TREATMENT OF THE RULES OF THE INTERNATIONAL LAW OF MONEY BY THE IRAN-US CLAIMS TRIBUNAL*

Allahyar Mouri**

1. INTRODUCTION

In an award issued in *The Stanwick Corporation, Stanwick International, Inc. and The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Mellat, Bank Tejarat* (hereinafter *Stanwick*)¹ a majority of two arbitrators in Chamber One of the Iran US Claims Tribunal (“the Tribunal”)² awarded payment of a total of rials 61,240,510 to the claimant.

In its award, the majority held that the depositary agreements between Stanwick and the Iranian banks (Bank Mellat and Bank Tejarat) involved a contractual or statutory obligation on the banks’ part to refer to the Central Bank of Iran (Bank Markazi) for the authorization required under the

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**Legal Assistant to the Iran-US Claims Tribunal; formerly a principal Counsel to the National Iranian Oil Company

1 Award No. 467-66-1 (rendered 31 January 1990), 24 *Iran-US Claims Tribunal Reports* (Iran-US CTR) 102.

2 The Tribunal has been established pursuant to two Accords arrived at through the mediation of the Government of the Democratic and Popular Republic of Algeria, to which the Governments of the Islamic Republic of Iran and the United States of America adhered on 19 January 1981. These Accords together with a couple of others are known as the “Algiers Declarations”; the more general of these agreements is the “Declaration of the Government of the Democratic and Popular Republic of Algeria”, often referred to as the “General Declaration”, and the other, specifically dealing with the establishment of an international Tribunal (the Iran-US Claims Tribunal), is the “Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the Islamic Republic of Iran,” known as the “Claims Settlement Declaration”. For the complete texts of the Accords, see, e.g. 1 *Iran-USCTR* (1983) 3, 9; 20 *ILM* (1981) 224, 230; 75 *AJIL* (1981) 418, 422; and A. LOWENFELD, *Trade Controls for Political Ends* (2nd ed.) (1983) vol. III DS-823 and DS-829. See also, in general, A. MOURI, “Aspects of the Iran-US Claims Tribunal”, 2 *AsYIL* (1992)

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prevailing exchange regulations.³ Finding the depository banks in breach of such an obligation, the majority ordered that the rials in the accounts be converted into US dollars, at the official rates in effect at the time when, as they saw it, the alleged payment obligation became due, and further that the amounts arrived at—a total of US\$ 870,388.13 plus the accrued interest as from the date of such breach up to the date of the actual payment⁴—be paid out of the “Security Account” established “for the sole purpose of securing the payment of, and paying, claims against Iran”.⁵

To assist the reader in better understanding the issue to be discussed in this article, a brief account of the facts will be given, followed by a discussion of the pertinent rules of law, in particular those which govern the international aspect of “money”, in so far as they are related to the decision in *Stanwick*. In doing so, the author expects to demonstrate the extent to which the Tribunal, in its award, failed to take those facts and rules of law into account.

2. REVIEW OF FACTS

Pursuant to contracts entered into with the Iranian Navy in 1974 and 1977, Stanwick undertook to provide the latter with engineering management, consultative and technical support and training services by means of recruiting and employing the experts needed by the Navy. On 22 June 1978, Stanwick also concluded a contract with the Ministry of Defence (formerly the Ministry of War) of Iran, aimed at upgrading an Air Force communications system. A specific part of the consideration of the two contracts was to be paid in dollars, and another part (a specific amount of the contract with the Air Force, and 25 per cent of the amount of the contract with the Navy) was to be paid in rials.⁶

The foreign currency portion of the contracts was to be paid as follows: first, Bank Markazi was to open certain letters of credit in an amount equivalent to the foreign currency (dollar) contractual amount, with a foreign bank or

3 Op.cit. n. 1, paras. 38–40.

4 Ibid, paras. 41–46.

5 Paragraph 7 of the General Declaration provides, in part: “As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of US\$ 1 billion. After the US\$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement.”

6 Provisions of the contracts with Stanwick, *inter alia*, Article 6 of the 1977 contract with the Navy and Article 17 of the 1978 contract with the Ministry of Defence. See also para. 8 and n. 4 to the award in *Stanwick*.

banks; Bank Markazi was then to make periodic or monthly payments, as requested by the Navy or Ministry of Defence, out of those letters of credit and to a pre-arranged foreign bank account in Stanwick's name.⁷ There was no dispute between the parties—and Stanwick itself confirmed—that the Armed Forces which were party to the contracts were initially to pay the rial equivalent of the amount of foreign currency provided for under the contract “to the Bank Markazi Iran, which then used the official exchange rate to change those rials into dollars, which it then sent to the United States.”⁸ The rial portion of the contract, which was to be used to defray expenses in Iran, was to be deposited in Stanwick's name, into Iranian bank accounts which had been pre-arranged or specified from time to time by Stanwick.⁹

The funds in the rial accounts, which were claimed to be the accumulated rial revenues derived from the contracts (and which reached the present levels by at least mid-1978), were never transferred abroad from Iran. On the other hand, documents (including a letter of 28 January 1979 to the Iranian Navy) clearly show that even under the revolutionary circumstances toward the end of 1978 and in early 1979, which Stanwick claimed had “resulted in the rapid depletion of [its] financial assets in the United States”, Stanwick knew that it could look only to “the dollar credits from the current contracts” for transfer abroad, and that the transfer of any quantity of foreign currency had to be arranged by the Armed Forces through Bank Markazi. The last payment, even in that “critical financial” and revolutionary situation, was credited by Bank Markazi to Stanwick's account in the United States on 20 March 1979, pursuant to Stanwick's request dated 28 January 1979 and on instructions from the Navy.

Either toward the end of the first half of 1979 or early in the second half thereof, Stanwick conceived the idea of transferring out of Iran the balance in its rial accounts, apparently due to delayed receipt of dollar payments under its contracts with the Air Force and Navy, and pending disposition of those payments. To this end, Stanwick referred initially to the Iranian banks with which its accounts were held; they, in turn, advised it to refer to Bank Markazi to obtain permission for such transfer.¹⁰ Stanwick then acted accordingly by requesting, in its letter of 6 July 1979 (sent with a covering letter dated 7 July 1979), that Bank Markazi agree to transfer most of the funds in Stanwick's rial accounts. To justify its request, and aware of the terms of its contracts with the Navy and Air Force, Stanwick gave a brief explanation of its accounts, and

⁷ See the articles of the contracts cited in n. 6 *supra*; also note 4 to the Award in *Stanwick*.

⁸ Para. 39, Statement of Claim, filed on 17 November 1981.

⁹ See n. 6 *supra*.

¹⁰ For some time following the Revolution—i.e. until sometime in December 1979—Stanwick had one or two representatives, Messrs. BILLS and STAUNCH, in Iran. Such actions, consisting of, *inter alia*, contacting the two Armed Forces, the Ministry of Defence, and Bank Markazi, Bank Mellat and Bank Tejarat, were carried out through those individuals. (In this regard, see Doc. No. 51 p. 11, filed with the Iran-US Claims Tribunal on 14 January 1983).

then argued that since, in the course of the revolution and with the establishment of the Government of the Islamic Republic of Iran, it had not received in excess of "3 million dollars (211,800,000 rials)" of the foreign exchange monies owed it under the contracts, it found itself facing such a critical financial situation in the United States that it had to "request the transfer of \$825,000 (58,245,000 rials) from its ... Bank Accounts to ... the USA."¹¹

On 11 July 1979, Bank Markazi's Foreign Exchange Commission replied (in a note on the cover letter attached to the aforementioned letter) that if the funds in question were in a foreign exchange current account, they should be transferred through the bank concerned; other-wise, the Navy and Air Force "should give their confirmation".¹² Bank Markazi chose this course of action in view of its role as the institution responsible for allocating contractually-specified foreign currency within the framework of the budgets of Government organizations; and given the relevant contractual provisions and the Parties' previous conduct under the contracts—in whose implementation Bank Markazi had played a part; and, most important, in light of the contents of Stanwick's letter which specifically made clear that the applicant sought to export the balance of its rial accounts or, according to its own assertion, to export the rial revenues from its contracts in lieu of its unrecovered foreign exchange revenues.

With no objection or protest whatsoever, Stanwick proceeded to act in accordance with the directive of the Foreign Exchange Commission, by sending the letter dated 25 July 1979 wherein it requested the Navy to notify Bank Markazi that it agreed to the transfer. Documents also confirm the fact that Stanwick subsequently provided the Navy with further information, in response to a request by the latter. However, the case file and the available evidence neither explain Stanwick's failure to refer to the Air Force in order to obtain its consent, nor reveal the Navy's final position *vis-à-vis* this request. For the main part, this ambiguity arises from the fact that Stanwick's claims against the Navy and Air Force and the Ministry of Defence were settled at an early stage in the proceedings. It is in any event certain, and relevant to the subject at issue that Stanwick never referred to Bank Markazi thereafter, either to protest the Commission's directive, or to report the results of its actions, or to make a renewed request for transfer of funds, based on whatever reason it might have had.

Subsequently, on 8 January 1980, Stanwick sent telexes to Bank Mellat and Bank Tejarat, wherein it informed them that so far Bank Markazi had not responded affirmatively to its request of 7 July 1979 for a permit.¹³ However, a

11 Para. 9, Award in *Stanwick*.

12 Ibid para. 11.

13 Ibid para. 13.

short time later (on 18 March and 15 April 1980), ignoring such events as the fact that it had been the banks themselves that had advised Stanwick to refer to Bank Markazi, that Bank Markazi had not yet issued its permission to export the funds in its accounts, and the fact that the banks were well aware of the course of events, Stanwick sent virtually identical telexes to Bank Mellat and Bank Tejarat, respectively, requesting information on the balances in its accounts and asking them to transfer the balances in its "accounts *in dollars at the current official exchange rate* to ... Riggs National Bank of Washington."¹⁴ The banks were unable then or subsequently, to comply with Stanwick's request for transfer of funds, other than to provide the information requested. In its response dated 5 April 1980, Bank Mellat informed Stanwick that in view of current exchange regulations, the bank was unable to make any transfer abroad of the funds in its accounts.¹⁵

On 17 November 1981, Stanwick filed a statement of claim against the Government of the Islamic Republic of Iran, the Ministry of Defence, the Air Force and Navy of the Islamic Republic of Iran, Bank Markazi, Bank Tejarat, and Bank Mellat. Aside from other relief sought, such as the cost of relocation of Stanwick's personnel to the United States and recovery of deductions withheld to secure payment of Social Security contributions, the demand for approximately \$3,070,000 for outstanding debts denominated in dollars under the 1977 contract constituted the principal claim against the Navy. As for the principal claim against the Air Force (aside from the claim for deductions withheld to secure payment of Social Security contributions), it consisted of a claim for approximately \$531,000 for outstanding dollar-denominated debts under the 1978 contract. In actuality, these two amounts made up the very monies that were owed in foreign currency under the contracts and whose payment had been delayed, causing Stanwick by its letter of 6 July 1979 (see at pp.73-74 *supra*), to request Bank Markazi approve the transfer of the funds in its rial accounts out of Iran in lieu thereof, in order to prevent its financial position in the United States from deteriorating further.

The claims against the Ministry of Defence, the Navy and the Air Force were settled pursuant to the settlement agreements which underlie the partial Awards on Agreed Terms,¹⁶ by payment of a total of \$3.7 million. These respondents were thus stricken from the case.¹⁷ In this way the Armed Forces, parties to the contracts, performed in full their obligations under the contracts

14 Ibid para. 14 (emphasis added).

15 Bank Tejarat denied having received the telex requesting transfer of the monies, but in any event it adopted a position similar to that of Bank Mellat from the beginning of the proceedings; namely, that the governing exchange regulations did not permit the transfer of foreign exchange abroad, without permission from Bank Markazi, just as it had informed Stanwick when the latter contacted it in 1979.

16 Awards No. 83-66-1 and 101-66-1, Iran-USCTR Vol. 4, 20; and *ibid.* Vol. 5, 76, respectively.

17 See para. 3, Award in *Stanwick*.

with Stanwick for the purchase and sale of services and goods, by paying every cent of their contractual debts.

3. WHERE DOES RESPONSIBILITY FOR SEEKING APPROVAL FOR TRANSFER RESIDE?

In para. 38 of the Award in *Stanwick*, the Tribunal held that there was no useful distinction to be made between the separate banking transactions “with respect to the depositary banks” obligation to seek necessary approval of Bank Markazi . . .” It would have been reasonable, in order to determine the nature of the banks’ statutory or contractual responsibility, first, to inquire whether an obligation had in fact arisen; and second, if such obligation was founded upon a contract, to determine the nature of that contract and how the obligation arose therefrom. From the contents of para. 38, as well as para. 40 of the Award, it is clear that the Tribunal did not follow that approach. The Tribunal’s statement referred to apparently served the purpose of avoiding an issue which, had it been addressed, would have led it to a radically different conclusion.

3.1 The banks had no contractual responsibility to seek approval for the transfer

The Tribunal appears to have been confused by needless abstractions that were the creation of its own trend of reasoning. Having recognized in para. 38 of the award that in order to determine liability, the question “whether Bank Mellat and Bank Tejarat met their obligations under the deposit agreements with Stanwick” must first be answered. The Tribunal then proceeded immediately in the same paragraph and also in para. 40 of the Award, without adducing reasons therefor, to reach the conclusion that Stanwick’s request for the transfer of the balance in its accounts abroad

“triggered the banks’ obligation under their deposit agreements with Stanwick to take all appropriate steps to effect the exchange and transfer of funds”.

Such a finding should surely have been reached only after proof of the existence of an agreement placing such an obligation upon the banks.

