

LEGAL ASPECTS OF THE IMF/WTO RELATIONSHIP: THE FUND'S ARTICLES OF AGREEMENT AND THE WTO AGREEMENTS

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The relationship between the International Monetary Fund (Fund) and the World Trade Organization (WTO) is a continuation of the long-standing relationship between the Fund and the Contracting Parties to the General Agreement on Tariffs and Trade (GATT),¹ as modified by new developments associated with the establishment of the WTO. The two organizations generally act in a complementary and cooperative fashion. Discussions about the legal aspects of the relationship, however, including recent WTO dispute settlement cases concerning the Fund, reflect misunderstandings about the legal nature of Fund activities and how they relate to the WTO provisions on this relationship. In addition, certain issues about the Fund/WTO relationship are not clearly resolved in the text of the WTO Agreements.² This article discusses key legal provisions of the WTO Agreements that concern the Fund and explains the legal nature of the Fund's activities relevant to these provisions.

The legal aspects of the Fund/WTO relationship can be illustrated by reviewing three categories of interaction. There is a different legal role for the Fund in each of these categories. The provisions in the WTO Agreements that address interaction with the Fund reflect the important objective of avoiding conflicting rights and obligations for members of the Fund and the WTO. This "jurisdictional aspect," however, represents only one category of the relationship. Two other categories were illustrated by recent WTO dispute resolution cases: the relationship of WTO obligations to a member's adjustment program while receiving Fund financing (a case concerning an import surcharge imposed by Argentina³) and the Fund's assessment of the member's balance-of-payments situation (a case concerning quantitative restrictions imposed by India⁴). While these two cases did not involve an overlap of rights and obligations, they posed the question whether WTO panels should consult the Fund and, if so, what the legal effect of this consultation would be.

* Senior Counsel, Legal Department, International Monetary Fund. This article expresses the personal views of the author and does not necessarily represent the views of the institution. It does take into account, however, discussion of these issues and decisions reached in the Fund's Executive Board. The author would like to thank various colleagues who have provided insightful comments on this paper, particularly William Davey, François Gianviti, Jesus Seade, and Robert Sharer. Any errors herein remain the responsibility of the author. This article was first published in the *American Journal of International Law*, Vol. 96, No. 3, p. 561.

¹ The contracting parties to the GATT are styled "CONTRACTING PARTIES" in GATT documents when acting jointly. General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XXV, TIAS No. 1700, 55 UNTS 194. The term will simply be capitalized ("Contracting Parties") in the text below when used in that sense, except for quotations of GATT materials. The current version of the GATT is in Annex 1A to the WTO Charter, THE LEGAL TEXTS, *infra* note 2, at 17, 33 ILM 1154 (1994) [hereinafter GATT].

² As used herein, "WTO Agreements" refers to the Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Charter] and the substantive multilateral agreements attached thereto, Apr. 15, 1994, *in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 3 (1999) [hereinafter THE LEGAL TEXTS], 33 ILM 1143 (1994).

³ Panel Report, Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/R (Nov. 25, 1997) (adopted Apr. 22, 1998), *as modified* by Appellate Body Report, WT/DS56/AB/R & Corr.1, DSR 1998: III, 1033 [hereinafter Argentine Footwear].

⁴ Panel Report, India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R (Apr. 6, 1999) (adopted Sept. 22, 1999), *as modified* by Appellate Body Report, WT/DS90/AB/R, AB-1999-3 [hereinafter India Balance of Payments].

The complexity of these issues is compounded by institutional differences between the two organizations. Therefore, before reviewing the three categories of interaction, this article considers some of the asymmetries between the organizations that may affect interpretation of the provisions that govern their relationship. These issues range from the different nature of the obligations covered, to the dissimilarities in their organizational structure and differences in domestic governmental constituencies (part I). The article next offers an overview of the provisions in the GATT 1994 and the Fund/WTO Cooperation Agreement (part II) that govern the legal relationship of the institutions. The three categories of interaction mentioned above are then discussed by reviewing the impact on WTO obligations of, first, measures in a member's adjustment program that are supported by Fund financing (part III); second, trade restrictions imposed for balance-of-payments reasons (part IV); and third, obligations under the Fund's Articles of Agreement regarding exchange matters (part V).⁵

While many of these issues arose under the GATT, the expanded scope of the WTO Agreements brings additional areas of interaction, especially given the increased areas of overlap in service transactions covered by the General Agreement on Trade in Services (GATS).⁶ New issues will need to be addressed, including, for example, the trade effects of exchange rate manipulation,⁷ and the scope of the prudential exception to the financial services commitments under the GATS.⁸ All these issues take on increased importance in view of the enhanced role of panel and Appellate Body reports under the dispute settlement mechanism of the WTO. While the contracting parties took a pragmatic approach to interpreting the GATT, the dispute settlement mechanism brings more legalism into the application of the WTO Agreements due to the prevalence of dispute settlement cases.⁹ However, the cases that have concerned the Fund/WTO relationship show that the panel process, which is designed to resolve disputes between WTO members, is not well suited to addressing questions of international architecture. Thus, although the panel reports have been generally well reasoned, the ad hoc approach to dealing with common issues that largely sufficed in the past is not desirable. Rather, issues should be resolved at the level of the decision-making bodies of the two institutions. This approach requires coordination between the trade and finance communities within governments so that the two organizations and their respective memberships can work together constructively to clarify the legal aspects of their relationship, preferably in advance of any future cases.

I. INSTITUTIONAL AND OPERATIONAL DIFFERENCES BETWEEN THE FUND AND THE WTO

⁵ Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 UNTS 39, as amended through June 28, 1990, available at <<http://www.imf.org/external/about.htm>>.

⁶ General Agreement on Trade in Services, WTO Charter, Annex 1B, THE LEGAL TEXTS, *supra* note 2, at 284, 33 ILM at 1167 [hereinafter GATS].

⁷ John H. Jackson, *Managing the Trade System: The World Trade Organization and the Post-Uruguay Round GATT Agenda*, in *MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS* 131 (Peter B. Kenen ed., 1994).

⁸ Christopher Parlin, Current Developments Regarding the WTO Financial Services Agreement (May 16, 2002) (paper delivered at IMF Legal Department and IMF Institute Seminar on Current Developments in Monetary and Financial Law).

⁹ See, e.g., Kenneth W. Abbott, *The Many Faces of International Legalization*, 92 ASIL PROC. 57 (1998).

While cooperation between the institutions overall is productive and positive, the three categories discussed herein demonstrate that the resolution of some of the issues that concern both organizations poses definite challenges. As a backdrop to the discussion of these categories, reflection on some of the institutional and operational differences between the WTO and the Fund may be helpful. These differences affect the perceived roles of the two organizations and their dynamic for cooperation in the areas discussed. While not intended to be exhaustive, the issues examined below are presented as relating to the asymmetry between the two organizations, differences in scope and exercise of mandate, and differences in domestic constituencies.

Asymmetrical Organizations Despite Complementary Objectives

The purposes of the WTO and the Fund are complementary. Participants in the Bretton Woods Conference of July 1944 recognized that, in addition to the Fund and the International Bank for Reconstruction and Development (i.e., the World Bank), an international trade organization to liberalize trade would benefit the world. Together with the Fund, this organization would work toward the expansion of international trade; the trade organization would have jurisdiction over the underlying transactions and the Fund would have jurisdiction over exchange controls relating to the payments and transfers for those transactions. The financing role of the Fund was designed to provide balance-of-payments support so that countries would not resort to measures that were destructive of international trade by restricting transactions or the related payments and transfers. While countries did not approve the establishment of the International Trade Organization as envisaged, they agreed to the GATT, which contained reciprocal trade concessions principally on tariff reductions and established rules intended to avoid nullifying the benefits of these concessions.¹⁰

The GATT is now folded into the WTO, which was formally created with legal personality in 1995. States or other entities that enter into the WTO Agreements thus are members of an international organization. Like the Fund, the WTO now has legal status, but the two are distinguished by several asymmetries of an institutional character. Importantly, the difference in the nature of obligations in the two organizations results in different modes of operation. In the WTO, obligations are characterized by the reciprocal nature of the trade obligations that originated in the GATT. Although the Contracting Parties to the GATT acted in many respects like an organization,¹¹ the GATT was a treaty under which parties undertook obligations to other parties. The WTO as an organization facilitates the implementation, administration, and operation of the agreements, and provides an important forum for discussion,¹² but as a legal matter, members' substantive obligations under the WTO Agree-

¹⁰ For a useful historical review, see Dukgeun Ahn, *Linkages Between International Financial and Trade Institutions: IMF, World Bank and WTO*, J. WORLD TRADE, Aug. 2000, at 1, 3–5.

¹¹ Article XXV authorizes the GATT contracting parties to act jointly and to give effect to those provisions in the GATT “which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of” the GATT. According to Frieder Roessler, former director of legal services of the GATT, the Contracting Parties used this authority “to establish relations with States, international organizations and private persons and to assume legal personality under international and municipal law for that purpose.” Frieder Roessler, *The Competence of GATT*, J. WORLD TRADE L., NO. 3, 1987, at 73, 75.

¹² WTO Charter, *supra* note 2, Art. III:1, 2.

ments flow from one member to another, as under the GATT. Obligations to the institution itself are limited to other matters, such as participation in trade policy reviews and fulfillment of administrative responsibilities, including payment of dues. The WTO creates the mechanism for formal dispute resolution concerning alleged violations of WTO rules, but the institution does not initiate complaints of noncompliance. The aggrieved members themselves must bring a complaint and, if sanctions are to be imposed, they take the form of compensation rendered by the member or suspension of reciprocal trade benefits by the challenging member. The WTO has no power to impose sanctions on a member that fails to comply with its obligations under the WTO Agreements.

Under the Fund's Articles, in contrast, prohibitions on exchange restrictions establish obligations that the member owes to the institution rather than to other members. A member is obligated to the Fund as an institution to refrain from imposing exchange restrictions on payments and transfers for current international transactions.¹³ The freedom from exchange restrictions is not based on reciprocal concessions but, rather, on the integrity of the international monetary system as a whole and the possibility of financial support by the Fund for a country that is adopting appropriate measures to resolve its balance-of-payments difficulties. The Fund's Articles require that a member remove restrictions affecting other members regardless of whether other members have submitted a complaint requesting such removal.¹⁴ The Fund's Executive Board meets in continuous session to review and reach decisions on members' compliance with this obligation, in contrast to the WTO panels. In the case of persistent violations, the Fund as an organization has the authority to impose sanctions, such as withdrawal of eligibility to use the Fund's general resources, suspension of voting rights, and eventual compulsory withdrawal.¹⁵ Thus, the approach to eliminating trade restrictions under the auspices of the WTO and the Fund's jurisdiction over the elimination of the restrictions on the "payments side" of these transactions are not symmetrical.

In other words, although the WTO is an international organization, it does not operate from the same "institutional" perspective as the Fund. Judith H. Bello has written that "the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives."¹⁶ This statement was made in arguing that WTO members found to have violated a WTO obligation have an equal choice of bringing the measure into compliance or providing compensation, because the WTO obligations are not "binding" in an international law sense: "The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas."¹⁷ Other scholars, however, attribute a more *supranational* character to the WTO. Professor John Jackson responded that the Dispute

¹³ As noted in the overview of Fund jurisdiction below (part V), exchange restrictions may be maintained under certain circumstances.

¹⁴ Indeed, the managing director is required to bring instances of breach of obligation to the Executive Board. INTERNATIONAL MONETARY FUND, BY-LAWS, RULES AND REGULATIONS, Rule K-1 (Fifty-eighth Issue, 2001). An executive director may bring a complaint to the attention of the Executive Board, or the board itself may raise the matter, but in practice they have rarely done so.

¹⁵ The Executive Board of the Fund has not made it a condition that members eliminate existing exchange restrictions in order to receive Fund financing, although it is a standard condition for continued receipt of Fund financing that the member refrain from imposing or intensifying import restrictions for balance-of-payments reasons. See *infra* note 25 and corresponding text.

¹⁶ Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AJIL 416, 417 (1996). This point of view has been put forward in the United States to make membership in the WTO more palatable to constituencies concerned about the *supranational* powers of the organization.

¹⁷ *Id.*

Settlement Understanding (DSU) “clearly establishes a preference for an obligation to perform the recommendation,” and that WTO rules are certainly binding in the traditional international law sense; still, he acknowledges that the WTO rules do not “nail down” the issue as to the domestic application of this obligation.¹⁸ Nonetheless, to the extent that Bello’s view is shared by others, it highlights an important difference between the Fund and the WTO.

Much of the day-to-day work in the two institutions is carried out by different categories of actors. In the Fund, staff and management play an important role in the recommendations to the Executive Board on its daily activities. In contrast, since the focus in the WTO centers on reciprocal trade relations, delegations conduct much of the work on the trade obligations in their capacity as representatives of their countries. The staff of the WTO remains a secretariat, although it now figures more importantly by supporting the various WTO councils and committees, and especially the Dispute Settlement Body.¹⁹

The different institutional characteristics of the Fund and the WTO affect cooperation between the organizations. Notwithstanding constructive interaction between the two staffs, organs of the WTO have sought little formal consultation with the Executive Board of the Fund, aside from the Committee on Balance-of-Payments Restrictions. The focus on trade concessions does not naturally provoke the delegations to seek input from the Fund on an institution-to-institution basis regarding issues relating to exchange matters, although some delegations occasionally contact Fund staff informally. These informal contacts were the only avenue of discussion between the institutions, for example, during negotiations on language concerning exchange measures and exchange rate policy in the documents regarding recent accessions to the WTO. On a broader scale, in multilateral negotiations, delegations are more naturally attuned to reciprocal benefits than those concerning institutional architecture and the possibility of conflicting rights and obligations for members of both institutions. Furthermore, the drafting of the texts in the Uruguay Round continued up to the moment the negotiations were concluded. While some delegations and the secretariat informally contacted Fund staff on selected matters, this process did not permit the vetting of issues on an organizational basis. This procedure contrasts with the drafting of certain documents in the earlier years of the GATT (such as a model Special Exchange Agreement for nonmembers of the Fund that were signing the GATT), when the Executive Board of the Fund was kept informed of developments and the staff could furnish any appropriate input. In the Uruguay Round, an attempt was made at the end of the

¹⁸ John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AJIL 60, 62–64 (1997) (emphasis omitted). Professor Jackson contrasts the language of Article 94 of the United Nations Charter: “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”

¹⁹ Somewhat representative of the different roles of the staffs in the two institutions, significant asymmetries in bureaucratic aspects remain, such as in staff size and travel budget. See, e.g., Ahn, *supra* note 10, at 1 n.1 (“The difference in the sizes of these institutions is still substantial. As of April 2000, the WTO Secretariat has 534 staffs and the total budget for year 2000 amounts to 125,386,460 SFR (about \$75 million).”; see WTO, 2000 ANNUAL REPORT. The Fund currently has more than 2000 working staff members and its administrative budget for the fiscal year 2000 was about \$576 million. FUND, 1999 ANNUAL REPORT. These annual reports are available online at the respective Web sites of the two organizations.

negotiations to resolve some ambiguities created in the relationship with the Fund, leading to the preparation of the Ministerial Declaration on the Relationship of the WTO with the Fund, discussed below in part V. Unfortunately, this interaction only aggravated the perception in the trade community of Fund “interference” in WTO matters at the eleventh hour.

Differences in Scope and Exercise of Mandate

Some commentators have questioned whether the exercise of Fund jurisdiction has facilitated the liberalization of the international exchange and trade system. First, trade retaliation (or the threat thereof) is perceived as more effective in getting countries to modify objectionable measures than the exercise of Fund jurisdiction.²⁰ Also, while the Fund’s Articles of Agreement prohibit restrictions on payments and transfers for current international transactions (Art. VIII), a “transitional” provision (Art. XIV) permits a member to choose to retain restrictions that were in place when it joined the Fund. This “grandfathering” provision has been seen as unduly protecting members that maintain exchange restrictions. As discussed more fully in the jurisdictional section below, however, Article XIV has limited scope, and the staff has taken a more active approach in the past five to ten years to encouraging members to forgo the protections of Article XIV (in Fund parlance, “accepting Article VIII status”).²¹

²⁰ One example is the U.S. law known as section 301, 19 U.S.C. §§2411–2420 (2000), which is now linked to the results of the WTO dispute settlement mechanism.

²¹ Compared with 18 members that accepted Article VIII status during the 1980s, 83 countries have done so during the past ten years (including 24 out of the 32 that joined the Fund after 1990). As of this writing, 153 members out of the total membership of 183 do not avail themselves of Article XIV. IMF Members’ Quotas and Voting Power, and IMF Governors (May 21, 2002), at <<http://www.imf.org/external/np/sec/memdir/members.htm>>.

