Legal Aspects of WTO-IMF Relationship Revisited

I Introduction

The relationship between the World Trade Organization (the WTO) and the International Monetary Fund (the IMF) has given rise to recurrent legal issues in international economic law, especially during times of financial turbulence, such as the 1970s economic crisis, 1997 Asian financial crisis, and the current difficulties. Institutional coordination between these two organizations dates back to the era of the General Agreement on Tariffs and Trade (GATT) when an international organization governing world trade had not yet come into being and decision-making was undertaken between the GATT Contracting Parties. With the establishment of the WTO, coordination between the WTO and the IMF embedded in the GATT provisions continued intact, but WTO Members went further adopting a decision on the WTO/IMF relationship and a declaration calling for greater coherence in global economic policymaking. The former decision reaffirms that the relationship between the WTO and the IMF with respect to GATT 1994 would continue to be governed by past provisions and practices established between the GATT Contracting Parties and the IMF; the latter declaration directs the WTO to pursue further cooperation with international organizations responsible for monetary and financial matters, notably, the IMF and the World Bank, with a view to achieving greater coherence in global economic policymaking. Subsequently, the institutional link between the WTO and IMF was formalized through an agreement between these two organizations.

The WTO panel and Appellate Body have addressed this subject matter in such complaints as Argentina – Textiles, Dominican Republic – Cigarettes, and India – Quantitative Restriction. The question arises whether the WTO panel/Appellate Body helps to clarify the WTO/IMF. In the policy domain, balance of payments measures (the BOP measures) remain the main recourse for developing countries seeking to safeguard their external financial position and

1 Decision on the Relationship of the World Trade Organization with the International Monetary Fund.
2 Declaration on the Contribution of the World Trade Organization in Global Economic Policymaking (hereinafter, the Coherence Declaration).
3 Agreement between the International Monetary Fund and the World Trade Organization, WT/L/195 (18 November 1996), approved by the General Council at its meeting on 7, 8 and 13 November 1996.
foreign reserves\(^4\) while exchange-rate targets that are under attack have shifted from Japanese Yen to Chinese Yuan. In that scenario, Brazil submitted a proposal to discuss the relationship between exchange rates and international trade in the Working Group on Trade, Dept and Finance under the auspices of the WTO.\(^5\)

The special exchange arrangement signed between Taiwan, under the title of ‘Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu’ and abbreviated as ‘Chinese Taipei’,\(^6\) and the WTO during the former’s accession process adds complexities to this subject matter. Since Taiwan is not a member of the IMF, Taiwan, as part of its accession package, signed a special exchange agreement with the WTO,\(^7\) annexed to the accession protocol pursuant to Article XV:6 of the GATT 1994. The role of the IMF in interpreting or monitoring the implementation of this special exchange arrangement is worth exploration.

In this context, this chapter thus aims to contribute to the old debate on the WTO/IMF relationship by accounting these new developments. Following this introduction, Section II will briefly contrast the constitutional features, institutional design and decision-making of the WTO and IMF. Section III will address jurisdictional conflicts between the WTO and IMF, while Section IV will determine the nature of the consultation requirement as set out in Article XV of the GATT 1994. Section V will examine issues arising from the special exchange arrangement, and Section VI will look at the IMF’s involvement on trade activities. Section VII concludes this chapter.

II Constitutional Feature, Institutional Setup and Decision-Making Process

Under the post-war economic architecture, the International Trade Organization (the ITO) was envisaged as complementing the Bretton Woods institutions and serving as its trade arm. This blueprint, however, was not

\(^4\) With the outbreak of the financial crisis starting from late 2008 and the resultant global economic downturn, Ukraine and Ecuador were prompted to adopt measures to safeguard their external financial position and balance of payments. These measures have revitalized the dormant Committee of Balance of Payments (the BOP Committee) by continuous consultations with these two Members. WT/BOP/R/98, (9 April 2010).

\(^5\) WT/WGTDF/W/53 (13 April 2011); WT/WGTDF/W/56 (20 September 2011).

\(^6\) When referring to official documents within the WTO, this chapter will use the official title of ‘Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu’ or ‘Chinese Taipei’. Otherwise, ‘Taiwan’ will generally be used.

