements may "maintain and adapt to changing circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date on which it became a member."<sup>80</sup> Usually, multiple currency practices that establish exchange rates for transactions of this character are also

restrictions of the kind referred to in this formulation. The Fund held, under the substantially similar provision of the original Articles, that a member availing itself of the transitional arrangements had to obtain the approval of the Fund under Article VIII, Section 3 for the introduction of a multiple currency practice, because Article XIV, Section 2 did not authorize the introduction of restrictions.<sup>81</sup> Article XIV, Section 2, however, did authorize the maintenance or adaptation of multiple currency practices, and it was the authority to adapt under the transitional arrangements that gave rise to the question of the necessity for the Fund's approval. The Fund held that approval was necessary even for adaptations of multiple currency practices because all the provisions of the Articles on exchange rates had to be observed.

The most obvious relevant provision on exchange rates before the Second Amendment was Article IV, Section 4(a), under which each member undertook to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations. Although the language of Article I(iii), which defines a purpose of the Fund in similar language, has not been deleted or modified by the Second Amendment, the former Article IV, Section 4(a) has been excised from the Articles. The provision has been abrogated because the stability that members now undertake to achieve is the stability of underlying conditions and not the stability of exchange rates. The stability of exchange rates, in the opinion of many members, had led to exchange rigidity and eventually to instability. The present theory is that if the stability of underlying conditions is achieved, a stable system of exchange rates will emerge. Notwithstanding the change in the concept of stability introduced by the Second Amendment, the same basic legal principle that the effect of all relevant provisions of the Articles must be respected still applies. Therefore, the broad obligation of each member to collaborate to ensure the existence of orderly exchange arrangements and a stable system of exchange rates, and the more specific obligation to refrain from manipulating exchange rates to gain an unfair competitive advantage over other members,<sup>82</sup> preclude the right of members to "adapt" (change) multiple currency practices without the approval of the Fund. Approval is necessary so that the Fund can be satisfied that the adaptation is required by "changing circumstances" in accordance with Article XIV, Section 2 and is consistent with the provisions of Article IV.

The two jurisdictional issues that have been discussed have not led to any change in the law relating to multiple currency practices as it existed before the Second Amendment, but fundamental changes have occurred in two other aspects of the law as a result of the present Articles. These aspects are the responsibility of members for exchange rates and the definition of multiple currency practices.

### *Responsibility of Members*

Article VIII, Section 3 provides now, and provided before the Second Amendment, that no member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section I, to engage in multiple currency practices that are not authorized by the Articles or approved by the Fund. The fiscal agencies of a member have always been defined as its treasury, central bank, stabilization fund, or other similar fiscal agency.<sup>83</sup> Multiple currency practices, therefore, have resulted from the conduct of a member or of its fiscal agencies. Before the Second Amendment, however, multiple currency practices might exist even though the member or its fiscal agencies had not taken positive action to produce multiple rates of exchange. A member might be held to be engaging in multiple currency practices if it or its fiscal agencies tolerated the emergence of exchange rates within the member's territories. In short, a member might be engaging in multiple currency practices as the result of either action or inaction. Multiple currency practices might emerge, without the impetus of positive action by a member or its fiscal agencies, because of action by commercial banks or exchange dealers in imposing charges or commissions that were deemed to be part of an effective exchange rate and that resulted in what was deemed to be a multiplicity of exchange rates. Domestic law was not decisive when the Fund examined the question whether multiple currency practices existed. The charges and commissions might be consistent with domestic law, but a member might be responsible for multiple currency practices if there was a black market in its territories that was tolerated even though it was not legal.

A member was held accountable for multiple currency practices as the result of inaction by itself or by its fiscal agencies because the member had an absolute duty to prevent exchange transactions from taking place in its territories at exchange rates that differed from the parity between the two currencies exchanged in the transactions by more than the margins

prescribed by the Articles.<sup>84</sup> The parity was the ratio between the par values of the currencies established in accordance with the Articles by the members issuing the currencies. Par values have been abolished by the Second Amendment, and members are no longer required to take measures to ensure that the exchange rates for exchange transactions in their territories remain within margins.

The Fund has examined its law and policy on multiple currency practices in the new conditions created by the Second Amendment, and on March 21, 1981 the Fund adopted the decision that is reproduced in Appendix D.<sup>85</sup> The decision purports to be confined to the Fund's policy, but the decision obviously assumes certain legal conclusions, without which the policy could not have been formulated. In fact, paragraph 1 of the decision is more a statement of law than of policy. The decision also states that the Fund will be "guided by the approach" in the conclusions that are set forth. This language is intended to permit flexibility and adaptability. Elasticity is advisable in the present international monetary system, in which conditions are changeable and legal obligations are less precise than in the past.

One of the fundamental legal postulates on which the decision rests is that members are responsible for exchange rates as multiple currency practices only if the rates result from "official action" or from "action by a member or its fiscal agencies." Language of this kind appears in almost every sentence of paragraph 1 of the decision. Official action is not defined. The concept could give rise to difficulty, particularly in view of the diverse ways in which members organize their constitutional and financial functions. For this reason, the decision states that when difficulties of interpretation and application arise in specific cases, "particularly concerning the nature of official actions," the staff of the Fund will present the relevant information to the Executive Board for its determination. Direct and overt action by a member or by its fiscal agencies, such as the imposition of exchange taxes or the institution of dual exchange rates, is not likely to create difficulty in recognizing that official action has been taken. Difficulty might arise if the action of a member or its fiscal agencies was not overt or was indirect because it was in the form of guidance or influence or in some other way that was less than peremptory.

Toleration is not the equivalent of official action, but a member's responsibility for multiple currency practices is not limited to those that

result from the actions of its fiscal agencies. Article VIII, Section 3 provides that a member shall not engage in multiple currency practices and shall not permit any of its fiscal agencies to engage in such practices. The word "member" is intended to be a broader expression than "fiscal agencies." It is less likely, but not at all inconceivable, that, in some economic structures, official action relating to exchange rates might be taken by an agency that was not fiscal. For example, an agency that has duties in the field of trade may perform accessory functions in connection with exchange. The provision assumes that an agency is not to be deemed "fiscal" simply because it engages in multiple currency practices.

An agency, whether fiscal or not, can "engage" in multiple currency practices without participating in exchange transactions. A central bank, for example, will be engaging in a multiple currency practice if exchange transactions that in all other respects fall within the decision are entered into by authorized exchange dealers as instrumentalities of the central bank. Moreover, a multiple currency practice may exist even though no agency of a member participates, directly or through instrumentalities, in exchange transactions. The Fund will conclude that there is a multiple currency practice if a member's agency applies regulations that impose a multiplicity of exchange rates for exchange transactions in which the agency is not involved in any other way. Article VIII, Section 3 prohibits members and their fiscal agencies from engaging in "practices," which may or may not be "transactions."

It follows from the emphasis on official action that if diverse exchange rates exist solely as the result of the commercial costs and risks of exchange transactions, however extreme the diversity may be, the Fund's jurisdiction under Article VIII, Section 3 will not be involved.

### *Definition of Multiple Currency Practices*

The Articles have never included a definition of multiple currency practices. The interpretation and application of the concept have been left to the Fund as the administrator of the Articles. The Fund has never attempted to formulate a comprehensive definition and has preferred to act pragmatically. It has decided whether a multiple currency practice existed in the circumstances of a particular case or, at most, it has decided that a category of exchange practices comes within the concept. An extensive "jurisprudence" developed over the years, but no attempt was made to synthesize it into anything resembling a *vade mecum*.

Before the Second Amendment, the parities between members' currencies that resulted from par values, and the margins around parities prescribed by the Articles for exchange transactions, had a fundamental function in the Fund's determination that multiple currency practices within the meaning of the Articles were in force. For example, if all exchange rates were within the prescribed margins, the Fund did not regard any practices that diversified the rates as multiple currency practices. If one exchange rate was within the margins but another rate was forced outside them, the practice was considered a multiple currency practice. To constitute a multiple currency practice, there need be no more than one buying rate or one selling rate outside the margins. An underlying idea in the Fund's approach was that multiple currency practices existed if there were two or more exchange rates, of which at least one was outside the margins, that were independent of each other because of nonmarket forces and that applied to different transactions.

The new decision (reproduced in Appendix D) is based on the same underlying idea in distinguishing between market and nonmarket forces, but margins for exchange rates are not prescribed by the Articles and have no role. Indeed, Article VIII, Section 3 makes it clear that multiple currency practices may exist even if all exchange rates are within margins for exchange transactions that a member is observing, or even if the rates are within margins prescribed by or under Schedule C should that schedule be called into operation.<sup>86</sup>

The Executive Board, in specifying what exchange rates will be considered independent of each other and therefore multiple currency practices, has been influenced by the two decisions it adopted on central rates and wider margins for operation in the period that succeeded the breakdown of the par value system and preceded the Second Amendment.<sup>87</sup> Those decisions recognized that multiple currency practices resulted either from (a) the character of the spread between the buying and the selling rate of exchange for a member's currency in its exchange market, or from (b) the character of the difference between the rates for a member's currency in exchange for other members' currencies in the member's principal exchange market and exchange rates between these other currencies in their principal exchange markets. The character of the spread or of the difference that the new decision treats as a multiple currency practice has been derived by study of the normal practice of exchange markets that are free from official action relating to the

quotation of exchange rates. The spirit of the decision can be said to be that a member should not have more than limited authority to interfere with the normal working of the exchange market without the approval of the Fund.

Spreads are the subject of paragraph 1(a) of the new decision. It establishes three propositions:

(i) The first proposition is that an exchange spread of whatever breadth does not give rise to a multiple currency practice if official action is not involved. The evidence of the markets is that normally spreads that are influenced solely by commercial considerations are not broad and do not create inequities among members. The proposition frees the Fund from the necessity to determine the reasonableness of commercial costs or of other practices.

(ii) A multiple currency practice exists if an action by a member or by its fiscal agencies results, by virtue of that action considered in isolation from other influences on exchange rates, in a spread of more than 2 percent between the buying and the selling rates for the member's currency in exchange for another member's currency. This proposition relates to spot exchange transactions, and, although it is not made explicit, the proposition probably relates to exchange transactions that take place within the territories of the member in which the spread occurs. The reason for the latter qualification is that a member has unquestioned jurisdiction to take official action on exchange rates only within its own territories. For this reason, the original Articles, which imposed on a member the obligation to take appropriate measures to ensure that exchange rates for its currency did not go beyond the prescribed margins, were explicit in declaring that this obligation related only to exchange transactions within the member's territories.<sup>88</sup> The territory within which an exchange transaction takes place may be debatable in some circumstances, but the Fund has not established criteria for settling this question.

Some illustrations may help to clarify propositions (i) and (ii) above. A spread of 1.5 percent exists between the buying and the selling rates quoted by the commercial banks for their domestic currency in exchange for a foreign currency. The spread is determined by the banks solely on the basis of commercial considerations and without the influence of official action. The member imposes a 1 percent exchange tax, and the spread becomes 2.5 percent. The effect is not to produce a multiple currency practice. If, however, the exchange tax is 2.5 percent, the tax



itself produces a multiple currency practice. Assume a spread of 2.5 percent without official action. The spread does not constitute a multiple currency practice, and even a broader spread of 4.5 percent as the result of an exchange tax of 2 percent does not become a multiple currency practice.

(iii) Deviations between the rates for spot exchange transactions and rates for other exchange transactions will not be considered multiple currency practices if the deviations represent the additional costs and exchange risks of the other exchange transactions. Nothing is said in the decision about the extent to which, if at all, official action can contribute to deviations without constituting multiple currency practices.

A quantitative limit for official action in relation to spot exchange transactions only has been specified because these exchange transactions represent the largest proportion of total exchange transactions, and because normally exchange rates for other exchange transactions are based on the rates for spot transactions. The evidence of practice in the markets shows that a spread of 2 percent for official action gives ample discretion to monetary authorities, and at the same time makes it unnecessary for the Fund to become concerned with such matters as small exchange taxes and minor stamp duties that do not threaten to create disorderly exchange markets.

Differences between exchange rates for currencies in a member's and other members' markets are the subject of paragraph 1(b) of the new decision. Action by a member or its fiscal agencies that results in midpoint spot rates for other members' currencies in exchange for the member's currency in a relationship that differs by more than 1 percent from what would be the midpoint spot rates derived from the spot rates for the exchange of the currencies of the other members in their principal markets constitutes a multiple currency practice. If the practice persists for more than a week, the approval of the Fund must be sought.

The decision refers to the exchange rates that are the subject of the differentials covered by paragraph 1(b) as "cross rates." This term and the substance of paragraph 1(b) must be understood by taking account of the practice of major exchange markets, in which the overwhelming proportion of exchange transactions is in U.S. dollars. In the absence of official action, the principal markets in which the U.S. dollar is the main traded currency would establish a consistent pattern of exchange rates in those markets and in all other markets connected with them. At any one

moment, the exchange rate between currencies A and B would be derived from the rate of exchange for currency A against the U.S. dollar in A's market and the rate of exchange for currency B against the U.S. dollar in B's market, and the rates of exchange in both markets would be in concord with each other. There would be concord among exchange rates for all currencies in all markets whatever the relationships (cross rates) that were the subject of comparison. Deviations from this concord constitute "broken cross rates."

Two kinds of practice may introduce discord. It may be produced, first, by official action in a market. Second, even in the absence of official action, concord will not prevail because the spreads between buying and selling rates are not the same in all markets. Moreover, it has been seen that spreads can be wide without creating a multiple currency practice even if there is no official action or only limited official action (up to 2 percent) to broaden spreads. In the absence of official action, concord would be achieved only if spreads were the same in all markets.

The decision adopts safeguards against the dangers of both discordant practices. One safeguard is the limit of 2 percent on official action to produce spreads without the need for the Fund's approval, as explained earlier. The limit exercises a restraint on the degree of discord that can be introduced freely by a member.

A second safeguard is that a member is deemed to be applying a multiple currency practice if the midpoint rates for the exchange of its currency and other members' currencies in its principal market differ by more than 1 percent from the midpoint rates that would be derived from the midpoint rates for the exchange of these other currencies in their principal markets.<sup>89</sup> Midpoint rates are considered because the spread between buying and selling rates is not the same in all markets. The difference of more than 1 percent must result from official action in order to justify the finding that there is a multiple currency practice because of broken cross rates. The differences must be no more than 1 percent, because broken cross rates are necessarily disadvantageous to one or more members in comparison with other members. The practices that are considered broken cross rates are discriminatory currency arrangements as well as multiple currency practices under the Articles. The Fund has been strongly opposed to discriminatory currency arrangements for many years.

The fluidity of conditions in exchange markets and the variability of exchange rates create difficulties in limiting discord among exchange relationships. The difficulties would be met to some extent if a member were to base the relationships between quotations of other members' currencies against its own currency on the midpoint rates of these currencies in their principal markets, but even this practice might not ensure concord because of differences in time and in administrative procedures. Even if members quote exchange rates daily, cross rates may be broken because of changes in exchange rates in other markets. Exchange rates have been volatile in the markets of major currencies. The decision gives a member reasonable leeway for the adaptation of its quotations without the necessity for seeking the approval of the Fund. To constitute a multiple currency practice, a difference in cross rates must persist for longer than a week. The period of a week should give members adequate opportunity to adjust their quotations to developments in exchange rates abroad. Under normal market conditions, differences of even less than 1 percent in midpoint exchange rates would induce arbitrage by operators in the exchange markets, which would eliminate the differences.

#### *Relevance of Other Provisions*

The new decision on multiple currency practices is inspired by the attitude that interference with the freedom of exchange markets to determine exchange rates should be kept within reasonable bounds. If differential exchange rates were to develop in a member's exchange market that do not amount to multiple currency practices under Article VIII, Section 3, for example, because they do not result from official action by the member or its fiscal agencies, the Fund might still consider it necessary to express concern under other provisions of the Articles. Article IV, Section 1 requires a member to collaborate with the Fund and other members "to assure orderly exchange arrangements and to promote a stable system of exchange rates." The Fund would be able to call on a member to collaborate under this provision by consulting with the Fund in order to determine the cause of certain conditions in the member's exchange market. If the Fund were to conclude that these conditions were not consistent with a stable system of exchange rates, the Fund could require the member to correct the situation in the exchange market.

### *Policy on Multiple Currency Practices*

The new decision on multiple currency practices sets forth a number of propositions of mixed policy and law that the Fund will observe in exercising its authority over multiple currency practices and discriminatory currency arrangements. It will become apparent from the propositions as discussed below that the Fund's practice has not been changed substantially by the disappearance of the par value system.

1. The policy on the exercise of the Fund's jurisdiction as established by a decision of June 1, 1960<sup>90</sup> "remains broadly appropriate." In accordance with that decision, the Fund will be prepared to approve multiple currency practices introduced or maintained by a member for balance of payments reasons if (i) the member represents, and the Fund is satisfied, that the measures are temporary and are being applied while the member is endeavoring to eliminate its balance of payments problems, and if (ii) the multiple currency practices do not give the member an unfair competitive advantage over other members and (iii) do not discriminate among them.

2. The Fund will "continue to be very reluctant" to approve the maintenance of broken cross rates. The new decision determines what are broken cross rates.

3. The Fund reaffirms its decision of June 26, 1957<sup>91</sup> on complex multiple currency practices and will not approve these practices unless the member is making reasonable progress toward simplification and ultimate elimination of the system or is taking measures or adopting programs that seem likely to result in such progress.

4. While urging members to apply alternative policies not connected with the exchange system, in accordance with the decision of June 1, 1960,<sup>92</sup> the Fund will be prepared to grant temporary approval of multiple currency practices introduced or maintained principally for reasons other than the balance of payments, provided that the practices do not materially impede adjustment of the member's balance of payments, do not harm the interests of other members, and do not discriminate among members.

This proposition is based on the legal principle, which is in conformity with a decision of the Fund on payments and transfers for current international transactions,<sup>93</sup> that the Fund's jurisdiction over the measures that need approval under Article VIII does not depend on the motive that induces a member to apply the measures. The proposition stated in the preceding paragraph refers to multiple currency practices that are

introduced or maintained “principally” for reasons not connected with the balance of payments. The adverb recognizes that there may be more than one motive for the application of measures.<sup>94</sup>

The Fund’s jurisdiction over exchange measures does not depend on the motive for measures because no such limitation is to be found in the provisions of the Articles. One justification for the absence of a limitation is that the measures subject to Section 2 or Section 3 of Article VIII may affect balances of payments whatever may be the motive or motives for the measures. The effect may be on the balance of payments of the member that resorts to the measures or on the balances of payments of other members.

The Fund’s jurisdiction over measures that are in force for reasons principally unconnected with the balance of payments avoids a gap in international economic jurisdiction and enables the Fund to ascertain that a member is not relying on multiple currency practices in order to avoid its obligations under other treaties. Multiple currency practices can have effects similar to those produced by measures directly applicable to trade that are within the province of the GATT. A member may find that, under its law and administration, multiple currency practices can be introduced more easily than trade measures. The GATT itself seeks to inhibit contracting parties to that Agreement from relying on exchange measures that frustrate the intent of the GATT:

Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.<sup>95</sup>

Multiple currency practices introduced or maintained for reasons unrelated to the balance of payments are not invariably, or even most often, designed as alternatives to measures that would fall under the jurisdiction of the CONTRACTING PARTIES to the GATT. For example, multiple currency practices may be designed for domestic fiscal objectives. These practices resemble taxes or subsidies in their effects and again may be adopted in lieu of fiscal legislation.

The proposition under discussion enables the Fund to take account of the feasibility of measures that would be alternatives to multiple currency practices applied for reasons mainly unrelated to the balance of payments. The Fund is also able to consider the relationship of such multiple currency practices to a member’s obligations under the GATT. If, having taken account of these matters, the Fund decides to approve the multiple

currency practices, it will do so only if the conditions stated in this proposition are satisfied. Furthermore, the Fund will give its approval for no more than a limited (“temporary”) period.

5. To assist the Fund in deciding whether or not to approve a multiple currency practice, the reasons underlying the practice and its effects will be analyzed in reports on consultations under Article IV or in other papers prepared by the staff on exchange systems. Approval will be granted for periods of approximately one year, so that the practices can be kept under review by the Executive Board.

### **Consequences of Unapproved Multiple Currency Practices**

The Fund’s approval or nonapproval of multiple currency practices can produce consequences within the Fund and outside it. Nonapproval is a term that applies to two situations: the Fund’s refusal to approve a multiple currency practice that a member has submitted to the Fund for approval and the failure of a member to submit a multiple currency practice for approval.<sup>96</sup> In both situations, the multiple currency practice can be said to be unapproved. Some of the consequences of unapproved multiple currency practices are as follows.

1. A member is in breach of its obligations under the Articles if it maintains, introduces, or adapts a multiple currency practice that is not authorized by the Articles or approved by the Fund. It follows that the Fund may declare the member ineligible to use the Fund’s resources or may react in other ways in accordance with the Articles. The word “sanctions” is frequently used for these responses of the Fund, but it is not wholly appropriate because some of the same responses may be available to the Fund in certain circumstances when a member is not in breach of obligations.<sup>97</sup>

2. An unapproved multiple currency practice may result automatically in a member’s inability to use the Fund’s resources. The model form of stand-by arrangement or extended arrangement adopted by the Fund on April 29, 1981<sup>98</sup> provides that a member for which an arrangement has been approved will not be able to make purchases beyond the first credit tranche under a stand-by arrangement or in any circumstances under an extended arrangement if the member

- (i) imposes [or intensifies<sup>99</sup>] restrictions on payments and transfers for current international transactions, or

- (ii) introduces [or modifies<sup>101</sup>] multiple currency practices, or
- (iii) concludes bilateral payments agreements which are inconsistent with Article VIII,<sup>101</sup> or
- (iv) imposes [or intensifies] import restrictions for balance of payments reasons.

If a member is unable to use the Fund's resources because the member is not observing the performance criteria listed above, the right to purchase resources revives only after the Fund and the member consult and understandings are reached on the circumstances in which purchases can be resumed.<sup>102</sup>

These provisions do not confine the interruption of a member's right to make purchases under a stand-by or extended arrangement because of the imposition or intensification of multiple currency practices to those cases in which the Fund has not approved these practices. If, however, the Fund approves the practices, and there are no other departures from performance criteria, it is improbable that the Fund would prolong the interruption of rights under an arrangement.<sup>103</sup>

The automatic effect of the imposition or intensification of multiple currency practices as discussed above affects access to the Fund's resources only under a stand-by or extended arrangement. A member's right to use the Fund's resources under provisions or policies not involving a stand-by or extended arrangement is not interrupted automatically because of the imposition or intensification of multiple currency practices. The member's right under these provisions or policies is not automatically affected even if its right to make purchases is interrupted under an arrangement. In order to interrupt a member's right to make purchases that were in accordance with these provisions or policies, the Fund would have to take a decision under another provision of the Articles to limit the member's use of the Fund's resources or to declare it ineligible to use them.<sup>104</sup>

3. Agreements under which official or private entities undertake to lend to a member sometimes provide that the member will be able to borrow under the agreement only if it is in a position to use the Fund's resources under a stand-by or extended arrangement.<sup>105</sup> An effect of an unapproved multiple currency practice may be that the member will be unable to borrow under agreements that are tied to a stand-by or extended arrangement.

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4. The Fund's Compensatory Financing Facility is designed to assist members, particularly the exporters of primary products, that have encountered difficulties because of temporary shortfalls in the proceeds of exports. A member that suffers this kind of difficulty can expect the Fund to comply with requests for transactions under the policy if

- (a) the shortfall is of a short-term character and is largely attributable to circumstances beyond the control of the member; and
- (b) the member will cooperate with the Fund in an effort to find, where required, appropriate solutions for its balance of payments difficulties.<sup>106</sup>

Purchases under the policy may amount to 100 percent of a member's quota, but requests for purchases that would increase transactions outstanding under the policy beyond 50 percent of quota are met "only if the Fund is satisfied that the member has been cooperating with the Fund in an effort to find, where required, appropriate solutions for its balance of payments difficulties."<sup>107</sup> Similar conditions apply under the Fund's decision on the compensatory financing of fluctuations in the cost of cereal imports.<sup>108</sup> Total outstanding purchases under the combined effect of the two decisions may amount to 125 percent of quota.

The conditions relating to willingness to cooperate and actual cooperation are intentionally vague and require the Fund to exercise judgment according to the circumstances of each request. Codification to govern or guide judgment has been avoided. It is conceivable that the circumstances taken into account may include a member's attitude to multiple currency practices, particularly if it persists in applying them without the Fund's approval. No decision has been taken, however, that the existence of such practices is conclusive or even presumptive evidence of unwillingness to cooperate or of actual noncooperation.

5. The first sentence of the much-litigated Article VIII, Section 2(b) provides that

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member....<sup>109</sup>

If a member's regulations prescribing a multiple currency practice that has been authorized by the Articles or approved by the Fund were deemed to be exchange control regulations, an exchange contract that was contrary to



them would be unenforceable in the courts of other members. This legal consequence would not follow under the Articles if the multiple currency practice was inconsistent with the Articles because it was not authorized or approved. The court's attitude to the regulations would be determined by its private international law without reference to Article VIII, Section 2(b).<sup>110</sup>

The Fund has refrained from taking a decision on the question whether a rate of exchange confined exclusively to capital transactions is subject to the jurisdiction of the Fund under Article VIII, Section 3. The problem is whether Article VI, Section 3, which authorizes members to control capital transfers, has overriding effect notwithstanding Article VIII, Section 3, or whether Article VIII, Section 3 has overriding effect notwithstanding Article VI, Section 3. The staff has concluded that the practice in question is indeed a multiple currency practice and subject to Article VIII, Section 3,<sup>111</sup> but the new decision on multiple currency practices continues to avoid a solution. The problem remains in limbo because of the enormous importance members attach to the power to control capital transfers and their effect on the domestic monetary situation.

As a result, a difficulty could arise for courts under Article VIII, Section 2(b). The provision applies to exchange control regulations whether they affect payments and transfers for current international transactions or capital transfers,<sup>112</sup> but the regulations must be authorized by the Articles or approved by the Fund. No difficulty would arise if Article VIII, Section 3 did not embrace capital transfers, because regulations controlling capital transfers would be authorized by the Articles (i.e., by Article VI, Section 3). Article VIII, Section 2(b) would apply. If, however, Article VIII, Section 3 does apply, the regulations would be neither authorized by the Articles nor approved by the Fund, and the court would not be required by Article VIII, Section 2(b) to treat contracts contrary to the regulations as unenforceable. The courts would find it necessary to choose between these alternative interpretations with no present guidance other than the opinion of the staff of the Fund.

The likelihood that the courts will have to face this predicament is less than might be assumed because regulations imposing a multiple currency practice on capital transfers are rarely confined with rigor to those transfers. The regulations usually affect payments and transfers for some current international transactions as well. The Executive Board has relied

on this circumstance to justify its reluctance to decide the jurisdictional issue. A member may find it difficult for administrative reasons to preserve a strict separation between payments and transfers for capital and for current transactions. In addition, the definition of payments and transfers for current international transactions is a broad one under the Articles.<sup>113</sup> It includes some payments and transfers that economists would classify as capital transfers. In some cases in which the two categories of payments and transfers have been involved, the Fund has avoided decision of the jurisdictional issue by means of a formula under which the Fund gives such approval as may be necessary under the Articles. Such a formulation relieves courts of the need to decide the jurisdictional issue for themselves.

