

SM/94/303

December 20, 1994

**To: Members of the Executive Board**

**From: The Acting Secretary**

**Subject: The Relationship of the World Trade Organization  
with the Fund - Legal Aspects**

Attached for consideration by the Executive Directors is the paper on the legal aspects of the relationship of the World Trade Organization with the Fund. Conclusion and issues for discussion appear on pages 48-52. This subject, together with the paper on the institutional aspects of the World Trade Organization (SM/94/304, 12/20/94), is tentatively scheduled for discussion on Friday, January 6, 1995.

Mr. Gianviti (ext. 38329) or Ms. Siegel (ext. 37711) is available to answer technical or factual questions relating to this paper prior to the Board discussion.

Att: (1)

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INTERNATIONAL MONETARY FUND

The Relationship of the World Trade Organization  
with the Fund -- Legal Aspects

Prepared by the Legal Department

(In consultation with the Policy Development  
and Review Department and the Office in Geneva)

Approved by François Gianviti

December 19, 1994

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## Introduction

The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act) significantly expands the regulatory framework for international trade beyond that of the 1947 General Agreement on Tariffs and Trade, as amended before the Uruguay Round (GATT 1947). 1/ The Final Act includes agreements that provide for the establishment of the World Trade Organization (WTO) as a new international organization, amend the rules governing international trade in goods (including reduced tariffs on industrial and agricultural products), set new rules on international trade in services and on protection of intellectual property rights, and codify and refine rules on multilateral dispute resolution and trade surveillance. The Final Act also incorporates several Understandings, Ministerial Declarations, and Decisions. 2/

During the preparation of the Final Act, consideration was given to the future relationship of the WTO with the Fund. With respect to trade in goods, the existing provisions of the GATT 1947 concerning relations with the Fund have been incorporated into the Final Act. For instance, the provisions regarding the avoidance of jurisdictional conflicts between the CONTRACTING PARTIES 3/ and the Fund, as well as the provisions regarding consultations with the Fund on exchange measures and balance of payments justifications for import restrictions, will also govern the relationship of the WTO with the Fund. With respect to trade in services, analogous provisions (though with substantive differences) have been included in the General Agreement on Trade in Services (GATS). Finally, the WTO Agreement and a ministerial declaration contemplate enhanced cooperation of the WTO with the Fund and the World Bank with a view to achieving greater coherence in global economic policymaking.

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1/ The Final Act was signed in Marrakesh on April 15, 1994. See "Conclusion of the Uruguay Round--An Agreed Final Act," SM/94/56 (3/1/94) and "Comprehensive Trade Paper--Issues Paper", SM/94/192 (7/19/94) for reports to the Executive Board on the conclusion of the Final Act.

2/ See "The World Trade Organization--Institutional Aspects," SM/94/304 (12/20/94), issued as background to this paper (hereinafter referred to as World Trade Organization--Institutional Aspects). At the Implementation Conference held on December 8, 1994 pursuant to paragraph 3 of the Final Act, it was decided that the Agreement Establishing the World Trade Organization (hereinafter cited as the WTO Agreement), together with the Multilateral Trade Agreements annexed thereto, shall enter into force on January 1, 1995. Therefore, the WTO will come into existence on that date.

3/ The term "contracting parties" refers to the individual parties to the GATT; and the term "CONTRACTING PARTIES" refers to the contracting parties acting jointly.

The purpose of this paper is to describe the legal framework of the relationship of the WTO with the Fund and to identify certain legal issues that may arise, taking into account the issues that have arisen under the GATT 1947 and remain unresolved. The paper first reviews legal aspects of the existing GATT/Fund relationship, in terms of its recognition of the Fund's jurisdiction over exchange matters and the role of the Fund in consultations with respect to, inter alia, balance of payments determinations (Section I). The paper then discusses the legal aspects of the relationship of the WTO with the Fund under the Final Act, specifically with regard to trade in goods, trade in services, and enhanced WTO/Fund cooperation (Section II). The main issues for discussion are summarized in the conclusion of the paper.

### I. The GATT/Fund Relationship

The GATT negotiations were concluded in 1947 and the GATT has been "provisionally" applied by the contracting parties since January 1, 1948. 1/ This was nearly two years after the Fund was established. 2/ While the GATT contains numerous provisions relating to the Fund, 3/ the cornerstone of the GATT/Fund relationship is Article XV on exchange arrangements.

Paragraph 1 of Article XV provides:

"The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of

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1/ Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Oct. 30, 1947, 55 U.N.T.S. 308). See "The World Trade Organization - Institutional Aspects", op. cit., Section I. References in this Section to the GATT are to the original GATT, as subsequently amended, but not including the results of the Uruguay Round.

2/ The expansion and balanced growth of international trade is one of the purposes of the Fund, but the participants in the Bretton Woods Conference recognized that the purpose could not be achieved through the instrumentality of the Fund alone. The Conference recommended that the Participating Governments make separate arrangements to facilitate international trade (Recommendation on International Economic Patterns), Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, (Vol. I, 1948), p. 941.

3/ For example, GATT provisions on tariff concessions, customs valuations and exchange rates refer to the Fund. See, generally, Article II, paragraphs 3 and 6(a) and Article VII, paragraph 4(a).

quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES."

Paragraph 2 of Article XV provides that the CONTRACTING PARTIES shall "consult fully" with the Fund on problems concerning monetary reserves, balances of payments or foreign exchange arrangements. It also provides for acceptance of the Fund's findings and determinations in certain circumstances, including the Fund's determination "as to whether action by a contracting party in exchange matters is in accordance with" the Fund's Articles.

In these two paragraphs one can find the two main aspects of the relationship with the Fund: jurisdiction and cooperation.

Cooperation is mentioned in paragraph 1, but only as a means for the Fund and the CONTRACTING PARTIES to coordinate the exercise of their respective jurisdictions over exchange questions and trade measures. An underlying assumption of this paragraph appears to be that these areas of jurisdiction are separate. In contrast, by requiring deference to the Fund's determination that a particular exchange measure is consistent with its Articles, paragraph 2 does not reflect the concept of separate jurisdictions, but rather the intention that the exercise of jurisdiction under the GATT should avoid inconsistent legal results for the same exchange measure under the GATT and under the Fund's Articles. A similar approach can be found in Article XV, paragraph 9(a) of the GATT, under which only measures consistent with the Fund's Articles are explicitly protected from the provisions of the GATT.

A rather different aspect of the relationship with the Fund is reflected in the reference to consultations with the Fund on problems concerning monetary reserves or balance of payments. For instance, such consultations will take place when a contracting party invokes the provisions of Article XII which authorize the imposition of restrictions to safeguard the balance of payments. Here, it is not the Fund's jurisdiction but rather its expertise in monetary matters that explains the need for consultation. Therefore, the Fund's contribution will only be to assist the CONTRACTING PARTIES in the exercise of their own jurisdiction.

This section discusses these two aspects of the relationship of the GATT with the Fund. First, in order to avoid inconsistent rights and obligations for measures that may fall within the jurisdiction of the GATT and the Fund's Articles, the GATT recognizes Fund jurisdiction over exchange matters that are consistent with the Articles as controlling (A). Secondly, the primary procedural mechanism for addressing these areas of mutual interest consists of consultations, the scope and effect of which are specified in the GATT (B).

A. Recognition of Fund jurisdiction over exchange matters

The reference in Article XV, paragraph 1 of the GATT to the jurisdiction of the Fund over exchange questions and of the CONTRACTING PARTIES over trade measures would seem to imply the existence of separate jurisdictions. However, a precise delineation would require the application of a common criterion, without which the same measure could be regarded by both the Fund and the CONTRACTING PARTIES as falling within their own jurisdictions. In practice, it appears that, after an initial period when the same criterion was used for the definition of exchange measures, the CONTRACTING PARTIES have now taken a broader view of what constitutes a trade measure, so as to include what the Fund would regard as an exchange measure falling within its jurisdiction.

Although the initial paragraph of Article XV would seem to rely on the concept of separate jurisdictions, other provisions of Article XV envisage a different approach to the relationship between the Fund and the CONTRACTING PARTIES; namely, that, given areas of common interest, the CONTRACTING PARTIES should not interfere with measures that are consistent with the Fund's Articles. In that case, it is not the characterization of the measure as exchange rather than trade that will limit the jurisdiction of the CONTRACTING PARTIES, but only whether or not the exchange measure is consistent with the Fund's Articles. They will be bound, as stated in Article XV, paragraph 2, by the Fund's determination that the exchange measure is consistent with its Articles; the measure will then be protected by Article XV, Section 9(a).

The existence of these two different approaches (recognition of separate jurisdictions over exchange and trade measures and protection of exchange measures consistent with the Fund's Articles) reflects an inherent ambiguity in the provisions of the GATT concerning the relationship with the Fund. These two aspects will be examined in turn. A third issue, which will be examined separately, is the application of similar principles to nonmembers of the Fund.

1. Distinction between trade and exchange measures

A distinction between trade and exchange measures can only avoid the inconsistent legal results of overlapping jurisdictions between the Fund and the GATT if the same criterion is used to give effect to the distinction. In practice, the main question has been whether the distinction should be based on a technical criterion or on an economic assessment of the effects of the measure.

The Fund has taken the position that, under its Articles, the characterization of a measure as an exchange (rather than a trade) restriction should not be determined by its purposes or economic consequences, but rather by its specific relation to the country's exchange system:

"[T]he 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." 1/

This technical criterion has enabled the Fund to develop a very precise delineation between trade and exchange measures with a view to avoiding conflicts with the GATT's jurisdiction over trade measures.

The application under the GATT of the distinction between trade and exchange measures appears to be somewhat different, although initially the Fund's technical criterion was applied. In the 1954-55 review of the GATT, a Working Group on the relations between the Fund and GATT in the field of quantitative restrictions for balance of payments purposes stated:

"2. Generally there is a fairly clear division of work between the International Monetary Fund on the one hand and the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade on the other. The division, however, 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." 2/

It may be noted that the Working Party agreed that "the technical nature" of the measure rather than its economic effect would qualify it as a trade or exchange measure. It also expressed the view, however, that

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1/ Decision No. 1034-(60/27) 6/1/60, Selected Decisions (Nineteenth Edition), p. 332.

2/ Reports Relating to the Review of the Agreement, Basic Instruments and Selected Documents (hereinafter cited as BISD), 3S/170 (which refers in this case to the third supplement, p. 170), p. 196 (1955).

reliance on the technical nature was somewhat arbitrary <sup>1/</sup> and did not yield clear-cut distinctions between trade and exchange measures, and it concluded that the same measure could fall under the jurisdiction of both the Fund and the CONTRACTING PARTIES. In contrast, the Fund has found that its practice of relying on the technical nature of the measure in making the distinction between trade and exchange measures has led to very precise distinctions, provided that complete information on the administration of the measure was made available to the Fund. Furthermore, were the "technical" means of distinguishing trade and exchange measures not be to applied, the concept of separate jurisdictions for the GATT and the Fund would become meaningless since, in an economic sense, most exchange measures affecting current payments could be viewed as in some way affecting the trade system of the country as well.

Since 1955, however, the practice under the GATT has taken a different approach. For example, in the context of reviewing an Italian deposit requirement for purchases of foreign currency in 1981, a background paper of the GATT Secretariat stated:

"If the distinction between import and payments measures were made by taking into account the purpose or the effect of the action, the Italian scheme would probably be both a trade and an exchange measure: it is intended to improve Italy's payments position as well as to restrain imports, and it has had an impact both on payments for imports and the imports themselves. If however the distinction were made by looking at the restrictive technique used, the Italian deposit scheme would probably have to be regarded as an exchange measure since it is formulated and operated as a requirement to be fulfilled for the purchase of foreign exchange rather than for importation.

The Executive Directors of the International Monetary Fund have decided in 1960 that, for the purposes of Article VIII of the Fund agreement, the criterion for distinguishing between trade and exchange measures should normally be the technique used. 'The guiding principle,' they determined, 'in ascertaining whether a

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<sup>1/</sup> Another criticism of the technical criterion is as follows: "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. . . . 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." Roessler, "Selective Balance-of-Payments Adjustment Measures Affecting Trade: The roles of the GATT and the IMF," Journal of World Trade Law (Vol. 9, 1975), p. 622.

measure is a restriction on payments and transfers for current transactions under Article VIII Section 2, is whether it involved a direct governmental limitation on the availability or use of exchange as such' (Decision No. 1034 - (60/27) of June 1960). In conformity with this principle the Fund has regarded the Italian measures as constituting a restriction on current international transactions requiring Fund approval under Article VII Section 2, an approval which it has granted until 30 September 1981 (C/M/149), page 12). . . ."

"In summary it can be said that the CONTRACTING PARTIES - unlike the IMF - have never formally decided how to distinguish between trade and exchange controls. . . . Their approach has been to examine particular restrictive measures affecting trade independent of the form that these measures took." 1/

Several aspects of this statement are worth noting. First, it shows both an awareness of the criterion used by the Fund for the clarification of exchange restrictions and an unwillingness to apply this criterion for purposes of the GATT. Second, in contrast with the 1955 statement, it asserts both that "the CONTRACTING PARTIES. . . have never formally decided how to distinguish between trade and exchange controls," and that the practice under the GATT has been to examine the economic effect of the measures on trade. Third, it recognizes that the Fund's approach in the characterization of exchange restrictions would "probably" have resulted in the characterization of the Italian deposit scheme for the purchase of foreign exchange as a pure exchange measure, while relying on the purpose or effect of the measure leads to characterizing the same scheme as both a trade and exchange measure, thus resulting in overlapping jurisdictions between the Fund and the GATT.

## 2. Protection of measures consistent with the Fund's Articles

In Article XV of the GATT, paragraphs 2 and 9(a) deal specifically with measures consistent with the Fund's Articles.

Article XV, paragraph 2 requires the CONTRACTING PARTIES to "accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund." Obviously, this provision implies that consistency of an exchange measure with the Fund's Articles will have certain consequences under the GATT.

Article XV, paragraph 9(a) of the GATT Articles provides:

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1/ General Agreement on Tariffs and Trade, Analytical Index, Sixth Edition, (1993), p. 402 (hereinafter cited as GATT Analytical Index).

"Nothing in this Agreement shall preclude: . . . (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund. . . ." 1/

This provision, at least on its face, ensures full protection from the application of remedies under the GATT for exchange controls and restrictions that are consistent with the Fund's Articles.

For a Fund member to rely on this provision, the measure must be an exchange control measure or an exchange restriction, and that measure must be maintained "in accordance with the Articles of Agreement" of the Fund. Accordingly, different exchange measures are covered, including:

- Exchange restrictions approved under Article VIII, Section 2(a) or 3; 2/
- Exchange restrictions maintained under the transitional provision of Article XIV, Section 2; 3/
- Exchange restrictions that do not constitute restrictions on the making of payments and transfers for current international transactions, such as a surrender requirement or a restriction on capital inflow or outflow (which is permitted under Article VI, Section 3 of the Articles of Agreement); and
- Exchange control measures that are not restrictive, such as the channelling of payments through the banking system.

In Article XV, paragraph 9(a), the terms "exchange controls or exchange restrictions" may be understood to extend to multiple currency practices as a form of exchange restriction. This conclusion is also supported by the broader term "exchange matters" in Article XV, paragraph 2 and specific references to multiple currency practices in various interpretative notes to the GATT (discussed below).

Since Article XV, paragraph 9(a) applies only to measures that are consistent with the Fund's Articles, it may be understood to authorize the

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1/ Additionally, under Article XV, paragraph 9(b), contracting parties are not precluded from using restrictions or controls on imports or exports to make effective such exchange controls or restrictions.

