# International Economic Relations

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For the first time the American Law Institute's *Restatement on the Foreign Relations Law of the United States*[1] includes a part devoted to international economic law under the title of "Selected Law of International Economic Relations" (Part VIII of the *Restatement*). The inclusion of such a topic can only be commended as a recognition of the substantial growth of international economic transactions, the increasing economic interdependence across national boundaries, the economic instrument as a discreet instrument in interstate relations, and, more generally, the acceptance and significance of economic well-being as a national and international goal. The addition also should be welcomed for another reason. Perhaps more than in any other area of international law, there is an urgent need to clarify and understand the legal process in the domain of international economic law in order to explain and evaluate existing trends of decision and thereby influence future decisionmaking.

## Orientation

I shall begin my analysis of this new section of the *Restatement* with a few preliminary observations. The new section of the *Restatement* of the "Selected Law of International Economic Relations" proceeds on several premises. Several of these premises reflect assumptions of the *Restatement* itself. For example, the *Restatement* assumes that it is possible to state in code-like form "black-letter" propositions of international legal rules and principles; that this can be achieved with synthetic statements in brief form; that such statements will not succumb to the normative ambiguity (especially the substitution or mixing of "is" and "ought") and the premature specificity inherent in codification; that such a codification can be achieved by a "committee process," as is used by the American Law Institute; that national identifications can be overcome so that the propositions faithfully "express the law as it would be pronounced by a disinterested tribunal, whether of the United States or some other na-

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)].

tional state or an international tribunal";[2] and finally, that U.S. domestic law can be segregated and stated apart from international law. These propositions powerfully influence the nature of the *Restatement*. Each of these premises is worthy of analysis,[3] and perhaps even a separate essay.[4]

Second, the *Restatement* has a limited scope. By definition, it is principally confined to *state* actions, although it does deal with some international organizations and non-state participants.[5] However, even when considering state participation in international economic relations, the *Restatement's* scope is limited. Part VIII consists of only two headings: the "Law of International Trade" and "International Monetary Law." Moreover, the international trade section deals solely with the General Agreement on Tariffs and Trade (GATT).[6] The section on international monetary law is confined to three sections: (i) the obligations of member states of the International Monetary Fund (IMF); (ii) the application of article VIII, section 2(b) of the IMF Articles by national courts; and (iii) U.S law on judgments on obligations in foreign currency.[7] Admittedly, full coverage of international economic relations would be impossible. As the *Restatement* concedes, "[t]he law of international economic relations in its broadest sense includes all the international economic law and international agreements governing economic transactions that cross state boundaries or that otherwise have implications for more than one state. . . ."[8] The choice of the two areas addressed by the *Restatement*, however, even if important in themselves, is very restrictive of the *Re-*

2. *Id.* at xi.

3. For example, some observers might contest whether an attempt to reduce international law to such succinct black-letter rules, thereby trying to take a still photograph of a moving target, is a useful exercise. This school of thought will inevitably embrace those who see law more as a process of authoritative decision, comprehensible only when analyzed systematically and in full context and with appreciation of the way in which policies in general, and common interests in the community in particular, are identified and converted into authoritative and controlling prescriptions.

Specifically, I would refer to the New Haven School of jurisprudence associated with Professors McDougal, Lasswell, and Reisman. Their works are voluminous and well known. As applied systematically to international law, see M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY (1981).

4. Several of these points are mentioned in the contributions to a seminar on the *Restatement* in 25 VA. J. INT'L L. 1-280 (1985). These points are particularly noted by Professor Oliver in the Foreword thereto. Oliver, *Foreword to the Symposium on the Restatement of a Foreign Relations Law of the United States*, 25 VA. J. INT'L. L. 1 (1985).

5. *See* RESTATEMENT (THIRD) §§ 101-103, introductory note at 16.

6. *Id.* pt. VIII.

7. Moreover, the link among the three subjects of international monetary law is tenuous, and, for monetary awards in foreign currency, questionable—the IMF's Articles of Agreement do not address the issue, which remains entirely a matter of national law.

8. RESTATEMENT (THIRD) pt. VIII introductory note at 261.

*statement's* scope.[9] It follows, therefore, that the *Restatement*, beneath the veneer of its title, does not purport to comprehend international economic law in any full sense and explicitly not in terms of the processes involved. The chapters under "Law of International Trade" and "International Monetary Law" for example, fail to discuss the rules and principles ostensibly contained within those titles.