Second, the exercise of Fund jurisdiction over exchange restrictions does not by itself help eliminate trade restrictions. As discussed in part V, the Fund defines exchange restrictions for purposes of its jurisdiction in a limited fashion: “The guiding principle in ascertaining whether a measure is a restriction on payments and transfers for current transactions under Article VIII, Section 2, is whether it involves a direct governmental limitation on the availability or use of exchange as such.”²² The Fund therefore identifies an exchange restriction by this technical criterion, rather than by the purposes or economic effect of the restriction; otherwise, there would be no way of distinguishing between trade and exchange restrictions, as both may be used to achieve the same purposes and have the same economic effect. Thus, while a restriction on payments for particular imports is covered by Fund jurisdiction, an outright ban on the imports (i.e., the underlying transaction) is not.²³ Fund members are obliged to avoid restrictions that are not maintained consistently with the Fund’s Articles, but the Articles impose no such obligation with respect to trade restrictions.

While Fund jurisdiction is limited, Fund conditionality covers a much broader scope of economic and financial policies that may extend to liberalization of trade measures. For example, consistently with the Fund’s purposes under Article 1 of the Articles, the Fund’s balance-of-payments assistance can facilitate trade as well as exchange liberalization. A recent study showed that trade liberalization measures included in such programs are almost always implemented.²⁴ Also, a standard condition for continued receipt of Fund financing requires the member to refrain from imposing or intensifying import restrictions for balance-of-payments reasons.²⁵ Indeed, several claims that the Fund interfered with trade liberalization were misplaced. The Fund provides generalized balance-of-payments financing that is not earmarked or traced to particular projects. Consequently, the receipt of Fund resources does not warrant the recent concerns expressed by the European Union and reflected in U.S. legislation²⁶ that resources received by Korea were channeled to subsidies for particular industries. Additionally, the Fund does not provide technical assistance to countries in drafting antidumping laws,²⁷ and maintains a strong institutional position against antidumping measures, trade taxes, and trade-related subsidies.²⁸

Differences Between Domestic Constituencies

The representatives of governments constitute an important set of actors in the Fund/WTO relationship. In many governments, external trade and finance are handled by different ministries. The “power of the purse” of the finance ministry, which often drives governmental decisions, may contribute to bureaucratic friction with the trade ministry and aggravate otherwise imperfect communication or cooperation between them. These

²² Decision No. 1034-(60/27), para. 1 (June 1, 1960), SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND 428, 428 (Twenty-fifth Issue, 2000) [hereinafter SELECTED DECISIONS].

²³ A 1955 working party on Fund/GATT relations commented that the potential use of the technical criteria “is inevitably somewhat arbitrary in some respects.” Report Relating to the Review of the Agreement, GATT B.I.S.D. (3d Supp.) at 170, 196 (1955).

²⁴ ROBERT SHARER WITH IMF STAFF, TRADE LIBERALIZATION IN IMF-SUPPORTED PROGRAMS (World Econ. & Financial Surveys, 1998).

²⁵ See, for example, the standard form for standby arrangements, SELECTED DECISIONS, *supra* note 22, at 174.

²⁶ Ahn, *supra* note 10, at 2 n.4; Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, §622, 112 Stat. 2681, 2681-116 (1998).

²⁷ Concern about Fund advice on antidumping laws was expressed in Jackson, *supra* note 7, at 143.

²⁸ Excessive subsidies or trade restrictions may also invite surveillance as giving rise to fiscal imbalances or more generally indicating poor macroeconomic policies. Additionally, according to the principles for conducting surveillance under Article IV of the Fund’s Articles, the Fund may raise the existence of trade restrictions as a sign of inadequate exchange rate policies in its discussions with members. Decision No. 5392-(77/63) (Apr. 29, 1977),

ministries may also have different views about the national objectives in international affairs. For example, trade ministries, especially those of exporting countries, are not charged with taking into account the cost of balance-of-payments support that may be necessitated by the increase in imports by countries that open their markets.

As these ministries are usually responsible for appointments to the political organs of the WTO and the Fund, the relationship of these actors at the national level may spill over to how issues of concern to both institutions are represented at the international level. Not all countries have developed a tradition of coordination at the national level so that either ministry would advance the concerns of the other at the international level. Thus, trade ministers generally incline more toward seeking redress through the GATT/WTO for concerns involving the trade effects of restrictive exchange measures, than toward engaging the finance ministry in discussing the exchange restrictions in the Fund.²⁹ This problem is demonstrated by the non-use of the various vehicles that enable trade officials to arrange for their government's interest to be represented in the Fund when exchange matters affect trade issues, as well as by the infrequency of formal consultation by the WTO aside from the Committee on Balance-of-Payments Restrictions. Nonetheless, developments in international negotiations, for example, such as including financial services in bilateral and multilateral treaties, may require these ministries to work together on such matters, and could foster better coordination on both the national and the international levels.

II. KEY LEGAL PROVISIONS GOVERNING THE FUND/WTO RELATIONSHIP

The Fund's Articles and the WTO Agreements provide the legal basis for cooperation. Several provisions in the WTO Agreements specifically address that organization's relationship with the Fund. While the Fund's Articles do not deal specifically with relations with the GATT or the WTO, having been written before the GATT, they nonetheless authorize relationships with other international organizations and set forth the basis for cooperation between the two organizations.

Mutual Cooperation Despite Asymmetrical Legal Provisions

Several provisions in the WTO Agreements address cooperation with the Fund in a general manner: Article III.5 of the WTO charter and two ministerial declarations, as well as specific provisions discussed below in the GATT and the GATS. Article III.5 of the WTO charter provides: "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." The Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking states:

²⁹ The problem may be exacerbated by the fact that a few government officials representing the member's trade interests in Geneva may bring with them any of their government's frustrations with the Fund generated in the context of an adjustment program supported by the Fund. "[T]he IMF's much feared Structural Adjustment Program places tremendous hardship on 'the weakest and poorest people of the victim countries.'" Jeffery Atik, *Uncorking International Trade, Filling the Cup of International Economic Law*, 15 AM. U. INT'L L. REV. 1231, 1238 (2000).

The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies. The World Trade Organization should therefore pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions.³⁰

³⁰ Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, para. 5, THE LEGAL TEXTS, *supra* note 2, at 386, 33 ILM at 1249, 1249. The Declaration on the Relationship of the World Trade Organization with the International Monetary Fund is discussed in part V *infra*.

The Fund's Articles also provide a legal basis for cooperation. Article X states in relevant part: "The Fund shall cooperate within the terms of this Agreement with any general international organization and with public international organizations having specialized responsibilities in related fields." While it has been said that "the text of the IMF Agreement lacks articulated co-operation provisions with the GATT,"³¹ the fact that Article X is general, rather than GATT-specific, has not precluded extensive cooperation between the institutions, both formal and informal. Activities include the sharing of information, reciprocal attendance at meetings, and joint participation in various working groups and committees. The High-Level Working Group on Coherence, consisting of senior staff from the Fund, the WTO, and the World Bank, met a few times to begin thinking about implementing the declaration on this topic. The Fund participates in the Integrated Framework for Trade-Related Technical Assistance, involving the WTO and other organizations. There are also bilateral contacts between the managing director of the Fund and the director-general of the WTO, as well as between the staffs, to discuss areas of common interest.

Nonetheless, the *legal* relationship between the two organizations is "one-sided" in that only the WTO Agreements take Fund jurisdiction into account and expressly require the WTO to rely on the Fund for its expertise in balance-of-payments assessments. Obligations under the Fund's Articles are not affected by action in the WTO. As a result, the WTO Agreements require the WTO to consult the Fund in specified circumstances, but these consultation provisions have no counterpart in the text of the Fund's Articles. In practice, however, procedures have been put in place to ensure that no actions taken in members' relationship with the Fund give rise to WTO inconsistency, as is described below.

In 1996 the Fund and the WTO signed a formal cooperation agreement (Cooperation Agreement).³² It implements the legal relationship between the organizations established in the WTO Agreements because it is based on the authority and mandate to cooperate in the respective charters. The Cooperation Agreement includes, for example, several provisions on document exchange, reciprocal attendance at meetings, and other routine "bureaucratic" matters that facilitate cooperation. The discussion herein, however, focuses only on the aspects of the Cooperation Agreement relating to the three categories of the relationship discussed in parts III to V below. The following sections discuss first the matters that trigger the need to consult the Fund and then the effect of any such consultation.

The Principle of WTO Consultation with the Fund

³¹ Ahn, *supra* note 10, at 7.

³² Agreement Between the International Monetary Fund and the World Trade Organization, Dec. 9, 1996, reprinted in SELECTED DECISIONS, *supra* note 22, at 705 [hereinafter Cooperation Agreement].

Under the WTO Agreements, the original GATT (GATT 1947) is incorporated as GATT 1994 (which also consists of identified protocols, decisions, and understandings).³³ Article XV of the GATT 1994 is the cornerstone of the Fund/WTO legal relationship, especially on matters concerning trade in goods, setting out both the principle of WTO consultations with the Fund and the scope and effect of such consultations. Focusing first on the principle of consultation—what triggers the consultation—paragraph 2 of Article XV provides: “In all cases in which the [WTO is] called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, [it] shall consult fully with the International Monetary Fund.”³⁴ The plain meaning of the statement that the WTO “shall consult fully” creates an obligation to consult with the Fund on specified matters: “problems concerning monetary reserves, balances of payments or foreign exchange arrangements.”

The reference to “the International Monetary Fund” means formal contact on an institutional level. In the Fund, this terminology has a precise legal meaning and, in the context of relations with other international organizations, refers to the Executive Board.³⁵ The Executive Board is an organ of the Fund, consisting of executive directors appointed by the membership. While any response to a request from the WTO would be drafted initially by the staff, it would be subject to the Executive Board’s review and approval before being submitted on behalf of the institution. Thus, the Fund’s responses to the WTO are not produced solely by its staff, but are vetted and approved by the Executive Board, after considering members’ views expressed by their respective executive directors.

The consultation requirement in Article XV is “one-sided” not only because no corresponding requirement is incumbent on the Fund, but also because it does not by itself impose an obligation on the Fund to respond. That is, neither the GATT nor the WTO Agreements oblige the Fund to respond to the request to consult.³⁶ The Fund undertook the obligation to consult at the request of the Contracting Parties in a 1947 exchange of letters, under which numerous consultations have occurred and a regular practice has developed. The Fund/WTO Cooperation Agreement replaces the letters and serves as the source of the Fund’s obligation to respond to the WTO’s request to consult. For example, the Cooperation Agreement extended to the WTO the procedures for consultation on balance-of-payments matters, which were well established: “The Fund agrees to participate in consultations carried out by the WTO Committee on Balance-of-Payments Restrictions on

³³ See *supra* note 1. Although the GATT 1947 is “legally distinct” from the GATT 1994, the text of the provisions discussed herein is identical. WTO Charter Art. II:4.

³⁴ In this context, because the WTO was created as an international organization in 1995, the references to the contracting parties, used to refer to parties to the GATT, should now be understood as “WTO members.” Similarly, the “WTO” replaces the “CONTRACTING PARTIES,” see GATT Art. XXXVIII.

³⁵ Under Article XII, section 2(b) of the Fund’s Articles, “[t]he Board of Governors may delegate to the Executive Board authority to exercise any powers of the Board of Governors, except the powers conferred directly by this Agreement on the Board of Governors.” Under the same article, section 3(a), “[t]he Executive Board shall be responsible for conducting the business of the Fund, and for this purpose shall exercise all the powers delegated to it by the Board of Governors.”

³⁶ Because the Fund is not itself bound by these provisions, Article XV:3 of the GATT instructed the Contracting Parties to “seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.” The WTO Charter contains a corresponding requirement on the WTO: “The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.” WTO Charter Art. V:1. Neither the exchange of letters nor the Cooperation Agreement creates an obligation for the Fund to consult the GATT/WTO on trade matters. As hypothesized by Roessler in discussing the exchange of letters, a provision to do so may have been understood to require an amendment of the Fund’s Articles. Frieder Roessler, *Selective Balance-of-Payments Adjustment Measures Affecting Trade: The Roles of the GATT and the IMF*, 9 J. WORLD TRADE L. 622, 644 (1975). While Article X of the Fund’s Articles authorizes cooperation with other international organizations, it stipulates that “[a]ny arrangements . . . which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement.”

measures taken by a WTO member to safeguard its balance of payments. For these consultations, existing procedures for Fund participation shall continue and may be adapted as appropriate”³⁷

³⁷ Cooperation Agreement, *supra* note 32, para. 4. Pending conclusion of the Cooperation Agreement, an interim letter covered the agreement to consult on balance-of-payments matters, including those that might have arisen under the GATS.

In a subsequent paragraph (paragraph 8), the Cooperation Agreement addresses first informal, then formal consultation between the organizations on matters other than balance of payments. In its first sentence, the paragraph sets forth a reciprocal agreement to share “views,” which must be recorded but have no binding effect on the other institution: “Each organization may communicate its views in writing on matters of mutual interest to the other organization or any of its organs or bodies (excluding the WTO’s dispute settlement panels) and such views shall become part of the official record of such organs and bodies.”³⁸ Dispute settlement panels were excluded because the legal regime does not envisage the presentation of Fund opinions on matters outside Article XV in the context of a dispute settlement case, and such a possibility was viewed as potentially compromising the “independence” of panels.³⁹

The second sentence of paragraph 8 takes as its point of departure that the GATT 1994 requires the WTO to consult, *inter alia*, on exchange matters within the jurisdiction of the Fund and therefore establishes its obligation to respond to such a request: “The Fund *shall* inform in writing the relevant WTO body (including dispute settlement panels) considering exchange measures within the Fund’s jurisdiction whether such measures are consistent with the Articles of Agreement of the Fund.”⁴⁰ At the time the Cooperation Agreement was under discussion, numerous nongovernmental organizations (NGOs) approached the WTO to have a voice in dispute settlement cases related to their areas of concern. The phrase in the Fund/WTO Cooperation Agreement “shall inform *in writing*” was intended in part to clarify that the Fund anticipated submitting a written report on the jurisdictional rulings of relevance to the case, and not having a full role in the proceedings, as NGOs were requesting.

When the WTO’s General Council approved the Cooperation Agreement, it adopted a decision reflecting some delegations’ hesitancy to acknowledge participation by outside parties in panel proceedings. The General Council’s decision contains an explanation that *allows* panels to receive a communication from the Fund.⁴¹ In contrast, the decision by the Fund’s Executive Board simply approved the Cooperation Agreement on the basis of its terms, which were understood to implement the requirement that the WTO consult the Fund by establishing the Fund’s role in response to these rules.⁴² The question whether a panel considering a matter covered by Article XV:2 was required to consult the Fund, as

³⁸ *Id.*, para. 8.

³⁹ Comment to author by Jesus Seade, then deputy director-general of the WTO (1996). Whether the Fund’s input has any impact on the independence of panels is addressed further in the *India Balance-of-Payments* case, discussed in part IV below.

⁴⁰ Cooperation Agreement, *supra* note 32, para. 8 (emphasis added).

⁴¹ The decision states in part:

[W]henever the IMF wishes to submit its views to a panel on whether an exchange measure within its jurisdiction is consistent with the IMF’s Articles of Agreement, it shall submit these views by directing a letter containing those views to the Chairman of the [Dispute Settlement Body]. The Chairman of the DSB shall inform the chairman of the panel of the availability of this communication which, unless the panel decides otherwise, shall remain confidential to the panel and to the parties to the dispute.

Decision Adopted by the General Council Concerning Agreements Between the WTO and the IMF and the World Bank at Its Meeting on 7, 8, and 13 November 1996, WT/L/194, para. 4(b) (Nov. 18, 1996), *reprinted in* SELECTED DECISIONS, *supra* note 22, at 701.

⁴² The Executive Board’s decision states:

The Executive Board approves the proposed Agreement Between the International Monetary Fund and the World Trade Organization as set forth in EBD/96/85 (7/5/96) on the understanding that decisions taken by either party for the implementation of this Agreement will not prevent the effective application of this Agreement in accordance with its provisions.

Decision No. 11381-(96/105) (Nov. 25, 1996), SELECTED DECISIONS, *supra* note 22, at 701.

opposed to having the option to do so, was raised in the context of the *India Balance-of-Payments* case,⁴³ but it is also relevant to the other issues discussed below.

The Effect of WTO Consultation with the Fund

Article XV:2 of GATT 1994 also describes the effect of consultation with the Fund. The WTO is required to accept certain determinations and information that correspond to the legal nature of the Fund's work. For this reason, Article XV:2 does not require the WTO to accept any of the Fund's views; rather, it identifies factual findings within the Fund's assigned competence, such as balance of payments, and legal determinations by the Fund concerning consistency of exchange measures with the Articles of Agreement:

⁴³ *Supra* note 4; see part IV *infra*.

