The Iranian Assets Control Regulations and the International Monetary Fund Agreement: Are the Regulations “Exchange Control Regulations?”

Natalie A. Simon
RECENT DEVELOPMENT

The Iranian Assets Control Regulations and the International Monetary Fund: Are the Regulations "Exchange Control Regulations?"

1. INTRODUCTION

After the President's Executive Order blocking Iranian assets subject to the jurisdiction of the United States,¹ the Treasury Department issued the Iranian Assets Control Regulations (Regulations)² which prohibited transactions, not licensed by the Treasury Department, in which Iran had any interest. If the Regulations are "exchange control regulations" within the meaning of the International Monetary Fund (IMF) Agreement (Agreement),³ their consequences would reach far beyond the administrative jurisdiction of the United States. This question, which as yet has not been answered, has been of recent interest and has continuing significance.⁴ Off-shore branches of United States banks, bound by these, or similar, regulations, could invoke principles of in-

---


⁴. This question has been the source of litigation in the past, see, e.g., J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd. 371 N.Y.S.2d 892 (1975) aff'd., 37 N.Y.2d 220, cert. den., 423 U.S. 866, and will continue to be the source of litigation in the future, so long as governments use exchange control regulations.
ternational law before foreign tribunals to avoid contractual, dollar obligations which would normally be binding under the domestic law of the bank's host country. Thus, in the age of the Eurodollar, U.S. exchange controls could affect transactions and financial obligations within one-hundred-thirty-eight IMF member nations. As long as economic, rather than military, conflict is used to conduct international disputes, this question merits attention.

This Comment will examine certain of the questions which were raised recently in foreign litigation involving the Iranian Assets Control Regulations of the United States. Specifically, the use in British courts of the argument that Article VIII § 2(b) of the Agreement frees the London branches from their customary obligation to repay funds deposited by Iran and Iranian entities will be discussed. This argument — that the Regulations operate through the Fund Agreement to make such contractual obligations unenforceable in IMF member nations — is known as the "Bretton Woods Defense," a reference to the site where the IMF Agreement was concluded. The validity of the "Bretton Woods Defense" depends upon the application of Article VIII § 2(b) of the Agreement to the Regulations. The United Kingdom is a member of the IMF and British law accepts the obligation imposed by Article VIII § 2(b) to give effect to certain foreign "exchange control regulations" within the United Kingdom. If all of the requirements of Article VIII § 2(b) are met by the Regulations, tribunals of the United Kingdom and other IMF member nations would be required to hold unenforceable the contractual obligations of the U.S. banks to repay Iranian deposits.

5. INTERNATIONAL MONETARY FUND, ANNUAL REPORT ON EXCHANGE ARRANGEMENTS AND EXCHANGE RESTRICTIONS 466-70 (Washington, D.C. 1979). [hereinafter cited as ANNUAL REPORT ON EXCHANGE]. The latest IMF report on exchange arrangements indicates that there are 138 IMF member nations. Id.

6. See, e.g., Bank Markazi Iran v. Manufacturers Hanover Trust, [1979] Queen's Bench [Q.B.] No. 5907; Bank Markazi Iran v. The Chase Manhattan Bank, N.A., [1979] Q.B. No. 5973. As a result of the freeze order, American banks refused to draw on Iranian assets to pay Iran’s interest obligation on its Eurodollar Loan. Iran could make payments from these assets only if it made further deposits. 31 C.F.R. § 535.201 (1980) as amended by 31 C.F.R. § 535.508 (1980). Iran refused to do. The banks therefore declared the obligation in default and offset Iran’s frozen accounts for the full amount of the loan. Iran sued challenging the offset and the applicability of the President’s freeze order to Iran’s deposits in Foreign branches of American banks. See Gordon, supra note 2, at 661.

7. Article VIII § 2(b) of the Agreement would also require an inquiry into whether or not the deposit arrangements were "exchange contracts." Much has been written on the subject of the meaning of "exchange contracts," although the question has not been entirely resolved. See, e.g., F. MANN, THE LEGAL ASPECT OF MONEY 421 (3rd ed. 1971) [hereinafter cited as MANN]; Nussbaum, EXCHANGE CONTROLS AND THE INTERNATIONAL MONETARY FUND, 59 YALE L.J. 421, 426-27 (1949). The issue, however, is beyond the scope of the present discussion.

9. Id. See ANNUAL REPORT ON EXCHANGE, supra note 5, at 470.
if the seizures of Iranian deposits were improper under the commercial law of England, an English branch of a U.S. bank could not be forced to repay the seized deposits.\textsuperscript{11} If the requirements of Article VIII § 2(b) are not met, however, the "Bretton Woods Defense" would fail and the parties would be left to determine their rights under the general principles of commercial law and conflict of laws.\textsuperscript{12}

This Comment will offer a brief history of exchange controls prior to the establishment of the Fund. A definition of "exchange control regulation," as the term is used in the Fund Agreement, will be suggested and analyzed. In the context of that suggested definition, the author will examine the Iranian Assets Control Regulations. Then, the question of whether the Iranian Assets Control Regulations were imposed consistently with the Fund Agreement will be discussed in light of the Fund's policies with respect to financial restrictions. Finally, the author concludes that the Regulations cannot properly be considered "exchange control regulations" and that, in any case, the Regulations were not imposed consistently with the Fund Agreement. Thus, the so-called "Bretton Woods Defense" is inapplicable to the Iranian Assets Control Regulations and the use of this argument should be unsuccessful in this and similar cases.

II. The Meaning of "Exchange Control Regulations"

There is no generally accepted definition of the term "exchange control regulations." In the Agreement, while several provisions refer to "exchange controls,"\textsuperscript{13} the term is left undefined. The Executive Directors of the IMF have never issued a formal interpretation of the term's meaning. In order to determine the meaning of "exchange control regulations" as it is used in the Agreement, one must examine: the objectives of the IMF, the context in which the term was used within the agreements and the generally understood meaning of the term at the time the Agreement was drafted.

