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## **1 ARTICLE XVIII**

### **1.1 Text of Article XVIII**

#### ***Article XVIII\****

##### *Governmental Assistance to Economic Development*

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living\* and are in the early stages of development.\*

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry\* and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries\* with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (a) Consequently, a contracting party, the economy of which can only support low standards of living\* and is in the early stages of development,\* shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

(b) A contracting party, the economy of which is in the process of development, but which does not come within the scope of subparagraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

5. The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (a) and (b) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

#### Section A

7. (a) If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry\* with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(b) If agreement is not reached within sixty days after the notification provided for in subparagraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or

withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in subparagraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.\*

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

- (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
- (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.\*

12. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them\* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in subparagraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; *Provided* that no consultation under this subparagraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with a contracting party under subparagraph (a) or (b) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) If a contracting party against which action has been taken in accordance with the last sentence of subparagraph (c) (ii) or (d) of this paragraph, finds that the release of obligations authorized by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary<sup>1</sup> to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(footnote original)<sup>1</sup> By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

(f) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Section C

13. If a contracting party coming within the scope of paragraph 4 (a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry\* with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.\*

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with provisions of paragraph 18; *Provided* that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.\*

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them,\* that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so, \*the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur\* in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur\* in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

- (a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or
- (b) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.\*

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; *Provided* that it shall not apply the proposed measure without the concurrence\* of the CONTRACTING PARTIES.\*

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove;\* *Provided* that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

#### Section D

22. A contracting party coming within the scope of subparagraph 4 (b) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry\* may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur\* in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.\*

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

### 1.2 Text of notes *ad* Article XVIII

#### ***Ad Article XVIII***

The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article.

#### *Paragraphs 1 and 4*

1. When they consider whether the economy of a contracting party "can only support low standards of living", the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.

2. The phrase "in the early stages of development" is not meant to apply only to contracting parties which have just started their economic development, but also to

contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.

*Paragraphs 2, 3, 7, 13 and 22*

The reference to the establishment of particular industries shall apply not only to the establishment of a new industry, but also to the establishment of a new branch of production in an existing industry and to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of the domestic demand. It shall also cover the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters.

*Paragraph 7 (b)*

A modification or withdrawal, pursuant to paragraph 7 (b), by a contracting party, other than the applicant contracting party, referred to in paragraph 7 (a), shall be made within six months of the day on which the action is taken by the applicant contracting party, and shall become effective on the thirtieth day following the day on which such modification or withdrawal has been notified to the CONTRACTING PARTIES.

*Paragraph 11*

The second sentence in paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.

*Paragraph 12 (b)*

The date referred to in paragraph 12 (b) shall be the date determined by the CONTRACTING PARTIES in accordance with the provisions of paragraph 4 (b) of Article XII of this Agreement.

*Paragraphs 13 and 14*

It is recognized that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned.

*Paragraphs 15 and 16*

It is understood that the CONTRACTING PARTIES shall invite a contracting party proposing to apply a measure under Section C to consult with them pursuant to paragraph 16 if they are requested to do so by a contracting party the trade of which would be appreciably affected by the measure in question.

*Paragraphs 16, 18, 19 and 22*

1. It is understood that the CONTRACTING PARTIES may concur in a proposed measure subject to specific conditions or limitations. If the measure as applied does not conform to the terms of the concurrence it will to that extent be deemed a measure in which the CONTRACTING PARTIES have not concurred. In cases in which the CONTRACTING PARTIES have concurred in a measure for a specified period, the contracting party concerned, if it finds that the maintenance of the measure for a further period of time is required to achieve the objective for which the measure was originally taken, may apply to the CONTRACTING PARTIES for an extension of that period in accordance with the provisions and procedures of Section C or D, as the case may be.

2. It is expected that the CONTRACTING PARTIES will, as a rule, refrain from concurring in a measure which is likely to cause serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

*Paragraphs 18 and 22*

The phrase "that the interests of other contracting parties are adequately safeguarded" is meant to provide latitude sufficient to permit consideration in each case of the most appropriate method of safeguarding those interests. The appropriate method may, for instance, take the form of an additional concession to be applied by the contracting party having recourse to Section C or D during such time as the deviation from the other Articles of the Agreement would remain in force or of the temporary suspension by any other contracting party referred to in paragraph 18 of a concession substantially equivalent to the impairment due to the introduction of the measure in question. Such contracting party would have the right to safeguard its interests through such a temporary suspension of a concession; *Provided* that this right will not be exercised when, in the case of a measure imposed by a contracting party coming within the scope of paragraph 4 (a), the CONTRACTING PARTIES have determined that the extent of the compensatory concession proposed was adequate.

*Paragraph 19*

The provisions of paragraph 19 are intended to cover the cases where an industry has been in existence beyond the "reasonable period of time" referred to in the note to paragraphs 13 and 14, and should not be so construed as to deprive a contracting party coming within the scope of paragraph 4 (a) of Article XVIII, of its right to resort to the other provisions of Section C, including paragraph 17, with regard to a newly established industry even though it has benefited from incidental protection afforded by balance of payments import restrictions.