6. If a member applies multiple currency practices, its own courts may find it necessary to decide which rate of exchange is appropriate as the basis for a judgment. The question of the validity of rates of exchange under domestic law has arisen in some proceedings, and this issue has led to the question of validity under the Articles.<sup>114</sup>

7. The Fund's classification of a practice as a multiple currency practice and the Fund's attitude to it may have consequences under treaties other than the Articles. The most obvious treaty under which there may be consequences is the GATT. For example, an Interpretative Note to Article VI of the GATT, which deals with antidumping and countervailing duties, explains that multiple currency practices in certain circumstances can constitute a subsidy to exports that may be met by countervailing duties or can constitute a form of dumping by means of a partial depreciation that may be met by an antidumping duty.<sup>115</sup> Multiple currency practices under the law of the GATT are said to be practices by governments or practices sanctioned by governments.<sup>116</sup> One expert, in discussing a contracting party's export subsidies under Article XVI of the GATT, has written that "approval by the IMF excludes the possibility of a challenge under Article XVI."<sup>117</sup> This conclusion is based on an Interpretative Note to Article XVI, which declares that nothing in Section B of Article XVI "shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund."<sup>118</sup>

In these matters, the legal position as discussed above probably has not been changed by the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and

Trade (Relating to Subsidies and Countervailing Measures), which was negotiated in the Tokyo Round of the Multilateral Trade Negotiations. The illustrative list of export subsidies annexed to the new Agreement includes "(b) Currency retention schemes or any similar practices which involve a bonus on exports." A currency retention scheme usually results in a multiple currency practice. "Any similar practices" could be interpreted broadly to encompass other forms of multiple currency practice.<sup>119</sup>

Article VIII of the GATT prohibits the imposition of certain fees and charges on or in connection with importation or exportation unless they are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes. An Interpretative Note to Article VIII of the GATT explains that, while the use of exchange taxes or fees as a device for implementing multiple currency practices is condemned, if multiple currency practices resulting from exchange fees are being used for balance of payments purposes with the approval of the Fund the practices are exempt from this condemnation.<sup>120</sup>

Article VIII of the GATT deals with valuation for customs purposes and prescribes as the basis for valuation the par value established under the Articles of the Fund or the rate of exchange recognized by the Fund. The CONTRACTING PARTIES were authorized, in agreement with the Fund, to formulate rules for the translation by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of the Fund.<sup>121</sup> The abrogation of the par value system necessitated the re-examination of the problem of valuation. The re-examination was undertaken as part of the Tokyo Round of the Multilateral Trade Negotiations, which led to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade. This Agreement has been discussed in Pamphlet No. 36 (1981).<sup>122</sup>

## **Discriminatory Currency Arrangements**

### *Discrimination Under the Articles*

A theme of the Fund's new decision on multiple currency practices is the undesirability of discrimination in the form of broken cross rates. The possibility that cross rates may be broken has increased since the demise of the par value system and the floating of major currencies. This

development is more likely among currencies that are pegged to one or more currencies or to a basket of currencies. Members' fiscal agencies that quote exchange rates may deliberately employ the practice for reasons of policy. But broken cross rates may result because of changing exchange rates in the principal markets abroad with a lagged response by a member in changing its quotations to conform with the changes.

Article VIII, Section 3 prohibits both discriminatory currency arrangements and multiple currency practices. Restrictions on the making of payments and transfers for current international transactions are prohibited by Article VIII, Section 2. The three categories must be regarded as distinguishable from each other, according to established principles of the interpretation of treaties, but over the years it has been rare to find that a discriminatory currency arrangement was not at the same time a multiple currency practice or a prohibited restriction as well. Sometimes, a single measure has fallen into all three categories.

The Fund has understood that the category of discriminatory currency arrangements was made the subject of a specific prohibition in order to emphasize the exceptional undesirability of measures of this character even if they fall into other categories as well. The Fund, therefore, has adopted decisions that express its opposition to discriminatory currency arrangements<sup>123</sup> even though it has authority under the Articles to approve them. The distaste for discriminatory currency arrangements probably influenced the Fund to forbear from invoking the so-called scarce currency clause,<sup>124</sup> under which the Fund can authorize members to discriminate against transactions in a currency declared scarce by the Fund, although there are other explanations of the dormancy of the clause.<sup>125</sup>

It may seem surprising that, notwithstanding the Fund's distaste for discriminatory currency arrangements, no attempt has been made to define them. The suspicion that a definition might be too rigid in a world of changing problems and of practices to deal with them may help to explain the absence of a definition. The Fund has not adopted precise definitions for the other two categories of measures prohibited by Sections 2(a) and 3 of Article VIII. The greater frequency of these measures, however, has led the Fund to adopt a "guiding principle" by which to determine whether a measure is a restriction on the making of payments and transfers for current international transactions.<sup>126</sup> The "guiding principle" has become over time a much firmer rule than is suggested by

the tentativeness of the adjective. On multiple currency practices, the Fund was content in the past to proceed from case to case without arriving at a comprehensive concept that rationalized the substantial jurisprudence. The Second Amendment made it necessary to have a more systematic approach to multiple currency practices. This approach also is said to be for the guidance of the Fund, but the Fund's conclusions are likely to become firm principles unless the conclusions are indeed shown to be unsatisfactory in some way. The Fund's active practice in relation to the other two categories of prohibited measures and the more systematic analysis of them, even though comprehensive definitions did not emerge, may have reduced the need to arrive at a unified and compact definition of discriminatory currency arrangements.

When, in 1959, it seemed that a number of European members were likely to undertake to perform the convertibility obligations of Article VIII, Sections 2, 3, and 4, the staff of the Fund prepared an analysis of discriminatory currency arrangements in which the following propositions were derived from the decisions and practice of the Fund:

(1) A discriminatory currency arrangement is an arrangement that involves discrimination against one or more members.

(2) A member is entitled to adopt restrictions on exchange transactions with nonmembers or with persons in their territories. This freedom does not justify restrictions that prejudice the interests of a member and are contrary to the purposes of the Fund.<sup>127</sup>

(3) The essence of discrimination is the absence of equal treatment for all members, with the result that some are treated less favorably than others, either because disadvantage is imposed or advantage conferred on some members as compared with others.

(4) The discrimination relates to currency. It is necessary, therefore, to decide whether, in the circumstances of a case, the unequal treatment of one or more members is so related to currency that it constitutes a discriminatory "currency" arrangement.

(5) The word "arrangement" does not mean that only bilateral agreements can be considered discriminatory currency arrangements, even though there is no doubt that the negotiators of the original Articles were opposed to bilateral payments agreements in particular. A bilateral or multilateral agreement may constitute a discriminatory currency arrangement, but even a member's unilateral action may constitute such

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an arrangement. Broken cross rates applied by a member are an example of a discriminatory currency arrangement of a unilateral character.

(6) If the Fund finds that a bilateral or multilateral agreement would be a discriminatory currency arrangement, both or all contracting parties must seek the approval of the Fund.

(7) The prohibition of discriminatory currency arrangements and the Fund's jurisdiction over them do not depend on the motive that influences a member to engage in such an arrangement. The prohibition and the Fund's jurisdiction are not limited to situations in which a member's motive is related to the member's present or prospective balance of payments.

(8) A member is entitled to engage in a discriminatory currency arrangement that is confined to capital transfers.

To these propositions of a legal character there should be added the recent affirmation of policy that

(9) The Fund "will continue to be very reluctant" to approve the maintenance of broken cross rates of exchange.<sup>128</sup>

### *Discrimination Under Treaty of Rome*

A case decided by the Court of Justice of the European Communities on October 28, 1980<sup>129</sup> raised the question whether discrimination was being practiced in contravention of the Treaty of Rome. The interest of the case for the present purpose is the suggestion that not every difference in the treatment of currencies should be classified as a discrimination prohibited by the treaty. Furthermore, in order to conclude that a measure is or is not a prohibited discrimination, a careful examination must be made of all relevant facts, and the practical effect of the measure will be decisive.

The issue arose under Article 7 of the Treaty of Rome, which declares that

[w]ithin the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Articles of the Fund are understood to prohibit the unequal treatment of members of the Fund (see proposition 3 above), while the Treaty of Rome prohibits the unequal treatment of nationals of member states of the Community. The difference is not important in the present discussion, because discrimination against a member under the Articles can take the

form of discrimination against the member's residents. Another parallel between the two treaties is that, in the court's opinion, prohibited discrimination against the nationals of another member state of the Community can be overt or covert. The actual effect and not the formulation of a practice was the test by which to decide whether the practice was discriminatory. In the case before the court, a discrimination formulated in terms of currency was considered a covert discrimination against nationals. The Fund also administers Article VIII, Sections 2 and 3 in relation to all three categories of prohibited measures by considering the effects of a member's practices and not the language of the law or regulations under which the practices are applied. But a law or regulation expressed as a discrimination puts the Fund on notice that a discriminatory currency arrangement may be in force.

The issue in the case arose in circumstances in which a French creditor instituted summary proceedings in a court of the Federal Republic of Germany for a debt denominated in French francs alleged to be owed by a German resident of the Federal Republic. Summary proceedings gave a creditor certain advantages. German law had been changed in 1976 to make the summary proceedings unavailable for the recovery of a debt expressed in foreign currency when owed by a German resident, although the procedure is available if the claim expressed in foreign currency is against a nonresident. This exceptional provision for debts expressed in foreign currency when owed by nonresidents had been made because the Government of the Federal Republic thought that the terms of a convention required this concession. The German court held that the amended law was discriminatory and in violation of Article 7 of the Treaty of Rome.

The Commission argued before the Court of Justice of the Communities that there was no discrimination because creditors, whether resident in the Federal Republic or in other Community countries, were in the same position in relation to debts expressed in German currency or in relation to debts expressed in foreign currency. The Attorney General disagreed with this argument because in practice German creditors were more likely to invoice their claims in German currency while creditors in other Community countries were more likely to invoice their claims in their own national currencies.<sup>130</sup> The probable effect of the 1976 amendment, therefore, was that German creditors would have the benefit of the summary procedure whether the debtors were resident or not resident in

Germany, because the debts owed to them would be denominated in German currency, while foreign creditors would not have the benefit of the procedure because the debts owed to them by German residents would be expressed in the creditor's currency. It was true that debts owed by nonresidents and expressed in foreign currency could be recovered under the summary procedure, but the creditors were not likely to resort to German procedures in such circumstances.

The Court of Justice noted that the 1976 amendment had been adopted to simplify and facilitate computerization, in effect by confining the summary procedure to debts in German currency against residents of the Federal Republic. Provision had been made, however, for the procedure to apply to debts in foreign currency owed by nonresidents, even though the debts were handled manually. It followed, therefore, that the need for computerization could not be considered a decisive justification for excluding from the summary procedure debts expressed in foreign currency against residents of the Federal Republic.

This reaction did not dispose of the issue. The Court of Justice held that the limitation on the availability of the summary procedure was not a prohibited discrimination. Contracting parties are free to select the currency in which debts are denominated, and ordinary legal procedures for the recovery of debts, in contrast to the special procedures, are available under the law of the Federal Republic to creditors resident in other states of the Community whatever is the currency in which debts are expressed.

### **Some Effects of Variable Exchange Rates**

The variability of exchange rates after the disappearance of the par value system has had numerous effects on international and national law. A study has been made of some of the influences of variability on the drafting of new or amended treaties and on the administration of treaties.<sup>131</sup> Units of account are now a common feature not only of treaties but also of contracts entered into by private parties. The law on the tax treatment of foreign exchange gains and losses has been influenced by current conditions, although inadequately according to some experts.<sup>132</sup> Formerly, the law in some jurisdictions rested on the assumption that exchange rates were stable and that traders did not need to take measures to protect themselves against loss, while now exchange rates are floating,



and sophisticated and substantial forward exchange and Eurodollar markets have emerged.<sup>133</sup> The question has been raised of the effect of fluctuations in the exchange value of the U.S. dollar on margins between fair value and the U.S. price of imported goods under antidumping legislation of the United States. One correlation, among others, that has been detected is between the initiation of new investigations of alleged dumping under the legislation and a declining exchange value of the U.S. dollar.<sup>134</sup>

Some new developments that have occurred as a result of the variability of exchange rates will be considered under the following headings:

Units of Account

Judgments in Foreign Currencies

Judgments and the Articles

Accounting for Variable Exchange Rates

Allocation of Exchange Risks

Normal Protection Against Exchange Risks

Adaptations to Variability

### *Units of Account*

The growing use of units of account by official and private entities is a consequence of the instability of the exchange value of currencies.<sup>135</sup> Some developments in the use of the SDR as a unit of account not noted in earlier pamphlets in this series have been discussed under the heading **SDR as Unit of Account** in an earlier section of this pamphlet. The European Currency Unit (ECU) is increasingly important as a unit of account and as a means of payment in capital and money market transactions, even though the second and permanent stage of the European Monetary System (EMS) has been postponed and even though some effort to extend uses of or to improve the ECU proper during the period of postponement has not succeeded.

The delay in the further development of the EMS or the ECU proper has not discouraged various members of the European Community from adapting their law or regulations to promote the use by private entities of the ECU as a unit of account and as a means of payment. In France, for example, the Ministry of Economics and Finance has advised French banks that, with a view to the expansion of their participation in international financial operations denominated in ECUs, the Ministry had

no objection, notwithstanding the rule prohibiting franc loans to nonresidents, to the grant of franc loans by French banks to nonresidents when the loans constituted the franc portion of ECU-denominated loans. Each bank had to ensure that the total of the franc "portions" of ECU-denominated loans it granted to nonresidents under this authorization did not exceed the total of nonresidents' franc deposits appearing in the bank's liabilities. Subsequently, as a further action to facilitate a larger role for French banks in operations denominated in ECUs on the international market, it was decided that these operations would be bracketed, for the purposes of exchange control regulations, with operations in foreign currency. One of the consequences is that banks may manage their assets and liabilities denominated in ECUs under the same conditions as their assets and liabilities in foreign exchange, without having to observe the former special provision with respect to the French franc portion. Another consequence of these official actions is that French banks may grant loans and advances in ECUs to residents on the same terms as loans and advances denominated in foreign currency; and residents may contract loans denominated in ECUs directly with foreign banks on the same terms as loans in foreign currency.

A similar development has occurred in Italy, where measures have been taken to give the ECU equal status with foreign currencies under exchange control regulations.<sup>136</sup> These and other actions to assimilate ECUs to foreign currencies are not matched by comparable actions to promote the use of the SDR as a unit of account within the Community, even though, under the Second Amendment, members of the Fund have undertaken to make the SDR "the principal reserve asset in the international monetary system."<sup>137</sup>

It has been reported that the leading commercial banks involved in ECU transactions are seeking a central bank, or other monetary authority, to carry out clearing operations and to act as lender of last resort. The banks wish to be able to assure depositors who may be interested in making deposits in ECUs that there would be an adequate supply of ECU-denominated assets to satisfy the depositors' claims.<sup>138</sup>

The ECU may be preferred to the SDR by some European entities because the ECU is composed of European currencies only, and because most of the currencies are allowed to fluctuate only within limits consistent with the exchange rate and intervention arrangements of the EMS. Another motive has been the symbolic quality of the ECU as an

achievement of European solidarity. But not all uses of the ECU have been confined to transactions in which all parties were European.

The Fund has prescribed operations in which settlements of financial obligations between members may be made with SDRs (that is to say, SDRs proper) if the obligations are denominated, *inter alia*, in a unit of account that is composed of currencies and is applied under an intergovernmental agreement.<sup>139</sup> The ECU is a unit of account that meets these criteria. The Fund's Annual Report for 1982 mentions that a transfer of SDRs took place between the central banks of two members of the Fund that participate in the EMS, under the Fund's prescription of settlement obligations. The transfer was in settlement of a financing operation denominated in ECUs that fell due under the operating procedures of the EMS.<sup>140</sup> For the purpose of this and similar settlements, a representative rate for the ECU in terms of the SDR had to be established.

The Protocol on Clearing and Payments annexed to the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States<sup>141</sup> signed at Lusaka on December 21, 1981 provides for the establishment of a Clearing House for the 18 states<sup>142</sup> on behalf of which the proposed treaty has been negotiated. The objective of the Protocol is to facilitate the expansion of trade among these states by establishing, through the medium of the Clearing House, a more effective machinery for the multilateral settlement of payments. The Clearing and Payments Committee, consisting of Governors of the monetary authorities of member states, after consultation with the Council of Ministers, is to establish a unit of account for the activities of the Clearing House. The unit of account is referred to in the Protocol as the "UAPTA" (unit of account of the Preferential Trade Area). Each monetary authority communicates to the Clearing House the official exchange rate of its currency against its intervention or reference currency, and the Clearing House computes the value of each currency in terms of the UAPTA.<sup>143</sup>

The protocol does not define the unit of account, perhaps because two of the potential members (Angola and Mozambique) are not members of the Fund. The UAPTA, however, could be defined by reference to the SDR.<sup>144</sup>

### *Judgments in Foreign Currencies*

*Developments in Miliangos doctrine.* The floating of sterling has led directly to the doctrine that English courts can give judgments in foreign

currencies, so that justice can be done to plaintiffs with claims that are payable in foreign currencies.<sup>145</sup> Another, although less powerful, influence has been the floating of other major currencies as well. The House of Lords, in *Miliangos v. George Frank (Textiles) Ltd.*,<sup>146</sup> rejected the former doctrine, which had prevailed for centuries, that judgments could be expressed only in sterling. The House of Lords decided also that the appropriate rate of exchange, if settlement of a claim expressed in a foreign currency is made in sterling, is the rate at the date of payment and not when the claim accrued. The decision and the remarkable effects it has had on judgments vindicating claims expressed in currencies other than sterling even though not rooted in contractual indebtedness have been described in earlier pamphlets in this series.<sup>147</sup>

The *Miliangos* case has had further important effects in English law since Pamphlet No. 36 (1981), the preceding issue in this series dealing with legal developments, was published. For example, under the provisions of English law governing attachment, only "debts" could be attached to satisfy a judgment. Until recently, a sum standing to the credit of a creditor in foreign currency was not regarded as a "debt." If the creditor was not paid, his remedy was not to recover a debt but to recover damages for breach of contract. The reason was that foreign currency was regarded as a commodity or other object and a claim to it was no more a debt than a claim to a foreign cow. Only a sum standing to the credit of a creditor in sterling in a current or deposit account could be attached by a procedure called garnishee proceedings.

In *Choice Investments Ltd. v. Jeronimon (Midland Bank Ltd, garnishee)*,<sup>148</sup> the English Court of Appeal has decided the question whether the *Miliangos* case has modified the older law. The C. Company obtained a judgment expressed in sterling against J. in respect of a debt in sterling and costs. J. had a credit balance in U.S. dollars in a deposit account with a London bank. Withdrawals were subject to seven days' notice. The company obtained a garnishee order nisi against the bank attaching a sufficient amount of the dollar account to satisfy the judgment. An order nisi directs the bank to pay that amount into court or to the judgment creditor within a stated period unless (nisi) there is a sufficient reason for the bank not to comply. The order nisi is an attachment that enjoins the bank from paying the money to its customer, so that the court can decide whether the garnishee order shall be made absolute, unless the debt is discharged in the meantime. The order is made absolute in the

absence of sufficient reason why it should not be. In this case the bank challenged the legality of the garnishee order nisi.

The Court of Appeal held that the dollar account must be considered a debt owed to the customer J. since the *Miliangos* case, because judgment could be given for the account in U.S. dollars as a debt. The procedure that a bank must follow on receiving a garnishee order nisi is to freeze such an amount of dollars as would realize the amount of the sterling judgment at the buying rate of sterling on the day the bank receives the order.<sup>149</sup> The bank makes the purchase of sterling as soon as reasonably practicable after it receives notice that the order has been made absolute. If, at that date, the dollars are more than enough to satisfy the judgment debt at the rate of exchange for purchasing sterling with dollars at that date, the balance is released to the customer on demand. If the amount realized is not sufficient to satisfy the judgment debt, the full amount realized is paid to the judgment creditor.

The Master of the Rolls stated that the principles of the decision would be adaptable to other circumstances. For example, the judgment creditor might have a judgment in Swiss francs and then find that the judgment debtor has a bank account in U.S. dollars. There was no reason why a garnishee order could not be made to attach the account in an amount sufficient to meet the judgment in Swiss francs.<sup>150</sup>

*Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.*,<sup>151</sup> decided by the Queen's Bench Division (Commercial Court) of the English High Court on February 27, 1979, provides some important clarifications of the *Miliangos* doctrine. Ozalid, an English company, agreed to sell certain machinery and equipment to a Nigerian concern for a price expressed in U.S. dollars. Payment was to be made by irrevocable letter of credit valid for six months and negotiable through a bank based in London. The seller arranged for a letter of credit to be issued by the defendant, a Nigerian bank with a branch in London. In the circumstances of the case, the defendant should have made payment not later than October 5, 1977, but, without legal justification for delay, did not pay until December 12, 1977. Dollars received by the plaintiff were credited to an account, from which, not later than the last working day of each month, an amount of "excess dollars" determined in accordance with English exchange control regulations had to be sold to an authorized bank for sterling. Dollars were sold under this exchange control instruction on November 1, 1977 and on January 3, 1978. The latter sale included

dollars received from the defendant on December 12, 1977. The U.S. dollar was depreciating against sterling in the period that was relevant.

The court concluded that the defendant must have been aware of the facts, and that the plaintiff's loss was foreseeable. The court held, nevertheless, that it may not have been foreseeable that Ozalid would have delayed sale of the dollars until the latest date for sale, the end of the month of receipt. It was appropriate, therefore, for Ozalid to base its claim on notional sales on October 5, 1977, when the defendant should have paid, and December 12, 1977, when it did pay. The plaintiff was entitled to an amount of sterling that represented the change in the exchange rate between the U.S. dollar and sterling between October 5 and December 12, 1977.

The court noted that because of the *Miliangos* case, which had "revolutionized"<sup>152</sup> the law on claims involving foreign currencies, a plaintiff is entitled to make its claim in foreign currency in circumstances covered by the *Miliangos* doctrine. But the doctrine did not require a plaintiff to make its claim in foreign currency:

The overriding reason for changing the law was to provide a procedure which would enable the Courts to compensate the claimant in full for the wrong which he had suffered. A change which *required* the plaintiff to claim in foreign currency and to accept sterling at the rate prevailing at the date of judgment could in some circumstances work as great an injustice as the old procedure requiring him to claim in sterling and to adopt the date of breach rate of exchange.<sup>153</sup>

Nevertheless, the court continued, a plaintiff does not have a free choice. In the circumstances of the *Miliangos* case, only a judgment in Swiss francs could compensate the plaintiff. Later cases<sup>154</sup> have decided that it is for the plaintiff to select the currency in which to make his claim and for the plaintiff to prove that an award or judgment in that currency will most truly represent his loss and most fully and exactly compensate him for that loss.<sup>155</sup> The currency of account is a factor of considerable importance but not decisive. (In this case, however, the dollar was both the currency of account and the currency of payment.)

Although the dollar had this double function, the plaintiff's loss was incurred in sterling, and this fact was reasonably foreseeable by the defendant.

In the light of the foreign exchange regulations of this country, the value of foreign currency to an English company engaged in the export trade must be the amount of sterling which that currency will buy.<sup>156</sup>

It was irrelevant that the plaintiff had accepted the risk of the depreciation of the dollar between the date of the contract and the due date for payment, because the risk was accepted for that period only. The plaintiff's claim was admissible even though the defendant had paid the full dollar amount called for by the contract before the writ making the claim was issued. That payment had to be credited at the rate of exchange on the date of actual payment against the sterling amount that would have been realized on the due date.<sup>157</sup>

The *Ozalid* case makes it clear that the issue between the parties in some circumstances may be the currency in which the plaintiff's loss really was suffered. The pre-*Miliangos* principle of judgment in sterling only was not subject to this uncertainty. The *Miliangos* doctrine is regarded as one that substitutes greater equity for certainty, but some commentators question whether the *Miliangos* doctrine does always produce greater equity.<sup>158</sup>

Another reflection prompted by the *Ozalid* case is that the law sometimes attaches importance to reasonable foreseeability by the parties that the fluctuation of exchange rates may produce loss. Why should there ever be doubt that it is reasonable to foresee that, in present conditions, exchange rates may fluctuate and produce loss for a party? It may have been defensible in the days of the par value system to require a party alleging the reasonable foreseeability of changes in par values, or alleging that a member of the Fund might resort to floating in violation of its obligations under the Articles, to offer proof of foreseeability, but it would be defensible now to assume that exchange rates will fluctuate. The one exception to this assumption might be the case in which the foreign currency in which a claim is expressed is pegged to sterling and pegged, moreover, within narrow margins. In those circumstances, the exchange rate that would be relevant in the proceedings would fluctuate only within the margins. This possible exception is of negligible practical importance if the facts as they stood at mid-1982 persist, because only one currency was pegged to sterling at that time.<sup>159</sup> If the United Kingdom were to join the exchange rate and intervention arrangements of the European Monetary System, further exceptions might be recognized for exchange rates between sterling and the currencies of other members of the European Community that subscribed to these arrangements. But the changes that have occurred in the definition of currencies in terms of the

ECU might deter the recognition, on the basis of the EMS, of exceptions to a presumption in favor of fluctuation.

The English Law Commission,<sup>160</sup> in collaboration with the Scottish Law Commission, in mid-1981 issued, for comment and criticism, its Working Paper No. 80, *Private International Law: Foreign Money Liabilities*.<sup>161</sup> The paper is a detailed and systematic survey and reappraisal of both law and procedure in the whole field of foreign money liabilities. The Commission has reached the provisional conclusion that, in view of the body of decisions that has developed in recent years, legislation is not necessary, at least for the time being, even to deal with aspects that have not yet been determined or with the few relatively minor matters that the Commission thinks have not yet been settled entirely satisfactorily.

The Law Commission endorses both elements of the *Miliangos* doctrine, namely, that the courts can express judgments in a foreign currency when appropriate and that the rate of exchange between sterling and the foreign currency is the one prevailing at the time of payment, which, in the case of execution of a judgment ordered by the court, is, for practical reasons, the date on which the court makes that order. It is interesting to note that, although the floating of currencies, in the sense that they are not maintained in value on the basis of a common denominator, has been the event that brought about the *Miliangos* doctrine, an intimation of the desirability of change was expressed in a dissenting opinion by Lord Denning as early as 1969.<sup>162</sup> The par value system was still in force and effect, but Lord Denning, then Master of the Rolls, was inspired to express his view as a result of the devaluation of sterling.

The provisional conclusions of the Law Commission on the major issues of policy it considered are reproduced in Appendix E.<sup>163</sup>

The leading English scholars on the *Miliangos* doctrine and developments based on it have expressed their doubts about the present state of the law when compared with the law before the *Miliangos* doctrine emerged. Their minor argument is that defendants may be induced to speed up or delay settlements on the basis of their forecasts of exchange rate fluctuations. Their major argument is that the new rules provide less certainty than the old rules, especially in the judicial determination of the currency of judgments, and therefore make parties more uncertain about the terms that they should negotiate or the means of protection against risk



that they should employ.<sup>164</sup> The absence of explicit agreement allocating the risk of fluctuations in exchange rates—which agreement the *Miliangos* doctrine permits—can inflict serious loss on a party.<sup>165</sup>

*Miliangos doctrine in other jurisdictions.* The effect of the *Miliangos* case in some other jurisdictions was examined in Pamphlet No. 33 (1980).<sup>166</sup> The case is more likely to produce effects in the many jurisdictions in which traditionally English decisions have persuasive influence. These effects may be produced even if the statute law of such a jurisdiction prevents the application of the *Miliangos* doctrine itself.

In Canada, the expression of judgments in a foreign currency is impeded by section 11 of the Currency and Exchange Act:<sup>167</sup>

All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.

It has been explained that the rationale of the provision in relation to judgments is that all judgments must be susceptible of execution,<sup>168</sup> although it has been pointed out that there are other justifications for the provision.<sup>169</sup> The sheriff's officers would have difficulty in attempting to execute a judgment expressed in a foreign currency. But an Ontario court, in *Batavia Times Publishing Co. v. Davis*,<sup>170</sup> has said that, were it not for the statutory provision,

I do not believe that similar problems would arise if a judgment of this Court could be expressed in terms which included a specified sum of foreign currency and provision for the payment of an equivalent amount of Canadian dollars.<sup>171</sup>

The *dictum* quoted above shows sympathy for the *Miliangos* solution even though it was not available for the expression of judgments. The *Miliangos* case, however, has exercised influence on other legal problems in jurisdictions other than England. In the *Batavia Times* case the plaintiff sought enforcement in Ontario of a judgment originally obtained in Pennsylvania and expressed in U.S. dollars. The issue was the date as of which the rate of exchange was to be chosen for translating the U.S. dollars into Canadian dollars.

Having regard to the economic climate of fluctuating currencies which I know has existed for some time the choice can be very significant to the parties.<sup>172</sup>

The court concluded that the law on the choice of the rate of exchange was judge-made, and that Canadian courts had followed English case-law.

Earlier English cases had applied the rate of exchange at the date of the original judgment. The court thought, however, that it should consider more recent developments in England when proceedings in Canada were based on the original cause of action. The English rule for over three centuries had been that in an action for damages the rate of exchange at the date of a breach of contract or the commission of a tort was the rate to be chosen. This rule had been applied to a debt due in a foreign currency. The *Miliangos* case, however, had "opted for a more realistic approach to modern economic conditions"<sup>173</sup> and had changed the law because fluctuations in exchange rates were normal now and not the exception. In present conditions, fluctuations occurred between the date of breach and the date of judgment as well.