In such consultations, the [WTO] *shall accept* all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and *shall accept* the determination of the Fund as to whether action by a [WTO member] in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that [WTO member] and the [WTO].⁴⁴

With respect to cases involving trade restrictions imposed for balance-of-payments reasons in particular, Article XV:2 provides:

The [WTO], in reaching [its] final decision in cases involving the criteria set forth in paragraph 2(a) of Article XII or in paragraph 9 of Article XVIII [of GATT 1994], *shall accept* the determination of the Fund as to what constitutes a serious decline in the [WTO member's] monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.⁴⁵

The provisions thus identify specific determinations by the Fund that must be accepted. Nonetheless, they result in a different role for the Fund in different circumstances. Some of the determinations that must be accepted concern *factual matters* (e.g., information about reserve levels). The factual information is necessary, for example, for the WTO to apply the balance-of-payments exception set forth in the GATT. In this circumstance, the role of the Fund is to provide its expertise on balance-of-payments assessments, not to rule whether the balance-of-payments exception applies.⁴⁶ In contrast, the determination whether a measure is consistent with the Fund's Articles of Agreement is a *legal ruling*. These legal rulings feed into other provisions in the GATT and GATS that take into account Fund jurisdiction with the goal of reaching consistent legal rulings for common members of both institutions.⁴⁷ In the GATT, this provision is Article XV:9: "Nothing in this Agreement shall preclude: (a) the use by a [WTO member] of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that [WTO member's] special exchange agreement"

The GATS also allows for a balance-of-payments exception to commitments on service transactions. Article XII contains an analogous statement on the effect of consultation with the Fund: "In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance

⁴⁴ GATT Art. XV:2 (emphasis added). The reference to a "special exchange agreement" deals with the situation where a GATT contracting party was not a member of the Fund. Such a member was required to enter into the special exchange agreement to replicate the obligations to avoid imposing exchange restrictions that are concomitant with Fund membership. See, e.g., JOSEPH GOLD, MEMBERSHIP AND NONMEMBERSHIP IN THE INTERNATIONAL MONETARY FUND 426 (1974); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 486-91 (1969). Although such cases are now rare, they are still relevant under the WTO (e.g., Taiwan Province of China, as it is known in the Fund). While these special exchange agreements raise important issues in Fund/WTO relations, a detailed discussion of such issues is beyond the scope of this article.

⁴⁵ GATT Art. XV:2 (emphasis added).

⁴⁶ See part IV *infra*.

⁴⁷ See part V *infra*.

of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.”⁴⁸ Article XI of the GATS, which requires permitting payments and transfers related to the covered services transactions, also addresses the interest in consistent legal rulings under the Fund’s Articles and the WTO Agreements:

⁴⁸ GATS Art. XII:5(e). The GATS provision is more complex because the GATS extends to payments relating to the scheduled services, which overlaps with the Fund’s Articles. This article does not address the details of the GATS balance-of-payments safeguard.

Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.⁴⁹

Given the legal consequences for WTO obligations of whether or not a measure is consistent with the Fund's Articles, the Fund agreed in the Cooperation Agreement to "inform the WTO of any decisions approving restrictions on the making of payments or transfers for current international transactions, decisions approving discriminatory currency arrangements or multiple currency practices, and decisions requesting a Fund member to exercise controls to prevent a large or sustained outflow of capital."⁵⁰

III. FIRST CATEGORY OF INTERACTION: WTO OBLIGATIONS AND FUND CONDITIONALITY

One category of interaction was demonstrated by the 1997 case concerning footwear from Argentina, which involved an import surcharge claimed to violate the GATT.⁵¹ The relevant question from this case can be framed as whether the WTO Agreements provide an exception for policies applied by a member when receiving financing from the Fund. The economic adjustment program associated with such financing will normally include measures that the Fund has identified as conditions for the continued receipt of Fund resources. Properly analyzing this case turns on an understanding of the legal nature of Fund conditionality: as these conditions are not obligations to the Fund, this category differs from the final category, which concerns obligations to the Fund under its Articles on exchange control measures, discussed in part V below. That category is defined by the interest in avoiding conflicting rights and obligations of common members in cases of jurisdictional overlap. In contrast to the Fund's jurisdiction over exchange control measures, Fund conditionality concerns the Fund's financing function.

The legal reasoning of the panel is not what makes this case unsatisfactory. The panel correctly found that GATT Article XV did not extend to the import surcharge that Argentina took while receiving Fund financing. As cited earlier, Article XV requires consultation on "monetary reserves, balances of payments or foreign exchange arrangements." Neither Fund conditionality nor adjustment measures are included in this list. There would logically be no requirement to consult the Fund or instructions on how to treat such information from the Fund, in the absence of an exception to WTO obligations for policies applied in such a context. The Fund has not taken a position in favor of any such exception. Rather, this case is worrisome because the panel declined to consult the Fund notwithstanding the requests from the United States and the interest in clarifying the facts surrounding the measure and the role of the Fund. Although the mandatory consultation provision of Article XV:2 did not apply, the panel could have invoked its discretionary authority to consult the Fund; by declining to do so, it showed that the panel process is not an appropriate mechanism for clarifying important aspects of Fund/WTO interactions.

⁴⁹ GATS Art. XI:2; *see also* part V *infra*. The reference to "request by the Fund" refers to Article VI, section 1 of the Fund's Articles authorizing the Fund to request that a member impose capital controls so as to prevent the use of the Fund's resources to meet a large or sustained outflow of capital. The Fund has never done so.

⁵⁰ Cooperation Agreement, *supra* note 32, para. 3.

⁵¹ Argentine Footwear, *supra* note 3.

The Arguments in the Argentine Case

The *Argentine Footwear* case involved an import surcharge imposed by Argentina that was challenged by the United States. The measure in question was an *ad valorem* tax of 3 percent on imports “to cover the cost of providing the statistical service intended to provide a reliable basis for foreign trade operators.”⁵² Argentina argued that the import surcharge was a “commitment” to the Fund, and its having been undertaken while Argentina was receiving Fund financing precluded action in the WTO in the interest of consistency between the two institutions. Because the argumentation did not elucidate the legal nature of conditions for receiving Fund financing, the discussion before the panel as to whether the Fund had “required” the measure confused the issue.

Argentina’s arguments before the panel ranged from noting that the Fund had “required” the measure as a condition for receiving Fund resources, to stating that the Fund had explicitly endorsed the measure, to suggesting that the Fund had implicitly required measures such as this one given the fiscal targets in the program.⁵³ The crux of the argument was that the measure constituted part of its “Fund commitments” and therefore should be permitted under the GATT to avoid conflicts between the two organizations. Argentina cited Article XV of the GATT, the Fund/WTO Cooperation Agreement, and the two ministerial declarations on cooperation and “coherence in global economic policy making” that were included with the WTO Agreements.⁵⁴

The Legal Nature of Measures Taken in the Context of a Fund-Supported Program

Understanding two key points about the legal nature of the use of Fund resources helps clarify why adjustment measures taken while receiving Fund financing do not involve legal consequences under the WTO Agreements. First, the member’s overall program for adjustment measures taken in connection with Fund financing should be distinguished from the measures that the Fund identifies as conditions for the continuation of such financing (known as “Fund conditionality”). Second, conditions for the receipt of Fund financing do not constitute obligations to the Fund.

With regard to the first point, in seeking financing from the Fund, the government sends a “letter of intent” that states the member’s intended policy for a program of adjustment measures. The Executive Board of the Fund decides whether to support the member’s program, usually through a decision called an “arrangement,” which is the instrument that will identify specific conditions for the member to continue receiving Fund resources. Thus, while this letter of intent is a necessary step in obtaining Fund financing, the member’s program is legally distinct from, and broader than, Fund conditionality. Although measures identified as conditions are drawn from the policy intentions stated in the letter of intent,

⁵² *Id.*, Panel Report, para. 6.70.

⁵³ *Id.*, paras. 3.276–3.282.

⁵⁴ *Id.*, paras. 3.283–3.305.

they must be limited to those that are consistent with the Fund's Articles.⁵⁵ Thus, not all of the adjustment measures that a member decides to undertake while receiving Fund financing constitute Fund conditionality; this broader set of policies is properly referred to as a "Fund-supported program."

⁵⁵ Fund Articles of Agreement Art. V, §3. Conditionality may take several forms, such as features that the Fund calls performance criteria, benchmarks, prior actions, and measures considered in a review. FUND, CONDITIONALITY IN FUND-SUPPORTED PROGRAMS—POLICY ISSUES §II.C (2001), *available at* <<http://www.imf.org/external/np/pdr/cond/2001/eng/struct>>. These conditions cannot extend to measures outside the Fund's competence (e.g., calling new elections), or involve matters that would be impermissible as conditionality under the Fund's Articles (e.g., opening up an identified sector to foreign investment, because Article VI, section 3 allows members to maintain capital restrictions).

This distinction has not been well understood for several reasons. It is not always clear outside the Fund which measures the Fund suggested in helping members design their programs and which were taken up as Fund conditionality. One reason is that governments find such ambiguity convenient, in that it permits unpopular reform measures that governments believe are necessary to be perceived as required by the Fund.⁵⁶ In a recent review of conditionality in the Fund, however, executive directors agreed that the member's own interest in pursuing the adjustment measures would be better understood if future programs were to distinguish the member's plan for its adjustment program overall more clearly from the measures that the Fund identifies as conditions for financing.⁵⁷ Also, the Fund recently adopted a policy that encourages members to agree to publish their letters of intent on the Fund's Web site; while the final decision must rest with the member, the relevant executive director must explain the member's decision to the Executive Board if the member opts against publication.

The second, and perhaps more important, point to be made about the legal nature of the use of Fund resources is that even those measures that constitute Fund conditionality do not entail legal obligations to implement the policies in the program. As a legal matter, failure to complete those measures results solely in the nonfulfillment of a condition for the use of Fund resources. Political ramifications may stem from this failure, but the legal consequences are limited to the suspension of financing absent further action by the Executive Board; they do not give rise to a breach of obligation or the possibility of sanctions.⁵⁸ Given the legal nature of conditionality, the Fund's Guidelines on Conditionality

⁵⁶ FUND, CONDITIONALITY IN FUND-SUPPORTED PROGRAMS—OVERVIEW, paras. 24–25 (2001), available at <<http://www.imf.org/external/np/pdr/cond/2001/eng/struct>>.

⁵⁷ See recent Fund papers on conditionality, *supra* notes 55–56.

⁵⁸ As explained by the former Fund general counsel, Sir Joseph Gold, there were political and diplomatic reasons for avoiding the legal status of breach of obligation:

If a member's statement of the policies it intends to pursue had contractual force, the member's failure to follow them would be a breach of obligation. It may have been the impression among some officials in some member countries that this would be the legal consequence if the policies were not pursued, or at least if those policies which were made performance criteria were not followed. The interruption of the right to make

state that contractual terminology should be avoided in arrangements and letters of intent.⁵⁹ Although the terms “commitment” and “agreement” often crop up in conversations about Fund-supported programs, they are misleading because of the connotation of obligation; formal documents should avoid their use.⁶⁰

How do these points relate to the circumstances of the *Argentine* case? Fund economists subsequently interviewed explained that the statistical tax levied on imports was introduced by the Argentine government in March 1995 as part of a comprehensive package of fiscal tightening in response to the Mexican crisis. In its letter of intent, Argentina had described the “temporary surcharge” to the Fund as imposed for statistical purposes. It was not a condition under the Fund-supported program and the staff had urged that the measure be eliminated. In any event, while the distinction between the program overall and Fund conditionality has import within the Fund, neither situation is mentioned in the WTO Agreements as an exception to WTO obligations.

The Outcome of the Argentine Case

purchases because a performance criterion had not been observed could easily have been regarded as a sanction for a breach of obligation. The result was probably a reluctance on occasion to set forth certain policies as part of a program for fear that it might be difficult for the member to observe these policies even though there was no question about their desirability.

JOSEPH GOLD, *THE STAND-BY ARRANGEMENTS OF THE INTERNATIONAL MONETARY FUND* 45 (1970).

⁵⁹ Guidelines on Conditionality, Decision No. 6056-(79/38) (Mar. 2, 1979), *SELECTED DECISIONS*, *supra* note 22, at 149, para. 3.

⁶⁰ Certain conclusions flow from the fact that noncompliance with Fund conditionality can result only in interruption of financing (absent further Executive Board action) and does not involve breach of obligation. For example, if necessary for the adjustment program, an arrangement from the Fund may include a condition for a trade liberalization measure such as lowering a tariff below the rate “bound” in the member’s WTO tariff schedules. If the member maintains the tariff above the level set as such a condition, the Fund may withhold financing under the arrangement. As there is no breach of obligation to the Fund, however, the Fund has no other recourse against the member in the form of any other sanction. Similarly, as the condition for a reduced tariff creates no obligation to the Fund, it cannot be used to create an obligation to, or right of recourse by, any other member. Additionally, the Fund may not include in an arrangement a condition that a member take on an obligation under the law of another institution (such as “binding” a tariff rate or committing itself to liberalization of a particular service under the GATS). The fact that a trade-liberalizing measure taken in the context of a Fund-supported program amounts to unilateral liberalization on the part of the member has led to discussion of “crediting” countries in subsequent rounds of trade negotiations. Coherence in Global Economic Policy-making: WTO Cooperation with the IMF and the World Bank, *Autonomous Trade Liberalization*, WT/TF/COH/S11 (June 18, 1999).

The panel ruled that the GATT inconsistency of Argentina's import surcharge is not excused under Article XV:2 on the grounds that it involved an adjustment measure in a Fund-supported program.⁶¹ First, on the legal analysis of the consultation issue, the panel correctly noted that it was not required to consult the Fund because the adjustment measures are not among those specifically listed in Article XV:2 as triggering consultation. Subsequently, the Appellate Body confirmed that there is a *requirement* to consult on the matters specified in Article XV:2, but that measures included in a Fund-supported program are not among them.⁶² The Appellate Body also correctly noted that the Cooperation Agreement did not establish consultation requirements in these circumstances.⁶³ As explained above, the Cooperation Agreement could not modify the WTO's consultation requirement, which was already set forth in the WTO Agreements; the role of the Cooperation Agreement is rather to implement this requirement when it applies.

Second, the panel ruled, and the Appellate Body confirmed, that no exception to GATT rules applied in the circumstances of this case. The Appellate Body stated that Article XV:2 identifies certain circumstances under which a member is "excused from certain of its obligations under the GATT 1994,"⁶⁴ but that the *Argentine* case did not involve those matters. The panel also ruled that there was insufficient evidence to support Argentina's argument that a memorandum of understanding with the Fund is a "simplified agreement" which includes an 'undertaking' or an 'obligation' on [Argentina's] part to collect a specified amount in the form of a statistical tax."⁶⁵

Argentina's argument that the alleged GATT inconsistency should be excused under the principle of "coherence in global economic policy making" and cooperation stated in the ministerial declarations has logical appeal but is not supported by the legal provisions in the GATT. One author proposed that a possible approach "to acknowledg[ing] the IMF functions in the WTO system is to grant a provisional waiver of WTO obligations to a Member country subject to an IMF programme for a specified period of time depending on the nature of urgency."⁶⁶ While this is an interesting suggestion, as a matter of practice, the Fund's approach is to help members avoid planning adjustment measures that would violate WTO obligations or, for that matter, trade taxes or subsidies even if they were WTO-consistent. In general, the staff's practice is to circulate draft documents for internal review among departments at every stage of the development of a program to avoid inconsistencies, starting with the "briefing paper" before a mission goes into the field and including the draft of the member's letter of intent. In particular, the Trade Policy Division of the Policy Development and Review Department checks the member's WTO obligations to verify that there are no inconsistencies with a Fund-supported program. This division frequently engages in informal consultations with the GATT Secretariat to ensure consistency of the measures with WTO obligations.

The fact that the panel declined to consult the Fund reveals deficiencies in leaving the Fund/WTO interface to be resolved in the panel process. At a minimum, the wide-ranging allegations that the Fund "required" the measure suggest that consultation was warranted

⁶¹ *Argentine Footwear*, *supra* note 3, Panel Report, para. 6.79.

⁶² *Id.*, Appellate Body Report, para. 84 [hereinafter AB Report].

⁶³ *Id.*, paras. 72, 85.

⁶⁴ *Id.*, para. 73.

⁶⁵ *Id.*, para. 65.