Third, the *Restatement* often proceeds on certain assumptions that may be challenged. For example, the introductory note to Part VIII states:

> The law of international economic relations is designed, generally, to specify actions that states may take unilaterally without transgressing international norms . . . and to impose restraints on other types of actions that might have adverse impact on foreign states or on the international economy as a whole. . . .[10]

This characterization, while intended to clarify the context, raises more questions than it answers.[11]

There is also the question of the relative weighting of coverage. Including comments and notes, the section on the GATT fills 50 pages. The section on the IMF obligations, on the other hand, requires merely 11.

## The Law of International Trade

The reaction to Chapter 1 should be generally laudatory. First, by following the flow of the GATT provisions, the twelve black-letter sec-

9. Even if international law is, by definition, confined essentially to *interstate* relations, many other areas of international law clearly overlap with and involve international economic relations. As the *Restatement* modestly states, "[s]ome rules set out elsewhere in this *Restatement* are relevant to international economic relations as well." *Id.* pt. VIII introductory note at 261 n.1. In fact, it specifically disclaims treatment of such topics as shipping, transportation and telecommunications law, and the commercial law applicable to international transactions by private persons.

Professor Henkin, in response to the question of why these areas were chosen rather than others, replied that "it may be hard to justify." *Continuation of the Discussion of Restatement of the Law, Foreign Relations Law of the United States (Revised) Tentative Draft No. 5*, 61 A.L.I. PROC. 124-25 (1984).

10. RESTATEMENT (THIRD) pt. VIII introductory note at 261.

11. Are the drafters assuming that there is a difference between general international law and international economic law in this respect? In light of the structure and nature of the international legal process, are the words "designed" and "specify" in the earlier part of the sentence appropriate and accurate? Is this generalization derived from the GATT and the IMF, or from a more general observation? Finally, the statement, being one of allocation of state competence, could be taken even further, to face the issue of the preferred allocation of authority between the national and the international, or between the exclusive and the inclusive. In other words, how are we to identify and appraise the community interests served by the existing allocation of competence between the participants in the international system? Is there another allocation that should be preferred?

tions reflect the major topics of GATT itself. The treatment is thus relatively comprehensive in scope while allowing ready reference to a particular topic of interest.

Second, the comments flesh out the black-letter statements, though they still present only a small part of the "mosaic" that comprises the GATT.[12] They seek to incorporate, though not always fully or explicitly, the larger framework of GATT's prescriptions and procedures, including in particular the Tokyo Codes of 1970 and other supplementary and *ad hoc* developments.

Third, the notes are generally informative and supportive. On the international side, the notes occasionally drop the pretense of being inductive and normative and hint at the actual working of the GATT. On the U.S. side, in turn, the notes are more generous in scope, conveying considerable information on the array of national issues associated with the negotiation, promulgation and implementation of GATT rules, in general, and the prescription and application of U.S. trade law, in particular.

Two reservations on the GATT chapter might be noted, however, both of which question the validity of the *Restatement* exercise itself. The first reservation goes to the usefulness of the black-letter law propositions. In the style of the *Restatement*, these statements use abstract terms and focus on the allocation of authority between national and international bodies. The statements are generally phrased as a rule and its exceptions. They lack, however, the substance that would contribute substantially to decisionmaking, judicial or otherwise, at either national or international levels. Moreover, the generality of these black-letter law provisions is achieved only by paraphrasing the GATT. This risks new formulations on the one side, and oversimplification through the glossing over of exceptions, qualifications, and nuances on the other. As an example, section 807(1), on dumping and antidumping, runs for six lines; the provision in GATT's article III on which it draws contains ten lengthy paragraphs. Similarly, section 805 deals with "Indirect Barriers on Trade." Paragraph (1) states: "Under the General Agreement on Tariffs and Trade, a state party may not apply internal taxes or other restrictions that unreasonably burden imports from other state parties." From where does the term "unreasonably" come? The source note refers to articles III and XVII of the GATT. Clearly, the "unreasonably" is the veritable tip of the iceberg.