A. The Use of Exchange Controls Prior to the Establishment of the International Monetary Fund

Although the use of exchange controls can be traced back to 1353, this device was not widely used until the 1930's.\textsuperscript{14} In fourteenth century England, the concept of economic controls first appeared in international trade when the Statute of Staple forbid "merchant strangers" to take any more money out of

\textsuperscript{11} See id. See also notes 144-46 and accompanying text, infra.
\textsuperscript{13} See, e.g., Agreement, supra note 3, art. VIII, §§ 2(b), 5(a)(xi).
\textsuperscript{14} See, e.g., A. NUSSBAUM, MONEY IN THE LAW: NATIONAL AND INTERNATIONAL 447 (rev. ed. 1950) [hereinafter cited as NUSSBAUM]; M. SHUSTER, THE PUBLIC INTERNATIONAL LAW OF MONEY 96 n.2 (1973) [hereinafter cited as SHUSTER].
the country than they had brought in to it. The mercantile era, and until the period of World War I, exchange controls were rarely used. The war and its immediate aftermath, at first produced only a slight increase in the use of exchange controls. The period ending in the 1930's can be characterized as a time of relative freedom in international finance.

However, the monetary crisis which accompanied the worldwide depression of the 1930's stimulated the use of exchange controls by economically distressed governments. Specifically, the abrupt end of the era of free international payments is often traced to the failure of the Austrian Credit Anstalt in 1931. The economic chaos which followed was characterized by wild currency fluctuations and speculative capital movements. Together with the Second World War, these adversities produced a system of restricted international payments. The economic nationalism and monetary warfare of the era was characterized by the widespread use of direct economic controls, including trade barriers and exchange control regulations. Initially, exchange controls were introduced unilaterally to protect currency supplies and to maintain equilibrium in balances of payments. Trading partners of nations which had imposed controls, often imposed their own controls in retaliation. Ultimately, to keep international trade open, states began to agree to bilateral arrangements which regulated their economic and commercial relations.

Several forms of exchange controls developed during this period. These included: 1) regulations mandating the observance of certain procedures, such as obtaining licenses, before international payments could be made; 2)

16. Id.
17. Id.
18. Shuster, supra note 14, at 97; Freutel, Exchange Control, Freezing Orders, and the Conflict of Laws, 56 Harv. L. Rev. 30, 30 (1940) [hereinafter cited as Freutel]. For a thorough discussion of the Credit Anstalt failure, see H. Ellis, Exchange Control in Central Europe 27-73 (1941) [hereinafter cited as Ellis].
20. Id. See generally Ellis, supra note 18.
21. Direct controls are defined as: "governmental legislative or administrative acts which interfere with the free international flow of goods, services, or capital." Shuster supra note 14, at 27.
22. Williams, supra note 20, at 322-23.
25. Id.
26. Id.
27. Professor Ellis, in his exhaustive tome on this topic distinguishes five types of exchange control, identified by degree of departure from the character of a free international system. See Ellis, supra note 18, at 1-7.
28. Williams, supra note 19, at 352 n.152.
Regulations which directly restricted payments on capital transfers;\(^{29}\) and 3) regulations which required that foreign exchange be surrendered to central officials.\(^{30}\) The developing system of exchange controls continued to impair international trade.

**B. A Definition of "Exchange Control Regulations"**

1. The Technical Character of Exchange Control Regulations

Two general types of direct economic controls were developed: those which controlled financial transactions and those which controlled trade.\(^{31}\) Although they are closely related and, for the most part, serve the same economic goals,\(^{32}\) the two types of controls are juridically distinct.\(^{33}\) An effective definition of "exchange control regulation" would apply only to restrictions on financial transactions and would distinguish exchange controls from trade controls.

One such definition classifies economic controls "as financial controls if they affect the means of payment for an international transaction, and as trade controls if they affect the underlying transaction itself."\(^{34}\) Characterization as an exchange control measure is determined by the regulation's technical character rather than by its effect.\(^{35}\) Indirect controls on international payments, such as import quotas, would not be considered exchange control regulations because they are directed toward the trade transaction itself;\(^{36}\) only direct controls on the payments resulting from a trade transaction would qualify.\(^{37}\) Licensing requirements are common in both trade and exchange control regulations.\(^{38}\) However, according to Sir Joseph Gold:\(^{39}\)

> If the license that was required did relate only to the ability of the defendant to make the import, and did not prescribe that he must get a license in order to obtain or use foreign exchange or pay in

---

29. ELLIS, supra note 18, at 2.
30. Id. at 1; Williams, supra note 19, at 353.
31. SHUSTER, supra note 19, at 28.
32. R. WILLEY, FOREIGN EXCHANGE: THE ACCOUNTING, ECONOMICS, AND CONTROL 107 (1977) [hereinafter cited as WILLEY]; SHUSTER, supra note 14, at 140 ("Restrictive trade and payment measures are both symptoms of and cures for, the same ailment — namely, a balance of payments deficit.")
33. SHUSTER, supra note 24, at 29.
34. Id. at 28.
35. See Williams, supra note 19, at 353; J. GOLD, THE FUND AGREEMENT IN THE COURTS, PARTS VIII-XI 7 (1976) [hereinafter cited as GOLD].
36. See Williams, supra note 19, at 353-54.
37. See id.
38. See L. YEAGER, INTERNATIONAL MONETARY RELATIONS: THEORY, HISTORY, AND POLICY 114-31 (2nd ed. 1976) [hereinafter cited as YEAGER].
39. Gold has been with the IMF since 1946. He became Assistant General Counsel in 1954, was General Counsel from 1960 to 1979 and is now Senior Consultant.
domestic currency for the import, it was probably not an “exchange control regulation.”