\(^7\) Special Exchange Agreement between the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the World Trade Organization (hereinafter “the Special Exchange Agreement”), Annex II to Protocol of Accession of the Taiwan, Penghu, Kinmen and Matsu, WT/L/433 (23 November 2001).
realized due to the failure of the US administration to secure sufficient congressional support for the ratification of the ITO Charter. The trade arm thus came into effect by virtue of the Protocol of Provisional Application of the GATT, with its decision-making body being constituted by the Contracting Parties as a whole.8 The long-awaited organization for the trade arm only came into being in 1994; the decision-making mechanism, which relies on reaching a consensus among WTO members as a whole, remains largely unchanged, with the exception of a ‘negative consensus’ in the establishment of dispute settlement panels and adoption of panel and Appellate Body reports. By contrast, the IMF has been designated an international organization since its inception in 1945, and while member governments, via the Board of Governors, retain ultimate authority over the IMF, this authority is mostly delegated to the Executive Directors and the Managing Director. The voting power in the IMF is determined by a member’s contribution to the IMF, which varies in accordance with a country’s economic strength. Therefore, IMF governance is based on a system of weighted voting power which differs from a ‘one country, one vote’ system.9 These institutional differences have led to divergent approaches in adopting the WTO - IMF Agreement. Whereas the agreement was adopted in the IMF through an Executive Board decision, it had to be adopted by a General Council decision in the WTO.10

The constituencies of the WTO and IMF are different. The membership of the IMF is limited to countries whereas the WTO included the European Union and two separate customs territories among its members when established in 1994. Later, at the Doha ministerial conference in 2001, Taiwan also joined the WTO as a separate custom territory. This difference of their constitutional features has cast a persisting challenge to the cooperation between the WTO and IMF for the mutual interests to common members of both organizations, which is highlighted in the WTO-IMF Agreement.11

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11 See e.g., WTO-IMF Agreement, paras. 8 & 10.
III Jurisdictional Conflicts between the WTO and the IMF

A fundamental issue in the WTO/IMF legal relationship is jurisdiction, specifically the definition of ‘trade action’ and ‘exchange action’. This issue was addressed in a GATT panel, which provoked subsequent discussion within the GATT and at the IMF. With the inception of the WTO, the subject was re-examined by the Panel on *Dominican Republic – Cigarettes*.\(^{12}\)

In the GATT era, the Panel on *Greece – Special Import Tax*\(^ {13}\) was asked to examine whether a special ‘contribution’ levied by the Greek government on certain goods was consistent with the GATT. The complainant claimed that the special contribution was applied only to imported goods and should be thus considered as being within the scope of the ‘internal tax’ as set out for in Article III:2 of the GATT.\(^ {14}\) In response, Greece argued that the pertinent ‘contribution’ was a charge imposed on foreign exchange allocated for importation of goods from abroad and was intended to rectify the widening gap between the official exchange rate of the Greek drachma and its effective purchasing power. This practice amounted to a multiple currency practice and should be governed by the IMF.\(^ {15}\) The Panel opined that if the ‘contribution’ was not “in the nature of a tax or charge on imported goods but a tax on foreign exchange allocated for the payment of imports”,\(^ {16}\) then the resultant questions were properly the characterization of such ‘contributions’ as a multiple currency practice and its consistency with the Articles of Agreement of the International Monetary Fund (the ‘IMF Agreement’). If both conditions were met, then the issue would fall outside the scope of Article III of the GATT. Even so, one would have to further inquire as to whether or not the action of Greek government frustrated the intent of Article III of the GATT.\(^ {17}\) However, the Panel found there was insufficient information before it to render a decision and suggested that the GATT Contracting Parties seek further information from interested parties and inquire the position of the IMF. After this, Greece withdrew the measure and the case did not again come before the Panel.

This complaint provoked discussion on the distinction between trade actions and exchange actions in the GATT, but no concrete decision was reached.