Canadian courts had applied the "breach-day" rule, but that rule had been based on English cases now overruled by the *Miliangos* case. No Canadian case had been cited applying the breach-day rule to actions to enforce foreign judgments. In the absence of such a decision, the court considered itself free to follow the new trend in England. English courts, it was assumed, would probably apply the *Miliangos* doctrine, insofar as it dealt with the choice of exchange rates, to actions to enforce foreign judgments.<sup>174</sup>

The Ontario court considered itself unable to apply the rate of exchange as of the date of payment, because that rate could not be known when judgment was given, and there was no machinery for enforcing it.<sup>175</sup>

If I could be satisfied that there are no procedural or practical problems and that the *Currency and Exchange Act* either did not apply to judgments or did not prevent a judgment being given for a sum of foreign currency and its equivalent in Canadian dollars, as the English Courts are now doing, I would adopt the effective date of payment as being the date for determining the rate of exchange. Because I am not certain that there are no problems and because I assume that the *Currency and Exchange Act* does not permit judgments to be given as they are now being given in England, I will use the rate of exchange as prevailing at the date of the second judgment herein, the date of my judgment, December 21, 1977, in determining the amount which the defendant here owes to the plaintiff. As I have said above if the parties cannot agree upon what the rate of exchange was on December 21, 1977, I will accept on behalf of the plaintiff a statement of any chartered bank of Canada signed by an officer or manager thereof which sets out the rate of exchange on that date.<sup>176</sup>

In a later case, *Am-Pac Forest Products Inc. v. Phoenix Doors Ltd. et al.*, decided by the Supreme Court of British Columbia on July 12,

1979,<sup>177</sup> damages were claimed for breach of a contract that provided for payment in U.S. dollars. An issue in the case was the date as of which to choose the rate of exchange for translating the U.S. dollar amount into Canadian currency. "In this era of constantly fluctuating exchange rates, this can be a matter of some import."<sup>178</sup> In this case, the Canadian dollar had depreciated substantially against the U.S. dollar between the date when the debt became payable and the date when the case began to be heard.

The court spoke of English law as now conforming to "commercial realities" and referred to the *Batavia Times* case as "a step in the same healthy direction."<sup>179</sup> The British Columbia court, however, distinguished the Ontario decision as one that dealt with the enforcement of a foreign judgment, and held that decisions of the Canadian Supreme Court required application of the breach-day rule in the case before the British Columbia court.

The decision of the Quebec Superior Court (in Bankruptcy) in *Re Canadian Vinyl Industries Inc.*,<sup>180</sup> on April 7, 1978, preceded the decision in the *Batavia Times* case. A creditor, resident in the Federal Republic of Germany, claimed an amount under contracts with a Canadian debtor expressed in deutsche mark in the bankruptcy proceedings of the debtor. The creditor based its claim on the rate of exchange at the date of submission of its proof of claim in the proceedings and reserved the right to adjust the rate when at later dates dividends were paid by the trustee in bankruptcy.

The court held that under the Bankruptcy Act<sup>181</sup> the claims of creditors are to be determined at the time the trustee files with the official receiver the insolvent person's proposal for a compromise with creditors, if the proposal is accepted by the creditors and ratified by the court. This date is relevant for all other purposes under the Act. The court held that the date should apply for determining the rate of exchange also unless there was a compelling reason to depart from it. The court considered this solution equitable because the proposal, if made effective, was a new contract that operated as a novation of the contracts under which claims arose. Under the new contract, dividends were payable at fixed dates, and the creditor could enter into a forward contract for sale, at the rate of exchange at the date of entry into the contract, of the Canadian dollars the creditor would receive from the trustee.

The court was pleased that the Bankruptcy Act relieved the court of the necessity to involve itself with English decisions, in view of the “instability”<sup>182</sup> that resulted from the decision by the House of Lords in the *Miliangos* case to overrule its own earlier decision of 1961.<sup>183</sup>

Thus a reason, persuasive to me, for applying to its fullest extent—albeit in a somewhat arbitrary and artificial manner—the clear and unambiguous rule set forth in the terms of the above-quoted ss. 42(1) and 95(4) of the Canadian Bankruptcy Act, is the sheer hopelessness of attempting to follow and to apply, on a continuing and current basis, the leading decisions in the law of foreign currency obligations of the highest courts of England (where the bulk of our bankruptcy law comes from, but not thank goodness, ss. 42(1) and 95(4), which are of pure Canadian inspiration).<sup>184</sup>

This rejection of English case-law is too energetic in view of *Re Dynamics Corporation of America*,<sup>185</sup> decided by the Chancery Division of the English High Court in 1975 but not mentioned in *Re Canadian Vinyl Industries Inc.* An English court had ordered the liquidation in England of a corporation incorporated in the State of New York for which a scheme of arrangement had been approved in New York under the Federal Bankruptcy Code of the United States. For the purposes of a scheme of arrangement for the distribution of assets in England, the English court was asked at what rate of exchange the claims denominated in U.S. dollars of creditors outside the United Kingdom should be translated into sterling. “The wind of change,” the court declared, “bloweth where it listeth,”<sup>186</sup> and the *Miliangos* case had opened up the theoretical possibility, in bankruptcy or liquidation proceedings, of choosing the rate of exchange on a date not selected in the past. In such proceedings, the principle is that liabilities have to be reduced to a single unit of account as of the same date so as to enable a *pari passu* distribution of available assets to be made to all claimants. The single unit of account in English proceedings can be nothing but sterling. The exchange rate must be the one at the date on which the bankruptcy or winding up is ordered by the court and not on any other of a number of conceivable dates, such as the dates when claims arose or proofs of claims were admitted.

The court rejected the argument that, on the basis of the *Miliangos* doctrine, the sterling value of dollar claims should be readjusted when dividends were paid. Even if the monetary value of a claim is

unquantified, the creditor must estimate its sterling value when, before the order is made, he submits his proof. Later events, such as changes in exchange rates, cannot be taken into account, even though, when sterling is depreciating, creditors would reap maximum advantage if the exchange rate at the latest conceivable date, which would be when dividends were paid, were feasible.<sup>187</sup>

The principle of the *Dynamics Corporation* case was confirmed by the English Court of Appeal on February 11, 1982 in *Re Lines Bros. Ltd.*<sup>188</sup> The principle was the same in both cases even though in the earlier case the winding up was compulsory while in the later case it was voluntary.

In the later case, a bank had lent an English company an amount of Swiss francs, which were repayable in the same currency on November 5, 1971. Voluntary liquidation was deemed to have begun on September 28, 1971. The liquidators paid dividends in sterling to the creditors whose claims were in currencies other than sterling at the rate of exchange prevailing on September 28, 1971.<sup>189</sup> Sterling began to depreciate against the Swiss franc after that date. All creditors, whether their claims were to payment in sterling or in another currency, were paid in full on the basis of the exchange rates on that date. A substantial amount of assets remained after this distribution, and the liquidators proposed to distribute the residue in partial satisfaction of claims to interest that had accrued after September 28, 1971. The bank protested, arguing that, on the basis of the rates of exchange when dividends had been paid, it had lost more than 40 percent of its claim, while the creditors with sterling claims had received 100 percent of their claims. A creditor with a claim in deutsche mark had received about the same return as the bank with its claim in Swiss francs, but a creditor with a claim in Italian lire had received more or less the whole of its claim because the lira had depreciated at about the same rate as sterling against the Swiss franc and the deutsche mark.

The bank argued that the liquidators should have paid the dividends to it either in Swiss francs or in an amount of sterling equivalent to the value of the proportion of the debt in Swiss francs that was being paid. The amount of sterling should have been calculated at the rate of exchange on the date of payment. If, for example, a dividend represented 10 percent of total claims, the bank was entitled to 10 percent of the total loan of SF 18.5 million, calculated at the rate of exchange on the date of payment of the 10 percent. The bank relied on the *Miliangos* doctrine to support this argument. The Court of Appeal rejected the bank's contention, because, if

accepted, it would destroy the certainty about the distribution of assets that the liquidators' practice ensured for all creditors.

One member of the Court of Appeal described liquidation as a "collective enforcement procedure."<sup>190</sup> A winding-up order (or its equivalent in a voluntary liquidation) was comparable to an order by the court authorizing execution of a judgment expressed in a foreign currency. The amount of the judgment had to be translated into sterling at the rate of exchange on the date of the court's order. The judgment creditor was not able to propose the rate of exchange as of a later date, and the creditors were in the same position after the winding-up order had been made in a liquidation.<sup>191</sup>

The *Dynamics Corporation and Lines* cases do not resile from the proposition that under the *Miliangos* doctrine a creditor whose claim is to foreign currency is entitled to that currency and not to the sterling equivalent. The practical necessities of liquidation require the solution that has been adopted in these cases, in the same way that a judgment expressed in foreign currency can be enforced in England only if the currency is translated into sterling when the court authorizes enforcement.

The *Miliangos* doctrine, it has been seen, has had some influence in Canada in enabling one court to conclude that the breach-day rule does not apply to judgments to enforce foreign judgments, although the court chose the rate of exchange at the date of the second judgment and not the rate at the date of payment. In the other Canadian cases that have been discussed, the courts have decided that the breach-day rule still applies to judgments for damages for breach of contract and that a special rule applies to claims in bankruptcy. In one of these other cases the court was vehemently critical of the *Miliangos* doctrine, although on similar facts English courts have reached the same result as in the Canadian case notwithstanding the *Miliangos* doctrine. One author who has examined Canadian jurisprudence has written that apart from a few exceptions

...Canadian law is currently governed by the principles which prevailed in England before the legal reform initiated by the *Miliangos* decision. Nevertheless, it is not to be excluded that these principles may be dropped in the near future. The unfair and anachronistic nature of the *breach-date rule* has caused a reaction in some legal quarters which now refuse to support it. The trend emerged among the judiciary in Ontario who recently have questioned its validity. Their decision met with a response that seems to be gaining increasing support. (*Translation*)<sup>192</sup>

The same author believes, “[w]ithout expressing too much optimism,” that the *Batavia Times* case “may be regarded as the beginning of a serious attack on the exclusive application of the breach-date rule.”<sup>193</sup> He cites other Canadian decisions that have followed the *Batavia Times* case in applying the rate as of the date of judgment, although not as of the date of payment. Not all the decisions he cites have involved the enforcement of foreign judgments. Nor have the decisions been confined to Ontario courts.<sup>194</sup>

The Law Reform Commission of British Columbia is of the opinion that the Canadian Federal authorities should amend Article 11 of the Currency and Exchange Act. In view of the slowness and complexity of such a procedure, the Commission would prefer a bolder solution. It has suggested that provincial laws should make it mandatory for courts to apply the rate of exchange at the date of payment.<sup>195</sup>

*Isaac Naylor & Sons Ltd v. New Zealand Co-operative Wool Marketing Association Ltd*,<sup>196</sup> decided by the New Zealand Court of Appeal on August 14, 1981, is an example drawn from New Zealand jurisprudence of the effects of the *Miliangos* case in other jurisdictions, even though the courts of those jurisdictions consider themselves unable to express judgments in a foreign currency. The litigation concerned five contracts under which Naylor, an English company, purchased wool from the Co-operative, comprised of New Zealand wool farmers. The wool was to be delivered in the last two quarters of 1974 on shipping instructions given in due time by Naylor. The prices were expressed in sterling. Payment was to be made in cash against documents on arrival of the wool. The practice of the Co-operative, which was known to Naylor, was to have sterling payments converted forthwith into New Zealand currency and remitted to New Zealand. Shipments were delayed until June 1975 at the request of Naylor, subject to reservation by the Co-operative of its rights resulting from the delay. Payments were made at the contract price, but the Co-operative claimed that the delay had caused them various losses, including loss occasioned by the depreciation of sterling against the currency of New Zealand, for all of which the Co-operative claimed damages.

Naylor argued that recovery for exchange losses was ruled out by the principle of nominalism. A debt expressed and payable in a particular currency may be discharged by late payment of the same number of units of the currency as is called for by the contract even if that currency has depreciated during the period of delay. The court pointed out that this

principle did not apply to the present case, which was one not of delay in payment after shipment but of Naylor's delay in giving shipping instructions.

All three members of the court agreed that the principle of nominalism did not apply in this case. One member of the court expressed the opinion that if there had been no international element in the case the principle of nominalism probably would have applied and probably would have prevented the recovery of damages claimed because of depreciation of the New Zealand dollar. The *Miliangos* case, he said, dealt not with the principle of nominalism but with another doctrine, which perhaps had an affinity with nominalism in reflecting the former judicial reluctance to allow changes in the value of money to be taken into account. The principle in issue in the *Miliangos* and later cases was whether English courts could give judgments only in sterling at the rate of exchange on the date of a breach of contract or the commission of a tort when liability had to be measured in a foreign currency. "The achievement of the House of Lords in those cases was to abolish that doctrine in favour of more realistic solutions."<sup>197</sup>

Judgment could be given only in New Zealand currency, but the *Miliangos* line of cases gives

...some encouragement for the approach that in contracts made in international trade and resulting in the exchange of currency by one party, there is no special rule against the recovery of exchange losses. On this approach such losses will be recoverable if the criteria ordinarily applied in damages cases in contract are satisfied. As is well known the most important of these is usually foreseeability.<sup>198</sup>

The court held that the loss sustained by reason of the depreciation of sterling against the New Zealand dollar between the latest dates when payments could have been made had shipping instructions been given in accordance with the contracts and the actual dates of payment was foreseeable and therefore not too remote. Judgment was given for that loss. The court regarded the case as one of first impression on this point. The principle of the case on the remoteness of damage is that in current conditions contracting parties, at least if they are experienced traders, must be taken to foresee that exchange rates may fluctuate and that loss attributable to fluctuation may be the result of failure to perform contractual obligations on time. The recovery of damages for this loss in



some circumstances may put a creditor in a position similar to the one that would result from the *Miliangos* doctrine, even though the court can express judgments only in its domestic currency. The effect of forward exchange contracts on the quantum of damages in the case is discussed in a later section of this pamphlet.

The New Zealand case resembles the English *Ozalid* case in the emphasis placed on the reasonable foreseeability of an exchange loss as a specific loss that was suffered because of the delayed payment of currency, foreign to the forum, in which the contract called for payment. In both cases, the defendant had foreseen, or should reasonably have foreseen, that the plaintiff would have exchanged the currency of payment for the currency of the forum. Foreseeability was emphasized because of the rules of both English and New Zealand law relating to damages for breach of contract. The specific character of the loss was emphasized because of difficulties in those systems relating to the recovery of damages for delayed payment of a debt.<sup>199</sup>

*Judgments and interest.* Pamphlet No. 33 (1980) discussed the conflicting views of English judges on the choice of the appropriate rate of interest on judgments expressed in foreign currencies in cases in which English courts have discretionary authority to grant interest.<sup>200</sup> The English Law Commission has provisionally endorsed the economic argument that there must be consistency between the currency of a judgment and the rate of interest awarded by the court. The inverse relationship that exists between the interest rate in a country and the strength of the external value of the country's currency should be recognized when courts award interest.<sup>201</sup> The Commission's endorsement favors the decision adopted in *Miliangos v. George Frank (Textiles) Ltd. (No. 2)*.<sup>202</sup> There is some evidence, however, that the inverse relationship is not inevitable. Economists have been puzzled by the relationship between the exchange rates and the interest rates of some currencies during certain periods.

The authors of a paper submitted to the Law Commission have demonstrated that under certain assumptions foreign creditors would have derived greater benefit if they had pursued claims in sterling from time to time in English courts instead of formulating their claims in a non-sterling currency. The demonstration rests on the assumption that the courts would have awarded the interest rate on sterling.<sup>203</sup> The authors recommend that

plaintiffs should take into account the currency in which interest will be awarded when considering the currency in which to formulate their claims.

These same authors have criticized the *Ozalid* case as one in which the plaintiff received double compensation. Special damages in sterling were awarded to the plaintiff as compensation for the fluctuation in the exchange rate of sterling, the currency in which loss was suffered as the result of delayed payment of a debt expressed in U.S. dollars. The award of interest on the sterling equivalent of the dollar debt for the period of delay was compensation for the same loss.<sup>204</sup> Courts should apply an economic analysis to ensure that the currency of judgment, the rate of exchange for translating a foreign currency, and the award of interest do not result in the overcompensation of plaintiffs.

### *Judgments and the Articles*

*Rates of exchange.* The Articles do not dictate the date as of which an exchange rate must be chosen in proceedings in the courts of members. In particular, the Articles do not direct that the courts must apply the exchange rate as of the date of breach or the date of payment. If the courts follow the "breach-date" principle, a difference between the exchange rate as of the date of breach and the exchange rate prevailing at the date of payment does not constitute a multiple currency practice. The translation of a foreign currency into the currency of the forum is not an exchange transaction. Multiple currency practices involve exchange transactions, that is, the exchange of one currency for another.

The courts are not fettered by the Articles in their choice of the date as of which an exchange rate is applied, but must the exchange rate of a member's currency as of the date they choose be consistent with the member's obligations under the Articles? A contract may provide for payment in the currency of the forum at the market rate of exchange between that currency and a foreign currency, or at one of various rates of exchange, but the contractual rate may be inconsistent with the issuing member's obligations under the Articles. The Fund may have decided that the exchange rate is inconsistent with the member's obligations under Article IV, or the rate may result from a multiple currency practice that is not authorized by the Articles or approved by the Fund. The question of the appropriate exchange rate may arise when the contract does not

prescribe a rate of exchange. For example, a contract provides for payment in a foreign currency. The forum finds it necessary to select an exchange rate either because the forum cannot give judgment in a foreign currency, or because it can do so, has given judgment in a foreign currency, and is then called on to enforce the judgment, which it can decree only in the domestic currency.

The rate of exchange to be selected by the court should not be affected by the consistency of exchange rates with the issuer's obligations under the Articles. Justice can be done between the parties only by applying the exchange rate that is appropriate in the circumstances of the case, whether or not that rate is consistent with the issuer's obligations. Normally, the appropriate rate of exchange will be one that prevails in the market. The issue of the legality of a member's exchange arrangements or the exchange rates for its currency arises, and is to be settled, between the member and the Fund.

A comparable issue of the choice of exchange rate arose in England in the case of *Lively Ltd. and Another v. City of Munich*.<sup>205</sup> although on facts that are not typical. Sterling was payable by reference to the exchange rate between that currency and the U.S. dollar on December 1, 1973 in accordance with the terms of the London Agreement of September 1953 on German External Debts. Under the Agreement, the rates were to be determined by "the par values of the currencies concerned in force on the appropriate date as agreed" with the Fund. On the appropriate date in the case, both sterling and the U.S. dollar were floating. The par values of both currencies were still in existence according to the law of the Fund, and market rates were inconsistent with the Articles. The court held, on the following principle, that market rates had to be applied:

In an issue concerning the applicable rate of exchange between a debtor and creditor under a bond which incorporates art 13 it is in my judgment essential to construe this article in a commercially realistic sense. The present issue is concerned with a rate of exchange applicable to a commercial transaction: it is not concerned with treaty obligations by governments to the IMF or inter se. It does not follow from the fact that par values continued to be used for certain purposes in the latter field that they were "in force" for the purpose of construing these words when art 13(a) is incorporated into a bond. In that context, par values are in my view no longer in force when margins are no longer being maintained in relation to the currencies in question. The fact that par values continue to exist does not necessarily mean that they remain in force.<sup>206</sup>

## SDRS, CURRENCIES. AND GOLD

The facts have been referred to as untypical for the purposes of the present discussion because they involved the interpretation of the London Debt Agreement, and the decision rested on the words "in force" in that Agreement.<sup>297</sup> But the court clearly held that the legality under the Articles of market exchange rates was irrelevant when commercial transactions were involved.

The *Miliangos* case is not a clearer indication of the judicial reaction to exchange rates that are incompatible with the Articles, even though the case involved the choice of a rate of exchange as of a date when the currencies of members were floating inconsistently with the Articles. The Second Amendment had not yet become effective, and par values were still in existence under the law of the Fund. The rate of exchange in the *Miliangos* case was between sterling and the Swiss franc. Switzerland was not a member of the Fund, so that a parity between the two currencies did not exist under the Articles. There is no suggestion, however, in any of the later cases involving exchange rates between the currencies of members that the legality of exchange rates under the Articles must be taken into account when a court selects a rate of exchange.

Only two exceptions might be recognized to the principle that courts adjudicating on the claims of private parties should not take into account the legality of exchange rates under the Articles. One possible exception would be the case in which legality under the Articles is required by the law of the forum as a condition for the recognition of an exchange rate. The exception is no more than possible because there may be no such case. If there were such a case, a court might be faced with the problem that there was no actual rate of exchange that was legal under the Articles. A plaintiff's valid claim should not be unenforceable for this reason. The *Lively* case shows how strongly courts may react against the application of a rate of exchange that is fabricated by some arithmetic exercise but was not in effect on a relevant date.

The other exception involves Article VIII, Section 2(b), and is discussed below under the heading *Restrictions*. This exceptional case is more likely to occur.

*Restrictions.* The Articles, though neutral on the question of the date as of which courts choose an exchange rate, can have an effect on a contracting party's claim to currency foreign to the forum. Suppose that X, a resident of England sues in England to recover U.S. dollars to which he is entitled under a contract with Z, a resident of Patria, a member of the

Fund. The contract is considered by the English courts to be an “exchange contract” within the meaning of the first sentence of Article VIII, Section 2(b) of the Articles.<sup>208</sup> Patria has adopted an exchange control regulation forbidding its residents to make payments in U.S. dollars to nonresidents. This restriction is authorized by the Articles or has been approved by the Fund. An English court should declare the contract unenforceable under Article VIII, Section 2(b). The result would not be an exception to the *Miliangos* doctrine. The result would be dictated by Article VIII, Section 2(b).<sup>209</sup> The court should award neither dollars nor sterling.

The provision would apply not because the United Kingdom objects in its own interests to a judgment in dollars on the facts as supposed, but because of the interests of Patria in the choice of currencies of payment made by its residents. Article VIII, Section 2(b) imposes an obligation on the United Kingdom to collaborate with Patria in these circumstances.

The section *Rates of Exchange*, above, concludes with the comment that an exception to the neutrality of the Articles on the validity of exchange rates selected by courts can occur as the result of Article VIII, Section 2(b). Patria’s exchange control regulations may forbid its residents to enter into exchange contracts at other than official rates of exchange.<sup>210</sup> If the exchange control regulations are maintained or imposed consistently with the Articles, courts in the territories of other members must refrain from enforcing exchange contracts if they provide for exchange rates that are not official. At first sight, a case of this kind would involve the question of consistency with the Articles of exchange control regulations and not exchange rates. It is unlikely, however, that a member’s exchange control regulations could be considered to be “maintained or imposed consistently with the Articles” if the regulations prescribed that residents were to enter into exchange contracts at specified exchange rates that were not consistent with the Articles.

The obligation to give effect to Patria’s law by declaring a contract unenforceable does not invalidate the conclusion of the English Law Commission that the *Miliangos* doctrine is a principle of procedure and not one of substance, so that, if Article VIII, Section 2(b) is not involved, foreign law cannot interfere with the application of the *Miliangos* doctrine by an English court.<sup>211</sup>

It must not be thought that the Articles require members to apply—or to reject—the *Miliangos* doctrine. Members have freedom of choice in

relation to this practice. The Articles recognize that international trade is carried on in relatively few currencies.<sup>212</sup> For example, members are required by Article VIII, Section 2(a) to obtain the Fund's approval of restrictions on the *making* of payments and transfers for current international transactions. The provision does not extend to restrictions under a member's regulations on the currencies that the member's residents may receive in international payments to them. A member is free to prescribe the currencies that its residents may contract to receive in payments to them, provided that its prescriptions are not discriminatory.<sup>213</sup>

The absence of a multilateral treaty on the *Miliangos* doctrine or on some other solution of the problems to which it is addressed may tend to encourage "forum shopping." The European Convention on Foreign Money Liabilities, which was proposed by the Council of Europe in 1967 but which has not become effective, would have dealt with the problem among contracting parties.<sup>214</sup> The absence of international agreement may also encourage parties to adopt contractual terms entitling a payee to recover, in jurisdictions in which the *Miliangos* doctrine does not apply, a head of damages equivalent to the decline in the exchange rate of the currency of the forum against the contractual currency of payment between the date of judgment and the date of discharge of the judgment debt.<sup>215</sup>

### *Accounting for Variable Exchange Rates*

The observance or nonobservance of recognized accounting practices can produce various legal consequences. The fluctuation of exchange rates has intensified problems of accounting when currencies foreign to the accounting entity are involved. The Financial Accounting Standards Board of the U.S. Financial Accounting Foundation has replaced Financial Accounting Standards Board (FASB) Statement No. 8 (*Accounting for the Translation of Foreign Currency Transactions and Foreign Currency Financial Statements*)<sup>216</sup> with FASB Statement No. 52 (*Foreign Currency Translation*).<sup>217</sup> The later Statement was published in December 1981 and is to be effective for fiscal years beginning on or after December 15, 1981, although enterprises may decide to follow its recommendations at an earlier date.

The approach of FASB Statement No. 8 was that foreign nonmonetary assets, such as inventories and property, plant, and equipment, should be translated into U.S. dollars at exchange rates prevailing when they were

purchased. Monetary assets and liabilities in foreign currency, such as cash receivables, payables, and debt, were to be translated at current exchange rates. Therefore, if a foreign company's total monetary assets were not equal to its total monetary liabilities, a "gain" or "loss" would occur on a change in exchange rates. According to FASB Statement No. 8, the "gain" or "loss" went into income statements, with frequent effects on them because of variations in exchange rates. Fluctuations in earnings had to be reported even when underlying foreign operations were stable. Many multinational businesses undertook uneconomic practices to reduce their exposure as a result of this form of accounting.

FASB Statement No. 8 was the subject of much criticism. FASB Statement No. 52 recommends, among other changes, that in most cases all assets and liabilities in foreign currency financial statements should be translated at current exchange rates, and that the adjustments produced by these translations should be recorded directly in a separate translation adjustment account in stockholders' equity and not in income. For revenues, expenses, gains, and losses shown in financial statements, the exchange rate at the date when these elements are recognized should be used. Translation at numerous dates might be required by this recommendation and therefore an appropriately weighted average exchange rate for the accounting period may be used. Foreign currency transactions, that is, transactions denominated in a currency other than the accounting entity's functional currency, may produce receivables or payables in a fixed amount of the foreign currency. A change in exchange rate between the functional currency and the foreign currency affects the expected cash flow in the functional currency when the translation is settled. The change is regarded as a gain or loss that normally should be included in determining net income for the period in which the exchange rate changes. Similar accounting should be observed for gains or losses realized on settlement.<sup>218</sup>

Efforts have been made to harmonize the standards recommended by accounting institutes in a number of countries. These institutes influence the standards recommended in other countries.<sup>219</sup>

Accounting at current exchange rates may not be the most convenient technique in all circumstances. The Deutsche Bundesbank, for example, has found that its former procedure has shown changes in its reserves in terms of deutsche mark that have not resulted from any deliberate change of policy. The annual balance sheet has valued the Bundesbank's external

position at the end of the year in accordance with the Bundesbank's obligation to enter its assets at the lowest value shown by various permitted methods of valuation. For example, the balance sheet for 1980 showed dollar holdings at about  $DM\ 1.73 = US\$1$ . During the whole of 1981, however, the dollar was continuously well above that rate, reaching a peak in August of  $DM\ 2.57 = US\$1$ . The Bank's weekly statements of account were based on the amounts of deutsche mark received or paid on sales or purchases of dollars. During 1981, the Bundesbank made frequent sales of dollars in order to smooth out fluctuations in exchange rates. These sales were shown in the weekly statements as deductions, at the rate at which sales were made, from dollar assets valued on the basis of the principle of lowest value as recorded in the balance sheet for 1980. The effect was to overstate the decline in the value of dollar holdings. When the balance sheet for 1981 was prepared, the principle of the lowest value was followed again, and showed, therefore, a discrepancy on comparison with the last weekly statement. As from the beginning of January 1982, purchases and sales of dollars in the foreign exchange market are not accounted at current exchange rates. The deutsche mark equivalent of changes in dollar holdings in 1982 is calculated at the constant exchange rate on which the annual balance sheet for 1981 is based. Any differences between that exchange rate and current exchange rates are shown in the weekly statements under the heading of "Other liabilities."<sup>220</sup>

### *Allocation of Exchange Risks*

The variability of exchange rates creates problems of the equitable allocation of the advantages and disadvantages that result from changes. Two situations can be distinguished. One situation involves parties to a single transaction. An advantage for one party must represent a disadvantage for the other. The problem is the allocation of the advantage and the correlative disadvantage between the two parties. In the other situation, the parties involved are not parties to a transaction they have entered into with each other, but each is a party to a transaction with a common entity. The parties may have entered into these transactions as part of a common design in which they have joined or there may be no such association among them. The situation is deemed to be one that calls for equal or *pari passu* treatment of the parties by or on behalf of the common entity. It is not an inherent element in situations of this kind that one party must have an advantage over another party or other parties, and that they must have a



correlative disadvantage. Although the situations are different, the solutions adopted for the allocation of advantages and disadvantages in both situations are designed to give effect to equitable considerations as recognized by the authorities empowered to find a solution.