In sum, unless a regulation is addressed to the financial aspect of an international transaction, it should not be considered an exchange control regulation.

2. The Purpose of Exchange Controls

Several definitions of the term “exchange control regulations” have been suggested. Some of these refer only to the technical character of the regulations. Professor Nussbaum’s definition is one such example: “Exchange control means literally control of foreign money or, more precisely, of media of international payment by the government.” However, a definition which refers solely to the term’s technical character fails to distinguish an exchange control from other types of regulations which control media of payment.

Other definitions of the term refer to the purpose of exchange controls. Historically, exchange controls have served a number of purposes. The two most common justifications for imposing exchange controls have been: 1) to alleviate disequilibrium in a country’s balance of payments or 2) to remedy a shortage of foreign exchange.

Professor Mann incorporates the purposes of exchange controls in his definition of exchange control regulations as “enactments which control the movement of currency, property or services for the purposes of protecting the

40. GOLD, supra note 35, at 7.
41. See, e.g., YEAGER, supra note 38, at 138 (“exchange control may be defined as a system of regulations designed to assure both that foreign exchange coming into the possession of residents of the controlling country is sold in official channels and that this exchange is used only for approved payments abroad”), R. HARROD, INTERNATIONAL ECONOMICS 101 (rev. ed. 1958) [hereinafter cited as HARROD] (“Exchange control is the generic expression for laws or regulations making it impossible for individuals to get foreign currency with a view to carrying out transactions that are unlawful in themselves.”).
42. NUSSBAUM, supra note 14, at 446.
43. See, e.g., Campos, Extraterritorial Effects of Foreign Exchange Controls in International Transactions, 34 Phil. L. J. 555, 556 (1959) (“Foreign exchange controls are regulations issued by a sovereign state in order to protect its currency in particular and its economy in general.”); MANN, supra note 7, at 444 (“Exchange control regulations are enactments which control the movement of currency, property or services for the purpose of protecting the financial resources of a country.”).
44. Professor Ellis outlines seven purposes, more technical than necessary for purposes of the present discussion. See ELLIS, supra note 18, at 290.
46. WILLEY, supra note 32, at 102; Metzger, supra note 23, at 315, 318.

Exchange control is ordinarily employed when a country has an insufficient amount of actual or anticipated foreign currencies to pay for all of its existing or anticipated obligations in that currency or currencies. In such an event, the country is concerned that what it has or expects to get of that currency shall be used for what it considers to be essential and not unessential imported goods.
financial resources of a country."

This definition has been widely accepted and cited. The more useful definition of the term "exchange control regulations" refers not only to the technical character of the regulations as restricting media of payment, but also to the purpose of the regulations in protecting a nation's financial resources.

3. "Trading with the Enemy" Regulations

The action taken by the United States with respect to Iran is comparable to the American "Freezing Order" of 1940. That Order, a "trading with the enemy regulation" which was promulgated after Germany invaded Norway, prohibited transactions involving Norwegian and Danish property not authorized by the Secretary of the Treasury. Whether "trading with the enemy" regulations, such as the Order of 1940, fall within the definition of exchange control regulations is, thus, a particularly relevant question.

In a 1942 pamphlet, the General Counsel for the U.S. Treasury explained that the purpose of the freeze was to keep assets out of the enemy's hands and, thus, to prevent their use to the enemy's advantage. The General Counsel explained that the Freezing Order was used as "part of a far-reaching policy in the economic and financial area for purposes of weakening and ultimately defeating the aggressor nations." To accomplish this objective, the Order subjected "to regulation and scrutiny all transactions in which blocked countries or their nationals have any type of interest."

Most commentators agree that "trading with the enemy" regulations are not exchange control regulations because they are not imposed for purposes of protecting the nation's currency in periods of balance of payments disequilibrium.

47. MANN, supra note 6, at 383-84.
48. See, e.g., Meyer, Recognition of Exchange Controls after the International Monetary Fund, 62 Yale L. J. 867, 890-91; Williams, supra note 19, at 252.
50. MANN, supra note 7, at 444. The freezing control Order is based on Section 5(b) of the 1917 Trading with the Enemy Act. 50 U.S.C. App. §§ 1-44 (1970).
51. Order of 1940, supra note 49.
52. Several commentators have addressed this issue. See, e.g., G. DeLaume, Legal Aspects of International Lending and Economic Development Financing 294 (1967) [hereinafter cited as DeLaume]; Williams, supra note 10, at 353, 356; MANN, supra note 7, at 444; Nussbaum, supra note 14, at 455-57.
54. Id. at 5-6.
55. Id. at 1.
56. Id. For a similar statement concerning the purposes of the American freezing control, see Freutel, supra note 18, at 31.
57. DeLaume, supra note 52, at 294; Williams, supra note 19, at 353; MANN, supra note 7, at 444.
1940 Order were directed toward exchange as such, thereby meeting the technical requirement of an exchange control, the Order was far removed from the general pattern of exchange controls. 58 According to Nussbaum, this conclusion follows because the Order's "primary objective was not so much the husbanding of American foreign exchange for the protection of the national monetary system as economic warfare against the enemy." 59 Furthermore, Nussbaum indicates that the drafters of the articles of Agreement of the IMF apparently did not classify the Freezing Order of 1940 as an instance of exchange control. 60 Had they done so, he asserts, they could not have held the dollar to be a "convertible" currency because exchange restrictions would have automatically made it "inconvertible," according to Article XIX(d) of the Fund Agreement. 61

Professor Mann shares Nussbaum's opinion that Freezing Orders are not exchange control regulations: "Although the problem of definition will not always be free from doubt, it ought to be clear that, for example, the American system of foreign funds control cannot be described as an exchange control regulation, because its purpose is not the protection of the dollar currency." 62

Therefore, trading with the enemy regulations generally should not be considered exchange control regulations. Although such regulations meet one criterion of exchange controls in that they directly effect financial transfers irrespective of the nature of the underlying transactions, they fail to meet the second criterion in that their purpose is not to conserve the supply of the nation's currency.