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15 Panel Report on *Greece – Special Import Taxes*, para. 2.
It may be observed that the GATT adopted a pragmatic approach and thus found it unnecessary to define the respective jurisdictions of the GATT and IMF. In the view of the GATT Contracting Parties, the more important task was establishing effective consultation mechanisms. By contrast, in 1960, the Executive Board of the IMF—after evaluating such various tests such as the intent, effect and technique—adopted the technique test and defined a measure restricting payments and transfers for current transactions as “a direct governmental limitation of the availability or use of exchange as such”. In other words, an exchange restriction is defined against the technical criterion regardless of its economic effect or its underlying purpose. With a view to avoiding potential jurisdictional conflict between the GATT and the IMF, the underlying transaction is to be treated as a trade measure and thus not within the jurisdiction of the IMF.

The definition of the IMF on exchange action was respected by the Panel on Dominican Republic–Cigarettes where the measure at issue related to a foreign exchange fee on all imports. The Panel firstly referred to the reliance of the Dominican Republic on the criterion for determining whether a measure is an exchange restriction: “whether it involves a direct governmental limitation on the availability or use of exchange as such”. The Panel further noted that the complainant did not object to this criterion. In view of Article XV:9 of the GATT 1994, which exempts exchange restrictions that are applied in accordance with the IMF Agreement from the obligations under the GATT 1994, the Panel thus held that the guiding principle for the definition of an exchange restriction should be respected.

In applying this definition to the case before it, the Panel firstly looked into the content of the disputed resolution of the Central Bank Monetary Board of the Dominican Republic, which originally dictated that a fee of two and half percent of the selling exchange rate be applied to each transaction. As this fee was applied to all kinds of transactions, the Panel held that the measure contained in

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19 BISD 35/198.
22 Panel Report on Dominican Republic–Cigarettes, para. 7.132.
23 Panel Report on Dominican Republic–Cigarettes, para. 7.132.
the original Resolution should be regarded as an exchange restriction. Nonetheless, the scope of the application of the revised resolution was limited to the importation of goods, excluding, *inter alia*, external debt service payments, capital repatriation and remittances of profit. In view of the Panel, the direct limitation of availability or use of exchange entails a limitation on the use of exchange for all purposes. Otherwise, the GATT disciplines would be easily circumvented by characterizing a fee or charge levied as an ‘exchange restriction’, which would discriminate against imports but at the same time fail to achieve the legitimate goals of the IMF Agreement. The Panel thus concluded that the foreign exchange fee imposed by the Dominican Republic did not constitute an exchange restriction, but rather a trade restriction subject to the WTO rules.

IV Whether It is Obligatory or Discretionary to Consult the IMF

The second element of the WTO/IMF relationship relates to the consultation requirement as set out for in Article XV:2 of the GATT 1994, which instructs the WTO to consult fully with the IMF when it is called upon to “consider or deal with issues concerning monetary reserves, balances of payments or foreign exchange arrangements”. This article raises several questions: the scope of the consultation requirement; the legal basis for the consultation process; the binding effects of the finding and statistical facts presented by the IMF and its determination on the consistency of an action with the Articles of the Agreement of the IMF or Special Exchange Arrangements; and the compatibility of this consultation procedure with the obligation of the WTO panel/Appellate Body to “make an objective assessment of the matter before it”.

Regarding the scope of Article XV:2 of the GATT 1994, upon appeal in appellate proceedings, Argentina argued that the Panel failed to consult the IMF and thus breached its obligation under Article 11 of the DSU to make an objective assessment. In response to this argument, the Appellate Body firstly stressed that the only provision containing such a consultation requirement lies in Article XV:2 of the GATT 1994, and the legal text does not mention a surcharge, or statistical *ad valorem* tax of three percent, as claimed by Argentina. The

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24 Panel Report on *Dominican Republic–Cigarettes*, para. 7.135.
25 Panel Report on *Dominican Republic–Cigarettes*, para. 7.136.
26 Panel Report on *Dominican Republic–Cigarettes*, para. 7.137.
27 The Panel also referred to the letter of the IMF as part of its reasoning, see, *infra*, text to n 38.
29 DSU, Art. 11.
Appellate Body distinguished this requirement for consultation with the right of a panel to “seek information and technical advice from any individual or body which it deems appropriate”. The latter is contingent on the sound exercise of discretion of a panel, the bounds of which the present panel did not overlook. According to the Appellate Body, the conditions under which a panel might consult the IMF are limited to matters relating to monetary reserves, balances of payments, or foreign exchange arrangements. For subjects falling outside of these three categories, the decision to consult the IMF, or not, is at the discretion of a panel.

