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**Committee on Balance-of-Payments Restrictions**

**NOTE ON THE MEETING OF 27 FEBRUARY**

1. The Committee met on 27 February 2002, under the Chairmanship of Ambassador Hernando José Gómez (Colombia), to continue its consultations with Bangladesh and to address paragraph 12(b) of the Doha Ministerial Declaration.<sup>1</sup> The report on the consultations with Bangladesh has been circulated in WT/BOP/R/60.

2. The Chairman reminded Members that according to the Decision on Implementation-Related Issues and Concerns adopted at Doha<sup>2</sup>, Members had decided to "reaffirm that Article XVIII of GATT 1994 is a special and differential treatment provision for developing countries and that recourse to it should be less onerous than to Article XII of GATT 1994". He recalled that paragraph 12(b) of the Doha Ministerial Declaration called upon relevant WTO bodies to address outstanding implementation issues as a matter of priority and report to the TNC by the end of 2002 for appropriate action.

3. The Chairman noted that tiret 1 and a part of tiret 3 of point 1 of Job(01)152/Rev.1 concerned the Committee. Tiret 1 stated that "only the Committee on Balance-of-Payments Restrictions shall have the authority to examine the overall justification of balance-of-payments measures". Tiret 3 stated that "a complete review of Article XVIII shall be undertaken with a view to ensure that it subserves the original objective of facilitating the progressive development of the economies in developing countries and to allow them to implement programmes and policies of economic development designed to raise the general standard of living of their people." The Chairman drew the attention of the Committee to a draft document that had been prepared by the Secretariat containing references related to these issues.<sup>3</sup> A tentative schedule, of two meetings before the summer break, and two after was agreed.

4. The delegation of India made a statement recapitulating India's position (see Annex 1). The United States, the EU, Canada and Switzerland offered preliminary responses with respect to the systemic implications of the issues before the Committee and agreed to come back in detail at the next meeting of the Committee scheduled for April 8. The Chairman urged Members to submit comments by March 22.

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<sup>1</sup> "We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action."

<sup>2</sup> WT/MIN(01)/17 dated 20 November 2001.

<sup>3</sup> Subsequently issued as WT/BOP/INF/9.

5. Under "Other Business", the Chairman drew the Committee's attention to the notification from Pakistan (WT/BOP/N/59), circulated on 17 December 2001, informing Members that it had completed the phase out of its balance-of-payments restrictions ahead of schedule.

6. At the conclusion of the meeting the Committee welcomed its new Chairperson, Ambassador Anda Christina Filip (Romania).

## ANNEX 1

### Statement by India

1. We attach importance to the mandate set out in paragraph 12 of the Doha Ministerial Declaration, and look forward to a constructive discussion on implementation issues during this year which enables a successful outcome to be reported to the Trade Negotiations Committee by the end of 2002.

2. In accordance with the requirements of paragraph 12 of the Doha Ministerial Declaration, this Committee is to take up work on tirets 1 and 3 listed in Job(01)/152/Rev.1. You have already listed the written proposals circulated by India and also by groups of developing countries in 1999. These proposals have been the subject of formal and informal discussion, albeit some elements of them more rigorously than others in the General Council. The purpose of our statement this morning is to refresh ourselves on various issues that have underpinned the proposals so that we can move to a substantive and conclusive phase on them.

3. As Members are aware, the provisions of Article XVIII:B of the GATT, and the 1994 BOP Understanding are premised on the recognition that Members whose economy can only support low standards of living and are in the early stages of development tend 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 when they are in rapid process of development. Thus, there is recognition of the tendency of development itself to generate balance-of-payments difficulties, as well as the need to safeguard the external position of developing countries and to ensure a level of reserves adequate for implementation of programmes of economic development through control of the general level of imports over a period of time as the progress of development programmes creates new demands.

4. Therefore, Article XVIII:B and the associated 1994 Understanding are intended to authorize protective or other measures affecting imports, including 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 programmes of economic development of developing-country Members. The criteria under Article XVIII:9 are intended to differ from those applied to developed-country Members under Article XII:2 and the Ministerial Declaration emphasizes this.

5. However, recent rulings and recommendations of the judicial bodies that were adopted by the Dispute Settlement Body in a particular case involving balance-of-payments measures taken under Article XVIII:B, would appear to have the result of making it extremely difficult for developing-country Members to take recourse to Article XVIII:B, besides vitiating the differences in the provisions intended through Articles XII and XVIII:B for developed- and developing-country Members, respectively. We will provide some more details on this later on in our statement, since they relate directly to tiret 3.

6. Turning specifically to the proposal in tiret 1, we recall that another set of issues that arise from the above mentioned decisions of the dispute settlement mechanism relate to the competence of political organs and judicial organs of the WTO in all matters relating to import restrictions maintained under Article XVIII:B. The provisions under the Uruguay Round Agreements were intended to provide that only matters arising from the application of restrictive import measures and not those arising from the overall justification of those measures can be referred to panels and that the invocation of the DSU cannot modify any of the rights accorded to developing-country Members under Article XVIII:B, including procedural rights.

