

Article XI GATS Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.
2. 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.

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CASE LAW

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CHRIST & PANIZZON

A. General

I. Overview

- 1 Art. XI (in conjunction with Art. XII) **liberalizes international transfers and payments** in connection with services that are provided pursuant to a specific commitment made under the GATS. Art. XI, as a general rule, prohibits any restrictions on international transfers and payments,¹ but permits exceptions in five sets of circumstances.²
- 2 The goal of the GATS, multilateral liberalization of trade in services, can only be achieved if the corresponding international transfers and payments are permitted.³ Yet, international transfers and payments are also governed by the **Articles of Agreement of the International Monetary Fund** (the “IMF Agreement” and the International Monetary Fund, the “IMF”).⁴ Art. XI attempts to (1.) liberalize international transfers and payments while at the same time (2.) recognizing the IMF’s role in creating a stable international financial system by providing for a conflict of laws rule between the GATS and the IMF Agreement.⁵
- 3 Since the wording of Art. XI is rather complex, trying to accommodate several interests that may, at least partially, diverge,⁶ **the following reading is recommended** for the discussion below: “A Member shall not apply restrictions on international transfers and payments for (current as well as capital) transactions relating to its specific commitments unless (i) restrictions are applied to safeguard the balance of payments in accordance with Art. XII GATS, (ii) in case a general exception applies in accordance with Art. XIV and XIV^{bis} GATS, (iii) in case an exception applies in accordance with para. 2 lit. a of the Annex on Financial Services, (iv) in the case of current transactions, if consistent with the rights and obligations of the members of the IMF under the IMF Agreement, or (v), in the case of capital transactions, at the request of the IMF”.

¹ See below, paras 11 *et seq.*

² See below, paras 23 *et seq.*

³ See *Lehmann et al.*, 3.

⁴ Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, 22 July 1944, UNTS 2 (1945), 39, as amended through June 28, 1990, <<http://www.imf.org/external/pubs/ft/aa/index.htm>> (last visited 1 October 2007).

⁵ See *Zapatero*, Penn St. Int’l L. Rev. 24 (2006), 595, 600; see *Footer*, Int’l Law. 27 (1993), 343, 356; see *Siegel*, AJIL 96 (2002), 561, 561 *et seq.*; see also *Williams*, Fordham L. Rev. 70 (2001), 561–621 for a critical view on the benefits of liberalizing international payments and transfers.

⁶ *Footer & George* in: *Macrory et al.* (eds.), 799, 842.

II. Historical Development

From the outset of the Uruguay Round negotiations on trade in services, it was widely accepted that the GATS should contain a provision liberalizing international transfers and payments while reserving certain measures to safeguard the balance of payments.⁷ During the Uruguay Round negotiations, the **IMF** issued a **communication** highlighting the overlap of jurisdiction between GATS and the IMF Agreement to explain the IMF's role to the negotiators and proposing to include in the GATS a conflict of laws rule preserving the IMF's jurisdiction over questions relating to the international monetary system.⁸ 4

The **Chairman's July 1990 draft** contained a clause regarding international transfers and payments, however, not until the **Chairman's December 1990 draft** the IMF Agreement expressly did take precedence. The draft was a compromise (notably the OECD countries had proposed including in the GATS liberalization, obligations beyond those of the IMF Agreement) that furthered international economic coherence by on the one hand respecting the responsibility of the IMF for achieving global financial stability and on the other hand realizing multilateral services trade liberalization under the GATS.⁹ The **December 1991 Dunkel Draft** represented the final form of the Article, adding the proviso regarding capital transactions and Art. XVI, footnote 8.¹⁰ 5

During the negotiations, there was only informal contact and little interaction with the IMF. Only at the very end of the negotiations did the Ministers issue the **Declaration on the Relationship of the WTO with the IMF**¹¹ and the **Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking**,¹² which promote a policy of "consistent and mutually supportive interlinkages" between the two organizations.¹³ 6

⁷ See *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2381, 2384.