2/ Such a measure is included regardless of whether the measure was approved before or after the party imposing the measure became a contracting party to the GATT.

3/ If a Fund member eliminated a restriction that was maintained under Article XIV of the Fund's Articles, any reintroduction of the measure is no longer in accordance with the Fund's Articles, unless it is approved under Article VIII.

application of remedies under the GATT to exchange measures that are not consistent with the Fund's Articles, presuming that such measures were also covered by the terms of the GATT, either as a violation or otherwise. 1/

The converse situation--an exchange measure that is consistent with the Fund's Articles--is within the scope of Article XV, paragraph 9(a). Even if this measure were to have adverse trade effects on other contracting parties, it would appear that it could not be found to be a violation of the GATT and, therefore, give rise to remedies under the GATT. However, a distinction between the finding of violation and the application of remedies has been suggested, on the ground that remedies can be applied under the GATT even in the absence of a violation of its provisions. Therefore, two questions must be envisaged. The first is whether an exchange measure that is consistent with the Fund's Articles could be found to violate the GATT, and thereby subject the Fund member imposing the measure to sanctions pursuant to GATT dispute settlement procedures if the measure is not removed or voluntary compensation is not provided (a). The second question is whether an exchange measure that is consistent with the Fund's Articles, even if it does not violate the GATT, could nevertheless subject the member imposing the measure to certain remedies under the GATT because of the trade effects of the measure (b). There has been no authoritative ruling by the CONTRACTING PARTIES on these questions because the few relevant cases that have arisen have been settled without resolving them. Nonetheless, from information about these cases, the text of the GATT itself, and commentaries on the GATT, the following points may be made.

a. Measures consistent with the Fund's Articles:  
GATT violation?

The first question is whether exchange measures could be found to violate the GATT even though they are consistent with the Fund's Articles.

Article XXIII, paragraph 1 of the GATT authorizes a contracting party to initiate consultations with another contracting party if it considers that any benefit accruing to it is being "nullified or impaired", or the attainment of any objective of the GATT is being impeded, as a result of (a) the failure of the other contracting party to carry out its obligations (alleged violations), or (b) the application by another contracting party of any measure to the detriment of another contracting party, whether or not it

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1/ Any case involving a violation of the GATT would be treated under the GATT dispute settlement procedures. These procedures, as amended by the dispute settlement rules of the WTO, are discussed in "The World Trade Organization--Institutional Aspects," op. cit., Section III. Dispute resolution could also be invoked in cases that do not involve a violation of GATT; see b. below.

conflicts with the GATT (nonviolation nullification or impairment). 1/ Paragraph 2 of Article XXIII provides that, in the absence of a satisfactory solution, the matter may be referred to the CONTRACTING PARTIES for settlement of the dispute.

As a procedural matter, after consultations, which may involve other international organizations, such a case would be adjudicated under the GATT dispute resolution rules that include consideration of the case by a GATT panel and, subsequently, adoption by the GATT Council of the panel report to give it legal effect. 2/ In the event of a finding of violation, the contracting party imposing the offending measure may be required to withdraw it, provide compensation, or be subject to the possibility of suspension of concessions or other obligations on a discriminatory basis. 3/

Article XXIII, paragraph 1(a), dealing with cases of alleged violations, does not explicitly address the case where the alleged violation arises out of exchange measures that are consistent with the Fund's Articles. Article XV, paragraph 9(a), quoted above, however, safeguards the use by a contracting party that is a Fund member of exchange controls or exchange restrictions that are in accordance with the Fund's Articles. The statement in that provision--nothing in the GATT shall preclude the use by a Fund member of an exchange measure that is consistent with the Fund's Articles--applies to remedies under Article XXIII and would not be respected if the Fund member imposing the measure could be required to remove it, provide compensation, or be subject to sanctions. Consequently, it is clear that, for a measure that is consistent with the Fund's Articles, a finding of a GATT violation would be contrary to Article XV, paragraph 9(a).

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1/ GATT, Article XXIII, paragraph 1. An additional ground for complaint--(c) the existence of any other situation--has not often been invoked, but was noted by the Working Party on Quantitative Restrictions during the Review Session of 1954-55 as a provision that could be invoked if, for example, "any contracting party considered that the pressure on its international reserves was resulting from the situation in some individual country. . . ." It was also noted in the February 1953 report on the accession of Japan that the provision might also be invoked in the case of "violent disruption of trading conditions. . . if remedial action consistent with the [GATT] would lead to a general raising of tariff levels and other barriers to world trade." GATT Analytical Index, op. cit., pp. 621-24.

2/ Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD, 26S/210, Annex, paragraph 4 (1979). See also, Ministerial Declaration: Dispute Settlement Procedures, BISD, 29S/9, paragraph (ix), (1982).

3/ In practice, because of constraints in the GATT dispute settlement procedures, countermeasures for GATT violations have rarely been authorized. See Bello and Homer, "Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits," The International Lawyer (Vol. 28, 1994), p. 1095.

This would be the outcome, for example, concerning the prohibition under the GATT of certain export subsidies (other than those on primary products) under Article XVI, Section B. 1/ If such subsidies were to result from a multiple currency practice approved by the Fund, they could not be considered a prohibited subsidy. In this regard, an interpretative note to Article XVI of the GATT confirms the application of Article XV, paragraph 9(a) to a multiple currency practice that functions as an export subsidy:

"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." 2/

Similar protection 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." 3/ An interpretative note to Article VIII, while "condemn[ing] the use of exchange taxes or fees as a device for implementing multiple currency practices," states that "if. . . 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." 4/

Article XV, paragraph 9(a) has also been regarded as an exception to other provisions of the GATT (even in the absence of a specific interpretative note on the point). This was illustrated by a 1952 case in which Greece had imposed a "contribution" requirement on the allocation of foreign exchange used for the purchase of imported goods. 5/ Greece described the contribution as a "tax on foreign exchange allocated for the payment of imports," which would be covered by GATT, Article XV, paragraph 9(a) if the measure were applied in accordance with the Fund's

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1/ See also Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (hereinafter cited as 1979 Subsidies Code), BISD, 26S/56, Article 9, paragraph 1 (1979).

2/ Annex 1, Ad Article XVI, Section B, Note 1. Nonetheless, as is the rule for all subsidies, these subsidies must be notified to the Contracting Parties. BISD, 9S/192, paragraph 13 (1961).

3/ GATT, Article VIII, paragraph 4.

4/ GATT, Annex 1, Ad Article VIII, Note 1. Similarly, Article XIV, paragraph 5(a) of the GATT provides that a contracting party shall not be precluded from "applying quantitative restrictions. . . (a) having equivalent effect to exchange restrictions authorized under Section 3(b) of Article VII [Replenishment and Scarce Currencies] of the Articles of Agreement of the International Monetary Fund. . . ."

5/ Special Import Taxes Instituted by Greece, BISD, 1S/48 (1952). The tax varied in level depending on the usefulness of the goods purchased, and was collected when a bank credit was opened for payment for the imports.

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. 1/ 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." 2/ 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. 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 before these questions were resolved.

Another issue concerning the application of Article XV, paragraph 9(a) is whether a contracting party could be asked to waive the application of this provision when acceding to the GATT. The answer should be in the negative. Otherwise, a Fund member would waive its right to apply exchange measures consistent with the Fund's Articles since these measures could constitute a violation of the GATT. 3/ In the Fund, it is recognized that a potential member may not be required to waive a right under the Fund's Articles as a condition of membership in the Fund. Similarly, under the GATT, the practice has been not to require an acceding Fund member to waive the application of Article XV of the GATT through a Protocol of Accession. 4/

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1/ Ibid., paragraph 1.

2/ Ibid., p. 50. Even if the contribution was not covered by Article III of the GATT, the report stated, "the further question might arise under Article XV:4 whether the action of the Greek Government constituted frustration by exchange action of the intent of [those other] provisions." BISD, 1S/50. The question of the applicability of Article XV, paragraph 4 is discussed in 2.b. below.

3/ Contracting parties that are not Fund members are required under Article XV, paragraph 7 to enter into a special exchange agreement relating to exchange matters, which "shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement of the International Monetary Fund on Members of the Fund" (paragraph 7(b)). It would be anomalous for a contracting party that is a Fund member to be required to adhere to rules more restrictive than the Fund's Articles when nonmembers of the Fund are not.

4/ In contrast, there have been circumstances where contracting parties have acceded to the GATT while reserving additional rights. See, for example, the protocol of accession of Switzerland (GATT Analytical Index, op. cit., p. 948).

b. Measures consistent with the Fund's Articles:  
remedies in the absence of GATT violation?

Under Article XXIII of the GATT, as noted above, a contracting party may seek redress for nullification or impairment of its benefits in response to a measure; under paragraph 1(b), it may do so even though that measure does not violate the terms of the GATT. Additionally, under Articles VI and XVI, when exports are subsidized by a contracting party, an importing contracting party may protect its domestic market through the imposition of countervailing duties, whether or not the subsidy violates the GATT. Could a Fund member imposing an exchange measure that is consistent with the Fund's Articles be subjected to such remedies? In view of the general formulation of Article XV, paragraph 9(a), which makes no distinction between violations and nonviolations of the GATT, GATT remedies should not apply to such measures. However, a different view has been expressed within GATT circles with respect to the application of Article XXIII and of Articles VI and XVI.

(i) "Nonviolation nullification or impairment"  
(Article XXIII, paragraph 1(b))

Under Article XXIII, paragraph 1(b) of the GATT, a contracting party may seek redress if it considers that, as a result of a measure imposed by another contracting party, any of its benefits are being nullified or impaired or that the attainment of any objective of the Agreement is impeded, even though the measure in question does not violate the GATT. 1/ Known as "nonviolation nullification or impairment", this situation requires a finding that benefits "reasonably anticipated" under the GATT have been nullified or impaired. 2/

These cases, like those involving GATT violations, are subject to the GATT dispute resolution rules. 3/ Remedies are the same except that, in nonviolation cases, there is no obligation to withdraw the offending measure. As in violation cases, the injured contracting party may, unless it is offered compensation, be permitted to suspend the application to the contracting party imposing the measure of concessions or other obligations

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1/ GATT, Article XXIII, paragraph 1(b).

2/ See, e.g., the GATT panel report on "European Economic Community-- Production Aids Granted On Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes," GATT, L/5778 (2/20/85).

3/ A procedural difference exists regarding the "burden of proof," in that GATT violations are considered prima facie to constitute a "nullification or impairment", while the complainant in nonviolation cases would be called upon to "provide a detailed justification" (Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD, 26S/216, (1979)).

under the GATT. 1/ Therefore, from a practical standpoint, there is no substantive difference between violation and nonviolation cases since the voluntary withdrawal of a measure may be obtained through indirect pressure, i.e., if compensation is not offered, the imposition of countermeasures.

Article XXIII, paragraph 1(b) does not explicitly address the case where such "nonviolation nullification or impairment" arises out of exchange measures that are consistent with the Fund's Articles. 2/ In this situation, the view has been expressed that, notwithstanding Article XV, paragraph 9(a), an exchange measure that is consistent with the Fund's Articles (and does not violate the GATT) could still constitute a nullification or impairment of benefits reasonably anticipated by another contracting party within the meaning of Article XXIII, paragraph 1(b) of the GATT. Therefore, under this view, Article XV, paragraph 9(a) would not safeguard the contracting party imposing the exchange measure, as it could be subject to the suspension of concessions (assuming it decided not to provide compensation). This view is based on an interpretation of Article XV, paragraph 4, which prohibits frustration of the intent of GATT provisions:

"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." 3/

According to this view, Fund-approved exchange restrictions that eliminate or curtail the competitive opportunities arising from a concession thus could, even though they would be considered to be consistent with the GATT, entitle the adversely affected contracting parties to compensation or suspension of concessions under Article XXIII of the GATT. 4/ In practice, this would mean that Article XV, paragraph 9(a) does not afford effective protection for measures that are consistent with the Fund's Articles since they could always give rise to the countermeasures authorized by Article XXIII. For instance, assuming that, in the context of a Fund-

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1/ See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD, 26S/210, Annex, paragraph 4 (1979).

2/ GATT, Article XXIII, paragraph 2, however, authorizes the CONTRACTING PARTIES to consult with "any appropriate inter-governmental organization in cases where they consider such consultation necessary." Consultations under this provision could, therefore, provide the basis for an agreed solution.

3/ Interestingly, paragraph 4 also requires a contracting party not to frustrate the Fund's Articles, regardless of whether it is a Fund member. The GATT includes an interpretative note to paragraph 4, but this note does not clarify its relationship to paragraph 9(a).

4/ See Roessler, "Countertrade and the GATT Legal System", Journal of World Trade Law (Vol. 19, 1985), p. 363. Mr. Roessler is Director, Legal Affairs Division, GATT Secretariat.

supported program, the Fund granted approval of certain exchange measures that would impair competitive advantages that were reasonably anticipated, other countries could invoke Article XXIII, paragraph 1(b) to counter the effects of the measures, thus defeating the purpose of the Fund's approval.

Another view on this question, which seems more consistent with the letter and spirit of Article XV, paragraph 9(a), is that, pursuant to this provision, an exchange measure that is consistent with the Fund's Articles cannot justify compensation or the suspension of concessions as a remedy under the GATT. Several arguments support this interpretation:

First, it relies on the plain language of Article XV, paragraph 9(a) ("[n]othing in this Agreement shall preclude. . ."), which by its terms applies to the entire GATT, including Article XV, paragraph 4 and Article XXIII, or the two taken together. 1/

Second, since Article XV, paragraph 9(a) protects measures consistent with the Fund's Articles from sanctions based on a finding of GATT violation, it should a fortiori protect them in the absence of such finding. In other words, even though the Fund member imposing the exchange measure in a nonviolation case could not be directly asked to remove it, the threat of suspension of concessions would effectively "preclude" the member from maintaining the measure. This result is precisely what Article XV, paragraph 9(a) purports to avoid. Thus, the distinction between violation and nonviolation cases, which may be meaningful under the GATT generally, is meaningless with regard to measures consistent with the Fund's Articles in view of the special protection afforded to them in Article XV, paragraph 9(a).

Third, this interpretation is supported by a norm of legal interpretation, according to which, in case of conflict between a general and a special rule, the latter should prevail, as an exception to a principle. 2/ Therefore, the more specific reference in Article XV, paragraph 9(a) to exchange restrictions and exchange controls that are consistent with the Fund's Articles should prevail over the more general prohibition in paragraph 4 against exchange measures that frustrate the intent of the GATT. 3/

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1/ "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 the light of its object and purpose" (Vienna Convention on the Law of Treaties, Article 31).

2/ Black, Black's Law Dictionary (1990), p. 684 ("Generalia specialibus non derogant"); see also, Maxwell on the Interpretation of Statutes (12th ed., 1969) p. 196.

3/ Additionally, the provision of the GATS that safeguards rights and obligations of Fund members was intended to be essentially parallel to Article XV, paragraph 9(a), and it does not contain any provision analogous to Article XV, paragraph 4.