In Argentina – Textiles, the Appellate Body seemed to imply that when a panel is called upon to examine matters falling into these three categories, it is obliged to consult the IMF. Such a requirement was not explicitly followed in India – Quantitative Restrictions, where the Panel was called upon to examine whether the import quantitative restrictions imposed by India for balances of payments purpose were consistent with WTO regulations. While not taking a position on the “extent to which Article XV:2 may require panels to consult with the IMF or consider as dispositive specific determinations of the IMF”, the Panel stressed the it had the right to seek information from the IMF—a recognized organization with extensive expertise in the relevant subject areas. After having referred to Article 13 of the DSU and Article XV:2 of the GATT 1994, the Panel “submitted a number of questions to the IMF”. In view of the wording chosen by the Panel, which wrote of having “submitted a number of question to the IMF” instead of a requirement to “consult fully with the IMF”, arguably, the legal basis for this initiative is more reliant on Article 13 of the DSU than on Article XV:2 of the GATT 1994.

Interestingly, in submitting questions to the IMF, the Panel on India – Quantitative Restrictions was alleged to have failed to make an objective assessment because it delegated its judicial function to the IMF. In response to this allegation, the Appellate observed that the Panel had critically assessed the view of the IMF and concluded that the actions of the Panel were consistent with Article 11 of the DSU. On its face, the Appellate Body did not take a position on

31 DSU, Art. 13.1.
32 Appellate Body Report on Argentina – Textiles, paras. 84-86.
34 Ibid para. 5.12.
35 Appellate Body Report on India – Quantitative Restrictions, WT/DS90/AB/R (23 August 1999), paras. 149-150.
the obligation of a panel to consult with the IMF under Article XV:2 of the GATT 1994 and to consider as dispositive specific determinations of the IMF. Nonetheless, as the Appellate Body observed and confirmed that the Panel critically assessed the view of the IMF, this observation and confirmation suggests the determination of the IMF may not be dispositive. To conclude otherwise leaves no space for a critical assessment by the Panel.

In Dominican Republic – Cigarettes, where the Panel was called upon to determine the nature of the foreign exchange fee imposed by the Dominican Republic, it again requested information from the IMF. In deciding to do so, the Panel first referred to Article XV:2 of the GATT 1994. The Panel then stated “it needed to seek more information on the precise nature and status of the foreign exchange fee measure in the stand-by arrangement between the IMF and the Dominican Republic”. It also needed to “consult with the IMF based on paragraph 2 of Article XV” to verify the validity of the assertion by the Dominican Republic that the foreign exchange fee in question was an exchange action. If so, the second question would be whether such a foreign exchange fee was in accordance with the IMF Agreement and thus justified under Article XV:9(a) of the GATT 1994. The Panel firstly noted that paragraph 8 of the WTO-IMF Agreement instructs the IMF to inform the relevant WTO body considering exchange measures within the IMF’s jurisdiction whether such measures are consistent with the IMF Agreement. The Panel then referred to Argentina – Textiles where the Appellate Body held the panel might have good reasons not to consult the IMF, but that it might also have been useful to do so. Taking these factors into account, the Panel thus decided to request information from the IMF.

