Juridical Substance or Myth Over Balance-of-Payment: Developing Countries and the Role of the International Monetary Fund in the World Trade Organization

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INTRODUCTION .............................................................................................................. 702

I. BALANCE-OF-PAYMENT AND THE FUND’S JURISDICTIONAL COMPETENCE ................................................................. 704
   A. Nature of a Balance-of-Payment Difficulty ............................................. 704
   B. The Jurisdictional Questions faced by the Fund ...................................... 707
      1. The Raison d’être of the Fund ................................................................. 707
      2. Attitude of the Fund Towards the Emergence of the GATT .............. 708
      3. Capital and Current Accounts in the Fund ........................................... 709
      4. The Fund’s Distinction Between Balance-of-Payment Accounts and Trade Policy ......................................................... 711

II. THE FUND IN GATT/WTO JURISPRUDENCE ......................................................... 713
   A. The GATT/WTO Legal Framework on Balance-of-Payment .................. 713
   B. Trade and an Exchange Action in the GATT/WTO ............................... 714
   C. The Role of the Fund in GATT/WTO: The India-Quantitative Restriction Case Revisited ....................................................... 716
      1. Facts ............................................................................................................. 716
      2. The Arguments .............................................................................................. 717
      3. The Decision .................................................................................................. 718
   D. Selected Issues in the India-Quantitative Restriction Case ................. 719
      1. Whether to Receive the Fund’s Opinion as Required Under Article XV GATT 1994 ................................................................. 719

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2. The Scope of the Information Which a Panel Faced with the Question of a Member’s Balance-of-Payment Situation May Consider .......... 721
3. The Question Concerning the True State of a Member’s Balance-of-Payment Position .......... 723

A. Some Preliminary Matters .......... 727
   1. Juridical Competence Between the Fund and the WTO .......... 727
   2. The Need for the Balance-of-Payment Exception in GATT/WTO .......... 728
   3. The Distinguishing Elements Evident in GATT/WTO .......... 730
B. Developing Countries and the Dimensions of Governance .......... 730
   1. The Malaise of Democratic Deficit Afflicting the Fund .......... 730
   2. The Special and Differential Treatment of Developing Countries .......... 732
   3. The Need for Harmonizing Jurisdiction over Balance-of-Payment .......... 733
   4. The Legalization of the International Trade Regime .......... 734

CONCLUSION .......... 735

And Jacob went near unto Isaac his father;
And he felt him, and said, The voice is Jacob’s voice,
But the hands are the hands of Esau.
And he discerned him not, because his hands were hairy,
As his brother Esau’s hands: so he blessed him.


INTRODUCTION

Although the architects of the Bretton Woods multilateral economic institutions—the International Monetary Fund (Fund) and the International Bank for Reconstruction and Development—envisaged a trade institution, the latter did not, for various reasons, eventually materialize. The advent of the quasi-trade institution, the General Agreement on Tariffs and Trade (GATT), to a great extent remedied that lacuna by regulating the trade aspects of the multilateral economic system. This was mainly so, as was argued with respect to the existing multilateral
institutions, because of the pervasive beggar-thy-neighbor policies characterizing the pre-World War II economic policies. Ensuring that gains already made in managing the multilateral fiscal policy by the Fund were not circumvented was a central preoccupation connected to the emergence of the GATT. This was the mosaic of the GATT’s evolution and it not surprisingly, not only influenced, but also found expression in its specific provisions.

Against that background, no other area of the multilateral trade system can better account for the intertwined relationship between the GATT’s progeny, the World Trade Organization (WTO), and the Fund than the balance-of-payment situation of Members of the WTO. From the beginning, it is instructive to note that the very nature of a balance-of-payment difficulty reveals a duality that resonates both in the foreign exchange and in the trade situation of a country. Given that state of affairs, the difficulty encountered in any allocation of jurisdictional competence over balance-of-payment becomes apparent.

This Note attempts to chart the division of labor in respect of balance-of-payment between the Fund and the WTO. More importantly, it reflects on how the intertwined relationship between the Fund and the WTO over balance-of-payment might impact on developing countries in the unfolding architecture of trade.

Part I of this Note starts by revisiting the nature of a balance-of-payment difficulty and goes on to trace the Fund’s own approach in demarcating the boundaries of its competence in respect of that problem. Part II examines the potential ramifications of the Fund’s role in the WTO, particularly in reference to developing country Members of the WTO. To animate that subject, Part II engages in a case analysis involving India; namely *India-Quantitative Restrictions*. Part III proceeds to situate the lessons drawn from that case analysis in the wider framework of global economic governance issues, the objective being mainly to delineate the regulatory boundaries as they affect developing country Members of the WTO. A fundamental point to note here is that the state of a Member’s balance-of-payment is intended to suggest the “need for action” in its economic policies. Consequently, this Note identifies those governance deficits likely to further constrain the available economic policy tools open to developing countries in the international trade sphere, particularly where the Fund’s role in the WTO is not subjected to

scrutiny. In that connection, this Note points to alternative approaches that will foster confidence among developing country Members. Part IV concludes by re-iterating some key points made in the course of this Note.

I. BALANCE-OF-PAYMENT AND THE FUND’S JURISDICTIONAL COMPETENCE

A. Nature of a Balance-of-Payment Difficulty

A country’s balance of international transactions is a statement that takes into account the values of all goods and services, all gifts and foreign aid, all capital loans, all official settlements and international reserves coming in and going out of a country. The “balance-of-payment account of a country is comprised of two accounts, namely, the current account and the capital account." The capital account depicts a record of a country’s transactions in relation to its exports of goods and services. Thus, for example, a government of Nigeria payment for the importation of electrical equipment is recorded on the current account side of the balance-of-payment account. On the other hand, the capital account aspect of the balance-of-payment records a country’s international investments or purchases abroad and vice versa. That is to say, the capital account also reflects international investments and purchases in a country. For example, income from an investment, say in an oil and gas

3. PAUL A. SAMUELSON, Economics 614 (1980). A short but concise discussion of the concept of balance-of-payment is that by HOST-MADSSEN, supra note 2; MAX J. WASSERMAN & RAY M. WARE, THE BALANCE OF PAYMENTS 159 (1965) ("The balance of payments may be defined as a statistical presentation of economic transactions during a given period between the residents of one country, and those of the rest of the world, another country, group of countries or specified international organizations). Note that sometimes the term “balance of international transactions” is preferred to “balance-of-payments.” This is so because the balance of international transactions reflects a country’s accounts balance vis-à-vis its external trading partners. For purposes of convenience, however, the terms “balance-of-payment” and “balance of international transactions” are used interchangeably throughout this note. On the uses of the balance-of-payment accounts, Wassermann and Ware state:

[The most important use of the balance of payments is to shed further light on the operations of the economy by showing the nature and the magnitude of its overseas transactions[.] More specifically, the balance of payments shows what was received from abroad in goods, services, unilateral transfers and capital and what was given in payment.

Id. at 161.


5. BLANCHARD OLIVIER ET AL., MACROECONOMICS 111 (2000).
company, is reflected on the capital side of the balance-of-payment account.\textsuperscript{6}

Wasserman and Ware regard the "magnitude, character and movement of balance of payments surpluses and deficits as one of the important features of this compilation [balance-of-payment accounts]."\textsuperscript{7} In that connection, they observe that:

The existence of a deficit indicates that a nation may have been living beyond its means internationally; that it has paid more to foreign residents than it received. A non-reserve center cannot run a deficit indefinitely. Sooner or later its holdings, its capacity to procure additional reserves by borrowing, drawing on the IMF or by obtaining grants from other governments is likely to disappear. Deficits in the case of such countries are a distinct danger signal.\textsuperscript{8}

Another implicit deduction from the statement above is that a deficit indicates a situation where imports outstrip exports.\textsuperscript{9} Conversely, a surplus in a country's balance-of-payments indicates that it is living within its means and accordingly, its exports exceed imports.