*Paragraph 21*

Any measure taken pursuant to the provisions of paragraph 21 shall be withdrawn forthwith if the action taken in accordance with paragraph 17 is withdrawn or if the CONTRACTING PARTIES concur in the measure proposed after the expiration of the ninety-day time limit specified in paragraph 17.

### **1.3 Understanding on the Balance-of-Payments provisions of the GATT 1994**

*Members,*

*Recognizing* the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions<sup>1</sup>.

*(footnote original)*<sup>1</sup> Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.

Hereby *agree* as follows:

*Application of Measures*

1. Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly announced by a Member, that Member shall provide justification as to the reasons therefor.

2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as



"price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.

3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.

4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term "essential products" shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.

*Procedures for Balance-of-Payments Consultations*

5. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the "Committee") shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as "full consultation procedures"), subject to the provisions set out below.

6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, inter alia, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.

7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.

8. Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47-49, referred to in this Understanding as "simplified consultation procedures") in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultations procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.

*Notification and Documentation*

9. A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

10. At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.

11. The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.

12. The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.

*Conclusions of Balance-of-Payments Consultations*

13. The Committee shall report on its consultations the General Council. When full consultation procedures have been used, the report should indicate the Committee's

conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII and XVIII:B, the 1979 Declaration and this Understanding. In those cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendations by the General Council, the Committee's conclusions should record the different views expressed in the Committee. When simplified consultation procedures have been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required.

#### **1.4 Article XVIII:B**

##### **1.4.1 General**

1. The Panel in *India – Quantitative Restrictions*, in a finding not addressed by the Appellate Body, explained the function of Article XVIII:B within the GATT framework. The Panel distinguished the conditions for taking balance-of-payments measures under Article XVIII from those applicable under Article XII of GATT and considered paragraphs 2, 4(a), 8 and 11 of Article XVIII:

"It is clear from these provisions that Article XVIII, which allows developing countries to maintain, under certain conditions, temporary import restrictions for balance-of-payments purposes, is premised on the assumption that it 'may be necessary' for them to adopt such measures in order to implement economic development programmes. It allows them to 'deviate temporarily from the provisions of the other Articles' of GATT 1994, as provided for in, *inter alia*, Section B. These provisions reflect an acknowledgement of the specific needs of developing countries in relation to measures taken for balance-of-payments purposes. Article XVIII:B of GATT 1994 thus embodies the special and differential treatment foreseen for developing countries with regard to such measures. In our analysis, we take due account of these provisions. In particular, the conditions for taking balance-of-payments measures under Article XVIII are clearly distinct from the conditions applicable to developed countries under Article XII of GATT 1994.<sup>1</sup>

We also find that while Article XVIII:2 foresees the possibility that it 'may' be 'necessary' for developing countries to take restrictions for balance-of-payments purposes, such measures might not always be required. These restrictions must be adopted within specific conditions 'as provided in' Section B of Article XVIII. The specific conditions to be respected for the institution and maintenance of such measures include Article XVIII:9, which specifies the circumstances under which such measures may be instituted and maintained, and Article XVIII:11 which sets out the requirements for progressive relaxation and elimination of balance-of-payments measures."<sup>2</sup>

##### **1.4.2 Jurisdiction of panels**

2. In *India – Quantitative Restrictions*, the Appellate Body reviewed the Panel's finding that India's import restrictions for balance-of-payments reasons were inconsistent with Article XI:1 and that India was not entitled to maintain these balance-of-payments restrictions under the terms of Note Ad Article XVIII:11. India argued that panels have no authority to examine Members' justifications of balance-of-payments restrictions, because footnote 1 to the Understanding on the Balance-of-Payments Provision of the GATT 1994 (the "BOP Understanding") provides that the DSU may be invoked in respect of matters relating to the specific use or purpose of a balance-of-

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<sup>1</sup> (footnote original) In particular, the conditions to be met for the institution of balance-of-payments measures are different in Article XVIII:9 and Article XII, and an Ad Note which applies to the conditions for progressive relaxation and elimination of restrictions under Article XVIII:11 has no analogue in Article XII.

<sup>2</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.155-5.156.

payments measure or to the manner in which a balance-of-payments measure is *applied* in a particular case, but not with respect to the question of balance-of-payment *justification* of these measures. Rejecting this argument, the Appellate Body stated as follows:

"Any doubts that may have existed in the past as to whether the dispute settlement procedures under Article XXIII were available for disputes relating to balance-of-payments restrictions have been removed by the second sentence of footnote 1 to the *BOP Understanding* ...

In our opinion, this provision makes it clear that the dispute settlement procedures under Article XXIII, as elaborated and applied by the DSU, *are* available for disputes relating to *any* matters concerning balance-of-payments restrictions.

...

We note India's arguments relating to the negotiating history of the *BOP Understanding*. However, in the absence of a record of the negotiations on footnote 1 to the *BOP Understanding*, we find it difficult to give weight to these arguments. ...

