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No. 7

# THE FUND AND NON-MEMBER STATES
## Some Legal Effects

Joseph Gold

International Monetary Fund
Washington, D. C.
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* Also reproduced in Appendix II.



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## PREFATORY NOTE

The opinions expressed in this paper are those of the author, who is the General Counsel of the International Monetary Fund, and not necessarily those of the Fund.



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# The Fund and Non-Member States: Some Legal Effects

## Introduction

THE RELATIONSHIP of an international organization to non-members raises a number of issues, not only in connection with the growing law of international organizations but also in connection with the older law of treaties. One of the leading issues is the legal effect of a treaty on states that are not parties to it ("third" states, "strangers"). Writing in 1960 as the Special Rapporteur of the International Law Commission, Sir Gerald Fitzmaurice, now Judge Fitzmaurice of the International Court of Justice, noted that the literature on this "amorphous and rather protean topic" was sparse and that both theory and doctrine were unsatisfactory.[1]

Sir Gerald felt that there was "only one absolutely firm and unequivocal principle," the one sometimes summed up in the Latin maxim *pacta tertiis nec nocent nec prosunt.*[2] He elaborated this, in Article 3(1) of his Report, as follows:

> . . . a State cannot in respect of a treaty to which it is not a party—
> (a) Incur obligations or enjoy rights under the treaty;
> (b) Incur any liability, or suffer any disability or detriment, or any diminution or deprivation of right, or be entitled to claim as of right any faculty, interest, benefit or advantage under the treaty.

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[1] Sir Gerald Fitzmaurice, *Fifth Report on the Law of Treaties (Treaties and Third States),* International Law Commission, Twelfth Session, A/CN.4/130, 21 March 1960, Introduction, pars. 2, 5.

[2] *Ibid.,* par. 3.



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Some jurists might question the absolute character of this formulation, in relation to both rights and duties.[3] According to Judge Fitzmaurice, however, even if there are no true exceptions to the rule, the qualifications of it constitute "a considerable gloss" on it, and to stop simply at the rule

> would be to give a very misleading picture of the position of third States in relation to treaties to which they are not parties. In short, there are a number of ways in which treaties do have legal effects on, for, or relative to, third States, even if directly obliging or entitling the third State under the treaty is not amongst them, and even if the latter remains in principle one of the effects that a treaty cannot have for a third State.

However, it is unlikely that any unifying legal principle runs throughout these qualifications.

It is the purpose of this paper to gather together the legal provisions and practices of the International Monetary Fund that involve non-member states. The relations of the Fund with non-members and the effects of the Fund's Articles on them will be considered mainly in order to see to what extent Fund experience has put a gloss on the legal principle already referred to, but other principles will be mentioned where they have been involved in the practice of the Fund.

In the first two sections of this paper, certain preliminary topics are considered in order to clear the way: categories of non-members, subordinate territories for which members are responsible, and ex-members. Sections 3 to 5 discuss three ways in which non-members are affected either because members are limited in their freedom of action in dealing with non-members or because non-members have consented to certain obligations or standards that parallel those of the Articles. In section 6, the topic is the withholding of certain benefits from non-members, but section 7 deals with the extension of these same benefits to some non-members. In section 8, the topic is once again the withholding of benefits, but different benefits in this case. In the final two sections (9 and 10), there is some treatment of the consequences for non-members that flow from certain agreements they have

[3] See the authorities cited by Finn Seyersted, "International Personality of Intergovernmental Organizations," *Indian Journal of International Law*, Vol. IV (1964), p. 236, fn. 254, and Fitzmaurice, *op. cit.*, par. 82 *et seq.*



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made with the Fund or from the objective personality of the Fund in action.

## 1. Non-Members

The Fund can decide whether or not to admit countries to membership. In considering applications, the Fund's practice is to satisfy itself that the country is a state that conducts all of its international relations and that the obligations of the Articles will be performed. Membership in the Fund had grown to 103 states by the beginning of 1966. Among the non-members are the U.S.S.R. and countries of Eastern Europe, Switzerland, and certain small territories such as Liechtenstein, but this list is not complete. The Eastern European countries include two that are former members of the Fund: Czechoslovakia and Poland. Cuba and Indonesia are also ex-members.

Certain territories have a status that precludes membership in the Fund so long as that status remains unchanged. Under Article XX, Section 2(*g*):

> By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority and all territories in respect of which they exercise a mandate.

This means that a member state is responsible to the Fund for the observance of the obligations of the Articles in all of the territories listed. Nevertheless, these territories are not themselves members of the Fund and are not capable of becoming members while they remain in any of the categories mentioned in the provision. Conceivably, there could be practical difficulties if a territory had autonomy in the conduct of its domestic affairs and the obligations of the Articles were not being observed in the territory, but this would not change the legal position. The difficulties would normally be eliminated by tripartite consultation among the Fund, the member, and the territory for which it was responsible.

## 2. Ex-Members

A purpose of this paper is to see whether there are legal effects on non-members even though they have not accepted the Articles. However, there are some obligations that can be owed by the



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Fund to a non-member or by a non-member to the Fund because of the former acceptance of membership in the Fund by the non-member. These are obligations related to the settlement of accounts between a former member and the Fund.

It may be useful to explain these obligations of the Fund and the ex-member a little further because they are not all purely pecuniary and because there may even be obligations on other members of the Fund. On a withdrawal, whether compulsory or voluntary on the ex-member's part, a settlement of all accounts between it and the Fund must be made by agreement with reasonable despatch.[4] If agreement is not reached promptly, the provisions of Schedule D apply, and these constitute a comprehensive code of settlement. It follows that the settlement between the Fund and the ex-member may establish obligations that will endure for some time whether that settlement is made by agreement or is the settlement of Schedule D. For example, under Schedule D, the settlement may show that the Fund or the ex-member is a debtor to the other party, and in that event the balance must be paid in a certain form and in prescribed installments. Provision is also made for the case in which the obligor fails to pay an installment by the due date. Any member that wishes to obtain the currency of an ex-member must purchase it from the Fund to the extent that the member has access to the resources of the Fund and the currency of the ex-member is available.[5] With respect to the ex-member's currency disposed of by the Fund under Schedule D, the ex-member guarantees unrestricted use at all times for the purchase of goods or for payments due to the ex-member or persons within its territories. In

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[4] Article XV, Section 3: "*Settlement of accounts with members withdrawing.*—When a member withdraws from the Fund, normal transactions of the Fund in its currency shall cease and settlement of all accounts between it and the Fund shall be made with reasonable despatch by agreement between it and the Fund. If agreement is not reached promptly, the provisions of Schedule D shall apply to the settlement of accounts."

See also General Arrangements to Borrow, Paragraph 17, in *Selected Decisions of the Executive Directors and Selected Documents* (3rd issue, 1965, hereinafter referred to as *Selected Decisions*), p. 64.

[5] Schedule D, paragraph 5: "Any member desiring to obtain the currency of a member which has withdrawn shall acquire it by purchase from the Fund, to the extent that such member has access to the resources of the Fund and that such currency is available under 4 above."



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addition, the ex-member is obliged to compensate the Fund for any loss resulting from the difference between the rate at which the Fund held the currency at the date of withdrawal and the rate realized on disposal of it.[6]

## 3. General Undertakings of Members Regarding Relations with Non-Members

One of the most striking efforts in the Articles to affect non-members is Article XI. This provision does not attempt to impose obligations on non-members, but its purpose is to impose obligations on members in their relations with non-members. Clearly, the broader the scope of these obligations, the narrower will be the freedom of action that non-members will find that they have in their relations with members. Article XI, Section 1, provides as follows:

> *Undertakings regarding relations with non-member countries.*—Each member undertakes:
> (i) Not to engage in, nor to permit any of its fiscal agencies referred to in Article V, Section 1, to engage in, any transactions with a non-member or with persons in a non-member's territories which would be contrary to the provisions of this Agreement or the purposes of the Fund;
> (ii) Not to cooperate with a non-member or with persons in a non-member's territories in practices which would be contrary to the provisions of this Agreement or the purposes of the Fund; and
> (iii) To cooperate with the Fund with a view to the application in its territories of appropriate measures to prevent transactions with non-members or with persons in their territories which would be contrary to the provisions of this Agreement or the purposes of the Fund.

