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The WTO dispute settlement mechanism in matters involving exchange rates and trade

GABRIELLE Z. MARCEAU AND JOHN J. MAUGHAN

A. Introduction – the relationship of exchange rates and international trade

Since the advent of the global financial crisis in 2008, the issue of how exchange rates relate to international trade has been a frequent subject of debate. In particular, there has been widespread speculation that the World Trade Organization (WTO) Dispute Settlement Body (DSB) could be called upon to adjudicate a dispute surrounding Members’ exchange rate policies. This chapter offers a modest description of the various types of challenges that could arguably be brought before the DSB in potential exchange rate disputes. It does not address the validity or WTO-consistency of potential claims and defences.

The relationship between exchange rates and trade is an old concern addressed in the provisions of the original General Agreement on Tariffs and Trade (GATT), drafted in 1947. The relationship has since been well-established, but remains extremely complex. In the context of the Working Group on Trade, Debt and Finance, the WTO Secretariat prepared a review of economic literature on the relationship between exchange rates and international trade and, in particular, to what extent an exchange rate or currency ‘misalignment’ could impact on Members’ economies. The study offered no firm conclusions on the exact interaction between exchange rates and trade, but rather highlighted the

The views expressed in this article do not bind WTO Members or the WTO Secretariat. Thank you to Christian Häberli for his valuable comments on the chapter, to Melanie Wahl and Susanna Waltman.

complexity of the issue, the number of variables at work and the avenues for current economic research in this area.

Although some argue that the WTO is not the proper forum to address exchange-related disputes, others point out the possibility that the trade-related effects of exchange policies could lead to a dispute among WTO Members. For example, some economists have noted that an allegedly undervalued currency could affect trade partners on both the export and import sides, acting in the first case as an export subsidy and, in the second case, as a higher import duty. In that context, it has been suggested that Members could seek to use the WTO dispute settlement mechanism (DSM) to address the alleged currency situation by claiming that a member’s exchange measures violate a WTO provision or nullify or impair benefits under the WTO Agreement. Alternatively, some suggest that a member could impose countervailing duties (CVDs), anti-dumping (AD) duties or increased import tariffs to counter the supposed trade effects of an allegedly misaligned currency. The member targeted by these trade remedies could then seek to have them reviewed at the WTO. In either case, the DSB could be obligated to resolve the dispute under the Dispute Settlement Understanding (DSU).

Adding to the complexity of this issue in the realm of international law is the fact that exchange rates and trade are governed by two different international organisations with overlapping and sometimes uncertain jurisdictions. Indeed, Article XV:9 of the General Agreement on Tariffs and Trade (GATT) makes clear that an exchange rate measure consistent with International Monetary Fund (IMF) rules could not be considered inconsistent with GATT Article XV, which prohibits exchange rate measures that frustrate the intent of other GATT provisions. It is probably for this reason that Article XV obliges the WTO under certain circumstances to consult with the IMF. But to what extent must the WTO consult the IMF? If such consultations were to take place, who would consult and how? To what extent would a panel be bound by the determinations of the IMF or technical experts, especially in a matter as complex as the relationship between exchange rates and trade? The DSB has never been asked to adjudicate any exchange-related trade dispute and members have not adopted any formal interpretations or other legal instrument concerned with this topic.

Based on publicly available information, this chapter introduces the various angles through which an exchange-related trade dispute could be submitted to the WTO DSM. It also reviews related procedural issues that could become relevant in the event of such a dispute. As such, this chapter serves as a modest starting point for understanding
the procedural elements of using the WTO dispute settlement system in the context of an exchange-related trade dispute.

B. WTO jurisdiction in exchange-related trade disputes

Under the DSU, WTO Members can initiate disputes by making three broad types of claims: a claim of ‘violation’ of one or more WTO provisions, a claim of ‘non-violation’ or a ‘situation’ claim. The most common type, violation claims, may be either *de jure* or *de facto*. This Section introduces these aspects of WTO dispute settlement in the context of exchange-related disputes.

I. Automaticity of the WTO dispute settlement mechanism

The DSB is required to address any dispute initiated by Members under the terms of the DSU and the WTO Agreements it covers. Under the DSU, Members initiate a dispute by filing a request for consultations. After this initial period of consultations, if the Members have not come to an agreement, the complainant may request the DSB to establish a panel. The WTO adjudication process would begin automatically. DSU Article 6:1 states that, ‘If the complaining party so requests, a panel shall be established. . .' (emphasis added). Under DSU Article 23:1, the panel’s jurisdiction is exclusive and compulsory. The parties’ legal and economic interests in the dispute are presumed and the procedural stages remain quasi-automatic throughout the dispute. Any overlapping jurisdiction between the WTO and other international organisations such as the IMF could not prevent a WTO member from initiating dispute settlement proceedings or establishing a panel.

Unless the complainant agrees otherwise, panels and the Appellate Body (AB) have the obligation to adjudicate all disputes brought by WTO Members. So far no panel or AB report has reached a conclusion of *non liquet*.²

² DSU Article 23:1 states:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

³ The expression *non liquet* is a legal term derived from Latin, meaning ‘it is not clear’. It is used by judges to indicate that there is no law presented to the court to allow it to
If the case proceeds, both parties have the opportunity to submit two sets of written and oral submissions asserting their claims and rebuttals. The burden of proof, according to the AB in *US – Wool Shirts and Blouses*, ‘rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence’.4 In general, it is for the complainant to establish a *prima facie* case of violation of one or more WTO provisions. The burden then shifts to the responding party to rebut the complainant’s *prima facie* case. The panel must weigh and balance the evidence and legal arguments presented by both sides.5 However, an exchange-related dispute may be initiated by the author of an exchange rate action (in response to the aggrieved Member’s unilateral imposition of trade remedies), or by the Member claiming to be aggrieved. The choice of action therefore has a direct impact on the burden of proof in any potential dispute. Indeed, in the former scenario the initial burden of proof would be on the author of the exchange rate action challenging the trade remedy taken as a reaction to the exchange rate action; in the latter scenario, the initial burden of proof would be with the victim of the exchange rate actions challenging the author of the exchange rate action.