Fourth, the negotiating history of the GATT indicates an affirmative intention that paragraph 9 not be limited by paragraph 4. In the original draft of the GATT as agreed on October 30, 1947, 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 to 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 which addressed the "Relationship [of the ITO] with the International Monetary Fund and Exchange Arrangements." 1/

Fifth, remarks by Professor Jackson (a noted GATT expert) on the 1952 case concerning Greece support the conclusion that a measure that is consistent with the Fund's Articles cannot be found to have "frustrated" the GATT under Article XV, paragraph 4. He notes the panel's statement that, if the measure were "not in the nature of a tax or charge on imported goods but was a tax on foreign exchange allocated for the payment of imports," as Greece had described it, "then the question would be whether Article XV, paragraph 4 had been violated." 2/ It may be noted that the reference to an infringement of paragraph 4 as a "violation," derives from the terms "contracting parties shall not frustrate. . ." (emphasis added), which highlights the incongruity of the argument invoking this paragraph with regard to nonviolation cases. In answering the question whether paragraph 4 could be violated, Professor Jackson describes the provisions of Article XV, paragraph 9 and states that "a determination of the IMF would have been necessary to a finding that Greece had not violated the GATT." 3/

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1/ GATT Analytical Index, *op. cit.*, pp. 407-408 (See also Report of the Working Party on Modifications of the General Agreement (GATT/CP.2/22/Rev.1). When this amendment was made, its effect was described to the Executive Board of the Fund as follows:

"According to the [original version], a discriminatory restriction on international payments applied consistently with the Fund Agreement which had the consequence of restricting importation of a product from a second country less than the importation of the like product from other countries, could have been objected to on the ground that it frustrated the intent of those provisions of the I.T.O. Charter which limit discriminatory quantitative restrictions. The I.T.O would have reported on such objections to the Fund. . . . According to the [revised version], the application of exchange restrictions, which are consistent with the Fund Agreement, cannot be objected to on the ground that they frustrate the intent of those provisions of the Charter . . ." (EB doc. No. 224, Sup. 1, p. 6.).

2/ Jackson, World Trade and the Law of the GATT (1969), p. 484.

3/ Ibid., p. 485.

The CONTRACTING PARTIES have not clarified their position on whether Article XV, paragraph 9(a) would safeguard the contracting party imposing the exchange measure from the suspension of concessions and the question is thus viewed as an open legal issue. In the context of the 1954-55 review of the entire GATT, a working party considered the relationship of paragraphs 4 and 9(a) of Article XV, but did not directly answer this question. Based on a report by a special sub-group on the relationship of the CONTRACTING PARTIES with the Fund, the working party decided "to leave this question over for empirical consideration if and when particular points arose which had a bearing on it" and declined to recommend an interpretative note to Article XV, paragraph 9, which would have involved GATT/Fund jurisdictional matters. 1/

A proposed interpretative note to Article XV, paragraph 9 that was not adopted by the Working Party included a reference to Article XXIII on nullification or impairment: "The paragraph shall not be interpreted to preclude a contracting party from invoking the provisions of paragraph 1 or 2 of Article XXIII in relation to such controls or restrictions maintained by another contracting party. . ." in accordance with the Fund's Articles. With regard to this portion of the proposed interpretative note, the report of the working party stated that it was "unnecessary." 2/

The working party's statement has been read to mean that "[t]here was . . . agreement in the sub-group that the exemption [in Article XV, paragraph 9(a)] did not preclude a contracting party from invoking, in relation to an exchange measure, the provisions of Article XXIII on nullification or impairment." 3/ Even accepting this reading of the working party's statement, it does not follow that suspension of concessions may be authorized. Article XXIII calls for consultations between disputants (paragraph 1) and with the CONTRACTING PARTIES if necessary (paragraph 2), and the latter consultations may also involve other organizations. Consultations under Article XXIII would not conflict with Article XV, paragraph 9(a), whereas suspension of concessions arguably would. As the working party stated in its report:

"paragraph 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.

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1/ Reports Relating to the Review of the Agreement (hereinafter cited as 1955 Review), BISD, 3S/170, paragraph 8 (1955). The working party stated that, rather than focusing on jurisdiction, "the more important problem was . . . that of establishing more effective machinery for consultation in accordance with the provisions of Article XV."

2/ Ibid., paragraph 8.

3/ General Agreement on Tariffs and Trade, Analytical Index, (1989), Note on Article XV, paragraph 9. It is noteworthy that the Sixth Edition (1994) of GATT Analytical Index does not contain this statement.

or from reporting on these matters to the IMF (as indeed was specifically envisaged in paragraph 5 of the Article [XV])." 1/

The decision by a working party to hold consultations in the Balance of Payments Committee on a 1981 deposit scheme introduced by Italy, notwithstanding the monetary character of the measure and its approval by the Fund, is also mentioned with respect to the question whether a Fund-approved measure may be subject to countermeasures. 2/ The Committee evaluated the measure in light of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes, in which the CONTRACTING PARTIES recognized that developed contracting parties should avoid restrictive trade measures for balance of payments purposes to the maximum extent possible. The Committee urged the Italian authorities to remove the measure as soon as possible and agreed to keep the progressive elimination of the deposit requirement under review. The Committee did not discuss the application of countermeasures, 3/ probably because, since the exchange measure under review was consistent with the Fund's Articles, Article XV, paragraph 9(a) would prevent the application of countermeasures under the GATT. Therefore, the only conclusion that can be drawn from this decision is that Fund approval of an exchange measure does not immunize the contracting party from further consultations where a resolution may be reached through diplomatic "peer pressure." Thus, as with the 1955 working party report, all that may be concluded is that a requirement to consult may exist regardless of whether the measure objected to is consistent with the Fund's Articles.

The Executive Board of the Fund has echoed the emphasis on consultations. During the 1954-55 review, the GATT Secretariat requested that the Fund issue a general statement of policy to the effect that Fund decisions in exchange matters are "without prejudice to the rights and obligations" of contracting parties to the GATT. 4/ The Executive Board

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1/ 1955 Review, op. cit., paragraph 8.

2/ GATT Analytical Index, op. cit., pp. 402 and 406. Because the deposit scheme was terminated shortly after the consultations were required, the CONTRACTING PARTIES were not faced with the issue of authorizing countermeasures.

3/ In balance of payments consultations, the CONTRACTING PARTIES must accept the determination of the Fund with regard to a contracting party's balance of payments, but they may make their own determination as to whether the restrictions exceed those necessary according to the relevant criteria in Article XII and the other balance of payments provisions under the GATT. Article XV, paragraph 2; see B. below. Under Article XII, paragraph 4(c)(ii), if the restrictions were "being applied in a manner involving an inconsistency of a serious nature" with the balance of payments provisions, and the contracting party applying the restrictions does not follow recommendations to correct them, the CONTRACTING PARTIES may authorize suspension of concessions by a contracting party the trade of which is adversely affected by the restrictions.

4/ EBD/54/151, Sup. 6, (12/31/54).

decided that the Fund mission to the GATT for the reviews should not concur in the Secretariat's proposal but that "it should be made clear that the Fund is prepared to cooperate actively with GATT to avoid unnecessary impairment of rights and obligations of CONTRACTING PARTIES under the GATT." 1/

(ii) "Countervailable" subsidies (Articles VI and XVI)

"Countervailable" subsidies present another circumstance in which the view has been taken that remedies may be imposed under the GATT, regardless of whether the subsidies constitute exchange measures that are consistent with the Fund's Articles.

Articles VI and XVI address the imposition by a contracting party of duties on imported products that benefit from subsidies, in order to "countervail" the effect of the subsidy in its domestic market, provided that it follows prescribed procedures for the imposition of the duties. While the GATT does not define countervailable subsidies, it provides guidance on this concept by limiting countervailing duties to "an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation. . . ." 2/ A subsidy may be countervailable independently of whether it is prohibited under the GATT. 3/

The procedures for imposing countervailing duties do not involve GATT dispute settlement procedures, in contrast to those applicable to nullification or impairment (involving either violation or nonviolation cases). A domestic agency of the contracting party intending to impose countervailing duties must establish that imported products benefit from a subsidy deemed countervailable under the GATT and that the subsidized imports "cause or threaten material injury to an established domestic industry. . . ." 4/ The imposition of the countervailing duties thus does not depend on adoption of a GATT panel report. Moreover, countervailing duties may be applied only to the imported products that benefitted from the subsidy; 5/ the remedy does not allow the complaining contracting party to suspend concessions on other products or in other sectors of trade, nor does it require the contracting party imposing the measure to withdraw it.

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1/ EBM/54/66 (12/31/54), pp. 3-4.

2/ GATT, Article VI, paragraph 3.

3/ If the subsidy is prohibited, a sanction for breach of the obligation may be imposed, but the 1979 Subsidies Code provides that a subsidy that is both prohibited (i.e., certain export subsidies) and countervailable may be subject to only one form of relief.

4/ GATT, Article VI, paragraph 6(a). See, generally 1979 Subsidy Code. Once the domestic procedures are completed, the contracting party against whom the countervailing duties are imposed may seek GATT panel review to challenge the procedures and determinations of the domestic agency.

5/ See, generally, Articles VI and XVI and 1979 Subsidies Code.

Articles VI and XVI of the GATT do not address the situation where a subsidy may result from an exchange measure that is consistent with the Fund's Articles. With regard to multiple currency practices, however, an interpretative note to Article VI states that:

"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." 1/

This note does not make clear whether the multiple currency practices referred to include those that are consistent with the Fund's Articles. If such a practice were to violate the GATT but were found to be consistent with the Fund's Articles, the remedies of Article XVI of the GATT for breach of obligation could not apply. 2/ Nevertheless, according to the GATT Secretariat, it is accepted within GATT circles that a multiple currency practice could be deemed a "countervailable" subsidy under the GATT, notwithstanding its approval by the Fund. Thus, products benefitting from the subsidy could be subject to countervailing duties (or antidumping duties) under Article VI when imported into the territory of other contracting parties.

It is difficult to reconcile this view with Article XV, paragraph 9(a), which, by its terms, extends to the entire GATT, and thus would also cover Articles VI and XVI. As is the case with the remedy for nonviolation nullification or impairment, countervailing duties do not directly involve a requirement that the offending measure be removed, but their imposition can nonetheless serve to deter the maintenance of the measure. 3/ Therefore, since the use of countervailing duties can be viewed as "precluding" the use of exchange measures maintained consistently with the Fund's Articles, the

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1/ GATT, Annex 1, Ad Article VI, paragraphs 2 and 3, Note 2. "Dumping" involves cases "by which products of one country are introduced into the commerce of another country at less than the normal value of the products. . . ." (Article VI, paragraph 1).

2/ See 2.a. above.

3/ Countervailing duties may be viewed as a "narrow" remedy in that they are imposed only on the products benefitting from the countervailable subsidy, as compared to suspension of concession for non-violation nullification or impairment which may or not involve the same sector of trade.

imposition of such duties would appear to violate Article XV, paragraph 9(a) of the GATT. 1/

### 3. Nonmembers of the Fund

The GATT, while generally relying on the Fund for its coverage of exchange arrangements, contemplates the case of exchange actions by a contracting party that is not a member of the Fund. In that event, so that the objectives of the GATT "will not be frustrated" by such actions, a contracting party that has not become a member of the Fund as of a specified date is required to enter into a "special exchange agreement" with the CONTRACTING PARTIES. 2/ Under the GATT, the terms of a special exchange agreement shall not impose obligations that are more restrictive than those imposed by the Fund's Articles of Agreement. 3/ Depending on the terms of the special exchange agreement, a nonmember of the Fund would be entitled to the same protection of its exchange measures as a Fund member. 4/

### B. GATT/Fund consultations

As noted earlier, the basic provision of GATT on cooperation with the Fund is Article XV, paragraph 1, which requires the CONTRACTING PARTIES to seek cooperation with the Fund so that both may pursue a coordinated policy with regard to "exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES."

The GATT also contains various provisions which call upon the CONTRACTING PARTIES to consider or deal with problems concerning monetary

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1/ Questions of policy inconsistencies arise if the targeted measure does not involve exchange measures, but is adopted as an element of a Fund-supported program.

2/ GATT, Article XV, paragraphs 6 and 7(a). The CONTRACTING PARTIES have sometimes dispensed with the requirement of a special exchange agreement through techniques such as waiver. Where such agreement was not required, the contracting parties concerned nevertheless gave separate assurances to the CONTRACTING PARTIES that they would act in exchange matters in a manner consistent with the Fund's Articles. See GATT Analytical Index, op.cit., p. 948, and Gold, Membership and Nonmembership in the International Monetary Fund (1974), pp. 426-445.

3/ GATT, Article XV, paragraph 7(b). In addition, a contracting party that is not a Fund member must furnish such information as the CONTRACTING PARTIES may require to carry out their functions within the general scope of Article VIII, Section 5 of the Fund's Articles. (GATT, Article XV, paragraph 3).

4/ Article XV, paragraph 9(a) also refers to measures maintained in accordance with the terms of a special exchange agreement.

reserves, balances of payments or foreign exchange arrangements; 1/ the most important and complex of these provisions concern the use of import restrictions by contracting parties for balance of payment reasons. 2/ In all these subjects, the GATT establishes a bridge to the Fund in that the CONTRACTING PARTIES are required to consult fully with the Fund.

1. Scope and effect of consultations

Article XV, paragraph 2 of the GATT sets out both the principle of GATT consultations with the Fund and the scope and effect of such consultations. It provides as follows:

"In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES 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 contracting party 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 contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES, in reaching their 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 contracting party'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."

It will be noted that this provision imposes a basic obligation on the CONTRACTING PARTIES to "consult fully" with the Fund on "problems concerning monetary reserves, balances of payments or foreign exchange arrangements." The provisions then stipulate that in these areas the CONTRACTING PARTIES shall "accept" three types of findings or determinations by the Fund:

(a) all findings of fact (i.e., findings of statistical and other facts) by the Fund relating to foreign exchange, monetary reserves and balances of payments;

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1/ See, in particular, Articles XII through XV and Article XVIII, Section B.

2/ Articles XII and XVIII.

(b) the legal determination by the Fund as to whether action by a contracting party in exchange matters is "in accordance with" the Fund's Articles; and

(c) in reaching their final decision as to whether the import restrictions applied by a contracting party for balance of payments reasons "exceed those necessary" to correct its reserves problem, the CONTRACTING PARTIES are required to accept the determination of the Fund as to what constitutes a "serious decline", a "very low level" or a "reasonable rate of increase" in such reserves, and as to related financial aspects covered in such consultations.

It is also important to note that "acceptance" by the CONTRACTING PARTIES of the Fund's factual findings or determinations in situation (c) above does not preclude the right of the CONTRACTING PARTIES to make their own independent "final decision" on the balance of payments exception to the GATT. The legal effect of this consultation obligation is that the decisions of the CONTRACTING PARTIES under the balance of payments provisions of the GATT should be made on the basis of, or having regard to, the Fund's findings and determinations. Thus, for example, in the course of a consultation, the Fund may have made a determination that a contracting party has a "serious problem with its monetary reserves;" while they are obliged to accept that determination, the CONTRACTING PARTIES may nevertheless decide that the particular import restrictions or other trade measures applied by that contracting party "exceed those necessary" to correct its balance of payments problem as provided under Article XII, Section 2(a) or Article XVIII, Section 9. <sup>1/</sup> In practice, since the "GATT is not institutionally equipped to collect and evaluate data on financial matters," <sup>2/</sup> a consensus has developed to accept that the Fund expresses its view on the appropriateness or necessity of the measure, although the final decision still rests with the GATT.

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<sup>1/</sup> 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" and the Fund representative did not suggest an alternative measure at that time. Nonetheless, the Working Party reported that it considered 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" (Analytical Index (6th ed., 1994), p. 399).

<sup>2/</sup> Roessler, "Selective Balance-of-Payments Adjustment Measures Affecting Trade: The Roles of the GATT and the IMF," Journal of World Trade Law (Vol. 9, 1975), p. 648.

## 2. Procedures

The CONTRACTING PARTIES and the Fund have established a general framework for cooperation through an exchange of letters (a). Additional procedures have developed over time, including procedures for exchanges of documents (b).