Therefore, in light of footnote 1 to the *BOP Understanding*, a dispute relating to the justification of balance-of-payments restrictions is clearly within the scope of matters to which the dispute settlement provisions of Article XXIII of the GATT 1994, as elaborated and applied by the DSU, are applicable."<sup>3</sup>

3. The Appellate Body also found that permitting panel review of balance-of-payments restrictions would not render redundant the competence of the BOP Committee and the General Council under GATT Article XVIII and the Understanding on the Balance-of-Payments Provisions of the GATT 1994:

"Recourse to the dispute settlement procedures does not call into question either the availability or the utility of the procedures under Article XVIII:12 and the *BOP Understanding*. On the contrary, if panels refrained from reviewing the justification of balance-of-payments restrictions, they would diminish the explicit procedural rights of Members under Article XXIII and footnote 1 to the *BOP Understanding*, as well as their substantive rights under Article XVIII:11.

We are cognisant of the competence of the BOP Committee and the General Council with respect to balance-of-payments restrictions under Article XVIII:12 of the GATT 1994 and the *BOP Understanding*. However, we see no conflict between that competence and the competence of panels. Moreover, we are convinced that, in considering the justification of balance-of-payments restrictions, panels should take into account the deliberations and conclusions of the BOP Committee, as did the panel in *Korea – Beef*.

We agree with the Panel that the review by panels of the justification of balance-of-payments restrictions would not render redundant the competence of the BOP Committee and the General Council. The Panel correctly pointed out that the BOP Committee and panels have different functions, and that the BOP Committee procedures and the dispute settlement procedures differ in nature, scope, timing and type of outcome."<sup>4</sup>

4. Further, in response to India's argument that while panels did not lack jurisdiction with respect to balance-of-payments restrictions, they should nevertheless exercise judicial restraint, the Appellate Body stated:

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<sup>3</sup> Appellate Body Report, *India – Quantitative Restrictions*, paras. 87-88 and 94-95. Following these paragraphs, in support of this finding, the Appellate Body referred to Panel Report, *Korea – Beef (US)*, paras. 117-118. Also, the Appellate Body rejected the argument that India presented referring to Panel Reports on *EC – Citrus*; *EC – Bananas I*; and *Korea – Beef (US)*. Appellate Body Report, *India – Quantitative Restrictions*, para. 100.

<sup>4</sup> Appellate Body Report, *India – Quantitative Restrictions*, paras. 102-104.

"India clarified its claim of legal error by stating that although panels, in principle, have competence to review any matters relating to balance-of-payments restrictions, they should exercise *judicial restraint* with respect to these matters.

...

[W]e note that, if the exercise of judicial restraint were to lead *in practice*, as India seems to suggest, to panels refraining from considering disputes regarding the justification of balance-of-payments restrictions, such exercise of judicial restraint would, as discussed above, be inconsistent with Article XXIII of the GATT 1994, as elaborated and applied by the DSU, and footnote 1 to the *BOP Understanding*.<sup>5</sup>

#### 1.4.3 Right to maintain balance-of-payments measures

5. In *India – Quantitative Restrictions*, India argued before the Panel that it had the right to maintain balance-of-payment measures until the BOP Committee or the General Council advised it to modify these measures under Article XVIII:12 or established a time-period for their removal under paragraph 13 of the BOP Understanding. The Panel, in a finding not specifically addressed by the Appellate Body, disagreed:

"We note at the outset that there is no explicit statement in Article XVIII:B or the 1994 Understanding that authorizes a Member to maintain its balance-of-payments measures in effect until the General Council or BOP Committee acts under one of the aforementioned provisions. Article XVIII:B, however, addresses the issue of the extent to which balance-of-payments measures may be maintained. Article XVIII:11, which is analysed in more detail in Part G below, specifies that a Member:

'shall progressively relax any restrictions applied under this Section [i.e., Article XVIII:B] as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article [XVIII] and shall eliminate them when conditions no longer justify their maintenance.'

The obligation of Article XVIII:11 is not conditioned on any BOP Committee or General Council decision. If we were to interpret Article XVIII:11 to be so conditioned, we would be adding terms to Article XVIII:11 that it does not contain.

Moreover, the obligation in Article XVIII:11 requires action by the individual Member. It is qualified only by a proviso and Ad Note (which we discuss in Part G and which are not relevant here) and it is not made subject to the accomplishment of other procedures. In light of the unqualified nature of the Article XVIII:11 obligation, it would be inconsistent with the principle *pacta sunt servanda* to conclude that a WTO Member has a right to maintain balance-of-payments measures, even if unjustified under Article XVIII:B, in the absence of a Committee or General Council decision in respect thereof. Thus, we find that India does not have a right to maintain its balance-of-payments measures until the General Council advises it to modify them under Article XVIII:12 or establishes a time-period for their removal under paragraph 13 of the 1994 Understanding."<sup>6</sup>

6. In *India – Quantitative Restrictions*, India further argued that Article XVIII:12(c)(i) or (ii) confirms the existence of a "right to a phase-out" for measures which no longer meet the criteria set out in Article XVIII:9, by providing for a "specified period of time" to be granted to secure compliance with the relevant provisions when an inconsistency has been identified. In this context, India also claimed that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a "right" to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIII:9. The Panel rejected India's arguments:

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<sup>5</sup> Appellate Body Report, *India – Quantitative Restrictions*, paras. 106 and 108.

