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The Extraterritorial Effect of Foreign Exchange Control Laws

F. David Trickey
University of Michigan Law School

NOTES

THE EXTRATERRITORIAL EFFECT OF FOREIGN EXCHANGE CONTROL LAWS

Article VIII section 2(b) of the International Monetary Fund Articles of Agreement[1] makes "exchange contracts" which are contrary to approved foreign exchange regulations of members "unenforceable"[2] and provides that member nations may further agree upon measures to enforce each other's foreign exchange laws.[3] The recent New York Court of Appeals decision in *Banco do Brasil, S.A. v. A. C. Israel Commodity Co.*[4] illustrates the serious shortcomings of IMF provisions for enforcing foreign exchange controls. The case also suggests that general conflict of laws rules can be used to effectuate the policies underlying exchange control laws.

Before May 1961, Brazilian exchange laws required coffee exporters to assign their rights to receive dollar proceeds from export contracts to plaintiff bank, an instrumentality of the Brazilian government, which then paid the exporters at 90 cruzeiros per dollar rather than at 220 cruzeiros per dollar, the prevailing free market exchange rate.[5] Plaintiff bank brought suit in New York to recover damages for financial injury allegedly caused by a fraudulent scheme to evade the Brazilian exchange regulations. The complaint alleged that United States and Brazilian corporations knowingly used forged exchange control documents to obtain clearance for shipping coffee from Brazil.[6] One of these business concerns, a Delaware corporation herein called the defendant, allegedly made dollar payments for its coffee purchases directly to collaborating Brazilian exporters, who

1 Articles of Agreement of the International Monetary Fund, 60 Stat. 1401 (1946) [hereinafter cited as IMF Agreement].

2 IMF Agreement art. VIII, § 2(b) [hereinafter cited as § 2(b)] provides in its first sentence: "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." 60 Stat. 1411 (1946).

3 The second sentence of § 2(b) provides: "In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement." 60 Stat. 1411 (1946).

4 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 84 S. Ct. 657 (1964) [hereinafter cited as principal case]. The principal case is noted at 63 COLUM. L. REV. 1334 (1963); 16 STAN. L. REV. 202 (1963); 15 SYRACUSE L. REV. 100 (1963).

5 On May 15, 1961, Brazil revised its exchange control laws. Coffee exporters must now deposit a stipulated number of dollars for each bag of coffee exported; they can exchange remaining dollar proceeds from the export sale at the free market rate. INT'L MONETARY FUND ANN. REP., EXCHANGE RESTRICTIONS 48-51 (1962). Both plaintiff's contract with the Brazilian government and Brazilian law authorized plaintiff to bring suit in its own name to recover money due Brazil under the exchange control laws. Brief for Appellant, p. 3, principal case.

6 The documents by which exporters assigned to plaintiff the foreign currency proceeds from export sales were termed "exchange contracts." Defendants' shipping permit forms allegedly referred to nonexistent exchange contracts and contained forgeries of plaintiff's stamp, signatures of plaintiff's officials, and signatures of United States commercial bank officials. Brief for Appellant, p. 5, principal case.

exchanged the dollars for cruzeiros at the free market rate. Purchase of coffee below market price, the plaintiff asserted, was the benefit achieved by the defendant's alleged participation in the scheme. Defendant's motion to vacate a warrant of attachment for failure to state a cause of action was granted,[7] and the Appellate Division affirmed.[8] On appeal to the New York Court of Appeals, the order was affirmed, three judges dissenting. The court ruled that International Monetary Fund membership does not compel courts of one member to give effect to another member's foreign exchange laws by allowing a suit to be brought for damages for violation of those exchange laws.