### a. Framework

Under the GATT, the CONTRACTING PARTIES must seek agreement with the Fund regarding procedures for consultation. 1/ In September 1948, the Chairman of the CONTRACTING PARTIES to the GATT wrote to the Managing Director of the Fund, stating that "an elaborate" agreement was not appropriate--in light of the provisional application of the GATT in anticipation of the creation of the International Trade Organization--and proposing a general framework for cooperation. 2/ In the same month, the Executive Board of the Fund authorized the Managing Director to accept this "informal arrangement." 3/ The proposed ITO did not come into being, and this exchange of letters has continued to serve as the basis for institutional cooperation between the Fund and the CONTRACTING PARTIES.

The operative part of the letter of the Chairman of the CONTRACTING PARTIES stated:

"Under such circumstances it is proposed by the CONTRACTING PARTIES that the Fund agree to cooperate with the CONTRACTING PARTIES in carrying out the provisions of the General Agreement in accordance with the terms thereof and, in particular, to consult, at the request of the CONTRACTING PARTIES, on matters as contemplated by the General Agreement. If such cases arise, the Chairman of the CONTRACTING PARTIES will notify the Managing Director of the Fund of each particular instance in which the CONTRACTING PARTIES desire consultation and will furnish the Fund with all information available which may assist the Fund in considering the question. Since various provisions of the General Agreement call for consultation between the CONTRACTING PARTIES and the Fund, it might be necessary in particular cases to await a meeting of the [CONTRACTING PARTIES] before formal consultation could be undertaken. However, the CONTRACTING PARTIES have authorized their Chairman to initiate requests, either at the direction of the CONTRACTING PARTIES or on the Chairman's own initiative if the [CONTRACTING PARTIES] are not in session, for the Fund to consult with the CONTRACTING PARTIES in accordance

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1/ GATT, Article XV, Section 3.

2/ Reproduced in EBD/54/167, Sup. 4 (2/15/55). The Fund and GATT staff had drafted a formal agreement between the Fund and the proposed ITO, but it was not implemented.

3/ Executive Board Decision No. 363-1, September 24, 1948.

with the provisions of the General Agreement. This arrangement should make it possible for the Fund to undertake with a minimum of delay such studies as may be necessary and should afford the Fund opportunity to become familiar with the subject matter involved in advance of consultation with the CONTRACTING PARTIES in particular cases.

The Fund may from time to time wish to request consultation with the CONTRACTING PARTIES on matters of common interest, and, in such cases, the CONTRACTING PARTIES will be prepared to consult upon such requests." 1/

The letter also stated that confidentiality of any information exchanged would be respected, that additional procedures could be worked out case by case, and that more formal procedures could be developed, if necessary, based on experience. Indeed, additional elements of cooperation have evolved, including the establishment of the Fund's Office in Geneva, the involvement on the Fund side of the Committee on Liaison with the CONTRACTING PARTIES to the GATT (CGATT), reciprocal attendance at certain meetings, and the reciprocal exchange of documents.

Over time, consultations on import restrictions taken under Articles XII and XVIII of the GATT for balance of payments reasons have become the most active form of GATT/Fund consultations. The criteria and procedures applicable to balance of payments consultations are discussed in the Appendix to this paper.

b. Exchange of documents

On the side of the Fund, Article IV consultation reports, requests for Fund resources, and Recent Economic Developments reports (RED) are transmitted to the GATT Secretariat, whether or not the CONTRACTING PARTIES are consulting with the member. 2/ On the side of the GATT, documents not designated for exclusive use by contracting parties are normally provided through the Fund's Office in Geneva, which transmits them to the Fund staff, and some of these documents may be circulated or reported to the Executive Board, as appropriate.

With regard to the balance of payments consultations, the GATT Secretariat prepares a background document about the consulting contracting party, describing developments in its exchange and trade system, as well as

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1/ EBD/54/167, Sup. 4 (2/15/55), p. 2.

2/ SM/90/120 (6/20/90) and Sup. 1 (7/17/90). The Fund decision on transmittal of documents to other organizations states that transmittal is "subject to the reciprocal transmittal of comparable documents of the recipients to the Fund and on the understanding with the recipients of the reports that the reports will be kept confidential" (Decision No. A-9058-(90/120), July 23, 1990).

macroeconomic and trade developments since the last consultations. In preparing this document, the Secretariat has access to the most recent Article IV consultation report and RED, assuming that the contracting party is a Fund member. Fund staff receive drafts of the background document (as does the consulting contracting party), and provide comments, paying particular attention to the macroeconomic assessment. In addition, the Fund delivers a statement at the GATT balance of payments consultations on the consulting country's situation, based on the staff appraisal and summing up of the Fund's most recent Article IV consultation (or discussion of use of Fund resources). The statement is approved by the Fund's Executive Board before it is delivered. 1/

Under the Trade Policy Review Mechanism (TPRM), which has been in effect since 1989 and will be administered by the WTO, 2/ each contracting party's trade policy is reviewed in the broader context of its macroeconomic environment. As for the balance of payments consultation, the GATT Secretariat prepares a background paper describing the macroeconomic developments and policies (including exchange rate policies) of the contracting party under review, relying on its own information on the contracting party's trade measures, information obtained from the relevant country and, for Fund members, the most recent Article IV consultation report and RED. Fund staff receive, on an informal basis, drafts of TPRM reports (prepared by the consulting contracting party and by the GATT Secretariat) at the same time as these are circulated to other contracting parties. Fund staff informally make available to the GATT Secretariat comments on the TPRM reports, again paying particular attention to the macroeconomic assessment. 3/

## II. The WTO/Fund Relationship

The relationship of the WTO with the Fund will be governed by a number of provisions in the WTO Agreement. With respect to trade in goods, the relationship of the CONTRACTING PARTIES with the Fund will be carried over to the relationship of the WTO with the Fund (A). With respect to trade in services, a similar relationship will be established (B). More generally, new provisions in the Final Act require the WTO to cooperate with the Fund and the World Bank, with a view to achieving greater coherence in global economic policymaking (C).

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1/ The proposed statement is circulated to the Executive Board for approval on a lapse-of-time basis. If an Executive Director raises a question about the statement, it is sent to the CGATT for discussion.

2/ For a discussion of the TPRM, see "The World Trade Organization-- Institutional Aspects," *op.cit.*, Section IV.

3/ Fund representatives attend GATT Council meetings that discuss the TPRM reports; they have the opportunity, but are not required, to make statements at these deliberations.

**A. Multilateral Agreements on Trade in Goods**

Membership in the WTO entails adherence to the numerous agreements, including the Multilateral Agreements on Trade in Goods, contained in Annex 1A to the WTO Agreement. <sup>1/</sup> Within the scope of these agreements, the provisions of GATT 1947 (and the ambiguities thereto) that governed the consistency of rights and obligations of contracting parties that are Fund members will apply to common WTO/Fund members. The provisions of GATT 1947 on consultations on balance of payments and other matters will also apply.

**1. Scope of the Agreements**

"GATT 1994" is included among the Multilateral Agreements on Trade in Goods that WTO members agree to apply as a condition of membership in the organization. GATT 1994 consists of the original GATT, as amended before the Uruguay Round (GATT 1947), plus protocols, decisions and understandings specified in Annex 1A to the WTO Agreement. Apart from GATT 1994, the following twelve Agreements on Trade in Goods are included in Annex 1A of the WTO Agreement:

- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (antidumping duties)
- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (customs valuation)
- Agreement on Preshipment Inspection
- Agreement on Rules of Origin
- Agreement on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

**2. Recognition of Fund jurisdiction over exchange matters**

GATT 1947 explicitly dealt with the question of the consistency of rights and obligations of contracting parties that are Fund members. As GATT 1947 is part of GATT 1994 (along with identified protocols, decisions

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<sup>1/</sup> WTO Agreement, Annex 1A. Membership also involves acceptance of the agreements in the following other annexes: Annex 1B: the General Agreement on Trade in Services (hereinafter referred to as GATS); Annex 1C: the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS); Annex 2: the Understanding on Rules and Procedures Governing the Settlement of Disputes; Annex 3: the Trade Policy Review Mechanism. Annex 4 contains the Plurilateral Trade Agreements, which need not necessarily be accepted by all WTO members.

and understandings), Article XV of GATT 1947, which is the primary article governing the relationship of the CONTRACTING PARTIES with the Fund on exchange matters, is thus explicitly part of GATT 1994. 1/

The Agreement on Trade-Related Investment Measures (TRIMs Agreement) 2/ also clearly incorporates Article XV, paragraph 9(a) of GATT 1994. Article III of the TRIMs Agreement provides that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." The application of this provision is particularly relevant to the requirement in that agreement that "[w]ithout prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM [trade-related investment measure] that is inconsistent with the provisions of Article III [national treatment] or Article XI [general elimination of quantitative restrictions] of GATT 1994." 3/ An illustrative list identifies TRIMs that are inconsistent with the general elimination of quantitative restrictions as those:

"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." 4/

Given the explicit reference in Article III of the TRIMs Agreement to all exceptions under GATT 1994, Article XV, paragraph 9(a) of GATT 1994 would ensure consistency with the TRIMs Agreement of an exchange measure that is "in accordance" with the Fund's Articles. 5/ In the case of a foreign exchange balancing requirement, for example, the requirement would appear to be covered by the TRIMs Agreement. At the same time, such a requirement would fall within the Fund's jurisdiction, being an exchange control measure. As such, it would be protected by Article XV, paragraph 9(a), as long as it was maintained consistently with the Fund's Articles, that is, because either it does not restrict current payments, or, if it does, it is maintained under Article XIV or approved by the Fund under Article VIII. 6/

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1/ See I.A. above.

2/ Final Act, Annex 1A.

3/ TRIMs Agreement, Article 2.

4/ TRIMs Agreement, Annex, paragraph 2(b).

5/ See I.A. above.

6/ In other words, only a foreign exchange balancing requirement that constitutes a restriction under the Fund's Articles and is neither maintained under Article XIV nor approved under Article VIII would fall within the purview of this provision of the TRIMs Agreement.

With respect to the other Multilateral Agreements on Trade in Goods, however, the application of Article XV was not so clear because these other Agreements do not contain a reference to Article XV, and they could be viewed as independent of GATT 1994 and each other. The relationship between GATT 1994 and the other agreements listed in Annex 1A was envisaged in the General Interpretative Note to Annex 1A (containing the Multilateral Agreements on Trade in Goods):

"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." 1/

The meaning of this Interpretative Note and the applicability of Article XV of GATT 1994 to the other agreements listed in Annex 1A were examined in the CGATT of the Fund. 2/ They were also discussed between the Fund staff and delegations of the Uruguay Round, and, in this discussion, it was agreed that the continued application of Article XV should be confirmed, together with a recognition of the more general obligation of the WTO to cooperate with the Fund as stated in the Final Act.

Subsequently, therefore, the following "Declaration on the Relationship of the World Trade Organization with the International Monetary Fund" was included in the Final Act as signed at Marrakesh:

**Ministers.**

*Noting* the close relationship between the CONTRACTING PARTIES to the GATT 1947 and the International Monetary Fund, and the provisions of the GATT 1947 governing that relationship, in particular Article XV of the GATT 1947,

*Recognizing* the desire of participants to base 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 to the WTO Agreement, on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund;

Hereby *reaffirm* that, unless otherwise provided for in the Final Act, the relationship of the World Trade Organization with

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1/ WTO Agreement, General Interpretative Note to Annex 1A, Multilateral Agreements on Trade in Goods. The interpretative note was added by the Legal Drafting Committee, which normally does not alter the substance of the agreement reached by negotiators.

2/ EB/CGATT/94/1 (3/10/94). At the CGATT meeting, Executive Director's agreed to raise the matter with Trade Ministers in their national governments.

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." 1/

On this Declaration, five points should be noted.

First, the Declaration reaffirms that the provisions governing the relationship of the CONTRACTING PARTIES under GATT 1947 with the Fund would continue to apply to the relationship of the WTO with the Fund with respect to the agreements in Annex 1A to the WTO Agreement. 2/ Therefore, even though the Multilateral Agreements on Trade in Goods may be viewed as independent of GATT 1994, the Declaration establishes that the provisions in GATT 1994 that govern the relationship with the Fund constitute general principles applicable to these agreements.

Second, the Declaration does not clarify any of the unresolved questions relating to these provisions that existed under GATT 1947; these issues thus remain open legal questions. Issues that are carried over to the new Multilateral Agreements on Trade in Goods include the question of remedies against exchange measures consistent with the Fund's Articles that give rise to nonviolation nullification or impairment or constitute countervailable subsidies. 3/

Third, during the discussion that led to the adoption of the Declaration, the Director, Legal Affairs Division of the GATT Secretariat, explained that the existing relationship under GATT 1947, even if it were to continue on the basis of Article XV and other relevant provision 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 (Article III, paragraph 5 of the WTO Agreement and the Understanding on Balance of Payments Provisions of GATT 1994). To that effect, the clause "unless otherwise provided for in the Final Act" was inserted in the final paragraph of the Declaration. The reasons given for this clause are consistent with the normal meaning given to this type of reservation, namely, that the

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1/ Final Act, Declaration on the Relationship of the World Trade Organization with the International Monetary Fund. The Ministerial Declaration is an integral part of the legal documentation constituting the Final Act.

2/ The Declaration does not apply to the Plurilateral Trade Agreements in Annex 4 to the WTO Agreement, which also govern certain aspects of trade in goods. Given the narrow focus of these agreements, it appears unlikely that jurisdictional conflicts will arise in these areas.

3/ See I.A. above. Any disputes under these agreements would be resolved according to the Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act, Annex 1B (hereinafter referred to as Dispute Settlement Understanding).

principle referred to in the main clause applies whenever no explicit exception is made in a specific provision. Therefore, absent an explicit reference to the contrary, the relevant provisions of GATT 1947 (now incorporated into GATT 1994) that govern relations with the Fund will apply to the WTO.

Fourth, the reference to the Multilateral Trade Agreements in Annex 1A of the WTO Agreement confirms that the relationship established under Article XV of GATT 1947, in particular Article XV, paragraph 9(a), which protects exchange measures that are consistent with the Fund's Articles, extends to measures that fall within the scope not only of GATT 1994, but also of all the other Multilateral Agreements on Trade in Goods. Therefore, the application of Article XV, paragraph 9(a) will not require an explicit reference. Rather, it will apply absent an explicit exception in the relevant provision.

Fifth, the Interpretative Note in Annex 1A cannot be regarded as authorizing implicit exceptions to the applicability of Article XV to Multilateral Agreements on Trade in Goods other than the GATT, because Article XV, pursuant to the Ministerial Declaration, is not only a provision of the GATT; it is deemed to be part of all the other Multilateral Agreements on Trade in Goods and, therefore, qualifies all the provisions of these agreements. Moreover, the Interpretative Note cannot be regarded as being itself one of the exceptions referred to in the clause "unless otherwise provided" of the Ministerial Declaration, because it does not by itself make any exception to Article XV. Additionally, the Interpretative Note cannot mean that Article XV only applies when specifically referred to, because the Ministerial Declaration makes it clear that a specific reference to Article XV is not necessary for its application.

The Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) 1/ provides an example of the application of the Declaration based on the above understanding. An illustrative list of prohibited export subsidies includes "[c]urrency retention schemes or any similar practices which involve a bonus on exports." 2/ Since a currency retention scheme would constitute an exchange control measure and the Subsidies Agreement does not provide for an exception to GATT 1994, Article XV, paragraph 9(a) would apply. As under the TRIMs Agreement, the measure would be protected as long as it was maintained consistently with the Fund's Articles, that is, because either it does not restrict current payments, or, if it does, it is

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1/ Final Act, Annex 1A.

