LEGAL TECHNICAL ASSISTANCE OF THE INTERNATIONAL MONETARY FUND TO ITS MEMBER COUNTRIES

The purpose of this article is to discuss some legal aspects of perhaps wider interest arising within the framework of technical assistance which the International Monetary Fund has given to its member countries during recent years for purposes of economic and monetary stability, development and international co-operation. The article will try to describe the necessity for legal technical assistance, what it involves, and the experience gained in connection with it.

PART I. LEGAL TECHNICAL ASSISTANCE IN GENERAL

"Legal" technical assistance

Legal technical assistance forms part of the general technical assistance carried out by the Fund. One may say that legal assistance, while on the increase, is the youngest offspring of the Fund's technical assistance activities. The senior of them is — without doubt — the technical assistance provided by the IMF-Institute (formerly known as the Fund's Training Program) which has been established to centralize and expand the Fund's training activities. Its main task is to hold courses on problems of economic, financial and monetary policy, balance of payments methodology, etc., and to familiarize central bank and government officials of member countries with numerous aspects of the Fund's purposes, its work and its organization. At times these courses include lectures by the Fund's legal staff on certain aspects of a legal nature connected with the Fund's Articles of Agreement, the Fund's operations or other matters involving the Fund or of interest to the Fund. To this extent, the courses organized by the IMF-Institute contain elements of legal technical training but they are not specifically designed for lawyers and are mostly attended by economists. Legal training is only a side-aspect.

In addition, the Fund provides technical assistance through programs under which panels of experts are established with the help of central banks or governments of member countries. These experts are not staff members of the Fund. They are frequently senior officers in the employment of a member country and are made available, on a temporary basis, for assignment by the Fund to serve as advisors or executive officers in central banks or governmental bodies of other member countries which have requested the assistance. The positions to be filled by the experts are not, normally, of a legal nature although it may well be that legal issues play a role, e.g., in the case of exchange control or tax administration. However this may be, one would not normally regard these

assignments as legal technical assistance unless a position specifically requiring legal education and training would have to be filled. As yet, there has been only one such case.

The Fund gives technical assistance also by assigning its own staff members to member countries in response to requests for advice on specific problems. These assignments at times involve the legal staff of the Fund together with staff of the Fund's Central Banking Service, Fiscal Affairs Department or the Exchange and Trade Relations Department. As a rule, this is the case when legal drafting is involved or will be involved at a later stage. In most cases the legal drafting concerns legislative work such as the preparation of central banking or commercial banking legislation, trade and exchange control legislation, investment promotion, public loans legislation or other types of legislative work. The legal staff of the Fund has also been involved in the preparation of arrangements for monetary and currency unions or arrangements for free interchangeability of currencies such as customary tender arrangements between countries which are economically closely related or integrated. In general, one may draw the conclusion that legal technical assistance provided by the Fund has been mainly administrative or legislative assistance in the drafting of treaties, laws and regulations for purposes of economic, financial and monetary stability and development or for purposes of international co-operation.

Legal "technical" assistance

The assistance provided by the Fund is of a purely technical character. Whether banking legislation or exchange control, investment promotion, income taxation or any other project is involved, the Fund's service is animated solely by the motive of serving the interest of the country concerned, bearing in mind the interest of the international community as a whole, and, within this context, to make available to Fund members the technical expertise of its own staff or personnel recruited for this purpose from central banks or governments. The aim is always to achieve technical professional quality and not to achieve a certain political result. This is not to say that political considerations are absent when member governments have decided to seek the approval of the legislature for the change of an existing law or the enactment of a new law, but these political considerations are the domain of the government. They are not the concern of the experts. If a government finds it necessary or convenient to explain its political considerations to the experts their attitude can be only one of receptiveness but not of active response. "Technical" assistance requires that the experts advise only from the viewpoint of their professional competence. The guiding principle of their assistance will be an attitude of *"sine ira et studio"*, in particular where the subject of their work may be influenced by principles of a political nature.

Legal technical "assistance"

It has been said that legal technical assistance provided by the Fund is mainly legal administrative or legislative assistance in the drafting of treaties, laws and regulations. This leads to another observation which

is important to bear in mind. The full jurisdiction over these matters rests with the country or countries which have requested the assistance of the Fund. The fact that the Fund agrees to send members of its staff or other experts to a country in order to provide the authorities with the help they need does not in any way transfer this jurisdiction to the Fund or its experts. The authorities of the country are free to accept, to reject or to modify any proposal made by the experts. Since the ultimate decision on the course to be taken lies with the authorities of the country there would be, in case of a disagreement on points of importance, no other solution than to agree to disagree — again *"sine ira et studio"*. On the other hand, because the authorities of the member country have the undivided jurisdiction and the right to decide as they think fit the Fund as such could not assume any responsibility and would not take any credit for whatever results may be achieved in respect of the technical assistance project in question.

Legal Basis of the Fund's Technical Assistance

All activities of the Fund, including legal technical assistance, must be guided by the purposes for which the Fund has been established. These purposes are listed in Article I of the Fund's Articles of Agreement.

"ARTICLE I. PURPOSES

The purposes of the International Monetary Fund are:

(i) To promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) 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.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to membes by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(iv) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its decisions by the purposes set forth in this Article."

It is easily recognizable that Article I(i), "to promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international mone-

tary problems", is one of the basic provisions that has induced the Fund to provide its good offices to member countries. The provision governs not only legal technical assistance but technical assistance in general for technical assistance is one of many ways in which consultation and collaboration on international monetary problems takes place. Of equal importance for the legal technical assistance provided by the Fund are the other purposes listed in Article I of the Articles of Agreement. Article I as a whole, either expressly or implicitly, circumscribes the scope of the legal technical assistance which the Fund can give. Thus, there is no doubt that the Fund could not, *ex officio,* undertake to draft a civil or criminal code or any civil or criminal procedure law. This is obviously recognized by the Fund members and, apparently, no such request has been received by the Fund. Sometimes, of course, there are border cases when specific aspects of commerce or certain types of financial institutions (e.g., an insurance companies act) are involved.

It has been said that Article I of the Articles of Agreement, as a whole, has a bearing on the legal technical assistance provided by the Fund. This includes also Article I (v), "to give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity". Legal technical assistance sometimes necessitates, and results in, a combination of measures. This can be illustrated in the case of Somalia: At the time of its independence Somalia inherited a dual system of trade and exchange control. The system in the northern region was relatively liberal while the system in the south was more restrictive. These systems were based on different concepts and consistent administration was nearly impossible. Towards the end of 1963 Somalia requested the Fund to provide technical assistance with a view to unifying the two separate systems including the drafting of a law and a number of regulations based on liberal principles. The Fund provided the assistance requested and, as a result, the Somali Parliament, on October 7, 1964, enacted a law providing for the establishment of a uniform exchange and trade control system throughout the whole country. The enactment of the law together with the regulations issued in pursuance thereof increased at once the level of liberalization of the Somali trade and exchange system despite a precarious balance of payments position. Consequently, precaution had to be taken that a potential initial increase in imports or outflow of remittances would not reduce the foreign exchange reserves of the country to such a low level as would necessitate the reintroduction of restrictive measures. With the advice of the Fund staff the Somali authorities therefore requested stand-by assistance from the Fund for a period of one year and in the amount of $4.7 million. By decision of the Fund's Executive Board a stand-by arrangement was approved.[1] It provided the necessary leeway for the Somali authorities

1. A Stand-by arrangement may be defined as an arrangement between the IMF and a member country whereby the latter is assured that, subject to such conditions as are included in the arrangement, it can use the financial resources of the Fund up to a stated amount during a stated period. Cf. Joseph Gold, The Law and Practice of the International Monetary Fund with respect to "Stand-by Arrangements", (1963) 12. *I.C.L.Q.* pp. 1-30.

and strengthened their hands in carrying out the intended reforms and liberalizations in the trade and payments system.