A number of factors could be responsible for a situation giving rise to what is regarded as a balance-of-payment crisis. In general, a quality of all those factors is that they have a negative impact on the foreign exchange and capital of the country. In particular, those responsible factors may arise owing to internal, external, or even from an interaction of both internal and external factors.\textsuperscript{10} The internal factors may include, \textit{inter alia}: a sudden and unforeseen failure in crop harvests particularly where such harvests comprise the country's main export; a decline in technological innovation or government monetary policy such as a devaluation of the domestic currency.\textsuperscript{11} An example of a pertinent external factor is a depression in world markets and an upward spiral in the prices of the country's imports. An example of an interaction of internal and external factors giving rise to a balance-of-payment crisis would be political upheaval in a country that precipitates a massive withdrawal of investments from a country. In this respect, an illustrative account of the interaction

\textsuperscript{6} At all times, at least notionally, the capital and the current must balance. \textit{See} \textsc{Samuelson}, \textit{supra} note 3, at 614.
\textsuperscript{7} \textsc{Wasserman \& Ware}, \textit{supra} note 3, at 162.
\textsuperscript{8} \textit{Id}.
\textsuperscript{10} It is of course increasingly difficult to distinguish between domestic and international factors given their increased interconnectedness.
\textsuperscript{11} \textsc{W.M. Scammell}, \textit{International Monetary Policy} 33 (2d ed. 1961).
between those factors culminating in Thailand's 1997 balance-of-payment difficulties is offered by Chantal Thomas:

[A] government policy of maintaining a strong currency made exports less competitive and created deficits in the mid-1990s. Finally, increasing acute concerns about the domestic banking system caused investors in 1997 to exchange their Thai assets for non-Thai assets en masse. The difficulties faced by an over-leveraged banking system created an investor exodus from Thai capital markets . . . In short, a severe balance-of-payments crisis struck.\(^\text{12}\)

Thailand's situation and its response to the balance-of-payment difficulty—in this case, the maintenance of an unsupportable exchange rate for its currency—lead to the question of policy options. In other words, what responses are usually adopted by a country to counter a balance-of-payment difficulty? Frieder Roessler's "tree of policy alternatives" broadly categorizing the available options as either "internal measures" or "external measures" is illuminating.\(^\text{13}\) Comparing those two primary forms of responses, Roessler views selective external measures as being problematic given that they:

[Introduce costly distortions in the countries' economies, jeopardize the result of past trade liberalization efforts and make future progress in the removal of trade barriers more difficult . . . selective measures impeding trade can spark off a spiral of retaliatory moves which—as the 1930s have demonstrated—can suffocate world trade.\(^\text{14}\)

Quantitative restrictions,\(^\text{15}\) such as those permissible under certain conditions in the WTO framework,\(^\text{16}\) fall under the category of selective

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14. Id. at 623.
15. The term "quantitative restrictions" is, in some ways, a generic term encompassing other measures such as import surcharges. See Christian Vincke, *Trade Restrictions for Balance of Payments Reasons and the GATT: Quotas v. Surcharges*, 13 HARV. INT'L L.J. 289 (1972). Note, however, that throughout this note the term is used as an import quota.
external measures employed by countries for countering a balance-of-payment disequilibrium. As will be seen, such quantitative restrictions, depending on how they are framed, could either be viewed as a monetary policy or trade policy with attendant jurisdictional implications.

B. The Jurisdictional Questions faced by the Fund

1. The Raison d'etre of the Fund

The recognition that a balance-of-payment disequilibrium was injurious to the international financial regime, and further, the lack of a coherent international response to the problem, were central factors leading to the formation of the Fund. 18 "The creation of the International Monetary Fund," opines Margaret De Vries, "established an entirely new framework for balance of payments adjustment." 19 Whereas the previous system for attaining balance-of-payment equilibrium was hinged on the gold standard, 20 the objective of the system heralded by the Fund was described as being:

[T]o simultaneously attain and maintain internal equilibrium (full employment) and external equilibrium (balance of payments equilibrium). Internal equilibrium was to be obtained by fiscal and monetary policy. Balance of payments adjustment was to be effected by (1) changes in exchange rates, (2) use of reserves, supplemented by the temporary use of the secondary line of reserves furnished by the Fund's resources while adjustment was being effected, (3) limited use of restrictions on exchange transactions, and (4) where necessary, restrictions on capital flows. 21

The foregoing system underscored a preference for a multilateral approach, as opposed to a unilateral one, in confronting a balance-of-payment disequilibrium. The Fund's resources, it was envisaged, could

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17. For the leading work analyzing and setting out the background details of the Fund's formation, see The International Monetary Fund 1945–1965: Twenty Years of International Monetary Cooperation (J. Keith Horsefield ed., 1969) [hereinafter International Monetary Cooperation].


21. DE VRIES, supra note 19, 9–10. Article IV:2 of the Charter of the Fund enjoins each Member of the Fund to: "[S]elect to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions." See Charter of the Fund, supra note 18, art. IV:2.
be applied to forestall a situation whereby a country's unilateral response to its balance-of-payment difficulty threatened to endanger the international financial regime.\textsuperscript{22}

2. Attitude of the Fund Towards the Emergence of the GATT\textsuperscript{23}

The precursor to the GATT, the International Trade Organization (ITO), was intended as one of the Bretton Woods institutions.\textsuperscript{24} This, however, was not to be the case, as the United States, a key proponent of the Charter of the ITO eventually failed to ratify it.\textsuperscript{25} What is instructive is that the interlocking between, on the one hand commercial policy that the ITO was intended to regulate, and on the other exchange policy to be supervised by the Fund, was not lost on the designers of those economic institutions. Thus, Clair Wilcox observes:

It is the purpose of the International Monetary Fund, by contributing to the stabilization of currencies, to bring about the eventual elimination of exchange controls. \textit{But there would be little point in abolishing national regulation of the use of monies if freedom to license imports were retained. For any restriction that a nation was forbidden to accomplish by regulating its exchanges, it could effect with equal certainty by imposing a quota system of its trade. Unless quantitative restrictions, as well as exchange controls, are brought under international supervision, the purpose of the fund can be circumvented with the greatest of ease. Unless the fund is supported by the ITO, its possible contribution to the restoration of a freer trading system will be insignificant...} The future of the fund is thus dependent upon the establishment and operation of the ITO.\textsuperscript{26}

With this potential for concurrent jurisdiction between the Fund and the ITO in terms of measures affecting trade, the Fund took more than a passing interest in the ITO even at the proposal stage. De Vries provides

\begin{itemize}
\item \textsuperscript{22} See Stephen Silard, \textit{The Impact of the International Monetary Fund on International Trade}, 2 J. World Trade L. 129 (1968).
\item \textsuperscript{23} The expression "the GATT" is employed to refer to the institution that was in fact in existence prior to the formation of the World Trade Organization (the WTO). The GATT administered the GATT 1947. Note that by a curious drafting technique, the GATT 1947 is distinct from the GATT 1994. This is so notwithstanding the fact that it is applied as part of the GATT 1994; see supra note 16.
\item \textsuperscript{24} See generally, Peter Kenen & Barry Eichengreen, \textit{Managing the World Economy under the Bretton Woods System: An Overview}, in \textit{Managing the World Economy: Fifty Years after the Bretton Woods} 5 (Peter Kenen ed., 1994).
\item \textsuperscript{25} The details of the controversy surrounding the adoption of the Charter of the ITO might be gleaned from Robert Hudec, \textit{The GATT Legal System and World Trade Diplomacy} 21–22 (1990).
\item \textsuperscript{26} Clair Wilcox, \textit{A Charter of World Trade} 211 (1972) (emphasis added).
\end{itemize}
us with an insight into the Fund’s ambivalence towards the ITO in its nascent stages when she notes:

*The Fund’s acute interest in whatever plans were drawn up was immediately made clear by the Executive Directors. The field of activity of the proposed ITO would, at the least, run parallel to that of the Fund. It might even be formulated as to encroach upon the Fund’s responsibilities; indeed the rules of the ITO might provide for its members a means of escape from the jurisdiction of the Fund. In either case, the Fund’s influence would be impaired. How to prevent this formed a major preoccupation of the Executive Directors as they considered the Fund’s participation in the Preparatory Committee’s sessions.*

From the earliest opportunity, therefore, the Fund was ill-disposed towards yielding any jurisdictional space to the ITO, more so given the potential impairment of its influence such an action would entail. Although the ITO subsequently failed to materialize, De Vries further notes, that “fortunately for the Fund, many of the relationships with the Fund that *had been so carefully defined for the proposed ITO were retained in the GATT*.”