Section 2(b) has been a source of frequent controversy,[9] and in the principal case the plaintiff contended that it requires the courts of one member to assist other members in obtaining compliance with their exchange controls. The court rejected this contention, relying on three different arguments. First, a proposal offered at the Bretton Woods Conference which would have made violation of a member country's foreign exchange controls an "offense" outside the territory of that member failed of passage.[10] Second, the first sentence of section 2(b) merely provides that exchange contracts covered by the section are *unenforceable* in member countries.[11] This terminology only directs that members deny assistance to parties attempting to enforce the proscribed exchange contracts. Accordingly, the IMF's executive directors have interpreted this section to mean that members must not lend judicial or executive assistance to parties seeking performance of, or damages for the breach of, exchange contracts which are unenforceable under section 2(b).[12] Third, although the second sentence of section 2(b) authorizes member countries to make agreements with each other to further effectuate their exchange control regulations,[13] the American Bretton Woods Agreement Act of 1945[14] enacted into

7 Banco do Brasil, S.A. v. A.C. Israel Commodity Co., 29 Misc. 2d 229, 215 N.Y.S.2d 3 (Sup. Ct.), *aff'd mem.*, 13 App. Div. 2d 652, 216 N.Y.S.2d 669 (1961).

8 *Ibid.*

9 See generally GOLD, THE FUND AGREEMENT IN THE COURTS (1962). *Compare* NUSSBAUM, MONEY IN THE LAW 540-45 (2d ed. 1950), *with* Meyer, *Recognition of Exchange Controls after the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953).

10 The proposal did not define "offense." 1 PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE 334 (1944) (Dep't State Pub. No. 2866, Int. Org. & Conf. Ser. Nos. 1, 3, 1948). An alternative proposal suggested the use of "unenforceable" instead of "offense." *Id.* at 341. A committee directed that the two proposals be reconciled to indicate no intent to impose criminal penalties. *Id.* at 605. Thereafter the proposal to use "unenforceable" was accepted. *Id.* at 628, 671.

11 Section 2(b); see note 2 *supra*. For discussions of "exchange contract" and the scope of § 2(b), see generally Gold & Lachman, *The Articles of Agreement of the International Monetary Fund and the Exchange Control Regulations of Member States*, 89 JOURNAL DU DROIT INTERNATIONAL 666 (1962); Mann, *The Private International Law of Exchange Control Under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97 (1953); Meyer, *supra* note 9, at 885-97.

12 INT'L MONETARY FUND ANN. REP. 82 (1949), 14 Fed. Reg. 5208-09 (1949).

13 See note 3 *supra*.

14 59 Stat. 512 (1945), 22 U.S.C. § 286 (1958).

municipal law only the first sentence of section 2(b).[15] Had the second sentence also been enacted, domestic courts might have been able to find an implied agreement between the federal government and another IMF member to effectuate the exchange control laws of that member. No implied agreement can properly be found, however, because the second sentence of section 2(b) has not been enacted into American municipal law. Section 2(b), therefore, does not impose upon courts in the United States an affirmative obligation to enforce Brazilian exchange laws.[16]

The plaintiff also argued that, apart from section 2(b), United States membership in the IMF establishes a federal policy which requires New York to recognize those exchange controls of members which are consistent with the IMF Agreement. The Department of State and the Department of the Treasury, the executive departments charged with negotiation and administration of the IMF Agreement, both advised, however, that mere acceptance of the IMF Agreement does not establish a federal policy compelling New York to entertain the plaintiff's suit.[17] These opinions quite likely were the dispositive factors which led the Supreme Court of the United States to deny certiorari in the principal case. The Supreme Court has indicated that such opinions weigh heavily against finding that the United States has an implied obligation under a treaty.[18] Moreover, the refusal to give effect to Brazilian exchange controls in the principal case circumvents only Brazilian regulations, not those of the IMF.[19] Finally, no express United States obligation under the IMF Agreement would be violated by New York's refusal to entertain the suit.[20] Therefore, *Kolovrat v. Oregon*[21] and *United States v. Pink*,[22] which respectively struck down

15 59 Stat. 516 (1945), 22 U.S.C. § 286h (1958).

16 *Accord*, NUSSBAUM, *op. cit. supra* note 9, at 545; Meyer, *supra* note 9, at 895; see Note, 63 COLUM. L. REV. 1334, 1339 (1963); Note, 16 STAN. L. REV. 202, 209 (1963). *But see* Note, 15 SYRACUSE L. REV. 100, 102-03 (1963).

17 Memorandum for the United States, p. 4, principal case.

18 Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933).