C. The Nature of the Iranian Assets Control Regulations

The Iranian Assets Control Regulations are comparable to several types of control regulations discussed above. 63 However, on the basis of the standards

59. Id. at 455-56.
60. Id.
61. Id. at 457 n.57.
62. Mann, supra note 7, at 444. Other authorities consistently support the view that an exchange control regulation's character is determined by its effect on the purely financial aspect of transactions. Professor Williams states:

Exchange control regulations to which Article VIII Section 2(b) applies are those laws or regulations genuinely concerned with the conservation of a country's economic resources and are directed to the financial aspect of an international transaction — whether current or capital transaction. Included are rules restricting the making of payments as well as exchange surrender regulations. Excluded are tariffs, trade restrictions, price control, and trading with the enemy regulations and legal tender laws, cours legal and cours force.

Williams, supra note 19, at 356.
63. See, e.g., Trading with the Enemy Regulations, § II.A.3 supra. See also, e.g., notes 27-30 and accompanying text, supra.
governing "exchange control regulations," they are not within the generally understood meaning of that term. That is, the Regulations are not directed to controlling the movement of the exchange resources of the United States in the interest of preserving the national currency.

1. The Financial Aspect of Transactions Test: Are the Regulations Directed Specifically to the Financial Aspect of Transactions with Iran?

The technical character of the Regulations makes a simple categorization of them difficult. The Regulations are designed as a licensing procedure, which is a typical form of exchange control, but they do not deal with "exchange" as such. Rather, the Regulations are concerned with Iranian property of all types, including, but not limited to, exchange. The effect of the Regulations is to halt virtually all transactions with Iran, including payments and transfers to any person in Iran. The Regulations prohibit all property transactions in which Iran has any interest and which are subject to the direct or indirect jurisdiction of the United States, unless a license is obtained from the Treasury Department.

Transactions with respect to "frozen" assets are not the only actions prohibited by the Regulations; all payments are barred. The comment of Gold is relevant in this respect. The licenses required by the Regulations relate only to the ability of a licensee to make a transaction otherwise prohibited; the Regulations do not require a license in order to obtain or use foreign exchange or to

64. See § II.B supra.
65. See notes 79-84 and accompanying text, infra.
   (a) Except as authorized by means of regulations, rulings, instructions, licenses or otherwise, no person subject to the jurisdiction of the United States shall, directly or indirectly, in any transaction involving Iran, an Iranian governmental entity, an enterprise controlled by Iran or an Iranian governmental entity, or any person in Iran:
   (4) Make any payment, transfer of credit, or other transfer of funds or other property or interest therein to any person in Iran.
See also 31 C.F.R. § 535.207 (1980) which prohibits certain trade, shipping and service transactions except as authorized by means of regulations, rulings, instructions, licenses or otherwise.
67. See Williams, supra note 19, at 352 n.12.
68. 44 Fed. Reg. 65,956 (1979). Section 535.201 of the Regulations provides:
   No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.
31 C.F.R. § 535.201 (1980). "Property" is defined in the Regulations to include all conceivable types of holdings including money, checks and bank deposits. 31 C.F.R. § 535.311 (1980).
69. 31 C.F.R. § 535.207 (1980).
71. See note 40 and accompanying text, supra.
pay in domestic currency for an approved transaction. According to Gold's analysis, the Regulations would not be a type of exchange control because their effect is not restricted to exchange, but extends to other aspects of transactions and trade as well.

A week after their original promulgation, the Regulations were amended to limit their application to deposits held in U.S. dollars. Arguably, Gold's analysis would not be fully applicable. As originally issued on November 14, 1979, the Regulations blocked all deposits held abroad by branches and subsidiaries of U.S. banks. However, on November 21, the promulgation of Section 535.566 of the Regulations unblocked deposits held in currencies other than U.S. dollars, although conversion of blocked, dollar deposits into foreign currencies remained proscribed. Thus, despite this revision, the Regulations essentially continued to impose a Treasury Department license requirement on a broad range of transactions. Because the Regulations applied to more than the purely financial aspects of transactions, they cannot be deemed to meet this criterion of the definition of "exchange control regulations."

2. The Protection of Exchange Resources Test

Under the standards discussed thus far, a bona fide exchange control regulation must have as its purpose the protection of the national currency. There is some evidence that the Regulations were issued to protect the dollar from a perceived Iranian attempt to damage or destroy its value as a medium of international payment. Before the Regulations were issued, Mr. Bani Sadr, the Iranian Foreign Minister, called for a fundamental review of the Iranian monetary system and for a currency independent of the dollar. On November 14, Mr. Bani Sadr announced Iran's intent to withdraw, immediately, all of its assets from U.S. banks, threatening a drastic contraction of the dollar supply. President Carter issued his Executive Order that day, apparently in response to this Iranian threat to the American currency.

73. See, e.g., 31 C.F.R. § 535.201 (1980) which permits payment to blocked accounts in domestic banks without a license under certain circumstances; 31 C.F.R. § 535.531 (1980) which permits payments of certain checks and drafts without a license until January 14, 1980.
74. GOLD, supra note 35, at 7.
75. See note 68 supra. 31 C.F.R. § 535.329 (1980) defines persons subject to the jurisdiction of the United States to include "[a]ny corporation organized under the laws of the United States or any state, territory, possession or district of the United States." An American bank doing business abroad would therefore be subject to the Regulations.
76. 31 C.F.R. § 535.566 (1980).
77. Id.
78. See § II.A.2 supra.
80. N.Y. Times, Nov. 15, 1979, at 1, col. 5; F.B.I.S. Nov. 15, 1979, R1.
However, the stated purpose and the terms of the Regulations go beyond the protection of the exchange resources of the United States. As summarized by the Foreign Assets Control Office of the Department of the Treasury, the purpose of the Regulations was "to meet the threat to the national security, foreign policy and economy of the United States with respect to which the President declared a national emergency in the Executive Order."81 Furthermore, the Regulations themselves are not restricted to transactions affecting the dollar, but also deal with a wider spectrum of commercial intercourse.82 In analyzing this aspect of the Regulations, the comparison between the Iranian Freezing Order and Regulations and the Freezing Order of 1940 is useful. The purpose of the 1940 Order was not so much the husbanding of foreign exchange as economic warfare against the enemy,83 even though the United States was not actively involved in the war against the countries which were the target of the Order. In this respect, the Regulations resemble traditional "trading with the enemy" regulations more closely than they resemble exchange controls. Their purpose is to restrict all financial dealings with a hostile country.84 To the extent that the Regulations resemble traditional "trading with the enemy" regulations, they cannot be considered to be within the generally understood meaning of exchange controls.