Going by that account, it is arguable that with the demise of the ITO, the template hitherto envisaged for the Fund-ITO relationship then became applicable to the Fund-GATT relationship. This, perhaps, signals the incipient stages of a jurisdictional quagmire on balance-of-payment measures between the Fund and what later became the GATT. This Note now turns to examine the specific provisions that govern the permissible fiscal measures a Member of the Fund might adopt in order to restore balance-of-payment equilibrium.

3. Capital and Current Accounts in the Fund

There are a number of provisions in the Charter of the Fund that signal the institutional attitude towards measures that a Member might adopt in order to restore equilibrium to the component aspects of its balance-of-payment. Thus, in respect of current accounts, the following provision titled: “Avoidance of Restrictions on Current Payments” is pertinent and states in part:

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27. Margaret G. de Vries, *Collaborating with the GATT, in International Monetary Cooperation*, supra note 17, 332, 333 (emphasis added). De Vries also points out that “the activities of the Fund’s representative at these preparatory sessions helped to ensure that the charter of the ITO would be compatible with the Fund’s interests.” *Id.* at 334 (emphasis added). See also Gilard Hexner, *The General Agreement on Tariffs and Trade and the Monetary Fund* 432–64 (1950–51).
(a) Subject to the provisions of Article VII, Section 3(b) and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.29

Regarding capital accounts, the Charter of the Fund states:

Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfer funds in settlement of commitments.30

When read together, those two key provisions in the Charter of the Fund relating to the component aspects of a Member’s balance-of-payment suggest at least that the approach adopted in respect of the current account is distinguishable from that adopted in connection with the capital account. Whereas, in respect of what is regarded as current international transactions (current account transactions), restrictions are ab initio disallowed (subject to limited exceptions); in respect of the capital account, the reverse is the case—restrictions are maintainable (again, subject to limited exceptions).31 Given this difference in the treatment of the two accounts, a distinction between what falls within their respective ambits appears crucial.

Furthermore, Article XXX of the Charter of the Fund provides a list of transactions considered “current” such that restrictions in those areas by Members are not permissible. That is to say, so long as the transaction in question reflects in nature those itemized under Article XXX of the Charter of the Fund, they would be considered current and a fortiori, not to be subjected to any restrictions. In part, those transactions envisage “all payments due in connection with foreign trade.”32

The phrase, “all

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29. Charter of the Fund, supra note 18, at art. VII:2. However, note the exceptions mentioned id. at art. VII:3 (b) and art. XIV:2. Those exceptions recognize instances that may warrant the imposition of restrictions on current international transactions.

30. Id. at art. VI:3.

31. However, James Evans Jr., argues that the provisions contained in Article VI:3 of the Charter of the Fund are superfluous, in so far as they relate to current transactions given that they add nothing new to that already provided for under Article VIII:2 of the Charter of the Fund. See, James Evans Jr., Current and Capital Transactions: How the Fund Defines Them, 5 FIN. & DEV. 31 (1968). A further rigorous examination of the phrase, “exchange restriction” and thus what might be characterized as a “current international transaction” coming within the Fund’s jurisdiction is that contained in the following piece: Hans Aufricht, Exchange Restrictions under the Fund Agreement, 2 J. WORLD TRADE L. 298 (1968).

32. The phrase “current international transactions” is defined in part as:

(1) All payments due in connection with foreign trade, other current business, including services, and normal short term banking and credit facilities;
payments due in connection with foreign trade" is instructive in that it suggests that Members are prohibited from restricting all payments arising in the course of their trade *inter se*. As Joseph Gold explains:

A resident of country X can decide to enter into a current international transaction with a resident of country Y, who offers the most favorable terms, *in the confidence that the proceeds of the transaction that the resident of X is to receive will not be blocked or restricted* in any way by country Y.\(^3\)

In sum, it might be noted, restrictions here and consequently, the jurisdiction of the Fund pertains more to "exchange restrictions" that might impede the flow of trade between its Members. On the other hand, restrictions pertaining to goods and services were to be outside the purview of the Fund’s jurisdiction.

4. The Fund’s Distinction Between Balance-of-Payment Accounts and Trade Policy

The difficult question here concerns how to deal with a trade policy measure, such as an import restriction, that is arguably beyond the purview of what might be regarded as an exchange action *as such*, but which nevertheless causes exchange repercussions. Is such an "import restriction" resonating in the balance-of-payment to be viewed as an exchange action, such that the Fund assumes jurisdictional competence? Or, should it be deemed as a trade action, notwithstanding its attendant exchange repercussions such that the Fund cedes jurisdictional competence to the WTO? Indeed, could such an import restriction be deemed as both an exchange action and, at the same time, a trade action? If so, what consequences will arise, given the separate jurisdictional arrangement between the Fund and the WTO over balance-of-payment?

The Fund by 1952 was already confronted with the intersectional issues arising here. This arose in connection with the Fund’s attempt to define restrictions for the purpose of Article VIII:2 of the Charter of the Fund. Gold’s account of this episode is illuminating because it reveals the relevant tensions at play. He states:

The question of the definition of restrictions for the purposes of Article VIII section 2 was raised as a problem of interpretation in 1951. There were forces pulling in opposite directions: *some*

\(^2\) payments due as interest on loans and as net income from other investments

\(^4\) moderate remittances for family living expenses.

See Charter of the Fund, *supra* note 18, at art. XXX.

wished to arrive at a definition that would make it clear that the Fund’s jurisdiction did not embrace restrictions on trade, even if they were imposed for balance of payments reasons, because these were within the competence of the Contracting Parties to the GATT, whereas others were troubled by the fact that this might limit the competence of the Fund in connection with members’ balances of payments. There was a division of opinion on the primary question of definition and therefore no agreement on the secondary question whether the same measure might be a restriction on both payments under the Funds Articles and on trade under the GATT. The differences of opinion could not be reconciled and discussion petered out.\textsuperscript{34}

By 1959, however, a staff study initiated by the Fund suggested three possible approaches as a way out: First, a measure could be deemed to be a restriction on payments if it was intended to influence the balance-of-payment. Second, the effect of the measure was to be the sole consideration. That is to say, if the measure, either directly or indirectly, affected international payments, it would be regarded as a payments restriction and accordingly, fall within the Fund’s jurisdictional competence. Third, the technique employed in formulating the trade measure was to be another relevant factor. By the technique method, it was meant that:

\begin{quote}
[I]f the measure was so formulated and made to operate as to affect directly the availability or use of exchange it would be considered an exchange restriction. If other techniques were used (for example, an import tariff) the measure under this criterion would not be regarded as an exchange restriction even if the motive was balance of payments oriented and the effect was to restrict indirectly payments.\textsuperscript{35}
\end{quote}

In the end, the Fund preferred the technique criterion over the other two possible approaches. “Either of the other approaches,” it was reasoned, “would have resulted unavoidably in a very considerable coincidence of jurisdiction for the two organizations.”\textsuperscript{36} Consequently, in adopting the technique criterion, the Fund decided that:

The guiding principle in ascertaining whether a measure is a restriction on payments and transfers for current transactions under

\begin{footnotes}
35. Roessler, \textit{supra} note 13, at 640.
36. \textit{GOLD, supra} note 34, at 554.
\end{footnotes}
Juridical Substance or Myth

Article VIII, Section 2, is whether it involves a direct governmental limitation on the availability of or use of exchange as such.\footnote{Id. (quoting E.B Decision No. 1034-(60/27)). Gold praises this approach as being "an example of self-imposed discipline" on the part of the Fund. Id. at 555. Cf. with Roessler who—although conceding that the technique method might be the only acceptable approach given institutional arrangements—nevertheless points out: A country that regulates its foreign trade through the banking system and therefore tends to take currency measures, and a country that uses its customs administration to control foreign trade and therefore tends to trade measures, should be subject to the same obligations. It seems unjustified that the internal administrative organization of foreign trade should determine whether a country is subject to the Fund's or the GATT's jurisdiction. Roessler, supra note 13, at 642.}

What thus emerged from the Fund's cartographic exercise was that the geographical contour of WTO's jurisdictional space revealed a congruence with that of the Fund save only that the method employed by the Member in addressing the balance-of-payment difficulty determined which of those institutions would assume jurisdiction. Just what type of government measures envisaged by the Fund's test is not clearly stated. The key word, however, is "direct." Thus, if a government measure in response to a balance-of-payment difficulty directly affected the use of exchange, it appears that the Fund could assume jurisdiction over such a measure. Conversely, where the government measure implicitly limited exchange usage, the Fund would lack jurisdiction notwithstanding the exchange repercussions of the measure.