7. Yet, the judicial bodies in this dispute have also made important rulings on the relationship between the judicial and political organs of the WTO in the area of balance-of-payments measures and, in our assessment by implication, also in the area of regional trade agreements. For instance they have ruled that:

- The DSU can be invoked with respect to any matters relating to balance-of-payments restrictions, i.e., not only with regard to matters arising from the application of individual BOP measures but also with regard to overall justification of the BOP measures.
- The provisions of Article XVIII:12 of the GATT 1994 and of paragraph 13 of the Understanding on BOP Provisions that permit the General Council to decide that balance-of-payments restrictions found to be inconsistent be removed within a "specified period" and to formally approve a time-schedule for the removal of restrictions need not be taken into account in the dispute settlement proceedings.

8. India has argued before the judicial bodies, and in the General Council, in the context of our proposal in tiret 1, that with regard to the balance-of-payments justification under Article XVIII:B as well as to the consistency of regional trade agreements with Article XXIV, there are strong grounds to reinforce, on the basis of the relevant texts as well as GATT practice, that the judicial bodies will look into matters arising from the "application of" restrictive import measures taken for balance-of-payments purposes or matters arising from the application of provisions of Article XXIV, as the case may be, and that they will not go into the overall justification of BOP measures or consistency of a regional trade agreement with Article XXIV.

9. If we look at what was the practice under GATT 1947, we find that in the only case in which GATT panels were asked to review the balance-of-payments justification of a measure, the panels did not themselves assess the external financial position of the country concerned but based themselves on the decision that the CONTRACTING PARTIES, acting jointly, had already taken on this matter on the basis of a determination by the IMF. The panels limited their examination to the GATT-consistency of the individual measures imposed for balance-of-payments reasons. Furthermore, the two panels that were asked to review the consistency of agreements notified under Article XXIV both refused to do so. Throughout the history of the GATT 1947, not a single panel has thus decided to determine the balance-of-payments justification of measures notified under Article XII and XVIII:B or the consistency of a regional trade agreement with Article XXIV. Prior to this last dispute, the consistent practice of the CONTRACTING PARTIES, acting jointly, was thus to assign these matters to bodies composed of the representatives of contracting parties.

10. When we look at the negotiating history, during the Uruguay Round negotiations the United States had presented a broad proposal for a reform of the provisions relating to surveillance of balance-of-payments measures which included, inter alia, provisions explicitly providing for resolution by panels of the question of consistency of the BOP measures under review in the Committee on Balance-of-Payments Restrictions (MTN.GNG/NG7/W/72 of 15 June 1990, paragraph 19). This particular portion was strongly opposed by the developing countries and it is India's firm belief that a compromise was found after lengthy negotiations in the form of footnote to the Understanding on BOP Provisions. The text of the footnote makes three matters clear:

- The dispute settlement procedures may be invoked in respect of restrictions notified under Article XVIII:B (which had been in dispute until the panels on Korea's restriction confirmed that such restrictions may be examined by panels);
- The invocation must relate to "matters arising from the application of restrictive import measures taken for balance-of-payments purposes" (which is the only matter that the panels on Korea's restrictions had examined);

- The invocation cannot entail a modification of the rights and obligations under Article XVIII:B.

11. The reference to the application of measures in the text of the footnote to the 1994 Understanding is identical to that in the text of paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994. None of the other clauses in the WTO agreements and understandings that define the causes of action under the DSU contain a similar reference to the application of measures.

12. While the proceedings on India balance-of-payments restrictions were underway, another panel examined, at the request of India, Turkey's restrictions on imports of textiles and clothing products introduced by Turkey under a trade arrangement with the European Communities (EC) that Turkey described as an agreement providing for the completion of a customs union. Turkey claimed that only the Committee on Regional Trade Agreements (CRTA) was competent to examine the matter. That panel reacted to this argument as follows:

"... we understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV that panels have jurisdiction to examine "any matters 'arising from' the application of those provisions of Article XXIV." For us this confirms that a panel can examine the WTO compatibility of one or several measures "arising from" Article XXIV types of agreement, as also argued by the United States in its third-party submission. ... Thus we consider that a panel can assess the WTO compatibility of any specific measure adopted by WTO Members ... on the occasion of the formation of a customs union. As to the ... question of how far-reaching a panel's examination should be of the regional trade agreement underlying the challenged measure, we note that the ... CRTA has been established, *inter alia*, to assess the GATT/WTO compatibility of regional trade agreements entered into by Members, a very complex undertaking which involves consideration by the CRTA, from the economic, legal and political perspectives of different Members, of the numerous facets of a regional trade agreement in relation to the provisions of the WTO. It appears to us that the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the CRTA since, as noted above, it involves a broad multilateral assessment of any such custom union, i.e. a matter which concerns the WTO membership as a whole."