The Necessity for Legal Technical Assistance

The involvement of legal experts in technical assistance projects and the experience gained in the execution of these projects has shown, time and again, that there exists a genuine need for legal technical assistance in member countries of the Fund. This applies, in particular, to developing nations where lawyers, unfortunately, do not participate in the public administration or in the process of the formulation of policies to the same extent as their colleagues in industrialized countries. This problem, and the general need for legal technical assistance, has been very ably stated by Thomas L. Farmer, the General Counsel of the U.S. Agency for International Development:[2]

> "Despite the clearly demonstrable need for the skills of creative lawyers, there is little doubt that economists, engineers, agronomists, public administrators and a variety of other specialists have played a far more prominent role than lawyers as architects of development in Asia, Africa and Latin America.
>
> The role of the lawyer in most developing countries is on the whole a very narrow one indeed. Both in government and private work, the lawyer is usually considered a technician and generally appears prepared to accept restriction to a technician's role. The government lawyer rarely participates in the policy making process and frequently even cedes the task of legislative drafting to government administrators. The private lawyer rarely acts as a general business advisor and generally does not participate significantly in negotiation on behalf of his client.
>
> There is no shortage of law school graduates or practicing lawyers in these countries. On the contrary, there are in most of the less developed areas many more lawyers than could be usefully employed even under the best of condition. Why, then, do attorneys in the developing world play such a minor role in what is unquestionably the central focus of popular concern in their countries?
>
> The explanation seems to lie first of all in the nature of their legal education — a system generally based on foreign models more responsive to conditions in Europe than to the distinctive needs of the developing societies. But even more important is the lawyers' preoccupation with formal rules rather than with creative problem — solving — whether the problems are those of a government trying to implement a new development program or those of private clients (local or foreign), trying to conduct business in a society experiencing the many stresses and strains besetting the developing countries. In general, then, we find a legal system inadequate to the task at hand and a legal profession not equipped to make the necessary improvements."

The experience the Fund's legal experts have had in carrying out projects of legal technical assistance conforms with this analysis. Relatively few meetings with Ministers, Central Bank Governors or their

2. Address by Thomas L Farmer, General Counsel, Agency for International Development, Department of State, before the Council of the Section of International and Comparative Law, American Bar Association, Montreal, Canada, August 7, 1966; published in Congressional Record, Proceedings and Debates of the 89th Congress, Second Session, Daily Issues of September 6 and 2 (Nos. 149 and 148) Combined.

senior staff were attended by lawyers, and usually these were foreign lawyers. The absence of local lawyers has been particularly conspicuous. This is regrettable in more ways than one. First, the local lawyers lose an opportunity to familiarize themselves with the policy aspects and the economic or monetary substance of the draft law and to contribute actively to its preparation. Secondly, their presence might facilitate a more expeditious handling of the formal aspects of the legal drafting which have their own peculiarities in every country and with which the local lawyers are, of course, more familiar than the legal experts of the Fund can be. The absence of the local lawyers during the policy making process, when the substance of the law is discussed and formulated, has the effect that only the formal legal vetting is reserved to them. Usually this takes place at a late stage, sometimes even after the cabinet has decided on the matter. Often it results in unnecessary delays. What is needed, indeed, particularly in developing countries with their pressing and vast problems of economic and social development, is a better utilization of the local lawyers' talents, the more so since experience in connection with technical assistance projects has shown that usually their expertise is of high standard. Contrary to Mr. Farmer's views it is submitted that there is probably less a problem of legal education because universities can only provide a thorough foundation in law and economics in more general terms. No law school would teach its students how to draft central banking, commercial banking or exchange control legislation. This kind of specialization will have to develop as part of a lawyer's future professional career in the government service. But it can only develop if the lawyer is given a chance to acquire an intimate knowledge of the policy considerations which determine the substance of the law. Several hundred years ago the great reformist Martin Luther once said: "A lawyer who is nothing but a lawyer is not a lawyer but a poor thing." This may, of course, be applied to other professions as well.

The Practical Approach to Legal Technical Assistance

(a) Teamwork

Legal technical assistance projects in which the Fund is involved are usually carried out by small teams of economists and lawyers. Once the team has been established, it is, whenever possible, not changed in its composition until the work has been completed in all its aspects. The combination of economists and lawyers has distinct advantages. It guarantees a coordinated approach right from the beginning and lets economist and lawyer share the same experience both in policy discussions and legal drafting. As a result the one profits from the other and the benefit accrues to the project itself. After a period of time the team grows together and becomes a homogeneous entity. When this stage has been reached the original differences of accent in the work of the economist and lawyer tend to diminish with the economist eventually influencing the legal drafting as much as the lawyer influences the economic considerations and policy decisions. Such harmony in approach will be the result of a close personal co-operation within the team but it does not indicate a shift in jurisdiction or responsibilities. These remain unchanged.

(b) Procedure and drafting technique

Whenever a request for legal technical assistance has been received and a decision has been made by the Fund to provide the required assistance, it would seem to be most useful to hold exploratory discussions with government or central bank officials of the country concerned before any tentative legal drafting is undertaken. Each country has its own problems and no legislation prepared by the Fund staff for one country has ever been quite the same as legislation prepared for a different country. This is not to say that it is impossible to work from model legislation. As a matter of fact the Fund staff seems to have worked out model approaches to various types of legislation (e.g. central banking, general banking, exchange control) because there is always a certain similarity within a category of laws. But a model cannot be more than a starting point and will always have to be adapted to local needs and circumstances.

One must also take into account the fact that the degree of sophistication in the economy or administrative machinery of countries differs widely. A complex law that is efficient perhaps in a sophisticated economy such as a European country or the United States might not suit the needs of developing countries. In the field of technical assistance there is not much use in clinging to one's own national legal concepts. Legal experts will have to consider that what is appropriate for one's own country is not necessarily the best for other countries. Every young lawyer grows up — more or less — in legal concepts of his own country or in concepts of the host-country in which he studies law and it is understandable that his first concern is to become a master in this particular legal system. He may be tempted to transfer these concepts to other countries. But in the twentieth century this is possible only to a very limited extent. The ever growing international interdependence brings about an ever growing need for studies in foreign or comparative law. Without this necessary research — which in itself is quite rewarding also from the intellectual point of view — legal technical assistance will not be as effective as it could be. It is, furthermore, important to bear in mind that the regulatory powers written into a law of an economic, monetary, financial or fiscal character should not only be designed to meet the needs of the country but should also cope with the administrative realities or potentials in the country concerned. No law should provide for more control or public regulation than can be administered within the foreseeable future. Otherwise, the law will remain ineffective and may open the doors to evasion or corruption. In the end, legal morality in the country may deteriorate.

