5. Special Exchange Agreements

Obligations Under Special Exchange Agreements

The discussion of Article XI, Section 1, and of premium gold transactions has dealt with two examples of the technique of acting through members in order to affect non-members and thus mitigate the possibly disturbing consequences of the fact that non-members are not bound by the obligations of the Articles. A similar result has been sought by a different technique, one by which obligations comparable to those of members are imposed on non-members under another multilateral international agreement as an alternative to the assumption of the obligations of membership in the Fund. This refers to the "special exchange agreement," which is prescribed under the General Agreement on Tariffs and Trade (GATT). The special exchange agreement is an unusually interesting legal phenomenon and many of its features are probably unique.

It was recognized at the Bretton Woods Conference that a rational system for the legal regulation of international economic relations would require the establishment of an organization with jurisdiction over trade practices to complement the Fund with its jurisdiction over exchange practices. Whether a particular practice must be classified as "trade" or "exchange" or both is a technical issue, and often a particular economic effect that is intended can be achieved by either a trade or an exchange measure or by a combination of the two. When the negotiation of a trade organization was undertaken, it was not contested that obligations in this field were not going to be effective if countries assuming these obligations could permit anarchy in their exchange systems. The obvious solution would have been to require that all countries must belong to both the Fund and the trade organization. It was decided that this was impracticable, partly because some governments found it inexpedient at that time to join the Fund, and partly because Article XV, Section 1, gives members of the Fund the right to withdraw from the Fund with immediate effect.[17]

[17] Article XV, Section 1: *"Right of members to withdraw.*—Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office. Withdrawal shall become effective on the date such notice is received."

This had been regarded at the Bretton Woods Conference as an essential safeguard for members, the importance of which is illustrated by the fact that any amendment of the Articles modifying the right to withdraw would require acceptance by all members.[18] It could have obstructed the exercise of this right if resort to it had involved withdrawal from the trade organization, but, even apart from that, it was dubious that there would be advantage to anyone in forcing such a result.

A trade organization as envisaged has not been created, but GATT has filled much of its role. The solutions of the problems outlined above are to be found in Article XV of GATT. Under paragraph 4 of that Article, contracting parties to GATT "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 the Fund. Paragraphs 6 and 7 of Article XV of GATT provide as follows:

> 6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.
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> 7. (*a*) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.
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> (*b*) The terms of any such agreement 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.[19]

[18] Article XVII (*b*)(i): "(*b*) Notwithstanding (*a*) above, acceptance by all members is required in the case of any amendment modifying

(i) the right to withdraw from the Fund (Article XV, Section 1); . . . ."

[19] Article XV of GATT established not only a general obligation of non-members of the Fund to enter into a special exchange agreement, but also a specific obligation to furnish such information "within the general scope" of Article VIII, Section 5, of the Fund's Articles as the CONTRACTING PARTIES "may require in order to carry out their functions" under GATT (paragraph 8). "Specific requests should be prepared in consultation with the Fund and transmitted to the contracting parties concerned by the Chairman. Copies of all information received should be transmitted promptly to the International Monetary Fund." See *General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents* (hereinafter referred to as *BISD*), Vol. II (May 1952), pp. 116-17.

The Fund collaborated closely with the CONTRACTING PARTIES in preparing a model special exchange agreement that would satisfy the provisions of GATT.[20] It was at one time thought that there would be a master text to which contracting parties that were not Fund members would adhere, with such modifications as might be necessary for each adherent. It was decided, however, that there should be a separate agreement with each such country, and the basic text was adopted by a Resolution of the CONTRACTING PARTIES on June 20, 1949.[21] The special exchange agreement is an elaborate document of 14 articles and 42 paragraphs, notwithstanding the view held by a few negotiators that it should consist of no more than a few general principles. From time to time, four special exchange agreements have been in existence, but none remains in operation now. The basic obligation under GATT of non-members of the Fund to sign an agreement still exists unless the CONTRACTING PARTIES take some action to dispense with an agreement. They have taken this action on four occasions. At the moment, therefore, the discussion of the special exchange agreement is as much one of legal history as of law.

The language of the model special exchange agreement follows the language of the Fund's Articles with fidelity. It may be said that the language has been adapted only where this was inevitable. Indeed, the language of the Articles has been followed even where the Fund had clarified it by interpretation, and modifications were not adopted to reflect these interpretations. The substance of the provisions was designed to bind the signatory country to as orderly an exchange regime as if the signatory had joined the Fund, although certain qualifications, which will be noted later, were necessary because, after all, the signatory was not joining the Fund. These qualifications must not obscure the fact that the substance of the special exchange agreement is remarkable in its scope, and can be said to embrace virtually the whole of the code of conduct prescribed by the Fund's Articles for Fund members.