The depositary agreements contained no provision that would give rise to such an obligation on the part of the banks, or indeed any obligations beyond those that arise from its fiduciary relationship. Even if such an obligation had existed, it could scarcely have been made the basis for holding, as the Award appeared to do, that the banks should have carried out a transaction that

violated the exchange regulations of a member of the International Monetary Fund (the "IMF").¹⁸

Whatever the nature of the relationship between Stanwick and the banks, whether called deposit,¹⁹ loan,²⁰ or more generally, "agency and trusteeship",²¹ the banks were obliged only "to restore [to the owner of the account] the equivalent (in quantity, kind and description) of that which it had received."²²

Stanwick's contemporaneous actions, for instance, its conduct in 1979 and its direct recourse to Bank Markazi and the Navy and Air Force, confirm that the banks had no contractual obligation to convert the funds in its accounts and to transfer them abroad, and that the claimant itself did not believe that any wider obligation existed.

3.2 The banks had no statutory obligation to seek approval for transfer

The ambiguity of para. 38 of the Award in *Stanwick* tend to confuse two types of obligation: the contractual and the statutory. Whereas the first part of the paragraph can be construed to mean that the banks had a contractual obligation to convert the funds in the rial accounts into dollars, the latter part of the paragraph (where the majority moves on to discuss Bank Markazi's Circular No. 11600) implies that the banks had a statutory obligation, pursuant to that circular, to convert rials to foreign currency and to transfer the latter abroad. Yet, even a brief consideration of the circular's import and content does not lead us to such a conclusion.

The award seems to imply—but falls short of stating—that the provisions of Circular No. 11600 of 4 November 1978 are exchange control regulations, and not restrictive regulations prohibiting current transactions.²³ Pursuant to this

18 See J. GOLD, *The Fund Agreement in the Courts* (hereinafter GOLD) Vol. 1 p. 86; Vol. 3 pp. 92, 233; and Vol. 4 pp. 203, 205, 226–227. See *infra*, part 4.5 and sources cited in n. 120.

19 SEYYED HASSAN EMAMI, *Hoquq-e Madani* [Civil Law], Vol. 2 (5th ed.) p. 178; F. NASSER KATOOZIAN, *Hoquq-e Madani—Review of Specific Contracts* (3) (1st ed.) (1364/1985) pp. 72–73.

20 SEYYED HASSAN EMAMI, *loc cit*; NASSER KATOOZIAN, *op. cit.* pp. 73–74.

21 NASSER KATOOZIAN, *op. cit.*, p. 75.

22 SEYYED HASSAN EMAMI, *loc. cit*; NASSER KATOOZIAN, *op. cit.* pp. 72–75. Aside from the special character of the fiduciary relationship between the bank and the holder of the account, in Part 5 of the present article the author will elaborate on the money of account and the money of payment, and on the rule that a contract is considered performed once the money of payment is that of the account. In this connection, it does not matter whether the contract constitutes a contract for which a name has been assigned to them by law (e.g. sale, hire etc) or a contract not so named.

23 In as much as Iran is an Article XIV member of the IMF Agreement, it will be immaterial, as we shall see, whether we qualify the exchange regulations imposed by Bank Markazi as measures controlling or restricting exchange transactions. This is because, as an Article XIV member, Iran was and is entitled to maintain exchange restrictions, even with respect to current transactions, and

circular, the banks could, provided that they observed the provisions of the circular of Bank Markazi—whose control and supervision under the critical situation prevailing from the time of the Revolution was of vital importance in preventing the drain of money from the country—still engage in the “sale of commercial foreign exchange for importation of goods.” The list attached to Circular No. 11600 permitted the sale of foreign exchange for the uses set forth in the annex, and as the award noted, item 4 thereof covered the “sale of foreign exchange for services *based on contracts* concluded between domestic and foreign enterprises . . . with (prior) *authorization by Bank Markazi*.”²⁴ And finally, item 14 of the list stated that the “sale of commercial foreign exchange for purposes other than specified above shall in all cases be subject to prior authorization by Bank Markazi, Iran.”

There is nothing in this circular or the attached list that could be invoked to place on the banks the burden of seeking Bank Markazi’s approval, upon being approached by any applicant for foreign exchange, just as the provisions of the circular cannot be construed as preventing an applicant for a foreign exchange permit from seeking it on his own initiative.²⁵

The language of para. 38 of the Award in *Stanwick* might be interpreted as meaning that since Circular No. 11600 addressed itself to the banks, the banks had a contractual or statutory obligation in this connection. However, any interpretation of the circular as somehow impliedly incorporating additional obligations into the customers’ contracts with the banks can hardly be sustained. Contractual obligations cannot arise except in accordance with the

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to adapt them to changing circumstances. In the circular in question, and also in a subsequent circular of Bank Markazi, No. 2090/5 dated 5 May 1979, permission was given, upon observance of the provisions of the circular, for the sale of foreign exchange for numerous kinds of transactions and needs, *inter alia*, authorized services by foreigners on the basis of contracts for engineering, expert, technical, consulting, and other services; for the purchase of authorized goods; for repaying the principal, interest and costs on loans obtained from abroad with the permission of Bank Markazi; and for profits from transport operations, reinsurance premiums, dividends on shares held by foreign shareholders in insurance and banking companies, rental fees on machinery and equipment, and payment of medical and educational expenses. This confirms, upon a comparison with Article XXX of the IMF Agreement, that payments for current transactions have not been restricted, but instead only placed under Bank Markazi’s control and supervision. Indeed, the circular goes further yet, and even permits the transfer of capital (and the profits thereon) brought into Iran on the basis of the Law for the Attraction and Protection of Foreign Capital.

24 Emphasis added.

25 See award of 14 March 1990 in *Ali Asghar* (United States of America on behalf of its national) and *The Islamic Republic of Iran* (hereinafter, *Ali Asghar*), Award No. 475-11491-1, para. 18, 24 Iran-USCTR 238 at 244. In this case the same Chamber One of the Tribunal (but chaired by Judge BROMS) ruled that in the absence of a contractual or statutory obligation, when the depositary bank instructed the claimant “to contact Bank Markazi Iran, then [he] had an obligation to do so in order to obtain permission for the transfer. Bank Melli was not the bank to be contacted with a request for an exchange transaction.”

mutual intent of the parties concerned. While it is true that the law might provide rules of interpretation for cases where the text of a contract is silent, such an eventuality is irrelevant here, particularly because the circular contained no language whatever which could be thought to replace the parties' intent or to interpret their silence. Rather, the circular explicitly required the applicant and the banks to observe the terms of the contracts on the basis of which the transfer is requested.

There is no basis in law for implying a statutory obligation from a circular which lacks any such express or implied directive, in particular where the legislator has refrained from stating any such directive even when in a position to do so. On the other hand, there are numerous indications that support a contrary interpretation, including the banks' advice to Stanwick to direct its request to Bank Markazi, the fact that Stanwick did actually do so in order to obtain authorization and that Stanwick followed up the matter by addressing the two Armed Forces and the manner in which Bank Markazi reacted in regard to Stanwick's independent application. Bank Markazi treated Stanwick's application not as infringing the regulations, but as being in conformity with them, seeking further information and making a distinction between cases where the funds were in a foreign exchange current account and where the current account was denominated in rials and, finally, referring Stanwick to the depositary bank only where the account was denominated in foreign exchange.²⁶

From the foregoing it would appear that none of the banks were obligated to refer the application to Bank Markazi for authorization. Indeed, it is difficult to see how Chamber One of the Tribunal could base its award in *Stanwick* on such an interpretation while the same Chamber in the same composition, was already aware in *Grune and Stratton, Inc.* that a private firm, wanting to transfer foreign exchange, had a duty to apply to Bank Markazi in order to obtain a "currency transfer licence"; and when it had obtained the foreign exchange transfer licence, present it at the Iranian bank with which it held the account and, by paying the rial equivalent of the foreign currency sought, proceed with the transfer of the funds.²⁷

3.3 The banks were under no obligation to refer Stanwick's request to Bank Markazi

Where, as in the present case, the claimant initially requested the banks to seek approval for the transfer of funds in its rial accounts, justifying the request

26 Para. 11, Award in *Stanwick* and *supra*, text at n. 10.

27 *Grune and Stratton, Inc.* (the United States of America on behalf of its national) and *The Islamic Republic of Iran*, Award No. 359-10059-1, 18 Iran-USCTR 224, at 228-229.

on the ground that it was in dire financial straits; where the banks advised the applicant to obtain authorization from Bank Markazi; and where the banks were informed at every stage, through Stanwick's representatives in Tehran and by correspondence, of the progress of—or rather the impediments facing—the transfer of the funds in the accounts, it would seem futile to expect the banks to approach Bank Markazi directly.

The Award itself seems to recognize the unreasonableness of such an expectation. It states in para. 40 that the banks could have relieved themselves of responsibility by demonstrating either that they had sought approval, or else that “their application would have been, anyhow, denied under the [exchange] regulations if they had made such application,” observing in the same paragraph that “Bank Mellat and Tejarat have not made such a showing here.” In this way, several paragraphs later, the Award in effect forgets the facts which it already found in paras. 9–13, (i.e., that the banks were fully informed as to what the claimant was doing) and fails to note that the claimant itself informed the banks by its telexes of 8 January 1980 that “to date,” it had not received authorization “from Bank Markazi in response to its request of 7 July 1979”. There is therefore, given the continuous validity of the relevant circular,

“no sufficient evidence that [the claimant] suffered damages as a result of any possible negligence, as there is no showing that the required permission which was denied in [July 1979], would have been granted by Bank Markazi at any [other] point of time”²⁸

If, for the sake of argument, we were to construe the ambiguous sentence in the *Stanwick* award as meaning that the Tribunal wished to place on the respondent banks the burden of demonstrating that Iran's exchange regulations conformed to the provisions of the IMF Agreement, then the Award could be open to further criticism. The first ground for questioning such a position would be the failure of the award to take into account of the fact that the majority [in the Chamber] based its finding against the banks on the premise that they failed, in violation of their statutory/contractual obligation, to refer to Bank Markazi to obtain a permit. Second, in such an event, the majority would have totally failed to take note of the well-established rule in international law that the courts cannot leave it to the parties to invoke exchange regulations but are, rather, required to make an *ex-officio* determination as to their existence.²⁹ Third, the Award should have taken

28 *Hood Corporation and The Islamic Republic of Iran et al*, (hereinafter, “*Hood*”, Award No. 1452-100-3), 7 Iran-USCTR 36, at 43.

29 See, e.g., *Mark Dallal and The Islamic Republic of Iran, Bank Mellat*, Award No. 53-149-1 (hereinafter, “*Dallal*”), 3 Iran-USCTR 10 at 14, 16; and the following awards cited in GOLD: the British award in *Batra v. Ebrahim* (Vol. 3 p. 60; Vol. 2 pp. 258–259; Vol. 4 p. 180); the award dated

into account that the conformity of the exchange regulations with the provisions of the IMF Agreement is legally presumed,³⁰ and that to make such a presumption it suffices that the State that has laid down those regulations is a member of the IMF, and that the Fund has made no representation or recommendation to that member concerning the maintenance of or amendments to the said regulations. The corollary to such a presumption is that the burden of proving nonconformity lies with the party seeking to enforce an exchange contract. In other words, that party bears the burden of proof that the exchange contract is enforceable,³¹ a rule which is entirely in conformity with the recognized scope of the exercise of sovereign rights, and the Act of State doctrine.³² Fourth, the most that could be expected of the respondent was that it proved the existence of exchange regulations making the transfer of bank account funds conditional upon authorization from Bank Markazi, a point that was not in dispute between the Parties in the *Stanwick* case.

The Award also appears to have failed to take into account the highly crucial and fundamental fact of two categories of agreements involved in this case. One category consisted of the contracts with the Navy and the Air Force, which could not be invoked against the banks. Even if they could, their terms and conditions (such as the currency in which the obligation was denominated and the limitation of the foreign exchange portion of the contracts) would have to be taken into account (as directed by item 4 of the list annexed to Circular

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8 July 1974 by the Berlin court (*Kammergericht*) (Vol. 4 pp. 263–268); the Argentinian award in *Citibank NA v. Narbaitz Hnos. Y. Cia. S.C.A.* (Vol. 4 pp. 189–203); and the award in *White v. Roberts* (Vol. 1 pp. 87–90). See also OTTO SANDROCK, “Are disputes over the application of Article VIII, section 2(b) of the IMF Treaty arbitrable?”, 23 *The International Lawyer* p. 933 at 938–939; and *United City Merchants (Investments) Ltd et al v. Royal Bank of Canada et al* (1982) 2 W.L.R. 1050; (1982) 2 All E.R. 729. By and large, the courts have invoked the language “shall be unenforceable” of Article VIII, s 2(b) of the IMF Agreement, in arriving at this conclusion.

30 BERNARD S. MEYER, “Recognition of Exchange Control after the International Monetary Agreement”, 62 *Yale Law Journal* (1953) 867–910; *Wilson, Smithett & Cope Ltd v. Terruzzi* (1976) 1 G.B. 683 at 696; *Callejo v. Bancomer SA*, (1985) 764 F. 2d 1101 at 1119. In this connection, in 1948 the IMF Legal Department interpreted Article VIII, s 2(b) as meaning that:

“Since the exchange control regulations of a member will normally be maintained or imposed consistently with the Articles of Agreement, courts should presume, . . . that this is the position unless the Fund has declared otherwise.” *International Monetary Fund 1945–1965*, Vol. 1 ed. by J.K. HORSEFIELD pp. 209–210.

