

Committee on Balance-of-Payments Restrictions

REPORT OF THE MEETING OF 8 APRIL 2002

1. The Committee on Balance-of-Payments Restrictions met on 8 April 2002, under the Chairmanship of Ambassador Anda Cristina Filip (Romania), to continue its work on outstanding implementation issues in accordance with paragraph 12(b) of the Doha Ministerial Declaration.

2. The Committee had before it:

WT/BOP/R/61

Note on the meeting of 27 February 2002
(18 March 2002)

WT/BOP/INF/9

Implementation Issues
(28 February 2002)

3. The Chair welcomed Members to the second meeting of the Committee in 2002, convened by airgram WTO/AIR/1759. She recalled that, during the last meeting of the Committee, the report of which was contained in WT/BOP/R/61, the Chairman had noted that tiret 1 and part of tiret 3 concerned the Committee (Job(01)/152/Rev.1, dated 27 October 2001). Tiret 1 stated that "only the Committee on Balance-of-Payments Provisions shall have the authority to examine the justification of balance-of-payments restrictions". Therefore, the Committee had before it both the issue of the "authority" of the Committee and the issue of "reviewing Section B of Article XVIII with the view to ensuring that it subserves the original objective of facilitating the economies of developing countries and allows them to implement programmes and policies of economic development designed to raise the general standard of living of their people". To help in the Committee's work, WT/BOP/INF/9 – listing earlier proposals with respect to the implementation issues – had been circulated on 28 February. She went on to draw the Committee's attention to paragraph 18 of India's statement, annexed to the report of the previous meeting, and invited delegations to address the issues in the order presented there: (i) the jurisdiction of the Committee on Balance-of-Payments Restrictions and the General Council, (ii) 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, (a) including 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.

A. DISCUSSION BY MEMBERS

4. The representative of the United States said that his Government and many other Members had spent considerable time and effort over the past several years to address the so called implementation issues, including those related to the balance-of-payments provisions. At Doha, they had made a good faith effort to resolve as many of these issues as possible and in the area of balance-of-payments had been successful in addressing tiret 2 regarding the relationship between Article XVIII and Article XII. However, the implications of the two balance-of-payments issues that remained continued to cause his Government serious concern. These were proposals that could only be addressed "in the context of a negotiation, on the basis of an appropriate mandate, or a political

commitment to do something while negotiations were underway". There was no such mandate for a negotiation and the United States failed to see how either proposal moved Members forward in establishing the rule of law or competition nor how they qualified as legitimate implementation issues.

5. The representative of Brazil said that her Government was still reflecting on both tirt 1 and 3, although it was sympathetic to India's proposals. As to whether these proposals were a matter for negotiations, her delegation considered that all proposals under paragraph 12(b), in fact all implementation issues, were matters for negotiation.

6. The representative of Canada expressed his discomfort with both tirt 1 and 3. The former raised serious systemic implications. As to tirt 3, he believed that the balance of payments provisions had functioned quite well and there was no need to fix them.

7. The representative of the European Communities recalled that at the last meeting he had promised to come back in detail, but expressed scepticism about the possibility of resolving these issues. India's argument that there should be a separation of power between the 'judicial' and 'legislative' branches of the WTO had been rejected in the *India-QRs* case, both by the Panel and the Appellate Body which found that panels may review measures allegedly justified for balance-of-payments reasons. Referring to paragraphs 101 to 105, he noted that the Appellate Body had found that first, Article XXIII of the GATT 1994, as elaborated and applied by the DSU, and footnote 1 to the Understanding on Balance of Payments Provisions clearly provided for the availability of WTO dispute settlement procedures with respect to any matters relating to balance-of-payments restrictions. Secondly, that the Balance of Payments Committee and panels had different functions, and that the BOPs Committee procedures and the dispute settlement procedures differed in nature, scope, time and type of outcome. Thirdly, in any case there should be no conflict between the 'judicial' and 'legislative' branch of the WTO as in considering the justification of balance-of-payments restrictions, panels should take into account the deliberations and conclusions of the BOPs Committee.

8. In addition to the 'institutional balance' argument, he noted that India was claiming in its statement that according to past practice under the GATT 1947, panels must show deference vis-à-vis the BOPs and Article XXIV Committees. However, his delegation was of the view that there was no such past practice as the panel reports that India referred to (*EC-Citrus* and *EC-Bananas I*) were both unadopted. Finally, he pointed out that, in paras 3 and 4 of its statement, India was trying to show that there was a contradiction between the panel ruling in *India-QRs* and the panel decision in *Turkey-Textiles*. He noted that India had failed to mention that the Appellate Body had struck down the deference approach adopted by the Panel in *Turkey-Textiles* and that both decisions were now consistent: panels had the authority to review the justification of measures under both Article XXIV and XVIII:B. The item raised by India had been settled by the jurisprudence and it would not be wise to come back to it under the heading of implementation. At best, it might be taken up under a DSU review process; a single Committee would be poorly situated to make any progress.

9. The representative of the United States added that they continued to view the proposal under tirt 1 as a non-starter as it represented a fundamental change in the rights and obligations of WTO Members and would undermine the role of the DSU and the DSB as legitimate authorities. The proposal had systemic implications for other Committees and bodies. Nor did he believe one could argue on GATT precedents on this issue. The WTO was a new departure and reaching back to GATT would not be useful. There were several levels on which one could argue this proposal: if India was suggesting that panels and the Appellate Body could not make decisions about violations of WTO agreements, this would make the DSU null and void. The DSU had been a major achievement of the Uruguay Round and such an outcome would be detrimental to this Organization and its Members. Alternatively, if there were a proposal to have this apply only in the balance-of-payments

area, this would be problematic. His Government was satisfied with the past rulings in this area; quality control had to be exercised, if not the provisions could become a pretext for countries to avoid any number of obligations. The issue had to be handled in a wider context, either in the DSU or under a negotiating mandate, were one to be developed.

10. The representative of Japan echoed the sentiments expressed by the United States and the European Communities. He failed to understand why India was pursuing this issue and wondered what specific difficulties lay behind the promotion of tiret 1, a proposal his Government could not support. It seemed that India sought to reinitiate the dispute. The Reserve Bank of India and the IMF had found that the reserves were not inadequate which had been a deciding factor. In his view, there should be no sanctuaries for applying the DSU without explicit provisions for such exclusion from the jurisdiction of the DSU. On past panel rulings under GATT 1947, as well as with respect to the consistency between the Article XXIV and XVIII:B cases, he joined in the views expressed by the EC and the US.

11. In concluding the meeting, the Chair recalled that the Committee would need to report to the General Council by the end of the year. The next meeting, scheduled for 10 June might provide an opportunity for other delegations, having received instructions from capital, to contribute. In the meantime, she would consider holding consultations in order to explore possible modalities to energise the discussion.

12. India requested that statements be circulated. The Chair responded that these would be included in the minutes which would be circulated in due time.

B. OTHER BUSINESS

13. Under "Other Business", the Chair drew the attention of Members to a letter from the Chairman of the Committee on Trade and Development requesting that the Committee on Balance-of-Payments Restrictions report to him on any discussions or other developments with respect to special and differential treatment taking place before July 2002. Members were invited to make suggestions to the Chair. In the meantime, the Chair would draft a reply to be on the agenda at the next meeting.