[20] It was contemplated that a similar special exchange agreement would be used in connection with the proposed International Trade Organization, and the Fund's collaboration covered this project also.

[21] *BISD*, Vol. II, p. 115 *et seq.* The text is reproduced in Appendix I of this pamphlet.

The agreement begins with a general undertaking on the part of the signatory relating to exchange stability, the maintenance of orderly exchange arrangements with other contracting parties to GATT, the avoidance of competitive exchange alterations and the elimination of certain restrictions, all of which derives from Article I and Article IV, Section 4(*a*), of the Fund's Articles. The signatory is bound to establish a par value, in effect by agreement with the CONTRACTING PARTIES, and by a procedure comparable to the one prescribed by Article XX of the Fund's Articles for the establishment of an initial par value. The signatory undertakes obligations, similar to those of Article IV of the Fund's Articles, with respect to exchange transactions in its territories, gold transactions, and changes in par value. In these and other provisions, where the agreement, approval or concurrence of the Fund would have to be sought under the Fund's Articles, the CONTRACTING PARTIES are substituted for the Fund in the corresponding provisions of the special exchange agreement.

The signatory also undertakes, subject to other provisions in the agreement, to avoid restrictions on payments and transfers for current international transactions, discriminatory currency arrangements, and multiple currency practices, in language based upon Article VIII, Sections 2 and 3, of the Fund's Articles. There is a further undertaking with respect to the unenforceability of exchange contracts that are contrary to exchange control regulations maintained or imposed consistently with the Fund's Articles or a special exchange agreement. This is drawn from Article VIII, Section 2(*b*), of the Fund's Articles. Other provisions relate to the control of capital movements, scarce currencies, the convertibility of balances of the signatory's currency held by other contracting parties, a transitional period, and the furnishing of information. These provisions are inspired by Articles VI and VII; Article VIII, Section 4; Article XIV; and Article VIII, Section 5, of the Fund's Articles.

Among the miscellaneous provisions, one worth special mention in this brief summary is the provision which declares that the explanation of terms in Article XIX of the Fund's Articles shall apply where these terms appear in the special exchange agreement.

This gives expression to an intention that there should be uniform interpretation of the Fund's Articles and the special exchange agreement.

Some general aspects of the special exchange agreement should be noted. First, the agreement does not represent any formal exception to the rule that the obligations of a treaty are not binding on non-parties. The obligations of the Fund's Articles are not binding as such on contracting parties that are non-members. Obligations based on the Articles are made to apply to the signatory of a special exchange agreement by virtue of its acceptance of the obligations of GATT and its signature of a special exchange agreement with the CONTRACTING PARTIES in accordance with those obligations. It will be recalled that Article XV: 6 of GATT declares that a special exchange agreement becomes part of the signatory's obligations under GATT.[22] Nevertheless, the special exchange agreement is a striking example of a legal technique for the application of the substance of treaty provisions to non-parties.

Second, not only is the special exchange agreement entered into with the CONTRACTING PARTIES and not the Fund, but in addition, where the Fund's Articles are drafted in terms of other members of the Fund, the obligations of the special exchange agreement are drafted in terms of other contracting parties and not members of the Fund. For example, the obligation of a signatory to ensure that exchange transactions taking place within its territories are within the prescribed margins from parity relates to transactions involving the currencies of the signatory and other contracting parties. Under these provisions, the signatory has no duty with respect to exchange transactions involving its own currency and the currency of a Fund member that is not a contracting party. Again, the obligation of a signatory to convert balances of its currency is confined to balances held by other contracting parties.

Third, although a special exchange agreement is entered into

[22] One consequence of this is that Article XXIII of GATT, which deals with the remedies of nullification or impairment of benefits under GATT, can be applied to failures to observe the provisions of the special exchange agreement.

with the CONTRACTING PARTIES, which have the responsibility for decisions taken under the special exchange agreement, and although the obligations are defined in terms of other contracting parties where they are defined in terms of Fund members under the Fund's Articles, the Fund plays an important role in making findings and determinations. In particular, the Fund determines whether actions in exchange matters are in accordance with the terms of the special exchange agreement, and the CONTRACTING PARTIES accept these determinations. The Fund's role derives from Article XV: 2 of GATT:

> 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.