III. ARE THE IRANIAN ASSETS CONTROL REGULATIONS CONSISTENT WITH THE FUND AGREEMENT?

Even if the Iranian Assets Control Regulations are characterized as "exchange control regulations," the Regulations must also have been "imposed consistently with [the Fund] Agreement"85 in order to invoke Article VIII § 2(b) to give the Regulations extraterritorial effect. The Agreement provides several criteria for determining whether controls should be deemed consistent with its purposes.86 The immediate focus of this inquiry is Article VIII § 2(a), which obliges member states of the IMF to avoid restrictions on payments and transfers for current international transactions.87

A. Reasons for Avoiding Restrictions

The international experience with exchange restrictions in the 1930's is considered an unsatisfactory period in world affairs. The restrictions were a great

82. See notes 66-69 and accompanying text, supra.
83. NUSSBAUM, supra note 14, at 455-56.
84. See notes 49-62 and accompanying text, supra.
85. Agreement, supra note 3, art. VIII § 2(b).
86. See Agreement, supra note 3, art. 1; note 99 and accompanying text, infra. See also II.B infra.
87. Agreement, supra note 3, art. VIII § 2(b).
inconvenience both to the governments which administered them and to the individual firms subject to them. 88 More important, they were a symptom of contracting economies and reflected a shrinking volume of world trade. 89 The widespread application of exchange controls during this period destroyed the international monetary organization which had functioned until that time. 90 The experience of the 1930's showed that uncoordinated restrictions can degenerate, under the pressure of events, into a system of trading or currency blocs. 91 Ultimately, a long-term disequilibrium results in which economic hardship is widespread. 92 In order to combat this problem and to promote the growth of world trade, the drafters of the IMF Agreement sought to create a "one-world," multilateral system of payment which would make the conditions for the international payments for the sale of goods more stable. 93 Although experience warned of potential hazards, the drafters initially chose a system of fixed exchange rates. 94 Historically, fixed exchange systems had encouraged protective exchange restrictions to compensate for balance of payments deficits when exchange rates were temporarily inappropriate. 95 However, the drafters had learned from the experience of the 1930's that current transactions were too important to the growth of world trade to be restricted. 96 Thus, the drafters obliged member nations to avoid restrictions of this type. 97

89. Id.
91. A. Crockett, International Money 15 (1977) [hereinafter cited as Crockett].
93. See Metzger, supra note 23, at 318; Crockett, supra note 91, at 15.
94. It was a system of occasionally adjustable exchange rates, whereby rates could fluctuate within a small range. Agreement, supra note 3, art. IV § 3. The par value of a member's currency could not be changed except to correct a fundamental disequilibrium. Id. § 5.
96. Gold, Convertibility, supra note 92, at 6-7. In its 1967 Annual Report the IMF reiterated: "there are strong reasons to believe that a unitary exchange rate which is supported without undue recourse to restrictions can provide an active and dynamic link between the growth of the economy and the world at large." IMF, 1967 Annual Report 46 (1967). See generally Machlup, supra note 95, at 230-33 (a fixed exchange system is superior to a flexible one only where there are no controls).
97. The drafters, however did not find it necessary to protect the freedom to transfer capital across boundaries. Gold, Convertibility, supra note 92, at 6-7. The apparent reason is that controls on capital transfers do not constitute a substantial enough interference to the making of financial settlements. Shuster, supra note 14, at 142-43. Thus, Article VI § 3 reserves to members the right to control capital transfers. Agreement, supra note 3, art. VI § 3.
The principle that payments for goods and services on current account should be free from restrictions is embodied in the first article of the IMF Agreement. According to this provision, the Fund's purposes are: "(iii) [T]o maintain orderly exchange arrangements among members . . . (iv) To 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."98 To this end, the Fund "shall be guided in all its policies and decisions by the purposes set forth [above]."99

To carry out these purposes, Article IV § 4(a) states that "[e]ach member undertakes to collaborate with the Fund . . . to maintain orderly exchange arrangements with other members. . . ."100 Article VIII § 2(a) of the Agreement further provides that, "no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions."101

However, the authors of the Agreement anticipated that some restrictions would undoubtedly be found necessary by nations in times of distress. Thus, the Agreement provided mechanisms for the adoption of certain financial restrictions.102

B. Some Permitted Restrictions on International Payments

While the Fund Agreement allows members complete freedom to impose restrictions on capital transfers,103 it permits only a limited set of restrictions on current international payments. Restrictions may be made only with respect to a scarce currency104 or during the post-war transitional period.105 Apart from these two cases,106 Article VIII § 2(a) provides that restrictions for