31 See *Dallal*, loc. cit. n. 29, 13; Berlin *Kammergericht* cited *supra* n. 29 Hamburg *Oberlandesgericht* 5 July 1978 cited in GOLD, Vol. 3 p. 275; Hamburg *Landesgericht* 24 February 1978, cited in GOLD, *ibid.* p. 271, and BERNARD S. MEYER, loc. cit. n. 30.

32 *French v. Banco Nacional de Cuba*, 295 N.Y.S., 2d 433, 442; 23 N.Y. 2d (1968) 46, 55–56; *Weston Banking Corporation v. Türkiye Garanti Bankasi A.S.* 456 N.Y.S. 2d 684; *Braka et al v. Bancomer S.A.*, (1984) 589 F. Supp. 1465, 1473; *Allied Bank Case* (1984) 733 F. 2d 23; see also GOLD, Vol. 3 pp. 161–167, 403–407; and the sources cited *infra* nn. 46–52.

No. 11600³³). So too would the fact that the foreign exchange obligations under this category of contracts had been fully paid pursuant to the awards issued on the basis of settlement agreements.³⁴ The other category of agreements consisted of the accounts with the banks, whose special terms had to be observed. Their balances were in the nature of capital, regardless of the original sources of the funds, and any transfer of those monies would have constituted a transfer of capital.³⁵ Article 5 of the terms and conditions of the current account (produced in evidence) demonstrates that the Parties were agreed that the funds in the bank accounts were, even if maintained in foreign currency, subject to the prevailing Iranian regulations—which certainly included Iran’s exchange regulations.³⁶ It is worth noting that the last agreement between the banks and Stanwick (which was at issue in the present case) was concluded on 5 March 1979, (i.e., subsequent to the issuance of Circular No. 11600); moreover, Circular No. 2090/5 was issued before steps were taken to transfer the funds abroad.

Another important aspect that appears to have been overlooked, is that according to the statements of account (filed as Exhibit 1 to the Claimants’ “Index of Documentary Evidence and Attached Exhibits upon Which Claimants Seek to Rely, and a List of All Documentary Evidence Submitted in this Case” (on 10 October 1986)), at various points of time during the relevant period there were only insignificant amounts of money in the current accounts to which the transfer request related. Until late 1979 and early 1980, most of the funds were being kept in fixed deposits and had not yet been transferred to the current accounts.³⁷

33 Para. 38 of the Award in *Stanwick*, and *supra*, text at n. 24.

34 Para. 3 of the Award, and *supra*, text at nn. 16 and 17.

35 See *infra*, Part 4.3 (especially text at n. 90 and nn. 90–91).

36 Since the law of both the contract and the currency involved, and that of the rights and obligations of the owners of accounts are part of the same legal system which also governs the money of account, Iranian law governed the relations between the banks and the owners of the accounts therein (see *infra*, text at nn. 112–115). Being cognisant of the terms of the IMF Agreement, particularly Article VIII, 2(b) and the definitions given of “exchange transactions”, and, finally, in recognition that the regulation of the State to which the currency belongs governs the currency involved in the transaction (no matter which law applies to the contractual relationship), Article 5 of the terms and conditions of Stanwick’s current account agreement recognized that the funds in Stanwick’s foreign currency accounts (if any such account existed) were subject to the laws of Iran and of the State to which the foreign currency belonged.

37 The claimant did not meet its burden of proof that it could have withdrawn and transferred abroad the funds in the fixed deposit certificates before they matured (para. 20 of the award in *Ali Asghar*, cited *supra* n. 25, and para. 8 of the Separate Opinion to the award in *Ali Asghar* by Judge HOLTZMANN). This point is further evidence corroborating the fact that the claimant’s transfer application was in reality a request to transfer capital funds. The banks’ answer to the transfer requests, to the effect that they were unable to honour the requests in view of the prevailing exchange regulations should not be construed as meaning that it would be possible to make the withdrawal from the time deposits before their date of maturity, because in such circumstances,

3.4 The precedents invoked in the Award

In the absence of contractual or statutory provisions requiring the depositary banks to perform any other function than to maintain Stanwick's rial accounts and to pay the funds kept therein,³⁸ the Award in *Stanwick* relies on certain Tribunal precedents as the basis for determining that such an obligation existed. A brief examination of these precedents follows.

The main precedent on which the Award relies, is that of *Benjamin R. Isaiah* (hereinafter "*Isaiah*").³⁹ In that case, Bank Mellat had agreed to issue, and did in fact issue, after receiving the rial equivalent thereof, a dollar-denominated cheque drawn on the Chase Manhattan Bank, to be paid in the United States. According to the Bank's initial pleading, the cheque was dishonoured for the sole reason that the American bank

"suddenly withdrew the credit facilities which it previously had made available to Bank Mellat, and that the latter made unsuccessful efforts to restore its credit facilities with Chase Manhattan bank so that the cheque could be paid."

The Tribunal found that explanation inconsistent with the respondent's subsequent plea of an "impediment to payment which would allegedly have resulted from Bank Markazi Iran's position as to the operation of exchange control in this case."⁴⁰ It is clear that the Tribunal, in reaching that conclusion, took into account the particular facts of the case, which were not in any sense comparable with those in the *Stanwick* case. Moreover, the fact that the bank issued the dollar cheque without any objection apparently convinced the Tribunal that when it issued the cheque, the bank was either operating according to authorization or else had obtained it, or at least the bank did not deem it necessary to obtain such authorization.⁴¹ In the *Stanwick* case,

cont.

"[t]he International Division [of the banks would] not find it necessary to forward the [requests] to the branch concerned", and in answering queries, they did not take additional problems and impediments into account." (*American Housing International Inc. and Housing Co-operative Society of Officers of the General Gendarmerie et al*, Award No. 117-199-3, 5 Iran-USCTR 235, 240).

³⁸ See *supra*, text at n. 25.

³⁹ *Benjamin R. Isaiah and Bank Mellat* (Award No. 35-219-2), 2 Iran-USCTR 232.

⁴⁰ *Ibid.*, p. 239.

⁴¹ In any event, this award presents numerous problems. First, it is not clear whether the arbitrators in Chamber Two shared a common understanding of the results of the deliberations and of the purport of the award, since on page 11 of the Persian version of the award, it is stated [retranslated by author into English] that "the Tribunal notes that Bank Mellat neither alleged nor proved any refusal by Bank Markazi, pursuant to the circular, to approve the payable foreign exchange which the bank had sought." The Persian text of the award does not expressly state that the bank had an obligation to refer to Bank Markazi, whereas it is stated in the English version of the Award that:

however, from the outset the banks had advised the claimant to apply to Bank Markazi, in order to obtain permission to transfer the funds in its rial accounts.

As for the other two precedents relied on in the award,⁴² both of which were handed down by the same Chamber and issued on the same date, it must be noted that

- (a) the findings set forth in *Isaiah* served as the supporting pillar for constructing the subsequent ruling in the two cases; and
- (b) they did not, apart from referring to the finding in *Isaiah*, invoke any recognised rule or principle of law, or any specific statutory or contractual provision, in order to support their findings.

Instead, the basic technique in the two cases was merely to list, in each award, the numbers of prior awards, and then to invoke them as precedents that ought to be followed by the Tribunal.

In *Computer Sciences* the Tribunal examined two kinds of accounts: rial and foreign currency (dollar) accounts. The issues relating to the funds in the dollar accounts were totally different from the issues in *Stanwick*, while the claims relating to the rial accounts, which could have raised issues analogues to those in *Stanwick*, were dismissed by the Tribunal as having been not outstanding of a date that would confer jurisdiction on the Tribunal.⁴³

The award in *Kohler*, which was issued simultaneously with that in *Computer Sciences*, related to funds in current and fixed deposit accounts with Bank Tejarat, and to accrued interest on another account (No. 5264), the principal of which had been transferred abroad. The Tribunal dismissed the claim relating to the transfer of funds in the fixed-deposit and current accounts, as having

cont.

“the Tribunal notes that Bank Mellat neither alleged nor proved any refusal by Bank Markazi of the foreign exchange approval which it was incumbent on Bank Mellat to seek pursuant to the circular.” (2 Iran-USCTR at 239)

It must be pointed out that both Persian and English have been designated as the official languages of the Tribunal and of its awards and decisions, with equal weight (Article 17, para. 2 of the Tribunal Rules), and that every matter which is made the subject of an award must be formulated in precise terms in both English and Persian (Article 31, Note 2 to the Tribunal Rules).

Secondly, even if the decision was based on the stated hypotheses, yet it is contrary to the rules of international law and the IMF regulations (*inter alia*, Article VIII, 2(b) thereof), as we shall suggest later.

Moreover, the decision was rendered without differentiating between current transactions and capital transfers, and was thus inconsistent with other awards by the Tribunal, such as the awards in *Dallal* (*supra*, n. 29) and in *Hood* (*supra*, n. 28). Finally, the Award appears to have been based on the theory of unjust enrichment, a theory not applicable in these circumstances. See *infra*, text at nn. 121–122.

42 *Computer Sciences Corporation and The Government of the Islamic Republic of Iran et al* (hereinafter, *Computer Sciences*), Award No. 221-65-1 (16 April 1986), 10 Iran-USCTR 269 and *Ronald Stuart Kohler* (United States of America on behalf of its national) and *Islamic Republic of Iran*, (hereinafter, *Kohler*), Award No. 223-11713-1 (16 April 1986), 10 Iran USCTR 333.

43 10 Iran-USCTR at 302.

been not outstanding on a date which would have conferred jurisdiction on the Tribunal and for lack of jurisdiction.⁴⁴ It would appear that the claim against Bank Tejarat for payment of rials 20,000.00 in interest on the funds in account No. 5265 (principal amounting to rials 200,000.00) was granted on the presumption that Bank Markazi's approval had been obtained at the time the principal amount was transferred (para. 30 of the award in *Kohler*).⁴⁵

It has been observed earlier that the Tribunal should have taken into account the special circumstances which clearly distinguished *Stanwick* from the other cases cited. In none of the cases invoked as precedent did the claimant seek to transfer out of Iran contractually-stipulated revenues denominated in rials that were to be received and spent in Iran, in lieu of dollar-denominated monies under such contracts. Moreover, in none of those cases did the Claimants apply independently, as *Stanwick* did, for authorization from Bank Markazi.

4. THE AWARD IN STANWICK AND THE RULES OF INTERNATIONAL MONETARY LAW

In holding against the banks in *Stanwick* the Tribunal did not give due weight to foreign exchange regulations and may thus be inconsistent with the rules of international law and the provisions of the IMF Agreement, *inter alia*, Articles XIII, XIV and XXIX thereof.⁴⁶

⁴⁴ Award in *Kohler*, *supra* n. 42, para. 31.

⁴⁵ Bank Tejarat did comply with the request to transfer the principal of the funds in account No. 5265. However, if Iran's exchange regulations make the transfer of rials abroad dependent upon authorization from Bank Markazi, or even prohibit such transfer in general, this does not bar the depositary bank or, *a fortiori*, Bank Markazi and the Islamic Republic of Iran, from invoking those regulations, because otherwise "lawful exchange restrictions [would be] made ineffective in individual cases and might thus constitute an infringement on the power of sovereign States." (The award in *Hood*, *supra* n. 28 at 47.) In other words, such payment "cannot render the plaintiff's claim receivable [in foreign currency]." See Maastricht District Court in *Frantzmann v. Ponijen*, *Nederlandse Jurisprudentie* (1960) No. 290, GOLD, op. cit. n. 18, Vol. 1 pp. 117–118; Supreme Court of the Federal Republic of Germany, 21 December 1976, cited in GOLD, *ibid.* Vol. 2 pp. 272–273. Similarly, the Tribunal could not avoid enforcing Article VIII, s 2(b), IMF and the international policy of protecting the currency of an IMF member State, merely by finding that the respondent had not advanced any objection. J. GOLD, "The Iran-United States Claims Tribunal and the Articles of Agreement of the International Monetary Fund", 18 *George Washington JLEc.* 537 at 549, and the sources cited, *supra* n. 29 and *infra* n. 65.

⁴⁶ For the IMF Articles of Agreement with the latest amendments, see the August 1985 reprint of collected IMF documents.

4.1 The right of a State to determine its financial and monetary policy, and to formulate its own exchange regulations

Under universally accepted rules of international law states may, as a manifestation of their economic sovereignty, determine and regulate their own monetary policy.⁴⁷ In this respect states enjoy broad authority to lay down exchange restriction and control regulations, without thereby incurring international responsibility.⁴⁸ There is no need to address the argument, advanced by certain well-known and learned jurists in the field of monetary law such as F.A. MANN, ARTHUR NUSSBAUM and J.E.S. FAWCETT, that exchange regulations must neither be discriminatory nor be imposed through misuse of discretion and authority, because the same authors endorse the position that States enjoy broad powers and prerogatives in this area.⁴⁹ It is thereby necessary to note, even if only in passing, the following points: first, the right to impose exchange regulations being recognized in principle, the burden of proving their invalidity rests on the party making the claim; and second, the mere existence of similar exchange regulations elsewhere and their recognition by the international community, will suffice to render those regulations, at least *prima facie*, valid and binding.⁵⁰

A special proviso to the aforementioned rule was made by the Permanent Court of International Justice in the *Serbian and Brazilian Loans* case:⁵¹ regulations should not affect the substance of the debt.⁵² In the instant case Iran's exchange regulations did not contain provisions by which the underlying obligation (Stanwick's ownership over the funds in the rial accounts) had been

47 Reference may be had, in this connection, to all of the works and articles written on the subject of "money", *inter alia*, the following sources: F.A. MANN, *The Legal Aspect of Money* (4th ed., hereinafter, MANN) pp. 295, 301–303, 404–405, 465 et seq; M.R. SHUSTER, *The Public International Law of Money* (1973, hereinafter: SHUSTER) pp. 73–75; J.E.S. FAWCETT, "The International Monetary Fund and International Law", BYIL (1964) p. 32 at 48–49; M.M. WHITEMAN, *Damages in International Law* (1964) p. 981; C.C. HYDE, *International Law* (1947) p. 690; PCIJ in *Serbian and Brazilian Loans* (1929): "[I]t is indeed a generally accepted principle that a State is entitled to regulate its own currency", PCIJ Rep. Ser. A, Nos. 20-1 at 44; US Int. Claims Commission in the *Tabar Claim*, I.L.R., pp. 242–243; US For. Claims Settlement Commission in the *Mitzi Schoo Claim*, F.C.S.C. 70th Semiannual Report; the Award in *Hood*, *loc. cit.* n. 28 p. 47; the position taken by the United States with respect to Chile's foreign exchange regulations, in HACKWORTH, *Damages in International Law* Vol. 2 (1944) p. 68; and the sources referred to *supra* n. 32.