The *Miliangos* doctrine is meant to provide a solution for circumstances that are an example of the first kind of situation. A choice is made among possible exchange rates in allocating risk between delinquent debtor and aggrieved creditor or between tortfeasor and victim when the creditor or the victim seeks a remedy. The decisions in bankruptcy or liquidation that have been discussed deal with a situation of the second kind. Each creditor has a claim against a common entity, and the problem is to do justice to all creditors. *Re Lines Bros. Ltd.*<sup>221</sup> shows that the circumstances of a case may call also for a determination of what justice requires in a contest between creditors and shareholders. A company's assets may be more than sufficient to pay all creditors on the basis of a particular rate of exchange. The remaining assets may then be claimed by shareholders, but the creditors may seek adjustment of the exchange rate that was the basis for payment to them if that rate was less favorable than the rates of exchange on the dates of payment.

The *Miliangos* doctrine has been established under the influence of the more obvious moral consideration that disadvantage should be assumed by a wrongdoer and not by an innocent claimant. In the bankruptcy and liquidation cases, there is no element of wrongdoing among the creditors on the basis of which to allocate advantage and disadvantage. The solutions found for both situations have not been free from the criticism that the solutions attribute excessive advantage to one party or excessive disadvantage to another.<sup>222</sup>

In Pamphlet No. 33 (1980) there was a discussion of a project then under consideration by the World Bank for equalizing the exchange risks assumed by borrowers from the Bank.<sup>223</sup> The problem was seen to be one that fell within the second category of situations mentioned above. Under the terms of loan agreements negotiated by the World Bank, a borrower is required to make repayments in the various currencies it has received under its agreement. It is impossible for the Bank to make disbursements to all borrowers in the same currencies or in equal proportions of the same currencies, with the result that borrowers formerly assumed different exchange risks if measured by a common denominator such as the U.S. dollar. Loans negotiated on or after July 1, 1980 are subject to an

arrangement called the Currency Pooling System that is designed, in terms of a single unit of account, to equalize among all borrowers the risks of fluctuations in the exchange rates of the currencies they borrow.<sup>224</sup>

All currencies disbursed and outstanding under loans subject to the System are deemed to be pooled. The outstanding principal amount under each loan is expressed at all times as a share in the pool arrived at by dividing this amount by the aggregate value of the pool. The value of the pool and of each share is recalculated daily by reference to the U.S. dollar as the unit of account. The effect is to prorate all currencies disbursed and outstanding among all loans subject to the System according to their shares in the pool. The System does not eliminate exchange risks for borrowers: it provides that all borrowers assume the same risk, namely, the risk of fluctuations in the exchange rates of all disbursed currencies against the U.S. dollar.

The World Bank enters into new loan agreements on the basis of the new System, but it has also given borrowers that had not drawn the full amount of loans outstanding on July 1, 1980 the option to bring the undisbursed amount into the System. If a borrower exercises the option, the original agreement is amended.

Some circumstances may combine the two situations that have been distinguished earlier in this section. For example, when a member of the Fund is designated by the Fund to receive SDRs from another member and provide a freely usable currency in return for the SDRs, the transaction must be carried out on the basis of the principle of "equal value."<sup>225</sup> One aspect of this principle is that the transferor of the SDRs must receive the same value whatever member the Fund designates as transferee and whatever currency the designated transferee provides. The equal value principle is addressed to a situation of the first kind because it ensures that a transferee of SDRs will not be able to act to its own advantage and to the disadvantage of the transferor by providing a currency that has depreciated in the market at an exchange rate unfavorable to the transferor. The principle is addressed to a situation of the second kind because, if the transferee of SDRs provides the same currency on the same value date to two or more transferors, they will all receive value at the same exchange rate.<sup>226</sup>

Application of the equal value principle requires the use of a single unit of account. It is the SDR.<sup>227</sup> In the English bankruptcy and liquidation

cases, the single unit of account is sterling whatever the currencies might be that the creditors had been entitled to receive.

### *Normal Protection Against Exchange Risks*

Courts are working their way toward an idea of normal protection against exchange risks that a party should arrange. The party's legal position may be affected if it does not arrange this protection.

It has been seen that in *Re Canadian Vinyl Industries Inc.*<sup>228</sup> the Quebec court rejected the contention that the Canadian dollar value of the claim of a German creditor in deutsche mark, calculated at the rate of exchange when proof of the claim was submitted in bankruptcy proceedings, should be recalculated at the dates when dividends were paid by the trustee in bankruptcy. Part of the rationale of the decision was the normal practice cited by the court, according to which a Canadian debtor who has to make a future payment to a German creditor of the deutsche mark equivalent of a debt expressed in Canadian dollars can arrange with his bank a forward purchase of deutsche mark within a defined period at the exchange rate prevailing when the contract is made. Similarly, a German creditor who is to receive a future payment of Canadian dollars from a Canadian debtor can arrange with his bank a future sale of the Canadian dollars for deutsche mark at the exchange rate prevailing when the contract is made. The point of this rationale was that parties could protect themselves and know where they stood with respect to exchange rates. Creditors submitting proofs in bankruptcy could protect themselves against exchange risks at the date of the filing of the proposal in bankruptcy.<sup>229</sup> Under the proposal, each creditor knew the amount of the dividend it would receive and when payment would be made. Considerations of certainty provided no overriding justification for the court to modify the choice of exchange rate.

In *Isaac Naylor & Sons Ltd. v. New Zealand Co-operative Wool Marketing Association Ltd.*,<sup>230</sup> the New Zealand court considered the effect of forward exchange contracts on a claim to damages for the purchaser's failure to perform according to the terms of the contract to purchase wool. Naylor argued that it expected the Co-operative to cover itself with forward exchange contracts and to roll them over when they expired in the event of delays, as did Naylor and other firms in the trade. Therefore, any loss suffered by the Co-operative was too remote to justify

the recovery of damages. The Co-operative had entered into forward exchange contracts for some deliveries and for part of the period before payment, but the Co-operative argued that these contracts were *res inter alios* and irrelevant to the proceedings. They were like contracts of insurance, which traditionally are disregarded in assessing damages. This argument of the Co-operative did not succeed. Forward exchange contracts, it was held, are not contracts of insurance, because they do not provide for the payment of sums on the happening of uncertain events. The obligation of the bank to buy at the specified rate if required by the Co-operative to do so was the same whether or not exchange rates fluctuated, and was independent of any breach of contract by Naylor. Nevertheless, the effect of forward exchange contracts should not be disregarded on principle:

If the floating currencies of recent times have led to developments in the law regarding exchange variations in the interests of realism and justice, I think that the Courts should be consistent and not shut their eyes to covering contracts of this kind. But whether the result of any particular case is affected by taking them into account will depend on the facts. Here, for reasons to be given, I do not think they make any difference.<sup>231</sup>

One reason was that it was not enough for Naylor to allege that it had expected the Co-operative to protect itself. The criterion was whether a reasonable man in the position of the Co-operative was so likely to take those steps that its failure to take them could be treated as the acceptance of risk. Naylor had not offered evidence of how common the practice of buying and selling forward exchange was at the material time among exporters and importers in the wool trade. The Co-operative could not be denied damages on the ground that there was an implied term that it must protect itself by forward exchange contracts in the event of delays or on the ground that its losses were too remote a consequence of the delays because of its failure to protect itself by forward exchange contracts.<sup>232</sup>

Naylor also argued that most of the Co-operative's loss was attributable to the forward exchange contracts the Co-operative had entered into and not to Naylor's breach of contract. Naylor contended that the damages should be equivalent to the sum by which the total New Zealand dollars the Co-operative had received under forward exchange contracts was less than the total it would have received under forward exchange contracts had there been no delays. A member of the court who dealt with this contention distinguished between the periods before and after the due date

for payment. For the period before the due date, the amount that would have been received under forward exchange contracts was not the criterion because, although the bank is bound to buy currency at a fixed rate, the customer is not bound to sell. The customer might refrain from selling because the market exchange rate was more favorable to him than the rate prescribed by the forward exchange contract. It was wrong to assume, therefore, that the Co-operative, by entering into forward exchange contracts, had committed itself to accept the exchange rate it would have received under forward exchange contracts had shipment not been delayed. Losses because of unfavorable exchange rates under forward exchange contracts during the period after breach could not be calculated because none of the contracts or rollovers ran precisely from the due date of payment. No evidence had been given of the difference in exchange rates prevailing on the due date compared with the actual date of payment.<sup>233</sup>

The decision was affected by considerations of evidence on a vital aspect of the case. The decision leaves open the issue whether there is a duty to mitigate damages by negotiating forward exchange contracts and also the issue of the effect of these contracts when entered into on claims for damages for breach of contract resulting from fluctuations in exchange rates.

A case decided by the Court of Justice of the European Communities on March 5, 1980<sup>234</sup> took cognizance of the effect of the normal practice of insuring against risk. Monetary compensatory amounts are a remedy for the effect on agricultural prices of imbalances that develop among the currencies of members of the European Community. The exchange rates applied in the framework of the common agricultural policy to the uniform prices fixed in national currency do not correspond to the exchange rates of the currencies in the market. The purpose of the system of monetary compensatory amounts is to neutralize the consequences for the common agricultural policy of developments that reduce correspondence between the exchange rates used in that policy and exchange rates in the market. A monetary compensatory amount is fixed for the currency of each member so as to compensate for these differences in exchange rates. The monetary compensatory amount payable in the case of exportation from a member with a currency that has appreciated above the specified margin of fluctuation to a member with a currency that has depreciated below that margin is composed of two elements: one granted by the exporting state

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when the goods are exported and the other granted by the importing state when the goods are imported. Under Community law, the exporting state may agree to pay the monetary compensatory amount payable by the importing state. Payment of this amount by the exporting state is subject to the condition that proof is offered that customs import formalities have been completed and that duties and equivalent levies have been charged.

The United Kingdom and the Federal Republic of Germany entered into an agreement of the kind referred to. An English company contracted to buy butter from a German company. The cargo was shipped but did not arrive because the vessel was lost. The customs authorities of the Federal Republic of Germany paid to the exporter the monetary compensatory amount payable on exportation but refused to pay the amount payable on importation because no proof was offered that customs formalities had been completed and duty charged. The exporter argued that there was a general principle of *force majeure* under Community law, and that in accordance with this principle the exporting company was discharged from the necessity of providing proof. If the further amount were not paid, the exporter would suffer as a result of fluctuations in exchange rate.

The Court held that the system of monetary compensatory amounts was introduced in order to remedy a monetary situation that threatened the Community's policy on prices for agricultural products. The system of monetary compensatory amounts was not conceived to give individual traders security against all risks that flow from fluctuations in exchange rates or to indemnify them for all loss suffered as a result of these fluctuations. There was no general principle of *force majeure* as alleged by the exporter and no reason to apply it in order to indemnify the exporter for a loss that normally constituted one of the commercial risks that traders assume by taking out suitable insurance.

In the discussion of multiple currency practices, it was noted that the Fund has decided that deviations between the rates for spot exchange transactions and the rates for other exchange transactions, which would include transactions under forward exchange contracts, will not be considered multiple currency practices if the deviations represent no more than the additional costs and risks of the other exchange transactions. Nothing has been said about official action in relation to deviations. The original Articles authorized the Fund to establish margins for other exchange transactions, including forward exchange transactions,<sup>235</sup> but the Fund never took action under this power. The Articles prescribe

margins for spot exchange transactions only, without empowering the Fund to establish margins for other exchange transactions, under the par value system that can be called into operation under Schedule C.<sup>236</sup>

### *Adaptations to Variability*

The prospect of changes in exchange rates is responsible for provisions in legal instruments that govern the adaptation of features of the instrument, particularly financial features. A number of treaties or proposed treaties, including but not confined to buffer stock agreements, provide special procedures for considering the adaptation of financial prescriptions if changes in exchange rates threaten to undermine the purposes of the treaty. These provisions have been examined elsewhere.<sup>237</sup> The Sixth International Tin Agreement, which entered into force provisionally on July 1, 1982, contains provisions of this kind. The Executive Chairman may convene, or any member may request him to convene, an immediate session of the Council to review the floor and ceiling prices if the Chairman or the member that has made the request considers that changes in exchange rates make a review necessary. Detailed provisions regulate the situation pending the session of the Council and for various periods after it does meet, according to various hypotheses about the Council's reaction.<sup>238</sup> The provisions of the COTIF on the summoning of sessions of the Revision Commission have been discussed in the section *International Conventions* under the general heading **SDRs** in this pamphlet.

Another technique, however, is the prescription by law of a formula for the automatic adaptation of financial provisions. The construction of a formula that will be satisfactory to all interests may be a complex undertaking. An example of such an effort is the proposal by the United States Federal Maritime Commission of requirements for filing currency adjustment factors (CAFs) reflecting changes in the exchange rates for tariff currencies by all common carriers by water and conferences of such carriers engaged in the foreign commerce of the United States.<sup>239</sup> The Commission seeks an effective system that will be reasonable and fair for carriers, conferences, and shippers. CAFs would enable adjustments in existing tariffs to be made more promptly than the substitution of changed

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tariffs because these changes must be preceded by statutory periods of notice.<sup>240</sup>

CAFs are a reaction to sharp and unforeseen fluctuations in the value of the U.S. dollar measured against the currencies of other major countries, because fluctuations can create substantial losses for carriers engaged in the foreign commerce of the United States. The dollar value of revenues is fixed in tariffs but the foreign currencies in which carriers may incur commitments and expenses are not. If the U.S. dollar depreciates against the foreign currencies, the dollar revenue becomes less adequate for the purchase of the necessary foreign currencies.

The Federal Maritime Commission has developed proposed rules under which no adjustments to tariff rates to take account of fluctuations in exchange rates would be allowed except in accordance with the rules if they become effective. Carriers and conferences would be able to file tariff schedules that would include a base level for their tariff currency (usually the U.S. dollar) in relation to each trade currency selected for the purpose of cargo carried to or from all the ports of a foreign country.<sup>241</sup> Adjustments in the form of surcharges or discounts could be made effective on the first market date of a month in accordance with the following formula:

No CAFs shall be imposed in any month unless currency values exceed a 2 percent minimum deviation from the base. The schedules are to be constructed on a 50 percent factor of the nominal change in the value of the selected trade currencies in relation to the tariff currency. Unless this 50 percent result equals or exceeds a 2 percent currency change at intervals of 2 percent at the beginning of a month, there shall be no currency adjustment or change in the adjustment. The schedules may be updated at any time based upon the exchange value of the trade currencies prevailing at the time of such filings. The first CAF adjustment under a new schedule cannot be imposed prior to the first market day of a month following the effective date of the revised currency clause.<sup>242</sup>

The element of 50 percent appears in this formula because of the assumption that carriers or conferences incur part of their commitments or expenses in U.S. dollars, and these outgoings should not affect the calculations that are designed to take account of changes in the exchange rates of other currencies against the dollar. The dollar portion would be fixed at 50 percent for reasons of simplicity. The alternative would have to be a detailed accounting.



Comments, of a legal or other character, in support of or in opposition to the proposed rules have been addressed to the Commission. Commentators have criticized the construction and effects of the formula for adjustments. Some comments are of general interest because they illustrate problems that are thought to arise in formulating automatic responses to fluctuations in exchange rates. One problem noted by commentators was that a carrier or conference that filed a schedule in accordance with the rules would be bound to impose a surcharge or discount on the basis of exchange rates on a single date. The exchange rates on that day might be unrepresentative, but adjustments would be in force for a whole month. A counterproposal has been made in favor of averaging exchange rates if carriers or conferences preferred this practice.<sup>243</sup>

The concept of two-currency trade and the requirement based on it that each non-U.S. currency must be treated separately have been criticized as inconsistent with trade between the United States and Europe, in which vessels call at ports in a number of countries and incur expenses in the currencies of all these countries. If CAFs were calculated on the basis of a single currency, a shipper or consignee might divert cargo from normal ports of call, with disruptive consequences for these ports, solely because of considerations relating to CAFs.

The proposed rules as they stand might permit a number of separate CAFs in a single trade, each of which would be based on a separate currency, if a number of trade currencies were involved. The proposals have been criticized, however, because they do not provide for a weighting of these currencies, based on the actual use of them, with the result that there might be overcompensation. The present practice of certain conferences is to employ a weighted basket of currencies in applying CAFs. A single CAF based on such a weighted basket has been suggested in place of the Federal Maritime Commission's proposal.

The Australia/Eastern U.S.A. Shipping Conference has argued that it should be exempted from the proposed rules if they become effective because the Conference is already subject to the system of CAFs that is required by Australian law. According to the Conference, the objectives of that system are similar to those of the rules proposed by the Federal Maritime Commission, but there are differences in both substance and procedure that would create complications. Under Australian practice, the CAFs are reviewed every three months on the basis of the average spot

buying and selling rates for U.S. dollars ruling on the twenty-fifth day of July, October, January, and April as announced by the Reserve Bank of Australia. Review does not mean that there is an automatic adjustment of CAFs. The calculations are not based on a 50 percent factor, and different margins of variation are employed for the adjustment of CAFs. Adjustments take effect with more delay than under the proposed rules of the Federal Maritime Commission. CAFs become part of scheduled freight rates on December 1 each year.

The differences between the proposal of the Federal Maritime Commission and the Australian system are an aspect of a much broader phenomenon. Widely differing CAF systems have emerged throughout the world. The application of CAFs is governed by the place of acceptance of the goods into the custody of a shipping line as shown in the bill of lading. The place of acceptance is normally, but not invariably, the loading area. Shippers in particular have been disturbed by the large disparities in the amounts of CAFs and the differences in procedure for revising them. Efforts have been made by conferences and shipping councils to arrive at a solution of widespread application.

An expert<sup>244</sup> has raised two questions. First, should CAFs be applied differentially area by area if circumstances warrant this treatment or should CAFs be averaged across loading areas? Second, would it be preferable to use the SDR or some other unit of account as the tariff currency instead of the common use of the U.S. dollar for this purpose? The expert opposes averaging CAFs because of the substantial differences in the strength of economies and currencies. To some extent CAFs have been partial averages because most of them have been calculated according to a basket of currencies of varied strength, so that extremes of adjustment have been avoided.

This expert opposes the use of the SDR because its composition—which consisted of 16 currencies when he wrote—was most unlikely to reflect the costs and income of most conferences. In addition, the SDR would be equivalent to applying a single average CAF. Moreover, the SDR is subject to as much fluctuation as CAFs, and indeed more fluctuation because of its daily reflection of exchange rates. These reactions are not the only indication that the special considerations of a trade may affect the acceptability of the SDR as a unit of account in commerce.<sup>245</sup>

## GOLD

### Report of U.S. Gold Commission

#### *Findings and Recommendations*

The Gold Commission was appointed by the Secretary of the United States Treasury on June 22, 1981 in accordance with Section 10 of Public Law 96-389<sup>246</sup> to "conduct a study to assess and make recommendations with regard to the policy of the U.S. Government concerning the role of gold in domestic and international monetary systems." In March 1982, the Commission discharged its duty of reporting to Congress.<sup>247</sup> The appointment of the Commission was followed by a cataract of suggestions in learned and other publications in the United States and elsewhere on the conclusions that the Commission should reach.

The findings and recommendations presented in an introductory chapter of the Commission's report represent the views of a majority of the Commission. Almost every view, however, is subject to dissents or qualifications by individual members of the Commission.

Chapter 1 surveys economic developments of recent years that led to establishment of the Commission, including the unprecedented rise in inflation in the United States since the mid-1960s. Public interest had developed in institutional arrangements that would ensure a reasonable approximation to price stability in an economy in which resources were relatively fully employed in a balanced and sustainable way. Chapter 2 examines the history of gold in the United States. Chapter 3 explores the strengths and weaknesses of possible monetary standards, including a number of versions of a gold standard. Chapter 4 reviews the current role of gold and considers possible changes.

The recommendations of the Commission, which range from matters of modest domestic interest in the United States to matters of the broadest international concern, can be summarized as follows:

1. The Commission supported the Treasury's plan to improve the existing program for the sale of gold medallions under a statute of 1978.<sup>248</sup>
2. The Commission favored issue by the Treasury of gold bullion coins of specified weights, without dollar denomination or legal tender character,<sup>249</sup> to be manufactured from the Treasury's existing stock of

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gold. Sales would be at a small premium over the market value of the gold content. The coins would be exempt from capital gains and sales taxes.<sup>250</sup>

3. The Commission opposed the issue of Treasury gold-backed notes or bonds.<sup>251</sup> Some witnesses had proposed that the repayment of principal and the payment of interest would be made in gold. The instruments were regarded by some of these witnesses as a means of introducing gold into the monetary system of the United States and of leading possibly to the convertibility of all dollar obligations into gold.

4. Various recommendations of the Commission related to the gold stock owned by the United States Government:

(i) Some U.S. citizens had been concerned that there had been unauthorized withdrawals of gold and that official accounting had been inadequate. The Commission was satisfied that the law on audit of the official gold stock was being observed and that the audit was an adequate basis for verification of the inventory records.

(ii) The Commission was satisfied with the relationship between gold certificates held as an asset of the Federal Reserve System and the gold held by the Treasury, and with the reporting procedures of the Treasury and the Federal Reserve System. Some U.S. citizens had considered the Treasury's claim to ownership of the gold and the Federal Reserve System's presentation of the certificates as assets to be double counting of the same asset.

The Commission explained that the Government owned the gold and that ownership of it was not represented by the certificates. Gold certificates, valued at \$42.22 per ounce of gold, are liabilities of the Treasury and are issued against its stock. The Treasury had received a counterpart deposit for the certificates in its account with the Federal Reserve. All gold held by the Treasury had been monetized in this way. New certificates could be issued only if the Treasury acquired additional gold or if the statutory price at which certificates may be issued was increased. If gold was sold, an equivalent amount in certificates would be retired and the Treasury's deposit balance reduced.

(iii) The U.S. gold stock was a little over 700 million fine troy ounces at the end of 1949, 345 million ounces at the end of 1967, and 264 million ounces at the time of the report. All agreed that a zero stock was not appropriate and therefore that the total stock should not be sold by

auction. A minority of the Commission preferred that the present stock should not be reduced further even though an increase in the monetary role of gold was not now timely. The stock should be held as a reserve for possible future use if a restored role for gold then appeared feasible, or against other contingencies. In support of this view, it was suggested that if an international monetary conference of free world countries were convened to recommend changes in the international monetary system, it would be useful for the United States to hold a substantial amount of gold in order to influence deliberations and to be in a strong position if the role of gold were re-established.

A majority of the Commission held the view that a limited depletion of the gold stock, for example as a result of the programs for the issue of medallions or coins, was acceptable. The Commission recommended that, while no precise level for the gold stock was necessarily "right," the Treasury should retain authority to conduct sales at its discretion, provided that adequate levels were maintained for contingencies.<sup>252</sup>

(iv) The Treasury values its gold stock at \$42.22 per ounce. The Commission noted that revaluing the gold stock at a price closer to the market price<sup>253</sup> had been supported so that the Treasury could raise revenue by selling part of its gold. The revenue could be used to retire debt and avoid the payment of interest on outstanding securities or could be used to finance the federal budget deficit. It had been argued also that international agreement to value gold at the market price might be a step toward making gold an international medium for settling disequilibria in balances of payments and enabling it to be used for intervention in the foreign exchange markets in support of the exchange rate for the dollar.

The Commission regarded the choice of a price at which to revalue gold held in reserves as independent of a decision on the price at which to restore a gold standard.

The Commission recommended that the Treasury and the Federal Reserve should conduct studies of issues that would be involved in a move toward valuing gold realistically at something closer to market prices. The change should be subject to the legislative constraint that the proceeds of this new valuation must not be monetized by the Treasury or in any way used to enhance the government's spending power.<sup>254</sup> The studies should develop a formula and a timetable for valuing the U.S. gold stock in a manner realistically related to the market value.

(v) The Commission examined the general proposition that constructive uses should be found for the gold stock that would put an end to its present immobility. Swaps,<sup>255</sup> leases, and other commercial uses to generate revenue, intervention in the foreign exchange markets, settlement of balance of payments disequilibria, and open market operations had been some of the suggested uses.

The Commission did not favor unconventional uses of the gold stock because the objectives sought by adding gold to the policy instruments of the monetary and fiscal authorities were attainable without such uses and because the side effects of these uses might be undesirable. The continued study of the role of gold in the monetary system was favored, however, and the Commission recommended that Congress should hold hearings on the subject.

5. The Commission had examined the reintroduction of gold in arrangements for domestic monetary policy<sup>256</sup> as a means of monetary control for the purpose of reducing inflation. The Commission mentioned various ways in which monetary aggregates could be related to the gold stock. Most members of the Commission believed that return to a domestic gold standard was not desirable. Even if that were not the view, two major problems would affect the feasibility of a domestic gold standard. One problem would be how to determine the fixed dollar price of gold at which to resume a gold cover requirement. The other problem was the absence of a sound guide on the extent to which the convertibility of domestic dollar obligations was feasible.

The Commission recommended that the Congress and the Federal Reserve should study the merits of establishing a rule specifying that the growth of the nation's money supply be maintained at a steady rate that ensured long-run price stability. The Commission concluded that, in present circumstances, restoring a gold standard did not appear to be a fruitful method for dealing with the continuing problem of inflation. The Congress and the Federal Reserve should study ways to improve the conduct of monetary policy, including the possible adoption of a monetary rule.

Some members of the Commission objected to the references in this recommendation to a monetary rule, because the rule was not related to gold. These members held that the Commission's terms of reference were confined to the role of gold domestically and internationally.

It will be recalled that the Second Amendment prohibits maintenance by a member of an external value for its currency in terms of gold,<sup>257</sup> but does not prohibit purely domestic functions for gold. For example, the Fund has not objected to Section 14(c) of the Gold Reserve Act,<sup>258</sup> as amended, of the United States, under which the last par value of the U.S. dollar (\$42.22 per ounce of fine gold) is “the legal standard” in terms of which the amount of gold certificates issued by the Treasury is calculated.<sup>259</sup> Many members of the Fund have adopted legislation or other measures under which they provide in various ways for the valuation of official gold holdings.<sup>260</sup>

6. The Commission discussed a system of par values fixed in terms of gold. Most members of the Commission thought that even if other countries with substantial gold stocks and the major gold producing countries were to agree with the United States on the restoration of an international gold standard, the United States and the system as a whole would have to confront the problem of the vast worldwide quantity of dollars that would be potential claims to conversion with gold. The Commission was not aware of international interest in restoring an international gold standard. On the contrary, a number of foreign officials had expressed negative views.

The Commission discussed also the desirability of taking steps to seek “restitution” of the gold that the United States and other members had subscribed to the Fund. The Commission noted that under the present Articles, the Fund could sell gold at the former official price (SDR 1 = 0.888 671 gram of fine gold) to members that were members on August 31, 1975.

The arguments against restitution listed by the Commission were that gold no longer has a central role in the international monetary system and no longer serves as the common denominator of a par value system or as the unit of value of the SDR; the official price of gold has been abolished; members of the Fund have no obligation to use gold in transactions with the Fund; and the Fund cannot accept gold from members unless approved by a decision taken with a majority of 85 percent of the total voting power. The Fund’s sales of gold were further evidence of the intention to establish a diminished role for gold in the Fund’s resources.