Taking a closer look at the case law, one may perceive a delicate shift in the attitude of the panels toward consulting the IMF. In Argentina – Textiles, the Panel decided not to do so as the surcharge at issue did not fall within one of the

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37 This position was criticized by some commenter. According to Siegel, the Panel failed to appreciate the institutional link between the WTO and IMF and thus mistook the IMF as an ordinary expert opinion. This interpretation runs counter to the clear language of Article XV:2 of the GATT 1994. Siegel (n 21) 581-582.
39 Panel Report on Dominican Republic– Cigarettes, para. 7.139.
40 Panel Report on Dominican Republic– Cigarettes, para. 7.139.
41 Panel Report on Dominican Republic– Cigarettes, para. 7.139.
42 Panel Report on Dominican Republic– Cigarettes, para. 7.140.
43 Panel Report on Dominican Republic– Cigarettes, para. 7.141.
three categories as set out in Article XV:2 of the GATT 1994. Nor did it refer to Article 13 of the DSU in seeking information from the IMF. In *India – Quantitative Restrictions*, the Panel decided to seek information from the IMF because the latter is a recognized organization with extensive expertise in the pertinent subject matter, which suggested that the legal basis for its initiative was based on Article 11 of the DSU and the consultation was discretionary. A stronger tone was found in *Dominican Republic – Cigarettes*, where the Panel referred only to Article XV:2 and considered it needful to consult with the IMF. In view of these developments, one may conclude that the panel attaches greater importance to Article XV:2, which sets out the consultation requirement.

With regards to the binding effects of the IMF’s statistical and factual findings, the Panel and Appellate Body on *India – Quantitative Restrictions*, on the face, did not take any position on this point. However, the Appellate Body, in confirming the fulfillment of the Panel obligation to make an objective assessment, stressed that the Panel ought to critically assess the information provided by the IMF. This implies the Appellate Body is of the opinion that the panel is not bound by the findings of the IMF. As for the determination of the IMF that the exchange action of a Member is consistent with the IMF Agreement, or the terms of a special exchange arrangement, the Panel on *Dominican Republic – Cigarettes*, while adopting the same guiding principle for the definition of an exchange action, firstly made its provisional decision and only then referred to the view of the IMF. In reaching its conclusion, the Panel stated that “for the reasons set out above by the Panel and considering the opinion expressed by the IMF”, 44 found the foreign exchange fee imposed by the Dominican Republic did not constitute an exchange restriction.

In that complaint, although the IMF found it unnecessary to determine whether or not the foreign exchange fee was consistent with IMF Agreements, as it was not an exchange restriction, the Panel nonetheless carried out an *arguendo* analysis as to whether the Dominican Republic had discharged its burden of proof in the demonstration of that point. The Panel found that the Dominican Republic had failed to do so and thus concluded that even if the foreign exchange fee were an exchange restriction, it was not implemented in accordance with the IMF Agreement and consequently could not be justified by Article XV:9(a) of the GATT 1994. 45 In view of this analysis, it seems that the Panel considered itself

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44 Panel Report on *Dominican Republic – Cigarettes*, para. 7.145.
45 Panel Report on *Dominican Republic – Cigarettes*, para. 7.154.
competent to examine the consistency of the exchange actions of a member with
the IMF Agreement and, subsequently, the justification under Article XV:9(a) of
the GATT 1994. In this, the Panel is not necessarily bound by the determination
of the IMF.

Finally, with regards to the potential tension between the consultation
requirement and an obligation on the part of a panel to make an objective
assessment, the Panel on Argentina – Textiles was alleged to infringe Article 11 of
the DSU by failing to consult the IMF, whereas the Panel on India – Quantitative
Restrictions was alleged to have acted inconsistently with the same article for its
decision to seek information from the IMF. And yet, both panel decisions were
upheld by the Appellate Body. The Appellate Body held in Argentina – Textiles
that the decision not to consult the IMF was within the bounds of the
discretionary power of the Panel; the Appellate Body then held in India –
Quantitative Restrictions that the Panel critically assessed the information
provided by the IMF and consequently did not delegate its judicial power. In both
cases, it found the actions of the Panels did not run counter to the obligation to
make an objective assessment, as set out in Article 11 of the DSU.