Any legal drafting should also observe the requirements of the traditional legal system into which the proposed measure shall fit. British Commonwealth countries have drafting methods and rules of public administration that are different from those of Latin American countries or countries of the French speaking community. There is no use trying to propose draft legislation that may be perfect in substance while it would be alien in form, procedures or rules for its administration. The result could well be that because of the unfamiliar way of drafting the authorities, particularly the local lawyers, would resent the adoption of an otherwise good and modern law and would resort again to a more

familiar law of yesterday although they had wanted to revise it and modernize its content.

Similarly, it would seem to be good practice to avoid changes that could appear as too radical unless the development of the country really calls for a major institutional step forward compared with some system of its past. A gradual development of its institutions and a smooth transition from a relatively simple to a more complex system of economic management is usually better than to try to achieve too much at once. Otherwise there might easily develop a situation of confusion or of public mistrust and this could lead to a setback rather than progress in the country's development. Governments and central bankers in developing countries have an ear for this and are sometimes concerned that certain proposals which they recognize as justified and reasonable may, nevertheless, have an undesirable effect on public confidence. Technical advisors may perhaps have an opinion on these matters but only governments and central bankers in the countries concerned can truly know what is politically feasible or not.

It has been said that legal technical assistance should be based on extensive studies of foreign and comparative law. This applies, for a special reason,, to the laws of countries neighboring the country requesting the assistance whether or not their legal systems are basically the same. Frequently, during the discussions of a draft law, the officials of the country raise the question "how does this proposal compare with the law of our neighbour X" or "this proposal sounds fine but our neighbour X has treated the problem in such and such a way, why do you think we should do it differently?". The technical experts will be well advised to have a ready answer to these questions or they may run the risk that their own proposal will sound less convincing.

Government officials sometimes complain that lawyers have a tendency to draft laws that nobody except a lawyer can understand. Some of them even suggest that there could be a certain strategy in that. Indeed, it seems that legal language is often unnecessarily complicated. One should perhaps make a greater effort to simplify the drafting techniques and write laws, particularly laws for purposes of economic development, that can more easily be understood by those who will be affected by them. It is perhaps easier — because it may involve less refinement — to draft a law in complicated language, structure and detail than to produce a law in short, clear and yet precise terms. One of the problems is that sometimes lawyers have a tendency to copy from other existing laws. This "borrowing" procedure may not be too objectionable as long as the model which is used is a particularly good one but it should not lead to a perpetuation of outdated drafting methods. The following three examples, all of which are often found in central banking legislation, will perhaps illustrate this drafting difference:[3]

> "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is

3. On this, see also Hans Aufricht, *Comparative Survey of Central Bank Law,* (London, 1965) pp. 60-61.

made, executed, entered into, done or had, shall be made, executed, entered into, done and had according to the notes and coins which are current as legal tender under this Ordinance, and not otherwise unless the same be made, executed, entered into, done or had according to the currency of some other country."

(Section 26(2) of The Bank of Northern Rhodesia Ordinance, 1964; Northern Rhodesia Government Gazette, Supplement, 31st July, 1964.)

"Toutes les transactions monétaires ayant lieu dans la République du Congo sont présumées étre exprimées en francs congolais sauf convention juridiquement valable entre les parties."

(Republic of the Congo, Article 18 of the Decree-Law of 24th February, 1961.)

"(a) All monetary transactions, contracts or obligations in the Kingdom shall be expressed, recorded, and settled in Jordan dinars.

(b) If no currency is specifically mentioned in any financial document, the currency shall be deemed to have been expressed in Jordan dinars.

(c) Foreign currencies may be used for these purposes only to the extent permitted by the Foreign Exchange Control Law and any regulations issued thereunder."

(Section 26 of the Central Bank of Jordan Law, Law No. 93 of 1966; Official Gazette, 22nd October, 1966.)

The examples quoted above may all have their "pros and cons" but it is suggested that the best of the three is the Congolese version. A similar provision in the English language could perhaps be the following:

"All monetary obligations or transactions in [country] shall be deemed to be expressed and recorded, and shall be settled in [currency of the country], unless otherwise permitted by any written law of [country]." [4]

Another problem of legal drafting technique relates to the question of precision. Legal precision is, of course, what is generally required of a lawyer. Nevertheless, at times, flexible language may be required. This is of importance especially for lawyers in the public service. Diplomatic documents, in particular, often appear to be written in such terms. Political considerations often necessitate that certain matters be couched in terms such as will provide the greatest possible flexibility. At other occasions political considerations may require that a binding agreement between states be reached before, or despite the fact that, a number of detailed, though still important, questions have not yet been settled. It may even be necessary, in view of overriding political considerations, to draft and conclude an agreement in full knowledge that at that time a number of detailed problems could not be solved because any attempted solutions might likely encounter unsurmountable difficulties and, thereby, threaten the success of the political move. In other words, the question of precision or flexibility in legal drafting is often determined by political aims and necessities.

The question then arises whether and to what extent these considerations have a bearing on legal technical assistance. It is submitted

4. Cf., e.g, Section 13 of the Singapore Currency Act. 1967 (Government Gazette, 23rd March, 1967): "All monetary obligations or transactions in Singapore shall be deemed to be expessed and recorded, and shall be settled in the Singapore Dollar unless otherwise provided for by law or validly agreed upon between the parties."

that this should be seen under two different aspects: First, as has been said before, legal assistance is of a technical nature only. It would, therefore, not be legitimate for an expert to involve himself in a project beyond the sphere of his technical expertise. He is not a policy-maker. On the other hand, the drafting technique must be adapted to correspond to the requirements of each particular situation because it should implement the will of the government or governments concerned without the expert's trying to regulate in a pre-established manner certain issues that should not be touched or should be kept flexible.

(c) Duration of the technical assistance assignment

It seems to be the Fund's policy to send its legal staff to member countries for short periods of time only. In almost all cases the assignments of lawyers in the member country do not exceed three or four weeks. This is not so with the Fund's economists who are often assigned to a country for six or twelve months, e.g. in connection with a stabilization program, balance of payments statistics, advice on fiscal measures, etc. To some extent the Fund's policy may be explained by a desire to do most of the drafting work at the head office in Washington. However, while this may have certain merits, it is submitted that complicated legislative work would be facilitated if it could be completed in the member country concerned in closest co-operation with local economists and lawyers. It would seem to be to the advantage of the project concerned if there could be a constant exchange of views on a daily basis between the Fund expert and the local authorities. For example, much time will be needed in order to write a new income tax law or to revise a country's exchange control system. It is difficult to see how this could be done most successfully unless it is done in the country concerned where the authorities are available at any time to provide the necessary information and guidance and to see to it that the expert's proposals can be discussed, co-ordinated and decided upon without delay. It is submitted, therefore, that the Fund's legal technical assistance could be made more effective if the lawyers' assignments were to be, where indicated, on longer term.