A number of difficulties arise in arriving at an understanding of this provision. For example, is Article XI the only provision establishing the obligations of members in relation to non-members? On the one hand, if it is a comprehensive provision, it is not easy to see how certain transactions with non-members or practices involving them could be contrary to other provisions

[6] Schedule D, paragraph 6: "The withdrawing member guarantees the unrestricted use at all times of the currency disposed of under 4 and 5 above for the purchase of goods or for payment of sums due to it or to persons within its territories. It shall compensate the Fund for any loss resulting from the difference between the par value of its currency on the date of withdrawal and the value realized by the Fund on disposal under 4 and 5 above."



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of the Articles. On the other hand, if it is not a comprehensive provision, but there are other provisions that regulate the relations of members with non-members, it is not immediately apparent why Article XI was necessary. It is possible that the answer is that some, but not all, provisions apply to the relations of members with non-members, and that for this reason the obligations of members were broadened by requiring them in Article XI, Section 1, to refrain from certain actions that would be contrary to the purposes of the Fund. For example, Article IV, Section 2,[7] obliges members to refrain from buying gold at a price above par value plus the margin prescribed by the Fund,[8] and no reference is made to the seller, so that a member may not buy gold at a premium price even from a non-member. This is an example of a provision which could be transgressed by a transaction between a member and a non-member. By contrast, exchange transactions involving a member's and a non-member's currencies could not be in violation of the margin provisions for exchange transactions in Article IV, Sections 3 and 4(*b*),[9] because the obliga-

[7] "*Gold purchases based on par values.*—The Fund shall prescribe a margin above and below par value for transactions in gold by members, and no member shall buy gold at a price above par value plus the prescribed margin, or sell gold at a price below par value minus the prescribed margin."

[8] Rule F-4 of the Rules and Regulations establishes the margin: "For transactions in gold by a member the margin above and below par value shall be, at the option of the member, either:

1. One quarter of one per cent plus the following charges:
   (a) The actual or computed cost of converting the gold transferred into good delivery bars at the normal center for dealing in gold of either the buying member or the member whose currency is exchanged for the gold;
   (b) The actual or computed cost of transporting the gold transferred to the normal center for dealing in gold of either the buying member or the member whose currency is exchanged for the gold;
   (c) Any charges made by the custodian of the gold transferred for effecting the transfer; or
2. One per cent, which one per cent shall be taken to include all of the charges set forth in 1 above."

[9] Article IV, Section 3: "*Foreign exchange dealings based on parity.*— The maximum and the minimum rates for exchange transactions between the currencies of members taking place within their territories shall not differ from parity

(i) in the case of spot exchange transactions, by more than one percent; and
(ii) in the case of other exchange transactions, by a margin which



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tions to observe these margins apply only to transactions involving the currencies of two members. However, it might be demonstrable that the purposes of the Fund would be undermined by exchange transactions involving a member's and a non-member's currencies if the rate or rates of exchange in those transactions were out of line with the rates in transactions involving the non-member currency and the currencies of other members. The transactions of the member in question would be in disregard of the purposes of the Fund which seek to promote exchange stability and avoid competitive exchange depreciation.[10] It is arguable, however, that this is not a perfect example of the application of Article XI, Section 1, on the basis of inconsistency with the "purposes" of the Fund as distinguished from its "provisions." Presumably, if an action were inconsistent with the central purposes of exchange stability and the avoidance of competitive exchange depreciation in Article I (iii), it would also be inconsistent with the provision which formulates the Fund's purpose as a corresponding obligation of members. Under Article IV, Section 4(*a*),[11] members undertake to collaborate with the Fund to promote exchange stability and to avoid competitive exchange alterations.[12]

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exceeds the margin for spot exchange transactions by more than the Fund considers reasonable."

Article IV, Section 4(*b*): "Each member undertakes, through appropriate measures consistent with this Agreement, to permit within its territories exchange transactions between its currency and the currencies of other members only within the limits prescribed under Section 3 of this Article. A member whose monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed by the Fund under Section 2 of this Article shall be deemed to be fulfilling this undertaking."

[10] Article I (iii): "To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation."

[11] Article IV, Section 4(*a*): "Each member undertakes to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations."

[12] The text has not been encumbered with mention of a third purpose of the Fund in Article I (iii), i.e., to maintain orderly exchange arrangements "among members" and the corresponding undertaking of members in Article IV, Section 4(*a*). The words "among members" do not limit the scope of the other purposes. Nor are they as restrictive as they may sound at first impression. Exchange practices between a member and a non-member might well lead to disorderly exchange arrangements among members.



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Whatever the difficulties of understanding Article XI, Section 1, it is clear from its structure and scope that it was intended to have a broad sweep in regulating the relations of members with non-members. This is apparent from the use of such general terminology as "transactions" and "practices" and is confirmed by the hearings on the U.S. Bretton Woods legislation before the Committee on Banking and Currency of the U.S. Senate. Senator Taft, in discussing Article XI, asked:

> If there is some nation that is not in the fund why shouldn't we [i.e., the United States] make any arrangements we think we want to make [i.e., with that nation]?

Mr. White explained:

> We didn't know what the nonmember countries would be, and it might be possible for member countries to make arrangements with nonmember countries which would have the effect of putting other member countries at a disadvantage. It was deemed desirable to have a broad clause in there which would protect the member countries from any undertaking or arrangement by a member country with nonmember countries. If that paragraph were not in there, if that protective clause were not there, there would be no protection that member countries would have against the dealings of a member country with nonmember countries; and since we don't know how many nonmember countries there may be, if any, it was deemed desirable in general to have that protective clause.

Senator Taft asked for an example of an arrangement that would be caught by the provision, and Mr. E. M. Bernstein then spoke as follows:

> The purpose of that first provision, as Mr. White indicates, is to prevent a country violating the purposes of the agreement by going into a non-member country to do it. For example, members are supposed to keep their currencies stable. Suppose the exchange authorities of a country went to Switzerland and there sold its currency at way below the levels that have been established under the fund. That would have the effect of undermining the stability of the currency which the agreement is intended to facilitate. So this provision is designed to prevent the authorities of a country from going into a nonmember country and doing there what presumably the fund does not permit.

In answer to a further question, Mr. Bernstein said that if England sold sterling at a discount in Switzerland, it "would give Switzerland sterling at a low rate which would give an advantage to the British exporter to Switzerland." Mr. White added that "the provision is a sort of a catch-all protective clause rather than aimed at any particular business transaction." Senator Taft responded: "It is suggested to me that you are setting up this fund



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board as kind of a regulator of the world, people who are nonmembers as well as members, or of members dealing with nonmembers." Mr. White replied. "Well, the intent was rather the latter, so that there would not be a loophole in the arrangements contemplated in the fund such as would be created by business dealings of nonmember countries over which the fund would have no control." He went on to say that if certain countries remained outside the Fund, they might constitute serious competitors; "they might resort to all kinds of devices in a few years, and if they did that there would be no way in which the fund could have control over them, and this clause provides that. It would mean that they could do business with member countries only on the basis of the principles that apply to all member countries."[13]

There has been little or no resort by the Fund to Article XI, Section 1, in its practice so far.[14] In part, this is because of the growth in the membership of the Fund. Again, although bilateral payments agreements between members and non-members could fall within the purview of Article XI, the Fund has so far been more preoccupied with the elimination of payments agreements between members. Nevertheless, this must not be understood to indicate a lack of concern with agreements between members and non-members.[15]

[13] All the quotations are from *Hearings Before the Committee on Banking and Currency of the U.S. Senate on H.R. 3314* (79th Cong., 1st Sess.), 1945, pp. 217-18.