V The Determination of Consistency of an Exchange Action with Special
Exchange Arrangements

A peculiar element of the WTO-IMF relationship relates to the special
exchange arrangements to be concluded between the WTO and an acceding
member, which is not IMF member. In the GATT era, there were four such special
exchange arrangements, the drafting processes of which the IMF participated in.
These four countries were Ceylon, Haiti, Indonesia and Federal Republic of
Germany, which subsequently became IMF members.46 The only special
exchange arrangement currently in force is the one signed between Taiwan and
the WTO, as Taiwan had been denied IMF membership since membership in that
body, unlike the WTO, does not offer an opportunity for Taiwan to join as a
separate customs territory.47

The purpose of this Special Exchange Agreement is to ensure that “the
objective of the General Agreement 1994 will not be frustrated as a result of action

46 J Gold, Membership and Nonmembership in the International Monetary Fund - A Study in
in exchange matters” by Taiwan.\textsuperscript{48} The Special Exchange Agreement also makes clear that it shall not include obligations inconsistent with those imposed by the IMF.\textsuperscript{49} It comprises six articles regulating orderly exchange arrangements; the avoidance of restrictions on current payments and multiple currency practices; controls on capital transfers; restrictions on payments; the furnishing of information; and other miscellaneous provisions.

As Taiwan is not a member of the IMF, it is not obligated by the IMF Agreement to provide information, notably, the Article VIII consultations, to that body. However, the Special Exchange Arrangement thus obliges Taiwan to provide information falling within the scope of the Article VIII of the IMF Agreement to the WTO in order for the WTO to perform its function under the WTO Agreement.\textsuperscript{50} The Special Exchange Arrangement also regulates indirect communications between the WTO, IMF and Taiwan. Whenever the WTO consults with the IMF on exchange matters or other cases particularly affecting Taiwan, the WTO shall ensure the effective presentation of Taiwan’s case to the IMF. Any views communicated by Taiwan to the WTO should thus be transmitted to the IMF.\textsuperscript{51} Such indirect communication deviates from the basic text adopted by the resolution of the GATT Contracting Parties on 20 June 1949,\textsuperscript{52} which provides the member in question an opportunity to present its case directly, and to initiate direct consultations with the IMF.\textsuperscript{53}

The provision of information and indirect communication, as set out in the Special Exchange Arrangement, is closely linked to Article XV:2 of the GATT 1994, which also instructs the WTO to accept the determination of the IMF as to whether the actions of a member in exchange matters are in accordance with the special exchange arrangement. Nonetheless, when the IMF is requested to make a determination as to whether or not an exchange action is in accordance with the IMF Agreement, the IMF is determining whether the rights and obligations of a member under the Agreement are satisfied. The reference to the jurisdiction of the IMF necessitates a determination from the IMF. In contrast, the rights and obligations as contained in the Special Exchange Arrangement are binding on the WTO and the member concerned. In other words, if the member concerned

\textsuperscript{48} The Special Exchange Agreement, second recital.
\textsuperscript{49} The Special Exchange Agreement, second recital.
\textsuperscript{50} The Special Exchange Agreement, Art. 5.1.
\textsuperscript{51} The Special Exchange Agreement, Art. 6.3.
\textsuperscript{52} BISD 2S/115.
\textsuperscript{53} Gold (n 46) 432-433.
breaches an obligation under the Special Exchange Arrangement, the obligation infringed is that undertaken in the context of the WTO Agreement rather than the IMF Agreement. In this particular case, even if the pertinent member adopts an exchange action, it will not fall under the jurisdiction of the IMF if the member is not also a member of the IMF. Instead, the exchange action is subject to the regulations of the WTO, which dictates that the member concerned not frustrate the intent of the GATT 1994 by exchange actions. However, the WTO is nonetheless instructed to accept the determination as to whether or not the exchange action is in accordance with the special exchange arrangement.\textsuperscript{54} Borrowing a term from Siegel,\textsuperscript{55} this determination may well be considered to be a ‘service’ provided by the IMF to the WTO, since the IMF is determining something that falls outside of its jurisdiction. In this connection, one may doubt whether it is feasible to attribute such weight to the determination of the IMF as concerns respecting the jurisdiction of the IMF were not sustained. This may then blur the line between consultation with the IMF under Article XV:2 of the GATT 1994, and seeking information and technical advice from any individual or body under Article 13 of the DSU.