Some of these arguments are stated in broad terms that disregard the precision of the Articles. It is true that members have no obligation to use gold in transactions with the Fund, but the Fund also has no obligation to

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use gold in transactions with members. Nor is the Fund entitled to use gold in transactions. The Fund has authority, however, as the Commission noted, to accept gold, instead of SDRs or currency, from members in discharge of their obligations to the Fund.<sup>261</sup> The provision giving this authority was adopted as part of the compromise on the treatment of gold under the Second Amendment. The provision was a concession to those members that wanted some recognition of an official status for gold even if the power conferred on the Fund was never exercised. If the Fund were to accept gold, the price would be agreed between the member using gold and the Fund for each operation or transaction on the basis of market prices. There is no corresponding provision under which the Fund can use gold, instead of SDRs or currency, in settling obligations to members.<sup>262</sup>

Although the Fund is not entitled to use gold in normal operations or transactions, the Fund has powers to sell gold under two provisions to willing purchasers. One of the provisions authorizes the Fund to sell gold for currency to members or to any other purchasers at a price agreed with the purchaser for each transaction on the basis of prices in the market.<sup>263</sup> A majority of 85 percent of the total voting power is necessary for the exercise of this power. The other provision<sup>264</sup> authorizes what the Commission and others refer to as "restitution." The word is inappropriate legally but came into use because, in the discussions of the Committee of Twenty and of the Interim Committee before the Second Amendment, some members thought that they had a moral lien on the Fund's gold as the result of having subscribed gold. The word "restitution" does not appear in the Articles, but there is tacit acceptance of this thought in the limitation of the circle of members to which gold can be sold at the former official price to those countries that were members on August 31, 1975. That date is the one on which the agreement on the future treatment of gold was recorded in a communiqué of the Interim Committee.<sup>265</sup> Sales of gold to those members in the circle that are willing to buy it are made in proportion to their quotas on that same date. No member is compelled to purchase gold under this provision. A majority of 85 percent of the total voting power is necessary for decisions under this provision also.<sup>266</sup>

The Commission recorded as an argument against restitution the same view that it advanced to justify the retention of gold holdings by the United States. If gold was an important strategic and monetary resource for the United States, gold had the same importance for the international



community and should be retained by the Fund "for possible use in various contingencies."<sup>267</sup>

The Commission's recommendations on international monetary arrangements are formulated as follows:

We favor no change in the flexible exchange rate system. In addition, we favor no change in the usage of gold in the operation of the present exchange rate arrangements.

We oppose action by the United States to seek a restitution of IMF gold to member countries.<sup>268</sup>

The introductory chapter is concluded with the following statement:

In presenting our report, we are conscious of the complexity of an attempt to define what the role of gold should be in the domestic and international monetary systems.

The majority of us at this time favor essentially no change in the present role of gold. Yet, we are not prepared to rule out that an enlarged role for gold may emerge at some future date. If reasonable price stability and confidence in our currency are not restored in the years ahead, we believe that those who advocate an immediate return to gold will grow in numbers and political influence. If there is success in restoring price stability and confidence in our currency, tighter linkage of our monetary system to gold may well become supererogatory.

The minority of us who regard gold as the only real money the world has ever known have placed our views on record: the only way price stability can be restored here (indeed, in the world) is by making the dollar (and other national currencies) convertible into gold. Linking money to gold domestically and internationally will solve the problem of inflation, high interest rates, and budget deficits.

We have made no attempt to conceal the divisions among us. In that respect, our views probably represent the range of opinions held by the country at large. We hope, nevertheless, that our report will make a contribution to public understanding of the important issues involved. In that event, the time we have devoted to preparatory study before our meetings and to the deliberations themselves will have been well spent.<sup>269</sup>

### *Some Further Legal Aspects*

The Commission's report distinguishes between a domestic gold standard and an international gold standard, each with a fixed price for gold. A distinction is made by reference to the purpose of the two standards. The purpose of the domestic standard would be to control the

monetary base while leaving exchange rates flexible. The purpose of the international standard would be to maintain fixed relationships among currencies, to permit gold, or dollars convertible into gold at the fixed price, to be used in the settlement of payments imbalances, and to enable the monetary base to vary in relation to flows of gold.

The report does not discuss the compatibility of the domestic gold standard with the Articles. In proscribing gold as a denominator, the Articles state that "exchange arrangements"<sup>270</sup> may include the maintenance by a member of a value for its currency in terms of the SDR or another denominator, "other than gold,"<sup>271</sup> selected by the member. But although a domestic gold standard may not be an "exchange arrangement," it can have international effects and therefore it would be of interest to the Fund under Article IV.

The report draws attention to prospective international effects of two kinds. First, under a domestic gold standard with the interconvertibility of gold and dollars limited to residents of the United States, the problem of enforcing the limitation appeared to be intractable. Residents might be required to declare under oath that they were acting for themselves or other residents when demanding or supplying gold in transactions with the monetary authorities. Alternatively, imports and exports of gold could be prohibited. Opportunities for profitable violation would arise with discrepancies between the U.S. fixed price and the world market price of gold. Whichever procedure was followed, an army of inspectors would seem to be necessary.

The other kind of international effect would arise from the shift by American investors from foreign currency into gold, which would impose the whole burden of adjustment on the exchange rate between the dollar and the foreign currency because the dollar price of gold would not change. If substantial portfolio shifts by residents of the United States between foreign currencies and gold were to occur, and if all else remained equal, exchange rates would tend to become more variable than they have been. Other countries could peg their currencies to the dollar, but the report asks whether in that event they would be able to engage in gold transactions with the United States.<sup>272</sup>

The report states that an international gold standard with a fixed price for gold could be achieved either by international agreement or by evolution. The United States could be the first to reinstitute the fixed price and others could follow because they were persuaded to do so by the

success demonstrated by the United States in stabilizing the domestic price level. The suggestion seems to be that a domestic gold standard would become an international gold standard also as soon as another country followed the lead of the United States. If that assumption is correct, the present prohibition of exchange arrangements in which gold is the denominator for maintaining the value of a currency would apply. The legal problems of compatibility with the Articles would arise if countries began to observe an international gold standard whether they did so because of international agreement or as the result of an evolutionary process.

The Commission seems to have been under the impression that only a multilateral return to an international gold standard would require amendment of the Articles.<sup>273</sup> Amendment would be necessary even if only some members wished to establish an international gold standard. In those circumstances, the amendment of Article IV, Section 2(b) would be necessary. If a widespread movement was in view, the amendment of Schedule C would have to be considered.

In either event, but particularly if there was a widespread return to an international gold standard, a sweeping modification of the Articles might have to be undertaken. The problem would be how much of the Articles that preceded the Second Amendment would have to be restored. Would gold be used as freely as in the past in operations and transactions between the Fund and members? What limits of price would members have to observe in their gold transactions? Would the SDR be defined in terms of gold? Numerous other problems would have to be faced by reversal of the policy of the present Articles to reduce the role of gold in the international monetary system.<sup>274</sup>

## **Application of Gold Units of Account**

### *Judicial Application*

Courts continue to be called upon to apply units of account defined in terms of gold, such as the Poincaré or the Germinal franc, under provisions of domestic law that give effect to treaties limiting the liability of entrepreneurs in a particular industry. Cases in which courts have to face this problem still arise because of the slow pace of litigation and also because the amendment of existing treaties or the replacement of them by

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new treaties has not yet become effective. The SDR is to replace the gold unit of account in all proposed amendments or substitute treaties.

The judicial approach to the problem is discussed in Appendix B of Volume II of *The Fund Agreement in the Courts*.<sup>275</sup> The discussion shows how diverse the solutions have been. Courts have translated a gold unit of account into the domestic currency of the forum by relating the unit of account to:

- (i) the last par value of the currency established under the Articles of the Fund;
- (ii) the last par value adjusted according to a retail price index;
- (iii) the last central rate notified to the Fund under the decisions on central rates and wider margins adopted after the par value system ceased to be observed;
- (iv) the current French franc as if it were the Poincaré franc;
- (v) the market price of gold;
- (vi) the former definition of the SDR in terms of gold and the current value of the SDR in terms of the domestic currency.

The practice of the central bank of the country of the forum in valuing its own gold holdings has been relied on to justify the application of a formula based in some way on the market price of gold, but so far a central bank's practice has not been applied as if it were authoritative in itself. Central banks that have based the valuation of their holdings on the market price have applied a variety of formulas for this purpose.<sup>276</sup> All solutions other than the market price are repudiations of the market price. The confusion created by the absence of uniformity among countries is compounded by the different solutions adopted by courts in the same country.<sup>277</sup>

The decision of the Supreme Court of the Netherlands, delivered on May 1, 1981, in *Giants Shipping Corporation v. State of the Netherlands (The Blue Hawk)* is an outstanding case.<sup>278</sup> The Supreme Court was called upon to apply the Poincaré franc in domestic legislation that gave the force of law to the Convention Concerning the Limitation of Liability of Owners of Seagoing Vessels signed at Brussels on October 10, 1957. The text of the International Convention on Limitation of Liability for

Maritime Claims, 1976 was settled at a Conference of the Intergovernmental Maritime Consultative Organization (IMCO) in London in 1976. The London Convention is to replace the Brussels Convention. The SDR is the unit of account in which limits on liability are expressed in the London Convention,<sup>279</sup> but this convention has not yet come into force. Similarly, the Agreement on a Protocol to the Brussels Convention of December 21, 1979 to deal with the problem of valuation by applying the SDR solution for the time being has not yet come into force.<sup>280</sup> A bill had been introduced into the Lower House of Parliament in the Netherlands that dealt with the translation into Netherlands currency of units of account expressed in gold, but it had not yet been passed into law at the time when the Supreme Court considered its decision. The bill provided for the SDR solution, that is, the translation of the Poincaré franc into the SDR according to the ratio of SDR 1 = 15 francs on the basis of the definition in terms of gold of the Poincaré franc and of the SDR before the Second Amendment.

The Netherlands had abolished by statute the former par value of the guilder. The State of the Netherlands, the aggrieved party in the case, contended that in the circumstances there was no alternative to the application of the market price of gold. The Supreme Court chose the SDR solution. The court held that, for the Netherlands, gold had lost all monetary significance, and therefore gold could no longer perform a function under the Brussels Convention. A gap existed in the international provisions, which the court had to fill. The SDR had been accepted by the members of the Fund as a standard in international monetary transactions, and it could serve as the standard that would achieve the objectives of the Brussels Convention. The SDR had a link to gold because there had been no break in the value of the SDR in terms of currencies when the method of valuation was changed from gold to a basket of currencies.

On September 28, 1982, the United States Circuit Court of Appeals for the Second Circuit in *Franklin Mint Corporation et al. v. Trans World Airlines, Inc.*<sup>281</sup> rejected the decision of the lower court,<sup>282</sup> which had based application of the Poincaré franc in the Warsaw Convention on the last official price of gold in U.S. dollars.<sup>283</sup> The Circuit Court of Appeals held that there was a "devastating"<sup>284</sup> argument against each of the four solutions that had been advanced in argument: the last official price, the market price of gold, the SDR, and the current French franc.

The court's reaction to the SDR solution was that there was no authority for it in the Warsaw Convention. The U.S. Senate had not yet ratified the Protocols to the Convention, in which the SDR is the unit of account. If the court chose the SDR solution, that step would have to be followed by a further step in which the court would have to define the limits of liability on the basis of the SDR without any guidance by the convention.

Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.<sup>285</sup>

The court concluded, therefore, that the limits of liability in the Warsaw Convention are unenforceable. This ruling was to be prospective. It would apply to events creating liability that occur 60 days or more from the issuance of the mandate in the case (i.e., on or after December 20, 1982, unless the mandate is stayed). The court chose prospective effect because the case was the first one in which the court decreed the unenforceability of the limits on liability, and carriers should be given time to reformulate their tariffs. For events occurring before the future date chosen by the court, the last official price of gold would be used to calculate the limits on liability.

The court has chosen a nonsolution to add to the list of solutions already adopted for applying a gold unit of account. *Fiat justitia*—if it is indeed *justitia*—*ruat coelum* is a particularly unfortunate attitude to take to the Warsaw Convention.

In a petition to the court for a rehearing, Trans World Airlines argued that the court's decision, if allowed to stand, might abrogate the Warsaw Convention as a whole and not merely the provisions on the limitation of liability. Other treaties in which the Poincaré franc is the unit of account would endure the same fate. The airline argued also that the court had ignored the primary intent of the signatories to the treaty and had failed to take account of the principle that treaties should be interpreted so as to make them effective. Moreover, the court, in rejecting the SDR as the medium for applying the Poincaré franc, had ignored the rule that the subsequent conduct of the signatories is evidence of their intent for the purposes of interpretation. The action of the signatories in approving the Montreal Protocols should have been taken into account, not so that the

court could apply them as if they had been ratified, but so that they could assist in the interpretation of the Warsaw Convention.

The transition to the basket method of valuing the SDR had not affected the immediate value of currencies in terms of the SDR. For this and other reasons, the court had

overlooked the fact that the role of gold as an international unit of account is now performed by SDRs and that, therefore, SDR's may be used to translate the original Warsaw limits into dollars in order to effectuate the universally accepted intent of the parties to the treaty.<sup>286</sup>

The petition for rehearing has been denied. TWA has requested, and been granted, a stay of the mandate pending consideration by the Supreme Court of the United States of a petition for appeal to that tribunal.

Meanwhile, an Illinois Federal court<sup>287</sup> has declined to follow the decision in the *Franklin Mint* case. The court noted that the Civil Aeronautics Board continues to allow airlines to calculate their limitation of liability under the Warsaw Convention on the basis of the last official price of gold. The court adopted this solution and explained it as follows:

We recognize that each of the solutions offered by the parties here and elsewhere is easy to criticize. What is needed is a treaty amendment, but we do not have that. Therefore, we have to choose one of the other alternatives. The one which seems most nearly to effectuate the intention of the treaty to *limit* the liability of air carriers is to employ the last official United States price of gold. We agree with the court in *In Re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 843 (S.D.N.Y. 1982), which, in holding as we do, stated:

The clear merit of using this price as the unit for conversion is that the price constitutes a conversion factor established by precisely the kind of mechanism that the Convention's drafters contemplated when the applicable clauses were drafted. The use of the last official United States price for gold means the use of a conversion factor chosen by the United States at the time the price was set to determine the relationship of this country's currency and those of other nations using a similar standard for conversion. Such a conversion factor, grounded in the policy of this country with respect to the value of its currency *vis a vis* all other currencies based upon the gold standard has a stability which would be entirely lost if the unit of conversion were subject to the fluctuations of a private commodities market relatively untouched by the regulating influence of any public policy.

### *Legislative Application*

Pamphlet No. 26 (1979)<sup>288</sup> discussed various legislative techniques that have been employed to provide for the translation into the domestic

currency of gold units of account in conventions. One technique is authority conferred on a Minister to adopt orders declaring the value of a unit of account in terms of the domestic currency without instructing the Minister how he is to make the calculation. Under some British statutes, orders have been issued prescribing the value of the gold unit of account in sterling, with an accompanying explanation that the amount had been determined by reference to the SDR. The amounts remain fixed until a new order is promulgated. The orders are binding on the courts and relieve them of the problem of determining how they should translate a gold unit of account into sterling.

The Federal Republic of Germany has followed a different procedure. The Bundestag adopted a law on June 9, 1980<sup>289</sup> expressing the Federal Republic's approval of the protocols to three conventions. Until these protocols enter into force in the Federal Republic, the gold units of account in the conventions are to be translated into deutsche mark at the ratio of SDR 1 = 15 Poincaré francs or 3 Germinal francs. Both ratios are determined by the definitions in terms of gold of the two francs and of the SDR under the First Amendment of the Fund's Articles. The value of the SDR in terms of the deutsche mark is determined according to the method applied by the Fund in its operations and transactions. The law provides that similar solutions are to apply under specified conventions and under a provision of the Commercial Code.

An explanatory Bundestag document stated that since the entry into force of the Second Amendment a generally recognized method for translating a gold franc into the national currency had been lacking, and it was advisable, therefore, to make transitional arrangements in order to avoid uncertainty. It was necessary, in order to provide judicial certainty, to make domestic arrangements for the purpose of conventions other than those for which protocols were being approved by the law.

In the conventions themselves the manner in which gold francs are to be converted into national currency has not been prescribed. As mentioned earlier, the assumption was that, in the countries that were parties to the conventions, a fixed relationship of value existed between gold and the national currency. Now that this is no longer so, it seems that the resulting gap should be filled by domestic legislation as long as a new international arrangement adapted to the changed circumstances has not entered into force. (*Translation*)

The advisory opinion submitted by the Attorney General of the Netherlands Supreme Court in *The Blue Hawk* cited this law, and



mentioned legislative measures or ministerial orders that were similar in effect and had been promulgated in Norway, Sweden, the United Kingdom, and Ireland.

## Resumé

### SDRs

1. The list of authorized holders of SDRs, apart from the Fund itself and members, has grown to 13 but is not closed. The terms and conditions prescribed by the Fund for all these "other holders" are the same. Other holders have begun to hold and deal in SDRs. The authorization of the Fund is not necessary for the use of the SDR as a unit of account or means of payment under contracts.

2. Increasing use is made of the SDR as a unit of account in the financial activities of the Fund and other international organizations, and for the purposes of new conventions or amendments of existing conventions. The Convention concerning International Transport by Rail for which the acronym, derived from the French text, is COTIF, has novel features in its provisions for increasing the limits on liability expressed in SDRs. These provisions might become a precedent for dealing with the widespread problem of adapting such limits in treaties. A procedure of the kind that is included in the COTIF would be an alternative to indexation, to which a number of states object.

3. The use of the SDR as unit of account in financial and commercial transactions can have reciprocal effects in encouraging the further use of the SDR. Not much evidence is available of use in commerce. FASB Statement No. 52 makes provision for the SDR and Lloyd's has developed a form of contract for salvage that incorporates the provisions on the SDR in the Convention on Limitation of Liability for Maritime Claims, 1976 in advance of the effective date of the Convention. The amendment of the Convention of the International Telecommunication Union means that the SDR will be the unit of account for recognized private operating agencies as well as for official administrations.

4. The United Nations Commission on International Trade Law (UNCITRAL) has recommended that the SDR should be the preferred unit of account in conventions or revised conventions, particularly of global application, that contain provisions on the limitation of liability. The

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possibility of a second monetary unit for the benefit of nonmembers of the Fund is mentioned, but this possibility does not derogate from the choice of the SDR as the preferred solution.

5. UNCITRAL has responded to the request for study of a unit of account of constant purchasing power for use in conventions by recommending the alternatives of a price index appropriate for the particular convention and a special procedure for considering increases in the limits on liability. The latter alternative, perhaps based on the COTIF precedent, seems more likely to be adopted.

### **Currencies**

6. The Managing Director's summing up endorsed by the Executive Board decision of April 9, 1982 after review of the Fund's principles and procedures for surveillance over the exchange rate policies of its members contains important statements of the constitutional law and practice of the Fund, particularly in clarifying the functions of the Managing Director, the Executive Board, individual Executive Directors, and the staff in surveillance.

7. The summing up encourages members to discuss with the Fund, and in the Fund, the aspects of their policies that have or can have an adverse impact on other members. Members are exhorted also to cooperate by giving serious attention to the views and conclusions of the Executive Board.

8. The need for symmetry in surveillance among all classes of members is emphasized, but a symmetry that does not overlook differences in circumstances among members.

9. The summing up explains that the effectiveness of surveillance can be enhanced if it is exercised not only in relation to members individually but also within a multilateral framework. The idea is adumbrated of conducting consultations with a group of industrial countries or with those among them whose currencies compose the SDR basket.

10. The duty of members to provide comprehensive and prompt information on their exchange rate practices and changes in them is emphasized as essential to the effectiveness of surveillance.

11. The seven Heads of State and Government who participated in the Versailles Summit Meeting in June 1982 attached to their communiqué a joint statement on monetary undertakings in which they reiterated their support of Article IV and the Fund's principles for the guidance of

members, declared their intention to strengthen cooperation with the Fund, and referred to their willingness to develop multilateral procedures, particularly among those members whose currencies are included in the SDR basket.

12. The Second Amendment, in permitting members freedom to choose their exchange arrangements, does not absolve them from the necessity of obtaining the Fund's approval of multiple currency practices in accordance with the Articles. It continues to be the law that the provisions on transitional arrangements do not authorize members to introduce or adapt multiple currency practices without the approval of the Fund.

13. The Second Amendment has made changes in the law relating to multiple currency practices as a result of the abrogation of the par value system. In particular, differential exchange rates that develop without official action by a member or its fiscal agencies no longer constitute multiple currency practices.

14. The Fund has adopted a new decision on multiple currency practices that establishes guidelines for determining when official action that produces differential exchange rates will be considered a multiple currency practice. The decision deals with official action relating to spreads between the buying and the selling rate for another member's currency and deviations in the exchange rates for transactions in a member's exchange market from the rates that would be derived for these transactions from transactions in other members' exchange markets.

15. The Fund may be concerned with exchange rates under Article IV even though differential exchange rates in a member's exchange market are not multiple currency practices under the new decision.

16. The new decision deals with the Fund's policies on the approval of multiple currency practices. Past policies are substantially unchanged.

17. Legal consequences flow from the absence of authorization or approval of a member's multiple currency practice: (i) the member is in breach of its obligations under the Articles, and the Fund may react in accordance with the Articles; (ii) the member may be automatically unable to use the Fund's resources under a stand-by or extended arrangement in the present standard form; (iii) the member may be unable to borrow under agreements with official or private entities that are tied to a stand-by or extended arrangement approved by the Fund; (iv) the Fund may find that the member is not meeting the conditions of the two compensatory

financing facilities, but this reaction would not be automatic; (v) exchange contracts contrary to exchange control regulations prescribing a multiple currency practice that is not consistent with the Articles are not unenforceable under Article VIII, Section 2(b); (vi) the invalidity under the Articles of a member's multiple currency practice may affect the question of the validity of the exchange rate under the member's domestic law; (vii) the administration of other treaties, and in particular the application of various provisions of the GATT, may be affected.

18. Discriminatory currency arrangements in the form of broken cross rates are more likely under present exchange arrangements, either by design or inadvertence. The Fund has not adopted a general decision on discriminatory currency arrangements comparable to the decision on multiple currency practices, but principles relating to discriminatory currency arrangements can be drawn from decisions and the Fund's practice. Nine principles are formulated. A decision of the Court of Justice of the European Communities on alleged discrimination under the Treaty of Rome emphasized practical effect and not formulation as the test of prohibited discrimination. Therefore, differences based, directly or indirectly, on currency are not automatically discriminatory.

19. The variability of exchange rates has produced many effects in international and national monetary law and practice. One effect is the growing use of units of account. The role of the SDR is referred to in paragraphs 2–5 above. Some members of the European Community have taken steps to assimilate the ECU to foreign currencies in order to promote its use as a unit of account and a means of payment.

20. The floating of sterling, as well as other major currencies, has led to the revolutionary *Miliangos* doctrine, according to which English courts can now give judgments expressed in foreign currency and under which the rate of exchange at the date of payment applies if settlement is made in sterling. The effects of the doctrine have spread through many aspects of English law. The law as developed by the courts has been provisionally endorsed by the English Law Commission. The reasonable foreseeability of fluctuation by the parties is relevant for some purposes, but it is submitted that foreseeability should be presumed in present conditions.

21. The *Miliangos* doctrine has affected the solution of exchange rate problems in jurisdictions in which the doctrine does not prevail. The doctrine is likely to have these effects in jurisdictions in which English

judicial decisions have persuasive influence. One Canadian court, however, has criticized the “instability” introduced by the *Miliangos* doctrine into the law of foreign currency obligations.

22. The English Law Commission has provisionally endorsed the economic principle that the rate of interest awarded by a judgment should be related to the currency of the judgment. This principle should be taken into account when plaintiffs are considering the currency in which to formulate their claims. Courts should apply an economic analysis, however, to ensure that the combination of currency of judgment, exchange rate, and rate of interest does not result in overcompensation.

23. Courts should apply an appropriate exchange rate when called upon to translate a foreign currency into the currency of the forum without reference to the consistency of the exchange rate with the issuing member’s obligations under the Articles (unless Article VIII, Section 2(b) applies). Only actual rates of exchange can do justice between parties. Problems of the legality under the Articles of the exchange rate for a member’s currency involve only the Fund and members.

24. The Articles do not prescribe or prohibit the *Miliangos* doctrine. But the effect of Article VIII, Section 2(b) may be to prevent recovery in a currency if recovery would be contrary to the exchange control regulations of another member. The absence of a multilateral international agreement on the *Miliangos* doctrine may encourage “forum shopping” by plaintiffs or the adoption of provisions in agreements for damages that reflect exchange losses because the *Miliangos* doctrine does not apply.

25. Legal consequences flow from the observance or failure to observe accepted standards of accounting. The variability of exchange rates has intensified problems of accounting. FASB Statement No. 52 in the United States prefers current exchange rates in lieu of historic exchange rates as recommended earlier by FASB Statement No. 8. The use of current exchange rates, however, may not always produce the most desirable results, as is illustrated by a change in one central bank’s accounting for its external assets.

26. Problems of the equitable allocation of exchange risks arise between the parties that have entered into a transaction with each other or among parties that have entered into individual transactions with a common opposite entity. The *Miliangos* doctrine is addressed to problems of the first kind; the principles for distributions in bankruptcy or liquidation are addressed to problems of the second kind. In the choice of

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one exchange rate rather than another. the *Miliangos* doctrine gives an advantage to one party and a correlative disadvantage to the other party when the exchange rate is compared with other conceivable choices. In bankruptcy or liquidation, equal treatment, whether advantageous or disadvantageous, for all creditors is the objective in selecting a rate of exchange. The Currency Pooling System of the World Bank is designed to deal with a problem of the second kind. The equal value principle of the Fund as applied to transactions in SDRs deals with a combination of the two kinds of problem.

27. Courts are working their way toward an idea of normal protection against exchange risks that a party should arrange in the present conditions of variable exchange rates. A party's legal position may be affected if it does not arrange this protection up to the due date for payment or possibly up to the date of actual payment when payment is delayed, on the principle that it is choosing to assume exchange risks. The Articles may affect exchange rates for forward transactions.

28. The variability of exchange rates is responsible for a tendency to provide for the adaptation of features of legal instruments that are affected by fluctuations. Buffer stock agreements are examples of this tendency. Provision is made for special procedures to consider the adaptation of financial aspects of the agreement and to deal with them once the procedure is invoked. Another legal technique in other instruments is to provide for automatic adaptations as the result of changes in exchange rates. Present and proposed currency adjustment factors in the maritime industry are examples of this technique. The construction of a formula for adaptation that is satisfactory to all interests may be a difficult undertaking. The case for or against the SDR as the basic datum in a formula has been considered. The specific interests of a trade have a bearing on the acceptability of the SDR as the unit of account in that branch of commerce.

### Gold

29. The Gold Commission was appointed under statutory direction in the United States to study and make recommendations on the policy of the United States Government concerning the role of gold domestically and internationally. The Commission reported in March 1982 and made recommendations that ranged from matters of minor domestic interest in the United States to matters of the broadest international impact.

30. The Commission was not in favor of restoring a par value system based on gold as the common denominator or in favor of a further "restitution" of the Fund's gold to members that had transferred gold to the Fund. Restitution was opposed so that the gold could be retained by the Fund for possible use in various contingencies, including the restoration of a par value system with gold as the common denominator. The report does not consider what amendments of the Articles would be necessary if an international gold standard were to be instituted or were to evolve within a group of countries or multilaterally.

31. Courts continue to be faced with the problem of applying legal provisions that limit liability by reference to a unit of account defined in terms of gold because the amendment of existing treaties or the substitution of new treaties under which the SDR will be the unit of account has not yet become effective. Various solutions have been applied by courts in different countries or even in the same country. The Netherlands Supreme Court has applied the SDR on the basis of the former definition of the SDR in terms of gold and the definition of the gold unit of account in a treaty. An appellate court in the United States has decided that provisions based on a gold unit of account will be unenforceable.

32. Some members have adopted legislation or regulations directing how gold units of account are to be translated into the domestic currency.