⁶⁶ Ahn, *supra* note 10, at 24.

to clarify the facts. Statements by Argentina and the Appellate Body express this point well. Argentina had argued on appeal that

[t]he Panel has not complied with its obligation to make an objective assessment of the matter before it in accordance with Article 11 of the [Dispute Settlement Understanding] . . . by not acceding to the request of the parties to gather information and consult with the IMF, so as to obtain its opinion on specific aspects of the matter.⁶⁷

The Appellate Body did not agree that the panel had failed to assess the matter but observed that it “might perhaps have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF in this case.”⁶⁸

Perhaps the panel’s hesitancy to consult the Fund reflects judicial economy in view of the ruling that there was no such obligation. Perhaps it reflects the then-prevailing aversion to participation in panels by any outside parties. Perhaps it indicates an aversion to involving the Fund, in particular, in WTO matters. Regardless of the motivation, a result of the decision is that cooperation between the institutions is not facilitated. The Fund’s representative in Geneva made a statement to this effect to the Dispute Settlement Body when the panel report was up for consideration.⁶⁹ Part I postulated some institutional and structural differences that may cause misunderstandings between the trade and finance communities and may have contributed to a tendency to exclude the Fund. A discussion that involved the political organs of the institutions, however, might have provided an opportunity to dispel some of those misunderstandings. It might also have permitted a useful debate from the Argentine arguments, given the prevalence of crises and adjustment programs supported by the Fund and the instruction to work toward coherence in global economic policymaking.

IV. SECOND CATEGORY OF INTERACTION: BALANCE OF PAYMENTS DEROGATION AND A SERVICE PROVIDED BY THE FUND

The question whether panels must consult the Fund was posed more pointedly in the so-called *India Balance-of-Payments* case.⁷⁰ The case concerned the rules allowing a WTO member to impose *trade* restrictions, otherwise prohibited by the GATT, to safeguard the member’s balance-of-payments position. This case does not concern obligations to the Fund because it does not involve an *exchange* measure subject to Fund jurisdiction, but the GATT nonetheless requires consulting the Fund on the economic situation underlying the claim of balance-of-payments difficulties. In such a case, the Fund provides a service, based on its assigned competence in balance-of-payments matters, to make certain factual determinations necessary for the legal decision under the GATT as to whether the balance-of-payments exception applies.

A key debate in the case centered on whether the panel was required to consult the Fund. The panel did not resolve this question and thus the case cannot be cited for the proposition that the consultation requirement either does or does not extend to panels. The

⁶⁷ Notification of Appeal, Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/8, para. 4 (Jan. 21, 1998).

⁶⁸ Argentine Footwear, *supra* note 3, AB Report, para. 86.

⁶⁹ WT/DSB/M/45, at 8 (June 10, 1998).

⁷⁰ India Balance of Payments, *supra* note 4.

panel chose to consult the Fund under its authority to seek information from outside experts, which is a positive result for both institutions. The rationale is troubling, however, because the panel treated consultation as discretionary, which therefore leaves open the question whether a future panel faced with issues covered by GATT Article XV would decline either to consult the Fund or to accept its determinations as dispositive of the issues on which it is consulted. Additionally, the litigious context was not conducive to resolving these questions, which involve broader issues of international architecture that shaped the drafting of the GATT. Rather than arguing against consultation, common members should contribute to fostering coordination between the institutions in the appropriate circumstances.

The Arguments in the India Balance-of-Payments Case

A brief overview of the balance-of-payments provisions of the GATT is a necessary backdrop to discussion of the *India* case.⁷¹ In short, Article XII and Article XVIII, section B of the GATT, and the Balance-of-Payments Declaration authorize a WTO member to impose otherwise impermissible trade restrictions to safeguard its balance of payments in specified circumstances. Article XVIII, section B contains rules specific to developing countries. These articles identify both the type of balance-of-payments problem required for a member to avail itself of this exception, which relates to consultation with the Fund, and additional criteria for determining whether the measures justify derogation from the WTO rules.⁷²

Under Article XII:2(a), a WTO member may impose quantitative restrictions otherwise prohibited under Article XI to “safeguard its external financial position and its balance of payments” where these restrictions are required either “to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves” or, if the member has “very low monetary reserves, to achieve a reasonable rate of increase in its reserves.” Article XVIII sets forth slightly different (generally interpreted as more lenient) criteria for developing countries. Article XVIII:9 does not require that the threat of a serious decline in the member’s monetary reserves be “imminent.” Also, rather than requiring that monetary reserves be “very low,” Article XVIII:9 requires only that the reserves be “inadequate.”⁷³

The measures must meet additional criteria to justify the derogation from WTO obligations. For example, the measures must not “exceed those necessary” to address the underlying problem, must not be discriminatory, must conform to certain minimum commercial standards (such as avoiding unnecessary damage to commercial and economic interests of other contracting parties), and will have to be phased out. Article XVIII requires that development concerns be considered in evaluating these criteria. With respect to the phase-out requirement, an interpretative note to the GATT states that a member will not be “required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution” of quantitative restrictions.⁷⁴

⁷¹ For a description of the GATT’s balance-of-payments exception and its applicability to this case, see, for example, Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT’L L. REV. 1249 (2000).

⁷² The GATS provision (Art. XII) is analogous, but is more complex because the GATS extends to payments relating to the scheduled services, which overlaps with the Fund’s jurisdiction over payments and transfers for current international transactions.

⁷³ Also compare the reference in Article XVIII:9 to the need “to ensure a level of reserves adequate for the implementation” of a country’s “programme of economic development” to the standard in Article XII for the implementation of such restrictions to “safeguard” the “external financial position.”

⁷⁴ GATT, Annex I, Ad Art. XVIII:11.

India had maintained restrictions under Article XVIII:B for several years, which had been criticized by other members in meetings of the Committee on Balance-of-Payments Restrictions (BOP Committee). The case raised numerous issues, ranging from the breakdown of the political compromise relating to India's request for leave to eliminate the restrictions over five to six years, to the justification for the balance-of-payments exception in the face of the country's large reserves, and the question whether the case should even be brought out of the BOP Committee and before a panel. These issues have been analyzed well in other articles,⁷⁵ and will not be reviewed here. This discussion focuses on how the panel considered the conflicting arguments on whether it was required to, or should, consult the Fund.

Recall that GATT Article XV:2 sets forth the role of the Fund in cases concerning trade in goods. The following excerpts highlight the aspects relevant to a balance-of-payments case:

⁷⁵ Ahn, *supra* note 10; Thomas, *supra* note 71.

In all cases in which the [WTO is] called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, [it] shall consult fully with the International Monetary Fund [and] shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments The [WTO] in reaching [its] final decision in cases involving the criteria set forth in paragraph 2(a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the [WTO member's] monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.⁷⁶

The panel report reflects the extensive arguments by the parties on this point.⁷⁷ The arguments in favor of a consultation requirement were sound and cogent. The adverse arguments reflected confusion about the consultation provisions and the proper role of the Fund. Instead of repeating the parties' argumentation (which can be read in the public panel report), the following summary organizes their reasoning by, first, the principle of whether the panel should consult the Fund and, second, what the effect of any such consultation should be.

The principle of consultation. The United States argued that the text of GATT Article XV:2 required the panel to consult the Fund. The United States recalled that the Appellate Body in the *Argentine* case had stated that the WTO is required to consult with the Fund on the matters specified in Article XV:2. The United States then argued that this requirement extends to the panels, as stated in the panel report: "Although Article XV:2 did not mention panels, *per se*, an interpretation of WTO [Agreements] would include panels."⁷⁸ The United States noted that India had acknowledged that the consultation requirement extended to the BOP Committee, which was also not mentioned in Article XV:2. Therefore, the text of the provision could not be used to argue that the consultation requirement did not extend to panels as well. The requirement was thus not limited to the General Council or the BOP Committee, as argued by India.⁷⁹

⁷⁶ See text at notes 34, 44–45 *supra* (quoting the provision in full).

⁷⁷ India Balance of Payments, *supra* note 4, Panel Report, paras. 3.305–3.358.

⁷⁸ *Id.*, para. 3.305. The United States made a similar argument before the Appellate Body:

Article XV:2 requires *panels*—and not just the BOP Committee and the General Council—to accept the findings and determinations of the IMF on the subjects specified in that provision. Article XV:2 requires the WTO to accept such findings and determinations in "cases" involving balance-of-payments matters or the criteria in Article XVIII:9. Such cases presumably include matters referred to in GATT Article XXIII, responsibility for which is assigned to the WTO, which administers the DSU pursuant to Article III:3 of the WTO Agreement.

Submission by the United States Before the World Trade Organization Appellate Body, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, AB-1999-3, para. 206 (June 21, 1999) (footnote omitted).

⁷⁹ India Balance of Payments, *supra* note 4, Panel Report, para. 3.309.

India also argued that the consultation requirement did not apply because of the specific considerations of Article XVIII:B relating to developing countries:

There was little doubt, therefore, that as between the [BOP] Committee and the General Council, on the one hand, and the IMF, on the other, it was the Committee and the General Council that had a special obligation to look after the trade related economic development needs of less-developed country Members.⁸⁰

According to India, these concerns gave rise to a distribution of competence among the organs of the WTO, which would be disrupted if the panel consulted the Fund and adhered to its findings.

⁸⁰ *Id.*, para. 3.315.

In response, the United States pointed out that the consultation requirement under Article XV:2 does not distinguish between aspects of the balance-of-payments exception that involve economic development (Art. XVIII:B) and those that do not (Art. XII).⁸¹ The United States also described the Fund's role as defined by the international community:

[T]he original intention of Article XV:2 had been to ensure that decisions made by the CONTRACTING PARTIES took proper account of the determinations of the IMF, the institution to which the architects of the post-war economic order gave the responsibility of overseeing balance-of-payments matters. Acceptance of India's position would effectively mean that panels would be less constrained by the rules of GATT 1994 than other bodies of the WTO and would introduce inconsistency between panels and the rest of the WTO.⁸²

Finally, India argued that because certain matters were outside the competence of the Fund, it should not be consulted: "the competence of the IMF did not extend to all the matters required to be taken into account by the General Council in making the final decision on whether India's balance of payments and reserves situation met the criteria of Article XVIII:9(a) and (b)."⁸³ One such matter was the schedule for removing a measure.⁸⁴

The effect of consultation. As grounds against considering a statement from the Fund, India stated: "the IMF did not take the final decision on the *legal status* of the import restrictions under the WTO."⁸⁵ In support of this argument, India described an early GATT case against the United States where a panel found that the balance-of-payments exception was not justified under the GATT even though the Fund had noted that the United States needed to avoid balance-of-payments deterioration.⁸⁶ Although the Fund had found that the United States was in balance-of-payments difficulties, the panel did not approve the particular measure chosen by the United States to respond to those difficulties. India argued that since the views of the Contracting Parties "had sometimes deviated" from those of the Fund, the Balance-of-Payments Committee was not bound by the Fund's determinations.⁸⁷

⁸¹ *Id.*, para. 3.320.

⁸² *Id.*, para. 3.309.

⁸³ *Id.*, para. 3.306.

⁸⁴ *Id.*, para. 3.307.

⁸⁵ *Id.*, para. 3.313 (emphasis added).

⁸⁶ In 1971, in connection with the introduction of a temporary import surcharge by the United States, the Fund had found that "in the absence of other appropriate action and in the present circumstances, the import surcharge can be regarded as being within the bounds of what is necessary to stop a serious deterioration in the United States' balance-of-payments position." The Fund representative did not suggest an alternative measure at that time. Nonetheless, the working party reported that it considered that the "trade surcharge, as a trade restrictive measure, was inappropriate given the nature of the United States balance-of-payments situation and the undue burden of adjustment placed upon the import account with consequent serious effects on the trade of other contracting parties." GENERAL AGREEMENT ON TARIFFS AND TRADE, ANALYTICAL INDEX 299-300 (6th ed. 1994) [hereinafter GATT ANALYTICAL INDEX].

⁸⁷ India Balance of Payments, *supra* note 4, Panel Report, para. 3.317.

The United States responded by noting first that the Fund must be consulted essentially as an “expert” by panels under Article XVIII:B and that its determination that India was not facing balance-of-payments difficulties was a “*factual* finding” for the panel’s consideration. The United States did not view this factual determination as detracting from the effectiveness of the “final decision” phrase in Article XV:2, which simply required the WTO and its bodies to accept such determinations on the factual issues enumerated in that provision. “[T]he ‘final decision’ clause did not prevent the IMF’s determination from being *factually dispositive* of the matters to which those determinations related. Any other reading would render meaningless the requirements that the WTO ‘shall accept’ IMF’s determination on the specified factual issues.”⁸⁸ Thus, as stated by the United States, the earlier panel’s “decision did not call into question the determination by the IMF that the United States was facing balance-of-payments difficulties.”⁸⁹

The Role of the Fund

Understanding the role of the Fund in the GATT’s balance-of-payments exception turns on distinguishing factual and legal determinations that underpin the ruling. As part of the postwar architecture of international organizations, Article XV:2 identifies a role of the Fund to analyze the existence and nature of a balance-of-payments problem for a member invoking the balance-of-payments exception to the GATT. The legal decision of the WTO on the overall justification of the exception should be made on the basis of the Fund’s factual findings and determinations on the underlying economic situation involving whether a WTO member has the specified balance-of-payments problem. Still, the WTO may decide whether the particular import restrictions or other trade measures applied by that contracting party “exceed those necessary” to correct its balance-of-payments problem or do not meet other criteria necessary to justify an exception to WTO obligations.

The Fund’s role may be called a service to the WTO because it provides a factual analysis that becomes a component of the WTO’s final ruling. The term “service” may also be appropriate because a statement is prepared specifically for the GATT/WTO upon receipt of a formal request. It is drawn, of course, from the Fund’s body of information about the member, but the timing of the request may not correspond to the annual consultation cycle for the member or any current work with that member, such as the provision of financing. Thus, an updated analysis is conducted by the staff and a paper is considered by the Executive Board specifically for transmittal to the WTO by the Fund’s representative in Geneva.

Practice over the years has blurred this distinction between the Fund’s role in factual determinations and the WTO’s legal conclusion on the overall justification for the exception to WTO obligations. A custom has developed for the Fund’s statement to include views about the appropriateness of the measure, such as its scope and how long it would be needed. As stated by the former director of legal services of the GATT, since the “GATT is institutionally not equipped to collect and evaluate data on financial matters,”⁹⁰ a consensus developed for the Fund to broaden its comments on such measures. In a similar vein, another author hypothesized that “the relatively loose application of Article XVIII” could be interpreted “as arising partially out of an institutional decision to leave scrutiny of balance-of-payments measures to the IMF. The IMF’s structure and focus

⁸⁸ *Id.*, para. 3.312.

⁸⁹ *Id.*, para. 3.319.

⁹⁰ Roessler, *supra* note 36, at 648. Roessler also provides an interesting historical review of the debate concerning the Fund’s role in providing balance-of-payments assessments under the GATT. *Id.* at 645–48.

allowed it a more extensive role in regulating those aspects of policy that relate to a country's balance-of-payments situation.”⁹¹

An important component of this architecture is not only that the parties to the GATT should consult the Fund, but also that they would accept as dispositive the determinations of the Fund based on its expertise. As seen above, the language of Article XV:2 is reasonably clear.⁹² Nonetheless, the fact that this consultation clause uses terms from the criteria identified in Article XII could raise a question about the precise scope of what must be accepted in cases arising under Article XVIII:B. For example, since the consultation requirement refers to a “very low level” of reserves, does that mean it extends to whether a developing country's reserves are “inadequate” under Article XVIII:B? The reference to “the criteria set forth in . . . paragraph 9 of Article XVIII” and the institutional role for the Fund represented in this provision overall suggest that it should be interpreted to apply to facts concerning members' level of reserves in both Article XII and Article XVIII cases.

⁹¹ Thomas, *supra* note 71, at 1261.

⁹² See text at note 76 *supra*.

Although practice may have obscured the distinction between factual and legal aspects of the balance-of-payments exception, the *India Balance-of-Payments* case shows that the increased role for panels signifies that the legal meaning of the GATT text remains important. An understanding of this text was recently reflected in the preparation of a similar safeguard provision in the draft Multilateral Agreement on Investment (MAI), which was ultimately unsuccessful for other reasons. The MAI would have prohibited capital restrictions on the investment transactions covered by the treaty. Negotiators included in the draft a temporary safeguard provision for balance-of-payments crises.⁹³ At the time the negotiations ended, the safeguard clause included a role for the Fund that was modeled on its role under the GATT in several ways. For trade restrictions imposed for balance-of-payments reasons (i.e., measures that did not involve exchange controls under Fund jurisdiction), the “Parties Group” was required to consult the Fund on the underlying economic situation.⁹⁴ This author participated in the Fund team that observed the discussions of the subcommittee drafting the safeguard provision. The discussions and the draft text indicate that the subcommittee applied this understanding of the GATT and endorsed the principle that the Parties Group would accept the Fund’s determinations as definitive on these matters.⁹⁵ Nonetheless, as under the GATT, judgments on the other components of the safeguard measure were left to the Parties Group.