⁸ See Group of Negotiations on Services, Uruguay Round, Communication from the International Monetary Fund, The Role of the Fund in the Area of Services Under its Articles of Agreement, MTN.GNS/W/91, 10 January 1990.

⁹ See *Footer*, Int'l Law. 27 (1993), 343, 356; see *Zapatero*, Penn St. Int'l L. Rev. 24 (2006), 595, 600.

¹⁰ See below, para. 18.

¹¹ Declaration on the Relationship of the World Trade Organization with the International Monetary Fund, 15 April 1994, ILM 33 (1994), 1252.

¹² Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking Adopted by the Trade Negotiations Committee on 15 December 1993, ILM 33 (1994), 1249.

¹³ *Ibid.*, para. 5; see *Siegel*, AJIL 96 (2002), 561, 565, 567 *et seq.* and 584 *et seq.*

III. Related Provisions

- 7 Art. XI is closely related to a number of other provisions in the WTO agreements:
- 8 The **Marrakesh Agreement Establishing the WTO** provides in its **Art. III:5** for the cooperation of the WTO with the IMF to achieve greater global economic coherence.¹⁴ This basic principle is the basis for the rule in Art. XI and its interpretation. Also, on 9 December 1996 both organizations entered into the **Agreement between the IMF and the WTO** regarding cooperation governing, for instance, the exchange of documents and the attendance at meetings.¹⁵
- 9 The **GATT** embodies in its **Arts. XII, XV and XVIII**, the **Understanding on the Balance-of-Payments Provisions of the GATT 1994**¹⁶ and the **Declaration on the Relationship of the WTO with the IMF** a set of rules comparable to Arts XI and XII governing international transfers and payments in connection with trade in goods.¹⁷ Accordingly, the jurisprudence and doctrine developed under Arts XII, XV and XVIII GATT 1994 apply *mutatis mutandis* to Arts XI and XII.
- 10 The **GATS** itself contains a number of other provisions relating to international transfers and payments. **Art. XII** (allowing certain restrictions to safeguard the balance of payments) is directly related to Art. XI specifying one set of exceptions to the general liberalization rule of Art. XI. **Art. XVI:1, footnote 8** (dealing with the general principles of market access) reiterates for capital transfers the general principle of Art. XI and provides an additional interpretative guideline as discussed below.¹⁸ The **Annex on financial Services**, finally, includes in its **para. 2 lit. a** a clause permitting measures for prudential reasons, thereby providing for an example of an exception to Art. XI.

¹⁴ See *Zapatero*, Penn St. Int'l L. Rev. 24 (2006), 595 *et seq.*

¹⁵ See Agreements Between the WTO and the IMF and the World Bank, Decision Adopted by the General Council at its Meeting on 7, 8 and 13 November 1996, WT/L/194, 18 November 1996; see also *Siegel*, AJIL 96 (2002), 561, 568.

¹⁶ Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, ILM 33 (1994), 1158.

¹⁷ See Working Group on the Relationship Between Trade and Investment, Exceptions and Balance-of-Payments Safeguards, Note by the Secretariat, WT/WGTI/W/137, 26 August, para. 35; *Siegel*, AJIL 96 (2002), 561, 568 *et seq.*

¹⁸ Para. 18; see *Footer*, Int'l Law. 27 (1993), 343, 356.

B. No Restrictions on International Transfers and Payments

As a basic rule, Art. XI prohibits any restrictions on international transfers and payments for transactions relating to specific commitments. It covers current transactions¹⁹ as well as capital transactions.²⁰ 11

In what follows, (1.) the definition of and the distinction between current and capital transactions (see I.), (2.) international transfers and payments (see II.), (3.) their relation to a specific commitment (see III.) and (4.) possible restrictions (see IV.) will be discussed in detail. 12