48 See J.E.S. FAWCETT, "Trade and Finance in International Law", ... RdC (1968-I) at 246–247; SHUSTER and other sources cited in nn. 30 and 47; decision in the *Tabar Claim supra* n. 47 and *infra* n. 101.

49 SHUSTER, p. 75.

50 SHUSTER, pp. 75–78; GOLD (examining the decision by the Hamburg court cited in n. 31), Vol. 1 pp. 82–86; and other sources cited in nn. 30–31.

51 *Supra*, no. 47.

52 FAWCETT, *loc.cit.* n. 47.

affected in any way. The respondents had at all stages regarded the claimant as the owner of the funds in the accounts, and had provided Stanwick with information on those accounts, even in the years since the claim was filed. Based on the data directly provided by the Iranian banks in connection with the balance of the accounts the claimant subsequently even increased the amount of the remedy initially sought by its claim. As to the requirement that such regulations not be discriminatory, Iran's exchange regulations are and have always been general, and uniformly applied and enforced with respect to all persons, although some scholars in the field hold that exchange regulations are inevitably discriminatory in nature.⁵³

It is generally recognized today that controlling and regulating domestic needs and demands through economic and monetary policies is the most important and effective instrument of States to achieve equilibrium in their exchange reserves and their international payments⁵⁴ and to prevent negative effects from export of those reserves.⁵⁵ Moreover, even though the principal policy and objective of the IMF agreement is said to be the promotion of cooperation between members, the coordination of their exchange regulations and the steering of their policies towards freedom of exchange transactions, the provisions of the Articles of Agreement nonetheless clearly show that a State's economic sovereignty and its authority to establish its own monetary policies take precedence over those objectives. The IMF's purpose is by no means to do away with every kind of control over exchange transactions, or to prevent imposition of exchange regulations under any circumstance.⁵⁶ For this same reason, not only has Article XIV lost its original transitional nature⁵⁷ but, as we shall see later⁵⁸ the IMF Agreement requires its members and their judicial bodies not to give effect to agreements that violate the exchange regulations of a member State, even if the law of the State whose currency is involved is not, according to the rules of conflict of laws, deemed to be the proper law of the exchange contract in question.⁵⁹

Not only did Iran's monetary and exchange policies govern Stanwick's

53 MANN, pp. 424–5, and SHUSTER, pp. 85–91; also A. NUSSBAUM, *Money in the Law: National and International* (1950, hereinafter: NUSSBAUM), pp.475–6.

54 See SHUSTER, p. 41, and FAWCETT, loc.cit. n. 47 at 59.

55 The (IMF) Articles of Agreement, the GATT and the 1948 Havana Charter, all permit States to take any necessary measures to prevent problems which might disrupt their economic equilibrium and monetary stability.

56 See SHUSTER p. 41; MANN p. 518; see also the decisions in *Braka v. Bancomer* and in *Batra v. Ebrahim* and the ruling by the Dusseldorf court in GOLD, Vol. 3 pp. 165, 180, 278.

57 See SHUSTER, p. 139 *et seq.*

58 Section 4.5 *infra*.

59 See the IMF's Interpretative Decision No. 446-4, dated 10 June 1949, cited in the *IMF Annual Report (1949)*, pp. 82–83; also in *Selected Decisions of the International Monetary Fund and Selected Documents* (11th issue, 30 April 1985). See also the award in *Dallal*, loc.cit., *Supra* n. 29 at 14.

relations (agreements, money of account and payment) with the banks and the Air Force and Navy through exchange and currency regulations, but Stanwick had notice of these facts from the time its contract for the purchase of goods and services were executed. Accordingly the claimant must be taken to have accepted those policies and restrictions when concluding the contracts with the Air Force and Navy which permitted payment of only 75 per cent, or else a specified amount, of the contractual price in the form of foreign currency (dollars). If Stanwick had insisted from the outset upon receiving a larger percentage or all of the contractual price in the form of foreign currency, it was likely that it would not have been awarded the contracts; or, if the contracts were awarded, the Plan and Budget Organization and Bank Markazi, as the organs responsible for making budgetary allocations and earmarking the amounts of foreign currency needed for Government projects as well as for regulating monetary and banking policies, would have barred the contracts from being implemented.

The purpose of subjecting contracts to the above restrictions was to balance income and expenditures and also to stimulate the domestic market, matters of critical importance for all States, especially developing countries. The provisions of the IMF Agreement, and, similarly, those of GATT (*inter alia*, Article XII) allow member States (even States with developed economies) to restrict the importation of goods and services based on their own interest, in support of and to safeguard their external financial position and to protect their purchasing power.⁶⁰ Article XVIII of GATT, essentially gives preference to the domestic and local policies of developing countries over the policy of international cooperation. It is remarkable that this recognition of the prerogative of developing countries is not contingent upon a decline of a country's reserves, nor upon proof that a threat of such decline is imminent.⁶¹

4.2 Bank Markazi is the authority that establishes Iran's monetary policies

The authority and competence to determine financial monetary policy and to regulate exchange transactions is usually vested in a State's central or reserve bank, or in its Ministry of Finance or Treasury.⁶² Initially, pursuant to the Law

⁶⁰ See SHUSTER, pp. 156–162.

⁶¹ Ibid, pp. 162–163. In interpreting the term “involve” in the provisions of Article VIII, s 2(b) relating to the unenforceability of exchange contracts, courts would enquire only whether the exchange contract “involve[s] the currency of [a] member”, and not whether there was an impact on the exchange reserves of that State (New York Court of Appeals in *Banco do Brasil S.A. v. A.C. Israel Commodity Co. Inc. et al.*, in: GOLD, Vol. 2, pp. 22–23 and Vol. 3 pp. 67–68). Inadequacy or shortage of the currency involved is not a requirement for imposing exchange regulations (see also MANN, p. 392).

⁶² SHUSTER, p. 30.

Entrusting Foreign Exchange Transactions to Bank Melli Iran (enacted 15 March 1958), the responsibility for “maintaining the equilibrium of the country’s foreign exchange and for supervising the enforcement of” this policy, was entrusted to Bank Melli Iran; and “to this end, the authorized banks [were] required to observe and enforce the exchange directives issued by Bank Melli Iran” (Article 2 of the Law). Similarly, Article 12 of the Bylaw for the Implementation of the Law Entrusting Supervision over Exchange Transactions [to Bank Melli Iran] provided that

“to maintain the foreign exchange balance and to ensure the necessary foreign exchange, no natural or juridical person has the right to accept any undertaking whatsoever to pay foreign exchange, to guarantee payment of foreign exchange, or to carry out futures transactions, without obtaining the approval of the Bureau for the Supervision of Foreign Exchange ...”

In 1960, Bank Melli Iran’s authority was transferred in full to Bank Markazi under Article 2(c) of the National Monetary and Banking Law. Subsequently, with the passage of the Monetary and Banking Act of Iran (ratified 18 July 1972), the responsibility for “regulating and implementing monetary and credit policy, with due regard to the country’s general economic policy,” remained with Bank Markazi Iran (Article 10 Law of 1972). According to Article 11(c) of the Law, Bank Markazi was also given the specific responsibility for “formulating regulations relating to foreign exchange transactions ... and for the control of foreign exchange transactions.”⁶³

Pursuant to Article 37 of the National Monetary and Banking Law, Iranian banks are obligated to,

“respect the provisions of the law and the pertinent bylaws issued on the strength of the law, and also the directives issued by Bank Markazi Iran pursuant to this law or its bylaws ...”

and are forbidden to carry out

“any banking operations resulting in the transfer of foreign exchange or giving rise to foreign exchange obligations ... without observing the regulations laid down by Bank Markazi Iran pursuant to Article 11 ...”.

Violators would be held liable for payment of pecuniary penalties (Article 42(a) of the National Monetary and Banking Law).

From the foregoing it would appear that the Tribunal’s finding against the banks is inconsistent with a substantial body of peremptory regulations that

⁶³ The Tribunal has, in a number of awards, taken note of this authority of Bank Markazi Iran. See, *inter alia*, the award in *Dallal* (*supra* n. 29 at 14), and *Hood* (*supra* n. 28 at 44).

requires banks to respect and enforce Bank Markazi's directives and circulars. No foreign exchange laws and regulations contain provisions that would permit banks to question regulations duly formulated by a competent supervisory organ such as Bank Markazi; and so far no court has regarded banks as competent to do so, or as being required to provide their customers with explanations when implementing such regulations.⁶⁴ Nor are the courts of an IMF member State entitled to disregard the international protection of the Member's currency provided for under Article VIII, section 2(b), even where the respondent has failed to prove the existence of valid exchange regulations, or has fallen short by not raising any defence.⁶⁵

4.3 Iran is an IMF Member under Article XIV of the Articles of Agreement

Article XIV, section 1 provides that every member can, upon accepting membership in the IMF, specify those terms and conditions under which it is adhering to the Fund. In the event that it declares its accession to Article XIV, a member may:

“[n]otwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date on which it became a member.” (Article XIV, section 2)⁶⁶

From among the 155 members of the IMF in 1991, 85 countries had continued to remain members under Article XIV, while 70 had accepted Article VIII of the Agreement.⁶⁷

64 Even in a case where a [Mexican] bank undertook to pay in dollars pursuant to a deposit agreement, the New York Court of Appeals ruled that:

“were we [the court] to issue the order they [plaintiffs] seek [in compliance with the contract obligation], we would find ourselves directing a State-owned entity to violate its own national law with respect to an obligation wholly controlled by Mexican law. This would clearly be an impermissible “inquiry into the legality, validity, and propriety of the acts and motivation of foreign sovereigns acting in their government roles within their own boundaries.” (GOLD, Vol. 3 p. 166).

65 GOLD, Vol. 1, pp. 82, 117–118; see also sources referred to *supra*, in n. 29.

66 Article VI, s 3 of the IMF Agreement permits all members, whether covered by Article VIII or Article XIV, to “exercise such controls as are necessary to regulate international capital movements.”

67 See the *IMF Annual Report* (1991) pp. 101, 150–152.

The right to remain a member under Article XIV has existed since the IMF came into being.⁶⁸ An examination of the IMF's practice shows that it is not easy to shift from membership under Article XIV to membership under Article VIII. Such a shift involves passing through certain stages, completing particular procedures, and meeting certain qualifications.

In particular, it should be noted that it is the member Government's sole prerogative to relinquish membership under Article XIV and to accept responsibilities under Article VIII.⁶⁹ Accordingly, a member cannot be deemed to fall under Article VIII contrary to its express intent and merely on the basis of an interpretation of certain asserted conduct. States have also been advised to exercise caution and prudence by consulting with the Fund prior to deciding to accept the obligations of Article VIII. In taking this conscious decision, Article XIV members must first eliminate all those measures and regulations that they have maintained or applied under Article XIV, and "satisfy themselves that they were not likely to need to have recourse to such measures in the foreseeable future."⁷⁰ Finally, after completing these arrangements, members must formally notify the IMF of their acceptance of responsibilities under Article VIII, and in doing so "notify the Fund that they accept the obligations under Article VIII, sections 2, 3 and 4, and no longer avail themselves of the transitional provisions of Article XIV."⁷¹ It was precisely in the light of the implementation of this policy that the declaration of adhesion under Article VIII by a number of States in 1961 could be accepted only after a one-year examination.⁷²

Iran adhered to the IMF Agreement as a member under Article XIV. It has never withdrawn from that Article and has never adhered to Article VIII.

At no stage did Iran enter into consultations with the IMF for the purpose of changing its exchange policy with a view to accepting membership under Article VIII. Nor has it ever announced such acceptance, either formally or informally, to the IMF. Iran has filed its annual reports concerning its exchange control regulations every year with the Fund, as a member under,

68 In its investigations, the IMF has concluded that it cannot announce the end of the so-called "transitional period" (of membership under Article XIV), and that "some countries could, if they wished, continue under Article XIV more or less indefinitely." HORSEFIELD *op.cit.* n. 30, Vol. 2 p. 284.

69 *Ibid.*, pp. 284, 288.

70 *Ibid.*, p. 288; see also the IMF Decision No. (6-/27) 1034) dated 1 June 1960, in HORSEFIELD *op.cit.* Vol. 3 pp. 260-261

71 *Ibid.* See also GOLD, Vol. 1, p. 116; and MANN, p. 396.

72 Following a long and intensive examination of applications whereby a number of States sought membership under Article VIII in 1960, the IMF finally accepted Saudi Arabia, Peru, Belgium, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Sweden and Great Britain to membership under Article VIII, in February and March 1961. HORSEFIELD, *op.cit.* n. 30 pp. 289 et seq.

and in compliance with, Article XIV.⁷³ Those regulations are reflected by the IMF in its Annual Reports.