A second qualification is more fundamental. It could be said that the *Restatement* misrepresents the real nature of the GATT by portraying

12. *See* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 59 (1969).

the GATT system as a mature international trade regime, self-contained in scope, balanced in its rights and obligations, readily transplanted into national law and allowing appeals to authority for its application and enforcement. The sanguine generalizations contained in the black-letter law require an injection of legal realism for their proper appraisal. That appraisal must account for the circumstances of the GATT, including its shaky constitutional base, its imprecise (and at times undefined) legal norms, the numerous exceptions and loopholes to its existing rules, the asymmetrical nature of its rights and obligations, the inadequacies of its procedures (such as information collection, surveillance of adherence, and modalities for complaints), and issues related to dispute settlement and enforcement.[13] The Leutwiler Report was succinct in its appraisal of the effectiveness of the GATT:

> The critical problem today is that the trade rules are no longer seen as being fully effective, nor generally obeyed. . . .
>
> From the beginning, the GATT rules were flexible and pragmatic. But in recent years some countries have abused the system's built-in flexibility to avoid complying with the spirit of its basic rules. Others have sought trade advantage by taking measures not adequately dealt with in normal negotiations or covered by the Rules of GATT. . . .
>
> Today, more and more countries are increasingly ignoring the trading rules, and concluding bilateral, discriminatory and restrictive agreements outside the GATT rules.[14]

In referring to the numerous examples of "this divergence between the rules and the practice," Professor de Lacharrière cites "the rules applicable to regional groupings, formal waivers, [and] measures tolerated or disregarded by the Contracting Parties (agreement providing for more or less 'voluntary' restraints etc.)."[15] On these three specific issues, reference to the *Restatement* is instructive.[16]

13. The *Restatement* is not completely oblivious to this distortion, for the introductory note states: "While some GATT obligations have not been meticulously observed at the margin, overall the Agreement constitutes the prevailing norm of international trade among member states." RESTATEMENT (THIRD) pt. VIII introductory note at 265.

14. GATT, TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION 18-20 (1985).

15. Lacharrière, *The Legal Framework for International Trade*, in TRADE POLICIES FOR A BETTER FUTURE: "THE LEUTWILER REPORT" THE GATT AND THE URUGUAY ROUND 113 (1987).

16. The black-letter statements cannot respond to such points. Nor, generally, can the comments. The notes are indicative only. Thus, "customs unions and free trade areas differ widely in the degree of integration they have achieved and in their compliance with GATT Article XXIV." RESTATEMENT (THIRD) section 809 reporters' note 2. On voluntary restraint agreements, "the practice under the GATT has been to regard such restraints as not violating

International Monetary Law

Chapter 2 of Part VIII consists of three sections, each dealing with a "selected" subject. Chapter 2 deals with the IMF under the formal heading of section 821, "Principal Obligations of Member States of the International Monetary Fund." In terms of international law, its substance is clearly much more significant than the other two that follow. Throughout the descending hierarchy of the black-letter law, the comment and the notes, a question of content becomes apparent. Notwithstanding the title of section 821, in setting the scene the introductory note states that section 821 "sets forth the principal provisions of the amended Articles of Agreement, concerning exchange arrangements, notification and consultations and exchange controls."

Two points might be noted here. First, as to coverage, the introductory note is more forthcoming than the section's title, confining the focus to exchange arrangements and exchange rate policies. Secondly, the introductory note is deceptive, in that section 821 does not "set forth" the provisions of the Articles; rather it condenses them, mixing article IV with parts of articles VIII and XIV. The comment to section 821, in turn, elaborates upon the black-letter propositions, incorporating other portions of the Articles and some of the IMF's implementing decisions. It also ventures into new territory, expounding on the use of the Fund's resources, on the one hand, and consequences of breaches of obligations under the Articles, on the other. Finally, the notes take off in several new directions, with definitions of several important terms, and discussions, among other subjects, of the place of gold, the relation between the IMF and the GATT, and the IMF and developing country debt. In short, the notes, while ambitious in scope, are largely unrelated to section 821, or even to the comment. This is not to suggest that the subjects treated in the notes are unworthy of elaboration, but rather that they are not supportive of the foregoing black-letter law and comment.

The focus of the second section of the chapter is article VIII, section 2(b) of the IMF's Articles, which deals with the recognition by a member of other members' exchange control regulations. That provision deserves to be quoted in full.

