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CUBAN REFUGEE INSUREDS AND THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND

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THE INTERNATIONAL MONETARY FUND

The International Monetary Fund, a specialized agency of the United Nations, is an intergovernmental organization whose members include one hundred two countries outside the Soviet bloc.[1] The Fund represents the applied thinking of those economic authorities who were concerned with preventing the financial turmoil of the period between World Wars I and II, particularly in the 1930's, from becoming a part of the post-World War II pattern of life. In large measure such financial turmoil had been the product of exchange restrictions, competitive devaluation, discriminatory currency arrangements, and multiple currency practices. Accordingly, at the Bretton Woods Conference in 1944 the International Monetary Fund was conceived of and designed to serve the member nations that would adhere to a code of international good behavior through agreed exchange rates and liberalized international payments. It was further contemplated that the resources of the Fund, made up of subscriptions by member nations, would be utilized to assist member nations experiencing international monetary difficulties.[2]

As an international organization the Fund evidences three fundamental departures from the characteristics of most other international bodies. In the first place, a system of weighted voting, which is based upon the subscriptions of the respective members to the Fund, has been adopted under article XII, section 5 of the Fund Agreement. Secondly, the Fund is authorized to exercise a measure of control under the Fund Agreement over matters that would ordinarily fall within the exclusive domestic jurisdiction of its members. Thirdly, the Fund is distinctive because of its tripartite functions: financial, consultative, and regulatory.[3] On the financial side, the Fund through

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1. INTERNATIONAL MONETARY FUND, ANN. REP. 8 (1964) [hereinafter cited as IMF].

2. IMF, INTRODUCTION TO THE FUND 1-2 (1964).

3. FLEMING, THE INTERNATIONAL MONETARY FUND, ITS FORM AND FUNCTIONS 3 (1964).

the subscriptions of its members, has both a pool of currencies and gold resources with which to provide foreign exchange to members who are experiencing balance of payments difficulties. The consultative functions of the Fund involve (1) annual consultations with article XIV members concerning the removal of restrictions on current (international) transactions, (2) consultations at the request of member governments concerning particular economic problems, (3) consulations with GATT on the balance of payments justification for trade restrictions, and (4) annual consultations, at the option of the member, with article VIII member countries.[4] The regulatory functions of the Fund are concerned with the supervision of exchange rate practices, the elimination of restrictions on current international payments, and the elimination of both multiple currency practices and discriminatory currency arrangements.[5]

The Articles of Agreement of the Fund, commonly known as its charter, became effective on December 27, 1945. The Articles delineate not only the Fund's powers and responsibilities but also the obligations and rights of countries that become members of the Fund. Each country by signing the Articles of Agreement becomes obligated to the other member nations to adhere to the code of international monetary conduct consistent with the provisions and purposes of the Fund Agreement. The key article concerning the obligations of members of the Fund is article VIII, which imposes definite restrictions upon the freedom of unilateral action of any member country. Under article VIII member countries are required to withhold judicial assistance if enforcement of a claim will result in the contravention of exchange control laws of a member country imposed *consistently* with the Fund Agreement.[6] This paper will deal with problems that have arisen under article VIII in connection with suits in courts by Cuban refugees for the cash surrender value of insurance policies issued to them in Cuba by American and Canadian insurance companies.

The cases discussed in this paper are concerned with two aspects of article VIII. First, whether certain Cuban laws raised as a defense by the insurers were maintained or imposed *consistently* with Cuba's obligations as a member country of the Fund. And second, whether the state and federal courts of the United States were bound by reason

4. IMF, INTRODUCTION TO THE FUND 5-7 (1964); FLEMING, *op. cit. supra* note 3, at 19.

5. FLEMING, *op. cit. supra* note 3, at 5.

6. Judicial authorities of a member are obligated not to assist a party to secure performance of an exchange contract that is contrary to another member's exchange control regulations where such regulations are maintained or imposed consistently with the Fund Agreement. IMF, SELECTED DECISIONS OF THE EXECUTIVE DIRECTORS 68 (2d issue 1963).

of the obligations of this country under article VIII of the Fund Agreement to refuse to enforce the claims of Cuban refugees under policies of life insurance.

On December 27, 1945, the United States enacted into law the provisions of the International Monetary Fund Agreement.[7] From that time until 1963, American courts seldom were called upon to interpret the Fund Agreement;[8] it was not until suits involving Cuban refugee insureds of American and Canadian insurers were commenced that wide areas of uncertainty became apparent. As a direct result of these suits it has become clear that the scope and effect of the provisions of the Fund Agreement must be reappraised, so that the courts may adequately deal with future litigation involving the Agreement.

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7. 59 Stat. 512, 22 U.S.C. §286 (1964).

8. During this period the courts reached the following conclusions regarding the Fund Agreement: fear that the Fund Agreement may not work satisfactorily does not justify refusal to recognize United States adherence to the Fund Agreement, Kolovrat v. Oregon, 366 U.S. 187 (1961); the fact that exchange control regulations of a member country may be contrary to public policy in the state where suit is brought does not justify refusal to enforce those exchange control regulations, Perutz v. Bohemian Discount Bank in Liquidation, 304 N.Y. 533, 110 N.E.2d 6 (1953); foreign exchange control regulations are not against public policy if they are used as a defense to the enforcement of a contract that was entered into and was to be performed in another country, *id.* at 537, 110 N.E.2d at 7; withdrawal from the Fund Agreement will no longer render a contract unenforceable that contravenes the former member's exchange control regulations, Stephen v. Zivnostenska Banka, 31 Misc. 2d 45, 140 N.Y.S.2d 323 (Sup. Ct. 1955); the facts in existence at the time performance is sought rather than at the time the contract was entered into determine whether an exchange contract is unenforceable under article VIII, §2(b) of the Fund Agreement, *id.* at 47, 140 N.Y.S.2d at 326; the Fund Agreement prohibits a local court from refusing to give effect to the exchange control laws of a member on the ground that such foreign laws provide only penal sanctions for violations, Southwestern Shipping Corp. v. First Nat'l City Bank of New York, 6 N.Y.2d 454, 160 N.E.2d 833, 190 N.Y.S.2d 352, *cert. denied*, 361 U.S. 895 (1959); the obligations of the Fund Agreement are between or among states not individuals so that there is no prohibition upon individuals from entering into exchange contracts that contravene the exchange control regulations of a member, Banco do Brasil, S.A. v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1963); the judicial obligation of rendering unenforceable contracts that contravene the exchange control regulations of a member country does not carry with it the right to impose tort liability on those persons who have executed such illegal contracts, *id.* at 376, 190 N.E.2d at 237, 239 N.Y.S.2d at 874; the Fund Agreement does not enable a member country to enforce a revenue law in another member country, *id.* at 377, 190 N.E.2d at 237, 239 N.Y.S.2d at 875; a claim to recover the value of funds and securities deposited in the bank of a member country contrary to the exchange control regulations of another member constitutes an attempted capital transfer and will be unenforceable when article VIII, §2(b) is invoked, Kraus v. Zivnostenska Banka, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup. Ct. 1946).

Cuba, as of December 18, 1953, became an article VIII member of the Fund.[9] By formally notifying the Fund of its assumption of the obligations of article VIII of the Fund Agreement, Cuba undertook that its currency was fully "convertible" and that its residents would be unrestricted in the use of the peso or foreign exchange needed for (international) payments.[10] By accepting the obligations of article VIII membership, Cuba agreed that it would not maintain or impose any form of restrictions on payments for current (international) transactions.[11] Cuba remained an article VIII member of the Fund until April 2, 1964, when that country formally notified the Fund of its withdrawal from membership.[12] Cuba's withdrawal from the Fund was occasioned by its failure to discharge its repurchase obligations to the Fund.[13] If Cuba had not withdrawn when it did from membership pursuant to article XV, section 1 of the Fund Agreement, it could have been compelled to withdraw under article XV, section 2. As a result of Cuba's withdrawal from membership in the Fund, all obligations that the United States owed to Cuba by reason of mutual membership in the Fund ceased. The cases and problems discussed in this article arose during the period of Cuba's membership in the International Monetary Fund, and the imposition, maintenance and application of certain exchange control laws and restrictions during Cuba's membership in the Fund have pointed up the need for clarification of the Fund Agreement. While the validity of these Cuban laws in relation to the Fund Agreement is a relatively moot question, as a result of Cuba's withdrawal from the Fund, nevertheless the problems raised by the Cuban exchange control laws in the Cuban insurance cases are very important and largely unresolved.

THE CUBAN REFUGEES

With the accession to power of the Castro government in Cuba there began a mass flight of Cubans to the United States. Many of the Cuban refugees owned policies of life insurance that had been issued to them by American and Canadian insurance companies. These companies did a substantial business in Cuba before Castro came to power. Since many of these refugee Cubans lacked any means of support when they arrived in the United States, some of them

9. IMF, TWELFTH ANN. REP. ON EXCHANGE RESTRICTIONS 93 (1961).
10. IMF, INTRODUCTION TO THE FUND 22 (1964).
11. GOLD, THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS 7-8 (1965).
12. IMF, Ann. Rep. 8 (1964).
13. *Id.* at 15.

made demands under the terms of their policies for their cash surrender value in United States dollars. Their demands were supported by the fact that in most instances their policies were issued for a face amount expressed in United States dollars rather than in Cuban pesos.

The problems that the Cuban refugees have encountered in suits to recover under their policies of life insurance have their source in the wanton, confiscatory, and arbitrary actions of the Castro government after it came to power in 1959 — actions that a 1962 Report of the International Commission of Jurists concluded were in violation of the Universal Declaration of Human Rights.[14] These refugee Cubans were completely deprived, for political reasons, of all rights to nationality and property. Most of these refugees, who were members of the Cuban middle class, were, for all intents and purposes, categorized by the Castro government as "counter-revolutionaries" or traitors. Their initial problems were then compounded by the fact that all of the Cuban assets of the American life insurance companies had been confiscated by the Castro government; the Canadian life insurance companies were fearful that if they made payments to former Cuban nationals outside of Cuba, their Cuban assets would also be confiscated. Thus, at the outset, the Cuban insureds were met with the refusal of the American insurers to make payment on the ground that the insurers' Cuban assets had been confiscated and with the refusal of the Canadian insurers to make payment under a policy anywhere but in Cuba.

The Problems Raised by the Cuban Refugees' Suits

The problems with which this paper is concerned are directly related to the question whether article VIII, section 2 of the Articles of Agreement of the International Monetary Fund operates to render unenforceable the claims of Cuban refugees for the cash surrender values of life insurance or annuity policies in suits in the American courts. Article VIII, section 2 (a) provides that "no member shall . . . impose restrictions on the making of payments and transfers for current international transactions." These Cuban refugee suits raise two problems under article VIII, section 2 (a) of the Fund Agreement: (1) whether payment of the cash surrender values of the life insurance or annuity policies would constitute a "current international transaction" or would constitute payments in the nature of capital transfers and (2) if payment is considered a "current international transaction," whether the Cuban exchange control laws and regulations, raised as a defense by the American and Canadian

14. INTERNATIONAL COMMISSION OF JURISTS, CUBA AND THE RULE OF LAW 96, 112-13 (1962).

insurers, were "restrictions" on payments and transfers for "current international transactions," contrary to the provisions of article VIII, section 2 (a).

Resolution of the two problems posed by article VIII, section 2 (a) is a necessary element in a determination of the enforceability of the insurance claims in the American courts under article VIII, section 2 (b) of the Fund Agreement. Article VIII 2 (b) provides in part that:

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

Section 2 (b) of article VIII sets up four tests for determining whether or not a contractual claim will be unenforceable in the courts of a member country. In the instant cases the tests or problems posed by section 2 (b) are (1) whether insurance or annuity contracts owned by the Cuban refugees were "exchange contracts"; (2) whether, if the insurance or annuity contracts were "exchange contracts," such contracts involved the Cuban currency; (3) whether the insurance or annuity contracts owned by the Cuban refugees in any way contravened existing Cuban exchange control regulations; and (4) whether the Cuban exchange control laws and regulations, which were raised as a defense by the insurers, had been imposed *consistently* with Cuba's obligations as an article VIII member of the Fund.

Once issue was joined, the Cuban insureds were met with the exceedingly burdensome problem posed by application of the act of state doctrine, particularly as most recently enunciated by the United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino*,[15] and by the possible applicability of the Fund Agreement so as to render their claims unenforceable in the United States courts.

The Cuban Currency Laws and Exchange Control Regulations

Pre-Castro Regulations

Cuban Law 13 of December 23, 1948, provided that one year after the Banco Nacional de Cuba had commenced operations United States currency would cease to be legal tender and to have debt-redeeming force in Cuba. Decree 1384 of April 19, 1951, provided that after June 30, 1951, obligations were to be discharged in Cuban currency, regardless of contractual provisions for payment in United

15. 376 U.S. 398 (1964).

States dollars and all contracts payable to or by Cuban nationals were required to be paid in Cuba. This law and decree imposed no exchange restrictions.

On December 18, 1953, Cuba notified the International Monetary Fund that it *assumed fully* the obligations of article VIII, sections 2, 3, and 4 of the Fund Agreement.[16] The only restrictions that Cuba, even as late as 1961, held itself out as having, were: (1) a 2 per cent exchange tax on withdrawals from nonresident accounts if the funds were sent or used abroad or were made payable in a foreign currency;[17] (2) the necessity for the prior approval of the Cuban Monetary Stabilization Fund with respect to payments of more than one hundred dollars in United States money per month for any purpose, including payments for royalties, insurance, transportation, interest, dividends, profits, commissions, and alimony as well as with respect to the granting of exchange for personal remittances and for capital transfers;[18] and (3) the requirement that personal remittances exceeding one thousand dollars be made only by bank transfer.[19]

Cuba, after it had accepted the obligations of article VIII membership in the Fund, was one of the few Latin American countries having virtually no exchange restrictions.[20] It freely allowed dollar remittances to be made to at least one country, since its payments agreement with Spain provided for the financing of transactions between the two countries through a dollar account.[21] Thus, before the Castro government came to power in 1959, the 2 per cent tax on foreign exchange remittances to other countries, including the United States, appears to have been the only practiced form of exchange control other than the regulation of capital transfers.[22] The executive directors of the International Monetary Fund have expressly stated that the Fund had approved Cuba's maintenance of the 2 per cent exchange tax on foreign remittances, but that any other existing Cuban restrictions on "current transactions" or discriminatory currency arrangements did not have the Fund's approval.[23]

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16. IMF, TWELFTH ANN. REP. ON EXCHANGE RESTRICTIONS 93 (1961).
17. *Ibid.*
18. *Id.* at 94-95.
19. *Ibid.*
20. MIKESELL, FOREIGN EXCHANGE IN THE POSTWAR WORLD 305 (1954). See IMF, TENTH ANN. REP. ON EXCHANGE RESTRICTIONS 352 (1959).
21. MIKESELL, *op. cit. supra* note 20, at 305, n.1.
22. See Gonzales v. Industrial Bank (of Cuba), 33 Misc. 2d 285, 227 N.Y.S.2d 459 (1959), *aff'd*, 12 N.Y.2d 33, 186 N.E.2d 410, 234 N.Y.S.2d 210 (1962).
23. See Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 224-25 (S.D. Fla. 1963).