Finally, the special exchange arrangements are devices that the GATT/WTO develops to oblige countries that are not IMF members to observe complementary rules both on trade and exchange. One would then wonder whether a similar mechanism exists in the IMF Agreement to prevent IMF countries that are not WTO members from circumventing IMF rules by trade actions. There was discussion as to whether the IMF should give a more extensive interpretation of “restriction on the making of payments and transfers for current international transactions” to be applied to an IMF member that was not a Contracting Party to the GATT, but such a proposal was soon renounced.\textsuperscript{56} However, this does not suggest that the IMF has no influence on trade policies of its members. As will be seen below, the IMF may impact the trade activities of a country in numerous ways.

\section*{VI The IMF’s Involvement on Trade Activities}

As noted by Wouters and Coppens, in response to the international debt crisis in 1980s, the IMF (and the World Bank) became deeply involved in the

\textsuperscript{54} Ibid 432.
\textsuperscript{55} Siegel (n 21) 580.
\textsuperscript{56} Gold above n 46, at 445.
economic policies of developing countries by promoting structural adjustment measures, of which the core ingredients were trade liberalization measures.\textsuperscript{57} Since then, in various ways, the IMF has greatly influenced the trade policy-making of low-income countries. The recommended trade reforms cover, \textit{inter alia}, liberalization of trade policy and inward foreign direct investment, privatization and property rights.\textsuperscript{58} The IMF may also exert influence on the trade policies low-income countries through such facilities as poverty reduction and growth facilities.\textsuperscript{59} The influence of the IMF on a national trade policy of interest to the WTO maybe categorized thus: structural adjustment programs and other IMF supported facilities; trade policy reform as IMF conditionality; and pre-accession liberalization efforts or unilateral liberalization beyond WTO commitments.

The structural adjustment program is aimed to oversee the distribution of capital of a country in support of macroeconomic policies that would ease the adjustment difficulties and make repayments.\textsuperscript{60} The country in question may be plagued with a balance of payments deficit. In seeking recourse from the IMF, a country may undertake a number of structural adjustment programs which do not necessarily constitute legal conditions for IMF financing and thus involve no legal consequence under the WTO Agreement.\textsuperscript{61} In Argentina – Textiles, while Argentina indicated the statistical tax in its ‘letter of intent’ to the IMF for financing, it was not written into the terms for the disbursement of the funding.\textsuperscript{62} As a consequence, this statistical tax does not give rise to the question of ‘cross-conditionality’ or ‘conflicts of obligations’ under the WTO and IMF.

In a recent BOP measure imposed by Ukraine against cars and refrigerator products in response to a significant reduction of foreign reserves, the IMF also

\textsuperscript{59} Ibid 948-959.
\textsuperscript{60} DC Finch, ‘Adjustment Policies and Conditionality’ in J Williamson (ed) \textit{IMF Conditionality} (Institute of International Economics, Washington, DC 1983) 78. In addition to the IMF, the World Bank also conducts structural adjustment lending. In a case relating to Egyptian structural adjustment, Australia alleged that raising of tariffs against Australian products were inconsistent with Egypt’s commitments under the GATT. See, J Baneth, ‘Comment on the Paper by Gary P. Sampson’ in AO Krueger (ed) \textit{The WTO as an International Organization} (The University of Chicago Press, Chicago; London 1998) 273.
\textsuperscript{61} Siegel (n 21) 573.
\textsuperscript{62} Ibid 574-575.
demonstrated its influence upon trade policy. During the process of consultation with the BOP Committee, the representative of the IMF stated that the imposition of surcharge "constituted a non-observance of a continuous performance criterion prohibiting the imposition of import restrictions for balance of payments reasons—standard in all Fund programs". While the Ukrainian government aimed to correct this by limiting its application to two product groups and agreed to remove the surcharge completely in the near future, the Executive Directors, at the recent IMF Board meeting to discuss the first review under the Stand-By Arrangement, Executive Directors called on Ukrainian authorities to eliminate all the import restrictions "without further delays".