Moreover, provisions in the special exchange agreement are designed to enable the signatory to put itself in direct contact with the Fund in exchange matters:

> The CONTRACTING PARTIES shall seek an understanding with the Fund to the effect that,
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> (*a*) Whenever the CONTRACTING PARTIES consult the Fund on exchange matters particularly affecting the Government of ....., the latter will be offered an opportunity to present its case directly to the Fund, and
>
> (*b*) The Government of ..... may initiate direct consultation between itself and the Fund in appropriate cases, provided that it shall notify the Chairman of the CONTRACTING PARTIES upon such occasion that it avails itself of this right.[23]

Thus, the CONTRACTING PARTIES are required by subparagraph (*b*) to seek an understanding on procedures that would facilitate direct contact between the signatory and the Fund. One reason

[23] Special exchange agreement, Article XIII, paragraph 5, reproduced in Appendix I.

why this was thought necessary is the fact that the CONTRACTING PARTIES may not be in session when the signatory contemplates some action in exchange matters.[24] By arrangement between the CONTRACTING PARTIES and the Fund, a procedure has been established whereby a signatory can consult the Fund directly if, when the CONTRACTING PARTIES are not in session, the Chairman of the CONTRACTING PARTIES seeks a determination from the Fund on the compatibility of a proposed action with the signatory's special exchange agreement. Moreover, if the Fund determines that the action is consistent with the agreement, the signatory may act at once in accordance with that determination pending an opportunity for consideration by the CONTRACTING PARTIES in session. A procedure has also been established under subparagraph (*a*) for direct consultation by a contracting party with the Fund on exchange matters particularly affecting that country on which the CONTRACTING PARTIES have already initiated consultation with the Fund. Again, a contracting party can act in accordance with a determination made by the Fund in these consultations pending an opportunity for consideration of the matter by the CONTRACTING PARTIES in session.[25]

Fourth, the resources of the Fund are available to members in accordance with the Articles to enable them to perform their obligations under the Articles. The signatory of a special exchange agreement does not have access to the Fund's resources to help it observe the obligations of the special exchange agreement. In addition, this has necessitated changes in the character of some of the obligations in the special exchange agreement as compared with their prototypes in the Articles. For example, Article IV, Section 6, of the Fund's Articles safeguards a member's ultimate sovereignty in relation to the par value for its currency by providing that if the member changes the par value notwithstanding the objection of the Fund where the Fund is entitled to object, the stigma of violation of a treaty obligation will not be attached to this insistence. The Fund's interests are protected by providing that the member becomes ineligible to use the Fund's resources

[24] *BISD*, Vol. II, p. 128 *et seq.*
[25] *BISD*, Third Supplement (June 1955), p. 13.

unless the Fund otherwise determines. The special exchange agreement deals with the case in which the signatory changes the par value for its currency despite the objection of the CONTRACTING PARTIES where they are entitled to object, but the consequence cannot be any ineligibility to use resources. The only alternative was to provide that the signatory "shall be deemed to have failed in carrying out its obligations" under the special exchange agreement. This is different from the legal consequence under Article IV, Section 6, of the Articles, under which, as already explained, a member is not deemed to be violating its obligations to the Fund. Again, under Article VIII, Section 4, if a member of the Fund tenders the currency of another member to the issuer for conversion, the issuer must convert it with gold or the holder's currency, but this obligation does not apply if the issuer is for any reason not entitled to make purchases from the Fund. The theory is that this form of conversion is obligatory only so long as the issuer is entitled to use the Fund's resources for the purpose. This theory is not applicable to conversion by a signatory for the benefit of other contracting parties under the obligations of a special exchange agreement. Therefore, the substitute provision is that the obligation does not apply "with the approval of the CONTRACTING PARTIES, in any particular circumstance in which the fulfillment of the obligations" of conversion "would dangerously threaten exchange stability." It is not possible to measure the effect of this obligation against Article VIII, Section 4. It might lead to the signatory's duty to convert larger or smaller amounts of its currency than it would have been required to convert had it been bound by Article VIII, Section 4.

The necessity of adapting the obligations of the Fund's Articles to a special exchange agreement has produced modifications even where the use of the Fund's resources is not involved. For example, under Article VIII, Section 2(*b*), of the Fund's Articles the sanction of unenforceability is imposed where certain exchange contracts are contrary to the exchange control regulations of other members of the Fund. In effect, therefore, reciprocal treatment is accorded to each other by members of the Fund although this is not a condition for the application of the provision. Full rec-

iprocity does not follow from the corresponding provision of the special exchange agreement. Exchange contracts are to be unenforceable in the territory of the signatory if they are contrary to the exchange control regulations of the contracting party whose currency is involved and if those regulations are maintained or imposed consistently with the Fund's Articles or the provisions of a special exchange agreement. Nothing in the Fund's Articles or GATT, however, would give reciprocity to the signatory if a question involving its exchange control regulations arises in the territory of a member of the Fund. The only reciprocity that the signatory would enjoy as of right would be under the special exchange agreements of other signatories.