II. THE FUND IN GATT/WTO JURISPRUDENCE\footnote{The expression, "GATT/WTO" is used as a matter of convenience in this section indicating that the discussion cuts across two periods. The first period discusses how the GATT confronted the jurisdictional dilemma relating to balance-of-payment. The later period discusses the era of the WTO. In actual fact, the GATT later metamorphosed into the WTO such that in principle, even though not exactly the same institutional body, the WTO is the subject of the present discussion as well.}

A. The GATT/WTO Legal Framework on Balance-of-Payment

The primary legal provisions concerning balance-of-payment in the GATT/WTO are contained in Articles XII, XV, and XVIII GATT 1994.\footnote{Others relevant documents include The Understanding and the Additional Articles to Article XVIII: B of the GATT 1994, both part of the Marrakesh Agreement, supra note 16, the Declaration on the Relationship of the World Trade Organization and the International Monetary Fund, WTO Doc. WT/L/194, and the 1979 Declaration on Trade Measures taken for Balance-of-Payments Purposes, Nov. 28, 1979, BISD 265/205–207.} Those provisions are set out in a labyrinthine order as if to dissuade their usage. To shed light on those provisions, however, this Note shall proceed...
as follows: First, the preliminary issue of whether there exists in the GATT/WTO framework a criteria for distinguishing between a “trade action” *per se* and an “exchange action” in the same manner as obtainable in the Fund is considered. Thereafter, by a case analysis, namely, the *India-Quantitative Restriction* case, the key aspects of the balance-of-payment provisions are examined with particular reference to considerations surrounding the Fund’s role in the WTO.

**B. Trade and an Exchange Action in the GATT/WTO**

As early as 1952, a GATT panel had to decide the question of how to construe what was termed “a special contribution” levied by Greece on some imported products. It was the contention of the Greek delegation that the said contribution was analogous to:

[A] charge imposed on foreign exchange allocated for the importation of goods from abroad equivalent to a multiple currency practice, which measure was considered by the Greek government as indispensable to cover the constantly widening gap between the official exchange rate of the drachma . . . and the effective purchasing power of the drachma.

The difficulty here related to how to characterize the Greek import measure: Whether to construe the Greek measure as a trade measure, and accordingly, within the jurisdictional competence of the GATT panel, or whether to consider it an exchange measure, in which case it would have been within the jurisdictional competence of the Fund. The panel framed the issue before it in this way:

[T]he principal question arising for determination was whether or not the Greek tax was an internal tax or charge on imported products within the meaning of paragraph 2 of Article III. If the finding on this point were affirmative, the Panel considered that it would be subject to the provisions of Article III whatever might have been the underlying intent of the Greek Government in imposing the tax . . . On the other hand, if the contention of the Greek Government were accepted that the tax was not in nature of a tax or charge on imported goods, but was a tax on foreign exchange allocated for the payment of imports, the question would arise whether this was a multiple currency practice, and, if so, whether it was in conformity with the Articles of

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40. *India—Quantitative Restrictions, supra* note 1.
42. *Id.* ¶ 2.
Agreement of the International Monetary Fund. These matters would be for the determination of the International Monetary Fund.\textsuperscript{43}

In the end, the panel refrained from making a pronouncement on the matter, preferring rather to direct the Contracting Parties\textsuperscript{44} to the GATT to seek further information from the Fund regarding how to construe this Greek "special contribution." By refusing to specifically pronounce on the nature of the Greek measure, the GATT panel lost an opportunity to contribute to the jurisprudence relating to the demarcation lines of measures that reflect an admixture of trade and incidental fiscal components.\textsuperscript{45}

In 1954, a Special Sub-Group conducting a review of GATT balance-of-payment vis-à-vis GATT and Fund relations concluded that:

[I]n many instances it was difficult or impossible to define clearly whether a government measure is financial or trade in character and frequently it is both\textsuperscript{...} the division of work between the Contracting Parties and the Fund was in practice "based on the technical nature of government measures rather than on the effect of these measures on international trade and finance.\textsuperscript{46}

By 1981, a Secretariat Background Paper had to address an issue reminiscent of that which arose before the GATT panel on Greek import measures. Here, the measure concerned Italian deposit requirements for purchases of foreign currency. The Secretariat Background paper to the consultation noted:

If the distinction between import and payments measures were made by taking into account the purpose or the effect of the action, the Italian scheme would probably be both a trade and an exchange measure: it is intended to improve Italy's payments position as well as to restrain imports, and it has had an impact both on payments for imports and imports themselves. If however the

\textsuperscript{43} Id. ¶ 5, 7–8.

\textsuperscript{44} This term "Contracting Parties" has assumed a technical meaning in that it is used to refer to the GATT Members.

\textsuperscript{45} It is perhaps interesting to reflect on the possible consequences of the panel deciding this matter one way or the other. This is especially so given that the issue confronting the panel preceded the Fund's decision to adopt the technique method in determining whether it had jurisdiction over a balance-of-payment measure or not. Whether the panel's decision would have influenced the outcome of the Fund's study is conjectural but it could have been a component aspect of its consideration in determining what would guide it in assuming jurisdiction over balance-of-payment measures.

distinction were made by looking at the restrictive technique used, the Italian deposit scheme would probably have to be regarded as an exchange measure since it is formulated and operated as a requirement to be fulfilled for the purchase of foreign exchange rather than importation.\(^{47}\)

By this time, the influence of the Fund's guiding principle on the Secretariat's Background paper was obvious. The reference to "looking at the restrictive technique used" was nothing more than another variant formulation of the "technique method" adopted by the Fund to resolve the questions of jurisdictional competence over balance-of-payment measures.

In the absence of any coherent GATT principles for resolving trade questions with attendant payment repercussions, the Fund's principles, it seems, were drafted to resolve such matters. The GATT's perceived disinclination towards regulating a trade matter with an attendant exchange component begs the question of whether indeed the Fund is better suited to deal with the incidental trade component of such exchange measures. The measures discussed here, be it the Greek or the Italian measures, surely reveal trade repercussions. And nothing so far suggests that the Fund, conversely, sufficiently collaborates with the GATT/WTO in reaching decisions on the trade elements of exchange actions.

C. The Role of the Fund in GATT/WTO:
The India-Quantitative Restriction Case Revisited

1. Facts

The facts leading to this dispute may be summarized as follows: India maintained quantitative restrictions on imports of products falling in 2,714 tariff lines for which it claimed balance-of-payment justification.\(^{48}\) Accordingly, it notified the Committee on Balance-of-Payments Restrictions (Committee)\(^{49}\) of these restrictions as required of a Member undertaking such measures. Consultations on those restrictions convened intermittently from 1957\(^{50}\) and culminated in the last one held on July 1,
1997. In between those years, improvements in India’s balance-of-payment enabled it to drop some of the restrictions whilst retaining some others. Nevertheless, some Members argued that India’s balance-of-payment situation no longer warranted the maintenance of even the remaining restrictions. This latter view was bolstered mainly by the opinion of the Fund, expressed at various times in the course of those consultations. It was the opinion of the Fund that the restrictions maintained by India would be unnecessary in a shorter time frame than that preferred by India. In effect, the disagreement here was more on the time frame for the removal of the restrictions and not really on whether India could maintain them ad infinitum. In the end, the Members could not reach a consensus on the issue. The ensuing stalemate led the United States to invoke the dispute settlement procedures in the WTO.

2. The Arguments

a. The Arguments made by the United States

The claim brought by the United States centered on its contention that the quantitative restrictions maintained by India amounted to a breach of the latter’s treaty obligations. The United States advanced a twofold argument: First, it argued that the restrictions maintained by India could not come within the envisaged exceptions to quantitative restrictions recognized under Article XVII:B GATT 1994. In support of that argument, the United States urged the panel to accept the determinations and findings of the Fund as conclusively settling the matter of whether India indeed faced a balance-of-payment difficulty. Second, it sought to rely on one of the multilateral agreements to the WTO Agreement, namely, the Agreement on Agriculture, to argue that restrictions maintained under India’s licensing requirements were nevertheless to be considered quantitative restrictions. This was so, the United States maintained, as long as those import license requirements operated in reality as an “import ban, or close to it.” Thus, the United States urged the panel to require India to bring its measures in line with its treaty obligations by removing the restrictions in issue.

some Member’s view, the schedule was unduly prolonged and was not borne out by India’s economic situation. See India—Quantitative Restrictions, supra note 1, ¶ 2.2–2.7.