Castro Regulations

Law 568 was enacted by the Castro government on October 2, 1959. This law placed foreign exchange transactions, including the arrangement of financing abroad, under very strict control. Foreign corporations doing business in Cuba were prohibited from making payments to Cuban nationals or crediting their accounts with any sums payable to them except in Cuba without the express authorization of the National Bank of Cuba.[24] In addition, the Cuban bank accounts of foreign residents were frozen. Article I (6) of the law absolutely prohibited the transfer of funds, securities or currencies to points abroad without the authorization of the Cuban Currency Stabilization Fund. Article I (10) prohibited the crediting to foreign bank accounts or the transfer to third parties of amounts collected abroad that resulted from business transactions or services rendered in Cuba, regardless of the source or origin of the funds. The imposition of the controls and restrictions provided by Cuban Law 568 raises serious doubts that the law was imposed and maintained consistently with Cuba's obligations as an article VIII member under the Fund Agreement.[25]

On July 6, 1960, the Castro government adopted Law 851 in retaliation for the reduction of Cuba's sugar quota by the United States. Under this law the President and the Prime Minister were empowered to order the expropriation of American-owned properties in Cuba. Law 851 then provided for compensation in the form of Cuban government bonds maturing in not less than thirty years and bearing interest at 2 per cent per annum. The proposed bonds were tied, however, to future American sugar purchases from Cuba and, accordingly, constituted a mere gesture, lacking in good faith. Among those companies subsequently expropriated under Law 851 and Resolution 3 of October 24, 1960, were all the American insurance companies having branches in Cuba. Law 851 provided for limited assumption of the liabilities of an expropriated business when such liabilities were payable in Cuba, in Cuban currency, and to Cuban creditors.[26]

Law 930 of February 23, 1961, provided for the regulation of the issuance of Cuban currency by the Banco Nacional de Cuba, a govern-

24. Allison, *Cuba's Seizure of American Business*, 47 A.B.A.J. 48 (1961).

25. It is apparent that Law 568 conflicts with one of the basic purposes of the International Monetary Fund under article I (iv), which is: "To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade."

26. See Allison, *supra* note 24, at 49-50. For text of law see 55 AM. J. INT'L L. 822 (1961).

ment agency. It further provided that Cuban pesos were to constitute the sole legal tender and were to be accepted in payment of any obligation payable in Cuba. It also required that obligations which by agreement were made payable in any other currency were to be settled and paid in Cuban pesos. Under this law complete control over transactions involving foreign exchange was vested in the Banco Nacional de Cuba.[27]

THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND

In some eleven suits brought by Cuban refugees in both federal and state courts, the Canadian and American insurance companies sought to set up the Articles of Agreement of the International Monetary Fund either as a bar to recovery by the insured or as an excuse for nonperformance.[28]

Never before in a series of cases has the potential effect, both legal and economic, of the Fund Agreement on the rights of individuals and private corporations been more clearly brought into focus than

27. IMF, THIRTEENTH ANN. REP. ON EXCHANGE RESTRICTIONS 89-91 (1962).

28. The provisions of the Fund Agreement were raised on appeal to the United States Court of Appeals for the Fifth Circuit in Pan American Life Ins. Co. v. Blanco, 311 F.2d 424 (5th Cir. 1962); on rehearing in the consolidated cases of Menendez Rodriguez v. Pan American Life Ins. Co. and Vento Jaime v. Pan American Life Ins. Co., 311 F.2d 429 (5th Cir. 1962), *petition for rehearing denied*, 311 F.2d 437 (5th Cir. 1962), vacated and remanded to the Fifth Circuit for consideration in light of *Sabbatino*, in 376 U.S. 779 (1964); and on rehearing in Menendez v. Aetna Ins. Co., 311 F.2d 437 (5th Cir. 1962), which was also vacated in light of *Sabbatino*, in 376 U.S. 781 (1964). On remand of *Blanco* to the United States District Court for the Southern District of Florida, the applicability of article VIII, §2(b) of the Fund Agreement was considered in the consolidated cases of Blanco v. Pan American Life Ins. Co., Conill v. Pan American Life Ins. Co., Lorido y Diego v. American Nat'l Ins. Co., and Zabaleta v. Pan American Life Ins. Co., 221 F. Supp. 219 (S.D. Fla. 1963).

In the Florida and Louisiana courts the insurers contended that article VIII, §2(b) absolved them from their duties of performance under their policies in Sun Life Assur. Co. of Canada v. Klawans, 137 So. 2d 230 (3d D.C.A. Fla. 1962), *aff'd in part, rev'd in part*, 162 So. 2d 702 (3d D.C.A. Fla. 1963), *quashed and remanded*, 165 So. 2d 166 (Fla. 1964), *rev'd and remanded with directions to dismiss*, 162 So. 2d 704 (3d D.C.A. Fla. 1964); in Confederation Life Ass'n v. Ugalde, 151 So. 2d 315 (3d D.C.A. Fla. 1963), *rev'd and remanded*, 164 So. 2d 1 (Fla. 1964), *cert. denied*, 379 U.S. 915 (1964); in Crown Life Ins. Co. v. Calvo, 151 So. 2d 687 (3d D.C.A. Fla. 1963), *judgment quashed*, 164 So. 2d 813 (Fla. 1964), *rev'd and remanded with directions to dismiss*, 163 So. 2d 345 (3d D.C.A. Fla. 1964), *cert. denied*, 379 U.S. 915 (1964); in Pan American Life Ins. Co. v. Raij, 156 So. 2d 785 (3d D.C.A. Fla. 1963), *writ quashed*, 164 So. 2d 204 (Fla. 1964), *cert. denied*, 379 U.S. 920 (1964); Theye y Ajuria v. Pan American Life Ins. Co., 154 So. 2d 450 (La. App. 1963), *rev'd*, 245 La. 755, 161 So. 2d 70 (1964), *cert. denied*, 377 U.S. 997 (1964).

in the suits brought by Cuban refugees seeking to recover the cash surrender value of their policies of life insurance in this country.

The Key Articles

Article VI of the Fund Agreement permits members of the Fund to regulate capital transfers. Section 3 thereof provides:

> Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3 (b), and in Article XIV, Section 2.

Thus, in effect, member countries of the International Monetary Fund are given freedom to regulate movements of capital, but they are restricted from prohibiting payments for current transactions unless they are availing themselves of the transitional arrangements of article XIV and have not assumed the obligations of article VIII, or unless the Fund has declared that a particular currency is scarce pursuant to article VII, section 3 (b).

Article VIII sets forth general obligations of members and expressly provides for the avoidance of restrictions on current payments under subsection (a) of section 2 of that article:

> SEC. 2 *Avoidance of restrictions on current payments* —
> (a) Subject to the provisions of Article VII, Section 3 (b), and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

Subsection (b) of section 2 of article VIII is the most far-reaching of the provisions of the Fund Agreement and calls for deliberate waiver by members of certain matters ordinarily within their domestic jurisdiction. Subsection (b) specifically requires member countries to give extra-territorial effect to the exchange control regulations of other members and to refrain from domestic action contrary to such exchange control regulations. It also requires the denial of judicial relief in actions founded upon exchange contracts which contravene the exchange control regulations of another member imposed *consistently* with the Fund Agreement.[29] Subsection (b) of section 2 of article VIII provides:

29. IMF, ANN. REP. app. XIV, 82-83 (1949); see also GOLD, THE FUND AGREEMENT IN THE COURTS 115-16 (1962).

(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territory of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Article XIV, section 2 of the Fund Agreement permits members of the Fund to maintain restrictions on payments and transfers for "current international transactions" during the post-World War II transitional period. It is provided, however, that members utilizing the transitional arrangements of article XIV "shall withdraw restrictions maintained or imposed under this section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly hamper their access to the resources of the Fund." Section 3 of article XIV provides that a member which has availed itself of the transitional arrangements of article XIV "shall notify the Fund as soon thereafter as it is prepared to accept" the obligations of article VIII, sections 2, 3, and 4. Section 4, article VIII empowers the Fund to notify a member that conditions are favorable for the withdrawal by the member of restrictions and for the assumption by the member of article VIII status and duties.

Article XVIII of the Fund Agreement provides in subsection (a) that any question of interpretation of the provisions of the Fund Agreement arising "between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision."

Article XIX contains a definition of certain of the terms which are used in other articles of the Fund Agreement. Subsection (i) makes it clear that the term "current transactions" includes:

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

(2) payments due as interest on loans and as net income from other investments;

(3) moderate payments for amortization of loans and for depreciation of direct investments;

(4) moderate remittances for family living expenses.

The Fund's 1964 Annual Report notes that there are twenty-four countries, representing over 60 per cent of world trade, which have accepted the full obligations of article VIII of the Fund Agreement.[30] This leaves seventy-eight countries which, having become members of the Fund, still cling to the transitional arrangements provided for under article XIV of the Fund Agreement. Thus, there are twenty-four countries today that have accepted the basic rule laid down by article VIII that member countries are bound to adopt a free and nondiscriminatory system of payments for current transactions and to provide for the convertibility of the proceeds of current transactions into other currencies at official rates approved by the Fund.[31] Cuba, which became an article VIII country in 1953, was one of the earliest countries to assume the obligations of article VIII membership. As noted earlier, however, the failure of the Cuban government under Castro to abide by its commitments to the Fund led to Cuba's withdrawal as a member of the Fund on April 2, 1964.

All the Articles of Agreement of the Fund are to be viewed in the light of article I of the Fund Agreement which sets forth the following express purposes for which the Fund was created: (1) the promotion of international monetary cooperation; (2) the facilitation of the expansion and balanced growth of international trade; (3) the promotion of exchange stability, the maintenance of orderly exchange arrangements among members and the avoidance of competitive exchange depreciation; and (4) the rendition of assistance "in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade."

In determining the full applicability of article VIII, section 2 of the International Monetary Fund Agreement, it is clear that there is a wide area of uncertainty as to the full effect and scope of the provisions of article VIII, section 2 (a) and 2 (b), particularly in view of the paucity of interpretation attributable, in part, to the relative newness of the Fund Agreement. This uncertainty is unquestionably highlighted by the cases involving Cuban refugee insureds. One factor, however, appears clear in regard to article VIII, section 2 – the recognition of exchange controls called for by the Fund Agreement is conditioned on the *consistency* of such controls with the Fund Agreement, and recognition of a member country's exchange controls should be refused when they are not imposed consistently with the Fund Agreement.[32]

30. IMF, ANN. REP. 8-9 (1964).

31. See GOLD, ANNUAL PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 188 (1960).

32. See GOLD, *op. cit. supra* note 11, at 23; see also Kolovrat v. Oregon, 366 U.S. 187 (1961) (dictum).

During the time when a member country of the International Monetary Fund operates under the transitional arrangements of article XIV of the Fund Agreement, that country has considerable latitude to adopt and to maintain exchange restrictions on payments and transfers for "current international transactions." However, once a member country has declared its acceptance of the obligations of article VIII, sections 2, 3, and 4 of the Fund Agreement it agrees to surrender any latitude it formerly had in this regard and becomes subject to the required approval of the Fund before it may retain, introduce, or adopt any restrictions on payments for current (international) transactions.[33] In effect, when a country accepts the obligations of article VIII, it is holding itself out as ready, willing, and able to promote the objects of the Fund, to obligate itself to permit the remittance of payments in connection with foreign trade, to eliminate discriminatory currency practices, and to create and maintain an atmosphere conducive to international trade.[34]

By accepting the obligations of article VIII membership in the Fund, including the express obligation to do away with all forms of restrictions on payments for current transactions, the scope of the power of the member country to apply and adopt controls even with respect to capital transfers is thereafter reduced. This follows from the fact that article XIX, subsection (i), which defines current transactions, makes it clear that certain transactions, which economists would regard as capital transactions, are to be treated as current transactions.[35] Thus, article XIX (i) specifies that the term "current transactions" shall be deemed to include payments of moderate amounts "for the depreciation of direct investments" and "for the amortization of loans." Article XIX (i) further provides that the power of the Fund to define current transactions shall be "without limitation."

Accordingly, acceptance of article VIII membership status in the Fund subjects a member to an obligation to adhere to a code of conduct consistent in all respects with the purposes of the Fund. This means that once article VIII status is assumed a member country may not maintain or impose any restrictions on payments for current international transactions without following the prescribed procedure for securing Fund approval.[36] Should any restrictions on payments

33. IMF art. VI, §3 and art. VIII, §2(a) (1944).

34. IMF art. I, §§ii, iv, vi (1944).

35. GOLD, *op. cit. supra* note 31, at 188; GOLD, *op. cit. supra* note 11, at 12-13; IMF, *op. cit. supra* note 2, at 22.

36. The applicable procedure, set forth in §H-4 of the Rules and Regulations of the Fund, is as follows: "All requests by a member under Article VIII, Sections 2 and 3, that the Fund approve the imposition of restrictions on the making of payments and transfers for current international transactions, or the use of dis-

for current transactions be imposed by the article VIII member without the prior approval of the Fund, such restrictions would clearly not meet the test of "consistency," laid down under article VIII, section 2 (b),[37] and should not be entitled to recognition by other member countries.[38]

Article VIII, section 2 (b) provides in part that:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed *consistently* with this Agreement shall be unenforceable in the territories of any member. . . . (Emphasis added.)

The tests, which the courts of a member nation are bound to apply in determining whether the contract in question is unenforceable, are spelled out in this section. The tests are:

(1) Is the contract an exchange contract?