The variations in obligation that follow necessarily from the adaptation of the Fund's provisions to special exchange agreements probably explain the word "generally" in the rule of Article XV: 7(*b*) of GATT, which provides that the terms of a special exchange agreement "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."

Four countries entered into special exchange agreements, which terminated, in accordance with their provisions, when the countries became members of the Fund. The effective dates for these agreements were as follows: Ceylon, April 2, 1950 to August 29, 1950; Haiti, February 23, 1951 to September 8, 1953; Indonesia, February 25, 1951 to April 15, 1954; Federal Republic of Germany, July 24, 1952 to August 14, 1952. Certain other countries did not enter into a special exchange agreement because they joined the Fund before the period for signing an agreement expired.[26] The CONTRACTING PARTIES adopted a special resolution which exempted a contracting party from the need to sign an agreement where the only currency in use was that of another contracting party and where neither country maintained exchange restrictions.[27] It was also provided in the resolution that a con-

[26] For the period, see *BISD*, Vol. II, pp. 17-18 and 115-16.

[27] *BISD*, Vol. II, pp. 18-19. The question was considered whether Liberia fell under this resolution (*BISD*, Vol. II, p. 127).

tracting party taking advantage of this exemption was deemed to have agreed to consult with the CONTRACTING PARTIES at any time on their request on any exchange problem. Southern Rhodesia was a contracting party to GATT but was not a member of the Fund. However, it did not sign a special exchange agreement because the United Kingdom had accepted the Articles in respect of Southern Rhodesia under Article XX, Section 2(*g*).

Obligations in Absence of Special Exchange Agreements

In three cases, the CONTRACTING PARTIES exercised their authority under Article XXV: 5 of GATT to grant waivers of obligations imposed under GATT by exempting certain contracting parties from the obligation to sign a special exchange agreement.

One of these countries, New Zealand, became a contracting party to GATT on July 30, 1948 and joined the Fund on August 31, 1961. The waiver was granted by the CONTRACTING PARTIES on January 19, 1955 by a decision which noted that "owing to special circumstances" New Zealand had not joined the Fund or signed an agreement, that it had taken no exchange action which had frustrated the intent of GATT, and that it had given assurances that it would "continue to act in exchange matters in a manner fully consistent with the Fund's principles and in accordance with the intent of the General Agreement." The waiver was granted for so long as New Zealand satisfied the CONTRACTING PARTIES that its action in exchange matters satisfied this criterion, and New Zealand was required to report to and consult with the CONTRACTING PARTIES as prescribed in the decision.[28]

The other two cases involved contracting parties that had withdrawn from membership in the Fund. Czechoslovakia was required to withdraw from the Fund for failure to perform certain undertakings and withdrew with effect from December 31, 1954. Cuba withdrew on April 2, 1964. The decision of March 2, 1955 granting a waiver to Czechoslovakia noted that "owing to special

[28] *BISD*, Third Supplement, pp. 42-43. For amendment of the original decision, see *BISD*, Sixth Supplement (March 1958), pp. 32-34 and 38.

circumstances," entry into a special exchange agreement "would raise a number of legal and practical difficulties" and that Czechoslovakia had given assurances that "it will act in exchange matters in a manner fully consistent with the principles of the [standard] special exchange agreement . . . and in accordance with the intent of the General Agreement."[29] The decision of August 7, 1964 granting a waiver to Cuba was similar in this respect.[30] Both decisions limited the period of the waiver by reference to observance of the criterion in the recitals, and also prescribed the reporting of certain information and consultation with the CONTRACTING PARTIES.