[14] The Fund has adopted the following Rules and Regulations:

"M-1. The Fund may request the cooperation of any member with a view to the application of appropriate measures to prevent transactions with non-members or with persons in their territories, contrary to the provisions of the Agreement or the purposes of the Fund.

"M-2. When the Fund finds that a member or any of its fiscal agencies referred to in Article V, Section 1, engages in any transaction with or cooperates in practices with a non-member or with persons in a nonmember's territory, contrary to the provisions of the Agreement or the purposes of the Fund, it shall present to the member a report setting forth its views and may request the cessation or modification of the transactions or practices."

[15] See, e.g., *Selected Decisions,* pp. 80-81, and in particular the following paragraph in the Fund's Decision on Discrimination for Balance of Payments Reasons: "Notwithstanding the extensive moves toward convertibility, a substantial portion of the current receipts of some countries is still subject to limitations on convertibility, particularly in payments relations with state-trading countries. In the case of these countries the Fund will be prepared to consider whether balance of payments considerations would justify the



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## 4. Premium Gold Transactions Involving Non-Members

At a time when the growth in premium gold transactions engaged the close attention of the Fund, an effort was made to affect the actions of non-members in connection with these transactions. Under Article IV, Section 2, members must refrain from buying gold at a premium (a price above the par value plus the prescribed margin) or selling it at a discount (a price below the par value minus the margin). The provision does not explicitly prohibit sales by members at a premium or purchases at a discount, and it does not deal with purchases or sales by private parties or non-members. However, as already noted, under Article I (iii), it is a purpose of the Fund to promote exchange stability, maintain orderly exchange arrangements among members, and avoid competitive exchange depreciation; and under Article IV, Section 4(*a*), members undertake to collaborate with the Fund to promote exchange stability, maintain orderly exchange arrangements with other members, and avoid competitive exchange alterations. On June 18, 1947, the Fund communicated to members a policy statement[16] in which it deprecated international sales of gold at a premium and recommended that all members take effective action to prevent these transactions with "other countries or with the nationals of other countries." The statement went on to say that:

> It is realized that some of these transactions are being conducted by or through non-member countries or their nationals. The Fund recommends that members make any representations which, in their judgment, are warranted by the circumstances to the governments of non-member countries to join with them in eliminating this source of exchange instability.

Some transactions at premium prices violate Article IV, Section 2, i.e., those involving purchases by the monetary authorities of member countries. The basis for the broader scope of the Fund's statement was the Fund's finding that exchange stability

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maintenance of some degree of discrimination, although not as between countries having externally convertible currencies. In this connection the Fund wishes to reaffirm its basic policy on bilaterialism as stated in its decision of June 22, 1955."

[16] *Annual Report* (1947), Appendix XII, pp. 78-79.



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might be undermined by continued and increasing external purchases and sales of gold which directly or indirectly produced exchange transactions at depreciated rates. The Fund felt that if this practice was not discouraged, it could fundamentally disturb exchange relationships among members.

It is useful to emphasize certain features of the statement. First, the Fund's recommendation to members was intended to include the recommendation that they prevent premium transactions with non-members or their nationals. Second, the Fund also recommended that members seek to collaborate with non-members in the elimination of these transactions. It was recognized that the effectiveness of a recommendation by the Fund on premium gold transactions could be weakened by the actions of non-members, and therefore it was considered important to include a call on members to conduct themselves in relation to non-members in accordance with the statement. Third, these recommendations were made under the general terms of Article I (iii) and Article IV, Section 4(*a*), on a finding that premium transactions could fundamentally disturb exchange relationships among members by establishing cross rates for member currencies in non-member countries significantly different from the pattern of rates established under the Articles. Notwithstanding this finding, the statement made no overt mention of Article XI, Section 1, in its references to non-members.

The moral of this experience is that Article I (iii) and Article IV, Section 4(*a*), are a reservoir of authority on which the Fund can draw in defense of exchange stability, orderly exchange arrangements among members, and the avoidance of competitive exchange alterations without determining whether the case falls within Article XI, Section 1, even though relations with non-members are involved. Certainly, it would seem that the Fund is able to do this for the purpose of making recommendations to members. This gives the Fund greater flexibility than it would have if the only course available to it was to rely on the strict prohibitions of Article XI, Section 1.



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## 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."



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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.
>
> 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.
>
> (*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]

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[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.



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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.

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[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.



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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.



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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.



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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,
>
> (*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.



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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

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



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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-



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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).



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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.



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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.



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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).



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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



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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

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[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.



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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."



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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.



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## 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



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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.



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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).



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expressed in the controlling statute, and thereby allow Czechoslovakia to take advantage of one of the privileges of fund membership when it is no longer a member. . . .

Accordingly, the present status of Czechoslovakia in relation to the International Monetary Fund does not bar the plaintiffs in this action.[39]

The decision is clear. An ex-member is not entitled to the benefit of Article VIII, Section 2(*b*), even though on the facts before the court the non-member would have been entitled to the protection of the provision if it had remained a member.

In *Pan-American Life Insurance Co. v. Lorido,* the respondent, who was the beneficiary under an insurance policy issued by the petitioner upon the life of her late husband, brought an action in Florida, where she resided, for the payment of benefits under the policy. The policy had been issued by the petitioner, a Louisiana corporation, in Louisiana in 1943, and was delivered to the insured, a Cuban national, in Havana. It was provided that payments by both parties of all obligations would be made in U.S. dollars in New Orleans. In contesting the widow's claim, the petitioner argued that its liability under the policy had been extinguished by certain decrees of the Cuban Government. The petitioner argued that Florida courts were required to give effect to the Cuban decrees under the act-of-state doctrine. The petitioner relied on a 1959 law making it unlawful for any Cuban national to receive payment of a debt anywhere except in Cuba, and a 1960 law expropriating the petitioner's assets in Cuba and substituting the Cuban Government as obligor under the policy. The petitioner also relied on Article VIII, Section 2(*b*), as a second string to its bow.

The court of first instance held that the petitioner could not rely on the Cuban laws because the place of performance was the United States and not Cuba. Appellate courts affirmed without opinion and denied certiorari on July 13, 1963.[40] The petitioner petitioned the Supreme Court of the United States for writs of certiorari to the Florida courts. It argued that one of the three questions presented for review was whether U.S. courts were

[39] See 140 N.Y.S. (2d), pp. 326-27 and Joseph Gold, *The Fund Agreement in the Courts* (Washington, D.C., 1962), pp. 77-78.

[40] 19 Fla. Supp. 167; 154 So.2d 200; 155 So.2d 695 (*Sup. Ct. of Fla.*).



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entitled to enforce a contract between a Cuban national and a U.S. corporation when that would result in the violation of a Cuban exchange control law that was maintained and imposed consistently with Article VIII, Section 2(*b*). The Florida courts had not dealt expressly with this issue in their judgments, and the petitioner argued that they had not passed on it. The Solicitor General of the United States was invited to express the views of the United States. He stated that he did not believe that the case presented any important question of federal law. On the issue relating to Article VIII, Section 2(*b*), he wrote:

> Further review is not warranted with respect to petitioner's other contention—that granting recovery to the respondent is contrary to Article VIII (2)(b). . . . In April of this year [1964], Cuba withdrew from the International Monetary Fund. The provisions of Article VIII (2)(b) are for the benefit of member states and not for the benefit of private parties. Since Cuba is no longer a member of the Fund and since the date of proposed relief determines the applicability of Article VIII (2)(b), a decree granting recovery to the petitioner will not violate the provisions of the Agreement. See *Stephen v. Zivnostenska Banka, National Corporation,* 140 N.Y.S. 2d 323, 326.