2/ WTO Agreement, Annex 1: Agreement on Subsidies and Countervailing Measures, Annex 1(b) (hereinafter cited to as Subsidies Agreement). The Subsidies Agreement sets forth a three-part regime regarding prohibited subsidies: (i) those that are prohibited per se (Part II); (ii) those that are "actionable" in that they may be found to be prohibited under specified conditions (Part III); and (iii) those that are "non-actionable" in that they may not be challenged as a prohibited subsidy (Part IV).

maintained under Article XIV or approved by the Fund under Article VIII. 1/

### 3. WTO/Fund consultations

Under GATT 1994, the consultative role of the Fund under GATT 1947 will continue as provided in Article XV, particularly with regard to the implementation of provisions authorizing restrictions to safeguard the balance of payments. The Fund's role will be similar under the other Multilateral Agreements on Trade in Goods, except that the provisions on restrictions to safeguard the balance of payments will not apply in the absence of a specific reference in the relevant agreements. 2/ The criteria and procedures under GATT 1947 for consultations on restrictions to safeguard the balance of payments will be carried over as appropriate to the new agreements, and certain matters of substance and procedure are elaborated on in the Uruguay Round Understanding on the Balance of Payments Provisions of GATT 1994 (1994 BOP Understanding).

The WTO Agreement creates a Committee on Balance-of-Payments Restrictions similar to that under GATT 1947; 3/ this Committee will also consider restrictions to safeguard the balance of payments under the General Agreement on Trade in Services. The criteria and procedures applicable to these consultations are discussed in the Appendix to this paper.

### B. General Agreement on Trade in Services

The General Agreement on Trade in Services (GATS) 4/ is a new agreement governing trade in services. "Trade in services" involves the "supply of a service" through specified modes of delivery in any sector except services supplied in the exercise of governmental authority. The new rules deal with such matters as non-discrimination against foreign service

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1/ If the view were taken on the basis of the clause "unless otherwise provided for in the Final Act," combined with the Interpretative Note in Annex 1A, that Article XV only applies to Multilateral Agreements on Trade in Goods that explicitly confirm its application, the Ministerial Declaration would have no meaning. For instance, an export subsidy resulting from an exchange measure that is consistent with the Fund's Articles would be prohibited by the Subsidies Agreement which is not part of GATT 1994. The argument would be that the illustrative list of prohibited export subsidies in the Subsidies Agreement does not refer to Article XV, paragraph 9(a) (or to the interpretative note to Article XVI of GATT 1947), which would explicitly safeguard the measure (see I.A.2. above).

2/ The Multilateral Agreements on Trade and Goods other than GATT 1994 must be individually consulted to determine whether the provisions on balance of payments restrictions apply.

3/ WTO Agreement, Article IV, paragraph 7.

4/ WTO Agreement, Annex 1B. Citations in this discussion are to the GATS unless otherwise indicated.

providers, market access, and payments and transfers associated with such services. 1/ Further, as in the case of trade in goods, the GATS contains several provisions which touch on the relationship of the WTO with the Fund in the area of trade in services and which are designed to avoid any conflict in rights and obligations for Fund members. In particular, Article XI of the GATS (like Article XV, paragraph 9(a) of the GATT) provides for consistency of rights and obligations for common WTO/Fund members. Additionally, the Fund's role in the provisions regarding restrictions to safeguard the balance of payments is essentially the same as that regarding the Multilateral Agreements on Trade in Goods.

1. Structure and scope

The GATS consists of a framework agreement and eight Annexes, 2/ together with schedules that are negotiated individually by each member and that state the extent to which that member agrees to liberalize a particular service sector. 3/ The framework agreement contains principles and rules that are applicable to trade in all covered services; it also contains other rules that are applicable only to the specific commitments in the schedules. 4/ Importantly, the rules with the most direct consequences for the Fund--those concerning payments and transfers--apply only to scheduled commitments. Nonetheless, since many rules apply to all covered services, and the schedules may be expanded in subsequent negotiations, the potential scope of the GATS is very broad.

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1/ For a critique of the GATS, see Stahl, "Liberalizing International Trade in Services: The Case for Sidestepping the GATT," Yale Journal of International Law (Vol. 19, 1994), p. 405.

2/ The Annexes are: (i) Annex on Article II Exemptions (i.e., from the most favored nation treatment); (ii) Annex on Movement of Natural Persons Supplying Services under the Agreement; (iii) Annex on Air Transport Services; (iv) Annex on Financial Services; (v) Second Annex on Financial Services; (vi) Annex on Negotiations on Maritime Transport Services; (vii) Annex on Telecommunications; and (viii) Annex on Negotiations on Basic Telecommunications.

3/ These schedules, which are annexed to the GATS, form an integral part of the GATS (Article XX, paragraph 3).

4/ Part III of the GATS deals with specific commitments undertaken in the schedules and includes Articles on Market Access (Article XVI), National Treatment (Article XVII) and Additional Commitments (Article XVIII). Part IV of the GATS deals with progressive liberalization, through negotiations of specific commitments in the schedules in successive rounds (Article XIX), schedules of specific commitment (Article XX), and modification of schedules (Article XXI).

The GATS defines "services" to include any service in any sector except "services supplied in the exercise of governmental authority." 1/ The Annex on Financial Services defines "services supplied in the exercise of governmental authority" as those "conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;" 2/ "activities forming part of a statutory system of social security or public retirement plans;" and "other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government." 3/ "Banking and other financial services" and "insurance and insurance-related services" are included under the GATS, in accordance with this Annex. 4/

There are four modes identified for the supply of a service under the GATS: (i) service from the territory of one Member into the territory of any other Member; (ii) service in the territory of one Member to the service consumer of any other Member; (iii) service by a service supplier of one Member, through commercial presence in the territory of any other Member; and (iv) service by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member. 5/

## 2. Reservation of rights and obligations under the Fund's Articles

In contrast to the GATT and the Multilateral Agreements on Trade in Goods, the GATS does not limit its application to trade measures. A number of provisions of the GATS deal with exchange restrictions. Therefore, the issue of potential overlap of jurisdiction between the GATS and the Fund's Articles had to be envisaged during the preparation of the GATS. This overlap is due generally to the concern that exchange restrictions might frustrate the intended liberalization of trade in services and more specifically to the nature of some services, where payments and transfers

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1/ GATS, Article I, Section 3(b). "[A] service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" (GATS, Article I, paragraph 3(c)).

2/ GATS, Annex on Financial Services, paragraph 1(b)(i). "Public entity" means a "government, a central bank or a monetary authority, of a Member; an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions" (*Ibid.*, paragraph 5(c)).

3/ *Ibid.*, paragraphs 1(b)(ii) and (iii). If such activities are "conducted by . . . financial service suppliers in competition with a public entity or a financial service supplier," they are covered by the GATS (*Ibid.*, paragraph 1(c)).

4/ *Ibid.*, paragraph 5(a).

5/ GATS, Article I, paragraph 2.

may be an inherent part of the service itself (e.g., financial services). However, it was eventually recognized, after discussions with Fund staff, that the GATS should not affect rights and obligations under the Fund's Articles, with a partial exception for capital movements.

In order to preserve the rights and obligations of common WTO/Fund members, the GATS contains a general proviso as follows:

"Nothing in this [GATS] 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." 1/

In one respect, this provision is more explicit than the equivalent clause in the GATT (i.e., Article XV, paragraph 9(a)) in its reference to the "rights and obligations" of Fund members. It means that, if a Fund member has a right under the Articles, this right is not denied or limited by the GATS, and if the member has an obligation under the Fund's Articles, it is not exempted from that obligation by the GATS. 2/

The concept of "obligations" under the Fund's Articles includes the obligations of the members under Article IV, Section 1, and the prohibition on the imposition of exchange restrictions, multiple currency practices and discriminatory currency arrangements without the approval of the Fund under Article VIII, Sections 2(a) and 3. It is therefore clarified that exchange restrictions (or other exchange measures) whose introduction or maintenance would not be consistent with the Fund's Articles will not be permitted under the GATS. The reference to "rights" of Fund members refers to the rights to impose or maintain all exchange measures that are consistent with the Fund's Articles, including nonrestrictive measures (which do not require approval), approved restrictions, restrictions on capital movements imposed under Article VI, and restrictions maintained under Article XIV. However, the right to impose restrictions on capital movements is limited by the proviso to Article XI, paragraph 2 of the GATS: the restrictions must be justified by the country's balance of payments situation (under Article XII of the GATS) or be imposed at the request of the Fund (under Article VI, Section 1 of the Fund's Articles).

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1/ GATS, Article XI, paragraph 2.

2/ It may be noted that the GATS does not contain a provision similar to Article XV, paragraph 4, which has been mentioned in support of the view that remedies may be imposed against exchange measures consistent both with the Fund's Articles and the GATT under the concept of "non-violation nullification or impairment" (see I.A.2. above).

a. Current transactions

The GATS contains a specific provision regarding international payments and transfers for current transactions. Article XI, paragraph 1 of the GATS provides as follows:

"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." 1/

As noted above, the member's specific commitments to liberalize a particular service sector are contained in the schedules. 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, discussed below). 2/ The fact that WTO members may not make commitments in all sectors does not change the obligation of Fund members under Article VIII of the Fund's Articles, which contains a general prohibition of restrictions on payments and transfers for current international transactions, except as approved by the Fund.

b. Capital transactions

Another provision of the GATS addresses payments and transfers for capital international transactions:

". . . a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII [restrictions to safeguard the balance of payments] or at the request of the Fund." 3/

Thus, as in the case of current transactions, members 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.

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1/ GATS, Article XI, paragraph 1.

2/ 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 that each member afford "most favored nation" (MFN) treatment to other members (although at the time a member signs the agreement, it is permitted to identify domestic discriminatory measures which may be "grandfathered.")

3/ GATS, Article XI, paragraph 2.

- 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. 1/
- Second, if a member commits to allow supply of a service through a commercial presence in its territory, the GATS requires authorizing "the related transfers of capital into its territory." 2/

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; 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. 3/

As any commitment with regard to unrestricted capital transfers is qualified by a right to impose restrictions "at the request of the Fund", a Fund member may restrict capital movements if so requested by the Fund (under Article VI, Section 1 of the Fund's Articles), regardless of a specific commitment under the GATS. 4/ This provision, therefore, does not extend to a Fund member's right under Article VI, Section 3 of the Fund's Articles to "exercise such controls as are necessary to regulate international capital movements. . . ." Therefore, depending on the member's scheduled commitments, the GATS can regulate a member's right to restrict the free movement of capital, subject to the provisions on restrictions to safeguard the balance of payments.

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1/ GATS, Article XVI, paragraph 1, note 8.

2/ *Ibid.*

3/ If the service is provided through other means, the GATS does not prevent the member from drafting its schedule to restrict any associated capital movement. The GATS identifies two other means of providing a service: (i) "in the territory of one Member to the service consumer of any other Member" (Article I paragraph (2)(b)); and (ii) "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member" (Article I paragraph (2)(d)). A preliminary review of the scheduled commitments suggests that no prospective member has agreed to allow the provision of a service in its territory through these means while restricting any associated movement of capital.

4/ In contrast, with respect to trade in goods, Article XV, paragraph 9(a) of GATT 1994 covers the use of exchange measures "in accordance with" the Fund's Articles and, therefore, would protect the member's right to impose measures that could be characterized as capital controls under Article VI, Section 3 of the Fund's Articles.

The GATS does not explicitly define "current" or "capital" transactions. The Fund's Articles, in contrast, contain an enumeration of payments for current transactions (Article XXX(d)) for purposes of Fund jurisdiction. 1/ It would follow, therefore, that the Fund's use of these terms would apply to the GATS, as the references in the GATS to current or capital international transactions clearly invoke the Fund's Articles. In any event, the characterization of an international payment as current or capital is unlikely to become an issue because, under the GATS, the prohibition of restrictions on either form of transfer are generally the same, and the provision on restrictions to safeguard the balance of payments does not distinguish between current and capital transactions. 2/

c. Prudential and tax safeguards

There are certain exceptions to obligations under the GATS, which authorize measures that would otherwise be inconsistent with the GATS. In addition to provisions on restrictions to safeguard the balance of payments that are discussed below, the following two exceptions seem particularly relevant to the Fund.

First, the Annex on Financial Services provides that a member will not be prevented from taking measures for prudential reasons, 3/ which could conceivably involve restrictions on payments and transfers for current international transactions. Nevertheless, this provision would not authorize a Fund member to impose any exchange measure that would be inconsistent with the Fund's Articles.

Second, the GATS provides for the primacy of a member's tax policy over any national treatment commitment (i.e., to afford to services and service suppliers of any other member treatment no less favorable than similarly situated domestic service providers). Subject to the requirement that the measure is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where like provisions prevail, as a disguised restriction on trade in services," a

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1/ Additionally, the Fund may, after consultation with the member concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions (Article XXX(d)).

2/ Nonetheless, the distinction between current and capital transactions could still be relevant under the GATS regarding (i) the GATS deference to the Fund on capital controls requested under Article VI of the Fund's Articles, and (ii) the minimum requirements on unrestricted capital movements for specified modes of scheduled services noted above.

3/ GATS, Annex on Financial Services, paragraph 2(a). Prudential measures include those taken "for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system." However, where such measures do not conform with the GATS, they shall not be used to avoid the member's commitments under the GATS (Ibid.).

member is not precluded from adopting or enforcing measures aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members." 1/ Again, while this provision provides an exception to obligations under the GATS, it would not permit a Fund member to impose tax measures that restrict payments and transfers on current international transactions. 2/

d. Suspension of obligations relating to payments and transfers

As a remedy for nullification or impairment (involving either violations or nonviolations) of any Multilateral Agreement included in the Final Act, the Dispute Settlement Body (DSB) may authorize, subject to certain conditions, the suspension of concessions or other obligations under the same Agreement or under any other such Agreements ("cross-retaliation"). 3/

Article XI, paragraph 1 of the GATS provides that "a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments," except for balance of payments purposes as provided in Article XII. Since the obligation not to apply such restrictions is created under the GATS, it may be suspended as a remedy for nullification or impairment of the GATS or one of the other Multilateral Agreements. 4/ However, in light of the general proviso in Article XII, paragraph 2, the suspension could not result in the imposition of restrictions that would be contrary to the Fund's Articles. The principle in the proviso "Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund. . ." does not create an obligation for WTO members, which could itself be suspended. The proviso is actually a limitation on the scope of the GATS, which cannot be affected by any suspension of concessions or other obligations under the GATS. Thus, the DSB cannot authorize a restriction on international

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1/ GATS, Article XIV, in particular paragraph d (including examples in n. 6 thereto). A similar provision applies with respect to bilateral tax treaties on the avoidance of double taxation.

2/ Such a measure would be restrictive, for example, if it involved a remittance tax that is levied only when profits or dividends are transferred abroad.

3/ Dispute Settlement Understanding, Article 22.

4/ The Dispute Settlement Understanding limits but does not preclude the circumstances where cross-retaliation may be applied (see "The World Trade Organization--Institutional Aspects," op.cit., Section III).

transfers and payments for current transactions that is inconsistent with the Fund's Articles. 1/

### 3. WTO/Fund consultations

The GATS provides that the "General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services." 2/ As in the GATT, Article XII of the GATS provides for consultations with the Fund specifically on restrictions imposed to safeguard the balance of payments.

In the same way as required under the Multilateral Agreements on Trade in Goods, members imposing such restrictions must consult with the WTO. 3/ The GATS provides that "[i]n such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance 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." 4/

The criteria and procedures applicable to these consultations are discussed in the Appendix to this paper.