II. Three legal bases for claims: violation, non-violation and situation complaints

GATT Article XXIII illustrates three ways in which a member may seek redress that remain applicable, under DSU Article 3.1, to the WTO Agreement as a whole. These include, first, violation complaints under Article XXIII:1(a), whereby the member alleges ‘the failure of another rule on the matter. The AB has confirmed that the WTO dispute jurisdiction is compulsory. In *US – Shrimp*, it noted that, ‘... in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the WTO Agreement generally, we must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX’. See WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US – Shrimp*), WT/DS58/AB/R, adopted 6 November 1998, para. 155.


contracting party to carry out its obligations under this Agreement'. The AB has interpreted this provision to cover violations of the letter of another GATT provision.\(^6\) Second, paragraph (b) covers 'the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement'. This is the basis for all 'non-violation' complaints. Finally, the so-called 'situation complaint' under paragraph (c) covers 'the existence of any other situation'. Paragraph (c) has never been interpreted or applied by a competent WTO body and we therefore do not consider it further.

This leaves Members with two options in case of a complaint regarding another Member's exchange rate or currency measures. First, Members may raise a violation complaint. The aggrieved Member may go directly to the DSB claiming a (de jure or de facto) violation of one of the provisions of the WTO Agreement. These claims could include, *inter alia*, GATT Article XV covering 'Exchange Arrangements', GATT Article II on Members' Schedules of Concessions and the SCM Agreement regarding subsidies.\(^7\) Alternatively, should the aggrieved Member take various trade remedies, the Member targeted by the trade may bring a (de jure or de facto) violation complaint to the WTO asserting that these remedies violate the provisions governing how Members impose trade remedies. Such claims may include, *inter alia*, the SCM Agreement and GATT Article VI on countervailing duties, the Agreement on the Implementation of Article V of the GATT 1994 (AD Agreement)\(^8\) and GATT Article VI on anti-dumping duties, and higher import tariffs under Article II.

Second, Members may initiate a non-violation complaint under GATT Article XXIII:1(b) and DSU Article 26.1. The purpose of Article XXIII:1(b) is 'to protect the balance of concessions under GATT by providing a means to redress government actions, not otherwise regulated by GATT rules, but which nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff negotiations'.\(^9\) The complainant could claim, either on


\(^{7}\) Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

\(^{8}\) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

its own or together with a violation claim, that a Member's exchange rate or currency practices nullify or impair its benefits or the attainment of any other objective under the GATT. Both potential violation and non-violation claims involving exchange rates are addressed in Section C below.

III. Possibility of de jure and de facto violations

A further important distinction frames the analysis below. Under the DSU, complainants may bring claims of either de jure or de facto violation of WTO provisions. The AB in EC – Bananas III found that the 'treatment no less favourable' requirement under GATT Articles I and II (as well as under other provisions such as GATS Article II) includes not only violations in law (de jure), but violations in fact (de facto). As such, even when a member's exchange or currency measures do not violate the letter of a WTO provision, their operation and application may nevertheless be found to violate those provisions in fact. Although controversial, it has been suggested that complainants in exchange rate and currency disputes could raise de facto violation complaints under, inter alia, the most-favoured nation (MFN), market access or national treatment obligations of GATT 1994 (Articles I, II and III).

IV. Presumption of nullification and impairment

The conclusion of a panel that a challenged measure violates any WTO provision carries a presumption of nullification or impairment of the complaining party's rights under GATT Article XXIII:1(a). In practice, this means that complainants do not have to submit evidence on the trade effects of a challenged measure. The respondent could rebut that presumption by showing that no such nullification or impairment exists. This GATT presumption, codified in DSU Article 3.8, has never been successfully reversed.

11 DSU Article 3.8.
C. Scenarios involving exchange rates in WTO dispute settlement

This section briefly summarises the types of exchange-related actions that could be brought to the DSB, including both violation and non-violation complaints. Because the WTO DSM is compulsory, the DSB would probably be obliged to establish a panel, if in either scenario a Member so requested. We therefore examine briefly the various components of these two alternative procedural courses.

I. Violation complaints before the DSB

Violation claims are the most common cause of action in the DSB. Members could take either 'offensive' or 'defensive' actions against another Member's exchange-related measures. For example, a Member could go on the offensive by taking a claim of violation or non-violation of a WTO provision by another Member directly to the DSB. A Member could also take defensive action by imposing unilateral trade remedies such as CVDs, AD duties or import tariffs to offset the alleged trade effects of another Member's exchange rate actions. The affected Member could then challenge these duties before the DSB.

1. Taking the 'offensive': claim that an exchange-related measure violates a WTO provision

The likely object of a Member 'taking the offensive' would be to challenge the WTO-consistency of a measure directly, with a view to obliging the implementing Member to bring the exchange rate measure into conformity with the relevant WTO provisions. As noted above, these claims may be either *de jure* or *de facto* and they are organised as such in our discussion below.

(a) *De jure violations*  It has been suggested that Members could attempt to make *de jure* violation claims against another Member's exchange-related actions under GATT Article XV, GATT Article II or the SCM Agreement. GATT Article XV governs Members' 'Exchange Arrangements', GATT Article II binds a Member's tariffs according to its Schedule of Concessions and the SCM Agreement regulates Members' use of subsidies.