(2) Does the contract involve the currency of a member country?

(3) Are the provisions of the contract contrary to the exchange control regulations of that country?

(4) Are the exchange control regulations of that country maintained consistently with the Fund Agreement?

If the answer to these four tests is in the affirmative, the contract should be rendered unenforceable.

Suits by Cuban Refugees Against Canadian Insurers Doing Business in Florida

In a number of instances former Cuban nationals, who fled Cuba after Castro came to power and who had taken up residence in Florida,

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criminatory currency arrangements or multiple currency practices, shall be submitted to the Executive Board in writing, with a statement of the reasons for making the request." IMF, By-Laws, Rules and Regulations 26 (22d issue, 1962).

37. Article VIII, §2 (b) places *strong* importance on the *consistency* of the exchange regulations with the Articles of Agreement. Thus, IMF art. VIII, §2 (b) states: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member *maintained or imposed consistently with this Agreement* shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, *provided that such measures and regulations are consistent with this Agreement.*" (Emphasis added.)

38. Article VI, §3 and article VIII, §2 (b) would make it clear that member countries are not obliged to recognize exchange control regulations that have not been imposed *consistently* with the Fund Agreement.

have brought suit in the Florida courts for the cash surrender value of policies of life insurance that had been issued by Canadian life insurance companies. In every case the Canadian insurance company issued the policy in question to the Cuban national in Cuba and, in each instance, the policy was issued and delivered in accordance with then existing Cuban laws. In each instance the policy provided for the payment of premiums in United States dollars at Havana, Cuba. In every instance the application for the policy was made in Cuba and was accepted at the head office of the insurer in Canada, where the policy was issued.

Service was effected upon the Canadian insurers by the medium of service upon the Florida Insurance Commissioner, pursuant to a Florida statute that required foreign insurers to appoint the Florida Insurance Commissioner as their agent for service of process before they could qualify to do business in Florida.[39] In addition, under a Florida statute, similar to statutes found in most states, each of the Canadian insurers was required to maintain in Florida statutory deposits in the amount of 300,000 dollars for the protection of the foreign insurer's policyholders and creditors.[40]

In the defense of the suits brought against them, the Canadian insurers contended that the exchange control laws of Cuba prevented payment by them of the cash surrender values of the policies in the United States.[41] In *Confederation Life Association v. Ugalde*,[42] in *Sun Life Assurance Co. of Canada v. Klawans*[43] and in *Crown Life Insurance Co. v. Calvo*[44] the Canadian insurers placed great reliance upon article VIII, section 2 (b) of the Fund Agreement and contended that enforcement of the judgments of the circuit court would wrongfully deprive them of treaty rights and immunities since the United States, Canada, and Cuba were members of the Fund and since the United States had enacted into law the provisions of the Fund Agree-

39. FLA. STAT. §624.0221 (1963).

40. FLA. STAT. §624.0211 (3) (1963).

41. Confederation Life Ass'n v. Ugalde, 151 So. 2d 315 (3d D.C.A. Fla. 1963), *rev'd and remanded*, 164 So. 2d 1 (Fla. 1964), *cert. denied*, 379 U.S. 915 (1964). Crown Life Ins. Co. v. Calvo, 151 So. 2d 687 (3d D.C.A. Fla. 1963), *opinion and judgment quashed*, 164 So. 2d 813 (Fla. 1964), *rev'd and remanded with directions to dismiss*, 163 So. 2d 345 (3d D.C.A. Fla. 1964), *cert. denied*, 379 U.S. 920 (1964); Crown Life Ins. Co. v. Luzarraga y Garay, 141 So. 2d 633 (3d D.C.A. 1962), *cert. denied*, 143 So. 2d 492 (Fla. 1962); Trujillo v. Sun. Life Assur. Co. of Canada, 166 So. 2d 473 (3d D.C.A. Fla. 1964); Sun Life Assur. Co. of Canada v. Klawans, 137 So. 2d 230 (3d D.C.A. Fla. 1962), *aff'd in part, rev'd in part on rehearing*, 162 So. 2d 703 (3d D.C.A. Fla. 1963), *quashed and remanded*, 165 So. 2d 166 (Fla. 1964), *rev'd and remanded with directions to dismiss*, 162 So. 2d 704 (3d D.C.A. Fla. 1964).

42. *Ibid.*

43. *Ibid.*

44. *Ibid.*

ment. The insurers contended that enforcement of the insurance contracts of the Cuban refugees would involve the United States in a violation of its international obligations under an international treaty; that under the Articles of Agreement of the International Monetary Fund the insurers had the right to rely on the Cuban exchange laws; that enforcement of the insurance contracts would result in assisting Cuban nationals to circumvent, and require Canadian nationals to violate Cuban law, thereby jeopardizing the Canadian nationals' business and property in Cuba.[45] The insurers alleged that article VIII, section 2 (b) of the Fund Agreement was controlling because the insurance policies were exchange contracts within the meaning of section 2 (b) and that the Cuban exchange control regulations applicable to the cases had been imposed consistently with the Fund Agreement.[46]

They also argued that the collection of dollars outside of Cuba on insurance contracts payable in Cuba would constitute typical international capital movements. In support of their contentions in this regard, the insurers, apparently having in mind both article VIII, section 2 (a) and article VI, section 3 of the Fund Agreement, argued that payment of the cash surrender values of the policies would constitute capital transfers or movements rather than payments in respect of current transactions.[47] Thus, the insurers argued that payments of the cash surrender values of the policies bore a direct analogy to the withdrawal of a savings deposit from one country to another and that such payments were equally capital movements.[48] It was argued by the insurers that Cuban Law 568, providing controls with respect to the transfer abroad of foreign exchange, had been specifically sanctioned by article VI, section 3 and by article VIII, section 2 (b) of the Articles of Agreement of the Fund.[49]

The arguments of the insurers concerning the applicability of the Cuban exchange control laws and of article VIII, section 2 (b) of the Fund Agreement were completely disregarded by the Third District Court of Appeal of Florida in *Ugalde, Klawans* and *Calvo.* In *Ugalde*

45. Reply Brief for Insurer, pp. 16-17, Sun Life Assur. Co. of Canada v. Klawans, 165 So. 2d 166 (Fla. 1964); Brief for Insurer, pp. 25, 33, Confederation Life Ass'n v. Ugalde, 164 So. 2d 1 (Fla. 1964); Brief for Insurer, p. 30, Crown Life Ins. Co. v. Calvo, 164 So. 2d 813 (Fla. 1964).

46. Reply Brief for Insurer, Sun Life Assur. Co. of Canada v. Klawans, *supra* note 45; Brief for Insurer, p. 28, Confederation Life Ass'n v. Ugalde, *supra* note 45; Brief for Insurer, p. 29, Crown Life Ins. Co. v. Calvo, *supra* note 45.

47. *Ibid.*

48. *Ibid.*

49. The insurers' contention that Cuban Law 568 had been specifically approved under article VI, §3 and article VIII, §2 (b) of the Fund Agreement is completely without foundation since the Fund had only approved the Cuban 2% tax on foreign exchange remittances.

the majority opinion of the district court was confined to the right of Cuba to enact domestic laws affecting currency and exchange and completely by-passed the extra-territorial effect of such laws or the effect of these laws in the United States under the Fund Agreement. Only in the separate opinion of Judge Horton were certain observations raised that were germane to the issues raised concerning the applicability of article VIII, section 2 (b) of the Fund Agreement. Judge Horton made it clear that in his view the Cuban exchange control laws (that is, Law 13 of 1948, Law 568 of 1959, and Law 930 of 1961) were not designed in any way to have an extra-territorial effect.[50] Judge Horton further observed that the defendant, Confederation Life Association, was a foreign corporation authorized to do business in Florida and that it was required to maintain as trust deposits in Florida a minimum of 300,000 dollars to be held "for the protection of the insurer's policyholders and creditors in the United States."[51] Based on this deposit and other assets of the insurer located in the United States, he found no possibility of a contravention of any Cuban exchange control regulations, as alleged by the insurer, since, in his view, payment could be made without involving the currency of Cuba or the Cuban assets of the insurer.[52]

In *Ugalde* the insurer filed a petition for rehearing with the district court in which the insurer alleged that that court's earlier opinion had entirely overlooked the Fund Agreement and the fact that Cuban Law 568 was a currency control regulation that the United States was bound to observe. The insurer urged that "Cuban

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50. Thus, in Confederation Life Ass'n v. Ugalde, 151 So. 2d 315, 324 (3d D.C.A. Fla. 1963), Judge Horton observed: "Even assuming arguendo that the agreement to pay cash surrender value should be governed by the laws of Cuba, the appellees would be entitled to payment in United States dollars. The Cuban laws or decrees upon which the appellant relies do not require a different result.

"The 1948 law simply displaced United States dollars as legal tender currency for the redemption of debts *in the territory of Cuba.* The Acts of 1959 and 1961 simply granted power to the Banco Nacional de Cuba to regulate the issuance of currency and established that 'the coins and bills issued by the Banco Nacional de Cuba shall be the only ones of legal tender and shall be admitted *in payment of any obligation payable in the Republic.* When they have been or are agreed upon in another currency, they shall be settled and paid necessarily in currency of legal tender.' These acts only prohibit *the export of currency or securities or the transfer of funds to points abroad and do not attempt by their scope, inference, or implication, to affect funds which may have already been located abroad or possessed by nationals in other states.*" (Emphasis added by the court.)

51. FLA. STAT. §624.0211 (3) (1963).

52. Confederation Life Ass'n v. Ugalde, 151 So. 2d 315, 324 (3d D.C.A. Fla. 1963) (Horton, J., concurring): "the appellant has funds in Florida and the United States which it could use to discharge its obligation to the appellee and would not be forced to violate the laws and decrees of Cuba by exporting currency or transporting funds from Cuba to the United States."

currency control regulations applicable to the contract of insurance upon which suit had been brought positively prohibited any payment whatsoever outside of Cuba, and that such currency control regulations were entirely consistent with, and protected by, the International Monetary Fund Agreement."[53] Confederation Life further contended that the effect of the court's decision was the conversion of a peso contract into an exchange contract, which would have a direct effect on the currency of Cuba.[54] Thus, the insurer on appeal and in its petition for rehearing raised all four of the tests that the courts should apply in determining the applicability of the Fund Agreement. In spite of this, the district court refused to consider the possible applicability of the Fund Agreement since rehearing was summarily denied by the court.

The Florida Supreme Court subsequently reversed the decision of the district court, first in *Ugalde* and subsequently in *Klawans* and *Calvo* (based on its decision in *Ugalde*) and remanded the causes to the circuit court with directions to dismiss the insureds' complaints.[55] The Florida Supreme Court held that the policy in *Ugalde* was governed by Cuban Law 13 of 1948 and Decree 1384 of 1951 and that the Florida courts were obligated under the International Monetary Fund Agreement to apply the said Cuban law and decree to this insurance contract.[56] Fundamental to the court's decision was its finding that the insurance contract was a Cuban contract payable in Cuban currency in Cuba and that the Canadian insurer had offered to make payment of the cash surrender value in Havana.[57]

Appeals from the decisions in *Ugalde* and in *Calvo* were taken by the insureds to the United States Supreme Court. The issue presented to the Supreme Court was whether a Canadian insurer, which had offered to pay the cash surrender value of a policy in Havana, Cuba in pesos, was protected by Cuban Decree 1384 and the Articles of Agreement of the International Monetary Fund from suit on the policy in the United States.[58] The Supreme Court denied certiorari in both cases.[59]

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53. Brief for Appellant on Petition for Rehearing, p. 5, Confederation Life Ass'n v. Ugalde, 151 So. 2d 315 (3d D.C.A. Fla. 1963).

54. *Id.* at 5-6.

55. Cases cited note 41 *supra.*

56. Confederation Life Ass'n v. Ugalde, 164 So. 2d 1, 2 (Fla. 1964).

57. *Ibid.*

58. Confederation Life Ass'n v. Ugalde, 33 U.S.L. WEEK 3144 (U.S. Oct. 20, 1964).

59. Crown Life Ins. Co. v. Calvo, 379 U.S. 915 (1964); Confederation Life Ass'n v. Ugalde, 379 U.S. 915 (1964).

CASES INVOLVING AMERICAN INSURANCE COMPANIES

In *Pan American Life Insurance Co. v. Blanco*,[60] the Fifth Circuit Court of Appeals had before it an interlocutory appeal by the insurer from an order of the United States District Court for the Southern District of Florida striking certain paragraphs of the insurer's answer wherein the insurer had alleged that it had been relieved of all obligations under three annuity policies by reason of Cuban Law 13 of 1948, Decree 1384 of 1951, Law 568 of 1959, and Law 851 of 1960. The district court certified to the Fifth Circuit the question whether the seizure by the Cuban government of all the assets of Pan American had relieved it of its obligations under the policies.[61]

The insured urged that there were two controlling questions presented: (1) whether Cuban Law 568 of September 29, 1959, terminated the right of the Blancos, as Cuban nationals, to enforce Pan American's policy obligations to pay in dollars in New Orleans, Louisiana; and (2) whether the expropriation Resolution 3 of October 24, 1960, "substituting the Cuban Government as the obligor upon the insurance company's policies outstanding in Cuba" made Pan American's policy obligations unenforceable against it?[62]

With respect to the first question raised by the insurer, the Fifth Circuit Court of Appeals noted that the insurer argued that Law 568 of 1959 was consistent with the Fund Agreement and that the annuity policies in question were exchange contracts that were subject to the Cuban exchange control regulations.[63] The Fifth Circuit Court of Appeals was of the opinion that Law 13 of 1948 did not require that all obligations due Cuban nationals be payable solely in pesos unless the obligation were actually paid in Cuba. The court was further of the opinion that Law 568 of 1959 was directed solely to Cuban residents rather than to the foreign payor of an obligation.[64]

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60. 311 F.2d 424 (5th Cir. 1962), on remand, 221 F. Supp. 219 (S.D. Fla. 1963).

61. Pan American Life Ins. Co. v. Blanco, 311 F.2d 424, 426 (5th Cir. 1962).

62. *Id.* at 426-27.