### C. Enhanced WTO/Fund cooperation

Given the scope of the Final Act and the status of the WTO as an international organization, cooperation with the Fund is likely to be significantly expanded compared to that of the CONTRACTING PARTIES of the GATT. Moreover, the Final Act includes provisions in the WTO Agreement and in an accompanying Declaration that require the WTO to cooperate with the Fund and the World Bank with a view to achieving greater coherence in global economic policymaking. The following discussion examines the legal bases for this enhanced cooperation between the WTO and the Fund, the main legal issues relating to cooperation, and the legal aspects of the modalities of cooperation.

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1/ This conclusion is supported by the limited role of the DSB in authorizing remedies, which is explicitly limited to "preserv[ing] the rights and obligations of members under the covered agreements," i.e., the recommendations may not "add to or diminish the rights and obligations" of members provided in the covered agreements (Dispute Settlement Understanding, Article 3, paragraph 2 and Article 19, Section 2).

2/ GATS, Article XXVI.

3/ GATS, Article XII, paragraph 5(a).

4/ Ibid., paragraph 5(e). If a member that is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary (Ibid., paragraph 6).

1. Legal bases for cooperation

The Final Act and the Fund's Articles expressly provide for the legal bases for cooperation between the respective institutions.

a. Final Act of the Uruguay Round

The WTO Agreement requires the WTO to cooperate with the Fund and the World Bank. The relevant provision is Article III, which enumerates the functions of the WTO:

"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." 1/

The implementation of this provision is a responsibility of the General Council, which "shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO." 2/

In addition to these provisions of the WTO Agreement, the Final Act includes a Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking. The Declaration emphasizes the importance of coherence at an international level for increasing the effectiveness of structural, macroeconomic, trade, financial and development policies at the national level, and articulates some guiding principles. Paragraph 5 of the Declaration requires the WTO to develop cooperation with international organizations responsible for monetary and financial matters, while "respecting the mandate, confidentiality requirements, and decision-making autonomy of each institution, and avoiding the imposition on governments of cross-conditionality and other conditions." In the same paragraph, the Director-General is specifically invited to review with the heads of the Fund and the Bank the implications of the WTO's responsibilities for cooperation and the forms that such cooperation would take.

The implementation by WTO members of commitments and concessions under the Final Act could cause some deterioration in their external positions over the short term. Anticipating this development, the Final Act includes a Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, which states in part:

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1/ WTO Agreement, Article III, paragraph 5.

2/ Ibid., Article V, paragraph 1.

"Ministers recognize that as a result of the Uruguay Round certain developing countries may experience short-term difficulties in financing normal levels of commercial imports and that these countries may be eligible to draw on the resources of international financial institutions under existing facilities, or such facilities as may be established, in the context of adjustment programmes, in order to address such financing difficulties."

In the Decision, Ministers take note of a September 1989 report of the GATT Director-General, which declared:

"The head of the Fund stated that the Fund already provides support for trade liberalization measures adopted by a member in the context of its overall programmes. The Fund also has in place special facilities to deal with various contingencies including temporary shortfalls in export financing, and excesses in cereal import costs." 1/

b. The Fund's Articles of Agreement

The Fund's authority for cooperation with other international organizations is expressly set out in Article X of the Articles of Agreement:

"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."

The WTO clearly falls within the purview of the latter category. While the word "shall" means that cooperation is an obligation for the Fund, the words "within the terms of this Agreement" limit the scope and content of such cooperation. A decision of the Fund to cooperate with the WTO would have to be guided by the Fund's own purposes and be consistent with the provisions of the Fund's Articles.

2. Main legal issues in cooperation

The adoption of the Final Act of the Uruguay Round presents an opportunity to address certain legal issues related to cooperation. In particular, two jurisdictional issues warrant attention. First, the question of consistency in the exercise of the respective jurisdictions of the WTO and the Fund is raised by the availability under the Final Act, in certain circumstances, of countermeasures against an exchange measure taken consistently with the Fund's Articles. 2/ Second, both the Fund and the

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1/ MTN.GNG/NG14/W/35.

2/ See above Section I.A.2.

WTO will exercise surveillance over certain economic policies of their members and their respective responsibilities may need to be clarified.

a. Countermeasures against exchange measures consistent with the Fund's Articles

As noted earlier, if countermeasures were authorized by the WTO as a remedy against exchange measures consistent with the Fund's Articles, the application of Final Act provisions by the WTO would conflict with the exercise of membership rights under the Fund's Articles. A particular consequence in this context relates to the role of the Fund as a financial institution that supports economic reforms, as compared to the WTO, which will have no financing functions. Countermeasures imposed under the Final Act could increase the financial risks faced by the Fund by undermining the effectiveness of a Fund-supported program in achieving its objectives and possibly impair the relevant member's capacity to repay the Fund. To prevent that unsatisfactory outcome, the matter should be raised with the WTO at an appropriate time for the purpose of obtaining a clarification of the relevant Final Act provisions through an authoritative interpretation adopted by the WTO.

The importance of this task is underscored by the adoption under the Final Act of dispute settlement procedures that are likely to be more effective than those under GATT 1947 by virtue of the enforceability of resulting decisions. 1/ Under the various GATT 1947 dispute settlement procedures, a contracting party subject to challenge could effectively veto the formation of an expert panel or, even if it were to agree to the formation of a panel, it could prevent the panel's report from being adopted and made binding. In contrast, under the unified dispute settlement procedures contained in the Final Act, the formation of a panel or the adoption of its report can be prevented only by reverse consensus, i.e., rejection by all members. Such reverse consensus cannot be achieved if the complaining party requesting the panel or the winning party in the panel report refuses to join the rest of the membership. Unless jurisdictional conflicts between the WTO and the Fund are resolved, it is thus possible that dispute settlement decisions that are to be enforced by the WTO will conflict with a Fund member's rights under the Articles.

b. Surveillance over trade and capital movements

The Fund's Articles provide for surveillance by the Fund over the international monetary system whose essential purpose, according to Article IV, Section 1, is "to provide a framework that facilitates the exchange of goods, services, and capital among countries. . . ." Moreover, each member of the Fund must "endeavor to direct its economic and financial

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1/ For a description of the procedures under the "Understanding on Rules and Procedures Governing the Settlement of Disputes," see "The World Trade Organization--Institutional Aspects," op.cit., Section III.

policies toward the objective of fostering orderly economic growth with reasonable price stability" and "seek to promote stability by fostering orderly economic and financial conditions." 1/ Although the precise extent of the Fund's surveillance over economic and financial policies has not been defined by the Fund, its practice has been to examine members' policies with respect to international trade and capital movements, two areas which will also fall within the scope of the WTO's jurisdiction. Therefore, cooperation between the two organizations in these areas will have to be envisaged. 2/

With respect to trade, an additional consideration is that, reflecting the objective of achieving a more viable balance of payments position, Fund-supported programs have often included trade reforms, sometimes as prior actions or structural benchmarks. In the course of GATT/Fund relations, such Fund practices have not raised significant issues of policy consistency, largely because of the confluence of interests of both institutions toward trade liberalization.

With respect to capital movements, it is clear from the Fund's Articles that Fund members have retained the right to restrict international capital movements. 3/ The Fund may even require, as a condition for the use of its resources, that a member exercise capital controls to prevent the use of such resources to meet "a large or sustained outflow of capital." 4/

In contrast to the legal position of the Fund in respect of capital controls, the signatories to the Final Act have taken a step through the GATS towards liberalization of capital transactions. The GATS is the first agreement of universal (as opposed to regional) application that proscribes certain restrictions on capital transactions. Under the GATS, a WTO member commits not to impose restrictions on capital transactions associated with its voluntary "specific commitments"; 5/ thus, if that member is also a Fund member, it may be obliged to have a less restrictive regime on capital movements than is required under the Fund's Articles. There would be no conflict, however, since the Fund's Articles do not preclude a member from entering into such commitments; 6/ the Fund has decided that members are "free to adopt a policy of regulating capital movements for any reason, due regard being paid to the general purposes of the Fund" and "may, for that purpose, exercise such controls as are necessary, including making such

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1/ Article IV, Section 1, (i) and (ii).

2/ See generally "Comprehensive Trade Paper--Issues Paper," *op.cit.*, pp. 33-47.

3/ Article VI, Section 3.

4/ Article VI, Section 1.

5/ See B.2 above.

6/ A conflict would not even arise if the Fund required the imposition of capital controls as a condition for the use of its resources since Article XII (Restrictions to Safeguard the Balance of Payments) of the GATS would then authorize the imposition of such restrictions.

arrangements as may be reasonably needed with other countries, without approval by the Fund." 1/

Notwithstanding their limited, specific, and voluntary nature, commitments under the GATS provisions on capital flows show an evolution toward liberalization of capital movements that is not reflected in the Fund's Articles. Moreover, this evolution, which was previously limited to regional contexts (including the OECD), is now under the aegis of a worldwide organization, thus highlighting the need for the Fund to consider a possible amendment of its Articles in the same direction.

If such an amendment of the Fund's Articles were envisaged, two main issues, pertaining respectively to the regulatory and financial roles of the Fund, would have to be considered. The first issue would be whether the Fund's jurisdiction over capital movements should parallel its jurisdiction over payments and transfers for current international transactions, which only applies to outgoing payments and transfers and, therefore, does not extend to the receipt of such payments and transfers or the underlying commercial transactions. Under such a parallel approach, the Fund's Articles could be amended to prohibit exchange restrictions in the making of payments or transfers (outflows) in respect of capital transactions, but (unlike the GATS) would not prevent members from regulating receipt of such payments and transfers (inflows) and the underlying financial transactions (loans, investments, etc.). 2/

The second issue would be whether, in support of efforts towards liberalization of capital movements, and in parallel with the Fund's role in the financing of balance of payments need that may arise from the liberalization of current account restrictions, the Fund would be authorized to finance need that may arise from the liberalization of capital transactions even when the capital outflows are "large or sustained." This extension of the Fund's responsibilities would not necessarily mean an unlimited financing of capital outflows by the Fund. As in any use of Fund resources, financing would have to be consistent with the Fund's purposes and could be limited by a policy on access. For instance, under the Fund's conditionality, the adoption of adequate policies could be required to avoid capital flight, with the amount of access increasing with the strength of such policies. Other limitations may also be envisaged.

The staff is preparing a paper for Board discussion on capital account liberalization which will make specific proposals on this matter.

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1/ "Controls on Capital Transfers," Decision No. 541-(56/39), July 25, 1956, Selected Decisions, Nineteenth Issue, p. 283. Therefore, the prohibition of discriminatory currency arrangements in Article VIII, Section 3 does not apply to restrictions on capital transactions.

2/ Such a parallel approach could also involve a transitional provision analogous to Article XIV that would apply to restrictions on capital transactions in place at the time the amendment came into effect.

### 3. Legal aspects of cooperation modalities

The establishment of the modalities of cooperation between the WTO and the Fund involves a number of legal aspects relating in particular to institutional arrangements and the framework of cooperation. 1/ The latter would need to be constructed in stages.

#### a. Institutional arrangements

The potential for effective cooperation between the Fund and the WTO will be conditioned to a certain extent by their respective institutional features. In fact, the structure, funding, and operating procedures of the WTO and the Fund differ significantly, and the full implications of these differences for cooperation will become apparent over time. However, the relationship established between the GATT and the Fund has shown that, with due regard to the respective mandates and the differences between the institutions, mutual cooperation can evolve flexibly in response to emerging needs.

One constraint to effective cooperation arises, for instance, from the lack of symmetry in the WTO and the Fund with respect to counterpart organs. While the WTO Ministerial Conference broadly corresponds to the Fund's Board of Governors, the Director-General of the WTO to the Managing Director of the Fund, and the WTO Secretariat to the Fund staff, the WTO General Council is substantially different from the Fund's Executive Board, a restricted body of Fund officials that is in continuous session. In addition, there are no Fund counterparts for the Dispute Settlement Body, the Trade Policy Review Body, the three Councils (Council for Trade in Goods, Council for Trade Services, and Council for Trade-Related Aspects of Intellectual Property Rights), the Committee on Trade and Development, and the Committee on Balance of Payments Restrictions. Under the GATT 1947, contacts between the Fund and the Trade Policy Review Body, the Committee on Trade and Development, and the Committee on Balance of Payments Restrictions have been channelled through the Fund staff (in Geneva and at headquarters), with the involvement of the Executive Board, as appropriate. There will be a need, therefore, to review existing and prospective linkages, given the different structures of the two institutions, and to formulate suitable working arrangements for contacts and consultations at the appropriate levels.

The issue of observer status within the Fund and the WTO will also need to be reviewed after the WTO is established. On the part of the Fund, the Executive Board will need to decide at an appropriate time whether, on the basis of reciprocity, to grant the WTO the same or greater observer privileges than those enjoyed by the GATT. 2/ On the part of the WTO, the

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1/ See "Statement by the Staff Representative on Collaboration with the World Trade Organization," op.cit.

2/ At present, the GATT has observer status at the World Bank/Fund Annual Meetings and the meetings of the Interim and Development Committees.

General Council will decide on the observer status of international organizations. In the deliberations of the Subcommittee on Institutional, Procedural and Legal Matters of the WTO Preparatory Committee, some participants have opposed observer status for the Fund in the Dispute Settlement Body (DSB). 1/ The decisions proposed by DSB panel reports, if not rejected by the WTO membership, will be enforceable and therefore may affect members' rights under the Articles and/or the implementation of Fund-supported programs. Therefore, the Fund should continue to stress the importance of having observer status in the DSB. Moreover, given the shift in effective decision-making from a plenary body (now the DSB) to the panels, arrangements could be made to allow the Fund to act as "amicus curiae" in DSB panels on issues involving the Fund. 2/

Cooperation between the WTO and the Fund will also have to take account of the differences in the voting rules of the two organizations. The Fund follows weighted voting, whereas the WTO will adhere to one vote per member, with each institution requiring different majorities depending on the issue involved. Thus, it is possible that a proposal might be approved in one institution but not approved in the other (even if the same members support it), or that, even if a proposal is not rejected, it might take longer to be approved in one institution relative to the other.

b. Legal framework for cooperation

Given the legal bases for cooperation between the WTO and the Fund, it will be necessary to agree on a framework of cooperation. In this regard, the staff envisages a process involving three stages.

At the Implementation Conference held on December 8, it was decided that the Final Act will enter into force on January 1, 1995; thus, the WTO will come into existence on that date. In the first stage, an interim framework for WTO/Fund balance of payments consultation would be put in place, in order to avoid ad hoc staff requests for authority to act from the Executive Board. Such framework should: (a) carry over to the WTO context the authority for consultations between the GATT and the Fund on restrictions imposed in respect to trade in goods to safeguard the balance

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1/ In respect of the GATT, no outside institution has observer status in dispute settlement panels and the Fund has not requested it. The Fund has such status, however, in the Council of Representatives in which GATT panel reports are considered for adoption. Observer status for the Fund in WTO organs other than the Dispute Settlement Body does not appear to be controversial.

2/ Amicus curiae means "friend of the court." The Fund, though not a party to a dispute, may have a strong interest in or views on the subject matter of a dispute if it relates to matters within Fund jurisdiction or programs supported by the Fund. On this basis, it may wish to file a brief or make an oral statement to apprise the DSB panel of its interest and views.

of payments; and (b) extend this relationship to trade in services. On November 30, 1994, the Chairman of the GATT Committee on Balance of Payments Restrictions sent a letter to the staff proposing the continuation of Fund participation in balance of payments consultations on measures relating to trade in goods and its extension to consultations on measures relating to trade in services. The Managing Director informed the Board on December 15, 1994 of this proposal.