(i) *GATT Article XV - exchange arrangements*  GATT Article XV is the central provision dealing with exchange rates under GATT 1994. It
prohibits WTO Member governments from frustrating the intent of the GATT or the IMF Articles through exchange action. Article XV:4 and accompanying Ad Note provide:

Contracting parties shall not, by exchange action, frustrate* the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

*Ad Article XV, paragraph 4

The word 'frustrate' is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

Article XV establishes the terms under which a GATT panel is authorised to adjudicate a dispute involving a Member's exchange rate policies. To date, the provision has never been formally interpreted, nor has it been the subject of a dispute settlement claim or proceeding. There is thus no clear guidance from WTO panels or the AB on how to interpret and apply the provision. The panel in such a dispute would

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12 The legitimate reasons for which a Member may take exchange actions are not covered by the WTO Agreement. Rather, these are determined by an evaluation under Article IV of the IMF Articles of Agreement.

13 Some have suggested that the WTO DSB could be requested under Article XV to establish a panel to adjudicate a dispute in which a WTO Member complains that another WTO Member's trade actions violate its rights under the IMF Articles of Agreement. Note that, pursuant to Article XV, a panel would be bound by the IMF's determinations of consistency with the Articles of Agreement. Difficulty in the legal situation could arise if the IMF did not or could not make such a determination of consistency. In such a case, it is debatable whether a WTO panel would consider that it had the competence or the expertise to interpret IMF provisions. In this chapter, we focus on the more likely scenario that a WTO Member could bring an action against another Member's trade-related exchange actions claimed to be inconsistent with the WTO Agreement.
first be tasked with interpreting the meaning of the provision's terms, including 'exchange action', 'trade action', 'frustrate' and 'intent'.

It has been suggested that a Member could argue, in light of the Ad Note, that Article XV prohibits exchange actions that frustrate the intent of another GATT provision. Thus, perhaps provisions including GATT Articles I, II and III could be brought within the realm of consideration. For example, it has been argued that an exchange action could frustrate the intent of GATT Article III if it were found to be a discriminatory regulation, affording detrimental treatment to a group of imported products vis-à-vis the group of like domestic products.\(^{14}\)

Given that Article XV has never been tested in dispute settlement, it is unclear how one should demonstrate that an exchange action contravenes Article XV. As noted above, the complexity of establishing that a currency is 'misaligned' is well-known. The panel's assessment would be likely to be based on a complex expert analysis, including experts from the IMF, the parties and any other authorities the panel deemed appropriate. The experts would need to analyse the situation and then report and explain to the panellists technically complex issues. It would therefore be difficult for the panel to determine the conclusion of the dispute. A complainant would bear the burden of proof in making a factual demonstration establishing a \textit{prima facie} case that a Member's exchange actions frustrated the intent of a GATT provision under Article XV.

There is an important limitation to the scope of GATT Article XV:4. Article XV:9 carves out from Article XV:4 any exchange actions that are consistent with the IMF Articles of Agreement.\(^{15}\) Article XV:9(a) provides that:

\begin{quote}
Nothing in this Agreement shall preclude:
\begin{enumerate}
\item the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the
\end{enumerate}
\end{quote}

\(^{14}\) Alternatively, it has been suggested that a Member could argue that 'intent' covers the GATT as a whole, thereby preventing any exchange actions enacted in order to restrict trade. As the GATT preamble suggests, the Agreement was entered into because the contracting parties desired, \textit{inter alia}, 'the substantial reduction of tariffs and other barriers to trade and ... the elimination of discriminatory treatment in international commerce'.

\(^{15}\) Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, 22 July 1944, entered into force 27 December 1945, as subsequently amended.
The exact meaning and scope of Article XV:9 is not clear, particularly the scope of the terms included in the phrase ‘the use ... of exchange controls or exchange restrictions’. Does this mean that all exchange-related measures that are consistent with the IMF Agreement are presumed to be GATT-consistent? Or is a positive consistency conclusion by the IMF needed in order to benefit from the presumption of this provision? In other words, does a Member who initiates a claim of violation of Article XV have to demonstrate, first, that the challenged exchange measure is inconsistent with the IMF provisions? Or is it for the respondent to demonstrate that its exchange measure has been approved by the IMF? In light of the fact that the IMF has never reached a conclusion of a consistency, the role of GATT Article XV:9 could become crucial in a debate over exchange measures reviewed by the DSB.

Moreover, Article XV:2 obliges the WTO to consult with the IMF in exchange matters and to accept its determination of consistency or inconsistency with the IMF Articles of Agreement. The extent of this obligation to consult is discussed hereafter.

The Panel in *Dominican Republic – Import and Sale of Cigarettes* concluded that, because the Dominican Republic had argued that its exchange restriction was imposed in accordance with the IMF Articles of Agreement under GATT Article XV:9, the panel needed to consult the IMF under Article XV:2 for a determination of consistency.17 The extent of this obligation to consult is discussed in further detail in Section IV below. What is clear is that the IMF determination is essential for deciding whether or not the Article XV:9 carve-out applies.

16 A similar carve-out exists under GATS Article XI:2, which states:

‘Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.’

Finally, should the panel or AB find that the respondent’s exchange measure did indeed violate Article XV, the implementing Member would be obliged to alter its exchange measures to bring them into compliance with WTO rules although again no clear lines of action exist.