I. Current and Capital Transactions

The GATS as well as the IMF Agreement distinguish between current and capital transactions. The **IMF Agreement** defines current transactions in its Art. XXX lit. d as any payments that are not for the purpose of transferring capital.²¹ This negative definition is followed by a non-exhaustive list of transactions to be considered current, including payments made in connection with the supply of a service. The IMF Agreement acknowledges that the distinction may not always be clear and, therefore, provides for the IMF to determine the nature of a specific transaction in case of doubt. Capital transactions are not further defined in the IMF Agreement. 13

The **GATS**, in contrast, while using both terms does not contain a definition. Yet, as construed here,²² for the purposes of Art. XI no definition other than that in the IMF Agreement will be required since, as a general rule under the GATS, neither kind of transactions may be restricted under the GATS. Only if applying the clause regarding the precedence of the IMF Agreement does the distinction become relevant. In this case, however, the IMF Agreement's definition must apply to actually be able to take precedence.²³ Other than under the GATS, for IMF purposes²⁴ a distinction is required, since restrictions on capital transactions, as a general rule, are permitted by the IMF Agreement while restrictions on current transactions are not. 14

II. International Transfers and Payments

International transfers and payments comprise all kinds of transactions for currency. Art. XI deals only with international transfers and payments; 15

¹⁹ See Art. XI:1.

²⁰ See the proviso Art. XI:2.

²¹ See MTN.GNS/W/91, para. 8 *et seq.*

²² See above, para 3.

²³ See MTN.GNS/W/91, para. 21; see *Siegel*, AJIL 96 (2002), 561, 598–599; see also *UNCTAD*, 12.

²⁴ As discussed below, paras 29 *et seq.* and 33 *et seq.*

accordingly only cross-border transactions between residents and non-residents will benefit from the liberalization.²⁵ Unlike Art. VIII of the IMF Agreement, which addresses outward transfers and payments only, Art. XI does not distinguish between outward and inward transfers and payments and, consequently, applies to both as long as they relate to a specific commitment.²⁶

III. Relation to a Specific Commitment

- 16 The provision of Art. XI exclusively applies to international transfers and payments that are related to a service provided pursuant to a specific commitment of a Member and, thus, Members' obligations under Art. XI are conditional obligations. Liberalization of international transfers and payments is not an independent goal of the GATS, but only an ancillary means to liberalize trade in those services for which specific commitments have been made.²⁷ There must be a direct relationship between the service and the international transfer and payment in question.
- 17 Regarding **current transactions**, the GATS fails to provide for any guidelines on how close the relationship between the transfer and the service must be. Based on the wording of Art. XI:1, the nature of Art. XI as a general obligation and the GATS' object and purpose of achieving progressively higher levels of liberalization of trade in services,²⁸ one can conclude that the GATS intends to liberalize any and all international transfers and payments that are directly related to a service covered by a specific commitment.²⁹
- 18 Regarding **capital transactions**, Art. XVI:1, footnote 8 contains an interpretation of how close the relationship between international transfers and payments and a service that is provided pursuant to a specific commitment must be. For services in **mode 1** (cross-border supply, Art. I:2 lit. a) the capital transaction must be an essential part of the service. For instance, for a cross-border bank loan it is essential that the lender may transfer the loan amount (that is the capital) to the borrower. In contrast, for services in **mode 3** (commercial presence, Art. I:2 lit. c), it suffices for the capital transfer to be related to the service. This distinction is consistent with the purpose of the GATS: a commercial presence will often entail incidental capital transfers (for instance, for the establishment of the presence or the repatriation of gains) even if the service to be provided does not itself

²⁵ See *UNCTAD*, 12 *et seq.*; see *Siegel*, *AJIL* 96 (2002), 561, 586.

²⁶ See *UNCTAD*, 25; see *Siegel*, *AJIL* 96 (2002), 561, 590.

²⁷ See *Williams*, *Fordham L. Rev.* 70 (2001), 561, 613.

²⁸ Rec. 3 of the Preamble to the GATS.