19 Refusal to recognize the Brazilian exchange controls indirectly detracts from the IMF's goal of promoting the currency stability and economic development of members. Nonetheless, the intricate Brazilian exchange control procedures prevent frequent violation of the laws. Furthermore, the International Coffee Agreement of 1962 will make future violations of Brazilian exchange controls more difficult because the agreement imposes a duty upon importing countries to permit entry of coffee only if prescribed certificates are presented. Bilder, *The International Coffee Agreement: A Case History in Negotiation*, 28 LAW & CONTEMP. PROB. 328, 361 (1963).

20 No article in the IMF Agreement obligates courts of one member to give effect to other members' exchange controls except in the situation provided for by § 2(b).

21 366 U.S. 187 (1961). The Court reversed an Oregon Supreme Court ruling that denied a Yugoslavian citizen his treaty rights to the property of an Oregon decedent. Reciprocity in favor of Oregon heirs was required under Oregon's Iron Curtain Statute. The Supreme Court rejected the conclusion of the Oregon courts that reciprocity was lacking because Yugoslavia might fail to meet obligations expressly placed on it by the IMF Agreement.

22 315 U.S. 203 (1942). A United States foreign policy expressed in connection with an executive agreement required recognition of Russian nationalization decrees. New York law prohibited local recognition of the decrees. The Court gave effect to the federal

state laws that blocked fulfillment of obligations of the United States under a treaty and an executive agreement, could not support the plaintiff's argument.[23]

It must therefore be conceded that the New York courts were not obligated to entertain the action in the principal case. Neither the fact that section 2(b) is inapplicable to suits of this kind nor the lack of a federal policy requiring domestic courts to entertain such suits, however, precludes the presentation of an enforceable claim. In the principal case, for instance, the New York courts could have entertained the cause of action since the complaint stated facts establishing a tort claim for damages based on fraudulent evasion of Brazilian exchange controls.[24] Emphasizing that defendant's acts allegedly in furtherance of the plan to defraud the plaintiff all occurred in New York,[25] the Court of Appeals stated that under New York law it is not a tort for an individual to enter into a contract which violates the exchange controls of an IMF member.[26] It is apparent, therefore, that the Court of Appeals consulted New York substantive law to determine whether the alleged facts were sufficient to state a cause of action.[27] Because significant aspects of the conduct complained of did occur in Brazil, the court should have examined relevant conflict of laws rules to determine whether New York or Brazilian law governed the plaintiff's tort claim.

The traditional conflict of laws rule for tort suits is that the substantive law of the place of the injury determines the rights and liabilities of the parties.[28] Under this rule Brazilian law would clearly be applicable to the principal case because both the false representation and the injury occurred in Brazil. Shortly after the decision in the principal case, however, New York rejected the "place of injury" test, and it now determines the rights and duties of parties to a tort suit by applying the law of the state with the most significant relationship to the transaction.[29] Under the American

policy established by the executive agreement over the conflicting state laws. See generally Cardozo, *The Authority in Internal Law of International Treaties: The Pink Case*, 13 SYRACUSE L. REV. 544 (1962); Note, *United States v. Pink—A Reappraisal*, 48 COLUM. L. REV. 890 (1948).

23 *But cf.* 63 COLUM. L. REV. 1334, 1340-41 (1963).

24 Principal case at 378, 190 N.E.2d at 238, 239 N.Y.S.2d at 876.

25 *Id.* at 376, 190 N.E.2d at 237, 239 N.Y.S.2d at 875. Also, defendant's principal place of business was in New York. *Ibid.*

26 *Id.* at 376-77, 190 N.E.2d at 237, 239 N.Y.S.2d at 875.

27 In giving a negative answer to the certified question of whether plaintiff had alleged facts sufficient to state a cause of action, the court parenthetically indicated that New York law was the law of the transaction. *Ibid.* This puzzling reference fails to indicate whether the court was applying New York law to the coffee sale contract, the alleged tort claim, or both the coffee sale contract and the tort claim.