Article XI because the injured party—*i.e.*, the exporting country—has given its consent." *Id.* § 804 reporters' note 4.

There are several good recent surveys of the current situation of GATT, especially in light of the Uruguay Round of negotiations. *See, e.g.*, G. HUFBAUER & J. SCHOTT, TRADING FOR GROWTH: THE NEXT ROUND OF TRADE NEGOTIATIONS (1985); J. FINGER & A. OLECHOWSKI, THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS (1987); M. KELLY, ISSUES AND DEVELOPMENTS IN INTERNATIONAL TRADE POLICY (IMF Occasional Paper No. 63, 1988).

> 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, 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.[17]

This provision can have a direct effect in private litigation. By its terms, article VIII, section 2(b), renders certain claims in national courts unenforceable.[18] The terms of the provision, however, need to be interpreted and applied; this is normally a judicial function at the national level.[19] In dealing with this issue different courts at different places have taken different approaches.

Finally, section 823 covers "Judgments on Obligations in Foreign Currency." The section's title is specifically limited to U.S. law. As with section 822, the underlying issues are not inconsequential in particular situations. Unlike section 822, however, the *Restatement* does not tie the issues considered to international obligations in general, or to the IMF's Articles of Agreement in particular.

## Critique

Of the treatments of the three topics considered in Chapter 2 of Part VIII, section 821, covering the "Principal Obligations of Member States of the International Monetary Fund," is obviously both the most ambitious and the most concentrated. It is, therefore, worth some detailed analysis.

A preliminary reaction concerns the approach. Even if the drafters decided to focus on members' obligations on matters of "exchange," why attempt to codify these in only one section? The provisions of the IMF's Articles on these matters are complex, subtle and interactive. To attempt to encapsulate them accurately in twenty-four lines requires considerable confidence. Thus, the section invites criticism at different levels.

17. International Monetary Fund Articles of Agreement, 60 Stat. 1401; T.I.A.S. 1501, 2 U.N.T.S. 39, *amended by* 20 U.S.T. 2775, T.I.A.S. 6748, *amended by* 29 U.S.T. 2203, T.I.A.S. 8937 [hereinafter Articles of Agreement].

18. Moreover, article VIII, section 2(b) is an obligation of Fund membership; members must therefore be in a position to respect that obligation.

19. In 1949, the Executive Board of the IMF adopted a decision in order to amplify the meaning and effect of the provision. *See* Decision No. 446-4, adopted June 10, 1949, SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND 290-91 (13th Issue 1987).

While most of section 821 draws on article IV, as would be expected,[20] subsections (1)(b) and (3) are derived from articles VIII and XIV, respectively. In condensing so much of the Articles of Agreement into such a short section the drafters had to resort to paraphrasing. In such circumstances, it is questionable whether a brief summation could capture the content, logic, and nuances of a provision like article IV, itself a carefully crafted product of extensive diplomatic negotiations.[21] Yet article IV is not reproduced in the *Restatement*. Even assuming the availability of the text of article IV to the reader, one would, nonetheless, be faced with the daunting task of comparing the paraphrase of section 821 to the actual text of article IV.

A brief explanation of article IV will enable the reader to understand how complex it is. Under section 1 of article IV, members agree to "collaborate" with the Fund for articulated purposes,[22] thereby obliging themselves in certain respects relating to exchange rates and exchange rate policies. Under section 2, members are free to choose the way in which they will fix their exchange rates.[23] Section 3(a) in turn confers a mandate on the Fund to oversee the international monetary system and the adherence by members to their obligations under section 1. This mandate is then buttressed by section 3(b):

> In order to fulfill its functions under (a) above, the Fund shall exercise firm surveillance over the exchange rate policies of its members, and shall adopt specific principles for the guidance of all members with respect to those policies. . . .

For this purpose, members must also provide information to, and consult with, the Fund upon request.

Accordingly, article IV imposes obligations on members and duties on the Fund to ensure the compliance of members with those obligations. At a further level, the Fund's mandate extends beyond the obligations of members to the extent that its "oversight" functions extend beyond members' obligations.