(ii) GATT Article II – schedules of concessions  GATT Article II establishes a Member’s obligation to apply its tariff rates at a level no less favourable than that agreed to in its Schedule of Concessions. It anticipates that a Member’s ‘method of converting currencies’ could impair the value of its concessions, that is, its bound tariff rates. Article II:3 states:

No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

Thus, it has been suggested that a member could raise a _de jure_ claim of violation of Article II:3 in response to an overvalued currency. The method of currency conversion could impair the value of a concession by raising the applied tariff rate to a level above the tariff bindings in a Member’s Schedule. In the case of a general currency misalignment, the situation of an artificially overvalued currency is unlikely to be the focus of an

18 See U. Thorstensen, E. Marçal and L. Ferraz, ‘Exchange Rate Misalignments and International Trade Policy: Impacts on Tariffs’, _Journal of World Trade_ 46:3 (2012) and also G. Hudson, P. Bentode Faria and T. Peyerl, ‘The Legality of Exchange Rate Undervaluation Under WTO Law’, _CTEI Working Paper_ (2011). It has also been suggested that this provision – together with Article II:6(a) mentioned below – could be cited in a complaint involving a member’s undervalued currency, to the extent that a method of converting currencies could impair the value of concessions by reducing a member’s market access. Note, however, that Article II deals with market access as a result of tariff concessions, rather than market access in an MFN or national treatment sense. Importantly, Article II grants both a right and an obligation to members: a _right_ to impose tariffs up to the bound rates and an _obligation_ not to impose tariffs above bound rates. Both are reflected in the paragraphs of Article II. We therefore consider an Article II claim for an undervalued currency as a _de facto_ violation claim, below.

19 E.g., assume two countries’ currencies, Currency A and Currency B, are of equal value. Country A’s Schedule of Concessions allows it to apply a ten unit duty on the import of a widget from Country B. This duty is initially equivalent to ten units of Country B’s currency. Next, Country A applies a method of converting currencies that overvalues its currency by 100 per cent relative to Currency B. Although the duty remains ten units of Country A’s currency, it now takes twice as many units of Country B’s currency to pay the duty. Thus, Country A’s widget industry effectively enjoys twice as much protection relative to its bound tariff rates when faced with competing imports from Country B. Article II:3 is designed to prevent such an event.
WTO dispute. The potentially higher tariff rates on a Member’s exports due to an overvalued currency may be of small concern relative to the benefit of increased price competitiveness for its exports.

Some have noted that Article II could provide guidance for when a member’s undervalued currency could be determined to impair concessions under Article II. In particular, Article II:6(a) considers that a member’s ‘specific’ duties or charges on imports – as opposed to import duties or charges made on an *ad valorem* basis, which is the case for the majority of members’ imports – may be upwardly adjusted if its currency’s ‘par value’ is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum. In such a case, the Article envisions a process of renegotiation to restore the member’s devalued concessions and assure it the level of protection to which it had agreed.

The *par value* system mentioned in Article II:6(a) for assessing specific duties and charges under Article II became defunct after the collapse of the Bretton Woods system in 1971. In 1978, the IMF passed the second amendment to the Articles of Agreement. Since then, market exchange rates have been used. For example, when making a comparison of export prices to normal value to determine appropriate levels of anti-dumping duties, AD Agreement Article 2.4.1 requires conversions of currencies to be calculated from the date of sale (or possibly the forward exchange rate) and exchange rate fluctuations must be ignored. The revised international monetary system has potentially important implications for the IMF, and for a WTO panel, seeking to ascertain the IMF- or WTO-consistency of a member’s exchange measure.

(iii) SCM Agreement – actionable and prohibited subsidies Some have suggested that the complainant could also make a *de jure* violation complaint under the SCM Agreement, claiming that the member’s...

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21 This provision does not apply as a trade remedy, however, and does not confer any right to upwardly adjust tariff rates (whether specific or *ad valorem*) in response to another member’s currency movements.
23 Similarly, the Customs Valuation (CV) Agreement removed the GATT Article VII:4 reliance on the old *par value* system for calculating rates of exchange. CV Agreement Article 9(a) requires rates of exchange to reflect ‘as effectively as possible... the current value of such currency in commercial transactions’, as duly published by the competent authorities of the importing country.
exchange rate policies are somehow actionable or prohibited subsidies. In order to do so, it would need to satisfy the terms of SCM Agreement Articles 1.1 and 1.2 that spell out what constitutes a ‘subsidy’ under the Agreement. Subsidies may be ‘actionable’ under SCM Agreement Article 5 or ‘prohibited’ under SCM Agreement Article 3.

The finding of a ‘subsidy’ is a threshold issue for considering exchange rate policies under the SCM Agreement. If it is not a ‘subsidy’, the provisions of the SCM Agreement do not apply. To determine that the member’s challenged exchange rate policy is a ‘subsidy’, the complainant must show four elements. First, the ‘subsidy’ must constitute a financial contribution or price support under SCM Agreement Article 1.1. Second, the financial contribution must be made by a public body, which the AB has interpreted to mean an entity ‘that possesses, exercises or is vested with governmental authority’. Panels will make this determination on a case-by-case basis. In this case, because central banks are responsible for making monetary policy, the panel would be tasked with weighing a central bank’s autonomy with the character of its authority, that is, whether or not that authority is ‘governmental’. Third, the financial contribution must confer a benefit. Fourth, the ‘subsidy’ must be ‘specific’ to certain enterprises under Article 2. Prohibited subsidies are automatically specific under Article 2.3.