There have been efforts, before the Tribunal, to represent certain instances of flexibility and relaxation shown by Iran since 1974 as constituting a sort of departure from its membership under Article XIV and as indicating its membership under Article VIII. These arguments are based primarily on

- (a) the contents of a letter of 22 July 1983 from Mr NICOLETOPOULOS, the then Director of the Fund's Legal Department;⁷⁴
- (b) statements made by Sir J. GOLD in one of his articles;⁷⁵ and
- (c) the IMF's Interpretative Decision in the *South Africa Case*.⁷⁶

As to the first two bases, it should be noted that Mr. NICOLETOPOULOS made two general statements in his letter, without attempting to find a relationship between them and Iran's exchange regulations and without taking up the issue directly. First, he stated that when a member state has eliminated a restriction under Article XIV, they cannot be reintroduced under that same Article unless permission as provided for in Article VIII is obtained. This general point, which is also stated in different language by Sir J. GOLD, only confirms the obvious fact that a withdrawal from membership under Article XIV cannot be reconciled with the reimposition of exchange regulations permitted under that same Article. However, Mr. NICOLETOPOULOS did not specify (as will be shown below) at what stage, and under what circumstances, the elimination of an exchange regulation can be regarded as constituting withdrawal from membership under Article XIV or as a bar to its reinstitution—or as its adaptation to the changed circumstances, to put it more precisely. The second general point addressed in the letter, a point to which GOLD also refers,⁷⁷ is that publication of exchange regulations in the IMF's Annual Reports does not constitute or indicate the Fund's approval of such regulations, if they are subject to Article VIII. In this connection it should be noted, first that the IMF at no stage treated Iran as being other than an Article XIV member, so that the second point would need no further

73 Affidavit of ALI MANAVI-RAD (Bank Markazi Iran's Director General in charge of International and Exchange Affairs in 1979, who was also a member of the Exchange Control Commission in Iran from that same year and the Director in Charge of the International Department for some time after preparing his affidavit), 1983, in *Schering Corporation and The Islamic Republic of Iran* (Award No. 122-38-3), 5 Iran-USCTR 361. See also in this connection, GOLD, loc.cit. n. 75 p.552.

74 The letter was addressed to Mr. JOSEPH P. GRIFFIN of WALD, HARKRADER & ROSS, Washington, D.C., a law firm representing a great number of United States claimants before the Tribunal. The letter is reprinted as exhibit 2 to the Memorandum of the Legal Adviser of the Department of State, in *US Congressional Record* (27 February 1984) Vol. 130, at S. 1685.

75 "The Iran-U.S. Claims Tribunal and the Articles of Agreement of the International Monetary Fund," 18 *George Washington JLEc.* (1985) 537.

76 IMF Exchange Restrictions 1967, 18th Ann. Rep. at 2; and HORSEFIELD, op.cit. n. 30 pp. 248–50.

77 Loc.cit. n. 75.

discussion; and second, the IMF Annual Reports relating to the periods before as well as after the years when the so-called “new” exchange regulations were imposed⁷⁸ explicitly considered Iran to be covered by the terms of, and to be a member under, Article XIV.

As to the third basis for the argument that Iran had abandoned its status under Article XIV, any comparison of Iran’s status with that of South Africa is out of place. As to the latter, “South Africa had in fact declared officially in November 1946 that it did not maintain any restrictions on making payments or transfer [of exchange] on current international transactions”⁷⁹ and as we have seen above such a formal declaration is in fact among the requirements for accepting Article VIII membership and withdrawing from Article XIV. GOLD himself has stated that giving up privileges under Article XIV and declaring adherence to Article VIII are requirements for withdrawal from Article XIV and acceptance of Article VIII⁸⁰ Furthermore, having maintained that only the Fund possesses the competence to interpret its Articles of Agreement, he has noted the Fund’s reluctance to classify a member as falling under sections 2–4 of Article VIII simply by virtue of certain practices, without its having notified the Fund that it adheres to that Article.⁸¹ Therefore, any analogy between the *South Africa* case and Iran’s status and situation would not be correct.

Apart from the fact that Iran’s exchange regulations, the provisions of Circular No. 11600 (of 4 November 1978) in particular, were published in the 1979 Annual Report and brought to the attention of both the IMF and the public,⁸² even a quick glance at the IMF’s relations with Iran would show beyond doubt that the IMF has regarded Iran, before and after 1979 (following its imposition of exchange control regulations), solely as a member under Article XIV, and still treats Iran as such. The 1979 Annual Report shows that the IMF itself was aware that under certain conditions (*inter alia*, where the provisions of the Law Concerning the Attraction and Protection of Foreign Capital are observed) Iran still permitted the transfer of even capital funds,⁸³ and that payments for certain kinds of transactions (with the control and approval of Bank Markazi) were regarded permissible. The IMF described the recent changes as merely a policy of “terminat[ing] [Iran’s] support of the noncommercial foreign exchange market . . . to match supply with demand for foreign exchange in that market.”⁸⁴ The IMF thus had an entirely clear

78 See also the certification by the Director of Foreign Relations of IMF, 19 January 1989, *infra* text at n. 87.

79 HORSEFIELD *op.cit.* n. 30 at 249.

80 Vol. 1 p. 116.

81 *Op.cit.* n. 67 at 555–556.

82 IMF Annual Report for 1979, p. 216. See also the Award in *Dallal*, *supra* no. 29 at 13.

83 IMF Annual Report for 1979, p. 215.

84 *Ibid.* p. 216.

understanding of Iran's exchange regulations and not only implicitly but also explicitly approved of them. Bank Markazi's policy of relaxation and flexibility as appeared from Circular No. 994/h of 14 January 1974 in connection with the sale of noncommercial foreign exchange constituted a permissible adaptation in the light of circumstances and within the scope of Article XIV, section 2. The IMF never interpreted these measures as constituting a shift away from membership under Article XIV, which understanding is entirely consistent with the spirit and tenor of the circular, pursuant to which the relaxing regulations were issued "until further notice."⁸⁵ Consequently, the IMF never removed Iran's name from the list of member States under Article XIV or added it to that of member States under Article VIII.⁸⁶

In his certificate dated 19 January 1989, filed with the Tribunal by the respondents,⁸⁷ the IMF's Director of Foreign Relations attested that up to that date the Islamic Republic of Iran had not accepted the obligations imposed by Articles II, III, IV and VIII of the Agreement, adding that:

"[t]he Islamic Republic of Iran therefore continues to avail itself of the transitional arrangements of Article XIV, section 2 for restrictions on payments and transfer for current international transactions that were in effect on the date on which it became a member of the Fund ..."

85 Not only did Iran never formally or informally apply for membership under Article VIII, but Bank Markazi's circular of 1974 also lacked many of the necessary preconditions for membership under that Article, *inter alia*, the condition that exchange regulations be eliminated with no likely need for their reimposition in the foreseeable future.

86 It should be noted that in every instance where a member State has accepted membership under Article VIII, the Fund has, in its Annual Report for that year, or for the following year, deleted the name of that State from the list of Article XIV members, and added it to the list of Article VIII members. In its Report for 1980 (pp. 126, 150, 457) for example, the IMF reported that the Dominican Republic and Finland had accepted membership under Article VIII and accordingly omitted their names from the list of member's under Article XIV and added them to the list of Article VIII members. The 1988 Annual Report does not list Korea as a member under Article VIII (p. 107), whereas Korea was added to that list in the Annual Report for the following year (1989), because it had accepted the obligations under Article VIII in November 1988. Similarly, Cyprus, Thailand, Tonga, Turkey and Switzerland were not among Article VIII members until 1989, but had been added to the list of such members in the Annual Report of 1990 and 1991.

In the case of Iran, there has never been any such transfer and shift. Accordingly the IMF has not, since 1978, proceeded at any stage to hold Iran's foreign exchange regulations to be in violation of the IMF regulations. Nor has it ever given any advice or made any representation in that connection, whereas, according to its regulations, it would have the duty to do so if it had considered them to be in violation.

In the IMF Annual Reports for 1976 (p. 94), 1977 (p. 99), and 1978 (p. 109) reflecting the names of State members of the IMF as of 30 April 1976, 1977 and 1978, respectively relating to the period prior to the issuance of Circular 11600 which was portrayed as unauthorised, because of the alleged prior departure of Iran from the category of Article XIV and, as well as in the Annual Reports for 1979 (p. 467), 1980 (p. 457), 1981 (p. 471), 1982 (p. 498), 1988 (p. 107), and 1989 (p. 78) Iran was consistently listed as an Art. XIV member.

87 Filed on 16 May 1989, together with other evidence and a brief, all registered under No. 118.

Emphasis has been placed on Article XIV of the IMF Agreement in order to demonstrate that, even if the exchange transaction which Stanwick had in mind was regarded as a current transaction, the award would be difficult to justify. If, on the other hand, Stanwick's transfer request constituted a request for capital transfer, the whole discussion would be unnecessary: the funds subject of the transfer request had been in the (current and time deposit) accounts concerned for years before the request was made,⁸⁸ and the greater part of the funds were still in fixed deposit accounts at the time of the request. This would render the transfer of funds from the accounts entirely within the control of the relevant member State of the IMF, as foreseen by Article VI(3).⁸⁹

4.4 Iran's foreign exchange regulations do not violate the Treaty of Amity⁹⁰

This article is not concerned with the validity of the Treaty of Amity, nor with the question of whether or not it is applicable to disputes falling under the Tribunal's limited jurisdiction as governed, *inter alia*, by Article V of the Claims Settlement Declaration. The issues of validity and applicability of the Treaty are immaterial since the latter, far from undermining the effectiveness of exchange regulations, can be invoked to confirm them.⁹¹

88 As already noted, in this connection, there is no need for us to examine the original sources making up the bank accounts. In this regard, see J. GOLD, Vol. 1 p. 116; and the Tribunal's awards in *Hood and Dallal*, *supra* nn. 28 and 29.

89 The test for distinguishing a current transaction from a transfer of capital is to find whether or not the funds whose transfer is sought represent the consideration for a transaction involving the purchase and sale of goods and services about which the parties have agreed upon to prompt payment. If the funds involved do not represent the immediate consideration for such a purchase and sales contract between the parties to that transaction, then the latter should be regarded as a transfer of capital. See, *inter alia*, the following sources: J. GOLD, *International Capital Movement under the Law of IMF* (1977), pp. 18, 19; J. GOLD, *The Multinational System of Payments: Keynes Convertibility, the International Monetary Fund's Articles of Agreement* 20 (IMF Occasional Paper No. 6 (1981), at 19; FAWCETT, *loc.cit.* n. 47 at 59; SHUSTER, pp. 34, 148.

In the cases of *Kraus v. Zivnostenska Bank* (64 N.Y. Supp. (2d) 208, 187 Misc. 681 (Supp. CT. 1946); and *Spitz v. Schesische Kredit Anstalt AG* (*New York Law Journal*, 21 January 1948 p. 267), the New York Court found no difficulty in ruling that the requests to transfer funds in bank deposits with the Bank of Prague constituted applications for the transfer of capital, and that they were thus subject to the provisions of Article VI (3).

90 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed 15 August 1955 (entered into force 16 June 1957), 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 900 ("Treaty of Amity").

91 Regrettably, despite the attention it paid to the difference between "validity" and "applicability," the Tribunal had confused these two concepts in its previous awards. Chamber Two of the Tribunal was the first to acknowledge the distinction between these notions in 1986, and yet in para. 27 of the Awards in *Phelps Dodge Corp. and Overseas Private Investment Corp. and The*

Before discussing the issue at hand, two preliminary points must be made. First, the United States Government and US nationals were familiar with Iran's restrictive foreign exchange regulations which in part had been in force for years since the Treaty of Amity became operative. Yet the United States had never taken the position that those regulations including the exchange regulations in Circular No. 11600 and subsequent circulars were in violation of the Treaty's terms. Nor did the United States ever take a formal position vis-à-vis Circular No. 11600 and subsequent circulars or did it refer to the IMF, the only forum competent to render a decision and interpretation on the matter, apparently because the United States found no conflict between its own position and that of Iran in this respect.⁹²

The second point to be noted is that the United States took measures⁹³ arising from its overall policies towards Iran and directed towards objectives

cont.

Islamic Republic of Iran (Award No. 217-99-2)—after noting that “the Tribunal does not find it necessary in this Case to determine whether the Treaty remains in force at present between the two States”—it abandoned its discussion of “applicability” and erroneously returned to the issue of “validity,” at the time the claim arose, stating that “the Tribunal is satisfied that Article IV, para. 2, was, in any event, clearly applicable to the investment at issue in this case at the time the Claim arose” (10 Iran-USCTR 121 at 131-2). In the author's view the Tribunal here failed to give due weight to Article V of the Claims Settlement Declaration, to the limits of the competence conferred upon the Tribunal and to the special and limited subject matter of the Claims Settlement Declaration, compared with the Treaty's broader scope. The majority in Chamber Two invoked (n. 7, and para. 27) the judgment of the International Court of Justice in the case *Concerning United States Diplomatic and Consular Staff in Tehran* (*The United States v. Iran*) (19 I.L.M. (1980) 553, 556) without taking into account the difference in subject matter and the surrounding circumstances involved in these two cases. The circumstances had radically changed since the ICJ decision, the most important one being the entry into force of the Algiers Declarations with the creation of a special tribunal with the limited power to adjudicate special and particular claims and charged with the duty to respect the law and contractual provisions, taking into account “changed circumstances”.

92 See Article XXIX, Section A of the IMF Agreement, cited in Part 4.6 of this paper, which relates to the issue of jurisdiction over disputes concerning exchange agreements and regulations.