In the second stage, after the establishment of the WTO, the Fund staff would enter into further discussions with the WTO Secretariat with a view to expanding the framework of cooperation within a few months. 1/ This stage would address such issues as attendance of representatives at meetings of organs (including possible reciprocal observer status) and participation of Fund representatives in the activities of the Dispute Settlement Body, as well as additional modalities of consultations. This expansion of the framework will require an exchange of letters between the WTO and, with Board approval, the Fund. Also during this stage, the staff intends to initiate discussions on unresolved jurisdictional issues, in particular, the availability under the Final Act of countermeasures against exchange measures taken consistently with the Fund's Articles.

The third stage would deal with a number of fundamental issues, in particular the resolution of jurisdictional issues between the WTO and the Fund, and the objective of achieving "coherence in global economic policy-making." The resolution of these issues may proceed at different paces and may involve different executing instruments. 2/ This third stage would also deal with other issues related to cooperation that may arise in the course of the WTO's operations.

#### Conclusion and Issues for Discussion

The results of the Uruguay Round of trade negotiations under the auspices of GATT 1947 will bring about a number of important changes to the international trading system. A new international organization, the WTO, is coming into existence and will provide the institutional framework to facilitate the administration of agreements on a range of matters that substantially exceeds the scope of GATT 1947.

The relationship with the Fund provided for in GATT 1947 will continue with respect to the WTO. As GATT 1947 is incorporated into GATT 1994, the relevant provisions designed to preserve the rights and obligations under the Fund's Articles of common WTO/Fund members will apply to the WTO/Fund relationship. Provisions on consultations with the Fund concerning

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1/ This ongoing process was intensified with staff contacts during the Annual Meetings in Madrid. A staff statement dated October 13, 1994 (BUFF/94/93) was discussed by the Board on October 19, 1994.

2/ Some of these issues may have been resolved during the second stage.

restrictions imposed for balance of payments reasons will also apply. The Final Act also establishes a similar relationship with respect to the new agreement on trade in services.

The WTO/Fund relationship will have a new dimension flowing from additional provisions in the Final Act calling for enhanced cooperation between the institutions, with a view towards achieving greater coherence in global economic policymaking. The establishment of the WTO thus presents an opportunity for increasing the harmonization of trade, financial and development policies.

The WTO's establishment also will require consideration by the Fund of a number of important issues. In general, the central objective of the WTO in seeking cooperation with the Fund and the World Bank, namely, to achieve greater coherence in economic policymaking, 1/ is consistent with the Fund's own mandate under the Articles to cooperate with public international organizations with specialized responsibilities in related fields. Nonetheless, particular attention is warranted for some unresolved issues that are carried over from GATT 1947 and, with the reform of the dispute settlement mechanism, are more likely to raise the question of conflicting rights and obligations, as well as for new issues that may arise. Modalities of cooperation will also need to be established at a suitable time, and perhaps in stages.

### Consistency

One essential element of cooperation concerns the respective jurisdictions of the WTO and the Fund. The importance of consistent rights and obligations for common WTO/Fund members has come into sharper focus as the new procedures for dispute resolution within the WTO could increase efforts by WTO members to enforce Final Act provisions, even when enforcement would adversely affect members' rights under the Fund's Articles. 2/ The staff recommends that the Fund and WTO seek early understandings of such jurisdictional questions with a view to achieving consistency. This could be achieved by an authoritative interpretation of the relevant provisions of the Final Act by the WTO. An early resolution would avoid having to address these issues in the more contentious forum of dispute resolution.

The issue of jurisdictional consistency derives from different approaches to distinguishing between trade and exchange matters. 3/ The WTO is likely to continue the present approach to jurisdiction under GATT 1947, which reflects the view that all restrictive measures having a direct or indirect effect on trade are within the proper realm for review

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1/ See II.C.1. above.

2/ See II.C.2. above and "The World Trade Organization--Institutional Aspects," op.cit., Section III.

3/ See I.A.1. above.

under GATT 1947, whether or not these measures are regarded by the Fund as exchange measures. In contrast, the Fund, in identifying exchange measures, which are subject to its Articles, takes a technical approach to deciding whether a restriction is a trade or exchange measure by looking at the technique used to apply the measure. These different approaches to jurisdiction may raise conflicts between the two institutions, particularly concerning possible remedies under the relevant WTO agreements in response to exchange measures that are taken in accordance with the Fund's Articles.

The issue of remedies to counteract exchange measures taken in accordance with the Fund's Articles arises in different contexts. 1/ There appears to be no dispute that, under Article XV, paragraph 9(a) of GATT 1994, a measure that is consistent with the Fund's Articles cannot be found to violate the GATT 1994. In contrast, despite the Declaration on the Relationship of the World Trade Organization with the Fund, it is apparently the understanding in some GATT circles that Article XV, paragraph 9(a) of GATT 1994 would not protect a measure that is consistent with the Fund's Articles from a finding of violation under one of the other Multilateral Agreements on Trade in Goods. 2/

Another aspect of the same issue is the view by the GATT Secretariat that a measure consistent with the Fund's Articles, even if it does not violate any of the Multilateral Agreements on Trade in Goods (including GATT 1994), may be grounds for countermeasures under the provisions for "non-violation nullification or impairment." This view would effectively eliminate the protection afforded to Fund members (under Article XV, paragraph 9(a)), which has been the cornerstone of GATT/Fund relations. A similar view has been expressed with respect the permissible application of countervailing duties on imports benefitting from a subsidy that could result from a Fund-approved measure (e.g., surrender requirements deemed to be export subsidies under the Subsidies Agreement).

Such remedies could undermine rights of Fund members under the Fund's Articles and the implementation of Fund-supported programs. For example, when the exchange measures at issue are part of a Fund-supported program, countermeasures under the Final Act could impair a Fund member's capacity to achieve the objectives of its program and possibly its capacity to repay the Fund.

### Institutional Issues

The difference between the Fund's financing function and the absence of a WTO counterpart to this function must be taken into account in the outstanding issue of potential remedies authorized by the WTO, which, unlike

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1/ See I.A.2. above.

2/ It is only in the TRIMs Agreement that the application of Article XV, paragraph 9(a) is clear, due to the specific reference to exceptions under GATT 1994 in the TRIMs Agreement itself.

the Fund, assumes no financial risks in the exercise of its jurisdiction. This difference may also influence views of the respective institutions on the pace of reform of individual members or of global economic policy choices.

Certain additional institutional differences between the Fund and the WTO, such as differences in voting majorities and asymmetry in institutional structures, may influence cooperation between the institutions. For instance, there is no WTO equivalent to the Fund's Executive Board and there are no Fund equivalents to various WTO councils and bodies. The General Council of the WTO differs from the Executive Board of the Fund in that the former is a plenary organ and does not sit in permanent session.

The staff does not recommend at this time that the Fund consider the establishment of Fund counterparts to the WTO specialized councils or committees, in addition to the existing CGATT (whose terms of reference will need to be revised). Rather, as some Executive Directors have previously stated, new institutional structures in the Fund should be created only in response to a need that could not be satisfied by existing arrangements.

#### Financial Assistance

The implementation of trade liberalization obligations undertaken pursuant to the Final Act may adversely affect the balance of payments of Fund members. The Declaration on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries notes that, as a result of the Uruguay Round, certain developing countries may need to draw on the resources of international financial institutions. The Declaration does not request specific action on the part of the Fund at this time. It notes the statement by the Managing Director that the Fund already provides support for trade liberalization by members through existing facilities, including the special facilities.

#### Legal framework for cooperation

The staff recommends a three stage process for developing a legal framework for cooperation between the Fund and the WTO. As a first interim measure, arrangements could be made to assure continuity in the Fund's participation in balance of payments consultations for goods and its extension to services. In the second stage, anticipated for the early months of 1995, the WTO and the Fund could exchange letters similar to the 1948 letters regarding modalities of WTO/Fund cooperation, including attendance of representatives (possibly with observer status) at meetings of each other's organs. In the third stage, the WTO and the Fund would address fundamental questions of jurisdiction and coherence in economic policymaking, as well as other issues of cooperation that may arise in due course. The resolution of these issues at the third stage may proceed at different paces and may involve different executing instruments.

Future role of the Fund on capital movements

The inclusion of certain capital transfers within the jurisdiction of the WTO, the first such move by a universal (as opposed to regional) institution, highlights the need for the Fund to review its own position on the liberalization of capital movements. The GATS obligation on capital movements extends to particular capital transactions, which are associated with "specific commitments" intended to liberalize trade in services. This obligation is limited in two ways: it applies only with respect to "specific commitments" and it regulates the capital transaction as a means of assuring fulfillment of the underlying commitment to allow the provision of the service.

As the universal monetary institution, the Fund cannot be indifferent to these developments. If an amendment to the Articles were envisaged that would extend Fund jurisdiction to include capital transactions, whether or not in parallel with its jurisdiction over current transactions, consideration would need to be given to a number of related issues, including the extent and conditionality of financing in support of capital liberalization.

Balance of Payments Consultations

Article XV, paragraph 2 of GATT 1947 requires the CONTRACTING PARTIES to "consult fully" with the Fund when they are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements. Consultations are required in particular to determine whether restrictions can be justified by a contracting party's need to safeguard its balance of payments, and this has been the area in which the CONTRACTING PARTIES have most frequently consulted with the Fund.

According to the Final Act, the Fund's role in balance of payments consultations will continue under the WTO regime on trade in goods and will be extended to cover the balance of payments provisions in the General Agreement on Trade in Services (GATS). This Appendix reviews the provisions and the practice for balance of payments consultations under GATT 1947 and describes the analogous provisions in the Final Act concerning trade in both goods (GATT 1994) and services (GATS).

A. GATT 1947

Article XII and Article XVIII, Section B of GATT 1947 authorize contracting parties to impose restrictions to safeguard their balances of payments. <sup>1/</sup> Articles XIII and XIV address the discriminatory administration of quantitative restrictions applied for this purpose under specified circumstances. Based on the criteria applicable to these consultations with the Fund (1), procedures have been developed for conducting them, including delineating the specific role for the Fund (2).

1. Criteria

a. Basis for restrictions

Article XII of GATT 1947, which applies to developed countries, authorizes a contracting party to apply quantitative restrictions on imports to "safeguard its external financial position and its balance of payments. . . ." <sup>2/</sup> Paragraph 2(a) of Article XII defines the limits of such restrictions as follows:

Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or

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<sup>1/</sup> See generally Roessler, "Selective Balance-of-Payments Adjustment Measures Affecting Trade: The Roles of the GATT and the IMF," Journal of World Trade (Vol. 9, 1975), p. 622.

<sup>2/</sup> Article XII, paragraph 1.

(ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves. 1/

Article XVIII contains similar provisions authorizing "a contracting party the economy of which can only support low standards of living and is in the early stages of development" to "deviate temporarily" from the provisions of the GATT and apply measures "to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development." 2/ In contrast with Article XII, paragraph 2(a), however, Article XVIII, paragraph 9 replaces "imminent threat" with "threat" and "very low monetary reserves" with "inadequate monetary reserves." 3/

Any contracting party applying new restrictions or substantially intensifying existing measures is required to consult with the CONTRACTING PARTIES after (or, when practicable, before) instituting or intensifying such restrictions, as to the nature of the balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties. 4/ Additionally, measures must be progressively relaxed as conditions improve. 5/

In 1979, the CONTRACTING PARTIES adopted a Declaration on Trade Measures Taken for Balance of Payments Purposes (1979 BOP Declaration). This Declaration articulated three additional conditions for contracting

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1/ Article XII, paragraph 2(a).

2/ Article VIII, paragraph 4(a).

3/ The Working Party on Quantitative Restrictions, in the context of a 1954-55 Review of the GATT, "recognized that for such countries balance-of-payments difficulties will tend to be generated by development itself. In addition, paragraph 9, although modelled on paragraphs 1 and 2 of Article XII, recognizes that the reserve problem for these countries is one of the adequacy of the reserves in relation to their programme of economic development, that for this reason the word 'imminent' which occurs in paragraph 2(a) is inappropriate in this context, and that in order to safeguard their external position these countries may need over a period of time to control the general level of their imports in order to prevent that level from rising beyond the means available to pay for imports as the progress of development programmes creates new demands" (GATT Analytical Index, op. cit., pp. 465-466).

4/ Article XII, paragraph 4(c); Article XVIII, paragraph 12(a).

5/ Article XII, paragraph 2(b).

parties applying measures for balance of payments reasons. 1/ These conditions are as follows:

- "(a) In applying restrictive import measures contracting parties shall abide by the disciplines provided for in the GATT and give preference to the measure which has the least disruptive effect on trade;
- (b) The simultaneous application of more than one type of trade measure for this purpose should be avoided;
- (c) Whenever practicable, contracting parties shall publicly announce a time schedule for the removal of the measures." 2/

Additionally, a Note on consultation procedures by the BOP Committee stated that "[a]ccount should be taken of all factors, both internal and external, which affect the balance of payments position of the consulting country." 3/

b. Nondiscriminatory application of quantitative restrictions

Under GATT 1947, a contracting party imposing quantitative restrictions must apply such restrictions in a non-discriminatory manner. 4/ Article XIII, paragraph 1 states that "[n]o prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party. . . unless the importation of the like product of all third countries. . . is similarly

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1/ BISD, 26S/205 (1980). The 1979 BOP Declaration consolidates and draws on previous notes and reports of GATT Committees: BISD, 9S/18-20 (1961); 18S/48-53 (1972); and 20S/47-49 (1974). See also, Consultative Group of Eighteen, Report to the Council of Representatives (BISD, 24S/58-60 (1978)). One of the main factors prompting the adoption of the 1979 Declaration was the increasing use by contracting parties of tariff surcharges (Edwards, International Monetary Collaboration, (1985) pp. 432-436).

2/ BISD, 26S/205 (1980), paragraph 11. This Declaration also provides: in the course of full consultations with a less-developed contracting party the Committee shall, if the consulting contracting party so desires, give particular attention to the possibilities for alleviating and correcting the balance-of-payments problem through measures that contracting parties might take to facilitate an expansion of the export earnings of the consulting contracting party. . . " (Ibid., paragraph 12).

3/ BISD, 18S/49. This Note also included a "Plan of Discussion" containing guidelines on specific factors to be considered.

4/ The use of quantitative restrictions for reasons other than balance of payments purposes is governed by Article XI.

prohibited or restricted". 1/ In applying import restrictions to any product, contracting parties are required to aim "at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions. . . ." 2/ Detailed procedural requirements have been included to assure a non-discriminatory quota allotment. 3/

Exceptions to this rule are set forth in Article XIV. This Article authorizes the discriminatory application of trade restrictions having equivalent effect to exchange restrictions consistent with the Fund's Articles. Paragraph 1 of Article XIV provides:

"A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV." 4/

(1) With respect to the concept of actions having an "equivalent effect," the Report of a Working Party on Quantitative Restrictions that was prepared as part of the 1954-55 review of GATT 1947 stated:

"For practical reasons, the Working Party has not tried to define the phrase 'equivalent effect' in paragraphs 1 and 5 of Article XIV. It agreed, however, to record their view that a contracting party which is deviating from Article XIII will not be considered to be in breach of its obligations under this paragraph if the International Monetary Fund has stated that corresponding restrictions on payments and transfers would have been authorized under the Articles of Agreement of the Fund or approved by the Fund if the contracting party in question had chosen to proceed by way of exchange restrictions rather than trade restrictions. . . .

". . . it was pointed out that under . . . paragraph 1 of . . . Article XIV, a contracting party could deviate from the provisions of Article XIII only in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party might at that time apply under the Articles of Agreement of the International Monetary

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1/ This restriction has been called "a least-favored-nation principle" for quantitative restrictions. Roessler, op. cit., p. 258.