Section 821 of the *Restatement* fails to capture the balance of article IV. In particular, it avoids the primary issue of the scope of the Fund's

20. For an exploration of the structure of article IV in its historical context, see Gold, *Developments in the International Monetary System, the International Monetary Fund and International Monetary Law Since 1971*, 174 RECUEIL DES COURS 107 (1982); R. EDWARDS, INTERNATIONAL MONETARY COLLABORATION 491-658 (1985).

21. This is recounted in the Fund's official history. M. DE VRIES, 2 THE INTERNATIONAL MONETARY FUND, 1972-1978 735-62 (1985).

22. Articles of Agreement, *supra* note 17, art. IV, § 1, at 23 U.S.T. 2203.

23. The IMF publishes these arrangements each year, together with other information on members' exchange and trade systems. *See, e.g.*, INTERNATIONAL MONETARY FUND, ANNUAL REPORT ON EXCHANGE ARRANGEMENTS AND EXCHANGE RESTRICTIONS (1988).

powers under article IV, not only in terms of the correlative nature of the member's duties, but also in terms of the authority of the Fund (i) to determine the content of members' obligations; (ii) to decide authoritatively when such obligations are breached; (iii) to promulgate principles and guidelines that are not (by definition) binding; and (iv) to give content to terms such as "exchange rate policies." In so doing, therefore, the conceptual linkage between the powers conferred on the IMF by article IV, section 3 and the obligations imposed upon members by article IV, section 1, is omitted. In section 821, subsection 2, the obligations of members to furnish information to, and to consult with, the Fund are extracted, but without reflecting the potency of the Fund under article IV.[24]

Given the structure and approach of section 821, it is perhaps unavoidable that it is prone to oversimplification and misstatement.[25] First, subsection 821(1), referring to the freedom of members to choose their exchange arrangements (under article IV, section 2), inserts a qualification that the choice must be "consistent with orderly economic growth and reasonable price stability."[26] On this interpolation three problems should be noted. First, the phrase is contained in a "soft" obligation of article IV, section 1(i) (members are to "endeavor"), yet the *Restatement* treats the feature as a firm condition. Second, the clause in fact speaks of "the objective of fostering orderly economic growth *with* reasonable price stability"[27] (that is "with," not "and"). Finally, article IV, section 1 concludes with the qualification: "with due regard to its circumstances."

Second, subsection 821(4) posits an obligation of members not to manipulate exchange rates. Unfortunately the statement excludes an important phrase contained in article IV, section 1(iii), from which it is taken, concerning manipulation of "the international monetary system." In addition, this obligation is one of several, in that article IV, section 1 imposes a general obligation on members to collaborate with the Fund, as well as two other "soft" obligations, and a further general obligation concerning appropriate "exchange rate policies."

24. For a summary of the Fund's authority and practice in this regard, see Holder, *Exchange Rate Policies: The Role and Influence of the International Monetary Fund*, 80 AM. SOC. INT'L L. PROC. 29 (1986).

25. For a vigorous criticism of this chapter, including the points following, see Gold, *The Restatement of the Foreign Relations Law of the United States (Revised) and International Monetary Law*, 22 INT'L LAW. 3 (1988). Sir Joseph made similar points prior to the finalization of the *Restatement*. J. GOLD, THE FUND AGREEMENT IN THE COURTS 673 (1986).

26. RESTATEMENT (THIRD) § 821(1); *see also* Articles of Agreement, *supra* note 17, at 23 U.S.T. 2203.

27. *Id.*

Additionally, subsections 821(1)(b) and (3), which deal with multiple currency practices and discriminatory currency arrangements, and exchange restrictions, respectively, (drawing on article VIII, sections 2 and 3 of the Fund's Articles) also fall short. In the Articles, the three categories of restrictions on payments and transfers for current international transactions, multiple currency practices, and discriminatory currency arrangements, are regarded as variations of a genus; the imposition of any one is prohibited without Fund approval. In section 821, not only are the categories segregated in terms of qualifying members' freedom to choose exchange arrangements, but this qualification does not extend to exchange restrictions.[28]

Section 821(3) on exchange restrictions could easily be misconstrued. The section needs to be clarified to indicate that despite a member's reliance on the transitional provisions of section 2 of article XIV of the Fund's Articles to maintain exchange restrictions in effect at the time of membership and to adapt them to changing circumstances, new exchange restrictions require the approval of the Fund (even if the member has not explicitly accepted the obligations of article VIII).