The Outcome of the India Balance-of-Payments Case

The panel did not resolve whether it was required to consult the Fund but noted that it had authority under the Dispute Settlement Understanding (Art. 13) to “seek information and technical advice from any individual or body which it deems appropriate.”⁹⁶ The panel

⁹³ Organisation for Economic Co-operation and Development, Multilateral Agreement on Investment: Draft Consolidated Text, DAFFE/MAI (98)7/REV1, “Temporary Safeguard” (1998) [hereinafter MAI]. Drafts of the consolidated text of the MAI and commentary are available online at <<http://www.oecd.org/daf/mai>>. For a discussion of the considerations leading to inclusion of such a safeguard in international investment agreements (especially as they relate to Fund jurisdiction), see UNCTAD, TRANSFER OF FUNDS, UN Doc. UNCTAD/ITE/IIT/23, UN Sales No. E.00.II.D.38 (2000) (written by IMF Assistant General Counsel Sean Hagan).

⁹⁴ For measures that were within the Fund’s jurisdiction, the measure was considered to have met the terms of the temporary safeguard if it had been approved by the Fund under the Articles of Agreement, thereby avoiding conflicting rights and obligations. MAI, *supra* note 93, Temporary Safeguard, para. 4. This result is analogous to the situation regarding GATT Article XV:9(a), discussed below.

⁹⁵ The negotiators were considering whether to go further than the GATT and either authorize or require the Parties Group to seek the Fund’s determination of the justification for the measure overall. *Id.*, para. 5(b). This aspect of the Fund’s role, however, was not agreed upon at the time the negotiations were terminated, and the text on this point remained in brackets.

⁹⁶ *India Balance of Payments*, *supra* note 4, Panel Report, paras. 5.12–5.13 (quoting DSU Art. 13.1). The

then chose to request a statement from the Fund on the balance-of-payments situation underlying the quantitative restrictions. The Fund provided a statement that, in accordance with the usual procedures, was prepared by its staff and approved by the Executive Board. This was a good result, but the reliance on discretionary authority under Article 13 of the Dispute Settlement Understanding to consult the Fund is troubling, as a future panel could choose not to consult the Fund or not fully to accept its findings in accordance with GATT Article XV:2.

panel's statements did not fully rule out Article XV:2 as a basis for it to consult with the Fund. For example: "Subsequently, having regard to Article XV:2 of GATT 1994 and Article 13 of the DSU, we have consulted the IMF on a number of issues related to India's balance-of-payments situation." *Id.*, para. 5.120. Nonetheless, this seems to relate only to the principle of consultation. The panel made no statement about a requirement to accept the Fund's determinations; also, it appeared to give equal weight to portions of the Fund's statement that were covered by Article XV:2 and those that were not.

Furthermore, while the panel ultimately accepted the Fund's statement on India's balance-of-payments situation, it did not conclusively explain the language in GATT Article XV:2 that the WTO "shall accept the determination" of the Fund on the specified matters. The case thus failed to clarify that the Fund's statement under Article XV:2 is not just another expert opinion. Objecting to the panel's acceptance of the Fund's statement, India argued on appeal that the panel had not fulfilled its obligation under Article 11 of the Dispute Settlement Understanding to make an objective assessment of the facts. The Appellate Body noted that, although the panel had given "considerable weight to the views expressed by the IMF," it concluded that a "careful reading . . . makes clear that the Panel did not simply accept the views of the IMF" but "critically assessed" the data and compared those data with data provided by other sources, such as the report of the Reserve Bank of India.⁹⁷ The panel and the Appellate Body thus appear to have taken the position that a panel could weigh the information from the Fund as it sees fit, as compared to other experts. A recent article suggested a related approach whereby panels would treat the Fund's determination as a "rebuttable presumption" so that litigants could introduce other factual evidence or call in other "experts" to convince panels of a different assessment of the member's balance-of-payments situation.⁹⁸

The panel apparently reached a compromise position on what was perceived to be a sensitive issue. Nonetheless, the text and its underlying rationale suggest a different analysis. The use of the term "shall accept" is better read to mean that these determinations are to be taken as dispositive, as was argued by the United States. This reading would seem to preclude allowing a variety of expert opinions on the member's balance-of-payments position; that is, the Fund's statement in this regard is not just another expert opinion to be considered or weighed against those of other experts. This interpretation not only reflects the plain meaning of the text, but also is supported by the drafting history of the GATT, which, as noted by the United States, records a considered decision of drafters to reject a proposal (by Australia) to change "shall accept the determination" to "shall give special weight to the opinions of" the Fund.

There are important institutional reasons for this explanation of the text of Article XV:2. The Fund's assessment is a service provided on the institutional level, which means that the statement comes from the Executive Board. As explained by the United States, the international architecture was designed for the GATT (and the ITO) to recognize the expertise of another organization. The Executive Board of the Fund does not operate as a paid expert but as the authority to which the international community has assigned the role of making these determinations. This authority has an appropriate "political" dimension in that the Executive Board is an organ where Fund members may express their views and advance their interests in a multilateral setting. In addition, the Fund could ultimately be asked to provide financing in support of a member facing balance-of-payments difficulties. The international treaties thus reflect the need for the Fund's assessment of the balance-of-payments problem to be used in determining whether the temporary restrictions are justified.

⁹⁷ *Id.*, AB Report, paras. 149 (quotations), 150.

⁹⁸ Ahn, *supra* note 10, at 25.

Commentators have noted the tension in this case between the instruction in Article XV:2 to accept the determination of the Fund as dispositive and the requirement in Article 11 of the Dispute Settlement Understanding that a panel make an objective analysis of the facts. Nonetheless, these provisions can be reconciled in view of the proper role of panels. Article 3.2 of the Dispute Settlement Understanding constrains the role of the dispute settlement process such that “[r]ecommendations and rulings of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the covered agreements.”⁹⁹ The GATT is one of the covered agreements and its Article XV:2 requires the WTO to consult the Fund and accept certain of its determinations. Excluding the panel from the consultation requirement would change the substantive effect of the instruction in the GATT precisely in the circumstances where these substantive rules are being applied to determine compliance with the agreements. Given the rule of Article 3.2 of the Dispute Settlement Understanding, therefore, the clause on objective analysis of these facts should yield to the special requirements on consultation with the Fund. In other words, the inclusion of the Dispute Settlement Understanding in the WTO Agreements should not be interpreted in a way that changes the relationship between the Fund and the WTO.

This interpretation need not be viewed as diminishing the value of the enhanced dispute settlement mechanism (sometimes called the “crown jewel” of the WTO Agreements). As the role of the panels is to resolve disputes between members, they must remain independent of litigants and the positions that they advocate. Being subject to the allocation of responsibilities among international organizations that was designed by the architects of the postwar economic order neither questions this independence nor detracts from any of the other enhancements of the new procedures, such as the deadlines for decision making and procedures for adopting panel reports.

That there are special rules on WTO/Fund consultation is apparent from a different case involving the discretion of panels to consult outsiders generally, which did not refer to the Fund. The so-called *Shrimp/Turtle* case involved the panel’s right to accept information under Article 13 of the Dispute Settlement Understanding.¹⁰⁰ The Appellate Body confirmed the panel’s right to accept unsolicited briefs from nonparties under its “right to seek information,” although it was not obliged to do so. This ruling indicates that a panel enjoys considerable discretion in how it treats information from nonparties. The panel report referred generally to international organizations but did not touch on the Fund’s special relationship with the WTO under Article XV:2. Correctly, the *India Balance-of-Payments* panel did not rely on this case in its reasoning. Thus, these cases are distinct and do not support the conclusion that consultation with the Fund is discretionary.¹⁰¹

Perhaps the prospect of panel consultation with the Fund in the *India Balance-of-Payments* case would have seemed less threatening if it were better understood that the scope of that consultation is limited to the factual criteria relating to the existence of the balance-of-payments problem, and that it could be consistent for a panel both to consult the Fund and to consider all the other criteria of the balance-of-payments exception, as well as India’s development concerns under Article XVIII of the GATT.¹⁰² Panels could still

⁹⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Charter, Annex 2, THE LEGAL TEXTS, *supra* note 2, at 354, 33 ILM at 1226 [hereinafter DSU].

¹⁰⁰ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, AB-1998-4 (Oct. 12, 1998) (adopted Nov. 6, 1998).

¹⁰¹ This author does not agree with the statement to this effect in Terence P. Stewart & Amy Anne Karpel, *Review of the Dispute Settlement Understanding*, 31 L. & POL’Y INT’L BUS. 593, 636 (2000).

¹⁰² In contrast to a perception of Fund “interference” in the GATT balance-of-payments exception, Roessler wrote in the 1970s:

As to exchange restrictions imposed for other reasons, the IMF’s Executive Directors decided “that the use of exchange systems for non-balance of payments reasons should be avoided to the greatest possible

exercise their discretion both in requesting information beyond that mentioned in Article XV:2 and in giving weight to that information. Still, the rule on accepting the Fund's determination as dispositive of the balance-of-payments problem might be of concern to those uncomfortable with Fund input as, admittedly, these criteria are essential to the case. Nevertheless, it should be remembered that the Fund's statement is considered and approved by the Executive Board, and all members have an opportunity to debate the factual description and evaluation of the balance-of-payments problem in the country in question. Better coordination between ministries at the national level could also improve the trade constituency's ability to contribute to the discussion of the balance-of-payments situation when it is considered by the Fund's Executive Board, which would promote confidence that all views are represented within the intended institutional framework.

extent". This implies that Fund members wishing to restrict imports for commercial reasons should, as far as possible, use trade rather than exchange measures. The suppression of commercially-motivated exchange restrictions in favour of trade measures forces countries to submit actions taken for trade purposes to the rules of the organization that was meant to deal with trade matters, namely GATT.

Roessler, *supra* note 36, at 636.

In sum, the view that the consultation requirement does not extend to panels effectively means that the creation of the enhanced dispute settlement process changed the institutional relationship between the Fund and the WTO. It seems inadvisable for such a decision to be made by the interpretation of a panel. Any such discussion would be better held in a multilateral forum, where the particular interests of the litigants do not aggravate the already complex issues. In this case, the litigious context precluded a considered analysis of the broader interorganizational matters. In addition to clarifying the role of the Fund under the existing provisions, new issues could usefully be broached in any such discussions. For example, the criteria justifying the use of the balance-of-payments safeguard are not linked in any way to an adjustment program supported by Fund financing; this omission is not surprising, as the practice for such programs evolved well after the GATT was drafted. The relationship of a balance-of-payments-based exception to trade treaties and the need for a broader adjustment program could form part of future discussions on the Fund/WTO relationship. The more recent North American Free Trade Agreement requires that a party invoking its balance-of-payments exception “enter into good faith consultations with the IMF on economic adjustment measures to address the fundamental underlying economic problems causing the difficulties.”¹⁰³

V. THIRD CATEGORY OF INTERACTION: AVOIDING INCONSISTENT RIGHTS AND OBLIGATIONS

This third category of interaction concerns the relationship of obligations under the WTO Agreements on trade matters and those under the Fund’s Articles on exchange matters. To discuss the “jurisdictional” relationship, the important issue is not delineating lines of jurisdiction, as competences necessarily overlap, especially in light of the expanded scope of the WTO Agreements. Indeed, it would be shortsighted to view the issue as a mere “turf battle” between the institutions, which would neither serve the interests of the common members nor take into account the special role of each institution, such as the Fund’s financing function. Rather, analysis of the treaties reveals an interest in avoiding conflicting rights and obligations of members common to both organizations. Given that the WTO Agreements and the Fund’s Articles establish international organizations that are expected to comprise virtually universal membership, the task is ensuring the maintenance of a coherent international architecture.

¹⁰³ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., Art. 2104:2(b), 107 Stat. 2066, 32 ILM 289 & 605 (1993). The GATT contains only an outdated and little-used provision: Article XIV, which links the application of the safeguard to exchange restrictions that may be imposed pursuant to the Fund’s Articles—it allows a member applying measures under the balance-of-payments safeguard to do so inconsistently with the rules against nondiscrimination in a way “having equivalent effect” to any restrictions that may be imposed under Articles VIII or XIV of the Fund’s Articles. This provision has limited utility, as under Fund policy restrictions would generally not be approved under Article VIII if they were discriminatory, and members that continue to impose restrictions under the transitional provisions of Article XIV are not necessarily those that have had a Fund-supported program.

The GATT/WTO provisions on the jurisdictional aspects of the Fund/WTO relationship have not been subject to panel rulings. While the GATT specifically addresses the issue, the matter is less obvious under the WTO Agreements as a whole. Not all the agreements include provisions that govern the Fund/WTO relationship and the relationship of the various agreements to each other is not entirely clear. Nonetheless, the GATT and its Article XV are included among the Agreements on Trade in Goods and the GATS contains an analogous provision concerning the Fund/WTO relationship.¹⁰⁴ These provisions ensure that common members are subject to consistent rulings in both organizations. The discussion below is grounded in the view that governments did not decide to change this aspect of the international architecture when approving the WTO Agreements in Marrakesh.

The approach of these provisions to avoiding conflicting rights and obligations among common members is to take into account measures that are applied in accordance with the Fund's Articles. Stating this proposition in black and white may be somewhat heretical in the trade community, especially given the interest in maximizing the scope of topics subject to adjudication in the WTO. Subjecting exchange matters to the dispute settlement mechanism would include the threat of retaliation, which some have thought to be more effective than Fund jurisdiction at removing objectionable measures, as noted in part I. Furthermore, in one sense the scope of measures accommodated is broad because the provisions extend beyond exchange restrictions to nonrestrictive exchange controls. In another sense, however, the Fund's approach in defining its jurisdiction on the basis of a technical criterion makes its scope more limited than it would be if the Fund considered the effect of the measure in defining its jurisdiction (as is done in interpreting many aspects of the trade agreements). Additionally, the discussion shows that the accommodation of Fund jurisdiction on exchange matters consistent with the Fund's Articles does not take the matter outside the scope of the WTO.

Overview of Measures Consistent with the Fund's Articles and Related Provisions of the WTO Agreements

The approach that the WTO Agreements employ to promoting consistent rights and obligations among members of both organizations is to take account of exchange measures that are consistent with the Fund's Articles. This approach is found specifically in Article XV of the GATT 1994, which permits WTO members to use exchange controls and exchange restrictions in accordance with the Fund's Articles,¹⁰⁵ and Article XI of the GATS, which safeguards the rights and obligations of Fund members, including their right to use exchange actions in conformity with the Fund's Articles.¹⁰⁶ In light of the reference to "exchange controls and exchange restrictions" in the GATT and "exchange actions" in the GATS, the following section provides an overview of those measures that are consistent with the Fund's Articles for the purpose of these agreements. This summary is not a substitute for a ruling by the Fund on any particular measure, which would supersede any conclusions expressed herein. For purposes of this discussion, the relevant measures are

¹⁰⁴ Even though the WTO Agreements came into effect after the Fund's Articles, the explicit accommodation of Fund jurisdiction obviates the *lex posterior* interpretive rule, such as Article 30(3) of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331 [hereinafter Vienna Convention], which provides that the "later in time treaty" would take precedence.

¹⁰⁵ See text following note 47 *supra*. Additionally, under Article XV, paragraph 9(b), WTO members are not precluded from using restrictions or controls on imports or exports "to make effective such exchange controls or exchange restrictions." This provision is not discussed herein.

¹⁰⁶ See text at note 49 *supra*. The reference in the GATS to "exchange actions" follows the language in Article XV:2 of the GATT, which requires consultation with the Fund on "action . . . in exchange matters."

referred to in this article as “exchange measures.” In general, exchange measures that are either authorized by the Fund’s Articles or, when approval is required, approved by the Fund are by definition consistent with the Articles.¹⁰⁷

¹⁰⁷ See 3 JOSEPH GOLD, *THE FUND AGREEMENT IN THE COURTS* 769 (1986), in the context of discussing Article VIII, section 2(b) of the Fund’s Articles. A member that imposed a restriction that is not consistent with the Fund’s Articles could not, with respect to such restriction, claim the benefit of Article VIII, section 2(b). Under that provision, which must become part of the domestic law of each Fund member, judicial or administrative authorities must not require performance or award damages for nonperformance of exchange contracts that involve the currency of any member of the Fund and are contrary to the member’s exchange control regulations if they are maintained or imposed consistently with the Fund’s Articles. Aspects of this provision have been subject to varying interpretations. See, e.g., François Gianviti, *Réflexions sur l’article VIII, section 2(b) des Statuts du Fonds Monétaire International*, 62 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* [RCDIP] 471–87, 629–61 (1973).