²⁹ See *Footer & George*, in: *Macrory et al.* (eds), 799, 842.

involve a capital transfer. For a cross-border supply, on the other hand, no such incidental transfers are necessary, which justifies limiting the permitted capital transfers in mode 1 to those essential to the service. It seems that **mode 2** (consumption abroad) and **mode 4** (presence of natural persons) have not been addressed in footnote 8 because, typically, neither the services in mode 2 nor those in mode 4 involve a cross-border capital transaction (of course, remittances of mode 4 persons are permitted since they qualify as current transactions).³⁰ To the extent that mode 2 or mode 4 services nevertheless would involve capital transactions, any restrictions on capital transfers that are necessary for such service would be prohibited applying the rules of footnote 8 by analogy (since, otherwise, the commitment in question would be without value).

IV. Restrictions

Art. XI, in principle, prohibits any restriction that could impede international transfers and payments in connection with a specific commitment.³¹ 19
Considering the general purpose of the GATS (that is the liberalization of trade in services), the term “restriction” should be **construed broadly**. The panels and the Appellate Body have repeatedly confirmed this interpretation in a number of cases dealing with the interpretation of the terms “restrictions” and “measures” in other provisions of the GATS and the GATT.³² Consequently, for the purposes of Art. XI, the term “restriction” includes any measure that could negatively affect international transfers and payments.³³

Typical **examples** of restrictions are, of course, the practices described in 20
Art. VII of the IMF Agreement (such as exchange restrictions, discriminatory currency arrangements and multiple currency practices), which are prohibited in general, but permitted under certain circumstances as discussed below.³⁴ However, the scope of possible restrictions is much broader than that and, as a basic rule, any measure that could impede international transfers and payments in connection with GATS services is prohibited. Restrictions can be direct or indirect. Direct restrictions affect the transactions themselves, for instance by prohibiting certain transactions, setting quotas, providing for approval procedures, etc. Indirect restrictions, conversely, do not restrict international transfers and payments as such, but discourage them without

³⁰ See *Lehmann et al.*, 19.

³¹ *Siegel*, AJIL 96 (2002), 561, 596.

³² See Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, paras 81–82, 88; Panel Report, *US—Gambling*, WT/DS285/R, para. 6.174; Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 194.

³³ See *UNCTAD*, 13 *et seq.*; see *Siegel*, AJIL 96 (2002), 561, 585 *et seq.*

³⁴ See below, paras 23 *et seq.*

directly limiting them by means of restrictive regulation, such as excessive taxation, measures requiring undue paperwork or those creating extensive delays, *etc.*³⁵

- 21 In the *US—Gambling* case, the complainant, Antigua, argued that the various US restrictions on payments for gambling services (such as a New York state law declaring void claims in connection with wagers or bets) were in violation of Art. XI.³⁶ The Panel for reasons of judicial economy did not rule on this claim. Yet, it confirmed in an obiter dictum “that Article XI plays a crucial role in securing”³⁷ the purpose of the GATS. Any restriction on international transfers and payments would seriously impair the value of Members’ commitments.³⁸
- 22 Art. XI belongs to the **general obligations** of Part II of the GATS that apply across the board to all services in trade. For current transactions the way Art. XI:1 is worded and for capital transactions Art. XVI, footnote 8,³⁹ confirm that the GATS does not permit a member to derogate from its general obligation to refrain from imposing restrictions on international payments and transfers relating to its specific commitments. The ruling of the GATT 1947 Panel Report, *US—Restrictions on Imports of Sugar* (applied in analogy to GATS) confirms that general obligations take precedence over the Members’ Schedules of commitments.⁴⁰ In *Mexico—Telecoms*, the Panel underlined that Members, in their specific commitments, are to specify limitations on the substance of their liberalization entries pursuant to the closed list of any of the three categories: market access, national treatment and additional commitments (Arts. XVI, XVII and XVIII). Thus, Members may not add limitations or restrictions that do not fall under any of the three categories, for instance by providing for restrictions on international transfers and payments relating to their specific commitments.⁴¹ Consequently, any such restrictions contained in a Schedule would have no legal effect. Also,

³⁵ See *Williams*, Fordham L. Rev. 70 (2001), 561, 571 *et seq.*

³⁶ See *US—Gambling*, WT/DS285/R para. 6.438.