51. Id. ¶ 2.6.
52. See figure 2.0 infra.
53. Agreement on Agriculture, Annex 1A to the Marrakesh Agreement, supra note 16.
54. India—Quantitative Restrictions, supra note 1, ¶ 3.10.
b. India’s Arguments

India’s reply to the arguments of the United States might be divided into two parts; one substantive and one procedural. In respect of the substantive element of its defense, India argued that, contrary to the United States contention, the quantitative restrictions came within the exceptions contemplated in Article XVIII:9 and XVIII:11 GATT 1994. In effect, India disagreed with the conclusions reached by the Fund’s factual review of the state of its balance-of-payment.\(^5\) Further, it argued that Article XI GATT 1994 was inapplicable to the matter brought before the panel, for this section did not govern the maintenance of quantitative restrictions for balance-of-payments reasons.\(^6\)

Moreover, India pointed out that the Agreement on Agriculture was also inapplicable to quantitative restrictions maintained by a Member for balance-of-payments purposes. Regarding the procedural plank of its defense, India argued that so long as the General Council of the WTO\(^7\) had not pronounced on the status of the quantitative restrictions, it was improper for either the dispute settlement panel or the Fund to reach a conclusion on the question. Implicit in India’s argument, therefore, was that the United States could not invoke the dispute settlement procedure to challenge the quantitative restriction, because the Committee or the General Council of the WTO had yet to pronounce on their validity. This position by India thus conflicted with the contention of the United States that the Fund’s findings on balance-of-payment were definitive. In sum, India sought to show that the WTO had the final say on the state of a Member’s balance-of-payment and not the Fund. Consequently, India urged the panel to reject the claim brought by the United States and to deny the relief sought.

3. The Decision

In its decision, the panel considered the procedural issue raised by India, namely, whether the claim brought by the United States was, in the first place, properly before it. That is to say, whether, in respect of the question concerning the true state of India’s balance-of-payment, it was the Committee and the General Council—and not the panel—that had the competence to decide the matter. On that procedural question, the panel came to the conclusion that it would run counter to the objective of the WTO Agreement to deprive Members of their right to invoke

\(^5\) Id. ¶ 3.228–238.
\(^6\) Id. ¶ 3.7.
\(^7\) The General Council of the WTO is composed of representatives of all the Members and acts in the interval before the meeting of the highest decision body in the WTO, namely, the Ministerial Conference. See Marrakesh Agreement, supra note 16, at art. IV:2.
dispute settlement procedures.\textsuperscript{58} "It would be inconsistent with the object and purpose of the WTO Agreement," said the panel, "to interpret the relevant provisions as precluding panels from reviewing the justification of measures taken for balance-of-payment purposes[.]\textsuperscript{59} Along that line of reasoning, the panel viewed the Committee's role as being "complementary" to its own adjudicatory functions.\textsuperscript{60}

Further, on the substantive matter of whether India's balance-of-payment situation warranted the imposition of quantitative restrictions, the panel, relying mainly on the evidence furnished it by the Fund, concluded that "India's balance of payments situation was not such as to allow the maintenance of measures for balance of payments purposes under the terms of Article XVIII:9."\textsuperscript{61} In doing so, the panel upheld the claim brought by the United States and in its recommendations, required India to bring its measures into conformity with its treaty obligations under the WTO Agreement. On appeal, the conclusions reached by the panel were affirmed, with the Appellate Body reiterating the panel's ruling that India bring its measures into conformity with its treaty obligations.

D. Selected Issues in the India-Quantitative Restriction Case

1. Whether to Receive the Fund's Opinion as Required Under Article XV GATT 1994

The United States argued that the panel was required, in all cases concerning monetary reserves, balance-of-payments, and foreign exchange arrangements, to consult with the Fund.\textsuperscript{62} This was so, in the view of the United States, notwithstanding that Article XV GATT 1994 mentions contracting parties rather than panels.\textsuperscript{63} India insisted on a somewhat unclear distinction between "contracting parties" and "panels" in arguing that based on a notion of institutional balance, it was the former—the contracting parties—that were required to consult the Fund.\textsuperscript{64}

\textsuperscript{58} Much of the confusion here arose in connection with the interpretation to be accorded to the provisions stipulated in footnote 1 of the Understanding. India argued that footnote 1 of the Understanding suggested a distinction between the "justification" and the "application" of measures imposed by a Member for balance-of-payment purposes. In India's view, therefore, the "justification" of its measures was a matter not yet determined by the Committee and therefore it implicitly argued that it was premature to invoke dispute settlement measures. The United States vigorously opposed that argument saying that it was tantamount to denying dispute settlement rights accorded under the WTO Agreement.

\textsuperscript{59} India—Quantitative Restrictions, supra note 1, ¶ 5.101.

\textsuperscript{60} Id. ¶ 5.92.

\textsuperscript{61} Id. ¶ 5.236.

\textsuperscript{62} Id. ¶ 3.305.

\textsuperscript{63} Id.

\textsuperscript{64} Id. ¶ 3.306.
In deciding the issue of whether it was required to consult the Fund because of the requirement contained in Article XV GATT 1994, the panel side-stepped this issue by choosing rather to act pursuant to the provision of the Dispute Settlement Understanding (DSU)\(^6\) which allowed it to seek expert opinion. In the panel’s view:

We find that whatever the interpretation of Article XV:2 of GATT 1994, Article 13:1 of the DSU entitles the Panel to consult with the IMF in order to obtain any relevant information relating to India’s monetary reserves and balance-of-payments situation which would assist us in assessing the claims submitted to us.\(^6\)

Although it reached the correct conclusion, it is submitted that the panel misconstrued the question before it. This led the panel thus to fall into the error of conveying the impression that by relying on Article 13:1 DSU, it could exercise discretion whether to seek evidence from the Fund or not.

To be sure, Article 13:1 DSU may of course be invoked where expert opinion is warranted. Once the subject areas mentioned under Article XV:2 GATT 1994 arise before a panel for determination, however, it is mandatory for the panel to seek the Fund’s opinion. This is so, because the operative phrase in Article XV:2 GATT 1994 provides in part that: “in all cases . . . concerning monetary reserves, balance of payments or foreign exchange arrangements . . . [the Contracting Party] shall consult fully with the International Monetary Fund.” As a result, Article 13:1 DSU, relied on by the panel, will not necessarily apply given that the question brought before it was clearly one of those mentioned under Article XV:2 GATT 1994. The position advanced by the United States thus mirrored better the requirement contained in Article XV:2 GATT 1994. Accordingly, be it a developing or a developed Member of the WTO, the Fund will at all times be involved in the scrutiny of its balance-of-payment situation.

\(^6\) Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement, supra note 16, Annex 2 [hereinafter DSU].

\(^6\) India—Quantitative Restrictions, supra note 1, ¶ 5.12.
2. The Scope of the Information Which a Panel Faced with the Question of a Member's Balance-of-Payment Situation May Consider

India sought to delimit the scope of the information that the Fund could validly furnish the Committee or a panel asked to assess a Member's balance-of-payment situation. The issue here related to the meaning to be accorded the provision of Article XV:2 GATT 1994. That is to say, should the information obtained from the Fund regarding the state of a Member's balance-of-payment be solely of a statistical nature or could it in addition include an evaluation of the statistical information?