The Supreme Court denied certiorari.[41]

The conclusion that Article VIII, Section 2(*b*), is for the protection of the economies of members and that non-members are not entitled to its benefits is sound. But another and more difficult issue arises. Has Article VIII, Section 2(*b*), or the Articles as a whole changed the attitude of members toward non-members because of the sharp distinction which the Articles make between members and non-members? If it used to be not inconsistent with the public policy of country A to recognize the effect of the foreign exchange regulations of country B where the law of B was the applicable law under the private international law

[41] 379 U.S. 871 (1964). See also *Varas v. Crown Life Insurance Company,* 203 A.2d 505 (Superior Court of Pennsylvania, 1964). "We agree that the currency laws of Cuba must be honored by the government of the United States and by our courts if Cuban law is applicable. The power of a sovereign state over its currency is absolute. This was especially true when both countries were signatories to the Breton *(sic)* Woods Agreement, a treaty of the United States and therefore a part of the supreme law of the land. The Breton Woods agreement specifically requires the recognition and honoring of Cuba's currency laws. The Breton Woods agreement brought into being the 'International Monetary Fund Agreement', 60 Stat. 1401-1411, 1945. However, Cuba has withdrawn from membership so that a new look must perchance be taken at the cases based on the fund agreement when membership was held by both countries . . ." (p. 510).



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of A, has this situation changed as a result of the Articles if A is a member and B a non-member? There is a decision of the Supreme Court of the Federal Republic of Germany which may perhaps be understood in this way,[42] but there is not yet sufficient authority on which to base a confident conclusion.[43]

## 9. Agreement Between Fund and Switzerland—*Stipulation Pour Autrui*

One effect of the Articles on non-members results from the exercise of the Fund's authority to enter into agreements with them. The major example of an international agreement of this kind is the agreement of June 11, 1964 between the Fund and Switzerland.[44]

On October 24, 1962 the Fund's General Arrangements to Borrow took effect.[45] Under them, eight members and the central banks of two other members agreed to lend their currencies to the Fund in accordance with the terms of the Arrangements. One purpose of the Arrangements, although not the only one, is to provide the Fund with supplementary resources of the currencies of those members to which capital is likely to flow from a member whose currency is under pressure.[46] In this way, the Fund can replenish its resources of the currencies with which it could appropriately help the member in difficulties. However, the ring was not complete because some capital might move to Switzerland, and Switzerland is not a member of the Fund.

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[42] Gold, *op. cit.*, pp. 139-42.

[43] However, it has been argued that Article VIII, Section 2(*b*), and the cases involving it have exerted a "favourable influence by increasing respect for the foreign exchange laws of non-member States" (I. Meznerics, "Application of Foreign Exchange Laws by Foreign Courts," *Acta Juridica Academiae Scientiarum Hungaricae*, T. [Vol.] V, Fasc. 1-2, 1963, pp. 56 and 64). The author, Head of the Legal Department of the National Bank of Hungary, cites no cases in support of this proposition. He criticizes the German case referred to above.

[44] *Selected Decisions*, pp. 69-72. Reproduced in Appendix II.

[45] *Selected Decisions*, pp. 56-68.

[46] "In order to enable the International Monetary Fund to fulfill more effectively its role in the international monetary system in the new conditions of widespread convertibility, including greater freedom for short-term capital movements. . . ." (Preamble of the General Arrangements to Borrow, *Selected Decisions*, p. 56).



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Under Article VII, Section 2,[47] the Fund may agree with a member that it lend its currency to the Fund. It is also provided that, with the approval of a member, the Fund may borrow that member's currency from "some other source either within or outside the territories of the member." These territories are not expressly declared to be the territories of members, and there is no reason to assume any tacit limitation of this kind. It would therefore be possible for the Fund to borrow from non-members or their residents. However, it is quite clear that no matter who the lender may be, the Fund's power to borrow under Article VII, Section 2, is confined to the replenishment of its holdings of member currencies. In short, the Fund does not hold Swiss francs and has no power to borrow them under Article VII, Section 2.[48]

The agreement of June 11, 1964 between the Swiss Federal Council and the Fund solves the problem by providing for a form of association of the Swiss Confederation with the General Arrangements to Borrow.[49] Switzerland could not adhere to the General Arrangements, but undertakes, subject to the terms of the agreement, to make a direct loan to a participant in the General

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[47] "*Measures to replenish the Fund's holdings of scarce currencies.*— The Fund may, if it deems such action appropriate to replenish its holdings of any member's currency, take either or both of the following steps:

(i) Propose to the member that, on terms and conditions agreed between the Fund and the member, the latter lend its currency to the Fund or that, with the approval of the member, the Fund borrow such currency from some other source either within or outside the territories of the member, but no member shall be under any obligation to make such loans to the Fund or to approve the borrowing of its currency by the Fund from any other source.

(ii) Require the member to sell its currency to the Fund for gold."

[48] Normally, the Fund cannot hold the currency of a non-member. Under Article V, Section 7(*b*), a member's obligations to repurchase its currency from the Fund where the Fund holds more of it than 75 per cent of the member's quota depends on increases in its monetary reserves, and under Article XIX (*a*) the Fund may specify the currency of a non-member for inclusion in the calculation of the monetary reserves of members. However, Schedule B, paragraph 2, provides that nevertheless the Fund shall not acquire the currency of a non-member under Article V, Section 7(*b*). But, of course, the Fund could hold the currency of a non-member country as a result of the withdrawal of that country from membership in the Fund. Again, a member may have a common currency with a non-member.

[49] Annex Prepared by Deputies to Ministerial Statement of the Group of Ten, August 1964, paragraph 2: ". . . The discussions also benefited from the presence of representatives of the Swiss National Bank, as decided by Ministers following completion of the legislation looking to Swiss cooperation with the General Arrangements to Borrow."



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Arrangements when the Fund borrows under the General Arrangements in order to finance an exchange transaction with that participant. For this purpose, there has to be an "implementing agreement" between the participant and Switzerland, which will be written in terms of reciprocity if Switzerland requires. Switzerland undertakes that it will be prepared to consider the conclusion of an implementing agreement if requested by a participant. The Fund accepts no responsibility or liability, whether as guarantor or otherwise, in connection with the basic agreement or any implementing agreement. Switzerland is to advance to the participant in the General Arrangements the amount specified by the Managing Director, provided that this does not exceed the amount of the implementing agreement or a total of outstanding advances to all participants equivalent to US$200 million, and provided further that Switzerland does not represent that its present and prospective balance of payments and reserve position do not justify the advance. A number of other provisions of equal importance need not be referred to here. However, it is important to note that Switzerland undertakes that repayment terms in an implementing agreement will correspond to the maximum extent practicable with the repayment provisions of the General Arrangements. Special arrangements were made by Switzerland for this purpose because the repayment provisions of the General Arrangements permit a use of the resources advanced that goes beyond the customary period of loans by the Swiss National Bank under Swiss law.[50] The form of the resources to be advanced is not prescribed in the agreement between Switzerland and the Fund, but the Decree enacted by the Swiss Federal Council authorizing entry into the agreement refers to Swiss francs or gold.[51]

The crux of the agreement is that the "Swiss Confederation will be prepared to consider the conclusion of agreements (hereinafter referred to as 'implementing agreements') with any of the participants in the General Arrangements if requested by such

[50] See in general *Message du Conseil fédéral à l'Assemblée fédérale concernant la collaboration de la Suisse aux mesures monétaires internationales* (No. 8698, of March 1, 1963).

[51] *Feuille Fédérale,* 1963, Vol. II, p. 796.