<sup>6</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.78-5.80.

"The text of paragraph 13 of the Understanding itself does not specify whether the balance-of-payments difficulties which justified the imposition of the measures should still be in existence when a time schedule is presented for their elimination. However, the notion of presentation of a time-schedule, starting when the balance-of-payments difficulties still exist, is consistent with the temporary nature of balance-of-payments measures and with the requirement for their gradual elimination. Also, the time-schedules referred to in paragraphs 1 and 13 of the 1994 Understanding are the same and paragraph 1 specifies that 'such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation.' This suggests that a time-schedule would have to be presented before the balance-of-payments difficulties disappear, otherwise, the reference to 'take into account changes in the balance-of-payments situation' would become redundant.

This does not mean that the General Council has no margin of discretion in deciding whether or not to accept or not a time-schedule that would provide protection to the Member concerned. We have seen that the Ad Note suggests also that measures could, under certain circumstances, be maintained for a time when balance-of-payments difficulties which initially justified their institution are no longer in existence. In addition, paragraph 13 of the 1994 Understanding provides that 'the General Council may recommend that, in adhering to such a time-schedule, a Member *may be deemed* to be in compliance with its GATT 1994 obligations' (emphasis added). There is no clear evidence that this phrase has to be interpreted as covering only situations under which a phase-out period would exactly coincide with the gradual disappearance of balance-of-payments difficulties.

In light of the above, we conclude that the procedure for submission and approval of a time-schedule incorporated in the 1994 Understanding, which is specific to the Committee consultations, does not give WTO Members a 'right' to a phase-out period which a panel would have to protect in the absence of balance-of-payments difficulties in the sense of Article XVIII:B.<sup>7</sup> Even assuming that such a 'right' could be recognised under paragraph 13 of the 1994 Understanding, such a recognition would in any case require a prior decision of the General Council."<sup>8</sup>

#### **1.4.4 Burden of proof regarding measures justified by Article XVIII:B**

7. The Panel Report in *India – Quantitative Restrictions* applied the general rules on burden of proof to balance-of-payments measures as follows:

"In all instances, each party has to provide evidence in support of each of its particular assertions. This implies that the United States has to prove any of its claims in relation to the alleged violation of Article XI:1 and XVIII:11. Similarly, India has to support its assertion that its measures are justified under Article XVIII:B. We also view the rules stated by the Appellate Body as requiring that the United States as the complainant cannot limit itself to stating its claim. It must present a *prima facie* case that the Indian balance-of-payments measures are not justified by reference to Articles XI:1 and XVIII:11 of GATT 1994."<sup>9</sup>

8. In *India – Autos*, India asserted a defence under Article XVIII:B to the extent of any violation of Article XI. India presented no evidence regarding its balance-of-payments situation, and argued that the burden was on the complainants to establish that its measures were not justified on balance-of-payments grounds. The Panel rejected this argument, and found that "the burden is on India in relation to this defence. To successfully assert this defence it must at a minimum, present a *prima facie* case that these measures can be considered to be maintained under Article XVIII:B."<sup>10</sup> The Panel ruled that India failed to make such a *prima facie* case, because India presented no information on its actual balance-of-payments situation during the relevant period, and did not explain how it had met the substantive conditions of Article XVIII:9.

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<sup>7</sup> (footnote original) As we note in our suggestions for implementation, a phase-out period typically has been negotiated (see text accompanying footnotes 366-368).

<sup>8</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.233-5.235.

<sup>9</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.119.

<sup>10</sup> Panel Report, *India – Autos*, para. 7.288.

The Panel declined to consult with the IMF because "the arguments presented did not even lead the Panel to that point."<sup>11</sup>

## **1.5 Article XVIII:9**

### **1.5.1 General**

9. In *India – Quantitative Restrictions*, the Panel decided that in its evaluation of the situation of India's monetary reserves under Article XVIII:9, it would need to examine the facts existing on the date of its establishment. The Panel gave both legal and practical reasons for not focusing on the situation existing at a later point in time:

"With respect to the date at which India's balance-of-payments and reserve situation is to be assessed, we note that practice, both prior to the WTO and since its entry into force, limits the claims which panels address to those raised in the request for establishment of the panel, which is typically the basis of the panel's terms of reference (as is the case here).<sup>12</sup> In our opinion, this has consequences for the determination of the facts that can be taken into account by the Panel, since the complainant obviously bases the claims contained in its request for establishment of the panel on a given set of facts existing when it presents its request to the DSB.

In the present situation, the United States primarily seeks a finding that, at the latest on the date of establishment of the Panel (18 November 1997), the measures at issue were not compatible with the WTO Agreement and were not justified under Article XVIII:11 of GATT 1994. Therefore, it would seem consistent with such a request and logical in the light of the constraints imposed by the Panel's terms of reference to limit our examination of the facts to those existing on the date the Panel was established.