³⁷ *Ibid.*, para. 6.442.

³⁸ *Ibid.*

³⁹ In relation to capital transactions one might argue that this applies to mode 1 and mode 3 commitments only based on Art. XVI, footnote 8, while, regarding mode 2 and mode 4 commitments (which are not mentioned in footnote 8), a Member may provide in its Schedule for restrictions. This argument is also based on the wording in the proviso of Art. XI:2 referring to “restrictions [...] inconsistently with its [...] commitments” (which can be construed to allow for specifications in the Schedule) rather than to restrictions “relating to its [...] commitments” (which does not permit any specifications in the Schedule). Apart from being of rather limited relevance, this argument is inconsistent with the view expressed in para. 18 above that footnote 8 applies by analogy to mode 2 or 4 services that necessarily entail international transfers and payments.

⁴⁰ See Panel Report, *US—Restrictions on Imports of Sugar*, BISD 36S/331, paras 5.3, 5.8–6.2.

⁴¹ See Panel Report, *Mexico—Telecoms*, WT/DS204/R; paras 7.359–7.362.

the fact that a specific restriction contained in a specific commitment may be consistent with other provisions of the GATS, such as for instance the national treatment principle embodied in Art. XVII, will not limit Art. XI's general application.⁴²

C. Exceptions

There are five alternative exceptions to the general rule of Art. XI that a Member may not impose restrictions on international transfers and payments (for current or capital transactions) relating to a specific commitment of such Member. The five exceptions are (1.) any restriction to safeguard the balance of payment in accordance with Art. XII (see I.), (2.) any restriction covered by the general exceptions of Arts XIV and XIV^{bis} (see II.), (3.) any restriction covered by the exception of para. 2 lit. a of the Annex on Financial Services (see III.), (4.) with respect to current transactions only, any restriction that is consistent with the rights and obligations of such Member under the IMF Agreement (see IV.), and (5.), with respect to capital transactions only, any restriction requested by the IMF (see V.) 23

I. Art. XII—Restrictions to Safeguard the Balance of Payments

The first exception, set out in Art. XII, permits restrictions to safeguard the balance of payments.⁴³ 24

II. Arts XIV and XIV^{bis}—General Exceptions

As a second exception to Art. XI, Arts XIV and XIV^{bis} provide for exceptions to a Member's obligations under the GATS in a number of circumstances listed in these Articles.⁴⁴ 25

Examples of domestic law restricting international transfers and payments, but permitted by virtue of the general exceptions, are, for instance, rules on the seizure or blocking of assets in connection with bankruptcies (dealing with the effects of a default on services contracts) or criminal procedures (public order). Even though such measures can, strictly speaking, amount to restrictions of international transfers and payments, they prevail for public policy reasons by operation of Arts XIV and XIV^{bis} over the rules of Art. XI. 26

⁴² See *Lehmann et al.*, 19.

⁴³ See *Grote*, Article XII GATS, paras 5 *et seq.*

⁴⁴ See *Cottier et al.*, Article XIV GATS, paras 16 *et seq.*, Cottier & Delimatsis, Article XIV^{bis} GATS, paras 13 *et seq.*; WT/WGTI/W/137, paras 15 *et seq.*

Accordingly, in its obiter dictum to Art. XI, the Panel in the *US—Gambling* case confirmed “that Article XI does not deprive Members from regulating the use of financial instruments, such as credit cards, provided that these regulations are consistent with other relevant GATS provisions, [...]”⁴⁵

III. Para. 2 lit. a of the Annex on Financial Services

- 27 Of particular importance in connection with Art. XI are, as a third exception, the exceptions known as measures for prudential reasons in the financial sector. As defined in para. 2 lit. a of the Annex on Financial Services, measures for prudential reasons include any regulations (1.) to protect any person to whom the financial service provider owes a fiduciary duty or (2.) to ensure the integrity or stability of the financial system. Examples of prudential measures are rules against money laundering.
- 28 While the broad language of the Annex permits a wide range of prudential measures, such measures may never be used as a pretext for actually avoiding any obligations under the GATS (including the obligation to liberalize international transfers and payments relating to services for which specific commitments have been made).⁴⁶