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participants."[52] Although legally any participant can benefit from this undertaking, there is less likelihood that in practice the benefit will be needed by participants that are not reserve currency countries, and this accounts for the fact that the undertaking is written in low key ("prepared to consider"). Whatever the content of the undertaking, it appears to be a *stipulation pour autrui,* that is to say, a stipulation for the benefit of the participants in the General Arrangements to Borrow on which they can rely on their own initiative. They are third parties because they are not parties to the agreement between Switzerland and the Fund.

Sir Gerald Fitzmaurice, in the Report already referred to, concluded that international law recognizes the *stipulation pour autrui* as conferring a right or benefit on a third party which it can legally insist on against the parties to the treaty.[53] Sir Gerald reconciles the *stipulation* with the basic rule that treaties cannot confer legal rights on third parties by stating that legal rights can be created only if the parties intend this result. It is perhaps more satisfying to regard the *stipulation pour autrui* simply as an important exception to the traditional rule than to attempt a reconciliation with it. In any event, it is hardly likely that the *stipulation pour autrui* could create a legal right unless the parties so intend. However, although Sir Gerald speaks of an intention to create a legal right against them both, there would seem to be no reason why it should not be possible for them to create a legal right exercisable against only one party if that is their intention. In the case of the agreement between Switzerland and the Fund, it is Switzerland that must consider the conclusion of an implementing

[52] See Appendix II.

[53] Art. 20: "(1) Where a treaty expressly confers rights or benefits on, or makes provision for the exercise of rights or faculties, or for the enjoyment of facilities or benefits by a third State, in such a way as to indicate that the parties meant to create legal rights for the third State, or to bind themselves to grant them, or to create a legal relationship between themselves and the third State, the third State concerned thereby acquires a legal right to claim the benefit of the provisions in question. . . .

"(3) . . . the claiming third State has a direct right of recourse against the parties to the treaty, acting in its own name and of its own motion, if the provisions of the treaty concerning the third State are not carried out—provided always that the third State has complied, or is willing to comply, with any conditions attached by these provisions to the grant." (See Fitzmaurice, *op. cit.*, pp. 42-43; discussed in pars. 82-90.)



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agreement. It will be recalled that the Fund accepts no responsibility or liability, whether as guarantor or in any other capacity, in connection with the agreement.

The Fund is, of course, a third party in relation to any "implementing agreement" that is entered into between Switzerland and a participant in the General Arrangements. The Fund has no responsibility or liability in connection with the performance of an implementing agreement. However, without prejudice to this, it is stated in the agreement between Switzerland and the Fund that, at the request of a party to an implementing agreement, the Fund may make any determination or use its good offices to facilitate the operation of the implementing agreement.

## 10. Objective International Personality and Non-Members

Article IX, Section 1, provides that to enable the Fund to fulfill its functions the status, privileges and immunities set forth in Article IX "shall be accorded to the Fund in the territories of each member." Section 2 provides that the Fund "shall possess full juridical personality" and, in particular, the capacity to contract, acquire, and dispose of property, and institute legal proceedings. Notwithstanding the reference to the territories of members, it has never been doubted that the Fund has juridical personality and the capacity that flows from it in relations with non-members. Indeed, there is explicit evidence in the Articles that the reference to the territories of members in Article IX, Section 1, does not circumscribe the personality and capacity of the Fund. Under Article X, the Fund may make arrangements with other international organizations, and it has already been seen that under Article VII, Section 2, the Fund may borrow from sources "either within or outside the territories" of a member. Even these express provisions, however, do not exhaust the personality and capacity of the Fund. It is established in international law now that an international organization has an objective personality which goes beyond the express provisions of its charter. In its Advisory Opinion of April 11, 1949 *(Reparation for Injuries*



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*Suffered in the Service of the United Nations)*,[54] the International Court of Justice dealt, inter alia, with the question whether the United Nations had the capacity to bring international claims against a non-member state for injuries suffered by agents of the United Nations in the performance of their duties in circumstances involving the responsibility of the state for those injuries. The Charter of the United Nations is silent on this subject, and it contains language similar to Article IX, Section 1, of the Fund's Articles.[55] The Court declared that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims."[56] The reference to member territory in Article IX, Section 1, must be taken to deal with the status of the Fund under the municipal law of members and not with the position under international law.[57]

The agreement between the Fund and Switzerland on the association of Switzerland with the General Arrangements to Borrow is an example of the Fund's capacity to enter into an agreement with a non-member in furtherance of the purposes of the Fund which derives from the objective international personality of the Fund. This is not the only agreement of the Fund with non-members. The Fund has made a number of agreements with non-members for technical assistance to them. Most of the agreements have been with countries contemplating membership, but some have preceded applications for membership. Moreover, the assistance dealt with the exchange system or monetary policy of the country and not with technical issues of membership. The

[54] *ICJ Reports* 1949, pp. 174-219.

[55] "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes" (Article 105(1)).

[56] *ICJ Reports* 1949, p. 185. For a full study, see Seyersted, *op. cit.*

[57] Cf. Article IX, Section 10: *"Application of Article.*—Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Fund of the detailed action which it has taken."



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agreements have been informal in character and have covered the nature of the assistance to be rendered and the sharing of the cost. They have not dealt with the privileges and immunities of the Fund personnel giving the assistance, presumably on the assumption that these would be accorded where appropriate.

The Fund has been willing to provide certain non-members with another service. It has established a service under which it seeks to match intending buyers and sellers of gold with a greater economy than might be available to them outside this service. Each party pays 1/32 of one per cent to the Fund on a completed transaction. The service was originally available only to members but was extended to transactions between a member on one side and a member, a specified non-member, or a specified international organization on the other side. It has been further extended to transactions between a member or a specified international organization on one side and a member, a specified international organization, or a specified non-member on the other side. The service has not been extended so as to cover transactions between non-members. The service is made available on the understanding that the Fund does not become a party to any contract of purchase or sale and does not accept any liability or obligation in connection with any transaction. The specified non-members have been Argentina, Ireland, New Zealand, Portugal, Saudi Arabia, Spain, and Switzerland, all of which, with the exception of Switzerland, have since become members.

The purpose of the service was, of course, to create a facility that would benefit members, although this purpose was broadened in the interest of cooperation with international organizations having responsibilities in fields related to the Fund's. The inclusion of non-members in the service was intended to increase its usefulness to members (or the specified international organizations) by finding more partners for gold transactions. The criterion of benefit to members explains a number of the actions of the Fund in relation to non-members. For example, the attention given to the role of non-members in the Fund's statement on premium gold transactions was intended to contribute to the stability of member currencies. Again, the agreement between the Fund and Switzer-



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land for association with the General Arrangements to Borrow was for the benefit of the participants in those Arrangements. Of course, benefit to members does not preclude, and indeed may necessarily include, some benefit to non-members, but it is the former which justifies the latter.

The enjoyment of privileges and immunities is one feature of the recognition of the objective international personality of international organizations. The question of privileges and immunities in non-member territory has arisen in connection with Fund personnel in Geneva in the course of their official duties. It has been agreed that a special agreement between the Fund and the Swiss authorities could be dispensed with and that the Decree of the Swiss Federal Council of July 11, 1947 would apply to Fund personnel. Under that Decree, officials of the Specialized Agencies of the United Nations on official missions in Switzerland enjoy the same privileges and immunities that officials of the European Office of the United Nations enjoy under the agreement of April 19, 1946[58] between the United Nations and the Swiss Federal Council.

## Summary

The experience of the International Monetary Fund in relation to non-member states illustrates the misleading character of any principle, however formulated, which suggests that states cannot be affected, to their advantage or disadvantage, by a treaty to which they are not parties.

Article XI, Section 1, is a key provision. It does not seek to impose direct obligations on non-members, but it binds members to avoid relations with non-members that would be contrary to the provisions or purposes of the Articles. There are obscurities in the language of the provision, but it is clear that it was intended to have a broad effect in controlling the conduct of non-members through members. The experience of the Fund in connection with premium gold transactions shows that the Fund may make recom-

[58] Entered into force on July 1, 1946. *United Nations Treaty Series,* Vol. 1, p. 163.