The panel refrained from addressing this issue specifically but rather seemed to assume that the nature of the information required from the Fund entailed not merely the production of statistical data, but also an evaluation of that data. That the panel adopted that approach may be inferred from the nature of the questions posed to the Fund in the course of the proceedings and the replies thereto. For example, the panel posed the following question to the Fund:

Noting that these restrictions relate mainly to consumption goods, would relaxation or removal of the restrictions . . . have been likely to produce thereupon conditions justifying the intensification . . . of restrictions?68

To this question, the Fund proffered the following answer:

The Fund's view remains as indicated in the statement to the WTO Committee on Balance-of-Payments Restrictions . . . namely, that the external situation can be managed using macro-economic policy instruments alone. Quantitative restrictions (QR) are not needed for balance-of-payments adjustment and should be removed over a relatively short period of time.69

From the standpoint of the Fund, the question regarding the scope of the information to be furnished GATT/WTO had long since been settled. In that regard, De Vries notes:

Should the Fund supply to the GATT only facts, especially statistical material, or should an evaluation and conclusions, particularly conclusions passed by the Fund's Board, be transmitted as well? Eventually these had to be answered by vote. The Board decided that the Fund was to supply to the GATT not

67. Id. ¶ 3.356.
68. Id. ¶ 3.366.
69. Id. ¶¶ 3.366–67 (emphasis added).
only relevant statistical data but also conclusions as to the current need for restrictions. The information supplied to the GATT on behalf of the Fund thus covered the restrictive systems and the balance of payments and presented analyses of the causes and effects of the import restrictions . . . of each country.\textsuperscript{70}

A closer examination of this issue, however, entails revisiting the requirements of Article XV:2 GATT 1994. It substantially provides as follows:

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 \textit{shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments . . .}

The Contracting Parties \textit{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, as to the financial aspects of other matters covered in consultation in such cases.}\textsuperscript{71}

Two considerations may flow from this provision in connection with the question as to the scope of the information that GATT/WTO may receive from the Fund: First, in respect of consultations involving, for example, balance-of-payment, GATT/WTO is required to accept \textit{all findings of statistical and other facts}. Thus, that phraseology, at least initially, suggests that in consultations concerning balance-of-payment, the Fund is limited to providing statistical data \textit{and nothing more}. The wording "and other facts" curtails a definite conclusion in this aspect, however. But, if a well known canon of statutory interpretation is followed, the phrase "and other facts" can only be read in the light of the special words—findings of statistical nature.\textsuperscript{72} Consequently, those "other facts" must also be of a statistical nature.

\textsuperscript{70} De Vries, \textit{supra} note 17, 339 (emphasis added).
\textsuperscript{71} GATT 1994, \textit{supra} note 16, at art. XV:2 (emphasis added).
\textsuperscript{72} See, the \textit{ejusdem generis} principle which postulates that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. \textit{Francis Bennion, Statutory Interpretation} 954–65 (1997).
Second, the provision notwithstanding its opening portions also obliges the WTO in the following subject areas, namely, monetary reserves, foreign exchange arrangements, and balance-of-payment, to accept the determination of the Fund as to the monetary situation of the Member wishing to invoke it. On this aspect, it may be noted that matters pertaining to either monetary reserves or foreign exchange are, in the first place, not within the juridical purview of the WTO. They are subject areas regulated elsewhere—in the Fund. As a result, the obligation on the WTO to accept determinations by the Fund in those subject areas is a mischaracterization of its juridical powers.

Further, it is obvious that the question of whether a Member may validly impose a quantitative restriction is necessarily anchored on (or encompasses) the actual state of its monetary reserves. The right to impose quantitative restrictions arises mainly because a country is undergoing "monetary" or "payments" problems. In practice, therefore, it is inconceivable for a conclusion to be reached on that question without an antecedent determination of the state of the Member's monetary reserves—in which case the Fund's determinations are expressly required and must be accepted when made. In sum, notwithstanding the opening portion of Article XV GATT 1994 suggesting that the information required from the Fund in balance-of-payment matters shall be limited to facts of a statistical nature, a more rigorous consideration suggests the opposite—that the Fund may in fact supply not only statistical data, but in addition to that, an evaluation of those facts.  

The drafting of the provisions of Article XV GATT 1994 is thus inelegant in that it appears to confer powers where none exist, and further, it conveys an impression of a limitation regarding the information that the WTO may receive from the Fund—again, where none seems to exist. One implication of the apparent reluctance by the panel to make a clear pronouncement on this issue will be to gradually reinforce the impression that the Fund's practice of forwarding both statistical and analytical data is coterminous with established GATT/WTO practice. The panel's pronouncement on this issue could have aided in determining whether indeed such a limitation regarding the scope of the information required from the Fund in respect of balance-of-payment exists or not.

3. The Question Concerning the True State of a Member's Balance-of-Payment Position

The United States argued that the findings and the determinations of the Fund in respect of a Member's balance-of-payment situation should,
without reference to further evidence, conclusively settle that question. 74

The relevant portion of Article XV:2 GATT 1994 states:

[T]he 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 . . . 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. 75

Although the panel refrained from making a finding on this issue, it remains very contentious. Two strains of arguments have emerged in this regard. One argues that recourse to the Fund is not only clearly mandatory, but also conclusively settles the question of whether a Member is experiencing a balance-of-payment difficulty. In that connection, Deborah Siegel makes the point that:

The use of the term “shall accept” is better read to mean that these determinations are to be taken as dispositive, as was argued by the United States. This reading would seem to preclude allowing a variety of expert opinions on the member’s balance-of-payments position; that is, the Fund’s statement in this regard is not just another expert opinion to be considered or weighed against those of other experts. This interpretation not only reflects the plain meaning of the text, but also is supported by the drafting history of the GATT, which, as noted by the United States, records a considered decision of the drafters to reject a proposal (by Australia) to change “shall accept the determination” to “shall give special weight to the opinions of” the Fund. 76

Another strain views the matter somewhat differently. In this regard, Dukgeun Ahn argues:

Considering the expertise and role of the IMF in the world economic system, a better way to balance the inputs by the IMF on BOP-related issues may be to consider the determination by the IMF a prima facie case. Thus, as far as the BOP-related issues are concerned, the determination by the IMF establishes a rebuttable presumption that a BOP measure is, or is not, justified

74. India—Quantitative Restrictions, supra note 1, ¶ 3.305.
pursuant to the IMF determination. The opposing party to the IMF determination would then have a burden of proof to refute the presumption with regard to the justification of BOP measures. 77

Siegel's contention is admittedly textually compelling. This contention, however, should for the following reasons not be accepted. First, the GATT/WTO history that Siegel draws attention to is helpful because it sheds light on the ancestry of Article XV:2 GATT 1994 but it should not supplant current realities. Under the current judicial legal framework and its attendant dispute settlement mechanism, it would certainly be anachronistic to insist that the drafting history of the former Article XV:2 GATT 1947 suggests that a panel faced with a Member's balance-of-payment situation should accept, without question or assessment, the findings and determinations of the Fund.

Second, Siegel makes heavy weather of the fact that implicit in the phrase "shall accept" is an obligation of the panel to accept the determinations of the Fund regarding a Member's balance-of-payment situation without recourse to further evidence on that issue. Again, given the textual provisions of Article XV:2 GATT 1994, the argument is not entirely without merit. The logical extension of that argument, however, seems to lead to a troubling result—such an argument is bound to collide with the core fundamental objective any modern dispute settlement process is meant to achieve. This objective is admirably encapsulated in the DSU in the following terms:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. 78

Were the panel to follow the course advocated by Siegel, it would be tantamount to the panel abandoning the cardinal requirement to conduct an objective assessment of the matter before it spelt out in the provision. It is difficult to see how an assessment that consists of the opinion of

78. DSU, supra note 65, at art. 11 (emphasis added).
only one expert, however definitive, without a corresponding opportunity of challenging it, can meet the crucial test of an objective assessment.

Consequently, it is submitted that if the requirement in Article XV:2 GATT 1994—"shall accept"—is read in conjunction with that contained in Article 11 DSU, an interpretation that results in preserving the panel's ability to conduct an objective assessment should be preferred. The evidence furnished by the Fund should not be an exception to the rule requiring an objective assessment. A panel can only fulfill that obligation if it at least conducts an assessment of the Fund's finding and determinations alongside those furnished by other experts. By this process, the distillation of objective findings will be enhanced and consequently, the panel's ability to reach a fair and impartial decision will be enhanced as well.

Fortunately, both the panel and the Appellate Body, if only to a limited scale, seemed to implicitly endorse the approach of considering alternative views to those of the Fund in reaching conclusions on the state of a Member's balance-of-payment. In upholding the panel's approach, the Appellate Body declared:

[N]othing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions.\(^7\)

Surely, the inclination evinced by the panel and the Appellate Body towards conducting some assessment of the Fund's opinion alongside that of other expert opinion conforms not only with the requirements stipulated under Article 11 DSU, but also with the minimum standards expected of any panel performing adjudicatory functions.