This result is also dictated by practical considerations. The determination of whether balance-of-payments measures are justified is tied to a Member's reserve situation as of a certain date. In fixing that date, it is important to consider that the relevant economic and reserve data will be available only with some time-lag, which may vary by type of data. This is unlikely to be a problem if the date of assessment is the date the panel is established, since the first written submission is typically filed at least two (and often more) months after establishment of a panel. However, using the first or second panel meetings as the assessment date is more problematic since data might not be available and, if the date of the second panel meeting were chosen, it could significantly reduce the utility of the first meeting.

We note that, in the case on *Korea – Beef*, the panel relied on the conclusions of the BOP Committee reached before its establishment, but also considered 'all available information', including information related to periods after the establishment of the panel.<sup>13</sup> In this case, the parties and the IMF have supplied information concerning the evolution of India's balance-of-payments and reserve situation until June 1998. To the extent that such information is relevant to our determination of the consistency of India's balance-of-payments measures with GATT rules as of the date of establishment of the Panel, we take it into account.<sup>14</sup><sup>15</sup>

### **1.5.2 Adequacy of reserves**

10. In *India – Quantitative Restrictions*, the Panel examined whether the Indian balance-of-payments measure met with the conditions set out in subparagraph (a) of Article XVIII:9. The

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<sup>11</sup> Panel Report, *India – Autos*, paras. 7.289-7.293 and 7.294.

<sup>12</sup> (footnote original) Appellate Body Report on *EC – Bananas III*, para. 143 and Appellate Body Report on *India – Patent (US)*, paras. 87-89.

<sup>13</sup> (footnote original) Panel Report on *Korea – Beef (US)*, paras. 122-123.

<sup>14</sup> (footnote original) We note for instance that such information might be relevant to an examination of the existence of a threat of serious decline in monetary reserves under Article XVIII:9 or to an examination of the conditions contemplated in the Note Ad Article XVIII:11.

<sup>15</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.160-5.163.

Panel first made a general statement about its analytical approach and then held that it would consider the "adequacy" of India's reserves for the purposes of both Article XVIII:9(a) and XVIII:9(b):

"The issue to be decided under Article XVIII:9 (a) is whether India's balance-of-payments measures exceeded those 'necessary ... to forestall the threat of, or to stop, a serious decline in monetary reserves'. In deciding this issue, we must weigh the evidence favouring India against that favouring the United States and determine whether on the basis of all evidence before the Panel, the United States has established its claim under Article XVIII:11 that India does not meet the conditions specified in Article XVIII:9(a).

...

The question before us is whether India was facing a serious decline or threat thereof in its reserves (Article XVIII:9(a)) or had inadequate reserves (Article XVIII:9(b)). In analysing India's situation in terms of Article XVIII:9(a), it is important to bear in mind that the issue is whether India was facing or threatened with a *serious* decline in its monetary reserves. Whether or not a decline of a given size is serious or not must be related to the initial state and adequacy of the reserves. A large decline need not necessarily be a serious one if the reserves are more than adequate. Accordingly, it is appropriate to consider the adequacy of India's reserves for purposes of Article XVIII:9(a), as well as for Article XVIII:9(b)."<sup>16</sup>

11. The Panel in *India – Quantitative Restrictions* then considered information supplied by the International Monetary Fund (IMF), which indicated the level of reserves which could be considered "adequate" for India:

"In this connection, we recall that the IMF reported that India's reserves as of 21 November 1997 were US\$ 25.1 billion and that an adequate level of reserves at that date would have been US\$ 16 billion. While the Reserve Bank of India did not specify a precise level of what would constitute adequacy, it concluded only three months earlier in August 1997 that India's reserves were 'well above the thumb rule of reserve adequacy' and although the Bank did not accept that thumb rule as the only measure of adequacy, it also found that '[b]y any criteria, the level of foreign exchange reserves appears comfortable'. It also stated that 'the reserves would be adequate to withstand both cyclical and unanticipated shocks'.

...

Turning now to the question of whether India was facing a serious decline or threat thereof in its reserves, it is appropriate to consider the evolution of its reserves in the period prior to November 1997. As noted above, as of 31 March 1996, India's reserves were US\$17 billion; as of 31 March 1997, India's reserves were US\$22.4 billion. We note that at the time of the BOP Committee's consultations with India in January and June 1997, the IMF reported that India did not face a serious decline in its reserves or a threat thereof. As of 21 November 1997, India's reserves had risen to US\$25.1 billion and the IMF continued to be of the view that India did not face a serious decline in its reserves or a threat thereof. In our view, in light of the foregoing evidence, and taking into account the provisions of Article XV:2, as of the date of establishment of the Panel, India was not facing a serious decline or a threat of a serious decline in monetary reserves as those terms are used in Article XVIII:9(a). In the event that it might be deemed relevant to add support to our findings concerning India's reserves as of November 1997, we have also examined the evolution of India's reserves after November 1997. We note that India's reserves fluctuated around the November level in subsequent months, falling to a low of US\$23.9 billion in December 1997 and rising to a high of US\$26.2 billion in April 1998. They were US\$24.1 billion as of the end of June 1998."<sup>17</sup>

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<sup>16</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.169 and 5.173.

<sup>17</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.174 and 5.177.