98. Agreement, supra note 3, art. I. The importance which the Fund attaches to the elimination of restrictions is also reflected in the Fund's goal for complete convertibility. Id. art. XIX(d). According to the Commentary on the Second Amendment, Article VIII § 2(a) "constitutes what has become the basic convertibility provision of the Articles." PROPOSED SECOND AMENDMENT TO THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND, A REPORT BY THE EXECUTIVE DIRECTORS TO THE BOARD OF GOVERNORS, Part II, Chap. c, § 14 (1976). The absence of restrictions is an important aspect of the goal of convertibility of Article XIX(d). The Fund's definition of a completely convertible country is one which has eliminated exchange control. Agreement, supra note 3, art. XIV.
99. Fund Agreement, supra note 3, art. I.
100. Id. art. IV § 4(a).
101. Id. art. VIII § 2(a).
102. SHUSTER, supra note 14, at 146.
103. Agreement, supra note 3, art. VI § 3.
104. Id. art. VII § 3(b).
105. Id. art. XIV.
106. Restrictions may also be imposed under Article XI § 2 in exchange transactions with non-members. Id. art. XI § 2.
payments and transfers for current international transactions shall not be imposed by a Fund member without the approval of the Fund.\textsuperscript{107}

Clearly, the Iranian Assets Control Regulations were not imposed due to a scarcity of dollars or during the post-war transitional period. Thus, only three ways are open for the Regulations to be construed as consistent with section 2(a) of the Fund Agreement: 1) they may be deemed to be merely "controls" and not "restrictions,"\textsuperscript{108} 2) they may be deemed to be restrictions on capital transfers only,\textsuperscript{109} and 3) they may receive Fund approval.\textsuperscript{110} Each of these three issues will be discussed separately.

1. Restrictions versus Controls

The distinction between restrictions and controls has been recognized and definitively addressed in a decision of the IMF executive.\textsuperscript{111} According to that decision, a restriction within the meaning of Article VIII § 2(a) involves a direct governmental limitation on the availability or use of exchange as such.\textsuperscript{112} This decision:

\begin{quote}
[C]learly implies that any governmental measures which either prohibit (a prohibition amounts to nothing more than a total limitation) or limit (the limitation can be less than total) either the availability or the use (an exchange control regime which freely makes available foreign exchange, but only for certain transactions, is restrictive) of exchange required for the consummation of current international transactions will, for the purposes of the Fund Agreement, constitute a restriction.\textsuperscript{113}
\end{quote}

Arguably, all exchange restrictions are a form of controls; but not all exchange controls are restrictive of international payments.\textsuperscript{114} As Gold noted, a "restriction" constitutes a real interference with payments and transfers for current international transactions.\textsuperscript{115} A "control," on the other hand, is something less than a "restriction."\textsuperscript{116} In this sense, a control is merely a procedure to be complied with as a condition precedent to payment or transfer.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{107} Id. art. VII § 2(a). Emphasis supplied.
\item \textsuperscript{108} If the Regulations are not restrictions, then they are not in violation of the obligation of Article VIII § 2(a) to avoid restrictions.
\item \textsuperscript{109} Restrictions on capital transfers are permitted by Article VI § 3.
\item \textsuperscript{110} Agreement, supra note 3, art. VIII § 2(a).
\item \textsuperscript{111} Decision No. 1034-(60/27), Jun. 1, 1960, Selected Decisions, supra note 5, at 139-41.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Shuster, supra note 14, at 141-42.
\item \textsuperscript{114} Fawcett, The International Monetary Fund and International Law, 40 Brit. Y.B. Int'l L. 42 (1964).
\item \textsuperscript{115} J. Gold, The International Monetary Fund and Private Business Transactions 8 (1965) [hereinafter cited as Gold, IMF].
\item \textsuperscript{116} See Id. at 7, 8.
\item \textsuperscript{117} See Id. at 8.
\end{itemize}
As long as a control procedure is not unreasonable, it would not be inconsistent with the Fund member's obligation to avoid restrictions.\(^\text{118}\) Conversely, although a licensing or similar procedure is not in itself a restriction, it would be regarded as one if it unduly delayed the making of payments or transfers. There would be no doubt that it was a restriction if it went beyond delay in its effect and involved the actual prevention of payments and transfers.\(^\text{119}\)

The Fund Agreement seeks to prohibit only restrictions, not exchange controls as such.\(^\text{120}\) The Agreement prohibits only those aspects of exchange control systems which truly constitute an *interference* with financial activities, rather than mere procedural inhibitions on the payments process.\(^\text{121}\) Thus, the question of whether "controls" are "restrictions" is a question of degree. However, the purposes of the Agreement indicate that this question may hinge on the nature of the payments involved. "The restriction which the Articles of Agreement wish to abolish is, not the resident trader's inability to make payments at his discretion, but the Exchange Control Authorities' power to withhold licenses for payments for current transactions to non-residents."\(^\text{122}\)

While an exchange control may not be a restriction which is inconsistent with the Fund Agreement *per se*, it would appear to be inconsistent with the Fund Agreement if a control unreasonably restricts payments and transfers for *current* international transactions.\(^\text{123}\)

2. Current versus Capital

Whether the distinction between current and capital transactions is properly maintained in a member's controls, is of crucial importance in determining whether those restrictions are consistent with the Fund Agreement.\(^\text{124}\) Article XIX(i) of the Agreement provides the operative definition of the term "*current transaction*" for purposes of the Fund Agreement.\(^\text{125}\) Initially, payments for "*current transactions*" are defined by exclusion; such payments are those "which are not for the purpose of transferring capital."\(^\text{126}\) However, the article continues to outline some examples of transactions which would be considered current under the Agreement:

(1) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;

\(^\text{118. Id.}\)  
\(^\text{119. Id.}\)  
\(^\text{120. SHUSTER, supra note 14, at 142.}\)  
\(^\text{121. Id. at 142-43.}\)  
\(^\text{122. Mann, Money in Public International Law, 96 RECUEIL DES COURS 7, 64 (1959).}\)  
\(^\text{123. SHUSTER, supra note 14, at 142.}\)  
\(^\text{124. See Williams, supra note 19, at 358.}\)  
\(^\text{125. Agreement, supra note 3, art. XIX (i).}\)  
\(^\text{126. Id.}\)
(2) Payments due as interest on loans and as net income from other investments;
(3) Payments of moderate amount for amortization of loans or for depreciation of direct investments;
(4) Moderate remittances for family living expenses.127

All of these transactions, with the exception of the last,128 are clearly controlled by the Regulations in question.129 Far from being limited to the control of capital movements, Section 535.206(a) of the Regulations includes control over all transactions: "Except as authorized by means of regulations, rulings, instructions, licensed or otherwise, no person subject to the jurisdiction of the United States shall . . . (4) make any payments, transfer of credit, or other transfer of funds or other property or interests therein to any person in Iran."130 The broad sweep of these provisions clearly includes controls on those transactions specifically enumerated in the Agreement as "current transactions," placing the Regulations in conflict with an IMF member's obligation to avoid restrictions on such activities.