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## APPENDICES

### Appendix A. Decision of the United Nations Commission on International Trade Law \*

*Recognizing* that many international transport and liability conventions of both a global and a regional character contain limitation of liability provisions, wherein the limitation of liability is expressed in a unit of account,

*Noting* that the limitation of liability as fixed in these conventions may become seriously affected over time by changes in monetary values, thereby destroying the intended balance of the convention as adopted,

*Believing* that a preferred unit of account for many conventions, particularly for those of global application, would be the Special Drawing Right as determined by the International Monetary Fund,

*Being of the opinion* that the conventions should in any event contain a provision which would facilitate the adjustment of the limit of liability to changes in monetary values,

1. *Adopts* the unit of account provision and the two alternative provisions for the adjustment of the limit of liability in international transport and liability conventions as contained in the annexes to the present decision;

2. *Recommends* that in the preparation of future international conventions containing limitation of liability provisions or in the revision of existing conventions the unit of account provision as adopted by the Commission should be used;

3. *Recommends further* that in such conventions one of the two alternative provisions for adjustment of the limitation of liability as adopted by the Commission should be used;

4. *Suggests* that, when the sample price index provision is to be used in such a convention, consideration be given to the nature of the intended price index and the institution to be charged with its preparation, revision and calculation;

5. *Requests* the General Assembly to recommend the use of these provisions in the preparation of future international conventions containing limitation of liability provisions or in the revision of existing conventions.

\*Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17 (A/37/17)*, United Nations (New York, 1982), pp. 14–17.

*Annex I*

UNIVERSAL UNIT OF ACCOUNT

1. The unit of account referred to in article [ ] of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article [ ] are to be expressed in the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The equivalence between the national currency of a Contracting State which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.

2. The calculation mentioned in the last sentence of paragraph 1 is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for amounts in article [ ] as is expressed there in units of account. Contracting States must communicate to the Depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.

*Annex II*

SAMPLE PRICE INDEX

1. The amounts set forth in article [ ] shall be linked to [a specific price index which might be considered appropriate for a particular convention]. On coming into force of this [Protocol-Convention], the amounts set forth in article [ ] shall be adjusted by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the index for the year ending on the last day of December prior to which this [Protocol-Convention] came into force over its level for the year ending on the last day of December [of the year in which the Protocol or Convention was opened for signature]. Thereafter, they shall be adjusted on the first day of July of each year by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the level in the index for the year ending on the last day of the previous December over its level for the prior year.

2. The amounts set forth in article [ ] shall not, however, be increased or decreased if the increase or decrease in the index does not exceed [ ] per cent. Where no adjustment was made in the previous year because the change was less than [ ] per cent, the comparison shall be made with the level for the last year on the basis of which an adjustment was made.

3. By the first day of April of each year the Depositary shall notify each Contracting State and each State which has signed the [Protocol-Convention] of the amounts to be in force as of the first day of July following. Changes in the amounts shall be registered with the Secretariat of the United Nations in

accordance with General Assembly regulations to give effect to Article 102 of the Charter of the United Nations.

*Annex III*

SAMPLE AMENDMENT PROCEDURE FOR LIMIT OF LIABILITY

1. The Depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article [ ]:

(a) Upon the request of at least [ ] Contracting States, or

(b) When five years have passed since the [Protocol-Convention] was opened for signature or since the Committee last met.

2. If the present [Protocol-Convention] comes into force more than five years after it was opened for signature, the Depositary shall convene a meeting of the Committee within the first year after it comes into force.

3. Amendments shall be adopted by the Committee by a [ ] majority of its members present and voting.<sup>4</sup>

4. Any amendment adopted in accordance with paragraph 3 of this article shall be notified by the Depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of [6] months after it has been notified, unless within that period not less than [one-third] of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the Depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all Contracting States [12] months after its acceptance.

5. A Contracting State which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment has entered into force. Such denunciation shall take effect when the amendment enters into force.

6. When an amendment has been adopted by the Committee but the [6] month period for its acceptance has not yet expired, a State which becomes a Contracting State to this Convention during that period shall be bound by the amendment if it comes into force. A State which becomes a Contracting State to this Convention after that period shall be bound by any amendment which has been accepted in accordance with paragraph 4.

(Adopted July 28, 1982)

<sup>4</sup>The Conference of Plenipotentiaries may wish to insert a list of criteria to be taken into account by the Committee.

**Appendix B. Surveillance over Exchange Rate Policies \***

(1) The Executive Board has reviewed the document "Surveillance over Exchange Rate Policies" as provided in paragraph 2 of Executive Board Decision No. 5392-(77/63), adopted April 29, 1977, and will review it again at an appropriate time not later than April 1, 1984.

(2) The Executive Board has also reviewed the procedures relating to the general implementation of the Fund's surveillance over members' exchange rate policies, as required by paragraph VI of *Procedures for Surveillance* in the document "Surveillance over Exchange Rate Policies" referred to in (1) above, including the procedures for the conduct of consultations under Article IV, which consultations shall comprehend the consultations under Article VIII and Article XIV, and approves the continuation of the procedures as described in SM/82/37, in the light of the attached Managing Director's summing up, until the next annual review, which shall be conducted not later than April 1, 1983.

*Decision No. 7088-(82/44)*  
*April 9, 1982*

*Attachment to Decision No. 7088-(82/44)*  
*Managing Director's Summing Up*

GENERAL REMARKS

The Board agreed that the principles embodied in the 1977 document on surveillance over exchange rate policies are not at this time in need of revision or reformulation.

Directors considered that, on the whole, the basic surveillance issues outlined in SM/82/37—particularly the references to the interrelationships and interactions of financial policies and to intervention—were addressed in a balanced manner.

A number of Directors considered that the surveillance function had not yet matured and was not as effective as it could be. There was a strong endorsement of the management's efforts to strengthen surveillance by the Fund, but it was recognized that full cooperation of members is essential if this function is to be made more effective. It is my understanding that the Board believes that cooperation between members should take place on three distinct levels:

a. It is important first to reach a common view or understanding on the analytical framework within which exchange rate issues and requirements can be discussed. In this respect, several speakers pointed to the need to look for ways of improving our appraisal—both quantitative and qualitative—of competitiveness and of the role of exchange rates in the adjustment process, of better assessing the

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\*International Monetary Fund. *Annual Report of the Executive Board for the Financial Year Ended April 30, 1982* (Washington, 1982), pp. 128–32.

adequacy or appropriateness of different exchange rate regimes, and of adjusting those regimes when warranted.

I have also noted the interesting comments on the need to do more analytical work on these issues. The staff and management have been working toward this goal in recent months, but more needs to be done to improve our understanding of the interrelationships between balance of payments deficits, budgetary policies, interest rates, and exchange rates. It has also been suggested that we need to better understand the functioning of the European Monetary System, the currency intervention that it entails, and the relationships between EMS members and other countries.

b. The second level of cooperation is the agreement by members to discuss with the Fund, and in the Fund, the aspects of individual policy choices that have or can have an adverse impact on other countries.

c. Third, it is important for members to cooperate by taking seriously into account, in their national process of decision making, the views expressed and conclusions reached by the Board in the form of "a" and "b" above.

Such cooperation is in fact what surveillance is all about. Things are not as simple as they were under the fixed exchange rate system. We have to reach common views on matters that are very difficult to assess scientifically; and we know very well that it is a conceptual difference of approach among a number of member countries with respect to exchange rate relationships which presently makes the exercise of surveillance particularly difficult. If there was a convergence of views on the role of the exchange rate in the adjustment process, some of the problems would be alleviated, but I believe that the needed cooperation would be made possible by a more objective approach to issues that lend themselves to objective analysis.

A number of Directors felt that there remains some asymmetry in the exercise of surveillance between members that use Fund resources and those that do not, or between small countries and major industrial countries. Those Directors considered that there was a need to move toward a more symmetrical treatment. I should note that we are very vigilant in this regard and attach great importance to treating members on a uniform basis. Indeed, a reading of the language employed in the staff reports for more recent Article IV consultations with industrial countries will show that the formulation of policy recommendations has tended to be more candid and more precise than in the past. And, in the spirit of the comments made today, I shall be continuing my efforts to be frank and forthcoming in my summing up statements on all consultation discussions. ●f course, an evenhanded approach does not mean that consultations will be perfectly symmetrical. The situations of countries themselves are not symmetrical; and we know that a country that is dependent on Fund resources is *de facto* more likely to be the object of active surveillance by the Fund than one not in need of the Fund's assistance. Given that natural distinction, we try especially hard to treat the appraisals and recommendations for different categories of countries in a uniform and evenhanded way.

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While we have reaffirmed today that the basic framework within which surveillance should be exercised is the individual Article IV consultation, we have also agreed that, for the exercise of surveillance to be really effective, it must be looked at in a multilateral context. One idea mentioned in this regard was the possibility, within the framework of the Fund, of holding informal discussions with or on the industrial countries as a group or those whose currencies make up the SDR basket. Directors also referred to the World Economic Outlook exercise as a very helpful method of integrating the individual judgments or assessments into a more collective framework. In this respect, the forthcoming April 19th discussion on the World Economic Outlook is particularly timely and should provide us with the opportunity to study in very practical terms the effects of the economic policies of industrial countries on one another and on the rest of the world. We should devote the first day's discussion of the Outlook to these interactions. The staff will be providing Executive Directors with a list of illustrative questions to facilitate such a discussion, which should be a helpful element in our approach to surveillance.

### *Role of the Managing Director in Surveillance*

A number of Directors stressed the role of the Managing Director in the surveillance process in conducting personal consultations with member countries and making public statements in this regard. In my own view, there are three levels to this role. First, the Managing Director must make every effort to keep abreast of the work of the staff and its assessment of world developments in order to come to conclusions about where and when surveillance needs to be exercised.

Second, he must keep in close contact with the countries that play an important role in the international monetary system, either through the Executive Directors or through direct contact with the officials of the countries themselves. In the course of such discussions, the Managing Director should focus on the concerns of individual countries with respect to the surveillance process so that he can take the "pulse" of the membership as a whole.

With the above information in hand, the Managing Director must then formulate proposals to the Executive Board about how surveillance or adjustment should be conducted. At this level, he must not serve simply as a conduit for the views of the membership—which are often divergent—but must exercise some independence in synthesizing these views and making proposals that, in his view, will best serve the membership as a whole. It is understood, of course, that such proposals must be expressed in a way that does not impinge on the sovereign right of members to make policy.

### CONSULTATION AND SURVEILLANCE PROCEDURES

Before turning to specific points on procedure, I feel it is appropriate to acknowledge, as the staff has already done, the broad support given by Directors to the staff's efforts to intensify and improve the content of the reports. It is

encouraging to know that we are moving in the right direction in taking account of the views of the Board as we prepare material for discussion.

### *Frequency and Scheduling of Missions*

A number of Directors endorsed the present frequency of consultations, but some of them stressed that any further fall in frequency should be avoided if possible. Several Directors could accept the staff's suggestion of a somewhat reduced frequency of consultations for members whose economics are small, whose underlying economic situations remain basically unchanged, and who are not using Fund resources. Several Directors stressed that visits by senior staff to such members should not be a substitute for consultations and it was agreed that adequate advance notice of such visits should continue to be given to the Executive Directors concerned in order to permit them to play their proper role in relation to their constituent countries. Two Directors stressed that the outer time limit for consultations should not exceed two years; increased frequency and better synchronization of consultations with major currency countries were also advocated. Several Directors suggested that updated reports on Recent Economic Developments (REDs) be issued in cases in which a fairly long time lag between consultations was developing.

Several Directors stressed the desirability of coordination in the timing of Board consideration of consultations with major member countries a matter which relates to the importance of taking a global view of the effects of economic policies of members on one another in conducting the Fund's surveillance procedures. Some speakers suggested grouping consultations with members participating in a currency union, while others underlined certain difficulties—both practical and otherwise—that may arise if such a course were to be adopted.

### *Role of the Executive Director in Consultations*

A number of Directors, either directly or indirectly, requested clarification of the role of Executive Directors in the consultation process and about the role of Executive Directors and perhaps of the Board itself in the briefing stage. The role of the Executive Board in the consultation process is clearly defined in the Articles, which provide that the Managing Director and the staff shall conduct the ordinary business of the Fund, including consultation missions, under the direction of the Board. The Board has the power and the responsibility to adopt policies and establish procedures for the conduct of consultations and negotiations with member countries, but the actual consultation discussions and negotiations are the responsibility of the management and staff.

The individual Executive Director plays a different but very important role in the consultation process. He is obviously responsible for presenting and explaining the views of his countries during Board discussions; but there are also many ways in which he can play a particularly useful intermediary role at an earlier stage by helping the staff mission to understand the policies and views of

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his countries and vice versa, and I wish to take this opportunity to express the appreciation of management and staff for the efforts made over the years by individual Directors in this regard.

### *Combining Consultation and Use of Fund Resources Missions*

Most Directors preferred, in principle, to have the Article IV consultations precede negotiations on, and Board consideration of, requests for use of Fund resources. When it is possible to arrange an Article IV mission before a negotiation—especially when a long time has elapsed since the prior Article IV consultation with the member—it would probably be best to follow such a procedure, particularly since the guidance given to the staff in the course of an Article IV consultation discussion in the Board can be very helpful in the conduct of further negotiations with the member country. Several speakers believed that this was the ideal scheme, but added that it would not always be practical in view of countries' sometimes urgent need for Fund resources. One Director felt that, in cases of urgent need for Fund resources, there should be no presumption that an Article IV consultation would precede discussions on use of Fund resources. Generally the Board felt that flexibility had to be employed in this regard. The Board's views on this matter will of course be carefully considered; but, in a number of cases, it may be a good idea to maintain the current practice of arranging the schedule of missions and discussions in such a way as to obtain maximum benefit from combining Article IV consultations with missions on the use of Fund resources.

### *Size and Duration of Missions*

Many Directors stressed the heavy burden of country missions on the staff in area departments. The current duration and size of missions was broadly endorsed. The view was also put forward that technical assistance departments in the Fund—especially the Fiscal Affairs Department—should be more actively involved in Article IV consultation missions where their participation was relevant. Several Directors suggested that the present strain on the staff might be eased by additional recruitment; this matter will be considered further by the Board during the forthcoming discussion of the financial year 1983 administrative budget.

### *Reporting on Consultations*

Several Directors acknowledged improvements in the analytical quality of staff papers on country matters, although a number of speakers wished to see further efforts with respect to external competitiveness, the exchange rate setting, the appropriateness of the exchange rate regime, external reserves, reserves policies, and the interrelationships between monetary, fiscal, exchange rate, and incomes



policies. It was also stressed that staff reports on industrial countries should focus more precisely on clearly identifiable issues in order to facilitate the conduct of the discussion.

Several Directors endorsed the techniques developed by the staff for reporting on the sensitive subject of the exchange rate, but others cautioned against too explicit a discussion of exchange rate policies in the reports, in view of the great sensitivity of the subject. Some Directors, while agreeing that exchange rate questions must be treated carefully in the reports, considered that in cases of inappropriate exchange rate policy or maintenance of an unrealistic exchange rate level, the staff reports should treat the issues sufficiently forthrightly.

There was general agreement that staff reports should continue to cover trade issues in supporting the efforts of the GATT, keeping in mind, of course, the respective jurisdictions of the two organizations. One Director noted that progress by members toward acceptance of Article VIII had been inadequate.

The staff was encouraged to improve the form and usefulness of RED reports, inter alia, by regularly updating the reports when warranted and feasible. One Director questioned the need to have a RED report with each consultation, and several cautioned against including judgmental material in REDs.

#### *Timing of Article IV Discussions*

Directors endorsed the existing three-month rule, while generally agreeing on the four weeks' delay given to the Board for consideration of the report before the discussion. One Director suggested that the staff or management should report to the Board if a consultation was not completed within, say, six months from the discussion.

#### *Special Papers and Seminars*

There was a strong endorsement by Executive Directors of the current and prospective range of special papers and seminars on exchange rates or exchange rate policies in certain groups of countries, on economic policies of oil producing countries, and on the Fund's approach to centrally planned economies. A number of Executive Directors called for further consideration of the matter of exchange rate policies in LDCs.

#### *Supplemental Consultations and Informal Visits*

Directors generally endorsed existing procedures on supplemental consultations, although some of them wished to have more precise reporting on such consultations. The staff will keep this suggestion in mind in the preparation of World Economic Outlook papers.

### *Exchange Arrangements*

On the subject of exchange arrangements maintained by members, Directors expressed agreement with the staff recommendations regarding the need for prompt notification of changes in exchange rate regimes and improvements in the Fund's classification of regimes. It is important that the international community, through the Fund, should be provided with timely and meaningful information in this area. The staff and management agree with the suggestion of Directors that the general rule for ensuring prompt notification would be notification within three days of the date of change in arrangements. The information also needs to be comprehensive and provided on an evenhanded basis, including intervention policies of members with flexible exchange rate regimes as well as developments in pegged or managed arrangements. The Fund must be kept up to date on policies conducted by members or actions taken by them affecting their exchange markets. This information plays an essential role in ensuring that the surveillance process keeps abreast of developments; and the need to be current is a concern that has been widely voiced today. Directors have thus reaffirmed their commitment to ensuring that the provisions of the Article IV, Section 2(b) regarding notification of exchange arrangements are implemented effectively. The staff will be continuing its work on this area, including, as was suggested by some Directors, the policy implications of exchange regimes. When the staff can elaborate on the categories of different groups of countries pursuing exchange arrangements of different types, it will do so.

### **Appendix C. Text of Joint Statement on Monetary Undertakings Annexed to Versailles Communiqué \***

*Following is the text of a joint statement on international monetary undertakings issued on June 6 at the conclusion of the economic summit in Versailles, France:*

1. We accept a joint responsibility to work for greater stability of the world monetary system. We recognize that this rests primarily on convergence of policies designed to achieve lower inflation, higher employment, and renewed economic growth; and thus to maintain the internal and external values of our currencies. We are determined to discharge this obligation in close collaboration with all interested countries and monetary institutions.
2. We attach major importance to the role of the IMF as a monetary authority and we will give it our full support in its efforts to foster stability.
3. We are ready to strengthen our cooperation with the IMF in its work of surveillance; and to develop this on a multilateral basis taking into account particularly the currencies constituting the SDR.

\**IMF Survey*, Vol. 11 (June 21, 1982), p. 189.

4. We rule out the use of our exchange rates to gain unfair competitive advantages.

5. We are ready, if necessary, to use intervention in exchange markets to counter disorderly conditions, as provided for under Article IV of the IMF Articles of Agreement.

6. Those of us who are members of the EMS [European Monetary System] consider that these undertakings are complementary to the obligations of stability which they have already undertaken in that framework.

7. We are all convinced that greater monetary stability will assist freer flows of goods, services, and capital. We are determined to see that greater monetary stability and freer flows of trade and capital reinforce one another in the interest of economic growth and employment.

#### **Appendix D. Policy on Multiple Currency Practices \***

The Executive Board has reviewed the Fund's policy with respect to multiple currency practices. The Fund shall be guided by the approach outlined in the conclusions set forth below.

1. Official action should not cause exchange rate spreads and cross rate quotations to differ unreasonably from those that arise from the normal commercial costs and risks of exchange transactions.

a. (i) Action by a member or its fiscal agencies that of itself gives rise to a spread of more than 2 per cent between buying and selling rates for spot exchange transactions between the member's currency and any other member's currency would be considered a multiple currency practice and would require the prior approval of the Fund.

(ii) An exchange spread that arises without official action would not give rise to a multiple currency practice.

(iii) Deviations between the buying and selling rates for spot transactions, and for other transactions would not be considered multiple currency practices if they represent the additional costs and exchange risks for these other transactions.

b. Action by a member or its fiscal agencies which results in midpoint spot exchange rates of other members' currencies against its own currency in a relationship which differs by more than 1 per cent from the midpoint spot exchange rates for these currencies in their principal markets would give rise to a multiple currency practice. If the differentials of more than 1 per cent in these

\*Executive Board Decision No. 6790-(81/43), March 20, 1981, *Selected Decisions of the International Monetary Fund and Selected Documents*, Ninth Issue (Washington, 1981), pp. 225-27.

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cross rates persist for more than one week, the resulting multiple currency practice would become subject to the approval of the Fund under Article VIII, Section 3.

When difficulties are encountered in the interpretation and application of these criteria in specific cases, particularly concerning the nature of official actions, the staff will present the relevant information to the Executive Board for its determination.

2. The policy of the Fund on the exercise of its approval jurisdiction over exchange measures subject to Article VIII, as set forth in paragraph 2 of Executive Board Decision No. 1034-(60/27), adopted June 1, 1960, remains broadly appropriate. In accordance with this policy, the Fund will be prepared to grant approval of multiple currency practices introduced or maintained for balance of payments reasons provided the member represents and the Fund is satisfied that the measures are temporary and are being applied while the member is endeavoring to eliminate its balance of payments problems, and provided they do not give the member an unfair competitive advantage over other members or discriminate among members. The Fund will continue to be very reluctant to grant approval for the maintenance of broken cross exchange rates.

3. In accordance with the Fund's policy on complex multiple currency practices, as stated in Executive Board Decision No. 649-(57/33), adopted June 26, 1957, the Fund will not approve multiple currency practices under complex multiple rate systems unless the countries maintaining them are making reasonable progress toward simplification and ultimate elimination of such systems, or are taking measures or adopting programs which seem likely to result in such progress.

4. While urging members to apply alternative policies not connected with the exchange system, the Fund will be prepared to grant temporary approval of multiple currency practices introduced or maintained principally for nonbalance of payments reasons, provided that such practices do not materially impede the member's balance of payments adjustment, do not harm the interests of other members, and do not discriminate among members.

5. To assist the Executive Board in reaching a decision concerning approval or nonapproval of a multiple currency practice subject to approval under Article VIII, Section 3, the reasons underlying the practice and its effects will be analyzed in reports on Article IV consultations or in other staff papers dealing with exchange systems. In all cases, consistent with the cycle of consultations under Article IV, approval will be granted for periods of approximately one year, in order to provide for a continual review by the Executive Board.

*Decision No. 6790-(81/43)  
March 20, 1981*

**Appendix E. English Law Commission's Working Paper No. 80:  
Summary of Provisional Conclusions on Major Issues of Policy \***

1. The principle underlying the decision in *Miliangos* and the consequences which flow from it are greatly to be preferred to the rules which it superseded.
2. Legislative intervention is not required to determine the question whether a plaintiff should be able to obtain judgment in sterling in cases where the relevant obligation is properly to be expressed in a foreign currency; the matter can be left for judicial decision.
3. The present rule that conversion of a foreign currency judgment into sterling is to be effected at the date of actual payment or the date on which the court authorises enforcement of the judgment, whichever is the earlier, provides the best practical implementation of the *Miliangos* philosophy, and should therefore be retained as the general rule.
4. The parties to an agreement should be free to agree:
  - (a) the date and rate of any conversion; and
  - (b) that payment in England should be made in a particular foreign currency alone, that is, with no option for the debtor to pay in sterling.
5. It should be possible to obtain and enter judgment in a foreign currency alone (in which case the judgment debtor would not have the option of satisfying the judgment in sterling); but a successful plaintiff should not have a right to judgment in that form without leave of the court.

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\*The Law Commission, *Working Paper No. 80. Private International Law [:] Foreign Money Liabilities* (London, 1981), pp. 180-81.

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## NOTES

References to provisions of the Fund's Articles of Agreement are to the present Articles unless they are followed by the word *original* or *first*, in which event they refer to the original Articles or the First Amendment, respectively.

The five earlier pamphlets in this series are referred to by the number and date of the pamphlet, as follows:

Pamphlet No. 19 – Floating Currencies, Gold, and SDRs:  
Some Recent Legal Developments (1976).

Pamphlet No. 22 – Floating Currencies, SDRs, and Gold:  
Further Legal Developments (1977).

Pamphlet No. 26 – SDRs, Gold, and Currencies:  
Third Survey of New Legal Developments (1979).

Pamphlet No. 33 – SDRs, Currencies, and Gold:  
Fourth Survey of New Legal Developments (1980).

Pamphlet No. 36 – SDRs, Currencies, and Gold:  
Fifth Survey of New Legal Developments (1981).

### SDRs

1. Pp. 21–26.

2. *Annual Report of the Executive Board for the Financial Year Ended April 30, 1982* (Washington, 1982), p. 89. (Hereinafter referred to as *Annual Report, 1982*.) The report states that the sale of SDRs by the Swiss National Bank involved the first transfer of SDRs against Swiss francs, and that the acquisition of SDRs from a prescribed holder by a new member of the Fund to enable it to pay the SDR component of its subscription to the Fund was the first acquisition of SDRs against SDR-denominated deposits with a private bank.

3. Article V, Section 10. See also Pamphlet No. 26 (1979), pp. 15–19.

4. See Pamphlet No. 33 (1980), p. 24.

5. Executive Board Decision No. 4773-(75/136), August 1, 1975, as amended by Decision No. 5694-(78/35), March 17, 1978. *Selected Decisions of the International Monetary Fund and Selected Documents*, Ninth Issue (Washington, 1981), pp. 295–97. (Hereinafter referred to as *Selected Decisions*.)

6. Executive Board Decisions No. 6843-(81/75), May 6, 1981, No. 6863-(81/81), May 13, 1981, as amended by Decision No. 6870-(81/83), June 1, 1981, and No. 6864-(81/81), May 13, 1981. *Selected Decisions*, Ninth Issue, pp. 143–86.

7. Executive Board Decision No. 6844-(81/75), May 5, 1981, *Selected Decisions*, Ninth Issue, p. 186.

8. *Ibid.*

9. *Ibid.*, pp. 186–88.

10. H. Schadee, ed., *Transport* (The Netherlands), pp. 1311 *et seq.*
11. Art. III of the Protocol.
12. Art. IV of the Protocol.
13. Pamphlet No. 22 (1977), pp. 29–31.
14. Pamphlet No. 26 (1979), pp. 22–23.
15. Pamphlet No. 22 (1977), p. 37.
16. Pamphlet No. 36 (1981), p. 30.
17. Schadee (cited in n. 10), pp. 1324–28 *et seq.*
18. Convention relative aux transports internationaux ferroviaires (COTIF); Convention internationale concernant le transport des marchandises par chemins de fer (CIM); Convention internationale concernant le transport des voyageurs et des bagages par chemins de fer (CIV); Organisation intergouvernementale pour les transports internationaux ferroviaires (OTIF); Office central des transports internationaux ferroviaires (OCTI).
  19. Art. 19 (COTIF).
  20. Art. 8 (COTIF).
  21. Art. 21 (COTIF).
  22. Appendix B, Art. 7 (COTIF).
  23. Appendix A, Art. 6 (COTIF).
24. J. H. P. Boudenwijnse, "The Berne Railway Conventions in a New Shape: The Convention of International Railway Transport (COTIF)," *Netherlands International Law Review*, Vol. 29 (No. 2, 1982), pp. 151–73.
25. Pp. 37–38.
26. Resolution No. COM8/3. See Stephen A. Silard, "ITU Decides to Adopt SDR as Monetary Unit," *IMF Survey*, Vol. 11 (December 13, 1982), pp. 404–405.
27. "[Babucar] N'diaye Moves Towards the Bond Markets," *Supplement to Euromoney*, May 1981, p. 8. For a list of identified public placements of SDR-denominated instruments in 1981, see Dorothy Meadow Sobol, "The SDR in Private International Finance," Federal Reserve Bank of New York, *Quarterly Review*, Vol. 6 (Winter 1981–82), p. 36.
28. *The Economist*, March 20, 1982, p. 38.
29. Wila D. Mung'omba, *Le Monde*, February 13, 1982.
30. Robert C. Efffros, ed., *Emerging Financial Centers: Legal and Institutional Framework*, International Monetary Fund (Washington, 1982), pp. 575–604.
31. East African Development Bank, *Annual Report, 1980* (Kampala), pp. 3, 13, and 1981, pp. 7, 12.
32. Sobol (cited in n. 27), pp. 29–41; Lawrence de V. Wragg, "Commercial Transactions in SDRs—Some Documentation Considerations," *Business Law Review*, Vol. 2 (October 1981), pp. 315–17; Th. N., "Le marché des certificats de dépôts en D.T.S., *Agence Economique et Financière* (year-end edition, December 1981), pp. 118–20; Joseph Gold, "Development of the SDR as Reserve Asset, Unit of Account, and Denominator: A Survey," *George Washington Journal of International Law and Economics*, Vol. 16 (No. 1, 1981), pp. 1–64; Orren



Merren, "The SDR as a Unit of Account in Private Transactions," *International Lawyer*, Vol. 16 (Summer 1982), pp. 503–20.

33. Financial Accounting Standards Board of the Financial Accounting Foundation, *Statement of Financial Accounting Standards No. 52: Foreign Currency Translation* (Stamford, Connecticut, December 1981), p. 76. An entity's functional currency is defined as the currency of the primary economic environment in which the entity operates, that is, normally the currency of the environment in which an entity primarily generates and expends cash (*ibid.*, p. 77). The commercial use of the SDR is referred to in Pamphlet No. 26 (1976), p. 30, in which a clause in one commercial contract made available to the author is quoted. See Merren, pp. 516–20 (cited in n. 32).