### **1.5.3 "restricting the quantity or value of merchandise permitted to be imported": quantitative versus price-based balance-of-payments measures**

12. Concerning the treatment under the GATT 1947 of balance-of-payments surcharges and other price-based balance-of-payments measures, see *GATT Analytical Index*, p. 361-367.

## **1.6 Article XVIII:11**

### **1.6.1 Burden of proof**

13. In *India – Quantitative Restrictions*, citing its statement in *US – Wool Shirts and Blouses*<sup>18</sup>, the Appellate Body agreed with the Panel that it is for the responding party to demonstrate that the complaining party violated its obligation not to require the responding party to change its development policy:

"The proviso precludes a Member, which is challenging the consistency of balance-of-payments restrictions, from arguing that such restrictions would be unnecessary if the developing country Member maintaining them were to change its development policy. In effect, the proviso places an obligation on Members not to require a developing country Member imposing balance-of-payments restrictions to change its development policy.

...

We consider that the invocation of the proviso to Article XVIII:11 does not give rise to a burden of proof issue insofar as it relates to the interpretation of what policies may constitute a 'development policy' within the meaning of the proviso. However, we do not exclude the possibility that a situation might arise in which an assertion regarding development policy does involve a burden of proof issue. Assuming that the complaining party has successfully established a *prima facie* case of inconsistency with Article XVIII:11 and the Ad Note, the responding party may, in its defence, either rebut the evidence adduced in support of the inconsistency or invoke the proviso. In the latter case, it would have to demonstrate that the complaining party violated its obligation not to require the responding party to change its development policy. This is an assertion with respect to which the responding party must bear the burden of proof. We, therefore, agree with the Panel that the burden of proof with respect to the proviso is on India."<sup>19</sup>

14. On the issue of the allocation of the burden of proof with respect to the *Ad Note* to the United States, India argued that the Panel had not applied the rules in accordance with the principles laid down by the Appellate Body in *EC – Hormones*. Specifically, India objected to the fact that the Panel had taken into account the responses of India in its assessment regarding whether the United States had made a *prima facie* case. The Appellate Body did not share India's view:

"We do not interpret the ... statement as requiring a panel to conclude that a *prima facie* case is made before it considers the views of the IMF or any other experts that it consults. Such consideration may be useful in order to determine whether a *prima facie* case has been made. Moreover, we do not find it objectionable that the Panel took into account, in assessing whether the United States had made a *prima facie* case, the responses of India to the arguments of the United States. This way of proceeding does not imply, in our view, that the Panel shifted the burden of proof to India."<sup>20</sup>

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<sup>18</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p.14. With respect to burden of proof in general, see Section on DSU.

<sup>19</sup> Appellate Body Report, *India – Quantitative Restrictions*, paras. 134 and 136.

<sup>20</sup> Appellate Body Report, *India – Quantitative Restrictions*, para. 142. With respect to the burden of proof in general, see also the Section on DSU.

## 1.6.2 Note *Ad Article XVIII:11*

### 1.6.2.1 General

15. The Panel in *India – Quantitative Restrictions*, in a finding not reviewed by the Appellate Body, addressed the question whether Note *Ad Article XVIII:11* permitted India to maintain balance-of-payments restrictions which did not meet the requirements of Article XVIII:9. India argued that it should not be required to remove its quantitative restrictions immediately, even if it were found that it currently did not experience balance-of-payments difficulties within the meaning of Article XVIII:9, because immediate removal would create the conditions for their reinstitution within the meaning of Note *Ad Article XVIII:11*. The Panel held that three questions had to be addressed in this context: namely (a) whether the *Ad Note* covered situations where the conditions of Article XVIII:9 were no longer met; (b) what conditions must be met in order to allow for the maintenance of measures under the *Ad Note*; and (c) whether these conditions were met in the present case. With respect to the first question – namely, whether the *Ad Note* covered situations where the conditions of Article XVIII:9 were no longer met – the Panel considered the wording of the *Ad Note*:

"It seems clear to us that the use of the word 'respectively' in this provision allows the sentence to be read to refer to two situations, so that the second sentence of paragraph 11 should not be interpreted to mean (i) that a Member is required to relax restrictions if such relaxation would thereupon produce conditions justifying the intensification of restrictions under paragraph 9 of Article XVIII or (ii) that a Member is required to remove restrictions if such removal would thereupon produce conditions justifying the institution of restrictions under paragraph 9 of Article XVIII.

The ordinary meaning of the words therefore suggests that the *Ad Note* could cover situations where the conditions of Article XVIII:9 are no longer met but are threatened. This would make it possible for a developing country having validly instituted measures for balance-of-payments purposes and whose situation has sufficiently improved so that the conditions of Article XVIII:9 are no longer fulfilled, not to eliminate the remaining measures if this would result in the reoccurrence of the conditions which had justified their institution in the first place."<sup>21</sup>

16. Having found that the ordinary meaning of the words of Note *Ad Article XVIII:11* could extend to situations where the conditions of Article XVIII:9 no longer exist, but are threatened, the Panel considered also the context of the *Ad Note* and the notion of "gradual relaxation":

"This appears consistent with the context of the provision, in particular with the general requirement of gradual relaxation of measures as balance-of-payments conditions improve, under Article XVIII:11. The notion of 'gradual relaxation' contained in Article XVIII:11 should itself be read in context, together with Article XVIII:9. Article XVIII:9 requires that the measures taken shall not 'exceed those necessary' to address the balance-of-payments situation justifying them. The institution and maintenance of balance-of-payments measures is only justified at the level necessary to address the concern, and cannot be more encompassing. Paragraph 11, in this context, confirms this requirement that the measures be limited to what is necessary and addresses more specifically the conditions of evolution of the measures as balance-of-payments conditions improve: at any given time, the restrictions should not exceed those necessary. This implies that as conditions improve, measures must be relaxed in proportion to the improvements. The logical conclusion of the process is that the measures will be eliminated when conditions no longer justify them.