28 *E.g.*, Sanders v. Glenshaw Glass Co., 204 F.2d 436 (3d Cir.), *cert. denied*, 346 U.S. 916 (1953); Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948); Kerfoot v. Kelley, 294 N.Y. 288, 62 N.E.2d 74 (1945); Turnowski v. Turnowski, 33 Misc. 2d 864, 226 N.Y.S.2d 738 (Sup. Ct. 1962); GOODRICH, CONFLICT OF LAWS 260 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS § 379 (1934).

29 Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The

Law Institute's formulation of this new rule, although all relevant factors and policies must be weighed, the place of injury, the place where the wrongful conduct was committed, and the domiciles of the parties are of particular importance.[30] Furthermore, in propounding its new rule the New York Court of Appeals said that in most instances the law of the place of injury will still control because of that jurisdiction's interest in regulating conduct within its borders.[31] In the principal case both the allegedly fraudulent acts and the injury complained of occurred in Brazil, which was also the plaintiff's domicile. Brazil clearly has an interest in regulating fraudulent conduct within its borders; competing New York interests are not apparent. Thus, even under the new "significant contacts" test, Brazilian law should have been applied to determine whether the plaintiff alleged sufficient facts to state a cause of action.[32]

Article 159 of the Brazilian *Codigo Civil* obligates one who intentionally violates the rights of another to compensate the injured person for damages incurred.[33] A right of the plaintiff was clearly in issue in the principal case because Brazilian exchange controls imposed a duty to pay proceeds from coffee exports to the plaintiff,[34] and the plaintiff was authorized to sue to recover money due it under the exchange controls.[35] The alleged concerted action by the defendants to evade the exchange control laws probably violated the plaintiff's right to receive foreign currency and therefore obligated the defendants to compensate the plaintiff for the injury. Thus, under Brazilian law a civil wrong may well have been committed. The law which conflict of laws rules indicate is applicable to a tort suit also determines whether an individual is liable as a joint tort-feasor[36] and establishes

New York rule follows RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963). See Cavers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963). Currie asserts that New York has actually gone beyond the "most significant relationship" test, and that the policies and interests of the states involved, rather than particular contacts, will determine the choice of law. *Id.* at 1235. *But see* EHRENZWEIG, CONFLICT OF LAWS § 122 (1962).

30 RESTATEMENT (SECOND), *op. cit. supra* note 29, § 379(2).

31 Babcock v. Jackson, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750-51 (1963).

32 See RESTATEMENT (SECOND), *op. cit. supra* note 29, § 379c: "Fraud and Misrepresentation. (1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines, almost invariably, the plaintiff's rights in tort against the defendant." See, *e.g.*, James-Dickinson Farm Mortgage Co. v. Harry, 273 U.S. 119, 126 (1927); Texas Tunneling Co. v. City of Chattanooga, 204 F. Supp. 821, 827 (E.D. Tenn. 1962); Israel v. Alexander, 50 F. Supp. 1007, 1009 (S.D.N.Y. 1942). *But see* EHRENZWEIG, *op. cit. supra* note 29, § 215(3).

33 CODIGO CIVIL art. 159 (Brazil 1961); see 1 BEVILAQUA, CODIGO CIVIL 448-50 (1951).

34 See INT'L MONETARY FUND ANN. REP., EXCHANGE RESTRICTIONS 48 (1962). Brazilian law would determine whether the plaintiff's right is legally protected. See RESTATEMENT (SECOND), *op. cit. supra* note 28, § 380a.

35 See note 5 *supra*.

36 RESTATEMENT (SECOND), *op. cit. supra* note 29, § 390c; see Mosby v. Manhattan Oil

the measure of damages.[37] The Brazilian *Codigo Civil* specifies that both the wrongdoers and those who participate in committing the wrong are jointly liable for the damage caused.[38] Thus, under Brazilian law, proof of the plaintiff's allegations that defendant knew of the plan to evade the exchange controls, participated in the plan, and benefited by its participation, would impose joint liability on the defendant to pay damages even though its acts occurred only in New York. Although courts have been reluctant to enforce tort liability imposed by the law of a foreign jurisdiction when the defendant was neither present in the foreign state nor a participant in the tortious conduct,[39] courts have enforced tort liability imposed by foreign law when the defendant, though not present in the foreign state, was sufficiently closely connected with the wrong committed there.[40] The alleged intentional participation in and benefit from the wrong committed in Brazil would sufficiently relate the defendant in the principal case to the place where the wrong was committed to warrant enforcement by a New York court of liability created by Brazilian law. Under the Brazilian law, the plaintiff did allege facts sufficient to state a cause of action. Furthermore, in similar cases, whether the forum follows the traditional place-of-wrong test or the new "significant relationship" test, foreign law will be applicable and, in most instances, will make the conduct actionable. Thus there will usually be a sound basis for providing relief, unless some other conflict of laws rule prohibits application of the relevant foreign law in the forum court.