The comment to section 821, while filling out the context somewhat, does not respond to these deficiencies in section 821's structure and content. Dealing in brief paragraphs with the "[u]se of Fund's resources" and "[c]onsequences of breach of obligation under Articles of Agreement," the comment is not probative of the propositions of the black-letter law set out in section 821. In fact, it contains its own ambiguities. The reporters' notes, meanwhile, are largely unrelated to the context and thrust of the black-letter propositions and the comments. While they provide a quick glance at the Fund's overall structure and operations, several misstatements detract from their usefulness and reliability.[29]

Article VIII, section 2(b) of the IMF's Articles of Agreement injected into private transnational claims a feature derived from the plateau of inter-state obligations. Its essence is that the domestic courts of member states must recognize and apply the laws of other members in certain circumstances, even when it requires overriding private rights. On the one hand, therefore, the interpretation and application of article VIII, section 2(b) depends upon national courts. On the other, since article

28. There are several other discrepancies. Certain questions concerning capital transactions are left in abeyance, including, in particular, whether the qualification in subsection (1) on "multiple currency practices" would be invoked for multiple currency practices involved in capital transactions. Also, subsection (1) speaks of discrimination against "currency," whereas article VIII, section 3 refers to "discriminatory currency arrangements." *See* Articles of Agreement, *supra* note 17.

29. *See* J. GOLD, *supra* note 25, at 694-97.

VIII is a living provision of the Fund's Articles, the interests of the Fund's membership are at stake.

The black-letter statement of section 822 presents, in a reformulation, the text of the first sentence of article VIII, section 2(b). Section 822 states:

> Under the Articles of Agreement of the International Monetary Fund, a member state may not enforce exchange contracts involving the currency of another member state if such contracts are contrary to that state's exchange control regulations maintained or imposed consistently with the Articles of Agreement.[30]

This statement does not purport to add to the understanding of the Articles. But since it is the elements of the paragraph that give teeth to the general concept of the *Restatement*, many issues should be clarified. In particular, what is the meaning of "exchange contracts" or "contracts which involve the currency of any member"? Furthermore, what is the meaning of the terms "contrary to [the] exchange control regulations," "maintained or imposed consistently," and "unenforceable"? And, of course, who decides? These terms are not tackled in the *Restatement*.

Nor are these straight-forward issues. The views of scholars and courts differ. The comments to section 822 offer a modest starting point for the required analysis. First, on the crucial question of defining "exchange contracts," comment b does not go much beyond the statement that "[a]t least two distinct interpretations of the term have emerged in judicial decisions and scholarly writing"; thus there is a narrow view (favored, according to the comment, by the U.S. and British courts) and a broader view (favored by "some courts of other states").[31] But the comment does not choose between the two views, and avoids analysis of the policies that those views entail. Comment c then expands on the concept of "[e]xchange controls maintained or imposed consistently with IMF Articles,"[32] albeit without full justice to the subtleties involved. These rest, essentially, on the principles that (i) "exchange control regulations" is a broader concept than restrictions on payments and transfers for current international transactions; (ii) that only those measures in the second and narrower category require approval under article VIII, section 2(a) to assure "consistency" with the Articles; (iii) that members relying on the transitional arrangements of article XIV may maintain and adapt to changing circumstances the existing restrictions on current payments—otherwise, however, restrictions on current payments are subject

30. RESTATEMENT (THIRD) § 822.
31. *Id.* § 822 comment b.
32. *Id.* § 822 comment c.

to approval under article VIII, section 2(a); and (iv) the Fund has adopted certain policies on approval of exchange restrictions.[33]

A final paragraph of the comment is more contentious, going to one of the aspects of who decides. Specifically, on the issue of whether or not an exchange control regulation is maintained or imposed consistently with the Articles, the Fund, as part of a 1949 decision aimed at aiding the application of article VIII, section 2(b) in national courts, stated that it "is prepared to advise whether particular exchange regulations are maintained or imposed consistently with the Fund Agreement."[34] In this context, the comment draws a distinction between a negative and a positive conclusion by the Fund; that is, when the Fund states that a regulation is inconsistent, the statement is binding, but when the Fund decides it is consistent, it is not binding—though it is "entitled to great weight."[35] No justification is given for the distinction, nor, it is suggested, could one be found. Such a distinction, furthermore, runs contrary to the fact that the Fund is in the best position to decide the matter, and that recognition of Fund authority will prevent conflicting outcomes by national courts.