The *Ad Note* clarifies that the relaxation or removal should not result in a worsening of the balance-of-payments situation such as to justify strengthened or new measures. It thus seeks to avoid a situation where a developing country would be required to remove the measures, foreseeing that in doing so, it will create the conditions for their reinstitution. In light also of the need to restore equilibrium of the balance-of-payments on a sound and lasting basis, acknowledged in the first sentence of

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<sup>21</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.188-5.189.

Article XVIII:11, it appears that removal should be made when the conditions actually allow for it. In this sense, we can agree with India that the developing country Member applying the measures is not required to follow a 'stop-and-go' policy. It is worth noting, however, that in circumstances where the balance-of-payments situation has gradually improved, if measures have been gradually relaxed as conditions improved under the terms of Article XVIII:11 and maintained only to the extent necessary under the terms of Article XVIII:9, it could be anticipated that only a minor portion of the measures initially instituted would remain to be removed by the time the balance-of-payments conditions have improved to the extent that the country faces neither a serious decline in monetary reserves or a threat thereof, or inadequate reserves. The elimination of these measures would thus constitute the final stage of a gradual relaxation and elimination.

We therefore conclude that the Note Ad Article XVIII:11 could apply to both situations where balance-of-payments difficulties still exist and when they have ceased to exist but are threatened to return. It is therefore possible for India to invoke the existence of such risk in order to justify the maintenance of the measures. However, this possibility is available only to the extent that the conditions foreseen in the Ad Note are fulfilled. We must therefore determine what these conditions are before examining whether they are fulfilled in this instance."<sup>22</sup>

17. Having answered the first of the three questions listed in paragraph 15 above, the Panel then turned to the second question, namely which conditions had to be satisfied for a measure to be justified in the light of the Note *Ad* Article XVIII:11, although the conditions under Article XVIII:9 were no longer met. The Panel gave the following overview:

"Three elements thus appear to be contemplated in this text:

- (i) that conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII would occur
- (ii) that the relaxation or removal of the measures would produce occurrence of these conditions
- (iii) the relaxation or removal would thereupon produce these conditions."<sup>23</sup>

#### **1.6.2.2 "would thereupon produce"**

18. In its analysis of the conditions which a balance-of-payment measure, imposed by a developing country, had to comply with in the light of the Note *Ad* Article XVIII:11, the Panel in *India – Quantitative Restrictions* first addressed the term "would thereupon produce":

"We agree with the Panel that the Ad Note, and, in particular, the words 'would thereupon produce', require a *causal link of a certain directness* between the removal of the balance-of-payments restrictions and the recurrence of one of the three conditions referred to in Article XVIII:9. As pointed out by the Panel, the Ad Note demands more than a mere possibility of recurrence of one of these three conditions and allows for the maintenance of balance-of-payments restrictions on the basis only of clearly identified circumstances. In order to meet the requirements of the Ad Note, the probability of occurrence of one of the conditions would have to be clear."<sup>24</sup>

19. With respect to the term "thereupon" in the phrase "would thereupon produce", the Appellate Body in *India – Quantitative Restrictions* rejected India's argument that the Panel had erred in interpreting the term "thereupon" contained in Note Ad Article XVIII:11 to signify "immediately":

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<sup>22</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.190-5.192.

<sup>23</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.194.

<sup>24</sup> Appellate Body Report, *India – Quantitative Restrictions*, para. 114.

"We also agree with the Panel that the Ad Note and, in particular, the word 'thereupon', expresses a *notion of temporal sequence* between the removal of the balance-of-payments restrictions and the recurrence of one of the conditions of Article XVIII:9. We share the Panel's view that the purpose of the word 'thereupon' is to ensure that measures are not maintained because of some distant possibility that a balance-of-payments difficulty may occur.

...

We recall that balance-of-payments restrictions may be maintained under the Ad Note if their removal or relaxation would thereupon produce: (i) a threat of a serious decline in monetary reserves; (ii) a serious decline in monetary reserves; *or* (iii) inadequate monetary reserves. With regard to the first of these conditions, we agree with the Panel that the word 'thereupon' means 'immediately'.

...