In the principal case the court held that no effect could be given to the Brazilian exchange controls because a conflict of laws rule barred enforcement of the revenue laws of a foreign sovereign.[41] However widely this

Co., 52 F.2d 364 (8th Cir.), *cert. denied*, 284 U.S. 677 (1931); Bache v. Dixie-Ohio Express Co., 8 F.R.D. 159 (N.D. Ga. 1948).

37 *E.g.*, Wynne v. McCarthy, 97 F.2d 964 (10th Cir. 1938); Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416 (1937); Davis v. Gant, 247 S.W. 576, 580 (Tex. Civ. App. 1923); 2 RABEL, THE CONFLICT OF LAWS 276-80 (2d ed. 1960); RESTATEMENT (SECOND), *op. cit. supra* note 29, § 390b.

38 CODIGO CIVIL art. 1518 (Brazil 1961); see 5 BEVILAQUA, *op. cit. supra* note 33, at 290-94.

39 A husband who has never been to Florida and who did not participate in the wrong can not be held liable in New York for his wife's tort committed in Florida even though Florida imposed liability on husbands for their wives' torts. Siegmann v. Meyer, 100 F.2d 367 (2d Cir. 1938).

40 Fischl v. Chubb, 30 Pa. D. & C. 40 (C.P. 1937), 51 HARV. L. REV. 738 (1938); see Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Le Forest v. Tolman, 117 Mass. 109 (1875); *cf.* Brackett v. Griswold, 112 N.Y. 454, 20 N.E. 376 (1889); Continental Confections v. S & M Sugar Co., 20 Misc. 2d 914, 194 N.Y.S.2d 178 (Sup. Ct. 1959).

41 Principal case at 377, 190 N.E.2d at 237, 239 N.Y.S.2d at 875. This rule was introduced into international law by dicta of Lord Mansfield in two King's Bench cases. Planche v. Fletcher, 1 Dougl. 251, 253, 99 Eng. Rep. 164, 165 (K.B. 1779); Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

Learned Hand once argued that courts ought not to act on claims arising from foreign revenue laws because such laws involve relations between states; a judicial decision might conflict with executive policies on foreign affairs or embarrass the foreign government which brings the suit. Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (concurring

rule may be followed,[42] it was inapplicable to the principal case for two reasons. First, as the dissent observed,[43] suit was not brought to implement Brazilian regulatory law, but to recover damages for fraud.[44] Second, the Brazilian exchange controls are not revenue laws. Recent authorities deny that exchange controls, particularly those consistent with the IMF Agreement, are foreign revenue laws within the meaning of the non-enforcement rule.[45] No significant authority supports the proposition that foreign exchange controls are revenue laws.[46] The Brazilian government does raise revenue from coffee exports; such revenue, however, is utilized in enforcing comprehensive controls on exports, imports, and financial transactions. The primary purposes of the exchange controls are to stabilize Brazilian currency, to supply vital foreign currency for payment of international trade obligations, and to promote planned economic development in Brazil.[47]

opinion), *aff'd on other grounds*, 281 U.S. 18 (1930). This abstention doctrine has not been applied to prior cases involving foreign exchange controls; furthermore, New York courts have frequently decided on the merits cases involving foreign exchange controls. Because application of Hand's abstention doctrine would block all suits for the recovery of damages by a foreign sovereign, the consequent harm to foreign relations would probably exceed that caused by an adverse decision on the merits. *Contra*, 16 STAN. L. REV. 202, 206-07 (1963).