3. Fund Approval

The Fund Agreement nowhere supplies the explicit standards by which the Fund executive will decide whether to approve restrictions under Article VIII § 2(a). The closest the Agreement comes to addressing the issue is the pronouncement in Article I that the "Fund will be guided in all its policies and decisions by the purposes set forth"131 in that article. In other words, fund approval of any restrictions should be consistent with the general purposes and spirit of the Agreement.

However, the only restrictions on current payments that could be justified under the Fund Agreement in light of its purposes and, thus, properly receive Fund approval, would be those that are necessary, temporary and imposed on balance of payments grounds.132 Further, a distinction must be made between restrictions that are approved by the Fund and those to which Article VIII § 2(b) gives extraterritorial effect. The Fund can approve a restriction to the limited extent that the member imposing it would not thereby be considered in

127. Id.
128. 31 C.F.R. § 535.563 (1980) exempts remittances up to $1,000 a month per family member in Iran.
130. 31 C.F.R. § 535.206(a) (1980).
131. Agreement, supra note 3, art. I.
132. See Shuster, supra note 14, at 155; Gold, supra note 35, at 16 (The fund Agreement seeks the elimination of exchange restrictions and controls but authorizes them in special circumstances, usually related to the economic difficulties of a member).
breach of its IMF obligations. However, such an approval would not automatically carry with it the extraterritorial reach of Article VIII § 2(b) of the Agreement. Arguably, the only exchange control regulations, other than those expressly allowed by the Fund Agreement, which should be given extraterritorial effect through approval by the Fund are those imposed as a temporary adjustment for a member’s payments difficulties. Consequently, the purposes which a particular restriction is intended to serve are crucial in determining whether the restriction can be considered an exchange control regulation within the meaning of Article VIII § 2(b).

A June 1, 1960 decision by the Executive Directors expresses the Fund’s attitude towards restrictions imposed for non-balance of payments purposes. In the decision, the Directors stated:

If members, for balance of payments reasons, propose to maintain or introduce measures which require approval under Article VIII, the Fund will grant approval only where it is satisfied that the measures are necessary and that their use will be temporary while the member is seeking to eliminate the need for them. As regards measures requiring approval under Article VIII and maintained or introduced for non-balance of payments reasons, the Fund believes that the use of exchange systems for non-balance of payments reasons should be avoided to the greatest possible extent, and is prepared to consider with members the ways and means of achieving the elimination of such measures as soon as possible.

Despite its desire to avoid such restrictions, the Fund, in another decision, recognizes that economic measures introduced for political, rather than balance of payments reasons, may be in a country’s sovereign interest, and therefore, justifiable and unavoidable at times. This Fund decision recognizes and sanctions a special procedure for Fund approval of restrictions imposed for security reasons. The member imposing security-motivated restrictions is first required to notify the Fund as promptly as circumstances permit. Notice is then circulated to the Executive Directors, who are required to inform the member within 30 days if they are unsatisfied that the restrictions are

133. E.g., if the member imposes a restriction which on its face violates the Agreement, but which the IMF believes is justified by extraordinary circumstances (such as national security reasons, see notes 136-40 and accompanying text infra), the IMF can grant limited approval. As a result of this approval, the member imposing the restriction will be able to continue to avail itself of the IMF. Such approval is limited in that it does not automatically carry with it the extraterritorial reach of Article VIII § 2(b) of the Agreement.
134. Decision No. 1034-(60/27), Jun. 1, 1960, SELECTED DECISIONS, supra note 5, at 140.
135. Id.
137. Id.
138. Id.
warranted solely by security reasons. 139 In the absence of any action by the Fund executive, the member may proceed with the understanding that the Fund has no objection to the imposition of the restrictions. 140

Although this decision sanctions politically motivated restrictions which can be linked to national security, the decision does not determine whether such measures are entitled to the extraterritorial effect of Article VIII § 2(b).

Article VIII § 2(b) fundamentally alters the generally understood rules of private international law. 141 Before the Fund Agreement existed, courts generally refused to recognize or to enforce foreign exchange control regulations on public policy grounds. 142 Even where foreign regulations do not conflict with domestic public policy, this refusal is considered preferable to having one nation enforce the "revenue" laws of another. 143 However, Article VIII § 2(b) obliges members to cooperate in making other members' exchange control regulations more effective. 144 Specifically, the Fund executive has interpreted this obligation to mean that:

[T]he tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. 145

Gold has commented that the Fund Agreement obliges members to cooperate with the Fund and among themselves, in recognizing each other's exchange control regulations, because "in this way they avoid intensifying any economic difficulties of that member." 146 Thus, the reciprocal recognition and enforcement of exchange controls under certain circumstances comports with the overall purposes of the International Monetary Fund. For this reason, the general rule of non-recognition of foreign exchange regulations has been amended by international agreement.