IV. Rights and Obligations of a Member Under the IMF Agreement

- 29 As a fourth exception, relating to current transactions only, Art. XI reserves the rights and obligations of a Member under the IMF Agreement. The major purpose of the IMF is to promote international trade and prosperity by creating an international monetary system (Art. I IMF Agreement).⁴⁷ To achieve this purpose, among others, the IMF Agreement provides (1.) in its Art. IV⁴⁸ for obligations regarding exchange arrangements, the IMF’s surveillance jurisdiction over the international monetary system and the members’ obligation to collaborate and (2.) in its Art. VIII⁴⁹ for obligations regarding current transactions.
- 30 In general, the IMF Agreement liberalizes current transactions between its members by prohibiting certain practices (including exchange restrictions, discriminatory currency arrangements and multiple currency practices), but permitting certain **transitional** (Art. XIV IMF Agreement)⁵⁰ or, with the IMF’s prior approval, **temporary restrictions** (Art. VIII IMF Agreement)

⁴⁵ See *US—Gambling*, WT/DS285/R, para. 6.442.

⁴⁶ See *Lehmann et al.*, 9, 19, 21; see *Siegel*, AJIL 96 (2002), 561, 589–590.

⁴⁷ See *Qureshi*, 107, 173.

⁴⁸ See MTN.GNS/W/91, paras 11 *et seq.*; *Lowenfeld*, 507.

⁴⁹ See MTN.GNS/W/91, paras 6 *et seq.*; *Lowenfeld*, 508 *et seq.*

⁵⁰ See *Lowenfeld*, 508; *Siegel*, AJIL 96 (2002), 561, 565.

to counter balance-of-payment difficulties.⁵¹ If the IMF Agreement permits any of these practices and, to the extent that they relate to current transactions, the IMF Agreement will take precedence over the GATS to avoid any inconsistencies between IMF and GATS rights and obligations.⁵²

Regarding current transactions, Art. XI exempts all rights and obligations under the IMF Agreement, not just those under Art. VIII of the IMF Agreement explicitly dealing with current transactions. This is confirmed by the clause in Art. XI:2 regarding **exchange actions**⁵³ (see Art. IV IMF Agreement) which are explicitly included in the term “rights and obligations” (to the extent applied in conformity with the IMF Agreement).⁵⁴ Strictly speaking, the clause would not be necessary, since, in any event, all rights and obligations under the IMF Agreement dealing with current transactions take precedence over Art. XI. 31

Since the 1980s the IMF’s adjustment programmes typically include various conditions that a member receiving IMF financing has to meet (**conditionality**). These conditions have become far more important than classical balance-of-payment measures. However, such conditions are not considered to be obligations of an IMF member and, therefore, cannot be invoked to justify a restriction on international transfers and payments.⁵⁵ 32

V. Request of the IMF

The fifth exception relates to capital transactions only and permits restrictions on capital transfers at the request of the IMF. As a general rule, the IMF Agreement predominantly deals with limitations on restrictions on current transactions, but does not address capital transactions.⁵⁶ Accordingly, Art. VI:3 of the IMF Agreement permits its members to exercise controls over capital transactions.⁵⁷ Therefore, to achieve its goal of avoiding restrictions on services-related international transfers and payments, regarding capital transactions, Art XI must provide for a general ban that can only be lifted in exceptional circumstances in which the IMF has an explicit overriding interest. 33

⁵¹ See *UNCTAD*, 16 *et seq.*; see *Qureshi*, 176–177; see *Lowenfeld*, 9 *et seq.*, 15 *et seq.*; see *Siegel*, *AJIL* 96 (2002), 561, 585 *et seq.*

⁵² See *Footer*, *Int’l Law* 27 (1993), 343, 356; see *Siegel*, *AJIL* 96 (2002), 561, 584 *et seq.*, 597; see also *UNCTAD*, 26.