(d) Publicity

The expert should not invite any publicity to legal technical assistance projects in which he is involved. There are several reasons for this: First, it is the responsibility of the country concerned to inform its public if and when it sees fit and the expert should — with caution and reserve — provide technical information only in accordance with an explicitly stated request by the local authorities. Sometimes the authorities request the expert to explain the nature of the project on which he is giving assistance to special interested groups such as the banking community or the chamber of commerce although this should generally not be encouraged by the technical experts. Secondly, any publicity in which the expert may find himself involved, could be regarded by some as a form of advertising and this would not conform with the technical nature of the assistance provided. Furthermore, it is important that a close working relationship between the local authorities and the technical experts be maintained which, as a precondition, requires that any information obtained by the experts be treated by them with utmost discretion.

PART II. LEGISLATIVE WORK

Central Banking Legislation

Over the past ten years a great number of central banks have been established in developing countries and this trend is still continuing. Other countries are in the process of modifying their central bank laws and the present indication is that this trend also is increasing. In some areas of west and equatorial Africa common central banks with jurisdiction over monetary matters in two or more countries have been set up. Other groups of countries have considered the establishment of common central banks but eventually decided against it and set up their own institutions.[5] The majority of these latter countries have, nevertheless, found other — less far reaching — ways of close monetary co-operation and some of them have concluded, or are considering, reciprocal "customary tender" arrangements.

"Customary tender" arrangements may be described as reciprocal arrangements between two or more central banks or governments for the purpose of facilitating the acceptability of each other's notes and coins at par without charge throughout the entire area covered by the arrangement. It is characteristic for these arrangements that banks in each currency area would be invited to provide local currency without charge in exchange for notes or coins of the issuing authorities of the other areas and would be given the right to exchange these notes at par at their own issuing authority. The issuing authorities would, in turn, settle in regular intervals in the manner agreed between them. In this way, the notes and coins covered by the arrangement can circulate, to some extent, side by side and the arrangement can contribute to a closer economic integration or help to compensate for the loss of a currency that once enjoyed legal tender status throughout the entire area.[6]

A good example of a customary tender arrangement would seem to be the exchange of letters that took place in June 1967 between the Governor of Bank Negara Malaysia, the Chairman of the Board of Commissioners of Currency, Singapore, and the Chairman of the Brunei Currency Board. The letter from the Governor of Bank Negara Malaysia to the Chairman of the Board of Commissioners of Currency, Singapore, reads as follows:—

> "Dear Mr. Chairman,
>
> I have the honour to refer to the meeting of the Board of Commissioners of Currency, Malaya and British Borneo, held at Kuala Lumpur on January 7. 1967, at the conclusion of which the representatives of the Governments of Malaysia, Singapore and Brunei agreed in principle to adopt a system of free intechangeability of their respective currencies as from June 12, 1967, when the existing Currency Board commences liquidation, in order to facilitate economic co-operation and trade relations between their countries.
>
> 2. The details of arrangements for this purpose have since been finalised by the technical advisers concerned. As between Malaysia and Singapore the arrangements are as follows:

5 Cf., e.g., Republic of Singapore, White paper on Currency, Cmd. 20 of 1966.

6. On this, see East Caribbean Currency Authority, First Annual Report, 24th May, 1966, Bridgetown, Barbados.

(a) (i) Bank Negara Malaysia will accept from banks in Malaysia, notes and coins issued by the Board of Commissioners of Currency, Singapore, and will exchange such notes and coins, at par and without charge, into notes and coins issued by Bank Negara Malaysia;

(ii) Bank Negara Malaysia will, from time to time and at its discretion, send to the Board of Commissioners of Currency, Singapore, notes and coins issued by the latter and accepted and exchanged by Bank Negara Malaysia under these arrangements, provided that shipments of such notes and coins will be in multiples of one thousand Singapore dollars with a minimum of ten thousand Singapore dollars per shipment;

(iii) After each shipment of notes and coins referred to in subparagraph (a) (ii) above, Bank Negara Malaysia will notify the Board of Commissioners of Currency, Singapore, of the costs incurred by Bank Negara Malaysia in connection with such shipment of notes and coins;

(iv) Upon receipt by the Board of Commissioners of Currency, Singapore, of each shipment of notes and coins, the Board of Commissioners of Currency, Singapore, will pay to Bank Negara Malaysia, at par value, the equivalent in sterling or some other agreed currency the full face value of the notes and coins stated by Bank Negara Malaysia to be contained in the shipment, provided that adjustments will be made subsequently in regard to surpluses, deficiencies and costs incurred in the shipment.

(b) (i) The Board of Commissioners of Currency, Singapore, will accept, from banks in Singapore, notes and coins issued by Bank Negara Malaysia, and will exchange such notes and coins, at par and without charge, into notes and coins issued by the Board of Commissioners of Currency, Singapore;

(ii) The Board of Commissioners of Currency, Singapore, will, from time to time and at its discretion, send to Bank Negara Malaysia notes and coins issued by the latter and accepted and exchanged by the Board of Commissioners of Currency, Singapore, under these arrangements, provided that shipments of such notes and coins will be in multiples of one thousand Malaysian dollars with a minimum of ten thousand Malaysian dollars per shipment;

(iii) After each shipment of notes and coins referred to in subparagraph (b) (ii) above, the Board of Commissioners of Currency, Singapore, will notify Bank Negara Malaysia of the costs incurred by the Board of Commissioners of Currency, Singapore, in connection with such shipment of notes and coins;

(iv) Upon receipt by Bank Negara Malaysia of each shipment of notes and coins Bank Negara Malaysia will pay to the Board of Commissioners of Currency, Singapore, at par value, the equivalent in sterling or some other agreed currency the full face value of the notes and coins stated by the Board of Commissioners of Currency, Singapore, to be contained in the shipment, provided that adjustments will be made subsequently in regard to surpluses, deficiencies and costs incurred in the shipment.

3. (a) Bank Negara Malaysia will inform all licensed banks in Malaysia of the arrangements referred to in paragraph 2 above and will request all banks to accept, at par and without charge, notes and coins issued by the Board of Commissioners of Currency, Singapore, and to exchange such notes and coins into notes and coins issued by Bank Negara Malaysia.

(b) The Board of Commissioners of Currency, Singapore, will inform all licensed banks in Singapore of the arrangements referred to in paragraph 2 above, and will request all banks to accept, at par and without charge, notes and coins issued by Bank Negara Malaysia, and to exchange such notes and coins into notes and coins issued by the Board of Commissioners of Currency, Singapore.

4. These arrangements shall take effect from June 12, 1967, and may be terminated by Bank Negara Malaysia giving notice in writing to the Board of Commissioners of Currency, Singapore, and vice versa.