63. *Id.* at 427. The Fifth Circuit raised the following questions in footnote eight to its opinion: "Has Cuba incorporated the Bretton Woods Agreement into its law as did the United States in Title 22 U.S.C. §286? Has Cuba complied with its obligations under such agreement? Did Cuba's withdrawal from the International Bank for Reconstruction and Development, on November 14, 1960 (see Dep't of State Bulletin XLIII, No. 1121, December 19, 1960, p. 945; Encyclopedia Brittanica Book of the Year, 1962 edition, p. 342 and p. 347) constitute such a breach of the purposes of the Fund as set forth in Art. I as to render such Agreement ineffective as to Cuba? Are the annuity policies in question 'exchange contracts' within the meaning of Art. VIII, Sec. 2(b) of the Bretton Woods Agreement?"

64. In footnote nine to its opinion the Fifth Circuit observed as follows: " 'The 1948 law, for example, does not require that payment of obligations due Cuban

On remand to the district court, *Blanco* was consolidated with three other cases: *Conill v. Pan American Life Insurance Co., Lorido y Diego v. American National Insurance Co.*, and *Zabaleta v. Pan American Life Insurance Co.*[65] In its opinion the district court noted that Cuba had notified the International Monetary Fund at an earlier date that it accepted the obligations of article VIII, sections 2, 3, and 4 of the Fund Agreement. The district court expressly recognized that Cuban Law 568 had not been the subject of a specific decision by the executive directors of the Fund, but that the executive directors had made a recent statement to the effect that the only Cuban exchange restriction approved by the Fund was the 2 per cent exchange tax on remittances abroad.[66] The district court found that the effect of Law 13 of 1948, and Resolution 1384 issued under it, was to make all preexisting Cuban contracts payable and demandable only in Cuban pesos if they were to be performed within the territorial limits of Cuba. The court observed that under Resolution 3 of October 24, 1960, promulgated under Law 851 of July 1960, Cuba had substituted itself as the obligor on the debts and obligations of the companies and the persons whose properties were expropriated by section 1 of that Resolution within Cuba.[67]

The district court held that not only was it not required to give recognition to the acts of the Castro government but, in addition, the Castro decrees had no extra-territorial effect and, as a consequence, neither the persons nor the subject matter of the action were subject to the sovereignty of Cuba. The court noted that its conclusions in this regard were compelled by its finding that the assets of the defendant insurers within Cuba bore no relationship to the transitory causes of action involved in the instant suits.[68] In the view of the court, these former Cuban nationals, while presently not being political citizens of any country, were civil citizens of Florida because of their domicile, and as such were possessed of municipal rights and obligated by domestic municipal duties.[69] And so, under the circumstances, the Cuban laws did not apply to cover the situation of a Cuban national

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nationals be made only in pesos. The law does require that, if an obligation is paid within the Republic of Cuba, then and in that event only, the national currency of Cuba, pesos, must be accepted in payment of obligations.

" 'Law No. 568' of September 29, 1959, 'is directed not to the party making the payment but to the resident of Cuba, * * *' (Brief of Appellee, pp. 5-6, 14)." Pan American Life Ins. Co. v. Blanco, 311 F.2d 424, 427-28 (5th Cir. 1962).

65. 221 F. Supp. 219 (S.D. Fla. 1963).

66. *Id.* at 224-25.

67. *Id.* at 225.

68. *Id.* at 226. See Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505 (5th Cir. 1963), *rev'd on other grounds*, 377 U.S. 179 (1964).

69. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 227-28 (S.D. Fla. 1963).

enforcing an executory contract in the forum of another jurisdiction according to the terms of an obligation existing prior to the passage of the laws in question. The court further was of the view that the Cuban laws and decrees could not have any force and effect over these litigants who were not only outside of Cuba as refugees, but were also not subject to its in personam jurisdiction. Accordingly, the court held that the International Monetary Fund Agreement did not have any applicability.[70]

In *Menendez Rodriguez v. Pan American Life Insurance Co.* and *Vento Jaime v. Pan American Life Insurance Co.*[71] and in *Menendez v. Aetna Insurance Co.*,[72] the United States Court of Appeals for the Fifth Circuit expressly followed its earlier decision in *Blanco* by dismissing the insurers' petitions for rehearing wherein the insurers alleged that article VIII, section 2 (b) of the Fund Agreement required dismissal of the insureds' complaints.[73]

In *Theye y Ajuria v. Pan American Life Insurance Co.*,[74] a suit brought in Louisiana courts, the insurer contended that the exchange control laws of Cuba, enacted after execution of the insurance policy, rendered that policy unenforceable by reason of the Fund Agreement. The Louisiana Court of Appeal for the Fourth Circuit, in reversing, held that the lower court had erred by disregarding article VIII, section 2 (b) of the Fund Agreement which, in the court's view, defeated the insured's right to recover the cash surrender value of his policy.[75]

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70. *Id.* at 229.

71. 311 F.2d 429, *rehearing denied*, 311 F.2d 437 (5th Cir. 1962), *vacated and remanded*, 376 U.S. 779 (1964).

72. 311 F.2d 437, *rehearing denied*, 311 F.2d 438 (5th Cir. 1962), *vacated and remanded*, 376 U.S. 781 (1964).

73. Menendez Rodriguez v. Pan American Life Ins. Co., 311 F.2d 429, 437 (5th Cir. 1962), *vacated and remanded*, 376 U.S. 779 (1964); Menendez v. Aetna Ins. Co., 311 F.2d 437, 438 (5th Cir. 1962), *vacated and remanded*, 376 U.S. 781 (1964).

74. 154 So. 2d 450 (La. App. 1963), *rev'd*, 245 La. 755, 161 So. 2d 70, *cert. denied*, 377 U.S. 997 (1964).

75. *Id.* at 453-54. The court relied on Kolovrat v. Oregon, 366 U.S. 187 (1961), which had involved the question whether an 1881 treaty between the United States and Yugoslavia entitled the petitioner to inherit personal property located in Oregon on the same basis as American next of kin and whether such rights had been taken away or impaired by the Yugoslavian monetary policies exercised in accordance with later agreements between Yugoslavia and the United States, including the adherence of both countries to the Fund Agreement. The United States Supreme Court had held that the 1881 treaty entitled the Yugoslavian relatives to inherit personal property located in Oregon on the same basis as American next of kin and that their rights had not been taken away or impaired by the adoption of Yugoslavian exchange control laws and regulations, imposed consistently with the Fund Agreement, which might have an effect upon the payment to Americans of legacies in the case of a Yugoslavian estate. In holding that the public policy of Oregon must give way to the treaty arrangements, the Supreme Court stated:

The vital question whether the payment of the paid-up amount of insurance constituted a capital transfer or a current transaction was not reached.

On review, the Supreme Court of Louisiana reversed the decision and expressly held that the Articles of Agreement of the International Monetary Fund did not apply so as to render unenforceable the insured's claim under his policy.[76] The court noted that the intention of the parties was clearly expressed in the insurance contract, which was expressed in United States dollars and which had called for payment of all premiums and payment of the cash surrender value of the policy at the New Orleans head office. It was the view of the court that all transactions were obviously intended to be negotiated in American dollars, and that this was the insurer's interpretation of the contract. The court further found that the foregoing factors had led the trial judge properly to the conclusion that Cuban laws and decrees enacted after the policy became a paid-up policy had no effect upon the obligation of the insurer.[77]

The Louisiana Supreme Court unequivocally rejected the holding of the court of appeal that article VIII, section 2(b) of the Fund Agreement rendered the insured's policy unenforceable in the United States since the contract was an American contract, payable in United States dollars and performable in the United States. The court further held that the Cuban laws and decrees did not apply to the insured in *Theye y Ajuria*, because he was a stateless person residing in the United States and was not subject to the in personam jurisdiction of Cuba.[78]

In *Pan American Life Insurance Company v. Raij*,[79] the applicability of the Fund Agreement was expressly considered and rejected. The insurer had appealed from a summary final decree en-

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"The International Monetary Fund (Bretton Woods) Agreement of 1945, *supra*, to which Yugoslavia and the United States are signatories, *comprehensively obligates participating countries to maintain only such monetary controls as are consistent with the terms of that Agreement.* The Agreement's broad purpose, as shown by Art. IV, §4, is 'to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations.' Article VI, §3, *forbids any participating country from exercising controls over international capital movements 'in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments. . . .'*" (Emphasis added.)

76. Theye y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70, *cert. denied*, 377 U.S. 997 (1964).

77. *Id.* at 248, 161 So. 2d at 73.

78. *Id.* at 248-49, 161 So. 2d at 73-74.

79. 156 So. 2d 785 (3d D.C.A. Fla. 1963), *rev'd*, 164 So. 2d 204, *writ of cert. quashed on rehearing*, 164 So. 2d 204 (Fla. 1964), *cert. denied*, 379 U.S. 920 (1964).

tered by the circuit court of Dade County, Florida. The decree held that a policy of life insurance issued to Raij, a Cuban refugee residing in Florida, was still in full force and effect and that the insurer was required to accept premium payments in United States currency and to pay amounts due under the policy in United States currency. The District Court of Appeal of Florida, Third District, subsequently affirmed the decree of the circuit court, Dade County.

On the insurer's petition for rehearing, the district court expressly rejected the insurer's contention that the Fund Agreement, particularly article VIII, section 2(b), governed so as to render the contract unenforceable. The court made it plain that it had considered the possibility of the applicability of the Fund Agreement at the time of its original opinion. The court held that since the insurance contract had been made in the United States with an American company and had been expressed in dollars and, since premiums had been accepted in dollars since 1942, and since the effect of the decree of the lower court only required the insurer to continue to accept premium payments in the United States in dollars, the Fund Agreement had no applicability. In this regard the district court expressly held that the instant contract was not an unenforceable contract under the Fund Agreement since it did not involve the currency of Cuba.[80]

Subsequently, the Florida Supreme Court found the district court's decision to be in conflict with its decision in *Ugalde* and quashed and remanded.[81] On rehearing, however, the Florida Supreme Court reversed itself and quashed its writ of remand.[82] On appeal to the United States Supreme Court the question raised by the insurer was whether the Florida courts' failure to recognize the insurer's defense,

80. Pan American Life Ins. Co. v. Raij, 156 So. 2d 785, 786 (3d D.C.A. Fla. 1963). "The appellant has filed a petition for rehearing, pointing out that, in rendering the opinion in this cause, the court overlooked and failed to consider its contention that this transaction was governed by the Bretton Woods Agreement relating to the International Monetary Fund and the Federal legislation pertaining thereto. See: 22 U.S.C.A. §286 et seq. At the time of the original opinion in this cause, this Agreement was considered and deemed to be not applicable, for the reason that the contract involved was a contract with an American company, made in the United States, payable in United States dollars; that premiums had been accepted in United States dollars since 1942, and that the effect of the chancellor's decree was only to require the appellant to continue to accept premium payments in United States dollars. *Not only were we of the opinion that the Bretton Woods Agreement was not applicable to the contract in the instant case,* we were further of the opinion that the Bretton Woods Agreement pertained only to contracts 'involving the currency of any member' of the Fund and that an American contract, upon which payments were to be made to or by the appellant in United States currency, was not an unenforceable contract within the provisions of Article VIII, §2(b) of the Bretton Woods Agreement." (Emphasis added.)

81. Pan American Life Ins. Co. v. Raij, 164 So. 2d 204 (Fla. 1964).

82. *Ibid.*

based upon the Cuban expropriation and exchange control laws, constituted the invalidation of such laws contrary to the act of state doctrine.[83] Certiorari subsequently was denied by the United States Supreme Court in November 1964.[84]

Application by the Courts of the Tests Called for Under Article VIII, Section 2 (b)

An analysis of the cases illustrates that the American courts either have not followed a consistent approach in determining whether article VIII, section 2 (b) of the International Monetary Fund Agreement applied so as to render unenforceable a Cuban refugee insured's claim for the cash surrender value of his policy or they have refused to face the problem. In *Klawans*, *Ugalde*, and *Calvo* the Florida district court was faced with the contentions of the Canadian insurers that the tests called for under article VIII, section 2 (b) had been met so as to render the insurance contracts unenforceable. The insurers argued that the life insurance policies in question constituted "exchange contracts" involving the currency of Cuba within the provisions of article VIII, section 2 (b), that payment of the cash surrender value of these policies outside of Cuba would result in capital transfers contravening Cuban Law 568, and that Cuban exchange control Law 568 had been specifically approved under article VI, section 3 and by article VIII, section 2 (b) of the Fund Agreement, and therefore, it had been imposed consistently with the Fund Agreement. In *Klawans* and in *Calvo* the district court impliedly rejected these contentions of the insurers since it did not even discuss them. In *Ugalde*, however, the majority of the district court and the Florida Supreme Court viewed the insurance contract as one that involved the currency of Cuba, and apparently viewed the insurance policy as an exchange contract. The Florida Supreme Court further held that Cuban Law 13 of 1948 and Decree 1384 of 1951 governed payment under the contract and held that the Fund Agreement obligated the Florida courts to apply the Cuban law and decree. A fundamental error in the court's reasoning is to be found in the fact that the law and decree were enacted prior to Cuba's acceptance of article VIII status in the Fund. Also, the court did not face the issue squarely because it failed to pass upon the consistency of the law and decree with article VIII, section 2 of the Fund Agreement.

The Louisiana Supreme Court, in *Theye y Ajuria*, without expressly delineating the tests under article VIII, section 2 (b), found that

83. Pan American Life Ins. Co. v. Raij, 33 U.S.L. Week 3144 (U.S. Oct. 20, 1964).

84. Pan American Life Ins. Co. v. Raij, 379 U.S. 920 (1964).

the insurance policy in question was not an exchange contract and that it did not involve the currency of Cuba. The court further held that the Fund Agreement had no applicability because the Cuban laws and decrees could not be applied in view of the fact that the Cuban refugees had lost their nationality and the contract was an American contract. The Louisiana Supreme Court held that the place of performance of a contract is a determining factor in whether or not the Fund Agreement applies.