It is further submitted that the position advanced by Ahn—that the Fund's determinations and findings be regarded as raising a *prima facie* presumption and *a fortiori*, requiring rebuttal by counter evidence—if accepted, would impose an unfair evidential burden on a Member asked to discharge it. This Note rather prefers the position of probative equality implicit in the objective assessment obligation placed on the panel: the findings and determinations of the Fund should not be accorded treatment any more favorable than that extended to other available expert evidence.

\(^7\) Appellate Body Report, *supra* note 1, ¶ 149 (emphasis added).
Assuming the approach of assessing the Fund’s determinations against those of other experts is followed, it settles the somewhat secondary level question of whether the WTO retains the final word on the state of a Member’s balance-of-payment situation. Of course, it should be an incidental element of the adjudicatory powers of the panel to retain the discretion to admit or to disregard evidence brought before it and this should be so irrespective of whether such evidence emanates from the determinations of the Fund or not. Any thing less would certainly fail the test of a fair adjudicatory process.

III. DEVELOPING COUNTRIES AND THE REGULATORY CONVERGENCE OF THE FUND AND THE WTO

A. Some Preliminary Matters

1. Juridical Competence Between the Fund and the WTO

The review in Part II leads to the following representation of the juridical competence of the Fund and the WTO over balance-of-payment matters:

<table>
<thead>
<tr>
<th>International Institutions of Regulatory Economic Governance</th>
<th>Notional Juridical Competence</th>
<th>Actual Juridical Competence</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT/WTO</td>
<td>Quantitative Restrictions (Articles XII and XVIII GATT 1994)</td>
<td>No jurisdiction over quantitative restrictions (Article XV GATT 1994 ensures this position).</td>
</tr>
<tr>
<td>The Fund</td>
<td>Monetary Matters (Article XV GATT 1994)</td>
<td>Jurisdiction in respect of both fiscal matters and quantitative restrictions (a trade matter). This is so for the following reasons:</td>
</tr>
</tbody>
</table>

- Notwithstanding the 1959 study wherein the Fund opted for the technique method—whether the action taken by the country involved "a direct governmental limitation on the availability of or use of exchange"—in conceding juridical space to the WTO
2. The Need for the Balance-of-Payment Exception in GATT/WTO

The initial post war impulse towards quantitative restrictions in general was that they should be eliminated. Thus, as Gardner notes:

There was solid agreement that such restrictions represented a particularly injurious form of trade barrier . . . It was also agreed that they were far more difficult to reconcile with multilateral principles, since there was no satisfactory method of assuring their non-discriminatory application.  

The foregoing apprehensions notwithstanding, quantitative restrictions nevertheless found their way into GATT 1947, albeit after difficult negotiations. They were, however, to be adopted only as corrective measures by Members facing balance-of-payment difficulties. What is instructive in that post war period was the push, principally by the United Kingdom and other Western European allies devastated by that

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81. Wilcox, supra note 26, at 45.
82. See generally, GATT 1947, at art. XII and XVIII.
war, to expand those quantitative restriction provisions in the GATT. Christian Vincke recounts the arguments made by those countries:

At that time the United States was running an $11 billion surplus. On the other hand, Great Britain, for instance, had accumulated an external debt of $15 billion. Furthermore, the currencies of the Western European countries were not convertible. Their ruined economies could not or would not (because of reconstruction policies) produce certain goods for which there was a very high internal demand. Since those goods were available only from the dollar countries, a free international trade system would have worsened the existing imbalance . . . At that time the necessity for deficit countries to use QR was probably an obvious and consequently little discussed fact.83

The parallels evident in this description with the situation in most developing countries today—especially the least-developing and African countries—leap to the eye. Most of those developing countries are neck deep in trade deficit situations.84 In addition, as was then the case of the United Kingdom and most of Western Europe, these countries lack the requisite capacity to produce most of the imports that are in high demand in their respective countries. It does not require a deity to know that an insistence on the route of liberalizing their markets without a demonstrated productive base could lead to an incurable deficit situation in those countries. With most developing country Members still engaging in primary production, the orientation towards liberalization should be approached with extreme caution if not outright suspicion.

What the decision of the panel, anchored mainly on the Fund’s conclusions, signals is that the WTO will curtail developing country Members’ resorting to this necessary exception to limit disproportionate importation.85 The panel’s factual review of India’s balance-of-payment situation appeared unmindful of that historical parallel evident in the post-war period and the economic challenges confronting most developing countries today. The decision certainly imposes pressure on developing countries to import more—a position that, in the absence of a significant and measurable improvement in their productive capacity base, puts their economies under pressure.

83. Vincke, supra note 15, at 298–9 (citations omitted, emphasis added).
3. The Distinguishing Elements Evident in GATT/WTO

Table 3:1 depicts some of the different characteristics between the Fund and the WTO. The discussion hereunder of the institutional differences between the Fund and the WTO will occasionally refer to Table 3:1:

<table>
<thead>
<tr>
<th>Table 3:1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>THE FUND</strong></td>
</tr>
<tr>
<td>• The practice of weighted voting remains the procedure for decision-making.</td>
</tr>
<tr>
<td>• No special and differential treatment principle exists in the Charter of the Fund for treating a category of its Members.</td>
</tr>
<tr>
<td>• Prohibitions on exchange restrictions establish obligations that Members owe to the institution rather than to other Members.</td>
</tr>
<tr>
<td>• May require a Member to remove restrictions affecting others regardless of whether a complaint has been submitted or not.</td>
</tr>
<tr>
<td>• The Fund’s Executive Board meets in continuous session to review and reach decisions on Member’s compliance . . . in contrast to WTO panels.</td>
</tr>
<tr>
<td>• In cases of persistent violations, the Fund as an organization has the authority to impose sanctions, such as withdrawal of eligibility to use the Fund’s general resources, suspension of voting rights, and eventual compulsory withdrawal.</td>
</tr>
</tbody>
</table>

B. Developing Countries and the Dimensions of Governance

1. The Malaise of Democratic Deficit Afflicting the Fund

The most significant difference emerging from figure 3:1 above is the asymmetrical power relationship evident in the decision-making process of the Fund. Whereas in the WTO, Members have equal voting

86. Figure 3:1 is generated mainly from the description of the differences between the Fund and the WTO contained in Siegel’s article. See, Siegel, supra note 76. Some other distinguishing features of those two institutions have been added, however.

rights, under the Fund, the voting structure is articulated in such a way as to reflect the strength of its contributors. Compared to the position obtainable in the WTO, this represents a particularly disturbing aspect of the merger of the Fund and the WTO. A former secretary of the Fund in addressing aspects of this question of institutional legitimacy noted that:

Fund governance of its system of quotas and voting power has not been satisfactory because of growing distortions which have developed over time are only now beginning to be addressed in discussions in the Board. The system as it exists is geared to defending the status quo, and this has played to the advantage of Western Europe and to the detriment of Asia and of the developing countries as a group, which is the overwhelming majority of the Fund members and of the global population. The institutional failure to correct more promptly the inequities in the distribution of voting power has added to the public perception of the Fund as being dominated by the Western European and North American industrial countries.

Absent a significant leap in remedying this observed legitimacy deficit, the merger portends a clear and present danger that the comparative strength of developing countries in the WTO will be compromised.

88. To be sure, however, that the WTO is not without its own legitimacy questions. For example, decision-making in the WTO is by a process of "consensus." The meaning accorded that term is unclear. Footnote 1 to art. IX:1 of the WTO Agreement provides: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision." Id. at art. IX:1, n. 1.

Now, the phrase, 'formally objects' is not defined anywhere in the WTO Agreement. This lack of clarity has led some to suggest that the 'consensus' entails some deference to economic clout such that the big economic powers can decide a matter one way or the other notwithstanding the theoretical majority of developing countries in the WTO. See John Jackson, The World Trade Organization: Constitution and Jurisprudence 46 (1998); cf. Asif H. Qureshi, International Economic Law 242–243 (1999).

89. See generally, Transcripts of Economic Forum titled Governing the Fund, International Monetary Fund (Sept. 17, 2002).