Exchange restrictions. Under Article VIII, section 2(a), a member is prohibited from imposing restrictions on “*the making of payments and transfers for current international transactions*” without the approval of the Fund.¹⁰⁸ This requirement falls within the concept of “obligations” under the Fund’s Articles.¹⁰⁹ Unless an exchange restriction is approved by the Fund under Article VIII or maintained under the transitional provisions of Article XIV (described below), it constitutes a breach of obligation under the Fund’s Articles. Each aspect of this phrase has significance.

- The “making” of payments and transfers refers to *outflows*, such as payments for imports of goods or services. Article VIII, section 2(a) does not apply to receipts from exports (although these are also current international transactions). For example, it does not require a member to seek approval for a rule mandating that *receipts* of foreign exchange must be repatriated and sold in the banking system for local currency within a specified time period. In the Fund this kind of requirement is called a “surrender requirement” but may also be framed as a “currency retention” scheme.
- “Payments and transfers” covers a current *payment* from a resident to a nonresident, as well as the ability of the nonresident to *transfer* the proceeds of this transaction out of the territory. Article VIII, section 2(a) would not prevent a member from requiring that payments within its jurisdiction be made in local currency, say, to prevent dollarization of the economy, even for a payment from a resident to a nonresident located within the country (e.g., for provision of insurance services locally). Nonetheless, the nonresident must be able to convert the proceeds of the transaction for transfer abroad.
- Payments arising from “current” transactions are defined under the Fund’s Articles to include payments relating to trade and services, in addition to various transactions that may be classified as capital for certain other purposes. For example, transactions defined under Article XXX as current transactions cover moderate amounts for amortization of the principal of loans (or other debt instruments) or for the depreciation of direct investments.
- The definition of “international transactions” is that used for balance-of-payments calculations and thus applies to transactions between residents and nonresidents.

¹⁰⁸ A description of Fund jurisdiction as it relates to investment agreements was recently published in UNCTAD, *supra* note 93, at 11–17.

¹⁰⁹ Fund members also undertake obligations with regard to exchange rate management under Article IV of the Fund’s Articles. The scope of this provision and its relationship to the WTO Agreements are beyond the scope of this article.

The Fund's definition of exchange restrictions for the purposes of the Articles reveals how the Fund distinguishes exchange measures from the underlying trade transaction. As mentioned in part I, the Fund defines exchange restrictions for purposes of its jurisdiction on the basis of a technical criterion, regardless of the economic effect of the measure or its underlying purpose. In 1960 the Executive Board evaluated different possibilities for defining exchange restrictions and, as seen above, adopted a test based on "whether it involves a direct governmental limitation on the availability or use of exchange as such."¹¹⁰ As opposed to a test that takes into account the effect of the measure, the Executive Board noted, this definition would serve to distinguish the jurisdiction of the Fund from the scope of the GATT.¹¹¹ The Executive Board acknowledged that preparations for the International Trade Organization were under way around the same time that the Fund was created. The Executive Board also recalled that the GATT was to take on the ITO's intended jurisdiction over trade restrictions, which led it to believe that the drafters had intended to eliminate substantial overlapping jurisdiction between the two entities. For purposes of identifying a member's legal obligation to avoid exchange restrictions, therefore, the underlying current transaction is treated as a trade measure and not considered as within the Fund's jurisdiction for purposes of evaluating exchange restrictions.¹¹²

The Fund's approach to determining if an exchange measure is restrictive—and therefore potentially in violation of the Articles—differs from the rules in most trade agreements. The latter are directed at avoiding discrimination either between residents and nonresidents (i.e., national treatment) or among members (i.e., most favored nation); this "relative" standard looks at how one category of actors is treated as compared to another. Under the Fund's Articles, an exchange restriction would result from any governmental action that hampers the making of payments and transfers for current international transactions, including the acquisition of foreign exchange for such payments and transfers, regardless of the internal rules for payments among residents.¹¹³ The concept of

¹¹⁰ Decision No. 1034-(60/27), *supra* note 22, para. 1, at 428. Note, for example, the premise of the Fund's decision establishing special procedures for approval of exchange restrictions applied for national security reasons: "Article VIII, Section 2(a), in conformity with its language, applies to all restrictions on current payments and transfers, irrespective of their motivation and the circumstances in which they are imposed." Decision No. 144-(52/51) (Aug. 14, 1952), SELECTED DECISIONS, *supra* note 22, at 422.

¹¹¹ Roessler, *supra* note 36, at 640–43, summarizes the Executive Board's considerations before establishing this rule. He laments that the technical approach could lead to "forum shopping" between the two organizations:

A country that regulates its foreign trade through the banking system and therefore tends to take currency measures, and a country that uses its customs administration to control foreign trade and therefore tends to take trade measures, should be subject to the same obligations. It seems unjustified that the internal administrative organization of foreign trade should determine whether a country is subject to the Fund's or the GATT's jurisdiction. In the case of countries that are administratively equipped to control their foreign trade both through their banking system and their customs authorities there is the danger that the techniques of trade control are manipulated to make applicable the rules of the organization providing for the more favourable treatment.

Id. at 642. However, the fact that the Fund's approval of exchange restrictions is only temporary partially cures this problem on the Fund side.

¹¹² Gianviti, *supra* note 107, at 638. In contrast, in 1981 the GATT Secretariat described the GATT/WTO approach as having "been to examine particular restrictive measures affecting trade independent of the form that these measures took." GATT ANALYTICAL INDEX, *supra* note 86, at 402 (discussing an Italian deposit requirement for purchases of foreign currency). This position seems to reflect evolution from an earlier approach expressed in the 1954–1955 review of the GATT in a report by a working group on the relations between the Fund and GATT in the field of quantitative restrictions for balance-of-payments reasons. After observing that there is generally "a fairly clear division of work" between the Fund and the GATT Contracting Parties, the report stated:

The division, . . . being based on the technical nature of government measures rather than on the effect of these measures on international trade and finance, is inevitably somewhat arbitrary in some respects. In many instances it is difficult or impossible to define clearly whether a government measure is financial or trade in character and frequently it is both. It follows that certain measures come under the jurisdiction of both the IMF and the CONTRACTING PARTIES and that decisions in relation to such measures have to be taken against a background of the objectives and rules both of the Fund and the General Agreement.

Reports Relating to the Review of the Agreement, GATT B.I.S.D. (3d Supp.) at 170, 196 (1955) (emphasis added).

¹¹³ The type of foreign exchange that must be made available has generally been understood as either the cur-

restriction thus may be considered an “absolute” standard. However, similarly to some trade rules, a determination of restrictiveness does not depend on the intent or purpose of the measure and need not derive from a total prohibition. For example, a measure would be restrictive if it increased the cost of transactions or introduced an unreasonable burden or undue delay.¹¹⁴

rency of the nonresident or a currency that the nonresident can readily convert into his or her own currency. UNCTAD, *supra* note 93, at 14.

¹¹⁴ Decision No. 3153-(70/95) (Oct. 26, 1970), SELECTED DECISIONS, *supra* note 22, at 430. Whether any delay is “undue” is assessed by the Fund on a case-by-case basis, taking into account the administrative capacity of the member.

Multiple currency practices. The terms “exchange controls or exchange restrictions” in the GATT and the term “exchange action” in the GATS extend to what the Fund calls “multiple currency practices,” particularly as they create subsidies disciplined by these Agreements. For example, an interpretative note to GATT Article VIII, while condemning the use of exchange taxes or fees as a device for implementing multiple currency practices, states that “. . . a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9(a) of Article XV fully safeguard its position.”¹¹⁵ Also, similar protection to that under GATT Article XV:9(a) is extended in the case of the prohibition in Article VIII of certain fees and formalities associated with customs administration, as applied in particular to “exchange control.”¹¹⁶

Under Article VIII, section 3 of the Fund’s Articles, a multiple currency practice arises if, as a result of governmental action, the market rate for spot exchange transactions deviates by more than 2 percent from any other market rate for other spot exchange transactions prevailing in the country.¹¹⁷ For example, a regulation that segments the market by allocating spot exchange transactions for some current international transactions to one exchange market (e.g., the banks) and others to another exchange market (e.g., licensed money changers) would constitute government action for this purpose. As an economic matter, a resulting differential in exchange rates for different current international transactions bestows a subsidy or penalty on certain transactions or actors. This provision applies to both outflows (such as payments for imports or transfers of dividends) and inflows (such as receipt of export proceeds or a surrender requirement), since section 3 is not limited to the “making” of payments and transfers (as is section 2(a)).¹¹⁸

A measure imposed by Argentina in mid-2001 in the context of its economic crisis demonstrates one aspect of the Fund’s analysis of a multiple currency practice. The Argentine measure entailed surcharges on imports and subsidies for exports equivalent to the exchange differential between the U.S. dollar and the euro. The Fund determined that the measure did not give rise to a multiple currency practice because neither the surcharge nor the subsidy was directly connected to exchange transactions. The payment of the

¹¹⁵ GATT Annex I, Ad Art. VIII(1). Similarly, the prohibition in the GATT of certain export subsidies (other than those on primary products) under Article XVI, section B effectively excludes subsidies that were to result from a multiple currency practice approved by the Fund, as explained in an interpretative note to Article XVI: “Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.” See also Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Art. 9, para. 1, GATT B.I.S.D. (26th Supp.) at 56 (1979).

¹¹⁶ GATT Annex 1, Ad Art. XVI, §B n.1. Nonetheless, as is the rule for all subsidies, these subsidies must be notified to the Contracting Parties. Review Pursuant to Article XVI:5, GATT B.I.S.D. (9th Supp.) at 188, 192, para. 13 (1961).

¹¹⁷ See UNCTAD, *supra* note 93, at 15.

¹¹⁸ Article VIII, section 3 is, however, limited to current transactions, as the Executive Board has not treated multiple currency practices on capital transactions as violations of Article VIII.

surcharge or the subsidy was not linked to the payment for the imports or the receipt of payment for the exports but, rather, to the submission of customs or export documentation irrespective of payment made or received. Connection to an exchange transaction is essential to a ruling on a multiple currency practice, even if the measure is the functional equivalent of multiple exchange rates in economic terms. Consequently, the measure was not subject to Fund approval under the Articles.¹¹⁹

¹¹⁹ This conclusion was conveyed at a press conference on June 22, 2001. Thomas Dawson, director, External Relations Department, International Monetary Fund, Press Briefing (June 22, 2001), *available at* <<http://www.imf.org/external/np/tr/2001/tr010622.htm>>.

Exchange restrictions applied consistently with the Fund's Articles. An exchange measure that the Fund has identified as restrictive may nonetheless be applied consistently with the Articles if it is approved by the Executive Board or "grandfathered" under Article XIV. The maintenance of these restrictions is among the "rights" of Fund members. The Executive Board has developed policies for approving exchange restrictions under Article VIII, as the Fund's Articles do not determine the conditions for approval. The restriction may be approved if the Executive Board determines that it is imposed for balance-of-payments reasons, the member has proposed a definite timetable for its removal, and it is nondiscriminatory vis-à-vis Fund members.¹²⁰ The rationale for only temporary approvals is to prevent members from depending on the use of exchange restrictions to address balance-of-payments difficulties, which otherwise require the introduction of necessary exchange rate or macroeconomic adjustment policies. Approvals are normally, but not exclusively, for one year and may be extended. While a measure may be restrictive even if it is not discriminatory, it cannot be approved unless it is nondiscriminatory with regard to Fund members; this element of the approval policy is thus a "relative" standard, analogous to the most-favored-nation standard in WTO terminology.

Article XIV provides a limited exception to the prohibition on unapproved exchange restrictions, allowing a member to choose to maintain and adopt only those restrictions that were in place at the time it joined the Fund. Upon joining the Fund, the member must indicate if it intends to avail itself of Article XIV ("an Article XIV member"). While this provision has been interpreted in the Fund to permit a member to relax, intensify, or vary a restriction that it applies to a particular current international transaction, there is a prevailing misperception that an Article XIV member may introduce *any new* exchange restriction. This misunderstanding has perhaps contributed to some dissatisfaction with the Fund's results in getting countries to eliminate exchange restrictions. The unfortunate statement in Article XIV that a member must notify the Fund whether "it is prepared to accept the obligations of Article VIII, Sections 2, 3, and 4" may have contributed to this confusion. Rather, Article VIII applies to all members upon joining the Fund, as it prohibits the imposition of any new restrictions (including the reimposition of Article XIV restrictions that had been eliminated) without the Fund's prior approval, regardless of whether the member is availing itself of Article XIV. It is the member's right to decide when to cease availing itself of the right to retain restrictions under Article XIV,¹²¹ but in recent years the Fund has become more active in encouraging members to remove existing restrictions and move to "Article VIII" status.

Other exchange controls maintained consistently with the Fund's Articles. Besides exchange restrictions that are approved under Article VIII or maintained under Article XIV, a broader group of exchange measures are consistent with the Fund's Articles, as relevant to the WTO Agreements. Note that the GATT refers to "exchange controls," and the GATS to "exchange actions" that are consistent with the Articles; these terms are not limited to

¹²⁰ Decision No. 1034-(60/27), *supra* note 22, at 428. A different approval policy applies to exchange restrictions imposed for national and international security reasons. The member is required to notify the Fund promptly of these restrictions (in any event no later than thirty days after they are imposed) and, unless the Fund informs the member within thirty days after receiving such notice that it is not satisfied that the restrictions were proposed for national security reasons, the restrictions are treated as approved. Decision No. 144-(52/51) (Aug. 14, 1952), SELECTED DECISIONS, *supra* note 22, at 422. Also, in certain limited circumstances a multiple currency practice may be approved even if it is not based on balance-of-payments reasons.

¹²¹ Article XIV, section 2 contains the hortatory statement that the members shall withdraw Article XIV restrictions "as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the general resources of the Fund." Under section 3 of that article, the Fund may only, in exceptional circumstances, make "representations" to any member that "conditions are favorable" for the partial or complete withdrawal of such restrictions. If, after a suitable time for reply, the Fund finds that the restrictions are continuing to be maintained inconsistently with its purposes, the Fund may declare the member ineligible to use Fund resources. This section has never been invoked.

exchange restrictions. This group of measures also forms a part of the concept of “rights” under the Fund’s Articles. The scope of such measures may be understood by reference to the purposes of the Fund and various other provisions in the Fund’s Articles. For example, since Article VIII, section 2(a) requires the Fund’s approval for a member to impose restrictions on the making of payments and transfers for current international transactions, the Articles also implicitly recognize a member’s right to introduce exchange control regulations that do not fall within that prohibition.¹²² Indeed, Article VIII, section 5(a)(xi) requires members to report on these exchange controls to the Fund. Also, there appears to be broad agreement that the concept of exchange control regulation in Article VIII, section 2(b) is broader than the concept of exchange restriction and extends to other kinds of regulations on current transactions, as well as capital controls, as discussed below.¹²³

Exchange controls thus include control measures that are nonrestrictive, yet may play an important part in a member’s exchange management for statistical or other purposes. One example is a rule for the channeling of payments through the banking system, which has important implications for reporting on balance of payments and the stability of the financial sector. Another example—especially important for anti-money-laundering efforts—involves capital controls or document verification requirements to confirm the bona fide nature of the transaction. Such documentation requirements are not considered restrictive unless they cause undue delay in the payments process.

¹²² François Gianviti, *Le Contrôle des changes étranger devant le juge national*, 69 RCDIP 659, 665–66 (1980); see also, e.g., 2 GOLD, *supra* note 107, at 410 (1982); 3 *id.* at 791 (1986); Gianviti, *supra* note 107, at 475, 643–45.

¹²³ See Gianviti, *supra* note 122.