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mendations to members in connection with their relations with non-members under the more general language of Article IV, Section 4(*a*), without reference to Article XI, Section 1. Juridically, perhaps the most interesting attempt to affect the conduct of non-members has been the obligation imposed on them as contracting parties to GATT to enter into a "special exchange agreement." These agreements have bound the signatory states to obligations that are closely parallel to the obligations in the code of conduct binding on members of the Fund under the Fund's Articles. In addition, although the obligations of a signatory of a special exchange agreement are owed to the CONTRACTING PARTIES to GATT, the Fund has had an important role in connection with them. This role has included authority to determine whether actions in the exchange field are in accordance with the terms of the agreement. Moreover, provision has been made for direct contact between the signatory and the Fund, and for the signatory to act on the Fund's finding in certain circumstances pending later consideration by the CONTRACTING PARTIES. There are no special exchange agreements now in effect, but where the CONTRACTING PARTIES have exempted non-members of the Fund from the duty to sign a special exchange agreement, they have done so on conditions that have been drafted in various ways but have stipulated, in effect, that the intent of GATT shall not be frustrated by actions in the exchange field and have thus required observance of the principles of the code of conduct in the Fund's Articles.

Article XI, Section 2, is the leading expression of the classical principle that the benefits of a treaty are not accorded to third parties. The provision declares that nothing in the Articles affects the right of a member to impose restrictions on exchange transactions with non-members or their residents. However, this freedom cannot be carried to the point where the Fund finds that restrictions prejudice the interests of members and are contrary to the purposes of the Fund. The Fund has made a finding that restrictions by Fund members against non-members that sign a special exchange agreement under GATT would be prejudicial to the interests of members and contrary to the purposes of the Fund.



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As a result, these non-members enjoy certain of the benefits of the Articles as if they were members.

There is judicial authority in support of the proposition that non-members are not entitled to the benefit of Article VIII, Section 2(*b*), under which certain exchange contracts that offend a member's exchange controls are unenforceable, even though they may have been members when the contracts were entered into.

The Articles can have effects on non-members because of the Fund's authority to enter into agreements with them. A leading example of this is the agreement of June 11, 1964 between the Fund and Switzerland, which is of further interest because it appears to be a *stipulation pour autrui,* with participants in the General Arrangements to Borrow as the third party beneficiaries. There have been other effects on non-members resulting from other exercises of the objective international personality and capacity of the Fund.



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# APPENDICES

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## I. Text of Special Exchange Agreement

*Whereas* paragraph 6 of Article XV of the General Agreement on Tariffs and Trade (hereinafter referred to as "the General Agreement") provides that any contracting party which is not a member of the International Monetary Fund (hereinafter called "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;[1]

*Whereas* paragraph 7 of the said article provides that such special exchange agreement shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of the General Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question, and taking into account that the terms of 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 Fund on members of the Fund;

*Whereas* by Resolution of June 20, 1949 the CONTRACTING PARTIES adopted the text of the special exchange agreement for the purpose of giving effect to the above-mentioned provisions of the General Agreement and authorized their Chairman to sign on their behalf a special exchange agreement in the terms of this text with any contracting party which is not a member of the Fund and to take all necessary action to give effect to that resolution;

The CONTRACTING PARTIES and the Government of ......................, acting through its representative duly authorized for this purpose,

*Hereby agree as follows:*

### *Article I*

#### EXCHANGE STABILITY AND ORDERLY EXCHANGE ARRANGEMENTS

The Government of ...................... shall collaborate with the CONTRACTING PARTIES to promote exchange stability, to maintain orderly exchange arrangements with other contracting parties to the General Agreement, to avoid competitive exchange alterations, and to assist in the elimination of restrictions on the making of payments and transfers for current international transactions with a view to the establishment of a multilateral system of payments and to the promotion of international trade.

### *Article II*

#### DETERMINATION OF INITIAL PAR VALUE

1. Unless an initial par value has been previously agreed between the Government of ...................... and the CONTRACTING PARTIES, the Government of ...................... shall, within thirty days after the CONTRACTING PARTIES so

[1] The first paragraph of the preamble shall be replaced by the following text in the case of a contracting party which has ceased to be a member of the Fund:

"*Whereas* paragraph 6 of Article XV of the General Agreement on Tariffs and Trade (hereinafter referred to as 'the General Agreement') provides that any contracting party which ceases to be a member of the International Monetary Fund (hereinafter called 'the Fund') shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES."



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request, communicate to them the par value of its currency based on the rates of exchange prevailing at the time. The par value so communicated shall be the initial par value of its currency for the purpose of this agreement unless within ninety days after the request has been received (*a*) the Government of ..................... notifies the CONTRACTING PARTIES that it regards the par value as unsatisfactory, or (*b*) the CONTRACTING PARTIES notify the Government of ..................... that in their opinion the adoption of such par value would be prejudicial to trade among the contracting parties. When such notification is given, the CONTRACTING PARTIES and the Government of ..................... shall, within a period to be determined by the CONTRACTING PARTIES, agree upon a suitable initial par value.

2. The par value of the currency of ..................... shall be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on 1 July 1944.

3. The CONTRACTING PARTIES will keep the Government of ..................... currently informed on the par values of the currencies of the other contracting parties.

## *Article III*

### GOLD TRANSACTIONS BASED ON PAR VALUE

1. The Government of ..................... shall not buy gold at a price above the par value of its currency plus the margin permissible under this article, or sell gold at a price below the par value minus the margin permissible under this article.

2. The margins permissible for transactions in gold by the Government of ..................... shall be the same as those permissible to contracting parties which are members of the Fund, and the CONTRACTING PARTIES shall keep the Government of ..................... informed of such margins.

## *Article IV*

### FOREIGN EXCHANGE DEALINGS BASED ON PARITY

The maximum and minimum rates for exchange transactions between the currency of ..................... and the currencies of other contracting parties taking place within the territories of ..................... shall not differ from parity:

(*a*) In the case of spot exchange transactions, by more than one per cent, and

(*b*) In the case of other exchange transactions, by a margin which exceeds the margin for spot exchange transactions by more than the CONTRACTING PARTIES consider reasonable.

## *Article V*

### OBLIGATIONS REGARDING EXCHANGE STABILITY

The Government of ..................... undertakes, through appropriate measures consistent with this Agreement, to permit within its territories exchange transactions between its currency and the currencies of other contracting parties only within the limits prescribed under Article IV. The Government of ..................... shall be deemed to be fulfilling this undertaking if its monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed under Article III.



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### *Article VI*

#### Changes in Par Value

1. The Government of ..................... shall not propose a change in the par value of its currency except to correct a fundamental disequilibrium.

2. A change in the par value of the currency of ..................... may be made only on the proposal of the Government of ..................... and only after consultation with the Contracting Parties.

3. When a change is proposed, the Contracting Parties shall first take into account the changes, if any, which have already taken place in the initial par value of the currency of ................... as determined under Article II. If the proposed change, together with all previous changes, whether increases or decreases,

(*a*) Does not exceed ten per cent of the initial par value, the Contracting Parties shall raise no objection;

(*b*) Does not exceed a further ten per cent of the initial par value, the Contracting Parties may either concur or object, but shall declare their attitude within ninety-six hours if the Government of ................... so requests;

(*c*) Is not within (*a*) or (*b*), the Contracting Parties may either concur or object, but shall be entitled to a longer period in which to declare their attitude.

4. The Contracting Parties shall concur in a proposed change which is within the terms of (*b*) or (*c*) of paragraph 3 if they are satisfied that the change is necessary to correct a fundamental disequilibrium. In particular, provided they are so satisfied, they shall not object to a proposed change because of the domestic social or political policies of the Government of ......................