42 Matter of Matthews' Trust, 21 Misc. 2d 356, 191 N.Y.S.2d 994 (Sup. Ct. 1959); *In re* Estate of McNeel, 10 Misc. 2d 359, 170 N.Y.S.2d 893 (Surr. Ct. 1957); United States v. Harden, [1963] Can. Sup. Ct. 366, 41 D.L.R.2d 721 (1963); Government of India v. Taylor, [1955] A.C. 491; GOODRICH, *op. cit. supra* note 28, at 27; 1 OPPENHEIM, INTERNATIONAL LAW § 144a (8th ed. Lauterpacht 1955).

43 Principal case at 378, 190 N.E.2d at 238, 239 N.Y.S.2d at 876.

44 In spite of the fact that recovery in the principal case would arguably implement Brazilian law indirectly, the defendants' allegedly tortious conduct would itself seem to justify recovery if proved.

45 *In re* Helbert Wagg & Co., [1956] Ch. 323, 351 (by implication); Zivnostenska Banka Nat'l Corp. v. Frankman, [1950] A.C. 57, 72; Kahler v. Midland Bank, [1950] A.C. 24, 57 (1949) (dictum); GRAVESON, THE CONFLICT OF LAWS 573-74 (4th ed. 1960); Cabot, *Exchange Control and the Conflict of Laws: An Unsolved Puzzle*, 99 U. PA. L. REV. 476, 489 (1951); Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 HARV. L. REV. 30, 45-46 (1942); Meyer, *supra* note 9, at 877; Note, *Foreign Revenue Laws and the English Conflict of Laws*, 3 INT'L & COMP. L.Q. 465, 466-67 (1954).

46 Although recognition of a Portuguese law prohibiting the exportation of gold was refused in Boucher v. Lawson, Cas. t. Hard. 85, 95 Eng. Rep. 53 (K.B. 1734), the opinion suggests that Lord Hardwicke would not have recognized any Portuguese law. Cermak v. Bata Akciova Spolecnost, 80 N.Y.S.2d 782 (Sup. Ct. 1948), *aff'd mem.*, 275 App. Div. 919, 90 N.Y.S.2d 680 (1949), and Matter of Theresie Liebl, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951), are sometimes said to hold that exchange control laws are revenue laws. In *Cermak*, however, the court held that because a license to make the assignments sued on *had* been issued in accordance with the Czechoslovakian exchange control laws, the license requirement was not a defense. The dictum implication that exchange control laws are foreign revenue laws seems no more than an afterthought. Although in *Liebl*, Czechoslovakian exchange control laws were described as fiscal and therefore unenforceable, the case can be viewed as based on the alternative holding that the New York public policy favoring protection of domestic distributee's interests in a decedent's property which is situated in New York precluded recognition of the foreign exchange laws. The confiscatory character of the Czechoslovakian exchange controls may have prompted the court to call them unenforceable.

47 See Mattera, *Foreign Exchange Budgets in Latin America*, 4 INT'L MONETARY FUND STAFF PAPERS 288 (1955). See generally Fleming, *Developments in the International Payments System*, 10 INT'L MONETARY FUND STAFF PAPERS 461 (1963).

The operations and purposes of the exchange controls extend far beyond those of domestic tax laws.[48] Thus the rule prohibiting enforcement of foreign revenue laws was improperly applied in the principal case, and would probably be equally inapplicable in similar cases.

Two other conflict of laws rules conceivably might be invoked by a court in order to bar reference to foreign exchange laws. The first rule is that courts of one country do not give effect to foreign penal laws.[49] This rule applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of a sovereign for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, as well as to suits based on judgments for such penalties.[50] The nature of foreign penal laws and claims has never been precisely delineated. Many foreign governmental claims are not barred by the penal law doctrine.[51] Recognizing the right of every foreign government to protect its economy by foreign exchange controls, a well-reasoned case recently held that foreign exchange laws are neither penal nor confiscatory.[52] Numerous other authorities agree that foreign exchange regulations are not penal laws.[53] In the principal case, for example, the plaintiff sought neither a statutory pecuniary penalty nor exemplary damages. Rather, the plaintiff sought damages to compensate it for the deprivation of foreign currency caused by the defendants' allegedly wrongful conduct.[54] The rule denying enforcement to penal laws or claims was therefore inapposite.