The United States Court of Appeals for the Fifth Circuit in *Blanco* questioned Cuba's entire status with regard to the Fund Agreement and seriously questioned whether the Cuban exchange control regulations had been imposed consistently with the Fund Agreement so as to require recognition. The Fifth Circuit questioned the consistency of the Cuban laws and regulations by questioning whether Cuba had given internal effect to the provisions of article VIII, section 2(b) of the Fund Agreement.[85] This is a most significant test of consistency with the Fund Agreement.[86] Since the record was insufficient on this point, however, the court reached no decision regarding the consistency of these laws and regulations with the Fund Agreement. The court further questioned whether the annuities constituted exchange contracts within the meaning of article VIII, section 2(b). By way of dictum the court observed that Cuban Law 13 of 1948 and Law 568 of 1959 were not designed to have any extra-territorial effect. In the light of *Blanco*, it may be argued that the Fifth Circuit was of the opinion that article VIII, section 2(b) of the Fund Agreement did not render the annuity contracts unenforceable since the annuities were not exchange contracts involving the Cuban currency. The argument is reinforced by the court's per curiam opinions dismissing the petitions for rehearing in *Menendez Rodriguez* and in *Menendez* on the authority of its decision in *Blanco*.

The United States District Court for the Southern District of Florida, on the remand of *Blanco*, found that the insurance contracts were not exchange contracts involving the currency of Cuba. The district court was of the view that the Cuban laws and decrees on their face did not purport to have any extra-territorial effect and that ex-

85. Pan American Life Ins. Co. v. Blanco, 311 F.2d 424, 427 n.8 (5th Cir. 1962).

86. Nussbaum has taken the position that the United States, Britain, and Canada, among others, have taken explicit steps to confer the quality of internal domestic law on article VIII, §2(b) of the Fund Agreement. It is Nussbaum's view that the exchange control regulations of article VIII member countries, which have not taken steps to incorporate article VIII, §2(b) into their domestic law, are not, as a consequence, maintained or imposed consistently with the Fund Agreement. See Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L. J. 421, 428-29 (1950).

pert testimony had substantiated this conclusion. The court further questioned whether the Cuban exchange control law (that is, law 568 of 1959) had been imposed consistently with Cuba's obligations under the Fund Agreement since Law 568 had never been approved by the executive directors of the Fund. In addition to its findings, which went to the basic tests under article VIII, section 2(b), it would appear that the district court viewed the requirement of consistency with the Fund Agreement as excluding Cuban confiscations sought to be enforced under the guise of exchange regulations — particularly in the case of political refugees.

In *Raij,* the Florida district court was of the opinion that the insurance contract was not an exchange contract and did not involve the currency of Cuba. A factor taken into consideration by the court was that the lower court's decree only required the maintenance of the insurance contract in force and the acceptance by the insurer of premium payments in United States dollars.

Thus, while the courts of Florida and Louisiana, the United States Court of Appeals for the Fifth Circuit, and the United States District Court for the Southern District of Florida have reached diverse conclusions on whether the Fund Agreement renders unenforceable the claims of Cuban refugee insureds for the cash surrender value of their policies, the decisions of these courts have not resulted in any enlightened analysis of the scope of the Fund Agreement. Indeed, in some instances it is arguable that the decisions of the courts have complicated rather than developed an understanding of the scope and effect of article VIII, section 2(b) of the Fund Agreement. The Fifth Circuit in *Blanco* appears to evade a basic issue by passing over the insurer's contention that one of the crucial issues presented was whether Cuban Law 568 of 1959 had been maintained or imposed consistently with Cuba's obligations under the Fund Agreement. Yet the same court raised the most sophisticated of questions concerning the consistency of the Cuban laws and decrees by directing inquiry into whether Cuba had incorporated article VIII, section 2(b) into its domestic law.

One may criticize the decisions of the Louisiana Supreme Court in *Theye y Ajuria* and of the Florida district court in *Raij* insofar as those courts appear to adopt the very broad general principle that an insurance contract expressed in dollars and payable in the United States by an American corporation could not constitute an exchange contract. Further, both the Fifth Circuit and the federal district court, on the remand of *Blanco,* and the Louisiana Supreme Court in *Theye y Ajuria,* were clearly wrong in their views that currency control regulations enacted subsequent to the time a contract was entered into could have no effect on the enforceability of the contract under

article VIII, section 2 (b) of the Fund Agreement.[87] Fortunately, however, the errors of the courts in *Theye y Ajuria, Raij,* and *Blanco* do not go so far as to affect the validity of their conclusions that the Fund Agreement did not render unenforceable the insurance contracts.

A point missed by all of the courts was the basic question whether payment of the cash surrender value of the insurance contracts would have constituted a "capital transfer" or a payment in respect of a "current transaction." Had the courts, as the insurers urged in *Ugalde, Klawans,* and *Calvo,* adopted the approach of determining whether such payments were "capital transfers" or "current transactions," their task would have been easier. Once the determination was made that payment of the cash surrender value of the policies would have constituted payments in respect of "current transactions," the courts could rightly have determined that the Cuban exchange control laws and regulations had no applicability in the absence of Fund approval of Cuban restrictions on payments for current transactions.

APPLICATION OF THE TESTS UNDER ARTICLE VIII, SECTION 2 (B) OF THE FUND AGREEMENT

Were the Insurance Contracts "Exchange Contracts" Within the Meaning of Article VIII, Section 2(b)?

An "exchange contract" has been variously defined as: a contract involving the exchange of one currency for another;[88] a contract that affects the exchange resources of a country;[89] and transactions having their bases in contract and involving exchange — whether of currency, property, or services.[90] The prevailing view apparently is that an exchange contract is one that affects the exchange resources of a country.[91]

While there is a conflict of authority as to the proper time for determining whether a contract constitutes an "exchange contract," under the authoritative view such a determination should be made as of the date when the contract was made; the alternative is that

87. See Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement,* 62 YALE L.J. 867, 893 (1953); Nussbaum, *supra* note 86, at 427.

88. Bayitch, *Florida and International Legal Developments, 1962-1963,* 18 U. MIAMI L. REV. 321, 349-50 (1963); Nussbaum, *supra* note 86, at 426-27.

89. Mann, *Money in Public International Law,* 26 BRIT. YB. INT'L L. 279 (1949).

90. Meyer, *supra* note 87, at 887.

91. GOLD, THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS 24-25 (1965).

the determination should be made at the time the party seeks enforcement of the contract.[92] Under either view most of the insurance contracts should not have constituted exchange contracts. The insurance contracts in the cases discussed were valid dollar contracts at the time they were entered into, and this situation had not been changed by the fact that at the time suits were brought the Cuban refugees had been deprived of their Cuban nationality and had become residents of Florida and the assets of the American life insurance companies had been confiscated by the Cuban state.

The insurance policies in most of these cases called for payment of the proceeds in dollars in the United States. But insurance policies in *Ugalde* called for payment of the proceeds in dollars in Havana. And the policy in *Zabaleta* was voluntarily amended to call for payment of the proceeds in pesos in Cuba, while the policy in *Diego* called for payment in pesos in the United States.

The cases are conflicting on whether the Cuban exchange control laws and regulations had converted the insurance/annuity contracts from dollar contracts into peso contracts. The Florida district court in *Ugalde* and *Calvo* held that Law 13 of 1948, Law 568 of 1959, and Law 930 of 1961 had converted the insurance contracts into peso contracts. The Florida Supreme Court, in *Ugalde, Klawans,* and *Calvo* has taken the position that the contracts were converted into peso contracts pursuant to Law 13 of 1948 and Decree 1384 of 1951 and impliedly under Law 568 and Law 930. The federal district court, on the remand of *Blanco* held that Law 13 and Decree 1384 would have converted the insurance contracts into peso contracts only *if* they were to be performed within the territorial limits of Cuba.[93] The Louisiana Supreme Court held in *Theye y Ajuria* that Law 13 did not convert the insurance contract into a peso contract.

The Florida Supreme Court in *Ugalde* and *Calvo* has viewed the insurance contracts as "exchange contracts" and the denial of certiorari by the United States Supreme Court has left this question unresolved since the Supreme Court also denied certiorari in *Theye y Ajuria,* in which the Louisiana Supreme Court had held that the insurance contract was not an "exchange contract." The

92. Mann, *The Private International Law of Exchange Control Under the International Monetary Fund Agreement,* 2 INT'L & COMP. L.Q. 97, 106-07 (1953) advances the view that the determination should be made with reference to the time when the contract was made. *But see* Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 227-29 (S.D. Fla. 1963); GOLD, THE FUND AGREEMENT IN THE COURTS 53-54, 64-66 (1962). Memorandum submitted by the United States Solicitor General, p. 4, on petition for certiorari to the United States Supreme Court in Pan American Life Ins. Co. v. Lorido, 376 U.S. 968, *cert. denied,* 377 U.S. 990 (1964).

93. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219 (S.D. Fla. 1963).

Fifth Circuit in *Blanco* questioned but did not answer whether the annuity contracts were "exchange contracts." On the remand of *Blanco,* the district court held that the annuity and insurance contracts were not "exchange contracts." This view was shared also by the Florida district court of appeal in *Raij,* which the Florida Supreme Court declined to reverse.

Adoption of the view that the time for the determination whether the insurance/annuity contracts were "exchange contracts" is the time when demand was made by the refugees in the United States would lead to the conclusion that such contracts were in most instances *not* "exchange contracts." Since at the time of demand the assets of the American insurance companies had been confiscated their insurance contracts would probably not be exchange contracts because they would not involve the conversion of the Cuban pesos into dollars. In the absence of this confiscation such a view would not be consistent with the fact that the payment sought under the policies was in United States dollars, a factor that necessarily would have an effect upon the exchange resources of Cuba. The factual situation posed, however, would support a finding that exchange contracts were not involved.[94] The Cuban assets of the American insurers had been confiscated by the Cuban government and their Cuban operations had completely ceased. The Cuban refugees had been stripped of their nationality and no longer resided in Cuba. Payments by American insurance companies, no longer doing business in Cuba, to Cubans domiciled in this country would not affect the exchange resources of Cuba, and therefore such payments should not be deemed exchange contracts.

In the case of the policies issued by the Canadian insurers in *Ugalde, Klawans,* and *Calvo,* however, a different result would be required since payment by these insurers to the refugees would in fact affect the exchange resources of Cuba. The Canadian insurers continued to do business in Cuba and the exchange resources of Cuba would have been affected by payments made to these insureds outside of Cuba even though the insureds in *Ugalde, Klawans,* and *Calvo* had become denationalized Cuban residents of the United States.

Would Payment Under the Policies Have Involved the Currency of Cuba?

Under article VIII, section 2 (b), the term "exchange contracts" is expressly qualified by the phrase "which involve the currency of any

94. Comment, 18 U. MIAMI L. REV. 455, 472-73 (1963); see also Bayitch, *supra* note 88, at 351.

member." The Cuban refugees, it must be remembered, not only fled Cuba but the Castro government, in almost every instance, published the names of these refugees as enemies of the state and simultaneously stripped them of all personal and property rights as Cuban nationals. And so, the courts were faced with the fact that the insureds were stateless persons who had established residence in the United States. While Law 13 of 1948 and Decree 1384 of 1951 provided that payments under the insurance contracts were to be payable in pesos within Cuba, the actual contractual provisions were not changed otherwise. Since domicile or residence is the key factor in determining whether the currency of the member is involved, once the courts determined that the domicile or residence of these Cubans was in the United States and that recovery was sought in United States dollars under their insurance contracts,[95] the courts could properly determine that the Cuban currency was not involved. This conclusion is supported by the fact that payment by the insurers could not have had any effect upon the Cuban currency since these refugees could not have been compelled to repatriate the dollar cash surrender value of their policies. Accordingly, it is clearly arguable that the separate opinion of Florida district appeal Judge Horton in *Ugalde*, the doubt expressed by the Fifth Circuit Court of Appeals in *Blanco*, the views of the United States District Court for the Southern District of Florida on the remand of *Blanco*, the decision of the Louisiana Supreme Court in *Theye y Ajuria*, and the decision of the Florida district court of appeal in *Raij* are correct and the courts were not faced with exchange contracts that involved the currency of Cuba within the meaning of article VIII, section 2 (b).[96]

The importance of the domicile/residence factor is illustrated in the leading case of *Moojen v. Von Reichert*,[97] decided by the Court of Appeals of Paris. One of the vital questions posed was whether Moojen was a resident of the Netherlands rather than of France. The court found that Moojen had his residence in the Netherlands and that Dutch exchange control legislation was applicable to an assignment of shares in a French corporation by Moojen, a Dutch national, to Von Reichert, a German national. In finding that Moojen's resi-

95. See GOLD, *op. cit. supra* note 92, at 145; Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219 (S.D. Fla. 1963); Pan American Life Ins. Co. v. Raij, 156 So. 2d 785 (3d D.C.A. Fla. 1963); *In re* Sik's Estate, 205 Misc. 715, 129 N.Y.S.2d 134 (Surr. Ct. 1965); Rossano v. Manufacturers Ins. Co., [1962] 2 All E.R. 214 (Q.B.).

96. Such a view would appear consistent with the views of the New York Court of Appeals concerning the phrase "involving the currency" in Banco do Brasil, S.A. v. A.C. Israel Commodity Co., 12 N.Y. 2d 371, 191 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964).

97. 51 Revue Critique de Droit International Prive 67 (1962), discussed in GOLD, *op. cit. supra* note 92, at 143.

dence was in the Netherlands, the court then held that the assignment, although expressed in French francs, would affect the Dutch currency since the Dutch Treasury had a direct interest in a Dutch resident's repatriation of foreign currency.

Thus, unlike the Cuban refugees, Moojen had maintained his Dutch residence and nationality and the Netherlands had an undisputed interest in Moojen's repatriation of French francs since the transaction in question did affect the Dutch exchange resources. In the case of the Cuban refugees, however, the Cuban government has no right or interest in the repatriation of any of the funds obtained by these refugees under their policies in this country. These refugees had abandoned their Cuban domicile, had subsequently been stripped of their nationality, and any assets left behind by them in Cuba had been confiscated.

Clearly, in every suit against the American insurance companies other than *Diego* and *Zabaleta* there should be little difficulty in finding that the currency of Cuba was not involved within the meaning of article VIII, section 2(b) of the Fund Agreement. All of the policies other than those of *Diego* and *Zabaleta* were expressed in dollars. All of the Cuban branches of the American insurance companies had been confiscated on or about October 24, 1960, and all of their Cuban assets had been taken over by the Cuban government.[98] In the face of these actions of the Cuban government, any claims that the Cuban government might have asserted against these insurance companies as a result of its confiscation of the rights of the refugees under their policies were foreclosed.[99] On the other hand, the Cuban refugees, having abandoned their former domicile, having been stripped of their Cuban nationality, and having become residents of the United States, could not have been compelled to repatriate any monies or assets belonging to them in the United States or any amounts paid to them under their insurance policies.[100]

While the problem is more complex in the suits brought against the Canadian insurance companies because they had been allowed to continue to carry on business in Cuba under Castro, the same result could follow. The refugees, at the time of demand for payment and at the time of suit, were residents of the United States who had been arbitrarily deprived of their Cuban nationality; they were seeking recovery under their policies from the insurers' dollar assets. As a

98. See Allison, *Cuba's Seizure of American Business*, 47 A.B.A.J. 48, 49-50 (1961); Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 225 (S.D. Fla. 1963).

99. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 227-28 (S.D. Fla. 1963).

100. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219 (S.D. Fla. 1963); Theye y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70 (1964).

consequence, it would seem that the applicable Cuban laws and decrees should not be controlling so as to require payment in pesos. Further, the policies were expressed in dollars and the world-wide assets of the Canadian insurers stood behind their policies, with the result that there was no necessity for the withdrawals of funds from Cuba by the insurers.[101]

Assuming the Insurance Contracts to Have Been Exchange Contracts, Were They Contrary to Cuban Exchange Control Laws and Regulations?

Decree 1384 of 1951, promulgated pursuant to Law 13 of 1948, provided that after June 30, 1951, obligations were to be payable in pesos rather than in dollars and that all contracts payable to or by *Cuban nationals* were required to be paid in Cuba. Under Law 568 of 1959 the export of currency or the transfer of funds abroad without the approval of the exchange control authorities was forbidden. Foreign corporations doing business in Cuba were prohibited from making payments or crediting the accounts of Cuban nationals, except in Cuba, without the express authorization of the National Bank of Cuba. Law 568 of 1959 further prohibited the transfer to third persons of "collections made abroad for business transactions or services rendered in Cuba, regardless of the source or origin of the respective funds." Law 930 of February 1961 provided that obligations, which by agreement were made payable in any other currency, were to be settled in Cuban pesos.

In determining whether the insurance contracts were contrary to the exchange control regulations of Cuba, either the status of the contracts when entered into or the time for performance is the crucial factor.[102] The contracts when entered into were not exchange contracts since the dollar was recognized legal tender in Cuba at the time. If, however, one adopts the position that that date of performance was the crucial date, then the status of the Cuban refugees at the time demand was made on the insurers is all-important. Law 13 of 1948 and Decree 1384 thereunder were directed to *Cuban nationals*. Law

101. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219 (S.D. Fla. 1963); Theye y Ajuria v. Pan American Life Ins. Co., 161 So. 2d 70 (1964); Pan American Life Ins. Co. v. Raij, 156 So. 2d 785 (3d D.C.A. Fla. 1963); Pan American Life Ins. Co. v. Recio, 154 So. 2d 197 (3d D.C.A. Fla. 1963), *cert. quashed without opinion*, 156 So. 2d 857 (Fla. 1963), *cert. denied*, 377 U.S. 990 (1964); Pan American Life Ins. Co. v. Lorido, 154 So. 2d 200 (3d D.C.A. Fla.), *cert. denied without opinion*, 155 So. 2d 695 (Fla. 1963), *cert. denied*, 377 U.S. 990 (1964); Rossano v. Manufacturers Life Ins. Co., [1962] 2 All E.R. 214 (Q.B.).

102. Stephen v. Zivnostenska Banka, 31 Misc. 2d 45, 140 N.Y.S.2d 323 (Sup. Ct. 1955) (time for performance); GOLD, *op. cit. supra* note 92, at 64-66, 78 (time for performance); Mann, *supra* note 92, at 106-07 (time entered into).

568 of 1959 prohibited payments to *Cuban nationals* anywhere but in Cuba. The intendment of Law 930 of 1961 appears to have been to require settlement in pesos of contractual obligations with a *Cuban national,* resident, or trader.

Once the Cuban State had stripped these refugees of their Cuban nationality, their status became that of stateless persons residing in the United States.[103] They owed no allegiance to Cuba and were no longer subject to the sovereignty of the Cuban State since their status became that of a civil citizen of Florida.[104] As such, the refugees were no longer within the intendment of the exchange control regulations of Cuba, which on their face were applicable only when Cuban nationals and residents were involved in a transaction. Accordingly, by reason of their change of status it is clearly arguable that the insurance contracts issued by the American insurance companies were *not* at the time of performance contrary to Cuban exchange control regulations.[105]

In *Ugalde, Klawans,* and *Calvo,* however, the insurance contracts had been issued by Canadian insurance companies that were doing business in Cuba through resident affiliates, and had expressly provided for payment of the proceeds in United States dollars in Havana. Cuban Decree 1384 and Law 568 prohibited the Canadian insurers, who were doing business in Cuba, from making payments to Cuban nationals outside of Cuba. Cuban Law 930 of 1961 further provided for the settlement of obligations in pesos rather than in any other currency. The view of the Florida Supreme Court that the contracts in question were Cuban contracts governed by Cuban law appears to be correct. Even though these insurance contracts had been entered into prior to the enactment of the cited Cuban laws and decree, these contracts would have been subject to these laws if they were valid exchange control regulations.[106] It is arguable that payment by the Canadian insurers to the insureds in *Ugalde, Klawans,* and *Calvo* would not have contravened any Cuban exchange control laws but would instead have contravened only Cuban exchange *restrictions.*[107] If this is the case then the Florida Supreme Court clearly erred in holding that the International Monetary Fund Agreement prohibited

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103. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 227-28 (S.D. Fla. 1963); Theye y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 766-67, 161 So. 2d 70, 73-74 (1964).

104. *Ibid.*

105. *In re* Sik's Estate, 205 Misc. 715, 129 N.Y.S.2d 134 (Surr. Ct. 1954); Rossano v. Manufacturers Life Ins. Co., [1962] 2 All E.R. 214 (Q.B.).

106. Mann, *op. cit. supra* note 92, at 104; Nussbaum, *supra* note 86, at 427.

107. See GOLD, *op. cit. supra* note 91, at 8, 9, 11; Bayitch, *supra* note 88, at 350.

the Canadian insurers from paying the claims of *Ugalde, Klawans,* and *Calvo* in the United States.[108]

Were the Applicable Cuban Exchange Control Laws and Regulations Imposed Consistently With the Fund Agreement?

The fundamental test under article VIII, section 2 (b) is whether the exchange control laws and regulations, which render an exchange contract unenforceable, have been maintained or imposed consistently with the member country's obligations under the Fund Agreement.[109] The fundamental nature of this test has been recognized by the United States Supreme Court in *Kolovrat v. Oregon*[110] and was recognized and asserted by the insurers in the Fifth Circuit Court of Appeals in *Blanco* and in the Florida courts in *Ugalde, Klawans,* and *Calvo.* The Florida Supreme Court in *Ugalde* did not go into the factors governing consistency and did not decide whether payment under the policies would have constituted "capital transfers" or payments in respect of "current transactions." The court impliedly held, however, that the applicable Cuban laws were consistent with the Fund Agreement.[111] The Fifth Circuit in *Blanco,* on the other hand, questioned the consistency of the Cuban laws and decrees with the Fund Agreement,[112] and on its remand the district court was of the opinion that Law 568, which it viewed as the governing law, had not been imposed consistently with the Fund Agreement.

Under the consistency test inquiry must be directed to the question whether the exchange control laws and regulations of an article VIII member operate to restrict payments in respect of "current transactions." In the event that such laws and regulations do restrict such payments, and in the event that special permission of the Fund has not been obtained, such exchange control laws and regulations have not been maintained or imposed consistently with that member's obligations under the Fund Agreement. Therefore, it must be ascertained whether laws and decrees apply only to capital transfers and not to payments with respect to current transactions. This was recog-

108. IMF art. VIII, §2 (a) and art. VI, §3 (1944).

109. In providing that article VIII, §2 (b) of the Fund Agreement should be given full force and effect in the United States, Congress certainly must have intended and understood that the test of *consistency* should be paramount. See H.R. REP. No. 629, 79th Cong., 1st Sess. 70 (1945); S. REP. No. 452 (79th Cong., 1st Sess. 28 (1945). Mr. Gold, General Counsel of the Fund, has expressly stated that *consistency* with the Fund Agreement is an express and obviously necessary condition. See GOLD, *op. cit. supra* note 91, at 23.

110. 366 U.S. 187 (1961).

111. Confederation Life Ass'n v. Ugalde, 164 So. 2d 1, 2 (Fla. 1964).

112. Pan American Life Ins. Co. v. Blanco, 311 F.2d 424, 427 (5th Cir. 1962).

nized by the insurers in *Ugalde, Klawans,* and *Calvo* for they placed great stress on the contention that payments under the policies would constitute capital transfers. An additional and more complicated test of consistency was raised by the Fifth Circuit in *Blanco,* for that court was of the view that the provisions of article VIII, section 2 (b) of the Fund Agreement must be incorporated into domestic law before the exchange control laws can be deemed consistent with the Fund Agreement.

It would appear that the laws in effect as late as 1961 compel conflicting conclusions with respect to Cuba's adherence to its obligations as an article VIII member. Law 13 of 1948 and Decree 1384 of 1951 substituted Cuban pesos for dollars as domestic legal tender and required the payment of obligations to Cuban nationals to be made in Cuba.[113] However, Law 568, enacted in September 1959 — almost six years after Cuba had accepted the obligations of article VIII membership, clearly was designed to impose restrictions on payments for current international transactions. This view gains support from the far-reaching language of article I of Law 568, which made it a felony not only to make payments in respect to ordinary commercial transactions without the prior approval of the Cuban Currency Stabilization Fund, but also "to receive and credit to bank accounts kept abroad, or to transfer to third parties collections made abroad for business transactions or services rendered in Cuba, regardless of the source or origin of the respective funds."[114]

Law 930 of 1961, which provided that obligations payable in any currency other than pesos were to be paid in pesos, raises questions that are difficult to resolve. If directed solely to payments to Cuban residents or nationals or to firms doing business in Cuba, it would appear consistent with the purposes of the Fund. If the law was intended to have extra-territorial effect, however, it would run counter

113. See Pan American Life Ins. Co. v. Blanco, 311 F.2d 424, 427-28 (5th Cir. 1962).

114. Mr. Gold, General Counsel of the Fund, in referring to the Fund Agreement's provisions for the abolition of exchange restrictions on payments in respect of current transactions, has stated that the term "Restriction" means any real interference with payments and transfers for current international transactions. Accordingly, an article VIII member cannot hamper or restrict "out-payments" although the member may regulate "in-payments" through the device of prescribing the currency payable to its residents. Gold notes that it would be contrary to the Fund Agreement for an article VIII member to prescribe the currency in which its residents can make payments and to bind other members to require residents of such other members to receive only the prescribed currency. GOLD, THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS: SOME LEGAL EFFECTS OF THE ARTICLES OF AGREEMENT 8-9 (1965); see also Mann, *Money as a Matter of International Organization,* 96 HAGUE ACADEMY RECUEIL DES COURS 19, 64-65 (1959).

to articles VI (3) and VIII (2) (a) of the Fund Agreement and would not be consistent with the Fund Agreement unless prior approval had been obtained.[115]

It appears that the executive directors of the International Monetary Fund have never made a decision on whether or not Cuban Law 568 of 1959 was consistent with Cuba's obligations as a Fund member. The executive directors' statement with respect to Cuba, however, makes it clear that the only sanctioned exchange control, other than controls of capital transfers, was the 2 per cent exchange tax on foreign remittances.[116] In practice, Cuban exchange control laws and regulations since the Castro government came to power demonstrate not only discriminatory application on the part of the Cuban government, but also an exceptionally close affiliation to acts of confiscation by that government.[117] In purpose and effect Cuban Law 568 runs counter to such express purposes of the Fund as "the expansion and balanced growth of international trade" (article I (ii)), the maintenance of "orderly exchange arrangements among members" (article I (iii)), and the "elimination of foreign exchange restrictions which hamper the growth of world trade" (article I (iv)). Cuban Laws 568 and 930 also violate the interdict of article VIII, section 2 (a) since their intendment is to impose restrictions on payments and transfers for current international transactions.[118] There is good reason to conclude, therefore, that Cuban exchange controls maintained or imposed since 1953, when Cuba became an article VIII member of the Fund, do not meet the test of consistency under article VIII, section 2 (b).

Utilization of the "consistency" test would have called for an analysis of whether Law 13 of 1948 and Decree 1384 of 1951 were being "maintained" and whether Law 568 and Law 930 had been "imposed" consistently with Cuba's obligations as an article VIII member of the Fund. It is arguable that Law 568 and Law 930 apply to transactions of any nature involving not only Cuban nationals or residents or corporations doing business in Cuba but also third parties having dealings with Cuba or Cubans. These laws ap-

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115. GOLD, *op. cit. supra* note 114, at 9.

116. This was pointed out by the United States District Court for the Southern District of Florida in the remand of Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 224 (S.D. Fla. 1963).

117. The intent of the Cuban government to restrict payments in respect of current transactions as well as capital transfers is evidenced by the fact that Law 568 and Instruction 4, the basic foreign exchange regulation, were utilized prior to confiscation of American companies, to refuse foreign exchange to the American oil companies that these companies needed for the purpose of paying for crude oil imports into Cuba. See Allison, *supra* note 98, at 48-49.

118. See discussion in GOLD, *op. cit. supra* note 114, at 8-9; see Comment, 18 U. MIAMI L. REV. 455, 475 (1963).

pear to apply not only to payments involving "capital transfers" but also to payments for "current transactions." Accordingly, the insurers should have been called upon to bear the burden of proving that the Fund had sanctioned the Cuban laws and decrees upon which they relied.[119] The District Court for the Southern District of Florida, contrary to allegations of the insurers, on the remand of *Blanco,* expressly found that Cuban Law 568 did not have Fund approval.[120] On the other hand, one may imply from the decision in *Ugalde,* that the Florida Supreme Court assumed "consistency" because of the apparent adoption by the district court of the insurer's erroneous allegation that the Fund had approved of Law 568.[121]

Despite the importance of applying the consistency test to determine whether or not exchange controls must be given effect, it is questionable, in the light of the recent Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino,*[122] whether American courts will ever be able to apply this test to the exchange control laws and regulations of another country even in view of the fact that the courts are faced with the question of interpretation of an international treaty. The ramifications of this problem are greater than would superficially appear.