5. If the Fund, in accordance with Article IV, Section 7, of the Articles of Agreement of the Fund, makes uniform proportionate changes in the par values of the currencies of Fund members, the Government of ..................... will change its par value proportionately, unless it informs the Contracting Parties within ninety-six hours after it has been notified by the Contracting Parties of the Fund's action that it does not wish the par value of its currency to be changed.

6. Changes in the par value made under paragraph 5 shall not be taken into account in determining whether a proposed change falls within (*a*), (*b*) or (*c*) of paragraph 3.

7. If the Government of ................ change the par value of its currency despite the objection of the Contracting Parties, in cases where the Contracting Parties are entitled to object, the Government of ..................... shall be deemed to have failed in carrying out its obligations under this agreement.

### *Article VII*

#### Avoidance of Restrictions on Current Payments

1. Subject to the provisions of Articles IX and XI, the Government of ............... shall not, without the approval of the Contracting Parties, impose restrictions on the making of payments and transfers for current international transactions.

2. The Government of ..................... shall not engage in, or permit its treasury, central bank, stabilization fund, or other similar fiscal agency, to



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engage in any discriminatory currency arrangements or multiple currency practices except as authorized under this agreement or approved by the CONTRACTING PARTIES. If such arrangements and practices have been maintained since 1 January 1948 (the date on which the General Agreement was first provisionally applied), the Government of ..................... shall consult with the CONTRACTING PARTIES as to their progressive removal. This paragraph shall not apply to such arrangements or practices maintained or imposed under paragraph 1 of Article XI, in which case the provisions of paragraph 3 of that article shall apply.

3. Exchange contracts which involve the currency of any contracting party and which are contrary to the exchange control regulations of that contracting party maintained or imposed consistently with the Articles of Agreement of the Fund or with the provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV of the General Agreement, shall be unenforceable in the territories of ..................... In addition, the Government of ..................... may, by mutual accord with other contracting parties, co-operate in measures for the purpose of making the exchange control regulations of either contracting party more effective, provided that such measures and regulations are consistent with this agreement or with another special exchange agreement entered into pursuant to paragraph 6 of Article XV of the General Agreement or with the Articles of Agreement of the Fund, whichever may be applicable to the contracting party whose measures or regulations are involved.

### *Article VIII*

### CONTROLS OF CAPITAL TRANSFERS

1. The Government of ..................... may exercise such controls as are necessary to regulate international capital movements, but may not exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Articles IX and XI.

2. The Government of ..................... undertakes that capital outflow will be in accordance with the objectives of this agreement and of the General Agreement.

### *Article IX*

### SCARCE CURRENCIES

1. The Government of ..................... is authorized to impose temporarily, after consultation with the CONTRACTING PARTIES, limitations on the freedom of exchange operations in a currency which has formally been declared scarce by the Fund in accordance with Article VII, Section 3 (*a*), of the Articles of Agreement of the Fund. Subject to the provisions of Articles IV and V of this Agreement, the Government of ..................... shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by, or accruing to, the Government of .....................; and they shall be relaxed and removed as rapidly as conditions permit. The authorization here mentioned shall expire whenever the Fund formally declares the currency in question to be no longer scarce.

2. If the Government of ..................... is imposing limitations in accordance with paragraph 1, it shall give sympathetic consideration to any representations by the contracting party whose currency has been declared scarce regarding the administration of such restrictions.



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3. The CONTRACTING PARTIES shall request any contracting party against which restrictions may be permitted under this article not to invoke the obligations of any engagement entered into with the Government of ..................... prior to this agreement in such a manner as will prevent the operation of the provisions of this article.

### *Article X*

### CONVERTIBILITY OF BALANCES HELD BY OTHER CONTRACTING PARTIES

1. The Government of ..................... shall buy balances of its currency held by another contracting party if the latter, in requesting the purchase, represents:

(*a*) That the balances to be bought have been recently acquired as a result of current transactions; or

(*b*) That their conversion is needed for making payments for current transactions.

2. The Government of ..................... shall have the option to pay either in the currency of the contracting party making the request or in gold.

3. The obligation under paragraph 1 shall not apply

(*a*) When the convertibility of the balances has been restricted consistently with Article VII or VIII; or

(*b*) When the balances have accumulated as a result of transactions effected before the removal by the Government of ..................... of restrictions maintained or imposed under Article XI; or

(*c*) When the balances have been acquired contrary to the exchange regulations of the Government of .....................; or

(*d*) When the currency of the contracting party requesting the purchase has been declared scarce and the Government of ..................... has been so notified under Article IX; or

(*e*) With the approval of the CONTRACTING PARTIES, in any particular circumstance in which the fulfilment of the obligations of paragraph 1 of this article would dangerously threaten exchange stability.

### *Article XI*

### TRANSITIONAL PERIOD

1. In the post-war transitional period the Government of ..................... may, notwithstanding the provisions of any other article of this Agreement, maintain and adapt to changing circumstances [1] restrictions on payments and transfers for current international transactions. The Government of ..................... shall, however, have continuous regard in its foreign exchange policies to the intent of this agreement and of the General Agreement; and, as soon as conditions permit, it shall take all possible measures to develop such commercial and financial arrangements with other contracting parties as will facilitate international payments and the maintenance of exchange stability. In particular, the Government of ..................... shall withdraw restrictions maintained or imposed under this paragraph as soon as it is satisfied that it will be able, in the absence of such restrictions, to settle its balance of payments in a manner which will not unduly impair its external financial position.

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[1] In the case of a government whose territories have been occupied by the enemy, insert after the word "circumstances" in the fourth line of paragraph 1 of Article XI the words "and introduce where necessary".



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2. The Government of ..................... shall notify the CONTRACTING PARTIES, within thirty days after it accepts this agreement whether it intends to avail itself of the transitional arrangements in paragraph 1, or whether it is prepared to accept the obligations of Articles VII and X. If the Government of ..................... avails itself of the transitional arrangements, it shall notify the CONTRACTING PARTIES as soon as it is prepared to accept the abovementioned obligations.

3. Not later than 1 March 1950, and in each year thereafter, the CONTRACTING PARTIES shall report on the restrictions still in force under paragraph 1. Not later than 1 March 1952, and in each year thereafter, if the Government of ..................... still retains any restrictions inconsistent with Article VII or X, it shall consult with the CONTRACTING PARTIES as to their further retention. The CONTRACTING PARTIES may, if they deem such action necessary in exceptional circumstances, make representations to the Government of ..................... that conditions are favourable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with the provisions of any other article of this agreement. The Government of ..................... shall be given a suitable time to reply to such representations. If the CONTRACTING PARTIES find that the Government of ..................... persists in maintaining restrictions which are inconsistent with the intent of this agreement, the Government of ..................... shall be deemed to have failed in carrying out its obligations under this agreement.

4. It is recognised that the post-war transitional period is one of change and adjustment, and when decisions are being made on requests occasioned thereby which are presented by the Government of ..................... that government shall given the benefit of any reasonable doubt.

### *Article XII*

#### FURNISHING OF INFORMATION

1. The Government of ................... shall furnish the CONTRACTING PARTIES with such information as they may require in accordance with paragraph 8 of Article XV of the General Agreement.

2. In requesting information under paragraph 8 of Article XV of the General Agreement, the CONTRACTING PARTIES shall take into consideration the varying abilities of contracting parties to furnish the data requested. The Government of ..................... shall be under no obligation to furnish information in such detail that the affairs of individuals or corporations are disclosed. The Government of ..................... undertakes, however, to furnish the desired information in as detailed and accurate a manner as is practicable, and, so far as possible, to avoid mere estimates.

### *Article XIII*

#### MISCELLANEOUS PROVISIONS

1. The relevant explanation of terms contained in Article XIX of the Articles of Agreement of the Fund shall apply to this agreement.