5. I am authorised to inform you that these arrangements have been approved by the Government of Malaysia.

6. I intend to send a similar letter to the Chairman of the Brunei Currency Board dealing with corresponding arrangements between Bank Negara Malaysia and the Brunei Currency Board.

Yours sincerely,

Ismail bin Mohamed Ali "

Since 1960 central banks have been established in many countries. To a number of these countries the Fund has given technical assistance by drafting legislation or by helping in the actual establishment and organization of the central banks. It would exceed the scope of this article to discuss at length the purposes, functions and structures of central banks or to consider the techniques of monetary control but it may perhaps be of interest to describe, from a lawyer's point of view, some aspects of central banking legislation that usually require extensive discussion with the authorities of member countries in view of their far reaching implications.

(a) The objectives of a central bank

The objectives of a central bank should not be confused with the bank's functions although there are quite a few central banking statutes which combine functions and objectives or confuse the one with the other. One could not say that this is of major importance but it is certainly a point of aesthetics. For example, a typical function of a central bank is to regulate the issue of currency and the supply of money but this should not be described as an objective. There are many ways in which the objectives of a central bank can be defined but most of them can be reduced to one basic goal: to promote economic growth under conditions of monetary stability. The following provision, drafted by the Fund staff, is typical therefore:

"Within the context of the economic policy of the Government, the Bank shall be guided in all its actions by the objectives of fostering monetary stability and promoting credit and exchange conditions conducive to the growth of the economy of Guyana."

(Section 5, Bank of Guyana Ordinance, 15th October 1965.)

Somewhat different in emphasis is the formulation of section 5 of the Bank of Tanzania Act, 1965, which is one of the provisions that combines functions and objectives:

"(1) The principal functions of the Bank shall be to exercise the functions of a central bank, and, without prejudice to the generality of the foregoing, to issue currency, to regulate banking and credit, to manage the gold and

> foreign exchange reserves of Tanzania, and to perform any function conferred upon it (or to act as the agent of the Government in respect of any function conferred on the Government) by or under any international agreement to which Tanzania is a party.
>
> (2) Within the context of the economic policy of the Government, the activities of the Bank shall be directed to the promotion of credit and exchange conditions conducive to the rapid growth of the national economy of Tanzania, due regard being had to the desirability of fostering monetary stability."

In the Tanzania law the accent is apparently slightly more on economic growth (even rapid growth) and in Guyana the accent is perhaps more on monetary stability.

The Tanzania version is also interesting from a different point of view. Subsection (1) of section 5 determines that the Bank shall exercise the functions of a central bank and, without prejudice to the generality of the foregoing, regulate banking, credit, etc. This would seem a rather subtle way of granting the Bank a wide range of implied powers and, thus, to minimize the risk that certain operations or other actions of the Bank could be "ultra vires". In Kenya, this same thought has been stated in somewhat more express terms:

> "The Bank shall exercise any type of central banking function unless specifically excluded under this Act, and shall enjoy all the prerogatives of a central bank."
>
> (Section 3(3), Central Bank of Kenya Act, 1966.)

(b) Legal status of the central bank

Modern central banks are usually corporate bodies with varying degrees of autonomy. In recent years no central bank has been established in the form of a private stockholding company and those of the older central banks which were set up in this way are being rapidly transformed into entities whose capital is fully owned by the government. Also disappearing is any limitation of the duration of central banks which may now be regarded as a relic of the past. All modern central banks are created with perpetual succession. Most central banks are still given the privilege of haying a "common" or "special" seal although the significance of such privilege is probably much less pronounced in present times than it once used to be. A typical provision dealing with the legal status of a central bank after a revision of the original central bank law is the following:

> "Notwithstanding the repeal effected by section 2, the Union Bank of Burma (hereinafter referred to as "the Bank") established under the Union Bank of Burma Act, 1947, shall be preserved and continue in existence under and subject to the provisions of this Act, so that the corporate identity of the Bank shall not be affected: and shall continue to be a body corporate with perpetual succession and a common seal, and shall continue to have power to sue or be sued in its corporate name."
>
> (Section 3, Union Bank of Burma Act, 1952.)

(c) Responsibility for central bank policy and administration

In many central bank laws all powers of the central bank, including responsibility for bank policy and administration, are vested in a board of directors. The chairman of the board is usually a governor or presi-

dent, frequently appointed by the head of state or prime minister, and responsible for the supervision of the administration of the bank. This arrangement has the advantage of hierarchical logic and legal order but, particularly in developing countries, not always the advantage of practicability. In many developing countries it is not easy to find the independent personalities with financial and monetary experience who would be suitable and willing to serve as directors on the board of the central bank. Sometimes even the position of a governor will have to be filled initially with a foreigner. Furthermore, since most of these banks will remain relatively small compared with the central banks of industrialized countries, the directors can only be part-time directors. Consequently, it would seem preferable in these countries to strengthen the position of the governor and to vest in him those powers of the bank that need not be reserved to the Board. Under these circumstances the Board would be created only as the policy making organ of the Bank and its powers would be clearly defined in the law. Any other power not reserved to the Board would be exercised by the governor. Examples of these approaches are the following provisions:

> "(a) The Governor shall be the chief executive of the Central Bank's policy and of the management of its affairs.
>
> (b) The Governor shall exercise all the powers and authorities conferred on the Central Bank other than those reserved to the Board either by this Law or by any other Law.
>
> (c) The Governor shall, at his discretion, inform the Board of his decisions and measures.
>
> (d) The Governor shall be answerable to the Board for the implementation of decisions taken by the Board.
>
> (e) The Governor shall have authority to incur expenditure for the Central Bank subject to such regulations as may be approved by the Board."
>
> (Section 13, Central Bank of Jordan Law, No. 93 of 1966.)
>
> "There shall be a Board of Directors of the Bank, constituted as provided in section 11 of this Act, which shall, subject to the provisions of this Act, be responsible for determining the policy of the Bank."
>
> (Section 10, Central Bank of Kenya Act, 1966.)