48 Details of Brazil's extensive exchange control system are digested in INT'L MONETARY FUND ANN. REP., EXCHANGE RESTRICTIONS 52-59 (1961); *id.* at 44-55 (1962); *id.* at 43-53 (1963). The foreign revenue rule seems to have been applied only to suits for foreign tax claims or judgments. Freutel, *supra* note 45, at 45-46, 46 n.65.

49 See generally GOODRICH, *op. cit. supra* note 28, § 12; GRAVESON, *op. cit. supra* note 45, at 572; RESTATEMENT, *op. cit. supra* note 28, § 611.

50 Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888). Further discussion of laws penal within the scope of the nonenforcement rule appears in Huntington v. Attrill, 146 U.S. 657, 666-74 (1892).

51 The Sapphire, 78 U.S. (11 Wall.) 164 (1871) (damages awarded to French government for collision injury to its ship); Lehigh Valley R.R. v. State of Russia, 21 F.2d 396 (2d Cir.), *cert. denied*, 275 U.S. 571 (1927); Connolly v. Bell, 286 App. Div. 220, 141 N.Y.S.2d 753 (1955), *modified*, 309 N.Y. 581, 132 N.E.2d 852 (1956); Wisconsin v. Pelican Ins. Co., *supra* note 50, at 290 (strictly civil claims of a foreign state said to be not penal) (dictum); RESTATEMENT, *op. cit. supra* note 28, § 610, comment *f* (proprietary claims of foreign state allowed). A New Jersey money judgment rendered in a suit brought by the state to rescind a contract was held entitled to full faith and credit in New York. "[W]e must keep in mind that here the state was in effect a private suitor seeking a private remedy to vindicate its proprietary interests. The mere fact that a sovereign state was the litigant is not controlling. . . . Such a recovery is not to be refused full faith and credit on the theory that the judgment was penal." Connolly v. Bell, *supra* at 230, 141 N.Y.S.2d at 764.

52 *In re* Helbert Wagg & Co., [1956] Ch. 323, 349-51.

53 Etler v. Kertesz, [1960] Ont. 672, 688; Kahler v. Midland Bank, [1950] A.C. 24, 57 (1949); Zivnostenska Banka Nat'l Corp. v. Frankman, [1950] A.C. 57, 72; Cabot, *supra* note 45, at 489; Freutel, *supra* note 45, at 46; Meyer, *supra* note 9, at 877.

54 Plaintiff sought damages measured by the difference between the price for the American dollars in the Brazilian free market and the lesser amount it would have paid

Another relevant conflict of laws rule bars recognition or enforcement of foreign laws which conflict wth the public policy of the forum.[55] "Public policy" is an ambiguous and nebulous term, but it has been defined to refer to established principles of law, whether found in the constitution, in statutes, or in judicial decisions.[56] Proof of the Brazilian exchange controls in order to assess damages in the principal case would not have offended provisions of the New York Constitution or statutes.[57] New York's judicial decisions disclose an occasional recognition of foreign exchange controls,[58] but more frequent refusal to recognize them.[59] Where recognition has been refused, however, it was because of some specific feature of the particular

the exporter for the American dollars had they been deposited with plaintiff bank as required by law.

55 See generally GOODRICH, *op. cit. supra* note 28, § 11; RESTATEMENT, *op. cit. supra* note 28, § 612. Kolovrat v. Oregon, 366 U.S. 187 (1961), and Perutz v. Bohemian Discount Bank, 304 N.Y. 533, 110 N.E.2d 6 (1953), contain language which suggests that United States membership in the IMF prevents domestic courts from finding that another member's exchange controls violate the forum's public policy. See GOLD, *op. cit. supra* note 9, at 52, 134. Art. VIII § 2(b) precludes members from denying effect to exchange regulations of other members on the basis of public policy in situations covered by § 2(b). INT'L MONETARY FUND ANN. REP. 83 (1949). The IMF's executive directors have also expressed willingness to rule on whether the exchange controls of a member are consistent with the IMF Agreement. *Ibid.* IMF rulings on the compliance of a member's exchange controls with the IMF Agreement are available to litigants in private suits. See GOLD, *op. cit. supra* note 9, at 99-100.