After finding that a measure is a subsidy, a complainant must show that it is either actionable or prohibited. For an actionable subsidy to be a violation, it must produce ‘adverse effects to the interests of other Members’ under SCM Agreement Article 5. Adverse effects include injury to another member’s domestic industry, nullification or impairment of benefits accruing directly or indirectly under GATT 1994, and serious prejudice to another member’s interests as defined by SCM Agreement Article 6. A prohibited subsidy is a subsidy that, in the present case, is ‘contingent... upon export performance’ under SCM Agreement Article 3.1(a). In other words, an exchange-related subsidy

24 E.g., see R.W. Staiger and A.O. Sykes, “Currency Manipulation” and World Trade’ World Trade Review 9:4 (2010). As provided in several SCM Agreement provisions (including Articles 1, 25 and 26), the SCM Agreement’s obligations regarding subsidies operate in tandem with GATT Article XVI. The Agreement also covers countervailing duties in tandem with GATT Article VI, as discussed below. The SCM Agreement does not apply to agricultural subsidies, which are governed by the Agreement on Agriculture.

would need to be tied in law or in fact to export earnings to be considered a prohibited subsidy. 26

If a panel or, in case of an appeal, the AB, finds that a Member’s subsidy is prohibited, that member is required to withdraw the subsidy within a time period specified by the panel following the adoption of the panel or AB report. If actionable, the relevant member is required to withdraw the subsidy or remove its adverse effects within six months following adoption of the panel or AB report. If the subsidy is not withdrawn or the adverse effects not removed, the complainant may take appropriate countermeasures in line with SCM Agreement Articles 4.10 or 7.9, unless the DSB decides by consensus to reject the request.

(b) De facto violations  It could also be argued that a WTO Member could attempt to raise a claim of de facto violation of certain WTO provisions, including GATT Articles I, II or III on members’ most-favoured nation (MFN), tariff binding and national treatment obligations. 27 Rather than focusing on the wording of the challenged measure, as in the case of a de jure violation, a de facto violation implies that the actual effects of the measure, as applied, violate a WTO provision.

(i) GATT Article I on MFN  GATT Article I provides that any advantage a member bestows on the trade of any product from any country be immediately and unconditionally granted to like products of all WTO Members. This provision assures that no member will privilege trade with one country over that with other WTO Members. Some suggest that a complainant could raise a de facto claim of violation under GATT Article I, arguing that the responding member’s exchange actions de facto raise or lower levels of market access between countries. Because such variation might favour some members while providing less favourable treatment to others, the exchange or currency measures might be said to violate the MFN principle.

(ii) GATT Article II on market access  As noted above, GATT Article II binds members’ tariff rates according to each of their Schedules of

26 This would include currency retention schemes or similar practices that involve a bonus on exports, according to SCM Annex I’s ‘Illustrative List of Export Subsidies’.

27 In this light, GATT Articles I, II and III could also serve as the basis for claims that an exchange action under Article XV frustrates the intent of another GATT provision or for claims of nullification and impairment under GATT Article XXIII:1(b).
Concessions, thereby guaranteeing a predictable level of market access to each member's exports and imports. Arguably, a *de facto* violation claim could be made under Article II if it could be claimed that the exchange rate of the importing country reduces market access for imported goods. Article II:1(a) provides:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

A member seeking to make a *de facto* violation claim under Article II:1 would bear the burden of proof, requiring a *prima facie* case that a member's allegedly misaligned exchange rate had resulted in a market access restriction. The complainant would thus need to show that the restriction amounted to less favourable treatment than that provided in the importing member's Schedule.

(iii) *GATT Article III on national treatment*  

GATT Article III requires that internal taxes, charges, laws and regulations not be applied on imports in order to protect domestic industry. As such, taxes on imports may not be applied in excess of those on like domestic products, nor may laws and regulations accord less favourable treatment to imports than to like domestic products. Could a complainant allege that a set of member's exchange actions constitute an import tax applied to imports in excess of that applied to domestic products because no such import barrier effect applied to domestic products? Similarly the complainant might claim that the member's exchange measures accorded less favourable treatment to imports by having a detrimental impact on their competitive opportunities in the domestic market. As such, the alleged exchange rate misalignment would be argued to *de facto* violate GATT Article III.

2. Raising the 'defensive': claim that a member's defensive duties in response to an alleged currency misalignment violate a WTO provision

Some interest groups are asking their governments to impose unilateral duties on imports to protect their industries from the trade effects of perceived currency misalignments that affect the value/price of exported products. Under this scenario, the affected exporting member may seek to bring a violation complaint to the DSB. In so doing, the affected exporting member would bear the initial burden of proving that the imposition of such duties is WTO-inconsistent.
Depending on the facts, a member is entitled to consider either *de jure* or *de facto* claims of violations of provisions of the SCM Agreement, AD Agreement or GATT.

(a) **Countervailing duties** Members may impose CVDs to offset the trade effects of a subsidy, as set out in the SCM Agreement. An (exporting) Member challenging the exchange-related CVD would need to demonstrate a *prima facie* case that the CVDs were *de jure* WTO-inconsistent by showing that they did not counteract an actionable or prohibited subsidy that causes or threatens to cause injury to the domestic industry. In situations other than *de jure* subsidies, that member would need to show that the challenged measures *de facto* violated an SCM Agreement provision in their manner of application.

In either case, the respondent would then have to rebut the complainant’s *prima facie* case. In its rebuttal, as discussed above, the responding Member imposing the CVDs would be required to show that the alleged exchange action constituted a subsidy under the SCM Agreement. That is, it would need to show that the exchange action made a financial contribution or other price support from a public body that was ‘specific’ and conferred a benefit. If the exchange action were argued to be a prohibited subsidy, specificity would be assumed, but the additional requirement that the subsidy was ‘contingent upon export performance’ would need to be demonstrated. If the subsidy were claimed to be ‘actionable’, it would have to be shown to cause ‘adverse effects’, including injury to a domestic industry, nullification or impairment, or ‘serious prejudice’ to the interests of another member.

Additionally, if the CVDs met these criteria, the member imposing them could be required to show that they were appropriate countermeasures applied consistently with SCM Agreement Article 4.10 or 7.9 and Articles 19–21. As provided in SCM Agreement Article 10, CVDs must also be in accordance with GATT Article VI and the other clauses of the SCM Agreement.