In a fourth case, the CONTRACTING PARTIES permitted a non-member of the Fund, Switzerland, to dispense with the signing of a special exchange agreement by a technique which did not involve a waiver under Article XXV: 5 of GATT. The technique adopted to take care of a number of difficulties in this case was a "provisional accession" with reservations, one of which was to Article XV: 6 of GATT, which requires non-members of the Fund to enter into a special exchange agreement. The provisional accession would provide time for finding solutions of the problems responsible for the reservations and would thus prepare the way for permanent accession. An essential part of the procedure was a declaration of November 15, 1956 on Swiss monetary policy by the Swiss delegation at the Eleventh Session of the CONTRACTING PARTIES. The declaration dealt with the par value and convertibility of the Swiss franc and other related aspects of Swiss law and practice. It explained that membership in the Fund could result in sales of Swiss francs to members of the Fund that might prove incompatible with the maintenance of the stability of the currency. Although, for the reasons explained in the declaration, Switzerland did not wish to join the Fund or sign a special exchange agreement, Swiss monetary policy had always been guided by traditional policies of exchange stability and freedom for transfers. The declaration concluded, therefore, that the Swiss

[29] *BISD*, Third Supplement, pp. 43-44. For amendment of the original decision, see *BISD*, Sixth Supplement, pp. 28-29 and 38.
[30] *BISD*, Thirteenth Supplement (July 1965), pp. 23-24.

authorities observed the basic principles of sound monetary policy and the rules of the Fund. The CONTRACTING PARTIES could rest assured that, as in the past, the Swiss authorities would refrain from action that might frustrate the intent of GATT.[31]

The Declaration of the CONTRACTING PARTIES of November 22, 1958, which established the provisional accession of the Swiss Confederation, included the following passage:

> The Government of the Swiss Confederation reserves its position with respect to the provisions of paragraph 6 of Article XV of the General Agreement. The Swiss monetary policy is set forth in the declaration made by the Government of the Swiss Confederation at the meeting of the Eleventh Session of the CONTRACTING PARTIES on 17 November 1956, which is incorporated by reference into this Declaration. In this connexion the Swiss Confederation undertakes that it will act in exchange matters in accordance with the intent of the General Agreement and in particular undertakes not, by exchange action, to frustrate the intent of the provisions of the General Agreement. The Swiss Confederation agrees to consult with the CONTRACTING PARTIES at any time, subject to thirty days' notice, upon the request of any signatory to this Declaration which considers that the Swiss Confederation has taken exchange action which may have a significant effect on the application of the provisions of the General Agreement or is inconsistent with the principles and objectives of the Special Exchange Agreement annexed to the resolution of 20 June 1949.[32]

The Declaration came into force on January 1, 1960.[33]

In the result, no special exchange agreement is in operation now and none has been in operation since April 15, 1954. However, when the CONTRACTING PARTIES have released a country from the duty to enter into a special exchange agreement, they have done so on condition that the intent of GATT in exchange matters will not be frustrated. Legally, this condition binds the country to certain standards in the exchange field that would have been the principles of a special exchange agreement, and any alleged departure from these standards could be examined at the request of a contracting party. It has been seen that these principles are drawn from the Fund's Articles. Moreover, the basic role of the Fund under Article XV: 2 of GATT as the consultant of the CONTRACTING PARTIES and as the institution making cer-

[31] See *BISD*, Fifth Supplement (January 1957), pp. 40-46.
[32] *BISD*, Seventh Supplement (February 1959), pp. 19-20.
[33] *BISD*, Tenth Supplement (March 1962), p. 58. On April 1, 1966 the CONTRACTING PARTIES agreed to Switzerland's full accession to GATT (GATT/954, 2 April 1966).

tain findings and determinations is not affected by the absence of a special exchange agreement. The Fund's role under that provision remains essentially the same as it would have been if the country had entered into an agreement, although in some respects the Fund might have had additional functions if there had been an agreement.

International lawyers are familiar with the question whether the obligations of a treaty can or have become binding on all states, whether signatories or not, because the obligations have become transmuted into customary international law. The reasoning to support an affirmative answer to this question has been based on the law-making character of the treaty, the broad sweep of formal adherence to it, the *de facto* "reception" of its standards by states that have not formally adhered, and similar considerations. It is not intended to pursue this inquiry, either in principle or in relation to the Fund. However, the experience of the Fund shows that the obligations or the principles of a treaty, in the sense of the fundamental postulates that underlie the obligations, can be made to affect and even bind non-members without establishing the contention that the principles have become customary international law. This would seem to be the result of two independent lines of development: Article XI, Section 1, and even Article IV, Section 4(*a*), under which non-members can be affected through obligations laid on members, and the various actions of the CONTRACTING PARTIES as a result of which obligations in exchange matters have been imposed on non-members with their consent. This is not as exciting as a claim that certain principles of the Articles have become customary international law, but the experience of the Fund is remarkable enough to deserve this excursus.

6. Article XI, Section 2: Restrictions Against Non-Members

The discussion so far has dealt with the obligations of the Articles and the extent to which they have been brought to bear on non-members. In this and some of the succeeding sections of