56 Mertz v. Mertz, 271 N.Y. 466, 472, 3 N.E.2d 597, 599 (1936); People v. Hawkins, 157 N.Y. 1, 12, 51 N.E. 257, 260 (1898). "Public policy," a troublesome concept, has been differently defined and has served different functions in conflict of laws situations. See generally Paulson & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

57 Neither the Court of Appeals nor the trial court referred to any constitutional or statutory provisions which would bar reference to the Brazilian laws. A further search has not revealed provisions with which the Brazilian law would conflict.

58 Perutz v. Bohemian Discount Bank, 304 N.Y. 533, 110 N.E.2d 6 (1953); Anderson v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942); Kraus v. Zivnostenska Banka, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup. Ct. 1946); Steinfink v. North German Lloyd S.S. Co., 176 Misc. 413, 27 N.Y.S.2d 918 (Sup. Ct. 1941). Foreign courts have given wider recognition to exchange controls since the creation of the IMF. See generally GOLD, *op. cit. supra* note 9.

59 *E.g.*, Southwestern Shipping Corp. v. First Nat'l City Bank, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352, *cert. denied*, 361 U.S. 895 (1959) (conflict with New York agency law prevented recognition); Bollack v. Société Générale, 263 App. Div. 601, 33 N.Y.S.2d 986, *leave to appeal denied*, 264 App. Div. 767, 35 N.Y.S.2d 717 (1942) (confiscatory exchange control held unenforceable); Matter of Theresie Liebl, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951) (exchange control which conflicted with the interests of domestic distributees of decedent's New York property held unenforceable) (alternative holding); see Meyer, *supra* note 9, at 876-78. See generally Rashba, *Foreign Exchange Restrictions and Public Policy in the Conflict of Laws* (pts. 1-2), 41 MICH. L. REV. 777, 1089 (1943).

Although the Brazilian exporters were required to assign a stipulated number of dollars to the plaintiff for each bag of coffee exported, it is improper to call the Brazilian exchange controls confiscatory. The Brazilian government does not appropriate the entire proceeds. Also, New York coffee importers pay for the right to import coffee from Brazil; that some of their payment goes to the Brazilian government to operate the exchange control system does not justify the conclusion that their property is confiscated or that the exchange controls are confiscatory.

exchange control. No apparent characteristics of the Brazilian exchange controls would have caused recognition of them in the principal case to "violate some prevalent conception of good morals, some deep-rooted tradition of the common-weal."[60] New York public policy, therefore, did not block reference to the Brazilian exchange controls in the principal case, and a similar resolution of this issue should be expected in other jurisdictions.

Although no federal obligation or policy required New York to entertain the suit in the principal case, a reasonable reading of New York conflict of laws rules indicates that the Court of Appeals deviated from established principles in affirming the dismissal of the principal case. In addition, the United States, through its treaties, the Alliance for Progress, and membership in the IMF, is deeply committed to fostering financial stability and economic development in Brazil.[61] The decision in the principal case, if followed by other state courts, will have the unfortunate effect of denying IMF members the right to seek compensation in American courts for acts which undermine their financial stability and economic development. In order effectively to enforce the strong commitments of the United States to the stability and development of IMF members, state courts must be willing to undertake a more imaginative and constructive approach than was followed in the principal case. Short of this, however, adequate enforcement may now be possible only if the second sentence of section 2(b) is enacted and formal agreements to effectuate members' exchange control laws are consummated.

F. David Trickey

[60] Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) (Cardozo, J.) (dictum).

[61] *E.g.*, 59 Stat. 517 (1945), 22 U.S.C. § 286k (1958); Agreement with the Government of the United States of Brazil on the Cooperation of the Government of the United States of America for the Promotion of Economic and Social Development in the Brazilian Northeast, April 13, 1962, [1962] 1 U.S.T. & O.I.A. 356, T.I.A.S. No. 4990; Agreement with Brazil Respecting Mobilization of the Productive Resources of Brazil, March 3, 1942, 57 Stat. 1314, E.A.S. No. 370.