

## An Early History of MOCOMILA

### Notes for the 100<sup>th</sup> Meeting of MOCOMILA in Berlin, September 4-5, 2015

The ILA itself was founded in October 1873. Its original name, “The Association for the Reform and Codification of the Law of Nations”, was changed to the International Law Association in 1895. The Monetary Law Committee of the ILA was established by the Executive Council of the ILA in 1951. The original rapporteur was F.A. Mann and the President was Max Gutzwiller.

The records show that on at least four occasions the ILA discussed issues of monetary law before MOCOMILA was formed in 1951.

The 31<sup>st</sup> Conference of the ILA in 1922 (held, appropriately enough, in Buenos Aires) discussed the Negotiation of External Loans with Foreign Governments. After a lengthy presentation by Charles Cheney Hyde, the Chairman of the meeting endorsed the opinion of the British representative that loans to foreign governments -- because they were not then enforceable in legal proceedings -- were “not a matter for our International Law Association at all”. Although the Minutes of this meeting endeavor to lay a soft blanket over the points of disagreement, it is clear that some participants had a strong negative reaction to the view that loans to foreign governments were not a fit subject for lawyers to discuss. They reminded their colleagues of the pernicious consequences that can follow from the non-payment of such loans, and of the views of the Argentine jurist, Dr. Luis Drago, on the use of force to compel payment of foreign loans.<sup>1</sup>

In 1926, at the 34<sup>th</sup> Conference in Vienna, one of the topics was “Rules Relating to the Rate of Exchange.”

At the 38<sup>th</sup> Conference in Budapest in 1934, the ILA considered “Payments in Gold and in Foreign Currencies” (this was one year after the U.S. Congress, as a matter of public policy, abrogated the gold clause in obligations subject to U.S. jurisdiction). At both the 39<sup>th</sup> and 40<sup>th</sup> Conferences (1936 and 1938), Gold Clause issues were also discussed.

To give you some idea of priorities, however, over this same period the ILA considered matters of divorce law at five separate Conferences.

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<sup>1</sup> See Luis Drago, *State Loans in Their Relation to International Policy*, 1 American Journal of Int’l Law 692 (1907) (warning of the danger of allowing public debts to be collected *manu militari*).

At its 45<sup>th</sup> Conference in Lucerne in 1952, the ILA instructed the International Monetary Law Committee:

to submit to the I.L.A. a statement of principles relating to such questions of Monetary Law as the Committee may select and for this purpose to keep in close touch with international and national authorities dealing with monetary administration and with the local branches of the Association.

Representatives of the IMF and the Bank for International Settlements have regularly attended Committee meetings, starting with the Committee's first meeting 63 years ago.

At that first meeting of MOCOMILA, Dr. Mann announced that "our task is to harmonize international monetary law." He encouraged MOCOMILA to aim high – seeking nothing less than a "comprehensive scheme for international legislation on monetary matters."

In its first report to the ILA, MOCOMILA said that it had resolved "to devote its attention primarily to practical questions rather than matters of academic interest". It therefore designated the following topics "with a view to developing principles recommended for general acceptance":

- (i) the conflict of laws relating to exchange controls,
- (ii) the law of protective clauses (gold clauses, index clauses, etc.) "with special reference to their efficacy in the event of legislative interferences",
- (iii) the determination of the money of account with special reference to certain types of contracts such as insurance, sale, agency and negotiable instruments,
- (iv) international investments and their protection by international monetary law,
- (v) the enforcement of foreign currency obligations, and
- (vi) international cooperation in monetary matters.

In this same initial report, MOCOMILA opined that the "branch of monetary law which is most urgently in need of international clarification is the conflict of laws relating to exchange controls."

Much of the Committee's attention -- and much of its scorn -- was directed at Article VIII(2)(b) of the IMF Articles of Agreement,<sup>2</sup> a provision that the Committee found "so obscure that it cannot afford any authoritative guidance to the solution of our problem."

Dr. Mann led the discussion of Article VIII(2)(b). He urged the Committee to treat the Bretton Woods Agreements as a *fait accompli* and to accord them a degree of "respect, goodwill and loyalty" commensurate with a multilateral treaty of great magnitude. It was now an "inescapable fact", he said, that some exchange controls -- sanctioned by the IMF -- had "become respectable". "Much of our old learning", he therefore concluded, "has become obsolete".

Not every member of the Committee was as prepared as Dr. Mann to go gentle into the good night of Bretton Woods. One member, Mr. Eder (nationality not clear from the record), "expressed almost total disagreement" with Dr. Mann's reports on Article VIII(2)(b). Based on his personal experience, Mr. Eder regarded exchange controls as simple theft; a violation of the "plighted faith of governments great and small". About Bretton Woods, Mr. Eder had this to say:

[I]f we are to be faithful to the high standards of our profession, we must condemn [the Bretton Woods Agreement]. The International Monetary Fund was foredoomed to failure, as was pointed out by many at the time of its drafting and signature. It is being more or less openly violated by several governments. The latest report of the Fund is a confession of failure. The fundamental vice of the Bretton Woods Agreement, from a lawyer's standpoint, is that it purports to legalize devaluation of economics.

Exchange controls, and in particular the implications of Article VIII(2)(b), occupied the attention of the Committee well into the 1960s.

President Nixon took the United States off the gold standard in August 1971. Unmoored from gold, commercial parties looked for ways to "maintain value in real terms" in international payments. This subject preoccupied the Committee's attention during the 1970s. MOCOMILA meetings in the 1970s

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<sup>2</sup> Article VIII(2)(b) reads as follows:

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.

considered the use of “value clauses”, Special Drawing Rights as a unit of account in international conventions, European Currency Units (ECU) and “real value” (compensatory purchasing power) clauses.

The global sovereign debt crisis that started in August 1982 with Mexico’s default set much of the agenda for the Committee’s meetings in the 1980s.

In the early decades of the Committee’s existence, perhaps guided by the person or spirit of Dr. Mann, MOCOMILA saw its task as attempting to harmonize international monetary law. This led to the promulgation of draft conventions and statements of principles by the Committee to a far greater extent than is attempted by the 21<sup>st</sup> century MOCOMILA.

The Committee has, however, always shown a degree of topicality in the issues it discusses. Exchange controls in the 1950s and 60s. Monetary rules in the absence of the gold standard in the 1970s. Sovereign debt crises in the 1980s. The development of the euro in the 1990s.

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