⁵³ See Art. IV IMF Agreement, above, note 4.

⁵⁴ See *Siegel*, *AJIL* 96 (2002), 561, 588 *et seq.*

⁵⁵ See Panel Report, *Argentina—Textiles and Apparel (EC)*, WT/DS56/R, as modified by Appellate Body Report, *Argentina—Footwear (EC)*, WT/DS121/AB/R; *Siegel*, *AJIL* 96 (2002), 561, 566, 572 *et seq.*; see *Thomas*, *Am. U. Int’l L. Rev.* 15 (2000), 1248, 1261–1262.

⁵⁶ See MTN.GNS/W/91, para. 21.

⁵⁷ See *Lehmann*, 19; see *Lowenfeld*, 509 *et seq.*

- 34 The reference to “at the request of the Fund” relates to Art. VI Section 1 IMF Agreement under which the IMF may request a Member to impose capital controls to prevent the use of the IMF’s resources to meet a large or sustained outflow of capital. Therefore, as with current transactions, the IMF Agreement takes precedence regarding capital transactions, but only if (direct or indirect) capital controls actually have been requested by the IMF. There has never been such request.⁵⁸

D. Evaluation and Outlook

- 35 Even though the liberalization of international transfers and payments is an “indispensable complement to the GATS”,⁵⁹ so far there has been hardly any jurisprudence and doctrine dealing with Art. XI. This may be for a number of reasons:
- 36 Art. XI addresses restrictions on international transfers and payments incidentally, in order to ensure that the services can actually be provided. In contrast, a number of other international organizations including the IMF or the Organisation for Economic Co-operation and Development (OECD) were expressly regulating such restrictions long before the GATS. In particular, the OECD Codes of Liberalisation of Capital Movements and of Liberalisation of Current Invisible Operations of December 12, 1961,⁶⁰ as amended, liberalize a broad range of transfers relating to investment and, in general, prohibit any controls on international transfers and payments.⁶¹ Therefore, many restrictions addressed by Art. XI have long been abolished among OECD members and reduced the potential for issues to arise under the GATS. Similarly, Arts. 56 *et seq.* ECT liberalize international transfers and payments between Member States of the European Union.
- 37 The IMF, today, typically favours conditionality over balance-of-payment safeguards, thus, aligning its lending with the GATS’ liberalization purpose.⁶² Therefore, there are currently probably very few instances in which a Member could actually invoke the precedence of its rights and obligations under the IMF Agreement.

⁵⁸ *Siegel*, AJIL 96 (2002), 561, 598, 572, footnote 49; see *Footer*, Int’l Law. 27 (1993), 343, 356; see also *Williams*, Fordham L. Rev. 70 (2001), 561, 605.

⁵⁹ See *US—Gambling*, WT/DS285/R, para. 6.442.

⁶⁰ OECD, Codes of Liberalisation of Capital Movements and of Current Invisible Operations, originally adopted by the OECD Council on 12 December 1961, OECD/C(61) 95, 96.

⁶¹ See *UNCTAD*, 18 *et seq.*; see *Williams*, Fordham L. Rev. 70 (2001), 583.

⁶² *Siegel*, AJIL 96 (2002), 561, 566; see *Thomas*, Am. U. Int’l L. Rev. 15 (2000), 1248, 1261–1262.

The commitments made under the GATS, in particular those of non-OECD Members, still remain relatively narrow in sector coverage. Accordingly, there are only a limited number of circumstances under which restrictions on international transfers and payments issues can actually arise. 38

Nevertheless, Art. XI has had and, as more GATS commitments are made, will increasingly have an important role to play in liberalizing trade in services.⁶³ 39

⁶³ The authors wish to thank *Dr. Rolf Adlung*, Senior Economist Trade in Services Division WTO Secretariat, and *Dr. Carsten Fink*, Senior Economist Trade Team World Bank, for their valuable comments and review of this commentary.