Another group of nonrestrictive exchange controls that are consistent with the Fund's Articles comprises those that do not affect the making of payments and transfers for current international transactions. For example, a surrender requirement is a nonrestrictive exchange control measure (provided that it does not give rise to a multiple currency practice) because it involves mandating the sale of foreign exchange received from an export (i.e., inflows) and thus does not constitute the *making* of a payment or transfer within the sense of Article VIII, section 2(a). This group includes controls on capital transfers (encompassing inflows and outflows). Capital controls (even restrictive measures) are authorized under Article VI, section 3 of the Fund's Articles.¹²⁴ Also, under Article VI, section 1, the Fund may "request" that a member receiving Fund financing impose capital controls to restrict a large or sustained outflow of capital, although this provision has never been invoked. While exchange controls on capital are consistent with the Fund's Articles, members agreed in the GATS to undertake obligations on liberalizing capital transfers related to the covered services, so that the GATS calls for only a limited accommodation of the Fund's jurisdiction on this point.¹²⁵

Fund Jurisdiction and the GATT

In GATT Article XV, paragraphs 2 and 9 work together to avoid conflicting rights and obligations in cases of overlapping jurisdiction. As noted above, Article XV:2 requires the WTO to accept the Fund's determination on the consistency of a measure with the Fund's Articles, and Article XV:9(a) states that the GATT does not preclude the use of exchange controls or exchange restrictions that are consistent with the Fund's Articles. What are the consequences under Article XV:9(a) when an exchange measure is consistent with the Fund's Articles? The terms of this provision are broad: "nothing in this agreement shall preclude the use of" such measures. The plain meaning of these words is that they create an exception to GATT obligations for a measure that the Fund determines is an exchange measure and is applied consistently with the Articles. Consequently, even if WTO members considered that the trade effects of a measure brought it within the scope of the GATT, the fact that it was an exchange measure that was applied consistently with the Fund's Articles would mean that it could not be found to violate the GATT. A common member would thus be subject to consistent rulings in both organizations in case of an overlap of jurisdiction.

¹²⁴ Article VI, section 3 of the Fund's Articles provides:

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

¹²⁵ See *infra* "Fund Jurisdiction and the GATS" at p. 596.

The exception to GATT obligations under Article XV:9(a) does not take the matter outside the scope of the GATT overall. First, the measure could still be actionable under the GATT. For example, if the Fund found the measure to be an exchange restriction and it was neither approved by the Fund's Executive Board under Article VIII nor maintained under Article XIV, it would not be applied consistently with the Fund's Articles. There would then be no bar to a challenge under the GATT, assuming the measure was within its scope. Again, a common member would be subject to consistent rulings. Another circumstance where a measure could be actionable under the GATT is if the Fund were to determine that it is not an exchange control measure for purposes of its jurisdiction.¹²⁶ As with the Fund's ruling that the 2001 Argentine import surcharge and export subsidy scheme did not give rise to a multiple currency practice (because the measure was not connected to an exchange transaction), Article XV:9(a) would not apply to any challenge under the GATT.

Second, even falling within the exception does not immunize the measure from scrutiny and discussion, which was the practice under the GATT and is the current practice in both organizations. As a working party on the relationship of GATT to the Fund stated:

[P]aragraph 9(a) was not to be interpreted so as to preclude the CONTRACTING PARTIES from discussing with a contracting party the effects on the trade of contracting parties of exchange controls or restrictions imposed or maintained by that contracting party, or from reporting on these matters to the IMF (as indeed was specifically envisaged in paragraph 5 of the Article [XV]).¹²⁷

The Executive Board echoed this emphasis on consultations and made clear the Fund's readiness to work together with the GATT so that Contracting Parties' GATT rights and obligations would not be unnecessarily diminished.

Thus, in areas of jurisdictional overlap, Article XV of the GATT avoids inconsistent rulings under the GATT and the Fund's Articles. Article XV:9(a) accommodates Fund jurisdiction for the focused group of measures that the Fund determines are consistent with its Articles. These provisions effectively defer to the Fund on this matter in that it is for the Fund to determine whether the measure fell within the scope of the Fund's Articles and whether it was applied consistently with the Articles. They also respect the Fund's financing role because it is for the Fund to decide through its approval policies whether the exchange restriction may be necessary as a temporary matter to alleviate a difficulty in the balance of payments, which might otherwise require Fund support.

One argument against this reading of paragraph 9(a) of GATT Article XV is that it is qualified by paragraph 4 of Article XV: "Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund." The scope of this provision has not been identified.¹²⁸ A GATT working party on the GATT/Fund relationship in 1955 declined to lay down general principles about the relationship of this

¹²⁶ For example, under Article XXX of its Articles, the Fund's jurisdiction applies to payments of interest or moderate amounts of amortization on permissible foreign loans, although a prohibition on the underlying transaction involving borrowing from abroad is outside the Fund's jurisdiction.

¹²⁷ Reports Relating to the Review of the Agreement, *supra* note 112, at 198. Indeed, in 1981 a working party decided to hold consultations in the Balance-of-Payments Committee on a deposit scheme introduced by Italy, notwithstanding the monetary character of the measure and its approval by the Fund. The committee did not discuss countermeasures but evaluated the measure in light of the Declaration on Trade Measures Taken for Balance of Payments Purposes, GATT Doc. BOP/R/119, C/M/152 (1981). The committee urged the Italian authorities to remove the measure as soon as possible and agreed to review the progressive elimination of the deposit requirement. GATT ANALYTICAL INDEX, *supra* note 86, at 402, 406.

¹²⁸ The GATT contains an "Ad Note" attempting to describe circumstances that would frustrate the provisions of the GATT, but it is not enlightening. This provision also requires a WTO member not to frustrate the Fund's Articles, but this issue has not been pursued in either organization.

provision to paragraph 9(a).¹²⁹ The view has been expressed informally that paragraph 4 is more precise and thus takes precedence over paragraph 9 under the rule that more specific provisions trump more general ones.¹³⁰ According to this view, a GATT violation could be found even if the measure were an exchange measure that is applied consistently with the Fund's Articles. Besides failing to avoid conflicting rights and obligations, this view seems improper for several reasons. First, paragraph 9(a) is arguably the more specific provision because it refers to exchange measures consistent with the Fund's Articles, whereas paragraph 4 refers to exchange action generally. Second, the argument that paragraph 4 overrides paragraph 9(a) is not supported by the negotiating history of the GATT, which indicates an affirmative intention that paragraph 9 of Article XV not be limited by paragraph 4.¹³¹

¹²⁹ Reports Relating to the Review of the Agreement, *supra* note 112, at 198.

¹³⁰ BLACK'S LAW DICTIONARY 684 (6th ed. 1990) ("Generalia specialibus non derogant").

¹³¹ In the original draft of the GATT, paragraph 9 of Article XV began with the qualifying words, "Subject to the provisions of paragraph 4 of this Article." The text was amended by the Contracting Parties at their first and second sessions in 1948 to take account of the most important changes in the Charter for the International Trade Organization made at the Havana Conference. These amendments included deletion of this qualifying clause to conform to a similar deletion in Article 24 of the ITO Charter that addressed the relationship of the ITO with the Fund. GATT ANALYTICAL INDEX, *supra* note 86, at 407-08.

No panel has made a definitive ruling on GATT Article XV:9(a). Nonetheless, the conclusion that the provision sets forth an exception to the obligations under the GATT is supported by a 1952 GATT case in which Greece had imposed a “contribution” requirement on the allocation of foreign exchange used for the purchase of imported goods. The measure was challenged as a violation of Articles II and III of the GATT.¹³² Addressing the national treatment issue under Article III, a dispute settlement panel stated that if “the Fund should find that the tax system was a multiple currency practice and in conformity with the Articles of Agreement of the International Monetary Fund, it would fall outside the scope of Article III.”¹³³ In discussing this case in his seminal book on the GATT, John Jackson noted that Greece had argued that the levy was a tax on foreign exchange allocated for the payment of imports, and stated: “If this were the case, then the question would be whether Article XV, paragraph 4, had been violated. *Even if it had*, however, paragraph 9 of that article *contains a general exception . . .*”¹³⁴ Former GATT Director of Legal Services Frieder Roessler also stated that Article XV:4 had to be read “in conjunction” with Article XV:9(a), noting that “Article XV therefore provides no protection against frustrating exchange action approved by the Fund or authorized under its Articles.”¹³⁵

The respective roles of paragraphs 4 and 9(a) of Article XV could become relevant should a question of sanctions arise under these provisions. The consequence of the exception to the GATT should be that Article XV:9(a) prevents all remedies under the WTO Agreements for such measures. For example, if a member restricts payments for certain imports and the Fund approves the measure under its approval criteria, Article XV:9(a) should prevent a panel from finding a violation of a provision and the member could therefore not be charged with removing the measures. The “alternative” remedies of suspension of trade concessions or provision of compensation may seem tempting in response to the view that an exchange measure is “frustrating” the application of the trade provisions, but the above discussion on paragraph 9(a) indicates that these sanctions are also precluded. Any one of these remedies would have the effect of pressuring the member to remove the measure, and thus would “preclude” the use of the measure in contradiction to the language of Article XV:9(a) and the interest in consistent rulings by the two organizations.¹³⁶

¹³² Greece described the contribution as a “tax on foreign exchange allocated for the payment of imports,” which would be covered by GATT Article XV:9(a) if the measure were applied in accordance with the Fund’s Articles. France and the United Kingdom considered the measure an “internal tax” in violation of the “national treatment” requirement of Article III of the GATT, since domestic goods were not similarly taxed. It was also argued that the contribution constituted a “charge” in violation of Article II, which prohibits such charges on products included in the Schedules of Tariff Concessions by Greece. Special Import Taxes Instituted by Greece, G/25 (report adopted Nov. 3, 1952), GATT B.I.S.D. (1st Supp.) at 48 (1953).

¹³³ *Id.* at 50. The panel stated that there was insufficient information on the nature of the measure to determine whether it was covered by Articles II or III and left open the issue of how Article XV:4 would be addressed. The panel suggested that the disputing parties collect further information and that the Contracting Parties consult with the Fund to determine whether the measure was a multiple currency practice, and whether it was in conformity with the Fund’s Articles. Greece eliminated the measure and the matter did not return to the panel.

¹³⁴ JACKSON, *supra* note 44, at 484 (emphasis added). Furthermore, Professor Jackson cited the portion of GATT Article XV:2 on accepting the Fund’s determination regarding consistency with its Articles and stated: “if the Greek argument prevailed, then a determination by the IMF would have been necessary to a finding that Greece had not violated GATT.” *Id.* at 485.

¹³⁵ Roessler, *supra* note 36, at 643.

¹³⁶ Another question—perhaps hypothetical, yet interesting—concerns the applicability of the WTO concept of “nonviolation nullification and impairment.” GATT Article XXIII:1(b) provides for redress in a case where, even though the agreement was not violated, a contracting party’s benefits were being nullified or impaired or the attainment of any objective of the GATT was impeded. Panel Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000) (adopted Apr. 5, 2001). This concept of nonviolation nullification and impairment is carried over into the WTO (DSU Art. 26). Even though the member would not be required to remove the measure, the member is expected to provide compensation or be subject to retaliatory action.

One view is that such remedies would be permissible even for a measure that is consistent with the Fund’s Articles. This view relies in part on the coexistence of this “nonviolation” provision with the “nonfrustration” provision in Article XV:4. The opposite view seems supported by the principle and text of the provisions avoiding conflicting rights and obligations. If such provisions protect measures consistent with the Fund’s Articles from sanctions

based on a finding of breach of obligation, they should a fortiori protect them in the absence of such a finding. The issue may also turn on the debate as to whether the remedies are coequal alternatives or involve a hierarchy with a preference for compliance. If the latter, then the other remedies could serve as a means to pressure the member to remove a measure that violates the WTO Agreements. If the measure is intended to be protected by the provisions governing the institutional relationship, then this pressure should not be applied through case-by-case litigation.

The topic of subsidies presents an interesting twist because of the difference between those that involve violations of the GATT and those that are subject to countervailing duties. In accordance with the above discussion, a subsidy arising from a multiple currency practice applied consistently with the Fund's Articles should not be found to violate the GATT.¹³⁷ Such a measure is apparently not immune from the imposition of countervailing duties permissible under the WTO regime, which are imposed on imports that are determined to have been subsidized. Countervailing duties are themselves an exception to the GATT as duties in excess of tariff bindings. An interpretative note to the GATT indicates that countervailing duties could be imposed even in response to a subsidy resulting from a multiple currency practice applied consistently with the Fund's Articles.¹³⁸ Perhaps the drafters viewed countervailing duties differently from other sanctions that are applied for violations of the GATT (e.g., suspension of concessions) because the former are imposed on the authority of national procedures rather than a report from a panel of a *supranational* entity. Under these circumstances, the issue of avoiding conflicting rights and obligations is less pronounced and Fund jurisdiction need not be accommodated. A contrasting approach could have viewed countervailing duties as putting pressure on the member to remove the measure in question and thus "preclude" its use inconsistent with GATT Article XV:9(a). In practice, the problem is not pronounced because the Fund encourages members to eliminate multiple exchange rates, which are viewed as distortive subsidies.

Fund Jurisdiction and Other WTO Agreements on Trade in Goods

The following discussion of the treatment of measures consistent with the Fund's Articles in the WTO Agreements on Trade in Goods continues the theme that GATT Article XV:9(a) contains an exception to GATT obligations and that governments did not decide to change this aspect of the international architecture when approving the WTO Agreements in Marrakesh. In this area consultation was less than optimal, and a common understanding cannot be discerned on either the scope of Fund jurisdiction or its treatment under the WTO Agreements.

¹³⁷ In another expression of the GATT's continued role concerning the subsidy despite this exception, a 1960 working party reiterated the obligation to notify any such subsidies, stating that interpretative note 1 to Article XVI, section B "was intended not to preclude the use by a country of multiple exchange rates which were approved by the [IMF], but that there was a clear obligation to notify to the CONTRACTING PARTIES multiple exchange rates which have the effect of a subsidy." Review Pursuant to Article XVI:5, *supra* note 116, at 192, para. 13.

¹³⁸ An interpretative note to GATT Article VI states:

Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

GATT Annex I, Ad Art. VI.

As part of the “single act” of the Marrakesh agreements, WTO membership entails adherence to all the agreements annexed to the WTO charter (except for the plurilateral agreements). Besides the GATT 1994, there are twelve Agreements on Trade in Goods included in Annex 1A to the WTO Agreement. Some of the agreements explicitly incorporate the exceptions of the GATT. As others do not, the relationships between agreements are not entirely clear and which ones would take precedence in the event of a conflict is uncertain.¹³⁹

Ministerial Declaration on Fund/WTO Relations. When the Uruguay Round negotiations were almost completed, the Legal Drafting Committee added a “General Interpretative Note” to Annex 1A, which was provided to the Fund with the near-final version of the WTO Agreements: “In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A . . . , the provision of the other agreement shall prevail to the extent of the conflict.”¹⁴⁰

While purporting to address the relationship of the GATT to the other Agreements on Trade in Goods generally, the note created ambiguity on the particular point about whether the exception under GATT Article XV and the goal of avoiding inconsistent rights and obligations would apply under the other Agreements on Trade in Goods. A specialized committee of the Fund’s Executive Board on Fund/WTO relations was convened to review the matter and decided that executive directors should recommend to capitals that the WTO Agreements contain a general statement confirming the Fund/WTO relationship as set out in the GATT. Executive directors recommended a general statement rather than addressing particular provisions, as not all areas of possible conflict could be anticipated. Following a meeting with the Fund’s general counsel, trade delegations agreed to propose to their ministers that the Marrakesh agreements include the “Declaration on the Relationship of the World Trade Organization with the International Monetary Fund.” The declaration noted the “close relationship” between the Contracting Parties to the GATT 1947 and the Fund, and the provisions of the GATT 1947 governing that relationship, especially its Article XV, and

*reaffirm[ed] that, unless otherwise provided for in the Final Act, the relationship of the World Trade Organization with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund.*¹⁴¹

The point of this ministerial declaration, therefore, was to confirm that the provisions governing the relationship established under Article XV of GATT 1947, particularly the provision relating to exchange measures that are consistent with the Fund’s Articles, extend to measures that fall within all the other Multilateral Agreements on Trade in Goods. Even if the other Multilateral Agreements on Trade in Goods were viewed as independent of the GATT 1994, the declaration establishes that the provisions in GATT 1994 that govern the relationship constitute general principles applicable to these agreements. Only if one of the other agreements contains an explicit exception indicating that provisions such as Article XV do *not* apply would an apparent conflict between the GATT and that other agreement

¹³⁹ See, e.g., Marco C. E. J. Bronckers, *More Power to the WTO?* 4 J. INT’L ECON. L. 41, 47 (2001) (stating that “the Marrakesh Agreement does not clearly establish the relationship between the different WTO Agreements” (footnote omitted)).

¹⁴⁰ WTO Charter, Annex 1A, THE LEGAL TEXTS, *supra* note 2, at 20, 33 ILM at 1154.