2. The CONTRACTING PARTIES shall at all times have the right to communicate their views informally to the Government of ..................... on any matter arising under this agreement.

3. The CONTRACTING PARTIES shall suspend the operation of Articles IV and V of this agreement for the same period of time and to the same extent as the Fund suspends the operation of corresponding provisions of its Articles of Agreement in accordance with Article XVI, Section 1, of the Articles of Agreement of the Fund.



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4. Without prejudice to Article XXIII of the General Agreement, whenever in the opinion of the CONTRACTING PARTIES the Government of ..................... fails to observe any of the provisions of this agreement, the CONTRACTING PARTIES shall make representations to the Government of .................... The Government of .................... shall be given reasonable time to reply to such representations.

5. The CONTRACTING PARTIES shall seek an understanding with the Fund to the effect that,

(*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.

*Article XIV*

ACCEPTANCE, ENTRY INTO FORCE AND TERMINATION

1. This agreement shall be signed on behalf of the CONTRACTING PARTIES by their Chairman and shall be deposited with the Secretary-General of the United Nations, who is hereby authorized to register this agreement.

2. The Government of ..................... may accept this agreement by depositing an instrument of acceptance with the Secretary-General of the United Nations. The Secretary-General will inform the CONTRACTING PARTIES of the date of deposit of such instrument of acceptance.

3. This agreement shall enter into force thirty days after the Government of ..................... deposits an instrument of acceptance in accordance with paragraph 2.

4. The provisions of this agreement, entered into pursuant to Article XV of the General Agreement, shall be deemed to be included within that article.

5. This Agreement shall terminate on the day on which the Government of ..................... becomes a member of the Fund or ceases to be a contracting party.

IN WITNESS WHEREOF, the Chairman of the CONTRACTING PARTIES has signed this agreement.

DONE at ...................., this .................... day of ...................., one thousand nine hundred and ......................



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## II. Exchange of Letters Between the Ambassador of Switzerland to the United States and the Managing Director of the Fund

June 11, 1964

The Managing Director
International Monetary Fund
19th and H Streets, N.W.
Washington, D.C. 20431

Sir:

I have the honor to refer to Mr. Jacobsson's letter of December 14, 1961 to the President of the Swiss Confederation and to conversations between representatives of the Swiss Confederation and the International Monetary Fund (hereinafter referred to as "the Fund") concerning the way in which the Swiss Confederation could be associated with the Fund's General Arrangements to Borrow, and thus contribute to the objectives of those Arrangements. The General Arrangements to Borrow (hereinafter referred to as "the General Arrangements") are those set forth in Decision No. 1289-(62/1) of January 5, 1962, of the Fund's Executive Directors, as amended by Decision No. 1362-(62/32) of July 9, 1962 and Decision No. 1415-(62/47) adopted on September 19, 1962.

In the light of the views that have been exchanged, the Swiss Federal Council, on behalf of the Swiss Confederation, is prepared to be associated with the General Arrangements as follows:

(1) The Swiss Confederation is prepared to make resources available to participants in the General Arrangements in accordance with this letter and in amounts not exceeding an outstanding total equivalent to 865,000,000 Swiss francs.

(2) The Swiss Confederation will be prepared to consider the conclusion of agreements (hereinafter referred to as "implementing agreements") with any of the participants in the General Arrangements if requested by such participants. The implementing agreements will prescribe the terms and conditions in accordance with which the Swiss Confederation will make resources available to the participant or the Swiss Confederation and the participant will make resources available to each other, which shall be on the basis of reciprocal terms if required. Immediately on the conclusion of an implementing agreement, or of any amendment of an implementing agreement, the Swiss Confederation will provide the Managing Director with a copy thereof.

(3) Whenever the Managing Director of the Fund initiates the procedure and makes a proposal for calls pursuant to Paragraphs 6 and 7 of the General Arrangements for the benefit of a participant that has entered into or enters into an implementing agreement, he may propose to the Swiss Confederation, after consultation with the Swiss Confederation, that it shall make a specified amount of resources available to the participant, which amount shall be in accordance with the implementing agreement with that participant. If the proposal for calls becomes effective under Paragraph 7 of the General Arrangements, the Swiss Confederation will make the specified amount of resources available to the said participant in accordance



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with this letter and with the terms and conditions of the implementing agreement. If, however, the Swiss Confederation gives notice to the Managing Director that in its opinion, based on its present and prospective balance of payments and reserve position, it should not make resources available in accordance with this proposal, or should make available a smaller amount than that proposed, the Swiss Confederation will not be obliged to make any such resources available or more resources than it represents to the Managing Director that it should make available.

(4) If the Swiss Confederation makes resources available to a participant otherwise than in accordance with the procedure of paragraph (3), the Swiss Confederation, after consultation with the Managing Director, may deem such resources to be or to have been made available pursuant to this letter, provided that at the date of such deeming Switzerland has entered into an implementing agreement with that participant, that at the date of such deeming a proposal for calls for the benefit of that participant is in effect under Paragraph 7 of the General Arrangements and provided that the terms and conditions for repayment to Switzerland accord or are made to accord with paragraph (5).

(5) The effect of the terms and conditions for the timing of repayment of resources made available by Switzerland pursuant to this letter will correspond, to the maximum extent practicable, with the repayment provisions of Paragraph 11 of the General Arrangements.

(6) The Fund may, at the request of a party to an implementing agreement, make any determination, or use its good offices, to facilitate the operation of an implementing agreement, subject, however, to paragraph (9).

(7) Whenever the Swiss Confederation makes resources available pursuant to paragraph (3) or deems resources to be or to have been made available pursuant to paragraph (4), the Swiss Confederation will inform the Managing Director of the amount in terms of Swiss francs thus made available. The Swiss Confederation will inform the Managing Director of the amount in terms of Swiss francs of the repayment of any resources made available pursuant to paragraph (3) or (4).

(8) The Swiss Confederation and the Fund will provide each other with the general information necessary to facilitate the operation of this letter and implementing agreements.

(9) The Fund does not accept any responsibility or liability, whether as guarantor or otherwise, in connection with this letter or with respect to the performance of the terms and conditions of an implementing agreement.

(10) This letter will remain effective for four years from October 24, 1962, provided that the Swiss Confederation may rescind this letter, with immediate effect, within one month after an amendment of the General Arrangements becomes effective pursuant to Paragraph 15 of the General Arrangements. This letter may be amended or rescinded at any time if the Swiss Confederation and the Fund shall so agree.

(11) Any question of interpretation or application of these understandings will be settled to the mutual satisfaction of the Swiss Confederation and the Fund.

(12) For the purposes of this letter, references to participants shall be deemed to include the official institution of a participant with which an implementing agreement is made, even though such institution is not a "participating institution" under the General Arrangements.



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(13) All communications by or to the Swiss Confederation pursuant to this letter shall be made by or to the Swiss National Bank.

I propose that, if this letter is approved by the International Monetary Fund, this letter and your reply constitute an agreement between the Swiss Federal Council and the International Monetary Fund, which shall enter into force on the date of your reply. I hereby declare that the Swiss Confederation has taken all steps necessary to implement the exchange of letters.

Accept, Sir, the assurances of my highest consideration.

/s/
A. ZEHNDER
*Ambassador of Switzerland*

June 11, 1964

Sir:

I am pleased to acknowledge receipt of your letter of June 11, 1964.

I have been authorized to inform you that the understandings set forth in your letter are accepted by the International Monetary Fund. Accordingly, your letter and this reply constitute an agreement between the International Monetary Fund and the Swiss Federal Council, which will enter into force on the date of this reply.

Accept, Sir, the assurances of my highest consideration.

Very truly yours,

/s/
PIERRE-PAUL SCHWEITZER
*Managing Director*

His Excellency
Alfred Zehnder
Ambassador of Switzerland
2900 Cathedral Avenue, N.W.
Washington, D.C. 20008



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