93 The sole target of the 1979–1980 US President's Executive Order (including Executive Order No. 12170) was Iran's property and assets (whether moveable or immoveable), so that the measure would have been contrary to the terms of Articles VII and VIII of the Treaty of Amity, under which a party was prohibited from resorting to such discriminatory acts. American commentators who have written at length on the Orders freezing Iranian assets and property, in an attempt to justify those measure, have not denied the discriminatory nature of those Executive Orders. (See, *inter alia*, the article by EDWARD GORDON, “Trends, the Blocking of Iranian Assets”, *The International lawyer* (1980) p. 659; and R.W. EDWARDS, “Extraterritorial Application of the U.S. Iranian Assets Control Regulations”, 74 *AJIL* (1981) p. 870 at 883).

94 American authors have conceded that the measures taken by the United States were the result of “political pressure mounted on President Carter to take decisive action to force Iran to release the hostages” (EDWARD GORDON, *loc. cit.* n. 92, p. 660). It has been alleged that the freeze Order No. 12170 was issued in anticipation of the possibility that Iran might decide to withdraw the funds in its accounts from the US banks, but there is evidence that the orders was ready well before that

that were inconsistent with the IMF Agreement.⁹⁴ In 1979 the United States started to block, freeze and seize Iranian properties and assets that either lay within its territorial jurisdiction or were at the disposal of United States nationals and banking institutions around the world. Besides, the United States prohibited the transfer of any property or funds to Iran, whether related to current transactions or capital movements.⁹⁵ The United States' position was that the measures constituted valid exchange control regulations notwithstanding the fact that it was itself bound by Article VIII of the Bretton Woods Agreement.⁹⁶ The United States did not consider the Treaty of Amity a bar to the imposition of such severe restrictions. Furthermore, it argued before all fora and courts that Iranian demands for the transfer of its frozen assets which were kept in the accounts with European branches of United States banks⁹⁷ should be denied, in accordance with Article VIII, s 2(b) of the IMF Agreement.

Article VII of the Treaty of Amity reads, in part:

"1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to ensure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund."

This Article of the Treaty of Amity thus provides the parties who are members of the IMF the rights recognized by the IMF Agreement and recognizes that, even where the Contracting Party is not a member of the IMF, it can impose restrictions without observing the provisions of the IMF Agreement, in order to ensure the availability of the foreign exchange essential for the health and welfare of its people. For now, the author will not take up this additional right under the Treaty.⁹⁸

cont.

time, for other purposes and (under both political and non-political pressures) aimed at protecting the banks' private interests (*ibid* p. 661, and n. 9 thereto). On the other hand, observers were fully confident that Iran intended (as proved to be the case in practice) to comply with its obligations, including those which it had undertaken under its loan agreements with US banks (see especially, *ibid*, p. 672, and the sources cited therein).

95 These measures against Iranian assets and property have been characterized or qualified as economic blockade and embargo. See EDWARDS, *loc.cit.* n. 93.

96 Apart from the fact that the Executive Orders to freeze, block and seize Iranian assets and property have been regarded as discriminatory, a further defect is, according to one view, that they cannot be regarded as valid restriction or control regulations. NUSSBAUM states that "the draftsmen of the Agreement of the International Monetary Fund apparently did not classify the Freeze Orders as an instance of foreign exchange control [regulations]". See NUSSBAUM p. 467.

97 See EDWARD GORDON and R.W. EDWARDS, *loc.cit.* n. 93.

98 The right to issue Circular No. 11600 and the need to control foreign exchange transfers not only were allowed by international law and the provisions of Articles XIV of the IMF Agreement.

As Iran was an IMF member under Article XIV of the IMF Agreement throughout the relevant period, and has continued to be so regarded down to the present time, Iran's "maintaining [or adapting] to changed circumstances the restrictions" was not, therefore, a surprise to the United States.⁹⁹ In addition, Article VI, s 3 of the IMF Articles of Agreement recognizes the right of IMF members to impose foreign exchange regulations, even of a discriminatory nature, in connection with capital transfers.¹⁰⁰

So long as exchange regulations are not discriminatory, their imposition is not prohibited by the general principles of law and international law. Therefore, commercial treaties, such as the Treaty of Amity, usually do not impose any duty in this connection beyond that of acting in good faith and avoiding any misuse of discretion involving discrimination against the

cont.

However, at the time the circular was issued, owing to the chaos attending the Revolution billions of dollars of Iran's foreign exchange reserves (which should have been used for the welfare of the nation) had been smuggled out of Iran by profiteers, foreign exchange dealers and those who fled the country. These circumstances are described in the *Middle East Economic Digest's* issue of 28 September 1979:

"... nearly \$3,000 million in foreign exchange has been taken out of the country since February's revolution. Western banking sources say about \$200 million a month is being taken out legally by travellers, while Bank Markazi (central bank) officials say a further \$2,000 million has been smuggled out.

The illegal export of money has not been stopped yet, Bank Markazi secretariat head Hossain Hanjani said. Maintaining Iranian students abroad is also costing \$2,000 million a year, he added.

Several thousand million dollars were smuggled out [of Iran] in the three years before the exiled Shah's fall. Foreign exchange controls imposed late last year failed to stem the flow. . . ."

In the Case Concerning South Africa Case, referred to above, text at n. 79, the Executive Board of the IMF initially ruled that South Africa could not impose new, restrictive exchange regulations without permission from the Fund (after having eliminated the exchange regulations which it maintained as an Article XIV member, and having opted for membership under Article VIII), but later the Fund confirmed the validity of South Africa's foreign exchange regulations retroactively as from the time they were imposed, in view of that country's serious losses of foreign exchange reserves (see, *inter alia*, HORSEFIELD, op. cit. n. 30, pp. 248-249). France too, which had subscribed to membership under Article VIII of the IMF Agreement in 1961, imposed certain exchange regulations in 1968 in order to protect its currency following the disturbances of the spring of 1968, without encountering any interference whatsoever (IMF 20th *Annual Report on Exchange Restrictions* (1969) pp. 160-2).

99 In contrast to the unprecedented and unexpected Executive Orders by the President of the United States (which totally banned all transfers to Iran notwithstanding the provisions of Article VII, para. 2 of the Treaty of Amity and Article VIII of the IMF Agreement) Iran's foreign exchange regulations continued to permit the transfer of most, if not all, of the items enumerated in Article VII, para. 2 of the Treaty, upon notification to Bank Markazi.

100 See Decision No. 541 (56/39) of the Executive Board of the IMF, dated 25 July 1956, included in *Selected Documents*, op. cit. n. 59 p. 127.

nationals of a State party to the treaty.¹⁰¹ This is because “there can be no vested right in the continuing value of the property or lines of trade.”¹⁰² Governments neither guarantee commercial relations nor ensure the value of properties within their territories.¹⁰³

4.5 All IMF member States and adjudicating fora have a duty to observe and respect Iran’s foreign exchange regulations

Article VIII, s 2(b) of the IMF Agreement prescribes, under the heading of “General obligations of Members”:

“Exchange contracts which involve the currency of any member and which are contrary to the exchange control of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.”¹⁰⁴

Few of the other Articles of the IMF Agreement have been subjected to as much attention by the Fund, as well as by the world’s jurists and judicial or administrative or other bodies.

There can be no doubt that Stanwick’s request to the banks for the transfer

101 See the writings by J. FAWCETT (p. 58), F.A. MANN (pp. 524–52) and M.R. SHUSTER (p. 85 et seq.) as cited in n. 47. In the *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, the International Court of Justice ruled that Morocco’s foreign exchange regulations were in violation of the treaty between France and the United States, because they were discriminatory (ICJ Rep. 1952 pp. 176–233). In the *Tabar Claim*, *supra* no. 47, the United States International Claims Commission found, in connection with funds in the claimant’s accounts which a Yugoslav bank had refused to pay owing to the existence of certain exchange regulations, that:

“International law and the usual commercial treaties are no bar to foreign exchange restrictions. So long as the control measures are not discriminatory, no principle of international law is violated.”

102 FAWCETT, *loc.cit.* n. 48 at 247. See also the decision by the Permanent Court of International Justice in the *Oscar Chinn* case (1934), PCIJ Series A/B No. 63 at 88:

“Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes. . . No enterprise. . . can escape from the chances and hazards resulting from economic conditions.”

103 *Barcelona Traction Case (Belgium v. Spain)*; ICJ Rep. 1970, at paras. 87–88; *Uptan Case (United States v. Venezuela)*, g UNRIAA 236; *Avona Mines case (Britain v. Venezuela)* 1903 and *Volkman case (United States v. Britain)*, g UNRIAA pp. 318, 424; See also IAN BROWNLIE, *System of the Law of Nations, State Responsibility* Part I (1983) p. 171; J.B. MOORE 6 *Digest of International Law* (1906) pp. 961–4; Award in *Starrett* (ITL 32–24–1), 4 Iran-USCTR 122; and *Braka et al. v. Bancomer SA*, *loc.cit.* n. 32.

104 There is no doubt as to the applicability of the provisions of Article VIII, s 2(b) to both categories of exchange transactions, i.e. those involving capital and current transfers. GOLD, Vol. 1, pp. 114–116.

of the balance of its “[r]ial] accounts in dollars at the current official exchange rate to ... Riggs National Bank of Washington,”¹⁰⁵ had as its subject an exchange transaction involving Iranian currency.

Regardless of whether a liberal or conservative interpretation is given to the term “exchange contract”, it could never exclude the transaction intended by Stanwick from the coverage of Article VIII, s 2(b): first, it affected Iran’s foreign exchange reserves,¹⁰⁶ and second, Stanwick was seeking to purchase dollars from the banks¹⁰⁷ in exchange for rials.¹⁰⁸ The request thus was concerned with, *stricto sensu*, a foreign exchange transaction.¹⁰⁹

The law applicable to a foreign exchange transaction is usually determined by rules of conflict of laws. Nevertheless there is a virtual consensus that, under Article VIII s 2(b), no matter which law is applicable pursuant to conflict of laws rules, the law of the State whose currency is involved governs exchange transactions. In the *Perutz* case the New York Court of Appeals ruled that Czechoslovak exchange regulations governed a foreign exchange contract, regardless of when the latter was executed.¹¹⁰ Pursuant to its authority under Article XVIII of the IMF Agreement (presently Article XXIX), the IMF Executive Board ruled that:

“It also follows that such contracts will be treated as unenforceable notwithstanding that under private international law of the forum, the law

105 Para. 14 of the Award in *Stanwick* and *supra*, text at n. 14.

106 See MANN, pp. 383–393; FAWCETT, loc.cit. n. 47 pp. 42–43; KRISPIS, “Money in Private International Law”, 120 *RdC* (1967-I) 191, 256–7; DICEY and MORRIS, *Conflict of Laws* (10th ed.) Rule 179, pp. 1028–29; *Perutz v. Bohemian Discount Bank in Liquidation* 304 N.Y. 533, 110 N.E. (2nd) (1952). 110 N.Y.S. (2nd) 446 (1952); GOLD, Vol. 1, pp. 50–55 (with respect to *Perutz*), 84, 91–93; LORD DENNING in *Sharif v. Azad* (1967) 1 Q.B. 605, 613–14, 618 (CA), where he found that “exchange contracts which involve the currency of any Member” as set forth in Article VIII, 2(b) included “any contract which in any way affects the country’s exchange resources.” According to Lord Justice DIPLOCK, even though the term “exchange contract” has nowhere been defined, it should nonetheless “be liberally construed having regard to the objects of the Bretton Woods Agreement to protect the currencies of the States who are parties thereto.” See also GOLD, *The International Monetary Fund and the International Recognition of Exchange Control Regulations: The Cuban Insurance Cases*, pp. 530–31; and the decisions cited in GOLD, Vol. 3 pp. 164–167, 266, 275–276, 354.

107 *Wilson, Smithett and Cope Ltd. v. Terruzzi* (1976) Q.B. 613; NUSSBAUM, pp. 426–7; GOLD, Vol. 3 pp. 59, 345–346; *United City Merchants case* (1979) 2 Lloyd’s Rep. 493; (1981) 3 W.I.R. 242.

108 The question whether Article VIII s 2(b) indeed prescribes a contract involving the currency of a member State to conform to the exchange regulations prevailing at the time of performance of the contract is not relevant in the present case as there was no difference between the regulations in force at the time of conclusion and those in force at the time of performance of the exchanges contract. Cf GOLD, Vol. 1 pp. 62–63; EDWARDS, loc.cit. n. 93, and the *Perutz* case, *supra* n. 106.

109 See *Recueil Dalloz Sirey*, 1985, No. 43, p. 500; and GOLD op. cit. n. 18, Vol. 4, p. 214.

110 Loc.cit. n. 106.

under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.”¹¹¹

Therefore, a contract which is regarded as valid under the law by which it is governed, but which contravenes the exchange regulations of the State whose currency is involved, will not be enforceable.¹¹² An identical conclusion may be arrived at by application of conflict of laws rules: in the present case Iranian law was obviously the governing law, by virtue of the terms of the contracts as well as by reason of the fact that the contracts were to be executed and performed in Iran.¹¹³ Aside from all this, the money of account involved in both types of contracts involved (the bank accounts and the contracts with the Navy and Air Force, so far as the latter are deemed relevant to the issue at hand) was specified to be the Iranian rial. Although the majority of the Chamber one did not address the issue in the *Stanwick* Award, it is difficult to find an instance in which an adjudicating body would refuse to enforce the exchange regulations of the state whose currency is involved as being “revenue” or “territorial” regulations,¹¹⁴ or else, that they were “contrary to public policy.”¹¹⁵ Failure to respect the IMF regulations would disrupt the global monetary order, an order that the nations of the world, by adhering to the Bretton Woods Treaty, consider mandatory, at least since 1945, and which

111 Decision No. 446-4 (1949), HORSEFIELD, op. cit. n. 30, Vol. 3, pp. 256–7; *Selected Decisions*, supra n.59 pp. 251–252; *IMF Annual Report 1949* (Appendix XIV) pp. 82–83.