Section 823, on "Judgments on Obligations in Foreign Currency," does not consider any issues of international law, nor does it purport to add to our understanding of international monetary law as such. But it is nonetheless significant in several respects. First, it states that while U.S. courts ordinarily give judgments in U.S. dollars, "they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred."[36] But both the comment and the reporters' notes follow the traditional rule—that "courts in the United States are required to render money judgments payable in United States dollars only, regardless of the currency of obligation or loss."[37] However, this perception is not well-founded, at least in an era of floating currencies.[38] While the new proposition cannot be based firmly on existing case law,[39] its sweep is nonetheless broad; state courts applying their own traditions are swept up in the generalization.

33. The comment includes the following questionable statement: "Ordinarily, the Fund will not approve restrictions on payments for current account imposed by 'Article VIII states,' but it may do so in some circumstances." *Id.* § 822 comment c. In fact, the Fund's policies on approval of exchange restrictions do not depend on whether or not the member has accepted the obligations of article VIII.

34. Executive Board Decision No. 446-4, adopted June 10, 1949, *reproduced in* SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND 290-91 (13th Issue 1987).

35. RESTATEMENT (THIRD) § 823 comment c.

36. *Id.* § 823(1).

37. *Id.* § 823 comment b.

38. *Id.*

39. Here the dominant influence of Miliangos v. George Frank (Textiles) Ltd., [1976] A.C. 443 (H.L.) is apparent.

Moreover, a major issue of application must arise. Even if U.S. courts are "not precluded" from making foreign currency awards, when will or should they do so? On this point, the black-letter law is silent. The comment responds, "only when requested by the judgment creditor,"[40] and only when it would "make the creditor whole."[41] The first part of this qualification might be viewed as unduly pandering to the plaintiff; the second as general and enigmatic.[42]

Under section 823(2), if the U.S. court gives judgment in dollars, the principle of making "the creditor whole" governs the manner in which conversion from a foreign currency is made. Again, one can accept this objective, but how will it guide future cases? The comment states that:

> the date used for conversion should depend on whether the currency of obligation has appreciated or depreciated relative to the dollar. In general, if the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of injury or breach.[43]

Even then, the comment adds a major qualification. The "guidelines" should be departed from when required by "the interests of justice."[44] The reporters' notes meanwhile admit that U.S. courts (both state and federal) have not been consistent, either in choosing between a "breach-date" and a "judgment date" rule,[45] or in the choice of dates for conversion into dollars of obligations stated in foreign currencies.[46]

## Conclusion

The *Restatements* of the American Law Institute carry considerable authority in the United States and beyond. The revised *Restatement on the Foreign Relations Law of the United States*, replacing its predecessor of 1965, will no doubt have a similar influence. As the first attempt to codify the rules in the area of international relations, Part VIII of the *Restatement* might well receive even greater attention.

The scope of the *Restatement's* consideration of international economic relations is confined, however, to international trade law (specifically the GATT) and international monetary law (including the IMF). The treatment of each is in the tradition of the *Restatement*, with the black-letter sections encapsulating general principles, often at a high level

40. RESTATEMENT (THIRD) § 823 comment b.
41. *Id.* § 823 comment c.
42. *See* Gold, *supra* note 25, at 24-29.
43. RESTATEMENT (THIRD) § 823 comment c.
44. *Id.*
45. *Id.* § 823 reporters' note 2.
46. *Id.* § 823 reporters' note 4.

of abstraction. The chapter on the GATT is much fuller, and thereby more faithful to the GATT Articles, than is the section on international monetary law.

As indicated in this review, the "prescriptive" quality of this part of the *Restatement* may be diminished for various reasons. The black-letter provisions seek to capture in brief synthetic passages trends of decisions, predictions of future decisions, and preferred decisions for sizable areas of international activity. This is no easy task. Whether completely successful or not, Part VIII of the *Restatement* on international economic relations will certainly contribute to the intellectual ferment in this area and will be a valuable source for commentators and decisionmakers during the years to come.