Moreover, the Ad Note to GATT Article VI could, arguably, be relevant in this context. It provides that ‘multiple currency practices’ can ‘in certain circumstances’ be considered an export subsidy or a partial depreciation of a country’s currency. It further provides that in such cases these multiple currency practices may be countered with CVDs or AD duties. Some suggest that this provision could offer guidance to a panel required to interpret both GATT Article VI and the SCM and AD Agreements in the context of an alleged currency
(b) AD duties  It has also been suggested that in some circumstances exchange rate measures may be equated to dumping and could be argued to allow for the imposition of AD duties under the AD Agreement. Normally, AD duties are applied to offset the unfair trade practices of private actors selling products at lower prices abroad than on the home market. In this case, the complainant would again bear the initial burden of proof of offering a *prima facie* case that the duties imposed could be inconsistent, either *de jure* or *de facto*, with the AD Agreement. In order to do so, the complainant would need to show that the duties had not been calculated based on the normal value of the products in question, either for market or for non-market economies, according to the terms of AD Agreement Article 2. Alternatively, it would need to show that there was no injury or causation arising from the alleged dumping. It would then be for the respondent to rebut the *prima facie* case.

Additionally, if the AD duties met these criteria, the member imposing them could be required to show that they did not exceed the margin of dumping, determined under AD Agreement Article 2, and that they had been applied consistently with AD Agreement Articles 9–11. As provided by AD Agreement Article 1, AD duties must also be in accordance with GATT Article VI and the other clauses of the AD Agreement. As noted above, some have suggested that the Ad Note to GATT Article VI could be relevant in a currency-related AD dispute.

(c) Collecting tariffs above the bindings of GATT Article II  A member could argue that it is justified to raise its tariffs above bound levels in response to the trade effects caused by the alleged currency misalignment. As noted above, Article II:1 prohibits members from applying tariffs less favourable than the bound levels in their Schedules of Concessions. It could be argued that Article II:3 prohibits a member from altering its method

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28 In respect of CVDs applied to offset the alleged export subsidy effect of ‘multiple currency practices’, the Ad Note to GATT Article XVI carves out ‘multiple rates of exchange’ that are in accordance with the IMF Articles of Agreement. These are not required to fulfil the obligations of Article XVI Section B, which includes the obligation to cease granting any export subsidy on non-primary products when it results in the sale of a product for a lower price than on the domestic market. The relevance of this Ad Note could be modified by the subsequent export subsidy provisions under the SCM and Agriculture Agreements.
of converting currencies in a manner that impairs the concessions made in its schedule under Article II. The initial burden of proof would be on the complainants to show that the tariffs collected were above bindings or otherwise contrary to Article II. It would then be for the respondent to justify why it believed that its import tariffs were consistent with Article II.

It should be noted that, as a general principle, DSU Article 23 requires members to seek redress of all claims through dispute settlement procedures and not to seek redress unilaterally. Thus, many believe that it would be difficult to demonstrate that above-binding, exchange-related tariffs could be consistent with Article II. Nevertheless, the duty-imposing member could seek to defend its increased import tariffs breaching Article II by invoking Article XV as a defensive justification (as we invoke Article XX in other circumstances). To support this argument, GATT Articles I–XI generally lay out Members’ core substantive market access obligations under the GATT, while Articles XII–XXI generally allow flexibilities, justifications or exceptions to these rules. Article XV could be seen as a justification for defensive responses to another member’s exchange actions, including higher import tariffs under Article II.29 If this view is correct, in such a case, after the complainant had made a prima facie case that the import tariff hikes were inconsistent with Article II, the respondent would claim that the tariff hikes were justified under Article XV because the exchange actions in question allegedly frustrate the intent of another GATT provision. Although so far Article XV has been argued as a basis for claims, a panel could nonetheless consider whether Article XV can be interpreted as allowing for (conditional) justifications of violations of other GATT provisions.

In the event that Article XV could be used as a justification, the invoking Member would need to comply with related obligations such as consultation with the IMF and accepting certain IMF factual assessments would be likely to apply. Arguably paragraph 9 of Article XV could be invoked as a defence in response to claims of GATT violation and this seems to include all GATT provisions. It is not clear, however, whether and how GATT Article XV could justify non-GATT violations such as those resulting from SCM claims.

II. Non-violation complaints

In sum, several violation claims might involve exchange-related actions that would oblige a WTO panel to assess the WTO-consistency of an exchange-related measure. Members could also initiate a non-violation claim. The object of a non-violation complaint would be to claim that, although the challenged exchange rate or currency measure violates no WTO provision in particular, it does amount to nullification or impairment of some benefit to which the complaining member is entitled under the GATT. The non-violation claim could be raised by, together with or as an alternative, a claim to a violation. The burden of proof would be on the complaining member to present a *prima facie* case that the measure nullified or impaired its benefits. It would then be for the responding member to show that it did not.

The AB in *EC – Asbestos* ruled that GATT Article XXIII:1(b), the non-violation provision ‘should be approached with caution and should remain an exceptional remedy’. Article XXIII:1(b) covers the application of ‘any measure, whether or not it conflicts with the provisions of this Agreement’. It is clear from the text of Article XXIII that it applies very broadly. Indeed, the AB has determined that ‘measures of all types may give rise to such a cause of action [under Article XXIII:1(b)]’. The non-violation claim will require consideration of at least three conditions. First, the application of a measure by a member that is not WTO-inconsistent; second, the existence of a benefit or objective accruing under the applicable agreement; and third, the nullification or impairment of that benefit or the obstruction of any objective under GATT 1994 as a result of the application of the measure. Moreover, it will require some consideration that the nullification or impairment was not reasonably anticipated at the time of the last tariff’s negotiation.