¹⁴¹ Final Act, Declaration on the Relationship of the World Trade Organization with the International Monetary Fund, Apr. 15, 1994, LEGAL TEXTS, *supra* note 2, at 447, 33 ILM at 1252. The ministerial declaration is an integral part of the legal documentation constituting the Final Act.

be resolved in favor of the latter. This is the point of the phrase “unless otherwise provided for in the Final Act.”¹⁴²

¹⁴² The phrase was also included so as not to preclude new aspects of cooperation that would result from the establishment of the WTO and its expanded activities (as compared to the GATT) and was thus intended to avoid a reading that the scope of the old relationship constrained the new one. It was based on the explanation of the director of the Legal Affairs Division of the GATT Secretariat that the existing relationship under GATT 1947, even if it were to continue on the basis of Article XV and other relevant provisions of GATT 1947, would have to be affected by the provisions of the Final Act that deal explicitly with the WTO's future cooperation with the Fund (e.g., Article III:5 of the WTO charter and the Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, WTO Charter, Annex 1A, LEGAL TEXTS, *supra* note 2, at 22, 33 ILM at 1158).

A broader view of the phrase “unless otherwise provided for in the Final Act” would lead to the result that GATT Article XV applies only when it is explicitly mentioned in other trade agreements and does not generally apply to the other agreements. Under this view, any provision in one of the other agreements that on its face creates an obligation that could cover exchange measures and is not explicitly protected by GATT Article XV:9(a) would override that exception. The flaw in this view is that it reverts to the very difficulty that the declaration was designed to avoid and thus is not supported by the context of the discussions. Because it would render the ministerial declaration meaningless, it ignores the tenet of interpretation holding that provisions should be interpreted in a way to give meaning to the agreement.¹⁴³ The unfortunate dynamic of the eleventh-hour discussions and resentment of what may have been perceived as undue intervention in “WTO affairs” could have contributed to this view, but it should be dismissed as unduly cynical about Fund/WTO relations.

Specific agreements. To illustrate the effect of Fund jurisdiction on WTO obligations, two agreements are discussed below. First, the relationship of the GATT to the Agreement on Trade-Related Investment Measures (TRIMs) is clear because it explicitly incorporates GATT exceptions. The second example involves the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement), in which GATT exceptions are not explicitly incorporated.

The TRIMs provides that “[w]ithout prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III [national treatment] or Article XI [general elimination of quantitative restrictions] of GATT 1994.”¹⁴⁴ Through an illustrative list identifying measures that would contravene these rules, the TRIMs prohibits the use of an exchange control measure known as a foreign exchange balancing requirement. It refers to measures

which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict: . . . the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise.¹⁴⁵

The TRIMs explicitly refers to the exceptions under the GATT by stating that “[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agree-

¹⁴³ The Vienna Convention, *supra* note 104, Article 31(1) provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” According to Sir Ian Sinclair, the International Law Commission apparently believed that these references to “good faith” and “the object and purpose of a treaty” expressed the principle of effectiveness: “When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.” IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 75 (1973) (quoting [1966] 2 Y.B. Int’l L. Comm’n 39, UN Doc. A/CN.4/SER.A/1966/Add.1 (Part 2)).

¹⁴⁴ Agreement on Trade-Related Investment Measures, Art. 2, WTO Charter, Annex 1A, LEGAL TEXTS, *supra* note 2, at 143 [hereinafter TRIMs].

¹⁴⁵ TRIMs, Annex, para. 2(b).

ment.”¹⁴⁶ Given this explicit reference to exceptions under the GATT (thereby including GATT Article XV:9(a)), exchange measures imposed consistently with the Fund’s Articles cannot be found to be violations of the TRIMs Agreement. Under Fund jurisdiction, a foreign exchange balancing requirement would be restrictive if it strictly limited an exporter to purchasing only the amount of foreign exchange that he earns through other transactions. In principle, therefore, such a rule would not be imposed consistently with the Fund’s Articles and GATT Article XV:9(a) would not excuse the TRIMs obligation.

Nonetheless, a foreign exchange balancing requirement could be maintained consistently with the Fund’s Articles in the following situations. First, the restrictive measure just described might be temporarily approved under Article VIII of the Articles or the member might maintain it under Article XIV. Second, the foreign exchange balancing requirement would be considered a nonrestrictive exchange control measure if it did not involve a strict limit but, rather, required the exporter first to use foreign exchange that it had acquired through inflows, as long as the exporter could purchase the remaining amount necessary for payments and transfers for current international transactions. Thus, a panel could not determine under the TRIMs that it was restrictive for a member to require use of an entity’s own foreign exchange in the first instance if the Fund had not found it restrictive.

¹⁴⁶ TRIMs Art. 3.

The Subsidies Agreement does not contain an explicit reference to exceptions under the GATT. One aspect of the Agreement relates to prohibited subsidies that are actionable under the dispute settlement procedures. An illustrative list of prohibited export subsidies includes “[c]urrency retention schemes or any similar practices which involve a bonus on exports.”¹⁴⁷ A currency retention scheme usually involves allowing certain exporters to retain a portion of their foreign exchange earnings notwithstanding a general rule for residents to surrender receipts of foreign exchange to local banks, or the central bank, in exchange for local currency. Under Fund jurisdiction, a surrender requirement is not itself an exchange restriction (because it involves receipts rather than outward payments and transfers). It could, however, give rise to a multiple currency practice if it involved a scheme requiring a rate for the sale of foreign exchange that is beneficial as compared to the market rate, and thus may possibly be viewed, in WTO terms, as a bonus on exports.

An interpretation of the Subsidies Agreement that respects the purpose of the ministerial declaration and preserves the principle of consistent rights and obligations among Fund and WTO members would follow the same analysis as the example under the TRIMs. If the measure gave rise to a multiple currency practice that was not approved by the Fund, the measure would not be consistent with the Fund’s Articles and would thus be subject to a finding that it violated the Subsidies Agreement because it provided a bonus on exports within the meaning of the WTO Agreements. The measure would be consistent with the Fund’s Articles, however, in three circumstances: if the Fund found that it did not give rise to a multiple currency practice (because it was not linked to an exchange transaction); if it were a multiple currency practice but was temporarily approved under Article VIII of the Fund’s Articles; or if it were maintained under Article XIV. In these cases, it would be problematic under GATT Article XV if a WTO panel ruled that the measure nonetheless was actionable as a “bonus on exports.”

Fund Jurisdiction and the GATS

The GATS necessarily contains a greater potential for overlap with Fund jurisdiction. It was designed to permit a gradual and conditioned approach to liberalization of trade in services. Given the nature of service transactions, it is not always easy to distinguish the underlying transaction from the related payments and transfers; indeed, the payments and transfers may be an inherent part of the service itself (e.g., financial services). Fund obligations must also be considered because the GATS itself explicitly prohibits restrictions on payments and transfers related to the covered services.

As a backdrop to the discussion of the overlap with Fund jurisdiction, the GATS structure can be summarized as follows: A first component consists of a framework agreement that contains rules regarding trade in services applicable to all WTO members and that includes various annexes, including one that deals with issues specific to financial services. A second component consists of “schedules” attached to the treaty that are negotiated individually by each WTO member and set forth the extent to which that member agrees to liberalize a particular service sector. All scheduled commitments under the GATS are made according to four “modes of delivery” of services (Art. I), including the possibility for foreign direct investment and related capital transfers. These modes are (1) cross-border supply, (2) consumption abroad, (3) commercial presence, and (4) presence of natural persons.

¹⁴⁷ Agreement on Subsidies and Countervailing Measures, Annex 1(b), WTO Charter, Annex 1A, LEGAL TEXTS, *supra* note 2, at 231.

The framework agreement, which applies to all members, contains the general principle prohibiting restrictions on payments and transfers. The framework agreement of general applicability is the proper instrument for the principle and for operational aspects of the rules on payments and transfers, even though the rules will apply only to the transactions that are identified in the schedules. This arrangement assures uniformity of approach across the membership notwithstanding the individual schedules, and a coherent approach to the Fund/WTO relationship.

Before examining the specific rules under the GATS on payments and transfers for current and capital international transactions, it is worth recalling that, in Article XI, paragraph 2, the GATS contains a general proviso to preserve the rights and obligations of common Fund/WTO members. It states that nothing in the GATS “shall affect the rights and obligations” of Fund members under the Fund’s Articles, including the use of exchange actions consistent with those Articles (subject to a partial exception discussed below).¹⁴⁸

As described above, the concept of “obligations” under the Fund’s Articles includes the requirement to refrain from imposing exchange restrictions on payments and transfers for current international transactions, multiple currency practices, and discriminatory currency arrangements unless approved by the Fund or maintained under Article XIV. The reference to “rights” of Fund members concerns the right to impose or maintain all exchange measures (relating to current or capital transactions) that are consistent with the Fund’s Articles. Such exchange measures may involve approved restrictions, those maintained under Article XIV, and nonrestrictive exchange control measures (which do not require approval), as well as restrictions on capital movements. In the GATS, however, members agreed to undertake obligations on capital liberalization and, as described below, the accommodation of Fund jurisdiction in the GATS is therefore more limited than under the GATT.

Current transactions. The first paragraph of Article XI explicitly covers international payments and transfers for current transactions: “Except under the circumstances envisaged in Article XII [restrictions to safeguard the balance of payments], a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.” Accordingly, for those services included in their schedules, members agree under the GATS to refrain from imposing restrictions on international payments and transfers (except for restrictions to safeguard the balance of payments).¹⁴⁹ This obligation is qualified, however, by the provision in Article XI, paragraph 2 cited above, which creates an exception to this obligation analogous to that in GATT Article XV:9 for

¹⁴⁸ GATS Art. XI:2, *quoted in text* at note 49 *supra*. These provisions will not win awards as a model of clarity. At the point when Fund staff were invited to participate in the drafting process, aspects of these provisions had already been agreed upon, and the issues of Fund/WTO jurisdiction were “grafted” onto them. This approach clearly does not produce the same clarity as might be expected in cooperative drafting from scratch. Separately, it may be noted that the GATS does not contain a provision similar to GATT Article XV:4, prohibiting “frustration” of the intent of the provisions of the GATS Agreement.

¹⁴⁹ Thus, any beneficial terms for international payment afforded to one member must be afforded to all members. Article II, paragraph 1 of the GATS requires each member to afford “most favored nation” treatment to other members (although at the time a member joins the Agreement, it is permitted to identify domestic discriminatory measures that may be “grandfathered”).

exchange measures that are maintained consistently with the Fund's Articles. Note that a WTO member that is a Fund member (as most are) remains subject to the broad-based prohibition under the Fund's Articles against unapproved exchange restrictions even if it does not undertake GATS commitments in a particular service sector and thus become subject to the GATS rule against restricting payments related to a scheduled service.

Capital transactions. Although it is not directed at capital liberalization per se, the GATS could significantly liberalize capital movements associated with the broad range of services covered, including foreign direct investment, depending on the level of commitments under this Agreement. Given countries' agreement to undertake these obligations in a multilateral context, negotiators balanced the need to accommodate the Fund's Articles, which includes the right to retain capital controls, with the importance of evolving an international framework that could regulate capital movements. The provisions relating to the Fund (prepared in consultation with Fund staff) recognize that the GATS should not affect rights and obligations under the Fund's Articles generally, but provide a partial exception to this principle for the capital transfers related to the service transactions covered by the GATS. As a result, the GATS regulates a member's right to restrict capital transfers, subject only to disciplines that any restrictions be imposed to safeguard the member's balance of payments or at the request of the Fund.

The rule on payments and transfers for international capital transactions is set forth in the second half of Article XI, paragraph 2, where it states that "a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund."

As in the case of current transactions, members first undertake not to impose restrictions on capital transactions related to services identified in their schedules. In addition, the GATS establishes minimum conditions on freedom of capital movement in two circumstances. First, if the scheduled commitment involves the supply of a service "from the territory of one Member into the territory of any other Member," and "the cross-border movement of capital is an essential part of the service itself," the member must allow the associated movement of capital.¹⁵⁰ Second, if a member commits itself to allow the supply of a service through a commercial presence in its territory, the GATS requires authorizing the "related transfers of capital into its territory."¹⁵¹

This obligation to permit capital transfers related to scheduled commitments is subject to an exception to accommodate Fund jurisdiction, but the exception is more limited than for current payments and transfers. Rather than excluding the member's broad right to impose capital restrictions under the Fund's Articles (Art. VI, sec. 3), it is qualified only by the right to impose restrictions "at the request of the Fund." This clause was included to accom-

¹⁵⁰ GATS Art. XVI:1 n.8.

¹⁵¹ *Id.* The term "cross-border movement of capital" in the first category suggests that the requirement covers both inward and outward movements of capital, whereas the second category does not appear to govern repatriation of capital. The minimum requirements are not individually negotiated as part of the schedules; it would therefore appear that a member not prepared to commit to these minimum requirements on movement of capital in a given sector would effectively be restrained from offering market access in that sector through these types of service suppliers. It would also seem that if the service is provided through the other modes of delivery, the GATS would not prevent the member from drafting its schedule to restrict any associated capital movement (but this does not appear to have been done).

moderate a provision designed to prevent the use of the Fund's general resources for capital transfers: Article VI, section 1 of the Fund's Articles provides that "the Fund may request a member to exercise controls to prevent such use of the general resources of the Fund," or be declared ineligible to receive Fund financing. While the Fund has never invoked this provision, it was important to retain the Fund's ability to safeguard its resources.

The GATS does not explicitly define "current" or "capital" transactions, whereas the Fund's Articles contain a list of payments for current transactions for purposes of Fund jurisdiction.¹⁵² In view of the proviso in GATS Article XI, paragraph 2, and the intention to avoid inconsistent rights and obligations, the Fund's use of these terms would seem to apply to the GATS. In any event, the characterization of an international payment as current or capital is unlikely to become an issue because the GATS prohibitions of restrictions on either form of transfer are generally the same. Nonetheless, these definitions might be relevant under the GATS both to the reference to the capital controls "requested" by the Fund's Articles and to the minimum requirements on restricted capital transfers for the specified modes of scheduled services noted above.

The already complex topic of jurisdictional overlap between the Fund's Articles and the GATT is aggravated by the multifaceted nature of the WTO Agreements. Deferral to another organization's jurisdiction is understandably a sensitive subject and it is likely that not all the above conclusions are fully accepted in the trade community. Precisely for this reason the Fund and the WTO should consult in a neutral context and disseminate a common understanding of these texts. A better understanding of the jurisdictional overlap could also inform the drafting of accession documents, which are increasingly including provisions on a member's exchange system. The usefulness of informal contacts between individual delegations or the secretariat with Fund staff should not be discounted. Still, joint consideration of these issues under the aegis of formal consultation would serve as a forum with balanced representation from all the interests in both the trade and the finance communities.

VI. CONCLUSION

The institutional differences between the Fund and the WTO and the recent cases involving Argentina and India reveal a less than complete understanding of the legal aspects of the relationship between the Fund and the WTO. Open questions may also persist on the regime for avoiding conflicting rights and obligations between common members. To the extent that there are ambiguities or varying views on the meaning of the governing provisions, these issues should be resolved in consultations between the organs of the institutions that represent the trade and finance community of members of the two organizations rather than in the WTO dispute settlement process.

It may be tempting, as is sometimes done in treaty practice, to leave the resolution of ambiguities to dispute settlement cases. This approach may be appropriate for the reciprocal obligations between members. Although the panels have decided the cases before them, the fact that they have done so without clarifying important questions raised about the Fund/WTO relationship shows that issues of institutional architecture are not properly resolved in the context of the WTO's dispute settlement mechanism. This mechanism is not bilateral between the Fund and the WTO; indeed, the above cases indicate reluctance to consult the Fund by either the panel or the parties to the dispute, even on seemingly obvious matters. Furthermore, the litigious environment does not favor an objective discussion of the issues, as the self-interest of the parties colors the

¹⁵² Fund Articles of Agreement Art. XXX(d); see also text at notes 105–25 *supra*.

argumentation. Leaving issues of the Fund/WTO relationship to the WTO's dispute settlement panels effectively amounts to allocating the conduct of international relations to judges; experience shows that the judicial process alone cannot properly ensure coordination between international organizations.

As to the institutional relationship, common members would benefit from clarity in the legal relationship between the two organizations. Coordination and common understanding will also be essential to addressing the evolving areas of overlap; many of these areas are identifiable now. The trade and finance communities have an essential role in fostering further cooperation at the national as well as the international level, notwithstanding the constructive cooperation by the staffs of the two organizations. If issues of the Fund/WTO relationship are to be left to ad hoc resolution, given the difficulty of negotiating formal texts, a new mechanism is needed to resolve them bilaterally between the organizations, above the fray of advocacy by parties in a dispute. The High-Level Working Group on Coherence set the groundwork for discussing these issues, but this work needs to be continued and to involve the political organs of the institutions. Ideally, the Fund and the WTO should actively pursue mechanisms to clarify the issues officially before they find their way into a litigious situation that is not conducive to objective argumentation and consideration of broader international concerns.