(d) Relationship between the central bank and the government

To achieve a balanced solution of the problem of how to reconcile the inherent functions of a central bank in the field of monetary policy with the overall responsibility of the government for the general economic policy of the country is probably one of the most difficult tasks in drafting central banking legislation. Perhaps there is no ideal legal solution to this problem at all because it is, in all its complexity, not legal, but political. It is generally agreed that the central bank — in accordance with its objectives — must direct its policies to the preservation of internal and external financial stability. The government, on the other hand, may find it necessary or desirable, for various reasons, to follow expansionist policies even if a price would have to be paid in the field of financial stability. This, then, may create a situation of conflict between the central bank and the government if they should find themselves on a collision course. How can this potential conflict be solved or, better,

avoided and which legal rules should be adopted for this purpose? Louis Rasminsky, Governor of the Bank of Canada, has dealt, inter alia, with these aspects in his lecture held in 1966 in Rome under the auspices of The Per Jacobsson Foundation.[7] He stated the problem so eloquently that it is proposed to repeat his remarks in full:

> "I turn now to the relationship between the government and the central bank. The formal status of the central bank varies a great deal from country to country. In any case, this is a field in which the real situation is not likely to be revealed by the terms of the statute. Much depends on history and tradition and a fair amount even on the personalities involved. There is a variety of views as to the appropriate relationship between the central bank and the government. The extreme positions can be stated simply. At one end of the spectrum there is the view that the central bank should be little more than a technical arm of the Treasury, that no significant degree of independence for the central bank can be reconciled with the democratic process since the electorate must be able to hold the government responsible for every detail of public economic policy, including monetary policy. At the other end of the spectrum, there is the view that, human frailty being what it is, a wide separation between the power of the government to spend money and the power to create it is necessary if the latter power is not to be misused.
>
> Between these two extreme positions there is room for varying degrees of independence for the central bank. My own opinion is that there are important advantages in arrangements under which the central bank has enough independence to insulate the management of its operations from the political side of government and to act as a formidable obstacle to the misuse of the monetary instrument. So far as basic policy is concerned, however, in most countries it would not be regarded as acceptable for the central bank to be able to thwart the government if the latter is prepared to take complete responsibility for bringing about a change of monetary policy in a way that causes the issues to be placed before the public in a clear and open manner. Arrangements which provide this degree of independence seem to me to have the advantage of putting both the central bank and the government in a position where there is no way in which either can avoid assuming responsibility for the monetary policy that is followed.
>
> In Canada, where as you know we have had our problems in this area, the central bank has been operating for a number of years under the general arrangements which I have just outlined and I believe that on the whole they have worked well. In order that the relationship between the Bank of Canada and the Government can be clarified in law, an amendment to the statute governing the Bank of Canada is now being considered by our Parliament. The amendment makes it clear that there must be, as there is now, continuous consultation on monetary policy between the Government and the Bank. It provides a formal procedure whereby, in the event of a disagreement between the Government and the Bank which cannot be resolved, the Government may, after further consultation has taken place, issue a directive to the Bank as to the monetary policy that it is to follow. Any such directive must be in writing, it must be in specific terms, and it must be applicable for a specified period. It must be made public. This amendment makes it clear that the Government must take the ultimate responsibility for monetary policy, and it provides a mechanism for that purpose. But the central bank is in no way relieved of its responsibility for monetary policy and its execution. It can be assumed that if the Governor were directed to carry out a monetary policy which, in good conscience, he could not regard as being in the national interest, he would, after taking steps to ensure that the issues involved were placed clearly before the public, resign.

7. Louis Rasminsky, The Role of the Central Banker Today, lecture sponsored by The Per Jacobsson Foundation and held in Rome, Italy, on November 9 1966; International Financial News Survey, Vol. XVIII, No. 46, Supplement, November 18, 1966, International Monetary Fund.

> As I have already indicated, however, I do not believe that the real position of the central bank in government is determined by the statutory arrangements under which it operates. In the final analysis, the influence of the central bank on economic policy depends on the respect it can command for the objectivity and cogency of its views as judged in the light of experience and on the proven degree of competence it displays in performing its own specialized role. It depends, too, on the contribution that it is able to make to the public understanding of economic and financial issues in analysing, in understandable terms, the complex forces operating at all times on the economy and in elucidating the basic rationale underlying the policies it has followed."

There are a number of central banking laws which attribute to the Government a power to issue directives or orders to the central bank or which include provisions of a somewhat different procedure but of similar character. Interesting, for example, is the relevant provision in the Reserve Bank of Australia Act:

> "(1) The Board shall, from time to time, inform the Government of the monetary and banking policy of the Bank.
>
> (2) In the event of a difference of opinion between the Government and the Board whether that policy is directed to the greatest advantage of the people of Australia, the Treasurer and the Board shall endeavor to reach agreement.
>
> (3) If the Treasurer and the Board are unable to reach agreement, the Board shall forthwith furnish to the Treasurer a statement in relation to the matter in respect of which the difference of opinion has arisen.
>
> (4) The Treasurer may then submit a recommendation to the Governor-General, and the Governor-General, acting with the advice of the Federal Executive Council, may, by order, determine the policy to be adopted by the Bank.
>
> (5) The Treasurer shall inform the Board of the policy so determined and shall, at the same time, inform the Board that the Government accepts responsibility for the adoption by the Bank of that policy and will take such action (if any) within its powers as the Government considers to be necessary by reason of the adoption of that policy.
>
> (6) The Board shall thereupon ensure that effect is given to the policy determined by the order and shall, if the order so requires, continue to ensure that effect is given to that policy while the order remains in operation.
>
> (7) The Treasurer shall cause to be laid before each House of the Parliament, within fifteen sitting days of that House after the Treasurer has informed the Board of the policy determined under subsection (4) of this section —
>
> (a) a copy of the order determining the policy;
>
> (b) a statement by the Government in relation to the matter in respect of which the difference of opinion arose; and
>
> (c) a copy of the statement furnished to the Treasurer by the Board under subsection (3) of this section."
>
> (Section 11, Reserve Bank Act, 1959.)

A procedure of this kind is legally neat and provides for all the checks and balances one can think of. And yet one can hardly believe that it could ever be applied. It would politically be most embarrassing to follow the procedure through. Therefore, is it really necessary? Either the government and the central bank can compromise and even-

tually agree on the policies to be adopted or they cannot. In the first case there would be no need for formal orders or instructions to the central bank and in the second case the governor of the central bank should better resign. Consequently, the value of the provision would mostly seem to be of a different nature. Its implications are so embarrassing that the mere fact of the provision's existence may be a sufficient guarantee that a difference of opinion will never develop into a situation in which the procedure will have to be invoked. In other words, the existence of the provision may have the value of deterrence. The provision is a kind of two-edged Damocles-sword hanging above the government and the central bank. Nevertheless, the government appears to be in the stronger position and the realization of this may induce the central bank to compromise more willingly than it perhaps should, in particular where the governor may have a strong desire to remain in office. In countries which do not have a long tradition in rules of parliamentary democracy this could create some problems. In view of this there may be certain advantages in following an approach that would be less mechanistic and, consequently, somewhat less infringing on the independence of the central bank. This approach could consist of the drafting of a "lex imperfecta", i.e., a provision that would require the central bank to act within the context of the economic policy of the government but without providing for any sanctions. The technique of a "lex imperfecta" is especially suited for the regulation of a relationship that does not involve clear elements of superiority on one side and sub-ordination on the other. If a sanction should ever become necessary, Parliament would then have to enact such measures as may be required.

A provision of this kind could perhaps be along the following line:

> "Within the context of the general economic policy of the government as it may, from time to time, be communicated to the central bank by the minister of finance, the central bank shall be guided in all its actions by the objectives of maintaining the external value of the [currency of the country], fostering domestic monetary stability, and promoting credit and exchange conditions conducive to the balanced growth of the economy of the [country]."