We agree with the Panel that it would be unrealistic to require that [i.e., the two other conditions] a serious decline or inadequacy in monetary reserves should actually occur within days or weeks following the relaxation or removal of the balance-of-payments restrictions. The Panel was, therefore, correct to qualify its understanding of the word 'thereupon' with regard to these two conditions. While not explicitly stating so, the Panel in fact interpreted the word 'thereupon' for these two conditions as meaning 'soon after'. This is also one of the possible dictionary meanings of the word 'thereupon'. We are of the view that instead of using the word 'immediately', the Panel should have used the words 'soon after' to express the temporal sequence required by the word 'thereupon'.<sup>25</sup>

### 1.6.3 Proviso to Article XVIII:11

20. In *India – Quantitative Restrictions*, the Appellate Body rejected India's argument that, contrary to the proviso to Article VIII:11, the Panel required India to change its development policy by holding that India could manage its balance-of-payments situation using macroeconomic policy instruments alone, without maintaining quantitative restrictions:

"[W]e are of the opinion that the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pursue. The IMF statement that India can manage its balance-of-payments situation using macroeconomic policy instruments alone does not, therefore, imply a change in India's development policy.

...

We believe structural measures are different from macroeconomic instruments with respect to their relationship to development policy. If India were asked to implement agricultural reform or to scale back reservations on certain products for small-scale units as indispensable policy changes in order to overcome its balance-of-payments difficulties, such a requirement would probably have involved a change in India's development policy."<sup>26</sup>

## 1.7 Article XVIII:12

### 1.7.1 Article XVIII:12(c)

21. The Panel in *India – Quantitative Restrictions* discussed Article XVIII:12(c)(i) and (ii) in rejecting India's argument that panels have no authority to evaluate Members' balance-of-payments justifications. See the excerpt referenced in paragraph 5 above.

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<sup>25</sup> Appellate Body Report, *India – Quantitative Restrictions*, paras. 115, 117 and 119.

<sup>26</sup> Appellate Body Report, *India – Quantitative Restrictions*, paras. 126 and 128.

22. Further, the Panel rejected India's argument that Article XVIII:12(c)(ii) confirms the existence of a right to a phase-out for measures no longer justified by current balance-of-payments difficulties, stating as follows:

"We note that Article XVIII:12(c)(ii), provides a specific mechanism in order for the BOP Committee to address possible violations of the provisions of, *inter alia*, Article XVIII:B and provides for a period of time to be granted to the Member in order to implement the requirement to remove or modify the inconsistent measures. In the situation envisaged by Article XVIII:12(c)(ii), a period of time is granted when an inconsistency with the provisions of either Article XVIII:B or Article XIII has been identified. The period of time which is allocated to the Member in order to bring its measures into conformity is thus comparable, but not identical, to an implementation period of the sort provided for in Article 21.3 of the DSU. However, this specific mode of determination of the 'implementation' period applies to procedures initiated under Article XVIII:12(c), which is not the procedure under which this Panel is acting. We consider the issue of whether a phase-out would be appropriate in this case in our suggestions in respect of implementation, where we note this provision of Article XVIII:12(c)(ii)."<sup>27</sup>

## **1.8 Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994**

### **1.8.1 General**

23. The Panel in *India – Quantitative Restrictions*, in a finding not addressed by the Appellate Body, explained the legal status of the BOP Understanding in relation to GATT Articles XII and XVIII:

"[The text of Article XVIII:B] should now be read in light of the 1994 Understanding, which clarifies the provisions of Articles XII and XVIII:B and of the 1979 Decision. The 1994 Understanding, which refers to the procedures for balance-of-payments consultations adopted in 1970 ('full consultation procedures') and 1972 ('simplified consultation procedures') as well as the 1979 Decision, contains provisions on the application of balance-of-payments measures, as well as provisions relating to the procedures for balance-of-payments consultations and their conclusion, but it does not explicitly refer to Articles XVIII:12(c) and (d)."<sup>28</sup>

### **1.8.2 Footnote 1**

24. The Appellate Body, in *India – Quantitative Restrictions*, referred to footnote 1 of the BOP Understanding in considering a panel's authority to examine the conformity with the WTO Agreement of Members' measures taken for balance-of-payments purposes. See the excerpts referenced in paragraphs 2-4 above.

### **1.8.3 Paragraph 1**

25. In *India – Quantitative Restrictions*, India argued that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a "right" to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIII:9. The Panel rejected this argument. See the excerpt referenced in paragraph 6 above.

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<sup>27</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.227.

<sup>28</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.48.

## **1.9 Relationship with other GATT provisions**

### **1.9.1 Article II**

26. The Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides in its paragraph 2 for an exception from Article II:1(b) for "price-based measures taken for balance-of-payments purposes":

"Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as 'price-based measures') shall be understood to include import surcharges, import deposit measures or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member."

### **1.9.2 Articles XI, XIII, XIV and XVII**

27. The Panels on *India – Quantitative Restrictions* and *Korea – Various Measures on Beef* discussed the interpretation and application of Note *Ad Article XI, XII, XIII, XIV and XVIII*, which clarifies that the terms "import restrictions" or "export restrictions" as used in these Articles include "restrictions made effective through state-trading operations".

### **1.9.3 Article XII**

28. In *India – Quantitative Restrictions*, the Panel explained the relationship between Articles XII and XVIII:B in clarifying the function of Article XVIII:B.

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