The act of state doctrine, which was raised by the insurers as a defense in certain of the Cuban insurance cases, embraces the concept that "every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."[123] The only exception to this doctrine which was recognized prior to *Sabbatino,* was when the executive branch, under the so-called *Bernstein* exception, made it known to the court that the act of state doctrine may be suspended.[124]

Sabbatino holds that the courts of this country will not examine the validity of a taking of property by a recognized foreign country within its own territory *"in the absence of a treaty or other unambiguous agreement regarding controlling legal principles,* even if the

119. See Nussbaum, *supra* note 86, at 427; The *Courtrai* case (an unreported decision of the Commercial Tribunal of Courtrai, Belgium) discussed in GOLD, *op. cit. supra* note 92, at 79-81.

120. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 224-25 (S.D. Fla. 1963).

121. Confederation Life Ass'n v. Ugalde, 164 So. 2d 1, 2 (Fla. 1964).

122. 376 U.S. 398 (1964).

123. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

124. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij, 210 F.2d 375 (2d Cir. 1954).

complaint alleges that the taking violates customary international law."[125] Thus, in *Sabbatino* the Supreme Court has expressly held that, even though acts of expropriation by a country may be clearly contrary to international law, American courts will not examine the validity of the taking in the absence of a treaty or unambiguous agreement.

The *Sabbatino* decision raises some exceedingly complex problems in connection with the suits brought in this country by Cuban refugees to recover the cash surrender value of policies of life insurance issued by American and Canadian insurers. There is, on the one hand, the possibility that the majority decision in *Sabbatino* will be interpreted to exclude from the ambit of the act of state doctrine another country's confiscation of contractual claims and rights in a manner calculated to have an extra-territorial effect. On the other hand, however, the reasoning of the majority in *Sabbatino* poses the possibility that the court has foreclosed any judicial inquiry predicated upon the recognized principle of the territorial limitation of acts of confiscation.[126] This view gains credence from the fact that, following the rejection by the Fifth Circuit Court of Appeals of the applicability of the act of state doctrine in *Menendez Rodriguez v. Pan American Life Insurance Co.*[127] and in *Menendez v. Aetna Insurance Co.*,[128] the United States Supreme Court vacated judgment for the insureds and remanded the cases to the Fifth Circuit with directions to consider the possible applicability of the act of state doctrine in the light of *Sabbatino*.

An even more basic problem, from the point of view of this paper, is whether the majority decision in *Sabbatino* has any relevance to the role of the American courts in connection with the interpretation and application to a given state of facts of the provisions of a multi-

125. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). (Emphasis added.)

126. *Id.* at 431-32, where the majority stated: "Judicial determinations of invalidity of title can . . . have only an occasional impact, since they depend on the fortuitous circumstances of the property in question being brought into this country. Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. . . .

"The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law. . . ."

127. 311 F.2d 429, *rehearing denied*, 311 F.2d 437 (5th Cir. 1962), *vacated and remanded*, 376 U.S. 779 (1964), *remanded to district court*, 340 F.2d 707 (5th Cir. 1965).

128. 311 F.2d 437, *rehearing denied*, 311 F.2d 438 (5th Cir. 1962), *vacated and remanded*, 376 U.S. 781 (1964), *remanded to district court*, 340 F.2d 708 (5th Cir. 1965).

lateral treaty such as the International Monetary Fund Agreement. While the Court in *Sabbatino* expressly limited its decision to cases involving customary international law and has excepted from the act of state doctrine cases involving a "treaty or other unambiguous agreement," nonetheless the majority of the Court clearly evidenced an intent to limit the bounds of judicial competence to areas of "consensus," "agreed principle," or "codification." As a consequence, it is a matter of some concern whether the International Monetary Fund Agreement, though a treaty, constitutes a permissible area for the exercise of judicial competence. This concern is a direct result of the fact that the Fund Agreement — in particular article VIII — because of the complexity of its provisions, unquestionably presents problem areas in which both the courts and the experts have expressed divergent views. Resolution of the problem will have to await an answer by the courts.

Article VIII, section 2 of the Fund Agreement is the most complicated of the provisions of the Fund Agreement and clearly is not "unambiguous." One may ask, therefore, whether *Sabbatino* will be extended to foreclose judicial determination of the ultimate question of the *consistency* of an article VIII member's exchange control regulations with the Fund Agreement when such exchange control regulations have been raised as a defense in private suits.

A possible solution to the impasse that would be created by a foreclosure of application of the "consistency" test in the American courts would be for the courts to assume the consistency of an article VIII member country's exchange control laws with the Fund Agreement, but to condition this assumption upon a literal interpretation of the Fund Agreement. In assuming the "consistency" of an article VIII member country's exchange control regulations with the Fund Agreement, there should be a presumption that the article VIII member's exchange control regulations do not intend, operate, or purport to restrict payments for "current transactions." Adoption of this approach would narrow the issue to whether the transaction in question involved a "capital transfer" or a payment for a "current transaction." Inherent in the above "solution," however, is the obvious danger that the courts could dignify exchange controls that were clearly inconsistent with the purposes and provisions of the Fund Agreement.

CURRENT (INTERNATIONAL) TRANSACTIONS

Article VI, section 3 and article XIX (i) speak in terms of "current transactions" whereas article VIII, section 2 (a) speaks in terms of "current international transactions." However, it is apparent that

the two terms are interchangeable.[129] Article XIX (i) of the Fund Agreement expressly defines current transactions as follows:

> Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:
>
> (1) *All payments due in connection with foreign trade, other current business, including services,* and normal short-term banking and credit facilities;
>
> (2) Payments due as interest on loans and as net income from other investments;
>
> (3) Payments of moderate amount for amortization of loans or for depreciation of direct investments;
>
> (4) Moderate remittances for family living expenses. (Emphasis added.)

It is to be noted that the above definition of "current transactions" is quite broad. Indeed, it has been observed that article XIX (i) has included certain transactions that might otherwise be regarded as capital in nature.[130] Apparently the only pronouncement by the the Fund concerning a current transaction is to be found in a decision of the executive board of the Fund dated June 1, 1960, in which the board stated that, in ascertaining whether a country maintains or imposes a restriction on payments and transfers for current international transactions, the guiding principle or test is whether the article VIII country is maintaining controls that involve "a direct governmental limitation on the availability or use of exchange as such."[131]

The views of the Fund with regard to *invisible transactions* throws additional light upon what is embraced by the term current transactions. The Fund has regarded the following as constituting invisible transactions: (1) international transportation of goods; (2) travel for reasons of business, education, health, et cetera; (3) insurance premiums and payment of claims; (4) investment income, including interest, rents, dividends, and profits; (5) miscellaneous service items such as advertising, commissions, film rentals, pensions, patent fees, royalties, subscriptions to periodicals, and membership fees; (6) donations, migrant remittances, legacies; (7) repayment of commercial credit; (8) contractual amortization and depreciation of

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129. The United States has adopted the definition of current (international) transactions as contained in article XIX (i) of the Fund Agreement. See United States-United Kingdom Financial Agreement, Dec. 6, 1945, §11 (i), 60 Stat. 1841, 1844 (1945).

130. GOLD, COMMENTS, ANNUAL PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 188 (1960); GOLD, *op. cit. supra* note 114, at 12-13.

131. IMF, ANN. REP. 29-30 (1960).

direct investment.[132] One authority has taken the position that the above enumerated invisible items, including insurance claims, correspond to the definition of "current transactions" as set forth in article XIX (i) of the Fund Agreement.[133] Another writer, in discussing invisible items vis-à-vis balance of payments, also seems to view payments in respect of invisible items as equivalent to payments with respect to *current transactions*.[134] Therefore, payments in respect of insurance contracts would appear to be excluded from the category of capital transfers, for the same writer defines "capital payments" to include "loans to, capital repaid to, or assets purchased from, foreign nationals."[135] The same writer views long-term capital movements as capital transfers whereby nationals of one country acquire bonds, securities, or tangible assets in another country with the purpose of earning a future income; short-term capital transfers constitute funds that move with some frequence from country to country either for speculative purposes or because of differences in interest rates.[136] Another writer has indicated that he views the distinction made in article VIII, section 2(a) between "capital transfers" and "current transactions" as a distinction that replaces the older distinction between financial and commercial payments.[137]

It may be argued that the term "current transactions" has been given a broad meaning under the Fund Agreement, for article VI, section 3 of the Fund Agreement seems to equate "payments for current transactions" with "transfers of funds in settlement of commitments."[138] Moreover, a logical application of the proclaimed purposes of the Fund would be to include normal commercial and service transactions within the scope of current transactions.[139]

It also may be argued that a transaction is outside of the scope of a "capital transfer" when the creditor is not a resident or national of the country whose exchange control regulations are involved and

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132. See IMF, ANNEX TO THE THIRD ANN. REP. ON EXCHANGE RESTRICTIONS (1952).

133. MIKESELL, FOREIGN EXCHANGE IN THE POSTWAR WORLD, 68-69 (1954).

134. SCAMMELL, INTERNATIONAL MONETARY POLICY 18-19 (1957).

135. *Id.* at 18.

136. *Id.* at 20.

137. Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421, 423 (1950).

138. Article VII, §3 (b), pertaining to the right of a member, after consultation with the Fund, to impose limitations on freedom of exchange operations in scarce currencies, would also support the proposition that the term "current transactions" is to be given a broad meaning.

139. Thus, the Fund's stated purposes are "To facilitate the expansion and balanced growth of world trade" (IMF art. I (ii)) and "to assist . . . in the elimination of foreign exchange restrictions which hamper the growth of world trade." (IMF art. I (iv)).

when the debtor is either an international foreign corporation doing business in a number of countries and having assets in the country where performance is sought or is a domiciliary of the country where performance is sought. If such is the case, and particularly if the world-wide assets of the debtor corporation stand behind its obligations, enforcement of the contract in a country other than the exchange control country should not result in a "capital transfer" since there would not be a capital movement.[140]

Insurance Payments as Payments in Respect of Current Transactions

In only one case prior to the Cuban refugee insureds cases have the provisions of the Fund Agreement been raised as a defense in a suit involving an insurance claim. In *Catz & Lips v. S.A. Union Versicherung*,[141] decided by the Civil Tribunal of Antwerp in 1949, Dutch claimants unsuccessfully sought to attach funds of a Czechoslovakian insurance company located in Belgium. At the time of suit Belgium, the Netherlands, and Czechoslovakia were members of the Fund and the defendant set up by way of defense the Fund Agreement and a Dutch-Czechoslovak Convention of November 15, 1946. The Convention, which had been entered into pursuant to the Fund Agreement, prohibited the transfer of funds from one country to another in any transaction involving payment of debts incurred prior to December 20, 1945. The Antwerp Civil Tribunal held that the insurance claimants' action must be denied because the payment of claims under an insurance policy constituted capital transfers and because the Dutch-Czechoslovak Convention was entered into pursuant to article VI, section 3 of the Fund Agreement, which authorized member countries to take necessary steps to regulate international capital movements. The *Catz* case has been criticized on the ground that the Civil Tribunal of Antwerp was wrong in classifying the payment of an insurance claim as a capital transfer rather than as a payment in respect of a current transaction.[142]

The cash surrender value of a policy of life insurance or an endowment or annuity policy before maturity constitutes the minimum

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140. Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219, 226-27 (S.D. Fla. 1963); Theye y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70, 73-74 (1964); Pan American Life Ins. Co. v. Raij, 156 So. 2d 785, 786 (3d D.C.A. Fla. 1963); see Comment, 18 U. Miami L. Rev. 455, 472-74 (1963).

141. 7 & 8 Jurisprudence du Port D'Anvers 321 (Antwerp Civil Tribunal, Fifth Chamber 1949), reported briefly in Gold, *op. cit. supra* note 92, at 30-32.

142. Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 Yale L.J. 867, 903 (1953).

worth of the policy.[143] The cash surrender value is related to the normal life expectancy of the insured, usually as of the date when the policy was taken out.[144] Although the cash surrender value represents what *might* be termed a savings factor,[145] any purported analogy between the cash surrender value of a life insurance policy and a savings account must fail. Normally, life insurance, endowments, and annuities are regarded as forms of family or individual income protection, rather than as strict forms of savings or investment in which there is the basic expectation of gain rather than of protection.[146]

There are a number of factors that tend to negate the argument that payment of the cash surrender value of an insurance policy to the insured constitutes either a repayment of an investment or otherwise a payment of a capital nature. Since the cash surrender value of the policy represents the minimum worth of the policy, it often follows that the insured will not receive from the insurer an amount equal to the amount of the premiums that he has paid, for it "is well known that the cash surrender value of life insurance does not increase dollar for dollar with the premiums paid."[147] Secondly, throughout the term of the policy and until the policy has matured, the insured is possessed of no identifiable property rights under the policy,[148] for the "premiums when paid become the property of the insurer and the insured has no interest in them."[149] The insurance company, during the term of the policy, moreover, holds no segregated assets for the insured.[150] Thus, the rights of an insured under an unmatured policy are only the rights of an obligee under an executory and conditional contract.[151] Until the insured exercises the option under his policy to receive the current cash surrender value of the policy there exists no debtor-creditor relationship between the insurance company and the insured.[152] Thus, it is only upon the election by the insured,

143. Equitable Life Assur. Soc'y v. United States, 331 F.2d 29, 36 (1st Cir. 1964).

144. *Ibid.*

145. *Ibid.*

146. Securities & Exchange Comm'n v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65 (1959); Savage v. United States, 220 F. Supp. 745 (E.D.N.Y. 1963); Spellacy v. American Life Ins. Ass'n, 144 Conn. 346, 131 A.2d 834 (1957).

147. Commissioner v. Charleston Nat'l Bank, 213 F.2d 45, 48 (4th Cir. 1954).

148. United States v. Behrens, 230 F.2d 504 (2d Cir. 1956); United States v. Aetna Ins. Co., 46 F. Supp. 30 (D. Conn. 1942); Senese v. Senese, 121 N.Y.S.2d 498 (Sup. Ct. 1953).

149. United States v. Behrens, 230 F.2d 504, 506 (2d Cir. 1956).

150. United States v. Behrens, 230 F.2d 504, 507 (2d Cir. 1956); United States v. Hopkins, 193 F. Supp. 207, 210 (S.D.N.Y. 1960); Senese v. Senese, 121 N.Y.S.2d 498, 503 (Sup. Ct. 1953).