(e) External reserves

. One of the typical functions of a central bank is to manage the country's external reserves in gold, foreign exchange and other liquid foreign assets. In many countries central banks are also required to maintain an amount in external reserves equal, as a minimum, to a certain percentage of its currency issue or its demand liabilities. It is not believed that the requirement of a currency cover conforms with a modern approach to central banking although, at times, (Singapore may be an example) it may still serve a legitimate purpose. However, this complex problem is more of economic than of legal substance and its discussion would, therefore, exceed the scope of this article. But it may be of interest to describe some innovations related to external assets to be held by central banks which have been made in recent central banking legislation. The first of these is a definition of the term "convertible" as applying to such assets:

> "Convertible currency means any currency which is freely negotiable and transferable in international exchange markets at exchange rate margins

consistent with the Articles of Agreement of the International Monetary Fund."

(Section 2, Central Bank of Jordan Law No. 93 or 1966.)[8]

The second innovation relates to the types of assets which may be held by central banks in form of a reserve. In the past these assets were often defined as gold, foreign exchange and certain short-term foreign obligations denominated in currencies which are freely convertible into gold, dollars or sterling. In recent years there has been a tendency to allow central banks to include in their reserves of external assets also securities of international financial institutions and readily available international drawing facilities. Some central banks, particularly in South or Central America, include the gold subscription to the International Monetary Fund as an external asset of the bank while others include the gold subscription to the Fund on account of their respective governments. In a few countries special statutory provisions have been made for the inclusion of the gold subscription to the Fund or the International Bank for Reconstruction and Development.[9] One country permits its central bank to include in its assets "contributions to the capital of, or advances to international financial organizations."[10] It is submitted that this is not very good practice. Gold and currency subscribed to the Fund are clearly within its unrestricted ownership. They do not in any way belong to the subscribing member. They appear as an asset in the Fund's balance sheet, with the member's quota shown as the corresponding liability. On the other hand, members' drawings within the gold tranche (i.e. normally those that do not raise the Fund's holdings of the currency of the drawing country above its quota) are available on a virtually automatic basis. Such drawing rights may be considered as part of a country's reserves[11] and it would be legitimate to include these drawing rights in the central bank's reserve of external assets if the bank's statutory provisions allow such inclusion. One central bank law expressly authorizes the bank to include in its reserve of external assets the gold tranche position in the Fund:[12]

"Whenever Guyana becomes a member of the International Monetary Fund;, the Bank may include in its reserve of external assets Guyana's drawing facility equivalent to its gold tranche position in the International Monetary Fund."

(Section 23(4), Bank of Guyana Ordinance, 1965.)

8. The following enactments have similar provisions: Section 2, Central Bank of Kenya Act, 1966; Section 53(4), Bank of Tanzania Act, 1965; Article 16(3), Foreign Economic Transactions Ordinance, Somalia (Decree Law No. 5, 10th May, 1964); Article 2, Banking Law No. 94 of 1966, Jordan.

9. e.g., Guatemala, Article 2 of the Bretton Woods Agreements Law, Decree No. 212 of 18th December, 1945.

10. Trinidad and Tobago, section 33(2)(f) of the Central Bank Act, 1964.

11. See International Monetary Fund, Annual Report of the Executive Directors for the fiscal year ended April 30, 1964, p. 34.

12. See also Article 35(3) of the Organic Law of the Central Bank of the Dominican Republic, 9th October, 1947; Article 20(iv) of the Organic Law of the Bank of Mexico, 31st May, 1941 (as amended). These provisions do not mention the gold tranche position but their language would seem to allow the inclusion of the gold tranche position.

Three of the most recently enacted central banking laws take even a step further. They not only take account of what may be regarded at the present time as constituting international liquidity of a wholly or virtually unconditional nature but provide already for future developments in this field. They would permit the central banks to include in their reserves not only gold, foreign exchange and the gold tranche position in the Fund but also any virtually automatic drawing rights, reserve units or special drawing rights that may be created at some future stage as a result of the recent or any future international negotiations on the problem of the deliberate creation of international reserves. Section 26(3) of the Central Bank of Kenya Act may be taken as an example of these provisions: [13]

> "(1) The Bank shall at all times use its best endeavours to maintain a reserve of external assets at an aggregate amount of not less than the value of four months imports as recorded and averaged for the last three preceding years. Subject to subsection (3) of this section such reserve shall consist of any or all of the following —
>
> (a) gold;
>
> (b) convertible foreign exchange in the form of —
>
> (i) demand or time deposits with foreign central banks or with the Bank's agents or correspondents outside Kenya;
>
> (ii) documents and instruments customarily used for the making of payments and transfers in international transactions;
>
> (iii) notes or coins;
>
> (c) convertible and marketable securities of, or guaranteed by, foreign governments or international financial institutions.
>
> (2) The Bank shall from time to time determine the type and form of convertible foreign exchange and the kinds of securities which may be held in the reserve of external assets pursuant to subsection (1) of this section.
>
> (3) The Bank may include in its reserve of external assets any liquid external asset not included in subsection (1) of this section, or any readily available international drawing facility, which the Bank, after consultation with the International Monetary Fund and with the approval of the Minister, considers suitable for inclusion in such reserve."

Exchange Control Legislation

Most exchange control laws have their origin in the years from 1930 to 1939 in which exchange control was introduced in two major waves as a result of the world economic crisis and the outbreak of World War II. Many of these laws have since remained unchanged in their basic concepts although most of them at least in their implementation have undergone almost innumerable modifications aiming at a greater liberalization in line with the gradual approach to convertibility of the world's major currencies. This process has produced a jungle of exchange control amendments, regulations, orders, directives, notices,

13. See also section 53 of the Bank of Tanzania Act, 1965; section 31 of the Central Bank of Jordan Law, 1966; and paragraph (d) of section 24 of the Singapore Currency Act, 1967.

instructions, etc., and it has become very difficult for foreign traders or even public administrations to find their ways through the complicated network of the exchange control system. In view of this there have been a number of requests from Fund member countries for technical assistance aiming at a modernization, liberalization or simplification of their exchange control laws and regulations.

Many exchange control laws are based on the principle that all exchange transactions are prohibited except those for which a permission has been granted. It is doubtful whether the present degree of convertibility of the world's leading currencies still justifies the perpetuation of this principle. A law based on the concept of total prohibition necessitates a very complicated system of departures from that general principle and requires a complex system of liberalization. It is suggested, therefore, that exchange control laws of the 1960's could perhaps emphasize the freedom of transactions rather than the prohibition or restriction of transactions. This could be done by reversing the principle, i.e., by permitting all transactions except where restrictions are expressly provided for by the law itself or by regulations or orders issued in accordance with the law. Such an approach may be particularly adequate where the government's aim is to grant the greatest possible freedom in foreign economic transactions while maintaining control together with legislative authority to make any necessary amendments on account of economic developments at home or abroad.