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30 WTO Appellate Body Report, *EC – Asbestos*, para. 186. As noted above, Article XXIII:1 paragraphs (a) and (c) also provide remedies for nullification or impairment due to a violation of a GATT provision or for ‘any other situation’ not covered by paragraphs (a) and (b).


33 WTO Panel Report, *Japan – Film*, 10.82.
It has been suggested above that the responding member could attempt to invoke GATT Article XV as a defence to a non-violation claim under Article XXIII. As noted above, Article XV:9 carves out all exchange rate measures consistent with the IMF Agreement. In this light, a respondent to a non-violation claim could argue that its exchange actions are in conformity or are not inconsistent with the IMF provisions and therefore could not be the subject of any DSB recommendation. The exact scope and meaning of Article XV:9 are not clear.

DSU Article 26:1 sets out special rules for non-violation claims. It requires the complaining party to make a detailed justification in support of its complaint against a measure that does not violate a provision of the WTO Agreement. If a panel or the AB finds a challenged measure nullifies or impairs benefits without being a violation, there is no obligation for the imposing member to withdraw it. Instead, the respondent ought to provide a form of compensation. Would this imply no obligation for the Member concerned to modify the challenged exchange-related trade measure?

D. The role of the IMF, experts and other considerations

I. Obligation to consult the IMF and related case law

GATT Article XV establishes the terms under which a GATT panel is authorised to adjudicate a dispute involving a member’s exchange measures. Among other obligations, it notes the dual responsibility of the WTO and the IMF and obliges the WTO to consult with the IMF on all exchange-related matters. As noted above, the Panel in Dominican Republic – Import and Sale of Cigarettes decided that, under GATT Article XV:2, a panel needed to consult the IMF in cases where the respondent claims that its exchange actions are consistent with the IMF Articles of Agreement. This is especially important because members’ exchange actions cannot violate Article XV if the IMF determines them to be consistent with the Articles of Agreement.

According to GATT Article XV:2:

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

34 WTO Panel Report, Dominican Republic – Import and Sale of Cigarettes, para. 7.139.
CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases. (emphasis added)

Thus, to the extent that they represent the contracting parties of the WTO in a dispute under Article XV, panels would be obliged to consult with the IMF 'on problems concerning monetary reserves, balances of payments or foreign exchange arrangements'. The meaning and scope of such terms, in particular ‘exchange arrangements’, and their relationship to a specific exchange-related trade dispute, are not clear. It should also be noted that DSU Article 13, 35 further discussed below, generally allows panels to consult with experts. The AB has not yet interpreted the relationship between the specific obligation to consult the IMF under GATT Article XV and the right of panels to consult experts under DSU Article 13.

Moreover, it is unclear to what extent the IMF consultation requirement holds in disputes that are not directly concerned with GATT Article XV, albeit involving exchange rate considerations. Does Article

35 DSU Article 13, Right to Seek Information, states:

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.
XV impose a general requirement to consult the IMF whenever an exchange action is involved? Or must that provision be cited by the parties? For example, a member could impose trade remedies against another member in response to an alleged currency misalignment. If the duties were challenged solely under the SCM or AD Agreements, and the parties invoked exchange rate arguments, would the panel be required to consult the IMF? The extent of the IMF consultation requirement under Article XV and its impact on the operation of other GATT or WTO provisions remains open to interpretation.  

There have been at least two cases in which the DSB has determined that panels should consult the IMF in matters subject to IMF jurisdiction. The AB found that, in the specific matter of Argentina - Textiles and Apparel, the Panel had discretion not to consult the IMF despite suggestions from both parties, Argentina and the US, that it should do so. This was because only Article XV required consultation and only under conditions not at issue in the dispute, namely, 'problems concerning monetary reserves, balances of payments or foreign exchange arrangements'.  

Nevertheless, the AB found that consultations could have been useful and that other situations under Article XV could require consultation.  

In Dominican Republic - Import and Sale of Cigarettes, the panel determined that a fee claimed to be an exchange restriction required consultation with the IMF for three reasons. First, the IMF's role in making determinations under GATT Article XV; second, paragraph 8 of the IMF/WTO Cooperation Agreement (discussed below); and third, the AB decision in Argentina - Textiles and Apparel.  

However in India - Quantitative Restrictions, the Panel decided not to make a finding on whether or not the DSB was bound by certain determinations of the IMF in its consultations under Article XV.

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36 The DSU may be instructive in this case. Article 7.2 requires panels to address 'the relevant provisions in any covered agreement or agreements cited by the parties to the dispute' (emphasis added).


38 WTO Appellate Body Report, Argentina - Textiles and Apparel, para. 86.

39 WT/L/195, Agreement Between the International Monetary Fund and the World Trade Organization, 9 December 1996.

XV.2. The Panel also refused to determine whether it was bound to consult the IMF and instead consulted the IMF on the basis of Article 13 of the DSU. Because the decision was not appealed, the AB had no opportunity to make a final determination on this issue.

II. The role of the IMF/WTO Cooperation Agreement

The IMF/WTO Cooperation Agreement was adopted pursuant to Article V of the WTO Agreement. Even if the legal nature of the IMF/WTO Cooperation Agreement is not clear, it could be argued to provide important context for interpreting the consultation requirement. As noted by the AB in Argentina — Textiles and Apparel, the Agreement ‘provides for consultations and the exchange of information between the WTO Secretariat and the staff of the IMF in certain specified circumstances, and grants to each organization observer status in certain of the other’s meetings’.

Recently, in US — Tuna II and US — Clove Cigarettes, the AB concluded that decisions from the Technical Barriers to Trade (TBT) Committee and the Doha Ministerial Decision of 14 November 2001 constituted a ‘subsequent agreement between the parties’ pursuant to Article 31.2(a) of the Vienna Convention. If a panel were to reach a similar conclusion with respect to the IMF/WTO Cooperation Agreement, its provisions could be used to interpret GATT Article XV and other WTO provisions.