A proposal, as follows, has been made by Giovanni Magnifico, economic adviser, Bank of Italy:

"These drawbacks might be avoided, at least in part, by pricing and invoicing oil in SDRs. This would recognize the fact that, although we have a dominant international vehicle currency, we do not have a national currency able to act satisfactorily as an international standard of value. This role can best be played by a composite monetary medium, such as the SDR; its mix of the world's five main currencies is likely to reflect the experience and the evolution of most, if not all, leading international currencies."—"Pricing commodities in SDRs," *Institutional Investor* (international edition, February 1982), p. 23.

Dr. Magnifico also states that "an increasing number of companies are resorting to SDR pricing." He cites, however, only the Suez Canal Authority (on which see Pamphlet No. 19 (1976), p. 48).

34. Anthony R. Miller, "Lloyd's Standard Form of Salvage Agreement—LOF 1980: A Commentary," *Journal of Maritime Law and Commerce*, Vol. 12 (January 1981), pp. 243–61, at pp. 254, 261.

35. See Pamphlet No. 22 (1977), pp. 34–35.

36. Pamphlet No. 36 (1981), pp. 41–42.

37. Robert C. Effros, "Unit of Account for International Conventions Is Considered by UN Commission on Trade Law," *IMF Survey*, Vol. 11 (February 8, 1982), pp. 40–41. The plaintiffs-appellants (TWA), in their petition for rehearing, and suggesting rehearing in banc, by the United States Court of Appeals for the Second Circuit in *Franklin Mint Corporation et al. v. Trans World Airlines, Inc.*, point out, in response to the court's statement that the valuation of the SDR is "variable at the whim" of the Fund, that the Fund's membership consists of 146 countries, that high majorities are required for decisions on the method of valuation, and that even nonmembers, including the U.S.S.R., agree that the SDR is the best unit of account (p. 14, fn., of the petition).

38. Pamphlet No. 26 (1979), pp. 22–24.

39. Report of the United Nations Commission on International Trade Law on the Work of its fifteenth session, *Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 17 (A/37/17)*, United Nations (New York, 1982), pp. 14–17.

40. Pamphlet No. 26 (1979), pp. 22–23.

41. Pamphlet No. 36 (1981), pp. 38–40. United Nations Commission on International Trade Law, Working Group on International Negotiable Instruments, *Unit of Account of Constant Value: Report of the Secretary-General*, UN Document A/CN.9/WG.IV/WP.27, November 23, 1981.

42. United Nations Commission on International Trade Law (cited in n. 39).

43. Joseph Gold, "Effects of Variable Exchange Rates on Treaties," *Revue Belge de Droit International*, Vol. 16 (No. 1, 1981–82), pp. 192–95, 199. (Hereinafter referred to as Gold, "Variable Exchange Rates.")

44. The subject of an index has been considered by French courts in connection with the application of a unit of account defined in terms of gold in two conventions. On August 24, 1978, the Le Havre Commercial Court decided that the Poincaré franc should be applied according to the most recent par value of the French franc adjusted according to the retail price index as determined by the French National Institute for Statistics and Economic Research. The Court of Appeal of Paris, on January 31, 1980, rejected this solution because it would require the court to select an index. Joseph Gold, *The Fund Agreement in the Courts: Volume II—Further Jurisprudence Involving the Articles of Agreement of the International Monetary Fund* (Washington, 1982), pp. 446–47. (Hereinafter referred to as Gold, *Fund Agreement in the Courts: Volume II*.)

### Currencies

45. Article IV, Section 3(a)

46. Article IV, Section 3(b).

47. Sec Executive Board Decisions No. 5392-(77/63), April 27, 1977, and No. 6026-(79/13), January 22, 1979, *Selected Decisions*, Ninth Issue, pp. 10–15; Pamphlet No. 22 (1977), pp. 78–81; Pamphlet No. 33 (1980), pp. 45–46; Pamphlet No. 36 (1981), pp. 43–45.

48. Article XII, Section 3(b). The procedure by which the Executive Board endorses a summing up by the Managing Director involves the Board's scrutiny of a draft summing up and amendment of it by the Board, if necessary, so that the statement is an adequate reflection of the Board's discussion, but the procedure avoids some of the give and take in drafting texts that purport to be formulated by the Board itself. The procedure avoids the risk of the lowest common denominator of consent and permits more detail than might be considered desirable in other forms of decision.

49. Article IV, Section 2(a).

50. Article VIII, Section 3.

51. Pamphlet No. 33 (1980), pp. 46–64.

52. How to refer to the views of Executive Directors who are fewer than the total number has never been resolved authoritatively. The statement mentions "a number of Executive Directors," "several" Executive Directors, "one" or "two" Executive Directors, "some speakers."

53. On the meaning of symmetry, and its contrast to uniformity, see Joseph Gold, "Symmetry as a Legal Objective of the International Monetary System," *New York University Journal of International Law and Politics*, Vol. 12 (Winter 1980), pp. 423–77, at pp. 423–28. On uniformity, see Joseph Gold, *Legal and Institutional Aspects of the International Monetary System: Selected Essays* (Washington, 1979), Chap. 13. (Hereinafter referred to as Gold, *Selected Essays*.)

54. See, for example, *World Economic Outlook: A Survey by the Staff of the International Monetary Fund*, IMF Occasional Papers, No. 9 (Washington, April 1982). For its predecessor, see IMF Occasional Papers, No. 4 (June 1981).

55. *Annual Report, 1982*, Appendix B, Role of the Managing Director in Surveillance, p. 130. The expression "sovereign right to make policy" does not, and could not, authorize policies that are inconsistent with the obligations that countries have undertaken by becoming members. The acceptance of those obligations is itself an exercise of sovereignty. For decisions of the Fund, taken on January 12, 1948, on the responsibility of the Managing Director, the staff, and the Executive Board on policies and major problems, see Joseph Gold, *Voting and Decisions in the International Monetary Fund* (Washington, 1972), pp. 249–50. (Hereinafter referred to as Gold, *Voting and Decisions*.)

56. "The Managing Director shall be chief of the operating staff of the Fund and shall conduct, under the direction of the Executive Board, the ordinary business of the Fund. Subject to the general control of the Executive Board, he shall be responsible for the organization, appointment, and dismissal of the staff of the Fund." —Article XII, Section 4(b).

See also Article XII, Section 3(a): "The Executive Board shall be responsible for conducting the business of the Fund, and for this purpose shall exercise all the powers delegated to it by the Board of Governors."

57. The statement represents no departure from the Fund's decisions of January 12, 1948 referred to in footnote 55. On the procedure for consultations, see Edward Brau, "The consultation process of the Fund," *International Monetary Fund and World Bank, Finance & Development*, Vol. 18 (December 1981), pp. 13–16.

58. *Annual Report, 1982*, Appendix B, Role of the Executive Director in Consultations, p. 131. See also the agreement that an Executive Director should receive adequate advance notice of the visit of senior staff to a member in the Executive Director's constituency in order to permit him to play his proper role in relation to members in his constituency.

Rule N-16(c) of the Rules and Regulations provides that

- "(i) Official travel by persons on the staff of the Fund to a member's territory shall be undertaken only after consultation with the Executive Director appointed, elected, or designated by the member.
- (ii) In addition, normally meetings of persons on the staff of the Fund with officials of a member to discuss official business shall be held only

after consultation with the Executive Director appointed, elected, or designated by the member.”

The Executive Director with whom consultation must be held cannot veto travel. Some Executive Directors participate in consultation discussions with members in their constituency when a mission from the Fund visits one of these member countries. An Executive Director can be “designated” by a member to represent its interests if no Executive Director casts the number of votes allotted to the member because the member did not participate in the election of Executive Directors.

59. The subject was not mentioned in the decisions of January 12, 1948 (see footnote 55).

60. See, for example, the title of Article IX, Section 8.

61. “The Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority. Each member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of these functions.”—Article XII, Section 4(c).

See Gold, *Voting and Decisions*, pp. 99–104.

62. *Annual Report, 1982*, Appendix B, Role of the Executive Director in Consultations, p. 131.

63. P. 58. On the subject of surveillance as a whole, see pp. 56–58.

64. See Article II(i) and Article X.

65. See Article VIII, Section 5(c), and Joseph Gold, *Order in International Finance, the Promotion of IMF Stand-By Arrangements, and the Drafting of Private Loan Agreements*, IMF Pamphlet Series, No. 39 (Washington, 1982), pp. 34–35. (Hereinafter referred to as Gold, *Order in International Finance*.)

The Economic Report of the President of the United States transmitted to the Congress in February 1982 contains the following comment on Article IV consultations:

“IMF Article IV consultations contribute to international stability in a number of ways. First, such consultations provide information to member governments regarding the national economic policies of other member governments. Such information may be helpful in shaping each member’s domestic policies as well as useful in avoiding conflicts because of misunderstandings. Second, Article IV consultations provide a valuable base of information for Fund staff assessments of global economic and exchange-rate developments which in turn provide useful information for national economic authorities. Third, Article IV consultations provide a framework for frank critiques among the representatives of member governments. Fourth, Article IV consultations provide a base from which all nations can develop a better understanding of the economic linkages among nations. And finally, these consultations can help a country to identify and address emerging payments problems at an early stage.” (Pp. 187–88.)

66. Article VIII, Section 5 (*original, first, and present Articles*).

67. Article IV, Section 3(b).
68. Article IV, Section 2(a).
69. *Annual Report, 1982*, p. 58.
70. For an analysis of categories of exchange arrangements and changes in them, see *Annual Report, 1982*, pp. 58–60.
71. *Annual Report, 1982*, p. 58. The Articles do not prescribe the periods at which consultations must be held under Article IV. The Fund has decided that in principle the consultations should be held annually (Pamphlet No. 22 (1977), p. 80–81). Article XIV requires consultations on the retention of restrictions under that provision to be held annually. Periodic consultations are foreseen on restrictions approved under Article VIII; ordinarily they would take place at intervals of about a year (Decision No. 1034-(60/27), June 1, 1960, *Selected Decisions*, Ninth Issue, pp. 209–11). The Fund is able to require consultation at any time when approving a restriction under Article VIII. Consultations under Article VIII or Article XIV are held (“comprehended”) within the framework of (i.e., at the same time as) consultations under Article IV whenever possible (Pamphlet No. 22 (1977), p. 80). The intervals for consultation, whether required by the Articles or by decisions of the Fund, are not observed in full because of practical difficulties, including those that are created by the growth in the Fund’s membership (*Annual Report, 1982*, p. 58).
72. Executive Board Decision No. 6790-(81/43), March 20, 1981, *Selected Decisions*, Ninth Issue, p. 227.
73. *Annual Report, 1982*, pp. 56–59.
74. *IMF Survey*, Vol. 11 (June 21, 1982), p. 177.
75. *Summary Proceedings of the Thirty-Seventh Annual Meeting of the Board of Governors*, September 6–9, 1982 (Washington, 1982), p. 293. (Hereinafter referred to as *Summary Proceedings, 1982*.)
76. *Summary Proceedings, 1982*, pp. 26–27.
77. *Ibid.*, p. 236. Cf. Donald T. Regan, Secretary of the Treasury and Governor of the Fund for the United States: “I am pleased to note that, with the assistance of the Managing Director, we have begun the process of enhanced international economic and monetary cooperation that was agreed upon at the Versailles summit.” (*Ibid.*, pp. 50–51.)
78. E. M. Bernstein, “Some Economic Effects of Multiple Exchange Rates,” *Staff Papers*, Vol. 1 (1950–51), pp. 224–37; Margaret G. de Vries, “Multiple Exchange Rates: Expectations and Experiences,” *Staff Papers*, International Monetary Fund (Washington), Vol. 12 (July 1965), pp. 282–311; Margaret G. de Vries, “Multiple Exchange Rates,” in *The International Monetary Fund 1945–1965: Twenty Years of International Monetary Cooperation*, Volume II: *Analysis*, ed. by J. Keith Horsefield (Washington, 1969), pp. 122–51.
79. Article I(iv).
80. Article XIV, Section 2.
81. Article XIV, Section 2 (*original, first*) contained an exception that permitted a member to introduce restrictions on payments and transfers for current international transactions if the member’s territories had been occupied by the

enemy during the Second World War. The rationale of this exception was that the member should be allowed to substitute its own exchange system for one that might have been imposed on it by the occupier. The Fund, however, did not understand that the member was absolved from the necessity to obtain the Fund's approval for the introduction of multiple currency practices even under this exception, because of the effect of other provisions of the Articles. Executive Board Decision No. 237-2, December 18, 1947, *Selected Decisions*, Eighth Issue, p. 151. The exception in favor of members whose territories had been occupied has been deleted from the Articles by the Second Amendment, but the exception had been regarded as exhausted even before the Second Amendment became effective because of the passage of time since the end of the Second World War.

82. Article IV, Section 1.

83. The Fund decided that “[T]he term ‘similar fiscal agency’ means an institution which performs an important function or functions similar to those normally performed by a Treasury, or central bank, or stabilization fund.”—Executive Board Decision No. 298-3, April 14, 1948, *Selected Decisions*, Seventh Issue, p. 147.

84. Article IV, Sections 3 and 4 (*original, first*).

85. See also “New Guidelines on Multiple Currency Practices Establish Criteria for Implementing Fund Policy,” *IMF Survey*, Vol. 10 (July 6, 1981), pp. 197, 204–209.

86. No exception is made for exchange rates within margins prescribed by or under Schedule C because the margins can be broad (*Proposed Second Amendment to the Articles of Agreement of the International Monetary Fund, A Report by the Executive Directors to the Board of Governors* (Washington, 1976), Pt. II, Chap. C, Sec. 8).

87. Executive Board Decisions No. 3463-(71/126), December 18, 1971, and No. 4083-(73/104), November 7, 1973, *Selected Decisions*, Eighth Issue, pp. 14–21.

88. Article IV, Section 4(b) (*original, first*). The explanation in the text is not affected by the obligation of a member, under Article XI in all three versions of the Articles, to avoid certain transactions or practices with a nonmember or with persons in the nonmember's territories. The nonmember, and not the member, has unquestioned jurisdiction over exchange transactions within the nonmember's territories. Article XI prevents a member from engaging in transactions or practices within a nonmember's territories that are permitted by the nonmember if the transactions would be contrary to the provisions of the Articles or the purposes of the Fund.

89. The exchange rates considered for the purpose of determining whether differences constitute multiple currency practices are not the buying and the selling rate for currencies but the midpoint between them because of the differences in spreads that may exist in exchange markets without constituting multiple currency practices.

90. Executive Board Decision No. 1034-(60/27), June 1, 1960. *Selected Decisions*, Ninth Issue, pp. 209–11.
91. Executive Board Decision No. 649-(57/33), June 26, 1957. *Selected Decisions*, Ninth Issue, pp. 223–25.
92. Executive Board Decision No. 1034-(60/27), June 1, 1960. *Selected Decisions*, Ninth Issue, p. 210.
93. Executive Board Decision No. 144-(52/51), August 14, 1952. *Selected Decisions*, Ninth Issue, pp. 203–204.
94. Gold, *Fund Agreement in the Courts. Volume II*, p. 412.
95. Art. XV, par. 4 (GATT).
96. The Fund is not prevented from examining a multiple currency practice that a member has not submitted for approval. The Fund may decide whether to approve or disapprove the practice. Moreover, the Fund may adopt a general decision that approves a category of multiple currency practices in advance.
97. Gold, *Selected Essays*, Chap. 3, pp. 148–81; see also Chap. 4, pp. 182–216.
98. Executive Board Decision No. 6838-(81/70), April 29, 1981. *Selected Decisions*, Ninth Issue, pp. 49–53; Gold, *Order in International Finance*, pp. 44, 47.
99. The words “or intensifies” appear when practices of the kind referred to are already in existence when the arrangement is approved.
100. The words “or modifies” appear in the circumstances mentioned in footnote 99.
101. Subparagraph (iii) is largely repetitive because bilateral payments agreements that are inconsistent with Article VIII would fall within subparagraph (i) or (ii), but there is the theoretical possibility that a discriminatory currency arrangement would not be covered by subparagraphs (i) or (ii).
102. Executive Board Decision No. 6838-(81/70), April 29, 1981. *Selected Decisions*, Ninth Issue, pp. 49, 53; Gold, *Order in International Finance*, pp. 44, 47.
103. It is theoretically possible that the Fund could permit the resumption of purchases under a stand-by or extended arrangement without approving multiple currency practices that had been imposed or intensified.
104. Article V, Section 5; Article XXIII, Section 2; Rules and Regulations, Rules K-2 to K-4, *By-Laws, Rules and Regulations*, Thirty-Ninth Issue (Washington, July 1, 1982), p. 46.
105. Gold, *Order in International Finance*, pp. 17–35.
106. Executive Board Decision No. 6224-(79/135), August 2, 1979. *Selected Decisions*, Ninth Issue, p. 57.
107. *Ibid.* For the full texts of the decisions on the Fund’s Compensatory Financing Facility, see *Selected Decisions*, Ninth Issue, pp. 56–63. See also Louis M. Goreux, *Compensatory Financing Facility*, IMF Pamphlet Series, No. 34 (Washington, 1980).
108. Executive Board Decision No. 6860-(81/81), May 13, 1981. *Selected Decisions*, Ninth Issue, pp. 59–63.

109. For discussions of cases involving this provision, see Joseph Gold, *The Fund Agreement in the Courts* (Washington, 1962) (hereinafter referred to as Gold, *Fund Agreement in the Courts*); and Joseph Gold, *Fund Agreement in the Courts, Volume II*.

110. Gold, *Fund Agreement in the Courts, Volume II*, pp. 95–104, 129, 258–65.

111. J. Keith Horsefield, *The International Monetary Fund, 1945–1965: Twenty Years of International Monetary Cooperation*, Volume I: *Chronicle*, pp. 403–404, 482; and Volume II: *Analysis*, ed. by J. Keith Horsefield, pp. 548–49 (Washington, 1969).

112. Gold, *Fund Agreement in the Courts*, pp. 30–32, 114–15, 146–47; Gold, *Fund Agreement in the Courts, Volume II*, pp. 80–87, 208–209, 215, 274–75, 420–21.

113. Article XXX(d).

114. Gold, *Fund Agreement in the Courts, Volume II*, pp. 95–104, 129, 258–65.

115. The effect of action in the Fund arose in *Energetic Worsted Corporation v. The United States*, Customs Appeal No. 5160 (April 7, 1966) in connection with countervailing duties under Section 303 of the U.S. Tariff Act of 1930, but the case was decided on the ground that there was no satisfactory proof that the multiple rates resulted in a bounty (Gold, *Fund Agreement in the Courts: Volume II*, pp. 104–107).

116. Annex I, Ad Art. VI, Paragraphs 2 and 3. Note 2. John J. Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (New York, 1969), pp. 418, 868. (Hereinafter referred to as Jackson, *World Trade and Law of GATT*.) On the difference between antidumping and countervailing duties, see Kenneth W. Dam, *The GATT: Law and International Economic Organization* (University of Chicago Press, 1970), p. 167. (Hereinafter referred to as Dam, *GATT*.) The Tokyo Round of the Multilateral Trade Negotiations resulted in the negotiation of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Relating to Subsidies and Countervailing Measures) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Relating to Antidumping Measures).

117. Dam, *GATT*, p. 138. See also Jackson, *World Trade and Law of GATT*, p. 385.

118. Annex I, Ad Art. XVI, Sec. B, Note 1. Jackson, *World Trade and Law of GATT*, pp. 387, 872.

119. Patrick Low, "The Definition of Export Subsidies in GATT," *Journal of World Trade Law*, Vol. 16 (September–October 1982), pp. 375–90, p. 388.

120. Annex I, Ad Art. VIII, Par. 1. Jackson, *World Trade and Law of GATT*, p. 869; see also p. 455.

121. Art. VII, Par. 4. Jackson, *World Trade and Law of GATT*, p. 814.

122. Pp. 47–48. See J. A. Usher, "Uniform External Protection—EEC Customs Legislation Before the Court of Justice," *Common Market Law Review*,



Vol. 19 (August 1982), pp. 389–412. Valuation is discussed at pp. 398–407, and the difficulties caused by translating the European Unit of Account (EUA) into currencies on the basis of par values under the Fund's Articles before the EUA was defined by reference to a basket of currencies are discussed at pp. 398–99.

123. Executive Board Decisions No. 433-(55/42), June 22, 1955, No. 201-(53/29), May 4, 1953, No. 955-(59/45), October 23, 1959, and No. 1034-(60/27), June 1, 1960. See, for example, *Selected Decisions*, Ninth Issue, pp. 204, 205–208, 208–209, 209–11.

124. Article VII, Section 3.

125. Gold, *Selected Essays*, pp. 85, 154–56, 160–63, 175–79, 186–87, 207–11, 216.

126. Executive Board Decision No. 1034-(60/27), June 1, 1960. *Selected Decisions*, Ninth Issue, pp. 209–11.

127. Article XI, Section 2, Rules and Regulations. Rules M-4 and M-5, *By-Laws, Rules and Regulations*. Thirty-Ninth Issue (Washington, July 1, 1982), p. 49.

128. Executive Board Decision No. 6790-(81/43), March 20, 1981. *Selected Decisions*, Ninth Issue, p. 226.

129. *Boussac Saint-Freres SA v. Brigitte Gerstenmeier*, Case 22/80 [1982] 33 C.M.L.R. 202.

130. "...the benefits which may be derived by an undertaking, particularly if it is small, from invoicing goods intended for export in its national currency: simplified processing of invoices; elimination of the exchange risk, which is passed on to the customer; application of a uniform price to transactions on the home market and to exports."—Mayras A.G., *ibid.*, pp. 210–11.

131. Gold, "Variable Exchange Rates," pp. 173–208.

132. John Chown, "The Tax Treatment of Foreign Exchange Fluctuations in the United States and the United Kingdom." *George Washington Journal of International Law and Economics*, Vol. 16 (No. 2, 1982), pp. 201–37: "The relevant law in both countries is both complex and unsatisfactory. It typically is based on statutes and cases that were enacted and decided when currency fluctuations were not major problems. The American literature, in particular, has tended to assume that other currencies, and not the dollar, fluctuate." (P. 235.)

133. R. K. Ashton, "Foreign Exchange Gains/Losses Reconsidered," *Business Law Review*, Vol. 3 (July 1982), pp. 218–20.

134. William Dickey, "Antidumping: Currency Fluctuations as a Cause of Dumping Margins," *International Trade Law Journal*, Vol. 7 (Fall–Winter 1981–82), pp. 67–72.

135. "The ample literature on this subject was tinged by manifold reservations on the prospective role of the basket-type ECU, so much so as to warrant one's asking oneself whether it was wise to keep the European flag nailed to this particular masthead. During a seminar held in Luxembourg in 1978, one participant likened units of account to fungus growing on monetary rot. Indeed units of account of the basket type were designed in order to allow operators to balance out the exchange risks that they would run on individual currencies going

to make up the basket. Such units of account absorbed the divergent movements as between the currencies making up the basket, movements which stemmed from the lack of harmonisation of national policies. The basket was the natural consequence of having autonomous national policies and therefore did not intrinsically belong to the process of European integration. On the contrary, it was the negation of the integration process.

"When the integration process was sufficiently advanced, the currencies concerned would return to exchange-rate stability in a system which even now was already substantially assisted by credits. The system would be defined by the parity grid and would need no numeraire. Gold, too, would be unnecessary (being replaced by credits) as would the basket of currencies, which would be made redundant by the disappearance of exchange risks." (Paolo Baffi, Honorary Governor of the Bank of Italy, *Il Sole-24 Ore*, March 22, 1981 (unpublished translation)). See also Atef Sultan, "Why the artificial dinar was created," *The Times* (London), March 10, 1982, p. 21; "Eurobond is Linked to Oil Price," *Journal of Commerce*, April 9, 1981, p. 6.

136. According to a Reuters news item of November 11, 1982, the Italian Treasury had announced that it would issue ECU 700 million of seven-year 13 percent Treasury certificates priced at par, of which ECU 650 million would be for public subscription in Italy. Annual interest payments and redemption would be made in ECUs if they become legal tender, or in lire at the average lira/ECU rates during the first 20 days of the October preceding redemption on November 22, 1989. Subscription would be in lire, at a price based on the ECU-lira rate prevailing on November 18, 1982.

137. Article VIII, Section 7; Article XXII.

138. "Ecus: The bankers' choice," *The Economist*, October 2, 1982, p. 52. See also H. Peter Dreyer, "Private Sector Use of ECU Rising," *Journal of Commerce*, April 15, 1982, p. 6A; Christopher Hugues, "Nouvelles opérations en ECU," *Le Monde*, June 27-28, 1982, p. 16; "ECUs Attracting More Interest," *Journal of Commerce*, February 26, 1981, p. 6.

139. Pamphlet No. 33 (1980), p. 6.

140. *Annual Report*, 1982, p. 90.

141. *International Legal Materials*, Vol. 21 (May 1982), pp. 479-541.

142. Angola, Botswana, the Comoros, Djibouti, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, Somalia, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe.

143. *International Legal Materials*, Vol. 21 (May 1982), pp. 525, 526.

144. A number of the states peg their currencies to the SDR.

145. The *Miliangos* doctrine applies, however, not only when the currency of account and the currency of payment are a foreign currency but also when the currency of account is a foreign currency and the currency of payment is sterling (*George Vestings Rederi A/S v. President of India* [1978] 1 W.L.R. 982). The plaintiff is entitled to the value he bargained for in terms of a foreign currency.

146. [1975] 3 All E.R. 801, [1976] A.C. 443, [1975] 3 W.L.R. 758.

147. Pamphlet No. 19 (1976), pp. 33–38; Pamphlet No. 22 (1977), pp. 15–19; Pamphlet No. 26 (1979), pp. 63–69; Pamphlet No. 33 (1980), pp. 76–81; Pamphlet No. 36 (1981), pp. 61–65; See also “Yougoslavie. Les contrats internationaux.” *Droit et Pratique du Commerce International*, Vol. 7 (1981), p. 141.

148. [1981] 1 All E.R. 225.

149. The order nisi operates as notice if withdrawals from the deposit account are subject, as they were in this case, to a period of notice (*ibid.*, p. 227).

150. *Ibid.*, pp. 228–29.

151. [1979] 2 Lloyd’s Rep. 231.

152. *Ibid.*, p. 233.

153. *Ibid.*, p. 234.

154. *Services Europe Atlantique Sud (SEAS) of Paris v. Stockholms Rederiaktiebolag SVEA of Stockholm (The Folias) and The Despina R.* [1979] 1 Lloyd’s Rep. 1; [1978] 3 W.L.R. 804; Pamphlet No. 33 (1980), pp. 77–79; Pamphlet No. 26 (1979), pp. 67–69.

155. This principle applies to the recovery of debt, damages for breach of contract, restitution because of unjust enrichment, and damages for tort. For a recent case on tort, see *Hoffman v. Sofaer* [1982] 1 W.L.R. 1350.

156. [1979] 2 Lloyd’s Rep. 234.

157. The reasoning of the decision is criticized in the Law Commission’s *Working Paper No. 80, Private International Law[::] Foreign Money Liabilities* (London, 1981) (hereinafter referred to as Law Commission, *Working Paper No. 80*), paragraphs 3.65–68, pp. 106–108, as inconsistent with the *Miliangos* doctrine because the decision reverted to the breach-day rule if the case is regarded as one to recover a dollar debt. That debt had been paid according to its sterling value as of the date of payment as required by the *Miliangos* doctrine. The Law Commission would consider the result defensible, however, if it were taken to involve the recovery of special damages for a specific and foreseeable loss consequent upon breach of contract by late payment. (Cf. *Wadsworth v. Lydall* [1981] 1 W.L.R. 599.) The decision is defended by Roger A. Bowles and Christopher J. Whelan. *Comments on the Law Commission Working Paper No. 80*, Centre for Socio-Legal Studies (mimeographed, Oxford, n.d.) submitted to the Law Commission, pp. 30–31. (Hereinafter referred to as Bowles and Whelan, *Comments on Working Paper No. 80*.)

158. See footnote 165.

159. International Monetary Fund. *International Financial Statistics* (October 1982), p. 15.

160. The Law Commission was established by Section 1 of the Law Commissions Act 1965 for the purpose of promoting reform of the law.