151. United States v. Aetna Ins. Co., 46 F. Supp. 30, 34 (D. Conn. 1942).

152. Mercantile Nat'l Bank at Dallas v. Franklin Life Ins. Co., 248 F.2d 57, 59-60 (5th Cir. 1957); United States v. Penn Mut. Life Ins. Co., 130 F.2d 495, 498

prior to the maturity of the policy, to exercise his option to take the cash surrender value of the policy that the rights of the insurance company and the insured may be said to become fixed.[153] Election to take the cash surrender value of a policy before maturity affirmatively terminates the insurance contract and substitutes the alternative promise of the insurer to pay a lesser amount than that contracted to be paid.[154] Since the liability of the insurer only becomes current at the time of the demand for payment of the cash surrender value, payment of the cash surrender value would constitute payment of a current liability arising out of a current transaction in connection with the policy.[155] Consequently, the better view is that the payment by an insurer of the cash surrender value of the policy does not constitute a capital transaction,[156] nor a "capital transfer,"[157] but rather constitutes payments in respect of a current transaction within the meaning of article XIX (i) of the Fund Agreement.[158]

CONCLUSION

The United States became a member of the International Monetary Fund in 1945. The effect to be given the exchange control laws of other members of the Fund in this country pursuant to the Fund Agreement has been raised in relatively few cases prior to the suits by the Cuban refugees against American and Canadian insurers. The suits by these Cuban refugees, however, have brought issues into focus involving the interpretation and applicability of the Fund Agreement. In the absence of definitive decisions and interpretations of the Fund Agreement, it is little wonder that the courts in these Cuban insurance cases have shown little understanding of the Fund Agreement. The

(3d Cir. 1942); United States v. Massachusetts Mut. Life Ins. Co., 127 F.2d 880, 883 (1st Cir. 1942); Fidelity Mut. Life Ins. Co. v. Merchants' & Mechanics' Bank, 71 F.2d 777 (5th Cir. 1934); Mutual Life Ins. Co. v. Kaiser, 193 Miss. 581, 10 So. 2d 766 (1942); 45 C.J.S. *Insurance* §460 (b) (1946).

153. Mercantile Nat'l Bank at Dallas v. Franklin Life Ins. Co., 248 F.2d 57 (5th Cir. 1957); United States v. Garland, 122 F.2d 118, 121 (4th Cir.), *cert. denied*, 314 U.S. 685 (1941); Pacific States Life Ins. Co. v. Bryce, 67 F.2d 710, 712 (10th Cir. 1933); 45 C.J.S. *Insurance* §460 (b) (1946).

154. Equitable Life Assur. Soc'y v. United States, 331 F.2d 29, 35 (1st Cir. 1964).

155. Mercantile Nat'l Bank at Dallas v. Franklin Life Ins. Co., 248 F.2d 57, 59 (5th Cir. 1957); Warren Co. v. Commissioner, 135 F.2d 679, 684-85 (5th Cir. 1943).

156. See Commissioner v. P. G. Lake, Inc., 356 U.S. 260, *rehearing denied*, 356 U.S. 964 (1958); Hort v. Commissioner, 313 U.S. 28 (1941); Bodine v. Commissioner, 103 F.2d 982 (3d Cir. 1939).

157. See Blanco v. Pan American Life Ins. Co., 221 F. Supp. 219 (S.D. Fla. 1963).

158. Bayitch, *Florida and International Legal Developments 1962-1963*, 18 U. MIAMI L. REV. 321, 350 (1963); Comment, 18 U. MIAMI L. REV. 455, 472 (1963); see also Meyer, *supra* note 142, at 903.

fault lies not with the courts, but with the State Department and perhaps with the Fund itself.

Under article XVIII of the Fund Agreement the executive directors and board of governors of the Fund have been given exclusive powers of interpretation of the Fund Agreement whenever a question arises between member countries. The executive directors have announced their willingness to assist in connection with interpretation of article VIII, section 2(b) of the Fund Agreement and to advise whether particular exchange control regulations have been maintained or imposed *consistently* with the Fund Agreement.[159] Apparently the executive directors of the Fund have never felt obliged to take the initiative in formally and exhaustively interpreting the complex provisions of article VIII, section 2(b). The United States Department of State seems to have remained indifferent to the problems of interpretation surrounding the language of article VIII, section 2(b). A case in point is the failure of the State Department to solicit the Fund's views upon the consistency of the Cuban exchange control laws and regulations with the Fund Agreement, particularly in view of the volume of American business transactions with Cuba and the amount of American capital tied up in Cuba at the time Castro took over.

While exclusive powers of interpretation of the Fund Agreement have been vested in the executive directors in disputes between member countries, there is nothing in the Fund Agreement that prevents the courts of this country from interpreting the provisions of the Fund Agreement in private suits. The only restriction upon the courts under the Articles is to be found in article VIII, section 2(b) in those situations in which the transaction in question falls squarely within the tests spelled out in article VIII, section 2(b).

A great danger can arise from the apparent passivity of the Fund and the State Department with respect to the problems of interpretation and application posed by article VIII, section 2(b). The danger comes from those writers who expound what might be termed the per se doctrine of article VIII, section 2(b). In the view of these writers, whose influence is quite great owing to the dearth of formal Fund interpretations or judicial decisions, the plea of the existence of the exchange control regulations of an article VIII member country should alone suffice to render a contract unenforceable under article VIII, section 2(b) without reference to the fundamental question whether or not the exchange control regulations invoked as a defense have been maintained or imposed consistently with the Fund Agreement. The danger inherent in this per se approach is that it would stifle any form of judicial inquiry into the tests spelled out in article

159. IMF ANN. REP. app. XIV, at 82-83 (1949).

VIII, section 2(b) and would paralyze any progress in the direction of resolving the multitude of problems that can and will arise out of the application of article VIII, section 2(b) of the Fund Agreement. This per se approach is implicit in the arguments of the insurers in *Ugalde, Klawans,* and *Calvo* and in the decision of the Florida Supreme Court.

A basic problem posed by the *Sabbatino* decision of the United States Supreme Court is whether the American courts in interpreting the Fund Agreement will be foreclosed from making inquiry into the *consistency* of another country's exchange control laws with the Fund Agreement.[160] One may imagine the scope of this problem when one considers the variety of ways in which countries may discriminate against foreigners through exchange control and the variety of ways in which revenue, penal, and confiscatory measures may be subtly tied in with and enforced through exchange control measures. *Sabbatino* raises the question whether the American courts will be compelled to recognize exchange control regulations that no other country would recognize. In light of *Sabbatino,* one may ask what an American court would do if another article VIII country's exchange control regulations were plead as a defense and if it were advised that the Fund did not regard the exchange control regulations of that country as being consistent with the Fund Agreement.

The above problems do not have a simple answer and seem to call for diverse conclusions. On the one hand, the position may be taken that *Sabbatino* forecloses judicial inquiry into the validity of the acts of a foreign state even in the field of exchange control laws or restrictions. This position is supported by the existence of ambiguity and lack of consensus created by the diverse results reached both by the courts and commentators in interpreting the Fund Agreement. Since the Supreme Court seems to require a high degree of consensus concerning a particular area of international law before the courts may

160. The recent Hickenlooper Amendment, which is contained in the Foreign Assistance Act of 1964 and which amends the Foreign Assistance Act of 1961, reverses in part the decision of the United States Supreme Court in *Sabbatino.* That amendment provides, in effect, that no court in the United States should decline, because of the act of state doctrine, to make a determination or to apply principles of international law in cases in which confiscations by foreign governments occurring after January 1, 1959, are alleged to be contrary to international law. The courts are free to presume that they may proceed on the merits unless the President officially states that an adjudication in the particular case would embarrass the conduct of foreign policy. The cut-off date with respect to suits brought pursuant to the amendment is January 1, 1966. 78 Stat. 1009, 22 U.S.C. §2370(e)(2) (Supp. 1964). The Hickenlooper Amendment would not, however, affect other acts of foreign sovereigns, as in the field of exchange control, unless they could clearly be tied in with a confiscatory purpose.

feel free to disregard the act of state doctrine,[161] it may be that *Sabbatino* forecloses judicial inquiry into the area of exchange control regulations. On the other hand, the position may be taken that *Sabbatino* precludes the application of the act of state doctrine, thereby allowing judicial inquiry, when the exchange control laws in question allegedly contravene the provisions of a multilateral treaty such as the Fund Agreement.[162] In any event, when the Fund itself has made known that the exchange control laws in question do not meet the test of consistency, the act of state doctrine should have no application.

A problem of some concern in the light of the Cuban insurance cases relates to the over-all questions of confiscation, the act of state doctrine, and the obligations imposed upon a former article VIII member of the Fund such as Cuba. A basic purpose of the Fund, as spelled out in article I (ii) of the Fund Agreement is "to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of *all* members as primary objectives of economic policy." (Emphasis added.) It has been observed that the Fund is a guardian of a "code of international good behavior."[163] Accordingly, the novel question presents itself whether, in accepting the obligations of membership in the Fund, member countries have not opened the door to scrutiny of acts of confiscation or expropriation that they perform. If the answer is affirmative, then it is logical to conclude that when the act of state doctrine and the Fund Agreement are raised as twin defenses in suits between private parties, the Fund Agreement should take precedence and govern any determination as to whether relief may be granted.

The basis for the foregoing conclusion lies in the voluntary surrender by each member of the Fund of a certain measure of its sovereignty upon accepting the treaty obligations of the Fund Agreement. Through the Fund each member owes certain duties to every other member. They pledge themselves to the abandonment of unilateral courses of action that may have detrimental effects on the economies of other members. It has been observed that under the Fund Agreement there is considerable emphasis placed upon the encouragement and protection of foreign investment.[164] Accordingly, the application of the act of state doctrine in certain of the Cuban insurance cases

161. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

162. See Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935, 939 (1964).

163. See FLEMING, THE INTERNATIONAL MONETARY FUND; ITS FORM AND FUNCTIONS 5 (1964).

164. GOLD, THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS: SOME LEGAL EFFECTS OF THE ARTICLES OF AGREEMENT 12 (1965).

could produce results contrary to the obligations imposed by the Fund Agreement.

The Cuban insurance cases raise the question whether article VIII, section 2 (b) may be utilized to effectuate extra-territorial acts of confiscation in connection with political refugees from a member country of the Fund. In the cases discussed herein, Cuba had declared the refugees' rights under their policies confiscated after they had fled Cuba. It would appear that article VIII, section 2 (b) would have rendered unenforceable any claims by these refugees against companies situate here in connection with capital transactions, such as withdrawal of bank accounts physically situated in Cuba. However, the claims of the Cuban refugees under their policies of insurance with the American and Canadian insurers appear to fall within the category of "current transactions"[165] and, as such, article VIII, section 2 (b) would not affect their enforceability in this country even if the American or Canadian insurers had been required to make payment from their Cuban funds or assets.[166] However, if it were possible to conclude that payment of the insurance policies would constitute payments in the nature of capital transfers, then the confiscatory measures of the Castro government could have indeed been given extra-territorial effect and rendered the Cuban insureds' claims unenforceable.

Still another question posed by the Cuban insurance cases is whether Cuba or any other article VIII member of the Fund may effectively convert a dollar contract for goods, services, and the like into a peso contract through exchange control laws and regulations. While the problem is novel, it would appear that this may not ordinarily be done in the case of current (international) transactions. The resident of the country should, pursuant to the Fund Agreement, be permitted to obtain the necessary foreign exchange to make out-payments in dollars. In the case of in-payments, however, the resident of the exchange control country may be required either to receive a given currency such as pesos or to surrender any dollars he may receive for pesos.[167] Thus, the only basis for concluding that a country may rewrite the terms of a written contract in a transaction that qualifies as a current (international) transaction under the Fund Agreement is when there are in-payments only. In that event a country may require its resident contracting party to receive a specified currency when payments are made pursuant to the contract.[168] In the case of insurance contracts, which may involve both in-payments (payments to residents) and out-payments (payments to foreign in-

165. Bayitch, *supra* note 158, at 350-51; Comment, *supra* note 158, at 472.
166. GOLD, *op. cit. supra* note 164, at 8-9, 11-12.
167. *Id.* at 12.
168. *Id.* at 9.

surers), it is difficult to concede that the exchange control country such as Cuba may effectively convert a dollar contract into a peso contract without imposing a restriction on payments for current transactions prohibited by article VIII, section 2 (a). In an instance such as this, it appears that the exchange control country cannot accomplish more than to regulate the manner of performance of the contract, so far as payment in dollars or pesos to its residents is concerned. The exchange control country however, cannot compel the foreign insurance company to accept a designated currency, nor may the exchange control country prevent its residents from securing the necessary foreign exchange, such as dollars, to make payments to the foreign insurer.[169]

Still another question that arises in connection with the Cuban insurance cases is what would the result have been if Cuba had withdrawn from the Fund *prior* to the time when suit was brought on these insurance policies. The answer to this question is that the provisions of the Fund Agreement could not then have been raised as a defense by the insurers. The provisions of article VIII, section 2 (b) of the Fund Agreement pertaining to unenforceability would have had no effect, regardless whether payment under the insurance policies would have contravened Cuban exchange control regulations.[170]

The gaps in the law and in the interpretation of article VIII, section 2 (b) and of other provisions of the Fund Agreement make it imperative that American firms doing business abroad remain constantly aware of the design behind the exchange control regulations of countries in which they do business. Such firms would be well advised to solicit the assistance of the State Department and the Treasury Department in gaining clarification of existing and future exchange control laws both from the enacting country and from the executive directors of the Fund. Otherwise, such companies may find themselves victimized by a more subtle form of "confiscation" than has heretofore been the case.

The last stage in the history of the Cuban insurance cases came on April 2, 1964, when Cuba withdrew from participation in the International Monetary Fund, thereby furnishing prima facie evidence of its unwillingness to abide by the obligations of article VIII membership. Cuba's withdrawal from the Fund lends credence to the position taken herein that the Cuban exchange control laws and regulations raised in the Cuban insurance cases were not being maintained *consistently* with Cuba's obligations under the Fund Agreement.

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169. *Id.* at 7-9, 12.

170. Stephen v. Zivnostenska Banka, 31 Misc. 2d 45, 140 N.Y.S.2d 323 (Sup. Ct. 1955); GOLD, *op. cit. supra* note 164, at 25; IMF art. VIII, §2 (b) (1944).