However, politically motivated exchange control regulations, i.e., those which are not justified by balance of payments reasons, appear to be beyond the Fund's mandate to alter customary international law. The Fund Agree-

139. Id.
140. Id.
141. See Metzger, supra note 23, at 326; DELAUME, supra note 52, at 292. See also NUSSBAUM, supra note 14, at 461-77.
142. Metzger, supra note 23, at 326.
143. Cf. Mann, The Doctrine of Jurisdiction in International Law, 111 RECUEIL DES COURS 9, 119 (1964). (The statement that monetary laws are strictly territorial and have no extraterritorial effect is an oversimplification).
144. See note 146 and accompanying text, infra.
145. Decision No. 446-4, Jun. 10, 1949, SELECTED DECISIONS, supra note 9, at 131-32.
ment was designed to ameliorate economic problems through the promotion of international trade.147

The fundamental principle that sovereigns are not obliged to carry out the political acts of other sovereigns retains its place in international law.148 International agreements in derogation of this principle should be construed narrowly.149 The purposes of the Agreement cannot be construed to impose reciprocal political obligations among the member nations of the Fund. Such an obligation would be ultra vires for an organization chartered to promote international financial stability.150

C. Were the Iranian Asset Control Regulations Imposed Consistently with the Fund Agreement?

The Fund executive issued no objection, during the 30 days following the submission of the Regulations to the fund by the United States.151 Accordingly, the U.S. could assume that there was no objection and that the Fund was satisfied that the Regulations were intended to preserve the security of the United States.152

However, the Fund's approval of these Regulations, tacit or otherwise, does not make the Regulations consistent with the spirit and letter of the Fund Agreement. The characterization of the Regulations as a "restriction" on international payments, including current transactions, is unavoidable.153 The stated purpose of the President's Executive Order, and of the Regulations themselves, was to "block all Iranian assets."154 Although the Regulations ostensibly impose nothing more than a licensing procedure, in their purpose and effect they prevent all transactions with Iran. The controls operate by blocking all Iranian accounts; the subsequent issuance of licenses would merely make exceptions to this general policy. Licensing is required for a wide

147. See notes 80, 81 and accompanying text, supra.
149. See id. at 96.
151. There is some indication that the IMF issued an affirmative approval of the Regulations. However, if it did, the approval has not been circulated publicly.
152. See note 140 and accompanying text, supra.
153. The Treasury Department's Summary of an amendment to the regulations characterizes the Regulations as restrictions. The amendment is titled: "IRANIAN ASSETS CONTROL REGULATIONS: ADDITIONAL PROHIBITIONS." The summary reads as follows: "Summary: The Office of Foreign Assets Control is amending the Iranian Assets Control Regulations. The purpose of the amendment is to impose additional prohibitions on dealings with Iran. The effect of the Amendment is that . . . restrictions are placed on various financial transactions to which Iran is a party." 45 Fed. Reg. 24,432 (1980). Emphasis supplied.
range of transactions;\textsuperscript{155} indeed, the breadth of the licensing provisions suggests that it would be difficult to conceive of a foreign transaction which falls beyond their scope. The licensing system essentially establishes a veto power in the United States Government over any transaction. In fact, the Government has used this power to preclude most transactions with Iran. Gold’s analysis of the distinction between “restrictions” and “controls”\textsuperscript{156} suggests that the licensing procedure should be regarded as a “restriction” if it unduly delays the making of payments or transfers.\textsuperscript{157} The Regulations do not merely delay, but actually prevent, payments and transfers. Under Gold’s analysis,\textsuperscript{158} they should then be considered “restrictions.”

IV. CONCLUSION

In order for the Fund to approve a member state’s exchange control regulations, such that they receive extraterritorial effect under Article VIII § 2(b), the regulations should meet two tests: the laws must be directed to controlling the movement of exchange resources as such\textsuperscript{159} and they must be promulgated for balance of payments purposes.\textsuperscript{160} The Iranian Assets Control Regulations fail both tests.

Furthermore, the Regulations fail to meet the definition of “exchange control regulations.”\textsuperscript{161} They are not directed solely toward “exchange” and they function more as trade controls.\textsuperscript{162} The Regulations are not limited to movements of “capital” but they also affect payments for current transactions.\textsuperscript{163} Furthermore, because they operate more like “restrictions” than “controls,” they are inconsistent with the Fund’s goal of promoting unrestricted international financial transactions.\textsuperscript{164} Thus, the Regulations cannot have been imposed consistently with the Fund Agreement.

The Bretton Woods Defense should succeed only if the Regulations are “exchange control regulations” imposed “consistently with the Fund Agreement.” The defense is not applicable with respect to the Iranian Assets Control Regulations. In situations such as this, the International Monetary Fund Agreement should not be strained to alter traditional conflict of laws principles. International disputes confined to the economic arena should be con-

\textsuperscript{155} See, e.g., 31 C.F.R. § 535.201 (1980) which prohibits the unlicensed extension of credit to Iran; 31 C.F.R. § 535.424 (1980) which requires a license to enter into any service contract in support of any enterprise in Iran. See also 31 C.F.R. § 535.502-578 (subpart E) (1980). This provision regulates the issuance of licenses.
\textsuperscript{156} See notes 115-19 and accompanying text, supra.
\textsuperscript{157} GOLD, IMF, supra note 115, at 8.
\textsuperscript{158} See notes 115-19 and accompanying text, supra.
\textsuperscript{159} See § II. B.1 supra.
\textsuperscript{160} See notes 43-48 and accompanying text, supra.
\textsuperscript{161} See § II.B supra.
\textsuperscript{162} See notes 82-84 and accompanying text, supra.
\textsuperscript{163} See note 130 and accompanying text, supra.
\textsuperscript{164} See notes 153-58 and accompanying text, supra.
ducted with due regard to the law of uninvolved nations. Off-shore deposits should not implicate the host nation's law in the disputes of the currency-issuing nation. Similarly, the fundamental mechanism of international monetary stability, the International Monetary Fund Agreement, should not become a casualty of such international disputes.

Natalie A. Simon