13. That panel thus interpreted the terms "any matters arising from" to refer to specific measures taken in connection with the formation of an Article XXIV agreement and ruled that the overall justification of that agreement was a matter to be generally left by panels to the CRTA. The Panel that examined India's BOP related quantitative restrictions, however, specifically rejected the contention that the terms "any matters arising from" in the Understanding on Article XXIV had this implication. It ruled:

"The phrase "the application of those provisions of Article XXIV" plainly means "the implementation of the provisions of Article XXIV ..." and does not allow for a distinction such as the one proposed by India."

14. Two concurrent WTO panels thus arrived on the same fundamental issue at opposite conclusions. Clearly, therefore, the WTO membership needs to resolve this contrariness, and to re-emphasise that the existing provisions provide that only the BOP Committee and the General Council have the authority to examine the overall justification of BOP measures.

15. Turning to tiret 3, we take this opportunity to recall that Article XVIII:9 itself recognizes that there may be special factors that may be affecting the reserves of a developing-country Member's

need for reserves. Article XVIII:11 itself gives further recognition to the need to pay due regard to the need to restore equilibrium in its balance-of-payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources in the carrying out its domestic policies by the Member concerned. Most importantly, the Note *Ad* Article XVIII:11, to the second sentence of Article XVIII:11, provides that the second sentence shall not be interpreted to mean that a Member 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 Article XVIII:9. Further, the proviso to the second sentence adds the requirement that no Member 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 Article XVIII:B. Article XVIII:11 and the Note thereto make it clear two points:

- One, that when the restrictions are relaxed or removed the level of imports does not rise at once but only after traders and investors have adjusted to the new situation. This provision would therefore have no practical applicability if the term "thereupon" were given the meaning "at once". It may be necessary to clarify that this term means "as a direct consequence" rather than "at once";
- Two, in interpreting the proviso and the Note to Article XVIII:11, the Committee on Balance-of-Payments Restrictions should more explicitly recognise and consider the greater need for reserves of developing countries for implementing their programmes of economic development and that these programmes entail the financing of infrastructure needs through foreign capital.

16. Despite these provisions, as mentioned by us earlier, recent judicial rulings that were adopted by the DSB in a particular case involving BOP measures taken under Article XVIII:B set out that:

- The right to gradually phase out balance-of-payments restrictions in accordance with the Note *Ad* Article XVIII:11 of the GATT 1994 is limited to cases in which renewed balance-of-payments difficulties would arise "immediately" from the removal of the restrictions. Consequently, this provision cannot be invoked in cases in which the adverse balance-of-payments impact of the removal of the restrictions, though direct and foreseeable, takes place after some time.
- The proviso in Article XVIII:11, according to which no WTO Member "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" does not relate to macro-economic policy instruments. Consequently, developing-country Members can be required to change their macro-economic policies to render their balance-of-payments restrictions unnecessary.

17. The experience of a number of developing countries over the last few years has shown that when countries are facing balance-of-payments difficulties, policies for reduction in import demand through exchange rate adjustments and other macroeconomic policy measures may not by themselves have perceptible positive impact, particularly when exports fail to rise because of the unfavourable external environment, as is the situation at present. Instability in financial markets as well as the volatility in the movement of funds, for short- and medium-term investments have further highlighted the need to have a broader and more holistic assessment of the foreign exchange needs related to their economic development. In view of the changing nature of the external vulnerability of developing countries, in particular to the volatility of capital flows, and the requirements to secure consistency between policies regarding the current and the capital account, the conventional criteria for the legitimacy of measures to safeguard the balance-of-payments in the context of WTO provisions for

developing countries, including the basis for assessing the adequacy of reserves, need to be reviewed. In the context of the development of guidelines in this area for policy makers in the wake of the volatility in global capital markets that has put increasing pressure on emerging-market economies and its implications for financial management of those economies seen in recent years, Mr. Alan Greenspan, Chairman of the Board of Governors of the United States Federal Reserve System, has also observed that one possible standard could be that "countries could be expected to hold sufficient liquid reserves to ensure that they could avoid new borrowing for one year with a certain *ex ante* probability, such as 95 per cent of the time". Other economists have also pointed out that criteria based on imports (for instance, 3 months of import cover) or current-account deficits can no longer provide an appropriate basis for assessing reserve adequacy and need to be reviewed.

18. In summary, these factors have underpinned our proposals set out in tirets 1 and 3, which relate (i) to the jurisdiction of the Committee on Balance-of-Payments Restrictions and the General Council, and (ii) to the examination by the Committee on Balance-of-Payments Restrictions of all issues that arise from the provisions of Article XVIII:B and the 1994 BOP Understanding, read along with Article XV of the GATT, including (a) all aspects relating to the criteria for assessing the adequacy of reserves and the justification for import measures, and (b) the scope and applicability of the proviso to Article XVIII:11 and Note *Ad* Article XVIII:11.

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