112 GOLD, Vol. 2 pp. 395–408; FAWCETT, loc.cit. n. 47; *Van Den Bussche v. Karabassis*, 16 *Journal des Tribunaux* (Brussels), (1987) No. 5423 pp. 343–4; *International Banking Law* (London), Vol. 6 No. 6 (1987) pp. 81–82.

113 When the law governing the contract is the same as that under which the exchange regulations are established, that law not only controls or restricts payments under the contract, but can also modify or even dissolve the contractual bond See MANN, pp. 407 *et seq.* in particular p. 412; DICEY & MORRIS, op. cit. n. 106, pp. 1023–24; Lord RADCLIFFE in *Kahler v. Midland Bank* (1950) A.C. 24 at p. 56; and GOLD, Vol. 3 p. 231. In *Zivnostenska Banka National Corporation v. Frankman* (1949) 2 All E.R. 671, known as *Frankman*, the plaintiff sought to recover dividends in a Czechoslovak corporation, which were on deposit with the London branch of a Prague bank in pounds sterling. The defendant invoked the Czechoslovak exchange control regulations under which it was necessary to obtain the permission of the National Bank. Quashing the judgment by the Court of Appeal and restoring the judgment by the lower court, the British House of Lords held that as the deposit agreement was made in Prague and the place of performance was deemed to be in Prague, Czechoslovak law (including its exchange regulations) governed the transaction. See GOLD, Vol. 1, p. 16; see also the decision in *Perutz*, loc.cit. n. 106.

114 See the IMF Decision No. 446-4 (1949), loc.cit. n. 111; MANN, pp. 273, 428–433, 511; GOLD, Vol. 1, pp. 11, 15, 52, 80; id., op. cit. n. 106 (*Cuban Insurance Cases*) pp. 524–525; FAWCETT, loc.cit. n. 48, pp. 290–291; CHESHIRE & NORTH, *Private International law* (10th ed.) p. 142; DICEY & MORRIS, op. cit. n. 106 p. 1025; *Perutz* loc.cit. n. 106; *Frankman* loc.cit. n. 113.

115 FAWCETT loc.cit. n. 48, pp. 289–291; GOLD, Vol. 1, pp. 11, 13, 15, 52, 109–111, 117; Vol. 2 p. 271; Vol. 4 p. 25; loc.cit. n. 106, pp. 524–525; EDWARDS, loc.cit. n. 93, pp. 882–883; IMF Decision No. 446-4 (1949), supra n. 111; HORSEFIELD op. cit. n. 30, Vol. 3 p. 256; and MANN pp. 403–406, 414–415.

they have made part of their own *ordre public*. It is worth noting that the party invoking Article VIII s 2(b) (here, the Iranian banks) need not even prove that the exchange regulations conform to a particular provision of the IMF Agreement, or that they have been expressly confirmed by the Fund.¹¹⁶

In their depositary contracts with Stanwick, the banks did not assume an obligation to pay the funds in those accounts in any currency other than rials at the request of the holder of the accounts, nor to transfer them abroad.¹¹⁷ However, even if they had assumed such an obligation, it would hardly be possible, in view of settled rules of law, to award against the banks for non-payment of foreign exchange out of the monies in those accounts, when conversion would have meant violation and disregard of the prevailing Iranian exchange regulations.

The IMF regulations and decisions whereby member States and the courts¹¹⁸ are categorically required not to enforce foreign exchange contracts that are in violation of other member States' exchange regulations are in line with the consensus of jurists and the uniform rulings by municipal courts. The general position is that the courts are not permitted to disregard the exchange regulations of a member State on the allegation that they constitute an expropriation,¹¹⁹ or on the basis of breach of contract,¹²⁰ or by recourse to

116 Tacit approval of the IMF, even in case approval is needed, has been regarded as sufficient. See MANN, pp. 518–519; the decision by the Hamburg Court, noted in GOLD. Vol. 1, p. 85; and EDWARDS, loc.cit. n. 93 p. 896.

In light of the language of Article XIV, which requires the IMF to advise or make representation to members as to any inconsistency of their regulations, or as to the need to withdraw them, it is clear that, with respect to regulations imposed by Article XIV members, silence on the IMF's part is tantamount to approval of such regulations. See also the IMF interpretation cited *supra* n. 30.

117 Payment in a currency other than that of the account, and the transfer of foreign currency by using funds of the account constitute totally distinct transactions, with respect to which the depositary bank has no inherent obligation towards the holders of the account, albeit the banks may engage in such transactions with their customers, within the limits of the prevailing regulations. A request to transfer foreign exchange constitutes a new transaction for the purchase of foreign exchange and its transfer abroad. See FAWCETT, loc.cit. n. 47, p. 45; loc.cit. 48 p. 282.

118 There is no difference in this connection between administrative and judicial authorities, nor international courts.

119 Particularly where (*Stanwick case*) owner/holder of the account has retained his rights in the actual funds. MANN, pp. 272, 474, 481, holds that the imposition of exchange regulations which affect the value, or limit the extent of the domestic use, of the money of account or even, the imposition of restrictions which prohibit payment in foreign currency, neither constitute expropriation nor entail responsibility.

Invoking Lord RADCLIFFE's decision in *Kahler v. Midland Bank* (*supra*, n. 113), MANN holds that if the law of the contract is the law of the restricting State, that law is able, without incurring responsibility, to modify, or even dissolve, the contractual obligation. See *ibid.*, pp. 404–14 (especially p. 412), 465.

On page 481, he states that:

“Since exchange control is designed to protect a State's exchange resources, the mere refusal to allow the transfer of funds abroad can hardly ever be such misuse of discretion as to be unfair and inequitable. Normally ... it will even be lawful for the restricting State to limit or

extra-contractual liability, such as unjust enrichment.¹²¹ Any such contradictory position would be inconsistent with the provisions of Article VIII, 2(b), IMF Agreement while, on the other hand, ordering the enforcement of contracts inconsistent with the exchange regulations of a member state would be tantamount to circumventing such regulations.¹²²

cont.

exclude the internal use of the non-resident alien's internal funds . . ."

See also FAWCETT, loc.cit. n. 47, pp. 58–59; loc.cit. n. 48 pp. 246–247 and the decisions examined by GOLD Vol. 1, pp. 87–89 (*Frankman v. Prague Credit Bank* and *White v. Roberts*, 33 *Hong Kong Law Reports* (1949) pp. 231–82).

SHUSTER pp. 72–85, (holds that governments have broad rights to introduce exchange regulations, and quotes *inter alia*, the United States Claims Commission in the *Chobady Claim* (1985) II I.L.R. pp. 292–4: "[A] prohibition against transfer of funds [a bank deposit with the Hungarian-Italian Bank] out of a country [Hungary] is an exercise of sovereign authority which, though causing hardship to non-residents having currency on deposit within the country, may not be deemed a 'taking' . . .")

One extremely rare and uncommon instance where regulations that affected the right of ownership were regarded as expropriatory and giving rise to responsibility, was in the United States Claims Commission's decision in the case of *John Stipkola* SHUSTER p. 81). In that case, the total annulment of the plaintiff's ownership over his banking accounts was deemed as constituting a "taking," whereas the other measures taken by the Russian Government prior to that expropriatory act were not regarded as entailing responsibility on its part.

In numerous other cases (e.g. the *Evanoff Claim* and the *Muresan Claim*, *ibid*, pp. 79–80) the Commission recognized the sovereign right of nations to impose restrictions or control regulations that even limit the transfer and domestic uses of the currency in which accounts are denominated, and concluded that as the owner of the account was still able to enjoy and use the funds in the account, no matter how restricted and insignificant his right of access might be, neither expropriation nor responsibility could be attributed to the State that had imposed the regulations.

The decisions of the United States Claims Commission lead to the following conclusions: (1) it is a legal principle and a *prima facie* assumption that an exercise of sovereignty through the imposition of such regulations does not constitute a taking or entail State responsibility, unless the owner has been divested of ownership; and (2) as against such a principle, the onerous burden of proving the contrary rests with him who asserts responsibility (cf. SHUSTER, 76–84).

120 See *White v. Roberts* (1949), *supra* n.119. In that case, the Hong Kong High Court relied upon the provisions of Article VIII, 2(b) in dismissing the plaintiff's claim, ruling that "It is immaterial in such a case whether the plaintiff relies on the breach of contract or on an action for money had and received."

Following an examination of the Netherlands court decision in *Frantzmann v. Ponijen* (1959), GOLD (Vol. 1 p. 118) states that:

"In other words, where a party's claim based on an 'exchange contract' is unenforceable because of Article VIII, section 2(b), he cannot succeed by reformulating the claim as one for damages or tort, or for the performance of a natural obligation, or for the restitution of an unjustified enrichment."

According to GOLD similar decisions have been reached in numerous cases. See the decisions cited in Gold, Vol. 2 pp. 23–24, 46; Vol. 3, pp. 90–92, 265, 272, 276, 282, 470–471; Vol. 4 pp. 181, 227. Compare them with the hasty dictum of the US-Iran Claims Tribunal in *Isaiah*: "In any event, exchange regulations are not relevant to a claim for unjust enrichment." *Supra* n. 39, at 239.

121 See the decisions cited *supra* n. 120.

122 See the decision in *Dallal*, *supra*, n. 29 and *infra* n. 152; also the decision in *Catz and Lips v. S.A. United Versicherung* (1949), GOLD, Vol. 1.

4.6 The Tribunal does not have jurisdiction over issues relating to exchange regulations

As adjudicative fora are required¹²³ under Article VIII, 2(b) IMF Agreement to respect the exchange regulations of member States, they do not have the competence to examine the validity of these exchange regulations. The competence to take up such issues has been vested in the Executive Board of the IMF, along with the authority to enforce certain limited sanctions. Article XXIX, s (a) of the IMF Agreement provides, *inter alia*:

“Any question of interpretation of the provisions of this Agreement arising between any member and the Fund, or between members, shall be submitted to the Executive Board ...”

The reason for conferring this exclusive competence in the IMF is both understandable and justified: if member States were to be dragged before the various courts and tribunals, especially commercial arbitral bodies, in connection with the imposition of exchange controls, the IMF's objectives and the policies pursued in the Bretton Woods Treaty would become the subject of an infinite number of possibly conflicting and possibly self-serving decisions—and indeed, the members' worst fears would be realized.

States have thus bound themselves, first, not to refer disputes over interpretation to any other authority than the Fund itself¹²⁴ and, second, that if an issue brought before the Executive Board is of such a nature that it might possibly affect a member of the Fund not entitled to appoint an Executive Director, such member shall be entitled to representation. Furthermore, with concern for the impact which decisions on currency and foreign exchange regulations may have on other members, Article XXIX, s (b) of the IMF Agreement allows any and all members to require, within three months from the date of the decision, that the issue be referred to the Board of Governors. The interpretation rendered by the Board of Governors shall be final and binding.¹²⁵

The effect of the Fund's decisions, and, for that matter, any decisions concerning exchange regulations upon (other) members of the IMF, and the

123 See *Dallal*, loc.cit. n. 29, pp. 14, 16; 3 *Tijdschrift voor Arbitrage* (1982) p. 76; GOLD, Vol. 4, p. 229.

124 See, GOLD Vol. 3, pp. 207–208.

125 MANN, “The Interpretation of the Constitution of International Financial Organizations,” 43 *BYIL* (1968–69); HORSEFIELD, op. cit. n. 30 pp. 267–273; US Federal Commission in *International bank for Reconstruction & Development & International Monetary Fund v. All American Cables & Radio, Inc.*, 17 F.C.C. 450 (1953) 22 ILR 705 (1958), discussed in GOLD, Vol. 1, pp. 20–27, 55–59.

objectives which States have intended the Fund to attain,¹²⁶ may explain why the member States were so careful and meticulous in drafting the IMF Agreement, so as not to surrender the fate of sensitive economic issues and matters relating to their national sovereignty and monetary and exchange policies into the hands of other fora, particularly arbitral bodies.¹²⁷ The states parties to the IMF Agreement have made it the duty and right of the Fund to render advice and carry out consultation. Thus, the Fund must, before taking any measures, undertake a lengthy process of consultation, discussion and advice, a duty and privilege quite outside the competence of municipal and international courts and arbitral fora.¹²⁸

If it had been intended that the Tribunal was to have such competence by way of exception, this would have to have been expressly vested by the states parties to the Algiers Declarations. Moreover, such express stipulation would—in view of its possible impact on the Fund's objective and members and the international monetary order—not have relieved the Tribunal of an obligation to refer issues and disputes relating to exchange regulations of IMF member countries to the IMF Executive Board.¹²⁹

In view of Article VIII, Section 2(b) of the IMF Agreement judicial fora are to seek the opinion of the Fund whenever they are confronted with the issue of (non-)conformity of exchange regulations with provisions of the IMF

126 Among those objectives that are reflected in Article I of the IMF Agreement and pursued by the members are the following: to promote international monetary cooperation through a permanent institution for consultation and cooperation; to facilitate the expansion and balanced growth of international trade and thereby to promote high levels of employment and real income through development of the productive resources of members; to stabilize the currency market; to establish a system of payments acceptable to the members; to build confidence among the members; and to prevent measures disequilibrating their balances of payment. Not only municipal courts of members, but *a fortiori*, arbitral fora, would be unable, no matter how dedicated they consider themselves to these objectives, to take the place of an institution in which all members have an active and direct participation.

127 In some extremely limited instances efforts have been made to separate arbitrable issues from disputes related to exchange contracts, but these efforts had to yield to non-arbitrability under Article VIII, s 2(b). See OTTO SANDROCK, *loc.cit.* n. 29.

