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

this paper the subject will be the extent to which the benefits of the Articles have been accorded to or withheld from non-members.

Article XI, Section 2, is an explicit application of the principle that the benefits of a treaty are not extended to non-parties:

> *Restrictions on transactions with non-member countries.*—Nothing in this Agreement shall affect the right of any member to impose restrictions on exchange transactions with non-members or with persons in their territories unless the Fund finds that such restrictions prejudice the interests of members and are contrary to the purposes of the Fund.

The intention of this provision is to make it clear that non-members are not entitled to insist that the regime of a multilateral and non-discriminatory system of payments and transfers for current international transactions shall extend to them or to their residents.[34] The words "exchange transactions" are a little puzzling because elsewhere in the Articles (e.g., Article IV, Sections 3 and 4) they mean the exchange of one currency for another. In Article XI, Section 2, they must be given a wider meaning and must include payments and transfers as well. This follows from Article I (iv), which declares that one of the purposes of the Fund is to "assist in the establishment of a multilateral system of payments in respect of current transactions between members. . . ."

Article XI, Section 2, contains a caveat which limits the freedom of members which is recognized by the provision. It is true that freedom to take action against non-members is limited only if the restrictions against non-members or their residents are harmful to members and contrary to the purposes of the Fund. Nevertheless, if the Fund finds that these effects have been produced, non-members will get the benefits of the regime of multilateral payments that the Articles establish for the welfare of members.

By Rules and Regulations adopted on September 25, 1946 the Fund established certain procedures for giving effect to Article XI, Section 2. Under Rule M-3 a member is required to inform the Fund "promptly and in detail of any restrictions which it imposes

[34] It does not follow from the fact that members may impose restrictions on exchange transactions with non-members or persons in their territories that they may impose restrictions on payments and transfers for current international transactions in non-member currencies with members or persons in their territories.

on exchange transactions with non-members or with persons in their territories." This Rule is drafted on the assumption that a member can impose restrictions on exchange transactions with non-members without the necessity for that prior approval which is required where the restrictions are on payments and transfers for current international transactions with members or their residents. Under Rule M-4, a complaint procedure is established:

> Any member may notify the Fund of restrictions imposed by a member on exchange transactions with non-members or with persons in their territories which are deemed to prejudice the interests of members and to be contrary to the purposes of the Fund.

Rule M-5 provides that if the Fund makes a "finding" of the kind referred to, it shall present to the member imposing restrictions against non-members a report setting forth the Fund's views and may request the abolition or modification of the restrictions.[35]

A case that occurred in 1951 shows that the complaint procedure of Rule M-5 is not the only available procedure. In the case referred to, a member informed the Fund that it had entered into a payments agreement with a non-member. As is usual with such agreements, restrictions were imposed on payments and transfers between residents of the two parties. For this reason, the member regarded the case as covered by Article XI, Section 2. The member explained why in its special circumstances it felt the agreement to be necessary and expressed the view that the Fund would find that it did not prejudice the interests of other members or conflict with the purposes of the Fund. The Fund noted the agreement and decided to take no further action. The case is authority for the conclusion that a member imposing restrictions against a non-member may take the initiative in seeking the guidance of the Fund and need not await a possible complaint and its outcome.

The 1951 case is interesting for another reason. In the course of the Fund's consideration of it, the question was raised whether

[35] Rule M-5: "When the Fund finds that the restrictions imposed by a member on exchange transactions with non-members or with persons in their territories are prejudicial to the interests of members and contrary to the purposes of the Fund, it shall present to the member a report setting forth its views and may request the abolition or modification of the restrictions."

it would have been more appropriate to examine the case under Section 1 of Article XI instead of Section 2. The problems of classification may be even more complex. For example, if a payments agreement between a non-member and a member discriminates by means of some exchange technique against other members, should the agreement then be regarded as a "discriminatory currency arrangement" under Article VIII, Section 3; or as a practice falling under Article XI, Section 1; or if there are restrictions against the non-member, as an exercise of the member's authority under Article XI, Section 2? Or does the case fall under various provisions? There are differences among them. For example, under Article VIII, Section 3, the member must seek approval before entering into a discriminatory arrangement. Under Article XI, Section 2, there is no such requirement, although it will be seen that the Fund can establish it.[36] Under Article XI, Section 1, there is no express provision for approval. For the reasons already mentioned,[37] it has not yet been necessary to clarify these jurisdictional questions.

There is yet another jurisdictional aspect of the payments agreement between a member and a non-member. The member may feel that, in order to make it effective, certain restrictions on payments and transfers to other members are necessary. For example, if the non-member's currency is inconvertible and a clearing procedure is established between the parties with payments in the currencies of the parties, the member may feel that it cannot afford to permit its residents to pay convertible currencies to other members for goods originating in the non-member country. If the member wishes to impose restrictions of this kind, it must seek the prior approval of the Fund under Article VIII, Section 2, whatever may be the application of the various provisions of the Articles to the payments agreement itself.

[36] See the discussion of Rule M-6, pages 29-30.
[37] See page 9.