2/ Article XIII, paragraph 2.

3/ Roessler, op. cit., p. 258.

4/ Article III addresses nondiscriminatory administration of quantitative restrictions.

Fund; it was understood that such restrictions could be applied only on currency grounds. . . . " 1/

(ii) With respect to the reference to restrictions on payments and transfers for current international transactions "which that contracting party may at that time apply under Article VIII or XIV of the Fund's Articles," a special sub-group on GATT/Fund relations of the Working Party on "Quantitative Restrictions" noted as follows:

" . . . the Fund representatives explained that Fund members which did not avail themselves of the transitional arrangements of Article XIV of the Fund Articles of Agreement had to seek prior approval from the Fund, under paragraph 2(a) (or in respect of discriminatory currency arrangements or multiple currency practices, under paragraph 3) of Article VIII for the imposition of restrictions on the making of transfers and payments for current international transactions. Fund members which availed themselves of the transitional arrangements under Article XIV could, subject to annual consultations with the Fund, continue to maintain exchange restrictions and adapt them to changing circumstances so long as they were needed for balance of payments purposes. The Fund could, if it deemed such action necessary in exceptional circumstances, make representations to such members that conditions were favourable for the withdrawal of any particular restriction, or for the general abandonment of restrictions inconsistent with the provisions of any other Article of the Fund Agreement.

In relation to multiple exchange rates, the Fund representatives recalled that the Executive Director[s] of the Fund in December 1947, took certain decisions relating to such practices. . . . " 2/

Article XIV, paragraph 5(a) of GATT 1947 permits quantitative restrictions having equivalent effect to exchange restrictions authorized under Article VII, Section 3(b) of the Fund's Articles, where the Fund has formally declared a member's currency scarce under Article VII, Section 3(a). No formal declaration under Article VII, Section 3(a) has been made by the Fund, and therefore no exchange restrictions have been authorized under Article VII, Section 3(b).

The Report of the Working Party on Quantitative Restrictions notes that during the Review Session, various proposals were made to amend GATT 1947 in order to provide for joint action to restore equilibrium in the system of

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1/ BISD, 3S/170, paragraphs 28-29 (1955).

2/ BISD., 3S/196, paragraphs 4-5. A copy of the Fund Decision regarding multiple currency practices was annexed to the Sub-Group's Report (Decision No. 237-2, December 18, 1947, Selected Decisions, Nineteenth Issue, (1994) p. 337.

world trade and payments in the event that system became seriously unbalanced and to avoid the imposition of unnecessarily severe restrictions on international trade. It was noted that GATT 1947 and the Fund's Articles "enable consultation to take place on the measures that might appropriately be adopted to meet such situations. . . ." <sup>1/</sup> In particular,

"First, the Fund may, if it finds a general scarcity of a currency under Article VII, Section 1, approve discriminatory measures under Article VIII, Sections 2 and 3. Certain important countries which are members of the Fund and GATT have stated that if they supported a finding under Fund Article VII, Section 1, they would also support appropriate action under Article VIII.

Secondly, Fund Article VII, Section 3, provides that if it becomes evident that the demand for a member's currency seriously threatens the Fund's ability to supply that currency, the Fund shall formally declare such currency scarce and such a declaration authorizes certain discriminatory limitations on the freedom of exchange operations in that currency. Although this provision has not operated in the past because the Fund's ability to supply a currency has never been threatened, it is to be expected that when the resources of the Fund are being used to support the convertibility of currencies, any serious scarcity of a major currency would be reflected in the holdings of the Fund. These provisions of the Fund Agreement bear directly on the question of trade discrimination; for under Article XIV of the GATT, as at present drafted, a contracting party would be able to apply discriminatory quantitative restrictions having equivalent effect to exchange restrictions authorized by the Fund under Article VIII, Section 3, as well as under Article VII, Section 3(b)." <sup>2/</sup>

## 2. Procedures

A contracting party applying restrictions to safeguard its balance of payments must consult with the CONTRACTING PARTIES. <sup>3/</sup> The consultations are conducted by the Committee on Balance of Payments Restrictions (the BOP Committee), which then reports to the GATT Council (the primary decision-making body under GATT 1947). The 1979 Declaration governs procedural aspects such as notification requirements for the contracting party applying

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<sup>1/</sup> BISD., 3S/170, paragraph 17.

<sup>2/</sup> Ibid., see also GATT Analytical Index, op. cit., pp. 388-389.

<sup>3/</sup> Articles XII and XVIII identify four situations that trigger the requirement for consultations: (1) the imposition or intensification by a contracting party of a restriction; (2) periodic review of existing restrictions (annually in general, biennially for developing countries); (3) persistent and widespread application of such restrictions; and (4) upon the complaint of another contracting party. Originally, the consultation procedures that applied to new and intensified restrictions differed slightly from those that applied to existing restrictions, but since 1979 the procedures for all such restrictions have been unified.

the measure, the periodicity of consultations, and the content of documents to be prepared and submitted. In dealing with balance of payments questions, the CONTRACTING PARTIES are required to consult with the Fund.

As noted above, 1/ Article XV, paragraph 2 of the GATT imposes a basic obligation on the CONTRACTING PARTIES to "consult fully" with the Fund on "problems concerning monetary reserves, balances of payments or foreign exchange arrangements." In reaching their final decision as to whether the import restrictions applied by a contracting party for balance of payments reasons "exceed those necessary" to correct its reserves problem, the CONTRACTING PARTIES must accept the determination of the Fund as to what constitutes a "serious decline", a "very low level" or a "reasonable rate of increase" in such reserves, and related financial aspects covered in such consultations. The CONTRACTING PARTIES must also accept all findings of statistical and other facts by the Fund relating to foreign exchange, monetary reserves and balances of payments. 2/

Within the framework for consultations established by the 1948 exchange of letters between the Chairman of the CONTRACTING PARTIES and the Managing Director of the Fund, detailed procedures for consultation have been developed over the years. The Fund is invited to the consultation with the CONTRACTING PARTIES as soon as the program of consultations for the year is drawn up and noted by the GATT Council. 3/ The Fund representative at each consultation delivers a statement providing a determination as to whether the contracting party is experiencing balance of payments difficulties, whether the measures in question "exceed those necessary" to address such difficulties, and whether the contracting party is undertaking macroeconomic adjustment policies to address them, as well as other information such as financial aspects of the restrictions in question. The statement is based on the staff appraisal and summing up of the Fund's most recent Article IV consultation discussion 4/ (or request for use of Fund resources) and is approved by the Fund's Executive Board before it is delivered. 5/ In addition, the Fund representative presents findings on those matters in the consultation that fall within the Fund's competence or special knowledge. Over time it has become acceptable that the Fund

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1/ See I.B.1. of the main text.

2/ If import restrictions at issue were to be viewed as an exchange measure, then Article XV, paragraph 9(a) would be triggered and the CONTRACTING PARTIES would be obligated to accept the determination of the Fund as to whether the measure is consistent with the Fund's Articles.

3/ Balance of Payments Import Restrictions--Consultation Procedures. BISD, 18S/51, Annex 1 (1972).

4/ Indeed, the Committee on Balance of Payments Restrictions often schedules the consultations partly to synchronize with Fund consultations with member countries in order to benefit from the most recent background information.

5/ The proposed statement is circulated to the Executive Board for approval on a lapse-of-time basis. If an Executive Director raises a question about the statement, it is sent to the CGATT for discussion.

representative will make a statement regarding the existence of a balance of payments problem sufficiently severe to justify the measures applied, although the BOP Committee makes its own determination as to whether the measures are imposed consistently with GATT 1947.

The 1979 Declaration also codified a practice whereby "simplified consultation procedures" were applied for developing countries that maintain restrictions under these provisions, as compared to the "full consultation procedures" described in the preceding paragraph. Under the simplified procedures, the required consultations will be deemed to be completed if the BOP Committee determines that a detailed discussion of the external financial justification for the restrictions is not desirable, based on a written statement by the contracting party on the nature of the balance of payments difficulties, the system and methods of restriction, the effects of the restriction on the economies of other contracting parties, and prospects of liberalization. 1/ The BOP Committee arranges for the Fund to supply balance of payments statistics for each country consulting under these procedures. 2/

**B. GATT 1994 (trade in goods)**

The Final Act incorporates the above provisions of GATT 1947 into GATT 1994 and thus the fundamental aspects of balance of payments consultations under the new agreements on trade in goods will continue to apply as under GATT 1947. 3/ The "Uruguay Round Understanding on the Balance of Payments Provisions of GATT 1994" (1994 BOP Understanding) addresses certain additional matters of substance and procedure, which are described below.

**1. Criteria**

The 1994 BOP Understanding begins by recognizing the provisions of Article XII and Article XVIII, Section B of GATT 1994 and the 1979 BOP Declaration. The following discussion identifies the main aspects of the 1994 BOP Understanding.

Under the 1994 BOP Understanding, Members confirm and expand their commitment (as required by the 1979 BOP Declaration) to announce publicly, as soon as possible, time-schedules for the elimination of trade restrictions. The time-schedules may be modified as appropriate to take into account changes in the balance of payments situation. 4/

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1/ BISD, 26S/205, paragraph 6; BISD, 20S/49, paragraph 3.

2/ BISD, 20S/49, paragraph 3.

3/ The Multilateral Agreements on Trade in Goods must be individually consulted to determine if they incorporate the GATT 1994 provisions on restrictions to safeguard the balance of payments.

4/ Final Act, "Uruguay Round Understanding on the Balance of Payments Provision of GATT 1994" (hereinafter cited as 1994 BOP Understanding), paragraph 1. If a time-schedule is not publicly announced by a Member, it must justify the reasons therefor.

Members also confirm their commitment to give preference to measures having "the least disruptive effect on trade," that is, according to the Understanding, "price-based measures" rather than quantitative restrictions. 1/ Such "price-based measures" are understood to "include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods." 2/

The 1994 BOP Understanding also reiterates that import measures taken for balance of payments purposes may be applied only to control the general level of imports and may not exceed what is necessary to address the balance of balance of payments situation. Additionally, members are required to administer restrictions in a transparent manner and to justify adequately the criteria they have used in determining the products that are subject to the restriction and the level of allowable import quantities or values. 3/

## 2. Procedures

The BOP Committee established under the WTO Agreement is charged with carrying out consultations on measures relating to trade in both goods and services and shall report on its consultations to the General Council. 4/ Membership in the BOP Committee is open to all members that wish to serve on it. 5/ The BOP Committee must follow existing rules on "full consultation procedures" and "simplified consultation procedures," except as modified in the 1994 BOP Understanding. 6/

The 1994 BOP Understanding clarifies rules on periodicity of consultations. First, regarding all members applying new restrictions for balance of payments reasons or intensifying existing ones, it specifies that consultations should be held within four months of the adoption of such measures. 7/

Regarding "simplified consultation procedures", the 1994 BOP Understanding states that such procedures are justified in the case of least-developed and developing country members that are pursuing liberalization efforts in conformity with the timetable that they have presented to the BOP Committee, or when the trade policy review of a country is scheduled for the same calendar year as the date fixed for the consultations. It adds that, except in the case of least-developed

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1/ Ibid., paragraph 2.

2/ Ibid.

3/ Ibid., paragraph 4.

4/ WTO Agreement, Article IV, paragraph 7; 1994 BOP Understanding, paragraphs 5 and 13. The report to the General Council will vary depending on whether "full consultation procedures" or "simplified consultation procedures" are used (Ibid., paragraph 13).

5/ Ibid., 1994 BOP Understanding.

6/ Ibid., paragraph 5 and 8.

7/ Ibid., paragraph 6.

countries, no more than two successive consultations may be held under simplified procedures. 1/

Additional provisions deal with requirements relating to notification and documentation. 2/

C. GATS (trade in services)

Article XII of the General Agreement on Trade in Services (GATS) authorizes a member to adopt or maintain restrictions on trade in services to safeguard the balance of payments, in a manner similar to GATT 1994:

"In the event of serious balance of payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments." 3/

The criteria for applying measures under this provision are essentially the same as those applied for trade in goods. The BOP Committee established under the WTO Agreement will carry out consultations under this provision.

1. Criteria

While Article XII of the GATS is not identical to Article XII of GATT 1994, it essentially codifies the practice that has developed thereunder, as reflected by the 1979 BOP Declaration and the other understandings under GATT 1947.

Most of the conditions for the application of measures under this provision are the same as those under GATT 1994: the restrictions shall not discriminate among members, shall avoid unnecessary damage to the commercial, economic and financial interest of any other member, shall not exceed those necessary to deal with the balance of payments difficulties, and shall be temporary and phased out progressively, as appropriate. 4/

Article XII of the GATS includes an additional requirement that the measure "be consistent with the Articles of Agreement of the International

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1/ Ibid., paragraph 8.

2/ Ibid., paragraphs 9 through 12.

3/ GATS, Article XII, paragraph 1.

4/ Ibid., paragraph 2. The GATS does not contain a provision analogous to the authority in GATT 1994 to apply quantitative restrictions in a discriminatory manner in specified circumstances. It may be noted that the provision refers only to "specific commitments," and, therefore, does not appear to authorize an exception to the most favored nation requirement in Article II of the GATS. If the measures were to be subject to the Fund's Articles, the Fund's nondiscrimination requirement would also apply.

Monetary Fund." 1/ This provision reflects the rule in Article XI reserving rights and obligations under the Fund's Articles: exchange restrictions imposed to safeguard the balance of payments, e.g., restrictions on current payments and transfers, could be authorized under the GATS balance of payments provision only if the measure were consistent with the Fund's Articles, as determined by the Fund.

The specified content for consultations on restrictions to safeguard the balance of payments is also similar to that applicable under GATT 1994. The GATS provides that the following considerations shall be taken into account: the nature and extent of the balance of payments and external financial difficulties, the external economic and trading environment, and the availability of alternative corrective measures to the consulting country when its balance of payments situation is being assessed. 2/

## 2. Procedures

Procedures for consultations on restrictions to safeguard the balance of payments under the GATS will be the same as those under the provisions for trade in goods. The GATS explicitly refers to the procedures governing balance of payments consultations under GATT 1994 to be conducted by the BOP Committee. 3/

The role of the Fund in these consultations follows the rules on trade in goods:

"In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance 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." 4/

It may be noted that, by stating that "conclusions shall be based" on Fund assessments of the balance of payments and the external financial situation of the consulting member, this provision goes further than the language in GATT 1994, which requires only acceptance of the Fund's findings and determinations relating to levels of monetary reserves and the financial aspects of other matters covered in the consultation. 5/ While still

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1/ GATS, Article XII, paragraph 2(b).

2/ Ibid., paragraph 5(c).

3/ Ibid., paragraph 5(b), note 4. The preference for price-based measures in the Understanding, which may be viewed as a substantive rather than a procedural aspect, would not appear relevant to the GATS because restrictions in services are likely to be complex given their diverse modes of delivery. Additionally, price-based measures can be difficult to employ, as compared, for example, to limits on the members of service providers.

4/ Ibid., paragraph 5(e).

5/ GATT 1994, Article XV, paragraph 2.

reserving the final decision to the competent WTO body, the GATS thus reflects the contribution to balance of payments consultations that the Fund has made in practice under GATT 1947 by providing an assessment of the balance of payments situation of a member which is offered as the justification for the measures.

One issue that will need to be considered in practice is the extent to which a member experiencing balance of payments difficulties would be justified in confining restrictive measures to either the goods or services sector. Logically, measures that are expected to have a balance of payments impact are likely to be applied broadly to goods and services.