The IMF/WTO Cooperation Agreement was not, however, written in the context of dispute settlement. In Argentina — Textiles and Apparel, the AB noted that it explicitly excludes cooperation in dispute settlement proceedings under paragraph 6, except where ‘matters of jurisdictional

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relevance to the Fund are to be considered'. Moreover, dealing with an Article II violation claim by the US, the AB noted that the Cooperation Agreement included no provisions ‘that require a panel to consult with the IMF in a case such as this’. Under paragraph 8, the IMF/WTO Cooperation Agreement requires the IMF to ‘inform in writing the relevant WTO body (including dispute settlement panels) ...whether such measures are consistent with the Articles of Agreement of the Fund’. This provision requires the Fund to respond to a DSB request for a determination of consistency with the Articles of Agreement — probably with GATT Article XV in mind. Paragraph 8 also provides that the IMF ‘may communicate its views in writing on matters of mutual interest to the [WTO] or any of its organs or bodies (excluding the WTO’s dispute settlement panels)…’. The AB concluded that, ‘[e]vidently, the IMF has not been authorized to provide its views to a WTO dispute settlement panel on matters not relating to exchange measures within its jurisdiction, unless it is requested to do so by a panel under Article 13 of the DSU’. Two further declarations could also be relevant to the WTO/IMF relationship: the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking (the ‘Declaration on Coherence’) and the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund (the ‘WTO/IMF Declaration’). The Declaration on Coherence establishes principles of cooperation between the WTO and certain other international institutions in response to a 1994 Ministerial Decision. Paragraph 5 states that the WTO should ‘pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution…’. The WTO/IMF Declaration reiterates that the relationship of the WTO with the IMF ‘will be based on the provisions that have governed the relationship of the contracting parties to the GATT 1947’. These provisions were also reviewed by the AB in *Argentina – Textiles and Apparel.*

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47 Ibid., para. 85.
48 The same requirement was reviewed in the context of *Dominican Republic – Import and Sale of Cigarettes*. See *WTO Panel Report*, para. 7.140.
49 Siegel, ‘Legal Aspects of the IMF/WTO Relationship’, 570.
51 Ibid., paras 67–74.
III. The role of experts and IMF determinations in WTO disputes

Panels are granted the right to consult Members, other international organisations, experts, expert review groups and any other relevant source under DSU Article 13. The procedures for setting up expert review groups are provided in DSU Appendix 4. Other WTO agreements also refer to the use of individual experts. For example, SPS Agreement Article 11.2 requires consultation with experts for scientific or technical determinations, SCM Agreement Article 24.3 allows panels to refer to the ‘Permanent Group of Experts’ for determinations of a ‘prohibited’ subsidy, and the TBT Agreement refers to consultations with ‘technical expert groups’ (Articles 14:2 and 14:3). Typically, even in the case of the TBT Agreement, panels have preferred to consult with individual experts. Any experts selected by the panel must be independent and impartial. Indeed, the AB in US – Continued Suspension found that the Panel had infringed the European Communities’ due process rights by consulting with two experts considered to be partial.

Panels have the right to seek or decline expert advice at their own discretion, even in cases when parties have requested it. The AB noted in Argentina – Textiles and Apparel that ‘a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision’. Pursuant to GATT Article XV:2, the WTO would be bound only by ‘all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments’.

Notwithstanding the requirement of IMF consultation, it would be for the WTO panel alone to critically assess all factual considerations, apply WTO law and make final determinations on whether or not a Member’s exchange actions had violated a provision of the WTO Agreement. The

53 Ibid., 497.
55 WTO Appellate Body Report, Argentina – Textiles and Apparel, para. 86.
56 WTO Appellate Body Report, US – Import Measures on Certain Products from the European Communities, WT/DS165/AB/R, adopted 10 January 2001, para. 92. Similarly, DSU Article 3.7 states that ‘the aim of the dispute settlement mechanism is to secure a positive solution to a dispute’. It is for the panel to resolve disputes and consultations are meant, under DSU Article 13, only to further that purpose.
IMF determinations would need to be examined next to and including additional considerations, such as the representations of the parties. However, given the important place of the IMF in GATT Article XV, GATS Article XI, and potentially other WTO provisions relating to exchange actions, the IMF experts' testimony would carry heavy weight in a dispute settlement proceeding. This is all the more so given the subsequent agreements on the coherence of international organisations and the IMF/WTO Cooperation Agreement.

E. Conclusions

This chapter has reviewed the various types of OSU actions that have so far been argued to be relevant to potential exchange-related trade disputes. In such disputes, the jurisdiction of the DSB will be compulsory and the panel will have full discretion for assessing and making recommendations based on the parties' claims. Members may bring the disputes to the DSB in a number of ways, either by taking 'offensive' actions through positive claims of violation, non-violation or situation, or in reaction to 'defensive' imposition of unilateral trade remedies or import tariffs that cause the affected member to make a challenge. Violation claims could be made on a *de jure* or a *de facto* basis. The panel will have full discretion for seeking and assessing expert opinion, but may be obligated to consult the IMF under certain circumstances under GATT Article XV. It is unclear to what extent this obligation applies in exchange-related disputes other than under GATT Article XV, such as under the SCM or AD Agreements. Moreover, the scope of the general carve-out of GATT Article XV:9 is not clear as to whether or not, and to what extent, an exchange rate measure generally subject to IMF surveillance could nonetheless be considered GATT-inconsistent when it has not been declared IMF-consistent. In any case, it is anticipated that such disputes would be very complex and difficult to assess.