161. Law Commission, *Working Paper No. 80*.

162. *The Teh Hu* [1969] 3 All E.R. at p. 1202. He was still pressing for change in another aspect of monetary law as late as 1981: “During the last 20 years the monetary systems of the world have changed radically. Sterling is no longer a stable currency. It floats in the wind. It changes like a weather-cock with every

gust that blows. Likewise all foreign currencies.” (*Techno-Impex v. Gebr. Van Weelde Scheepvaartkantoor B.V.* [1981] 1 Q.B. at 665.

163. Law Commission, *Working Paper No. 80*, pp. 180–81. (Citations of other paragraphs of the Working Paper have been deleted from the appendix to this pamphlet.)

164. See Georges Janson, “La protection de l’entreprise contre les risques de change. L’Institut Belgo-Luxembourgeois du Change et le controle des changes,” *Revue de la Banque* (Brussels) 2/1982, pp. 189–203. The author examines the techniques available to firms subject to the authority of the Belgium-Luxembourg Economic Union to protect themselves against exchange rate risks, and the changes that have occurred in the use of these techniques, but it is not part of his study to relate his conclusions to the law of Belgium and Luxembourg on the currency of judgments.

165. Bowles and Whelan, *Comments on Working Paper No. 80*, pp. 65–77. See also the same authors’ “Law Commission Working Paper No. 80, Private International Law: Foreign Money Liabilities,” *Modern Law Review*, Vol. 45 (July 1982), pp. 434–46; “International Contracts: English Law and Floating Exchange Rates,” *National Westminster Bank Quarterly Review* (November 1981), pp. 27–36; “Foreign Money Liabilities: Comments on the Law Reform Commission of British Columbia, Working Paper No. 33” (submitted to the Commission).

166. Pp. 80–81. The *Miliangos* case has been followed in Cyprus. (*Lamaignere v. Selene Shipping Agencies Ltd* (1982) 1, CLR 227 as discussed in *International Financial Law Review* (1982), p. 39.) For a discussion of U.S. law, see Thomas J. Egan, Jr., “Conversion of Judgments Measured in Foreign Currencies,” *Washington and Lee Law Review*, Vol. 39 (Winter 1982), pp. 165–184.

167. R.S.C. 1970, c. C-39.

168. *Batavia Times Publishing Co. v. Davis* [1978] 88 D.L.R. (3d) 145.

169. Khaled Chebil, “Les jugements relatifs aux créances libellées en monnaie étrangère en droit anglais, français et canadien,” *McGill Law Journal*, Vol. 27 (No. 2, 1982), pp. 299–329. (Hereinafter referred to as Chebil, *Les jugements*.)

170. *Batavia Times Publishing Co. v. Davis* [1978] 88 D.L.R. (3d) 144.

171. *Ibid.*

172. *Ibid.*, at p. 146.

173. *Ibid.*, at p. 149.

174. For a discussion of English law on this topic, see Pamphlet No. 33 (1980), pp. 77–78.

175. For English practice, see “Practice Direction” by the Senior Master of the Supreme Court, December 18, 1975, [1976] 1 All E.R. 669–71. Where the plaintiff desires to proceed to enforce a judgment expressed in a foreign currency by the issue of a writ for enforcement (*fieri facias*), the praecipe for the issue of the writ must certify, for the purpose of determining the sterling equivalent of the judgment, the rate current in London for the foreign currency on the date nearest or most nearly preceding the date of the issue of the writ of *fieri facias*.

176. *Batavia Times Publishing Co. v. Davis* [1978] 88 D.L.R. (3d) at p. 154. The date of December 21, 1977 was the date of the court's judgment enforcing the Pennsylvania judgment. The "second judgment" refers to the first Ontario judgment and not to the second Ontario judgment of May 19, 1978 determining the date as of which the rate of exchange was to be chosen.

Unexplained delay by the judgment creditor in seeking enforcement of the foreign judgment may induce the court in which enforcement is sought to refuse application of the rate of exchange at the date of the second judgment if it is favorable to the creditor. See Ethel Groffier, "Droit international privé," *Revue du Barreau*, Vol. 39 (May-June 1979), pp. 653–55, discussing the Quebec case *Kraft v. Otto* (1978) C.S. 752. For the practice of courts in the United States, see R. Doak Bishop and Susan Burnette, "United States Practice Concerning the Recognition of Foreign Judgments," *International Lawyer*, Vol. 16 (Summer 1982), pp. 425–42, at pp. 439–40.

177. *Ant-Pac Forest Products Inc. v. Phoenix Doors Ltd. and Arab and Arab (Third Party)* [1979] 14.B.C.L.R. 63.

178. *Ibid.*, at p. 66.

179. *Ibid.*

180. *Re Canadian Vinyl Industries Inc.; Textilwerke Gebrüder Hoon v. Corber* (1978) 29 C.B.R. 12.

181. R.S.C. 1970, c. B-3.

182. *Re Canadian Vinyl Industries Inc.; Textilwerke Gebrüder Hoon v. Corber* (1978) 29 C.B.R. at p. 23.

183. *Re United Railways of Havana and Regla Warehouses Ltd.* [1961] A.C. 1007. See Clive M. Schmitthoff, "Non stamus decisis," *Europäisches Rechtsdenken in Geschichte und gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag*, ed. by Norbert Horn (Munich, 1982), pp. 469–82.

184. (1978) 29 C.B.R. at p. 23. See also p. 25. For a discussion of Canadian cases, see Chebil, *Les jugements*, pp. 320–21.

185. [1976] 2 All E.R. 669.

186. *Ibid.*, at p. 673.

187. For a discussion of *Re Dynamics Corporation of America*, see Law Commission, *Working Paper No. 80*, paragraphs 3.39–3.49, pp. 89–96. The Commission approves of the decision and does not propose a modification of it.

188. [1982] 2 All E.R. 183. See Michael Burke, "Foreign Currency Claims: Pari Passu May Not Mean Equal," *Business Law Review* (June 1982), pp. 183–84.

189. The rate was the buying rate for sterling against the foreign currency ([1982] 2 All E.R. at p. 190).

190. *Ibid.*, p. 189; see also pp. 194–95, 198–99.

191. Two members of the Court of Appeal left open the question whether dividends to creditors whose claims had been in foreign currencies could be recalculated on the basis of later exchange rates if after all creditors' claims were satisfied, including claims to post-liquidation interest, assets remained that would go to the shareholders of the company (*ibid.*, pp. 195–96, 199).

Notes (pages 54–61)

192. Chebil, *Les jugements*, p. 325.
193. *Ibid.*, p. 327.
194. *Ibid.*, pp. 327–28. See also the discussion of other Canadian cases in *Canadian Year Book of International Law*, Vol. 19 (1981), pp. 390–91. In *Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd.* [1979] 108 D.L.R. (3d) 585, the British Columbia Supreme Court followed the *Batavia Times* case, although the action was for breach of contract and not for the enforcement of a foreign judgment.
195. Chebil, *Les jugements*, p. 320, footnote 88 (referring to the Commission's *Working Paper No. 33: Foreign Money Liabilities* (1981)).
196. [1981] 1 NZLR 361. Johanna Vroegop, "Exchange Losses on an International Sale of Goods," *New Zealand Law Journal* (January 1982), pp. 3–5.
197. [1981] 1 NZLR, at p. 364. It has been pointed out that the *Miliangos* doctrine, in holding that a Swiss franc remains a Swiss franc, is an application of the principle of nominalism, while the pre-*Miliangos* principle that a promise to pay Swiss francs had to be transformed into an obligation to pay sterling was not an application of nominalism (Bowles and Whelan, *Comments on Working Paper No. 80*, pp. 7–8).
198. [1981] 1 NZLR, at p. 365.
199. See Charles Bennett, "Recent Cases on Claims for Interest," *New Law Journal*, Vol. 131 (October 15, 1981), pp. 1065–67.
200. Pp. 61–65.
201. Law Commission, *Working Paper No. 80*, paragraphs 4.13–4.21, pp. 127–33.
202. [1976] 3 W.L.R. 477; [1976] 3 All E.R. 599; [1977] Q.B. 489. Pamphlet No. 36 (1981), pp. 62–63. The Law Commission quotes with approval the views of Roger A. Bowles and Christopher J. Whelan in "The Currency of Suit in Actions for Damages," *McGill Law Journal*, Vol. 25 (No. 2, 1979), p. 236. These two authors have criticized the decision in the case because simple interest was awarded, while compound interest would have been better compensation for the opportunity costs that the plaintiff was made to bear (Bowles and Whelan, *Comments on Working Paper No. 80*, pp. 38–44).
203. Bowles and Whelan, *Comments on Working Paper No. 80*, pp. 23–27, 32–36.
204. *Ibid.*, pp. 30–31.
205. [1976] 3 All E.R. 851.
206. *Ibid.*, p. 862.
207. *Gold. Fund Agreement in the Courts, Volume II*, pp. 236–41; see also pp. 95–104.
208. "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member...."
209. The English Law Commission's *Working Paper No. 80* does not consider Article VIII, Section 2(b). It raises the question whether contracting parties can

contract for payment by one to the other in foreign currency and can exclude the discharge of a judgment in the sterling equivalent at the date of payment (paragraphs 32–23, pp. 75–77). The Law Commission favors the legality of this contractual provision in circumstances in which the court thinks it appropriate to give a judgment that precludes discharge in sterling. One reason given for conferring this discretion on courts is that exchange controls may preclude payment in the foreign currency, but the assumed exchange controls are those of the United Kingdom. Article VIII, Section 2(b) applies to the exchange control regulations of members of the Fund other than those of the country of the forum.

210. See, for example, *Sharif v. Azad* [1967] 1 Q.B. 605, [1966] 3 W.L.R. 1285, [1966] 3 All E.R. 785 (C.A.); *Sing Butra v. Ebrahim*, *The Times* (London), May 3, 1977, p. 11. Gold, *Fund Agreement in the Courts, Volume II*, pp. 107–16, 258–65, and *passim*.

211. Law Commission, *Working Paper No. 80*, paragraph 2.18, p. 19.

212. Note, however, “Ex-Im Bank to Offer Guarantee Credits in Foreign Currencies,” *Wall Street Journal*, March 12, 1980, p. 21, in which it is reported that the U.S. Import-Export Bank will provide U.S. exporters greater flexibility in arranging financing for foreign orders by guaranteeing private export credits and insurance contracts denominated in “freely convertible currencies” (including the deutsche mark, Japanese yen, Swiss franc, pound sterling, Netherlands guilder, Swedish krona, etc.). In the past, guarantees were limited to obligations denominated in U.S. dollars. Under the new practice, on a default under a loan extended by a U.S. bank or bank abroad to help a foreign buyer purchase U.S. goods or services, the Eximbank will pay the lender in the foreign currency specified in the loan agreement; but the Bank gives no indemnity against foreign exchange risks. According to the Bank’s President, some potential foreign buyers preferred to do business in currencies other than the U.S. dollar, because these currencies could be borrowed at lower interest rates.

213. Joseph Gold, *The Fund’s Concepts of Convertibility*, IMF Pamphlet Series, No. 14 (Washington, 1971), p. 9.

214. Council of Europe, *European Conventions and Agreements*, Vol. II, 1961–70 (Strasbourg, 1972), pp. 310–16. The text provides, inter alia, that a sum of money due in a currency other than that of the place of payment may be paid in the currency of the place of payment, unless a different intention of the parties appears or a different usage is applicable (Annex, Article 1(1)).

The translation is to be effected at the rate of exchange at the date of payment (Annex, Article 3). In the event of proceedings for the recovery of a sum of money in a currency other than that of the forum, the creditor, at his choice, may demand payment in the currency to which he is entitled or the equivalent in the currency of the forum at the rate of exchange at the date of payment (Annex, Article 5). If a judgment entitles the creditor either to an amount in a currency other than that of the forum or the equivalent in the currency of the forum, and a depreciation of the former currency in relation to the latter currency occurs between the date of judgment and the date of payment, the debtor must pay an additional amount corresponding to the difference (Annex, Article 7(i)).

215. See Pamphlet No. 33 (1980), p. 81.

216. Pamphlet No. 36 (1981), pp. 60–61.

217. Financial Accounting Standards Board of the Financial Accounting Foundation, *Statement of Financial Accounting Standards No. 52: Foreign Currency Translation* (Stamford, Connecticut, December 1981.).

218. See Michael A. Perlino, "Firms Now Able to Examine Effects of Currency Shifts on Assets Abroad," *Journal of Commerce*, March 15, 1982, pp. 13C, 14C; David B. Pearson, "Accounting for Foreign Currency Transactions Still Troublesome for Business," *Journal of Commerce*, May 18, 1981, pp. 2A, 10A; Leslie Wayne, "Foreign Accounting Change," *New York Times*, December 8, 1981, pp. D1, D8.

219. See *Proceedings of the Conference on the Internationalization of the Capital Markets, March 19–21, 1981, New York*, ed. by Joan B. Ellsworth, Robert H. Mundheim, and Douglas W. Hawes (Amsterdam, 1981), pp. 178–79.

220. "The monetary reserves of the Bundesbank as reflected in its Weekly Return," *Monthly Report of the Deutsche Bundesbank*, Vol. 34 (January 1982), pp. 13–16.

221. See footnote 188.

222. On the *Miliangos* doctrine, see footnote 165. On bankruptcy and liquidation, see Michael Burke, "Foreign Currency Claims: Pari Passu May Not Mean Equal," *Business Law Review*, Vol. 3 (June 1982), pp. 183–84.

223. Pp. 74–76.

224. International Bank for Reconstruction and Development, *The Currency Pooling System* (Washington, August 1980).

225. Article XIX, Sections 5 and 7. Joseph Gold, *Use, Conversion, and Exchange of Currency Under the Second Amendment of the Fund's Articles*, IMF Pamphlet Series, No. 23 (Washington, 1978), pp. 49–53.

226. The equal value principle applies also to agreements between members for the transfer of SDRs, but the Fund is authorized to adopt policies under which in exceptional circumstances members entering into these agreements are permitted to agree on exchange rates that do not conform to the equal value principle (Article XIX, Section 7(b)). For decisions to adopt such policies, a majority of 85 percent of the total voting power is required, and for decisions on particular transactions under the policies a majority of 70 percent of the total voting power is necessary.

The principle applies also to "operations" in SDRs. (For the difference between "operations" and "transactions," see Article XXX(i).) The Fund may dispense with the principle when prescribing, by a 70 percent majority, operations in SDRs that members may enter into by agreement (Article XIX, Section 2(c)). The Fund has dispensed with the principle in swaps and forward operations in SDRs that it has authorized (Pamphlet No. 33 (1980), pp. 10–11).

On all operations and transactions in SDRs, see International Monetary Fund, *Users' Guide to the SDR: A Manual of Transactions and Operations in Special Drawing Rights* (Washington, 1982).



227. Article V, Section 10.

228. [1978] 29 C.B.R. 12.

229. To the argument that the debtor was not able to make a contract with his bank, the court responded in a way that negated its own rationale. “[O]ne need only point out that the foreign currency claims would normally be a small portion of the total claims filed. Therefore such a difficulty would not be insurmountable.” —*Ibid.*, p. 22.

230. See footnote 196.

231. [1981] 1 NZLR 361, at p. 366.

232. *Ibid.*, pp. 367, 381–82, but note p. 371, lines 15 to 22. There was evidence that the Co-operative had suffered more loss with the forward exchange contracts it had arranged than it would have suffered without them. The exchange rate at the time of a rollover was substituted for the preceding exchange rate, and the Co-operative incurred costs. The Co-operative, however, limited this item in its claim to damages to the losses it would have incurred without forward exchange contracts (p. 367).

233. *Ibid.*, p. 377.

234. *Butter-und Eier-Zentrale Nordmark eG v. Hauptzollamt Hamburg-Jonas*, Case 38179 [1982] 2 C.M.L.R. 753.

235. Article IV, Section 3(ii) (*original, first*).

236. Schedule C, paragraph 5.

237. Gold, “Variable Exchange Rates”, pp. 192–95.

238. Art. 31 (United Nations Conference on Trade and Development, TD/TIN. 6/14, July 6, 1981, p. 29).

239. Federal Maritime Commission Docket No. 82-36: 47 *Federal Register* 31408 (July 20, 1982).

240. The base level would be the exchange rate of the trade currency in relation to the tariff currency selected by the carrier or conference for a date within the period of 30 days prior to the filing of a schedule.

241. For an example of the difficulty of imposing surcharges in the days of the par value system, see *AustraliaU.S. Atlantic & Gulf Conference, Proposed Imposition of Currency Adjustment Surcharge* (Federal Maritime Commission, Docket No. 72-5, January 28, 1972) and *Federal Maritime Commission v. AustraliaU.S. Atlantic & Gulf Conference et al.* (337 F. Supp. 1032 (1972)). See Gold, *Fund Agreement in the Courts, Volume II*, pp. 161–71.

242. *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States: Requirements for Filing Currency Adjustment Factors Reflecting Changes in the Exchange Rate of Tariff Currencies* (Federal Maritime Commission, Docket 82-36 (46 C.F.R. Part 536)).

243. Gold, “Variable Exchange Rates,” pp. 197–99. The case for averaging exchange rates is that they may deviate from the trend for short periods but not over the longer run.

244. T. R. O’Brien, “Currency adjustment factors: some alternative strategies,” *Maritime Policy and Management*, Vol. 7 (1980), pp. 271–81.

245. Joseph Gold, "Development of the SDR as Reserve Asset, Unit of Account, and Denominator: A Survey," *George Washington University Journal of International Law and Economics*, Vol. 16 (No. 1, 1981), pp. 43–44.

## Gold

246. 94 Stat. 1555. See Pamphlet No. 36 (1981), p. 79.

247. *Report to the Congress of the Commission on the Role of Gold in the Domestic and International Monetary Systems* (March 1982). 2 vols. (Hereinafter referred to as *Gold Commission Report*.) See Phillip Cagan, *Current Problems of Monetary Policy: Would the Gold Standard Help?* (American Enterprise Institute, Washington, 1982).

248. American Arts Gold Medallion Act of November 10, 1978, Public Law 95–630.

249. For a memorandum by the Office of the General Counsel of the Treasury on "Some Implications of Legal Tender Status of U.S. Currency," see *Gold Commission Report*, Vol. II, pp. 525–29.

250. A majority did not exist in favor of the proposal that the Treasury should be required to stand ready to purchase coin offered to it at the market price on the day of redemption (*Gold Commission Report*, Vol. I, p. 8).

251. The sale of gold certificates as securities, whether registered or made out to bearer, that would give the holder a right to a specified amount of gold, has been proposed in Switzerland. According to Fritz Zimmermann, "Verwahrung von Wertpapieren und Gold der Kunden bei Schweizer Banken" (Custody of Customers' Securities and Gold at Swiss Banks), *Information* (Basel), No. 65 (November 1981), pp. 30–35, only the Swiss National Bank would be empowered to issue such certificates because they would be considered surrogates for the note issue; and an infringement of this monopoly would be punishable. The Swiss National Bank has not exercised its right to issue gold certificates.

The author distinguishes these certificates from (i) an arrangement under which the owner of gold becomes a co-owner with others by depositing his gold in a collective account with a bank; and (ii) a right to call for the delivery of gold as the holder of a noninterest-bearing account opened for the purpose by a bank, which gives a contractual right but not ownership of gold until gold is called for and obtained. The holder of the account does not pay the Swiss purchase tax on gold transactions until he calls for gold.

On the subject of taxation, see Neal S. Solomon and Linda D. Headley, "State Attempts to Tax Sales of Gold Coin and Bullion in the United States: The Constitutional Implications," *Boston College International and Comparative Law Review*, Vol. 5 (Summer 1982), pp. 297–344. The issue arises because of the freedom of private persons to hold gold in the United States, which has developed concurrently with official determination to reduce the role of gold in the international monetary system. One of the conclusions reached by these authors is that

“The U.S. Government has the power to regulate the value of coin and currency, U.S. or foreign, in this country and wherever the U.S. Constitution applies overseas. This constitutional authority applies to foreign gold coins. It also applies to bullion, whether or not it is legal tender in the United States or elsewhere. States cannot assess sales taxes on gold coin and bullion because the monetary and foreign commerce clauses of the U.S. Constitution give the U.S. government the sovereign power to regulate the value of money, including gold coin and bullion, and to conduct foreign commerce. No act or omission of the U.S. government has given this power to the states.” (Pp. 343–44.)

The authors, in concluding that gold has retained a monetary quality, quote the following passage from Joseph Gold, “Gold in International Monetary Law: Change, Uncertainty, and Ambiguity,” *Journal of International Law and Economics*, Vol. 15 (No. 2, 1981), pp. 323–70, at pp. 362–63:

“It is a widespread view among members that gold continues to be a reserve asset and continues to have monetary functions. This view persists notwithstanding the change in the legal status of gold and the absence of its use in official settlements or in support of currencies. Gold is still a reserve asset that is desired by many members, not only because it has appreciated in value and may appreciate further, but also because it gives a sense of confidence to its owners and to others. According to unofficial reports, some monetary authorities in the Middle East, Southeast Asia, and Latin America have purchased gold in the market in order to diversify their reserves. The continuing attitude to gold is no surprise to the drafters of the Second Amendment, because, as realists, their objective did not go beyond a gradual reduction in the role of gold.”

The authors note also the role of gold in the European Monetary System (see Pamphlet No. 33 (1980), pp. 56–57).

See also the discussion of the reactions by the courts of jurisdictions other than the United States to the question whether kruggerands are means of payment or goods (Pamphlet No. 33 (1980), pp. 86–87).

252. The Secretary of the Treasury has authority, under 31 U.S.C. 733 and 734, to sell gold, and with the approval of the President, to purchase gold, at home or abroad, in such amounts and manner and at such rates as he deems to be in the public interest. In addition, the Secretary, with the approval of the President, is authorized to deal in gold and foreign exchange for the account of the Exchange Stabilization Fund (ESF) that was created by Section 10 of the Gold Reserve Act of 1934 (31 U.S.C. 822a). The assets of the ESF have not included gold since December 1974.

253. The Treasury could revalue the gold stock without legislative approval, but this action would have no economic consequences because gold certificates have been issued to the full extent permitted by present law. The issue of certificates is based on the last par value of the U.S. dollar (*Gold Commission Report*, Vol. I, pp. 135–36).

254. See Pamphlet No. 36 (1981), pp. 84–85.

255. See Peter Truell, "Countries Try Swapping Gold Holdings For Cash to Fill Short-Term Credit Needs," *Wall Street Journal*, December 1, 1982, p. 33. This article discusses the practice, the parties involved, and the amounts involved in recent transactions. The relationship of the practice to the gold futures market is mentioned. See also Roy W. Jastram, "World Illiquidity and Central Bank Gold Reserves," *Wall Street Journal*, December 16, 1982, p. 30.

256. Gold is not in use as U.S. currency or backing for currency. Public Law 90-296 amended the Federal Reserve Act by eliminating the requirement that the Federal Reserve Banks maintain reserves in gold certificates of not less than 25 percent against Federal Reserve notes in circulation. In addition, this law eliminated the gold reserve requirement for U.S. notes and Treasury notes of 1890. Reserves now consist of the accounts of depository institutions at Federal Reserve Banks and their holdings of vault cash (*Gold Commission Report*, Vol. I, p. 136).

257. Article IV, Section 2(b).

258. Public Law 94-564, sec. 9.

259. Pamphlet No. 26 (1979), pp. 40–41.

260. Pamphlet No. 22 (1977), pp. 52–55; Pamphlet No. 33 (1980), p. 89.

261. Article V, Section 12(d).

262. Except in special circumstances under the liquidation provisions of Schedule K. The Fund has no obligation to use gold in a settlement of accounts with a member that withdraws from the Fund (Schedule J).

263. Article V, Section 12(c). The Fund must consult the member for whose currency gold is sold, and its currency held by the Fund in the General Resources Account may not be increased by the sale to a point at which the member would have to pay charges, unless the member concurs. The member may request the Fund to sell its currency for the currency of another member to the extent that the exchange would prevent the accrual of charges. The Fund must consult the member for whose currency the exchange would be made, and the exchange must not impose on this member the obligation to pay charges. Consultations with, and the concurrence of, members are necessary because various rights and obligations are affected by the level of the Fund's holdings of their currencies in the General Resources Account. For the Fund's treatment of the proceeds of sale, see Article V, Section 12(f).

264. Article V, Section 12(e).

265. *Summary Proceedings of the Thirtieth Annual Meeting of the Boards of Governors, September 1–5, 1975* (Washington, 1975), pp. 299–304.

266. Article V, Section 12(b).

267. *Gold Commission Report*, Vol. I, p. 20.

268. *Ibid.*

269. *Ibid.*, p. 21.

270. Article IV, Section 2(b).

271. *Ibid.*

272. For discussion of the two kinds of international effect, see *Gold Commission Report*, Vol. I, pp. 140–41.

273. *Gold Commission Report*, Vol. 1, p. 142.

274. For the legal history of gold under the Articles, see Joseph Gold, "Gold in International Monetary Law: Change, Uncertainty, and Ambiguity," *Journal of International Law and Economics*, Vol. 15 (No. 2, 1981), pp. 323–70.

275. Pp. 439–57.

276. See Pamphlet No. 22 (1977), pp. 52–55; Pamphlet No. 26 (1979), pp. 32–35; Pamphlet No. 33 (1980), p. 89. Egypt, Venezuela, and Ecuador have joined the members that value their gold holdings on the basis of market prices.

277. See, for example, *Re Air Crash Disaster at Warsaw, Poland*, *on March 14, 1980*, 535 F. Supp. 833 (1982) (United States District Court, Eastern District of New York, February 16, 1982), in which the last official dollar price of gold was adopted for the purpose of applying the Poincaré franc in the Warsaw Convention, and *Boehringer Mannheim Diagnostics, Inc. aka Hycel v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (1981) (United States District Court for the Southern District of Texas, Houston Division, November 24, 1981), in which the market price was chosen for the same purpose.

278. *Rechtspraak van de Week*, May 30, 1981, pp. 321–30; *Gold, Fund Agreement in the Courts, Volume II*, pp. 451–54.

279. Pamphlet No. 22 (1977), pp. 33–34.

280. Pamphlet No. 36 (1981), p. 34.

281. Docket No. 82-7012.

282. 525 F. Supp. 1288.

283. *Gold, Fund Agreement in the Courts, Volume II*, pp. 456–57.

284. Docket No. 82-7012. Memorandum Opinion, p. 4. Stephen A. Silard, "U.S. Court Decision on Gold Unit of Account Holds Warsaw Liability Limits Unenforceable," *IMF Survey*, Vol. 12 (January 12, 1983), pp. 11–12.

285. Docket No. 82-7012, Memorandum Opinion, p. 13. The U.S. Court of Appeals for the Ninth Circuit decided on August 24, 1982 that the plaintiffs had not succeeded in their contention that the limitation provisions of the Warsaw Convention were inapplicable because they were unconstitutional. The court did not deal with the argument, which may not have been advanced, that the limits were unenforceable, although the court said that "the treaty limitation is expressed in gold 'Poincaré' francs, and what the present value of the limitations may be, given the increased dollar value of gold, is an open question." (*In re Aircrash in Bali, Indonesia on April 22, 1974, Causey et al. v. Pan American Airways, Inc. et al.* (684 F. 2d 1301).)

286. Petition, pp. 11–12.

287. *Deere & Company v. Deutsche Lufthansa Aktiengesellschaft* (U.S. District Court for Northern District of Illinois Eastern Division, Memorandum Opinion, December 30, 1982, Index No. 81 C 4726).

288. Pp. 38–40.

289. *Gesetz zu den Protokollen vom 19. November 1976 und vom 5. Juli 1978 über die Ersetzung des Goldfrankens durch das Sonderziehungsrecht des Internationalen Währungsfonds sowie zur Regelung der Umrechnung des Goldfrankens in haftungsrechtlichen Bestimmungen* (*Goldfrankenrech-*

*nungsgesetz*) (Law concerning the Protocols of November 19, 1976 and July 5, 1978 on the substitution of the International Monetary Fund's special drawing right for the gold franc and regulating translation of the gold franc under liability provisions (Gold Franc Translation Law)) (*Bundesgesetzblatt*, Part II, Z 1998AX, 1980, No. 23, issued in Bonn, June 13, 1980).

**CONSOLIDATED LIST OF CASES  
AND  
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The following references to the six pamphlets surveying legal developments involving SDRs, currencies, and gold are made in the Consolidated List of Cases Cited and the Consolidated Index of Topics.

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