7. Restrictions Against Signatories of Special Exchange Agreements

The Fund has taken cognizance of the fact that the signatory of a special exchange agreement would not be free to impose discriminatory exchange restrictions against other contracting parties, without having the benefit of any provision in the special exchange agreement comparable to Article XI, Section 2, of the Fund's Articles. Therefore, a signatory would be unable to impose exchange restrictions against contracting parties that were members of the Fund, but the latter would be able to impose exchange restrictions against the signatory. Members would be able to do this under Article XI, Section 2, unless, of course, the Fund made the finding referred to in that provision. It is true that Article XV: 4 of GATT provides that contracting parties shall not, by exchange action, frustrate the intent of the provisions of GATT, but Article XV: 9(*a*) states that nothing in GATT precludes the use of exchange restrictions if they are in accordance with the Fund's Articles.

It was the view of the Fund that its purposes were advanced if non-members accepted certain fundamental rules of conduct in the field of exchange policies similar to the rules binding on members. GATT and special exchange agreements were designed to promote the acceptance of those rules by non-members. Accordingly, the Fund thought it desirable to make a finding under Article XI, Section 2, that the imposition of restrictions on exchange transactions with contracting parties that signed a special exchange agreement, or with their residents, was prejudicial to the interests of members and contrary to the purposes of the Fund. At the same time it was not intended to put a signatory in a better position than a member of the Fund. Therefore, it was provided that the finding would not preclude the imposition of exchange restrictions against a non-member if they would be authorized by the Fund's Articles had the non-member been a member. For example, the finding would not preclude the imposition of restrictions if the member was authorized to impose comparable restrictions against members under the transitional arrangements of

Article XIV, Section 2. Again, there was no reason why a member should be under an absolute prohibition if it could seek prior approval from the Fund for comparable restrictions against members, e.g., under Article VIII, Section 2. The Fund's various conclusions were set forth in Rule M-6 of the Rules and Regulations:

> M-6. The Fund deems that it would be prejudicial to the interests of members and contrary to the purposes of the Fund for a member to impose restrictions on exchange transactions with those non-members having entered into special exchange agreements under the General Agreement on Tariffs and Trade, or with persons in their territories, which the member would not in similar circumstances be authorized to impose on exchange transactions with other members or persons in their territories. Therefore, pursuant to Article XI, Section 2, members should not institute restrictions on exchange transactions with such non-members, or persons in their territories, unless the restrictions (a) if instituted on transactions with other members, or persons in their territories, would be authorized under the Fund Agreement, or (b) have been approved in advance by the Fund. Requests for prior approval shall be submitted in writing with a statement of reasons.

Certain features of this Rule are particularly interesting. First, the ruling relates to *any* member of the Fund imposing or seeking to impose restrictions on exchange transactions with non-members or their residents, and it is not confined by its language to members that are also contracting parties. It thus goes beyond the narrower concern of ensuring precise reciprocity among contracting parties that are members of the Fund or have signed special exchange arrangements. Second, the effect of Rule M-6 is, of course, to restrict the freedom of members of the Fund in relation to non-members and thus make available to non-members benefits that, but for this action, are enjoyed only by members of the Fund. Third, it has already been noted that a member may seek the Fund's view under Article XI, Section 2, of the effect on members of restrictions against non-members. Rule M-6 makes it clear that members may be required to seek the Fund's view before imposing restrictions against non-members or their residents. Fourth, the Fund may make a finding under Article XI, Section 2, without awaiting an approach by a member either for guidance on its own restrictions or with a complaint against those of another member.

Rules M-6 does not apply to those cases in which the CONTRACTING PARTIES grant a waiver to, or permit the provisional accession of, a non-member of the Fund exempting it from the obligation to sign a special exchange agreement on assurances that the non-member will observe the principles of the special exchange agreement and the intent of GATT. Nor has the Fund taken any decision similar to Rule M-6 for these cases. This is the position even though these non-members are not free to act as they see fit in exchange matters. It has been seen that the actions of the CONTRACTING PARTIES have been taken on condition that the non-members observe the principles of the Fund's Articles, GATT, or the standard special exchange agreement.

8. Recognition of Exchange Controls of Non-Members

The question whether non-members can derive a benefit from the Articles has arisen in the courts in connection with Article VIII, Section 2(*b*). According to that provision:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. . . .

In *Stephen v. Zivnostenska Banka National Corporation,*[38] the plaintiffs sought to have the defendant's assets placed under permanent receivership on the ground that the plaintiffs were the creditors of a foreign nationalized institution. The case had been remitted to a referee for examination and report. The New York Supreme Court decided to confirm the referee's report except on two issues, on one of which it said:

> Regarding the second exception, that relating to the plaintiffs' standing as creditors, as influenced by the International Monetary Fund Agreement, the referee noted the membership of Czechoslovakia in the International Monetary Fund, and considered particularly . . . Article VIII, section 2(b). . . . He therefore concluded that the plaintiffs could not obtain relief in this court. . . .
>
> However, he did state, and with mindful foresight, that this phase could be reopened if Czechoslovakia ever withdrew, voluntarily or otherwise, from the fund organization. Such circumstances actually occurred on January 5, 1955, when the International Monetary Fund issued a release that Czechoslovakia was no longer a member. . . .
>
> No valid reason currently exists to frustrate our public policy, as

[38] 140 N.Y.S. (2d) 323 (1955).