In concluding the consultations, the BOP Committee arrived at the conclusion that "Ukraine’s external financial position and its balance-of-payments are not under an imminent threat" owing to the depreciation of Hryvnia, measures of fiscal consolidation, and the receipt of external financing from the IMF. The BOP Committee was thus of the view that the measures were "not justified by Ukraine’s current balance-of-payments situation" and not "applied in a manner consistent with the requirements" set forth in Article XII of GATT 1994 and the BOP Understanding. In this case, Ukraine’s surcharge did not only run counter to WTO disciplines but also constituted non-observance of IMF performance criterion. The BOP Committee thus had little difficulty in determining that the measure was inconsistent with the WTO. However, in case where there are ‘conflicts of obligations’ between IMF conditionalities and WTO disciplines, the scenario would be different. Therefore, it essential for the IMF to take great care in drafting its trade-related conditionalities to avoid such a threat.

The final issue to address is the relevance of unilateral trade liberalization undertaken by countries either as part of structural adjustment programs recommended by the IMF or as a condition for receiving financing from the IMF. Similar problems may arise in pre-accession liberalization efforts. The difficulties faced by countries undergoing trade liberalization due to the influence of the IMF include a loss of bargaining power during trade negotiations in the WTO forum. As a consequence, there had been discussion in the Uruguay Round of means of giving ‘credit’ for these liberalization measures. However, no concrete result was

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64 Ibid para. 7.
65 WTO Document, WT/BOP/R/93 (29 June 200), para. 32.
agreed upon. A similar idea was also proposed during the Doha negotiations, but it remains to be seen whether these efforts will bear fruit.

VII Conclusion

This chapter revisited the legal relationship between WTO and IMF, focusing on the Article XV of the GATT 1994. It examined the different constituencies of these two organizations and how these present challenges for the pursuit of mutual interests for common members of both organizations. In approaching the jurisdictional aspect, this chapter examined the relevant case law and found that the definition of the IMF on “exchange actions” and “trade actions” has been embraced by the WTO. However, the WTO dispute settlement panel tends to make its own determinations first, and then refer to the opinion of the IMF. The panel has become more willing to consult with or seek information from the IMF, regardless the legal basis for its initiative. The panel also tends not to treat the information provided by the IMF as dispositive, but rather critically assesses it. In this way, the panel does not breach its obligation to make an objective assessment of matters before it.

After investigating the Special Exchange Arrangement concluded by Taiwan and the WTO, this chapter found it deviates from the model special exchange arrangement which the IMF helped to draft in that the Special Exchange Arrangement does not offer an opportunity for Taiwan to present its case directly, or to communicate with the IMF. In seeking a determination from the IMF as to whether an exchange action adopted by Taiwan is in accordance with the Special Exchange Arrangement may blur the line between the consultation under Article XV:2 of the GATT, and seeking information under Article 13 of the DSU, as the pertinent obligations exist between Taiwan and the WTO. The determination of the IMF is defined as rendering a ‘service’ to the WTO.

This chapter also found that the IMF may influence the trade policies of a country through structural adjustment programs or other facilities and IMF conditionalities. Given that the IMF is taking greater care to its conditionalities, the chance that ‘conflicts of obligations’ will arise seems remote. On the contrary, as seen in the case of the Ukraine, the IMF may contribute to the WTO-consistency of the trade measures of a country. Nonetheless, an outstanding issue is a loss of bargain power resulting from trade liberalization as

66 Wouters and Coppens (n 57) 303-305.
67 Saner and Guilherme (n 58) 968-969.
recommended or dictated by the IMF. While the idea to ‘credit’ countries for these efforts in the WTO trade negotiations is a move in the right direction, it remains to be seen whether it can be written into law.

The issue of the WTO-IMF relationship may surface again when the next financial storm strikes, though we have ridden out of the present one. In the current financial crisis, the debate over the WTO-IMF relationship has shifted from BOP measures to the relationship between exchange rates and international trade. Since the previous Asian financial crisis, the approaches taken by the WTO and IMF in ascertaining the line between trade actions and exchanges have converged gradually. Also, the WTO dispute settlement panel has demonstrated its goodwill towards the IMF by consulting with, or seeking information from, the IMF. In the policy measures examined in this chapter, there is evidence of a certain degree of coherence.
Reference

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