90. One other indicator of the power dimensions would be the fact that all Chief Executive Officers of the Fund have come from developed countries. Note, however, that the current director of the WTO, Dr. Panitchpakdi Supachai, is from a developing country, namely, Thailand.


Nothing so far suggests that the asymmetrical dimension in the decision making process of the Fund is about to change. On this score, developing country Members of the WTO should be aware of this danger.

2. The Special and Differential Treatment of Developing Countries

Table 3:1 further highlights another key lesson that may be drawn from the India-Quantitative Restriction case. That is to say, the real danger of eviscerating the special and differential rights accorded to developing country Members in the WTO. The extension of those rights to developing countries evidences the WTO’s sensitivity to the peculiar difficulties of those Members as late comers to a trade architecture designed mainly by wealthy nations. Short of those provisions being no more than mere rhetoric, the close connection of the Fund and the WTO, at the very least, obscures that carefully articulated arrangement peculiar to the WTO.

For the Fund to uphold that crucial element of the treaty obligations contained in the WTO Agreement, its factual review must reflect that nuance—that is, the nuance of the special and differential treatment of developing countries underpinning Article XVIII GATT 1994 provisions. In that regard, it is a cardinal obligation of the dispute settlements panels of the WTO to ensure that those special and differential provisions are not nullified in the course of the Fund’s factual review. This is so, because the WTO Agreement requires panels to:

>[P]reserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary and rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The dispute settlement panel of the WTO is thus a critical element in ensuring that the negotiated position of Members as articulated in the WTO treaty obligations are not undermined. The point here thus further underscores the need to ensure that the dispute settlement panel retains the final word on the evidence submitted to it by the Fund. It is difficult to see how the panel can perform those functions of preserving Members

93. DSU, supra note 65, at art. 3.2 (emphasis added).
94. This requirement bears close resemblance to another prescription that the Fund should be mindful of the social context of its determinations. Rather than unduly focusing on the developing country Member “liberalizing” its domestic markets, a more enlightened view would be for the Fund to focus on persuading Members enjoying a surplus to import more and generating market access for those in deficit.
rights were it to accept, willy nilly, the determinations and findings of the Fund. Such a configuration will most likely result in a situation that will diminish the rights and obligations provided in the covered agreements. For the dispute settlement panel to be perceived as fair and impartial arbiters of Member's rights and obligations, it is imperative that its power to pronounce on the consistency of a Member's measures be not impeded.

3. The Need for Harmonizing Jurisdiction over Balance-of-Payment

The impetus for harmonization stems primarily from the interrelatedness of trade and exchange issues arising in the context of a balance-of-payment difficulty already alluded to. At a broader level, Clair Wilcox's observation that an unregulated restriction on imports might circumvent the gains made regulating exchanging restrictions represents another linkage point for some coordination. On the strength of those two points, a case could be made out for collaboration between the Fund and the WTO on balance-of-payment questions. Quantitative restrictions for balance-of-payment purposes resonate in the Member's exchange condition and vice-versa. Added to that is the limited competence of the WTO in connection with balance-of-payment.

As figure 3:1 demonstrates, however, the contrasting institutional dimensions between those two organizations are significant. Collaboration, it must therefore be pointed out, should not be synonymous to a wholesale delegation of juridical competence by the WTO to the Fund in the area of balance-of-payment as seems to be the dominant orientation of the WTO. The Fund's input is admittedly important, but no less so are the WTO Agreement provisions.

Three approaches are advanced here that might foster confidence: First, the consultations on balance-of-payment proceedings might be an opportunity to reiterate the relevant WTO Agreement provisions. For example, the Committee could direct the Fund in those consultations to ensure that treaty provisions of the WTO—particularly those concerning special and differential treatment of developing countries—are reflected


96. See Wilcox, supra note 26.

in its findings and determinations. Second, given the current structure of the Fund, the WTO should perhaps explore the possibility of receiving balance-of-payment statistics from other organizations for the sake of transparency. "The determination of balance of payments surplus or deficit," Poul Høst-Madsen reminds us, "is far from a fully objective exercise."98 The difficulty, of course, with this suggestion is the acknowledged competence of the Fund in balance-of-payment questions and the organization that might serve this objective. Nevertheless, the transparency of the WTO's assessment of a Member's balance-of-payment situation, as distinct from that conducted by the Fund, is crucial to fostering confidence in the international system of trade. One significant consequence of failing to explore alternative sources of balance-of-payment information that cannot be lost sight of is that the WTO merely becomes a convenient proxy for enforcing the Fund's de facto juridical competence over that subject matter. The institutional detachment of the WTO, especially in situations where it exercises adjudicative powers, is particularly critical if it is to convey that important message of impartiality to all Members.

Finally, the WTO arguably retains superior competence over the Fund in matters concerning trade. Given the obvious trade repercussions of balance-of-payment problems, the discretion of the WTO in examining the overall trade ramifications of Members in redressing it should not be impaired. This, after all, will also be in line with the Fund's cartographic exercise of 1959.99 An import restriction is clearly an example of a measure that going by the direct test implicit in that technique method, is beyond the juridical competence of the Fund notwithstanding its attendant payment repercussions.

4. The Legalization of the International Trade Regime

Another inference apparent from Table 3:1 is the fact that the current trade system is one arbitrated by legal means as opposed to one shaped by economic influence and raw economic power—a situation often referred to as the legalization of the international trade sphere.100 Implicit in that proposition, is the rather seductive notion that the law is an impartial

98. See Høst-Madsen, supra note 2, at 16.

99. See supra text at note 35.

100. This thesis has spawned a rich literature. This is especially so given that the period preceding the creation of the dispute settlement system was said to be characterized by the exercise of power. See generally, Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement: International Law, International Organization and Dispute Settlement (1997); Ernst-Ulrich Petersmann, How to Promote the International Rule of Law: Contributions by the WTO Appellate Review System, in Dispute Resolution in the WTO 75 (James Cameron & Karen Campbell eds., 1998). See also, Meinhard Hilf, Power, Rules and Principles-Which Orientation for WTO/GATT Law, 4 J. INT'L ECON. L. 111 (2001).
tool that limits the exercise of power. The dispute settlement process of the WTO is seen as heralding this process of legalization. It envisages a system where all Members—developing and developed—can invoke the dispute settlement process and be entitled to fair and dispassionate consideration of their claims.\(^{101}\)

A range of post-modern theoretical resources clearly demonstrate, however, that although the law might curtail the exercise of power, it is often the case that it is complicit with power in maintaining privileged positions.\(^{102}\) Thus, the law could be Janus-faced in that whilst it expands rights and privileges, it also serves as a complicit tool in denying those rights. As a hand-maiden to the powerful, this simultaneity of the law masks the expression of that latter quality. And it is in that context that it is very important for the dispute settlement process to be perceived as neutral and transparently fair to all Members. The propositions advanced in the course of this note in that regard cannot thus be overlooked: its independence in reaching conclusions on the evidence furnished it by the Fund and the requirement that the dispute settlement process remains vigilant in ensuring that treaty provisions are not obscured but protected. Absent that configuration, the dispute settlement process will degenerate to a situation where it secures legitimacy to the exercise of power.\(^{103}\) This will, however, over time, sap the confidence instrumental to its legitimacy and existence.

**Conclusion**

The Bretton woods system appears to have come full circle going by the way jurisdiction is exercised over this subject-matter by the Fund and the WTO. The review of the materials in the note indicates that although the WTO retains a notional jurisdiction over trade measures invoked by a Member for redressing its balance-of-payment problems, it is the Fund, however, that retains *de facto* jurisdiction. What seems to have evolved, in the absence of some coherent position in the WTO regarding the scope of its juridical competence over balance-of-payment, is that the principles developed in the Fund have been assimilated in the WTO. Consequently, unless the arguments advanced in the course of this note are read into the balance-of-payment provisions in the WTO Agreement, it can be safely said that what the WTO exercises over that subject

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matter is a mere jurisdictional mirage—a jurisdiction in form but certainly not in substance. Given the noted contrasting institutional differences between the Fund and the WTO, the merger bodes ill especially for developing countries. As argued in the note, collaboration is important but so long as it is done to reflect sensitivity towards the peculiar requirements contained in the WTO Agreement. This should be the desired model especially to ensure that the interests of developing country Members are not compromised in that process.