The approach suggested above would be facilitated to a considerable extent if exchange control legislation were combined with control of foreign trade and services. When this is done, delays or confusion can also be prevented that sometimes arise when two licenses are required for one and the same transaction (e.g., an import license for the import and an exchange control license for the payment). After all, foreign trade, services and capital movements and their payment and transfer aspects are two sides of the same coin. No payment or transfer is made without a cause and this cause can be found in the underlying transaction which is either a transaction in goods, services or capital. A combined law would avoid a duplication of foreign trade laws and exchange control laws. In addition, it would simplify the administration of the system.

The Somali Foreign Economic Transactions Ordinance[14] may be taken as an example of a combined law. In respect of payments it contains, *inter alia,* the following provision:

ARTICLE 13

AUTHORIZATION IN RESPECT OF PAYMENTS

1. Any person in the Somali Republic who engages in foreign economic transactions — whether it be in goods, services or capital — for which a licence is not required, shall be authorized to make a payment or to place a sum to credit in respect of that transaction, provided he submits docu-

14. Decree-Law No. 5 of 10th May, 1964, Bolletino Ufficiale 21st May, 1964.

mentary evidence relating to the transaction, and provided further that the Somali National Bank or an agent appointed in accordance with paragraph (4) is satisfied that the transaction is legitimate.

2. Any person in the Somali Republic who engages in a foreign economic transaction — whether it be in goods, services or capital — for which a licence is required and has been obtained, shall be authorized to make a payment or to place a sum to credit in respect of that transaction, provided he submits documentary evidence relating to the transaction to the Somali National Bank or an agent appointed in accordance with paragraph (4).

3. Any person in the Somali Republic who engages in a foreign economic transaction — whether it be in goods, services or capital — for which a licence is required and has not yet been obtained, shall not be authorised in advance to make a payment or to place a sum to credit in respect of that transaction.

4. The Somali National Bank is hereby authorized to appoint authorized exchange dealers as agents in respect of the granting of authorization relating to a payment or to the placing of a sum to credit.

A combined law dealing with the totality of foreign commerce, gold and foreign exchange could also avoid difficulties of a legal nature that may arise if an exchange control law is used (or, as a litigant might say, "misused") in order to regulate issues which are not connected with the management of a country's external reserves or based on other monetary considerations including the balance of payments. For example, if a government wanted to restrict the import of certain types of politically or otherwise undesirable literature or of films, could it do this by restricting the making of payments when there is neither a balance of payments justification nor any other proper exchange control authority except the convenient availability of the machinery of the exchange control law? Supposing Parliament is opposed to any kind of censorship, could a government practise censorship under the disguise of an exchange control law? This danger could be reduced if the law were to regulate more than just the exchange aspects of transactions and were to define the purposes for which any controls or restrictions could be applied.

Articles 2 and 19 of the Somali Foreign Economic Transactions Ordinance are examples of such definition of purposes and powers:

ARTICLE 2

RESTRICTIONS

1. Foreign economic transactions, namely:

   (a) transactions in goods, services and capital, and payments and other economic transactions with foreign countries;

   (b) transactions in gold and other foreign assets between residents of the Somali Republic;

   are subject to the restrictions which are contained in this decree-law or in supplementary legislation and regulations as provided in Articles 34 and 35 of this decree-law.

2. Foreign economic transactions may be restricted or prohibited in order:

   (a) to safeguard the security of the Somali Republic;

(b) to protect the balance of payments and the development of the agricultural resources, the commerce and the industry of the Somali Republic;

(c) to prevent any major disturbance of the peaceful and friendly co-operation between nations; and

(d) to ensure the implementation of lawful measures enacted by international institutions or organizations to which the Somali Republic is a party or the implementation of multilateral international agreements to which the Somali Republic has adhered.

3. Restrictions shall be limited in their nature and scope to what is necessary in order to achieve the objects stated in paragraph (2) of this Article. They shall interfere as little as possible with private economic activity.

4. Restrictions shall be relaxed or removed as soon as, and to the extent of which, the reasons justifying their imposition cease to exist.

5. Insofar as restrictions are permitted by virtue of this decree-law, it may be laid down by supplementary legislation or regulations that certain foreign economic transactions and other related acts:

(a) require licence or other authorization, or

(b) be prohibited.

ARTICLE 19

EXPORT OF GOODS

Without prejudice to anything contained in Article 2 paragraph (2), the export of goods may, by decree of the President of the Republic, be restricted or prohibited:

(a) in order to prevent or counteract a situation endangering the vital needs of the Somali Republic, in particular with regard to foodstuff and other agricultural products;

(b) in order to prevent or counteract disruptions of exports owing to the delivery of low-quality products. Minimum requirements for the quality of the products may be imposed by regulation.

General Banking Legislation

Many developing countries, specially those which have gained independence during the last decade, find it necessary to enact their own legislation for the control of banks and the regulation of banking business or to revise the existing laws which they inherited from a colonial system. In a number of cases the Fund has been requested to provide legal technical assistance. Mostly this has been in connection with the drafting of central banking legislation which provided a welcome opportunity to co-ordinate the one with the other. General banking legislation, whether it involves the business of deposit banks, savings institutions, instalment loan business or co-operative societies such as credit unions, is enacted primarily in the interest and for the protection of depositors. Its purpose is not to provide the central bank with monetary tools in the interest of the economy as a whole. These are included in central banking legislation which deals with such issues as the central bank as lender of last resort to banks, inter-bank clearing services, discounting and rediscounting, open market operations, cash reserve requirements, regulation of interest rates and other forms of credit control relating to the volume, terms and conditions of credit. General banking legislation contains

provisions dealing with the licensing of banks, restrictions on certain non-banking or unsound activities, capital and reserve requirements, minimum liquid assets, auditing of banks and banking supervision. It is believed that some of the best banking laws have been devised over the years by British banking experts. As a result, there has developed a certain standard approach to banking which the Fund staff has more or less followed and which has been adopted by many countries. It would be difficult to see how this approach — certainly a rather conservative one — could be much changed in substance without leading to potentially unsound banking practices.

Legislation in the Field of Fiscal Affairs

Appropriate legislation in the field of fiscal affairs is an important element in maintaining or achieving a balanced development of a country's economic resources leading the country to progress and prosperity. As such there is an intimate connection between fiscal legislation and monetary, banking and exchange control legislation. In order to assist member countries in the fiscal field the Fund has, in May 1964, established a Fiscal Affairs Department which deals, *inter alia*, with measures designed to strengthen public finances, with problems of budgetary planning and control, tax policy and tax administration. There have already been requests from member countries for Fund technical assistance relating to the drafting of legislation for direct taxation and for tax and other incentives to foreign investors in order to promote investment which is likely to contribute effectively to economic development. At the present time, and within the scope of this article, it is not feasible to discuss details of fiscal legislation but this short reference is meant to indicate that legal technical assistance provided by the Fund in the fiscal field is on the increase.

FRANZ BALLMANN*

* Attorney at Law; graduate of Goethe-University, Frankfurt on Main; Oberregierungsrat, Federal Ministry of Economics, Bonn/Germany. Special Consultant on Currency, Banking and Exchange, Ministry of Finance, Singapore.

The views expessed in this article are those of the author, and not necessarily those of the International Monetary Fund.