128 See HORSEFIELD, *op. cit.* n. 30, Vol. 2 pp. 231–232.

129 The decision of the ICJ in *Rights of US Nationals in Morocco*, (ICJ Rep. 1952 p. 176) has been criticized on the grounds that the Court should have remitted the case to the Fund (see, *inter alia*, FAWCETT *loc.cit.* n. 47, p.60 et seq., especially p. 63). It has been said that, having held the act by the French Government to be discriminatory and in violation of the treaty between France and the United States, the World Court considered it unnecessary to pronounce on the exchange regulations issue and the Fund's competence. It is interesting to note that in that case the United States took the position that the regulations concerning the Fund's competence with respect to interpretation are mandatory, that the Fund enjoyed sole jurisdiction, and that the issue should have been referred to the Fund (GOLD Vol. 1 p. 47, and Vol. 4 p. 206; FAWCETT, *loc.cit.* at 70).

Agreement.^{130, 131} In other words, they should relinquish such issues to the Fund for decision.

It is noteworthy that although the United States, as one of the members of the IMF Agreement, has the right to seek an interpretation from the Fund, it has not to date availed itself of that right. This fact may confirm that it agrees that Iran's exchange regulations do conform to the IMF Agreement.¹³²

5. THE RIAL WAS THE MONEY OF ACCOUNT AND MONEY OF PAYMENT

By ordering payment in dollars from the funds in the rial accounts and by factually enforcing contracts inconsistent with Iran's exchange regulations, as well as by requiring the Iranian banks to transfer foreign currency abroad without the permission of Bank Markazi, the Award in *Stanwick* did not take into account international rules and principles governing "money".

This issue was discussed generally in paragraphs 39–40 of the Dissenting/Concurring Opinion filed with the Tribunal in *TME International Inc. and The Government of the Islamic Republic of Iran et al.* ("TME"), Award No. 473-357-1,¹³³ by the arbitrator who also dissented in *Stanwick*. It was pointed out in that opinion that, except where expressly provided in the contract, the currency specified in a contract not only determines the currency of account but also specifies that of payment, i.e., whether the obligation is one requiring discharge in local or foreign currency. Any increase or decrease in the value of the money of account at the time of payment is thereby deemed to be irrelevant.¹³⁴ Nor would change in the locus of payment change the currency of

130 Or, for that matter, in case of a dispute or uncertainty over distinguishing a current transaction from a transfer of capital. See Decision No. 446-4 (10 June 1949), *Selected Decisions*..., op. cit. n. 59 pp. 251–252; GOLD, loc.cit. n. 75 pp. 578–579.

131 In addition to the sources *supra* n. 129, see also *Dame Dong Thi To Tam et Autres v. Banque Française Commerciale*, Recueil Dalloz 1985 No. 43, pp. 500–501; GOLD, Vol. 4 pp. 206–209; Hamburg Landesgericht, 24 February 1978, cited in GOLD, Vol. 1 p. 85, Vol. 3, p. 272, Vol. 2 p. 291–292; BERNARD S. MEYER, loc. cit. n. 30.

132 Cf. GOLD, Vol. 3 p. 76; BERNARD S. MEYER, loc.cit. n. 30.

133 Dissenting/Concurring Opinion of ASSADOLLAH NOORI, 24 Iran-USCTR 162, pp. 107 *et seq.*

134 See MANN, pp. 199, 272–299, 304–307, 322, 339–343, 467; DICEY & MORRIS, op.cit. n. 106, ss 173, 176–178; NUSSBAUM, pp. 172–183; Article 1895 French Civil Code; and MAZEAUD, *Droit Civil*, Vol. 2 s 860.

In *Deutsche Bank Filiale Nurnberg v. Hamphreys* (1926) 272 US 517 at 519, the United States Supreme Court ruled:

"We may assume that when the bank failed to pay on demand, its liability was fixed at a certain number of marks both by the terms of the contracts and by the German law, but we may also assume that it was fixed in marks only, not at the extrinsic value that those marks had in commodities or in the currency of another country."

the obligation, which is the specified means of satisfying the debt.¹³⁵ The obligation is satisfied upon payment of the currency specified in the contract.¹³⁶

In *Stanwick*, the money of account and the money of payment were the same. Therefore, in view of the universally recognized principle of the nominal value of the currency ("nominalistic principle"), the banks in that case incurred an obligation to pay the holder of the accounts in rials.¹³⁷ According to most legal systems, payment in the currency of the obligation, by depositing the money in an account in the obligee's name, constitutes proper satisfaction of the obligation.¹³⁸ In the *Stanwick* case, the claimant's right was only in respect of the rials it had in its accounts, and those rials were at all times available to it. Accordingly, the Tribunal should not have ordered the banks to pay the claimant the equivalent, in dollars, of the rials out of the funds in the Security Account¹³⁹, thereby circumventing Iran's exchange regulations which governed the contract and the currency.¹⁴⁰

Where an obligor has undertaken to satisfy his obligation in local currency or in some specified currency, he cannot be assumed to have undertaken the risk of paying in any of the manifold currencies of many countries in the world

135 MANN, p. 274; and *Sternberg v. West Coast Life Insurance Co.*, 16 Cal. Rep. 546 (1961) p. 550. 136 Art. 275 of the Iranian Civil Code prescribes:

"The obligor shall not be required to submit anything other than what he has undertaken to provide, even if it has the same value as, or is less valuable than, the subject of the obligation."

137 See MANN, loc.cit. n. 134 (and pp. 539–541). According to NUSSBAUM, op.cit. n. 53, pp. 172–175, the nominalistic principle, i.e., dollar for dollar, franc for franc, etc. has become so deeply ingrained in the public conscience that the courts, especially the municipal courts, seldom find it necessary to pronounce on the principle in their decisions (p. 175). Relying on the ruling by the US Supreme Court in *Nortz v. United States* (1935) 294 US 317, 55 S. Ct. 428, 79 L. Ed 907, and the decision by the British courts in *The Baarn* (1933), pp. 251, 265 (C.A. 1933), and after examining the practice under French law, he arrives at the conclusion that the nominalistic principle is a rule which governs the discharge of obligations (pp. 180–183).

138 See MANN pp. 413–415 and the decisions invoked by that author, *inter alia*: *De Beeche v. South American Stores (Gatt & Chaves) Ltd*, (1935) A.C. 148, and *St Pierre v. South American Stores (Gatt & Chaves) Ltd* (1937) 3 All. E.R. 349. In both cases the court ruled that the plaintiff's only alternative was to appoint a representative in Chile to obtain the rents in the currency of the obligation, which the defendant had declared willing to pay. In his comparative study, the writer arrives at the conclusion that the courts of Germany, Canada, Great Britain, the United States, and certain other countries have followed the same pattern.

139 The Security Account provided for by Paragraph 7 of the General Declaration, *supra* n. 5.

140 See ASSADOLLAH NOORI's Opinion in *TME*, *supra* n. 133, paras. 39–40, and also the quotation from the Award in *Dallal*, *infra* n. 152.

Besides, a private claimant should not be allowed to alter the basis of the obligation and the subject thereof, by means of forum shopping. See *Siriev v. Godfrey* (1921) 196 App. Div. 529, 188 N.Y. Supp. 52; *Metcalf v. Mayer* (1925) 213 App. Div. 607, 211 N.Y. Supp. 53; *Buxhoeven v. George Frank (Textile Ltd.)* (1976) A.C. 443, 468, 469. In this regard, it does not matter whether the claim arises from contract or from tort. See MANN, pp. 339–347.

where he might eventually be sued.¹⁴¹ Nor would it be logical to assume that banks, in opening accounts, agree implicitly to pay the deposited funds in any currency the account holder desires. Such obligations could not arise except under the express provisions of a contract which would be binding only if not in violation of the law governing the contract and the currency.

Even if the banks were found to have been in breach of their contractual obligations towards Stanwick, such breach would not by itself be sufficient to convert their rial obligations into dollar-denominated obligations.¹⁴² According to a settled rule of law, the obligor can in fact choose whether to pay in the money of account or in its equivalent in the foreign currency requested.¹⁴³ If the obligor fails to discharge his obligation, or if he chooses to satisfy the debt by payment in the currency requested by the claimant or else in that of the court's venue, then the debt shall be converted at the rate of exchange in force as of the date of payment,¹⁴⁴ whether the actual obligation be in cash or a judgment debt for damages for breach of contract, or damages in tort.¹⁴⁵

Finally, no provision in either of the Algiers Declarations requires payment of dollars in satisfaction of rial-denominated obligations, much less at the rate prevailing at the date when the obligations arose.¹⁴⁶ Although the dollars in the Security Account are, pursuant to paragraph 7 of the General Declaration, "to be used for the sole purpose of securing the payment of, and paying, claims against Iran",¹⁴⁷ and although United States claimants would not be entitled to look to other fresh sources of money so long as the Security Account subsists, the provisions of paragraph 7 do not *ipso facto* change the Iranian respondents' obligations denominated in other countries, including rials, into dollar-denominated ones. Nothing would prevent Iranian respondents from fulfilling their obligations, if and as they wished, from other sources¹⁴⁸ or funds and in

141 MANN, p. 324, citing ATKIN, L.J.

142 MANN p. 76.

143 MANN pp. 310–317; DICEY & MORRIS, op.cit. n. 106, s 177; *Barclays International Ltd v. Levin Bros* (1977) Q.B. 27 at 277.

144 See CHESHIRE & NORTH, op.cit. n. 114 pp. 715–716 and the sources cited in ASSADOLLAH NOORI'S Opinion, loc. cit. n. 133 at nn. 33, 36.

145 MANN pp. 224, 341, 347–352; NUSSBAUM p. 304; MR. NOORI'S Opinion, loc.cit. n. 133 at n. 35.

As has been noted, damages for delayed payment on the principal amount of debt are compensated through calculation of interest in the actual currency of the account. See NUSSBAUM pp. 159, 184; MANN, p. 290; ASSADOLLAH NOORI'S Opinion, loc. cit. 133 at n. 33.

146 See, e.g., *McCullough and Company Inc. and The Ministry of Post, Telegram and Telephone, et al. (McCullough)*, Award No. 225-89-3 (para. 108), 11 Iran USCTR3; and *T.C.S.B., Inc. and The Islamic Republic of Iran ("T.C.S.B.")*, Award No. 114-140-2 (pp. 13–14), 5 Iran-USCTR 160, 168–169.

147 See *supra* n. 5.

148 See Awards on Agreed Terms in cases filed by *Flour Corporation* against certain Iranian respondents, Awards No. 433-333-1, 434-810-1 and 435-811-1, *Iranian Assets Litigation Reporter* (22 September 1989) p. 17814.

the contractually stipulated (French, German, British etc.) currency¹⁴⁹ or in any currency agreed between the Iranian respondent and the United States claimant for the purpose of satisfying the claim.

It would follow that, where the Iranian respondent refused to satisfy an obligation by payment in the contractually denominated currency,¹⁵⁰ the dollar funds in the Security Account should be used to pay or satisfy the debt or obligation by applying the rate of exchange prevailing at the time such monies were withdrawn from the Security Account.¹⁵¹ The Tribunal should not, by specifying the rate of exchange at the date the obligation arose, have disregarded Iran's valid exchange regulations merely because a Security Account denominated in dollars is foreseen by the Algiers Declarations.¹⁵²

6. CONCLUSION

In sum, the Award in *Stanwick* does not satisfy any of the well-established rules and principles of law, in particular the rules governing "money" in the national and international spheres and the provisions of the IMF Agreement. In finding the Iranian banks to be in breach of their statutory or contractual obligation, the Award is also inconsistent with the facts of that case and with Tribunal precedents established both prior to¹⁵³ and after¹⁵⁴ the Award in

149 It has been the Tribunal's practice in such circumstances that the judgment debt "be converted to US dollars . . . at the conversion rate then prevailing [at the date of withdrawal from the Security Account]" and paid to the United States Claimants. See, *inter alia*, *Rexnord Inc* and *The Islamic Republic of Iran et al*, Award No. 21-132-2, 2 Iran-USCTR 6 at 9, and the Award in T.C.S.B., loc. cit. n. 146 at 169.

150 See Dissenting/Concurring Opinion of ASSADOLLAH NOORI, loc.cit. n. 133, and n. 35 thereto, which reads:

"The compensation will be limited to the value of the undertaking plus interest from the moment the debt arose to the day of payment, if international law is not breached and the wrongful act consisted merely in not having paid . . . the just price. (See Chorzow Factory Case, PCIJ Series A, Vol. 3 N) 3 pp. 46-47 and para. 96 of *Amoco Int'l Finance Corporation and The Government of the Islamic Republic of Iran et al*, Award No. 310-56-3, reprinted in 15 Iran-USCTR p. 189 at 247.)"

151 See *McCullough*, loc. cit. n. 146; Dissenting/Concurring Opinion of ASSADOLLAH NOORI, *supra* n. 133 n. 34.

152 So "if the Tribunal were to permit the claimant to obtain payment for the cheques in United States dollars from that account, the Tribunal would in fact enforce the exchange contract. Such an award would in practice circumvent the currency regulations which, if valid, both Iran and the United States as well as all other member States of the IMF are obliged to respect. Strong reasons suggest that also international tribunals should respect the relevant provisions in the IMF Agreement." (*Dallal*, *supra* no. 29)

153 *Dallal*, *supra* n. 29; *Hood*, *supra* n. 28; *Grune and Stratton, Inc*, *supra* n. 27 (the latter award has been issued by the same composition of arbitrators in Chamber One who rendered the Award in *Stanwick*).

154 *Ali Asghar*, *supra* n. 25.

Stanwick. To this extent, the Award in *Stanwick* has little to offer by way of precedent.