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INDIA – QUANTITATIVE RESTRICTIONS ON IMPORTS OF AGRICULTURAL, TEXTILE AND INDUSTRIAL PRODUCTS

AB-1999-3

Report of the Appellate Body

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WORLD TRADE ORGANISATION

APPELLATE BODY

India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products

India, *Appellant*

United States, *Appellee*

AB-1999-3

Present:

Ehlermann, Presiding Member
El-Naggar, Member
Matsushita, Member

I. Introduction

1. India appeals from certain issues of law and legal interpretations developed in the Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (the "Panel Report").[1] The Panel was established to consider a complaint by the United States relating to quantitative restrictions imposed by India on imports of agricultural, textile and industrial products.

2. India maintains quantitative restrictions on the importation of agricultural, textile and industrial products falling in 2,714 tariff lines. India invoked balance-of-payments justification in accordance with Article XVIII:B of the GATT 1994, and notified these quantitative restrictions to the Committee on Balance-of-Payments Restrictions (the "BOP Committee"). On 30 June 1997, following consultations in the BOP Committee, India proposed eliminating its quantitative restrictions over a seven-year period. Some of the Members of the BOP Committee, including the United States, were of the view that India's balance-of-payments restrictions could be phased out over a shorter period than that proposed by India. As a result, consensus on India's proposal could not be reached. The relevant factual aspects of this dispute are set out in greater detail in paragraphs 2.1-2.28 as well as in paragraphs 3.345-3.417 of the Panel Report.

[1] WT/DS90/R, 6 April 1999.

3. On 15 July 1997, the United States requested consultations with India under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") on the consistency of the latter's quantitative restrictions with its WTO obligations.[2] Japan participated as a third party in these consultations. Subsequently, Australia, Canada, the European Communities, New Zealand and Switzerland also requested consultations on claims similar to those of the United States.[3] India reached mutually agreed solutions with all concerned parties except the United States.[4]

4. The United States requested the establishment of a panel to examine the consistency of India's balance-of-payments restrictions with its obligations under Article XI and Article XVIII:11 of the GATT 1994, Article 4.2 of the *Agreement on Agriculture* and the *Agreement on Import Licensing Procedures*.[5]

5. In its Report, circulated on 6 April 1999, the Panel concluded that:

> (i) the measures at issue applied by India violate Articles XI:1 and XVIII:11 of GATT 1994 and are not justified by Article XVIII:B;
>
> (ii) the measures at issue, to the extent they apply to products subject to the Agreement on Agriculture, violate Article 4.2 of the Agreement on Agriculture; and
>
> (iii) the measures at issue nullify or impair the benefits of the United States under GATT 1994 and the Agreement on Agriculture.[6]

The Panel recommended that the DSB request India to bring the measures at issue into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").[7]

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[2]WT/DS90/1, 22 July 1997.

[3]WT/DS91/1, WT/DS92/1, WT/DS93/1, WT/DS94/1 and WT/DS96/1, respectively.

[4]In accordance with these mutually agreed solutions, India will phase out its quantitative restrictions over a six-year period.

[5]WT/DS90/8, 6 October 1997.

[6]Panel Report, para. 6.1.

[7]Panel Report, para. 6.2.

6. On 25 May 1999, India notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[8] On 4 June 1999, India filed an appellant's submission.[9] The United States filed an appellee's submission on 21 June 1999.[10]

7. The oral hearing in the appeal was held on 19 July 1999.[11] The participants presented oral arguments and responded to questions put to them by Members of the Appellate Body Division hearing the appeal.

II. Arguments of the Participants

A. *Claims of Error by India - Appellant*

1. Competence of the Panel

8. In what it describes as its principal claim of legal error, India argues that the Panel erred in law by failing to take into account that each organ of the WTO must exercise its power with due regard to the powers attributed to the other organs of the WTO. India thus appeals from the issues of law and legal interpretations on the basis of which the Panel, according to India, concludes that the authority of panels to determine the justification of balance-of-payments restrictions is "unlimited", notwithstanding the fact that jurisdiction over this matter has been explicitly assigned to the BOP Committee and the General Council.

9. In support of its position, India notes that the constitutions of modern democracies provide for a separation of legislative, executive and judicial powers and establish systems of checks and balances designed to avoid a concentration of governmental power. In addition, a doctrine of institutional balance has been developed by the Court of Justice of the European Communities in cases involving the question whether organs of the Communities have exceeded their powers or have infringed upon the powers of the other organs. While the United Nations Charter does not effect a complete separation of powers between the organs of the United Nations, individual judges of the International Court of Justice and scholars have pointed to the need for the maintenance of an institutional

[8]WT/DS90/5, 25 May 1999.

[9]Pursuant to Rule 21(1) of the *Working Procedures*.

[10]Pursuant to Rule 22(1) of the *Working Procedures*.

[11]Pursuant to Rule 27 of the *Working Procedures*.

equilibrium within the United Nations, which can only be maintained if each organ of the United Nations respects the functions and powers of the other.

10. India submits that, while the institutional structure of the WTO is not comparable to that created by constitutions of modern democracies or by the European Union, and while many of the checks and balances that have been created in modern democracies are missing in the WTO, the principle of institutional balance has an important role to play in the WTO context as well.

11. India argues that the Panel's view about the distribution of powers between the judicial and the political organs of the WTO is inconsistent with the practice under the GATT 1947. India draws an analogy between the balance-of-payments provisions of the GATT 1994 and the provisions relating to Article XXIV of the GATT 1994. Throughout the history of the GATT 1947, not a single panel decided to determine the balance-of-payments justification of measures notified under Article XII or Article XVIII:B, or the compatability of regional trade agreements with Article XXIV. The practice under the GATT 1947 was to assign these matters to bodies composed of representatives of the Contracting Parties.

12. With respect to regional trade agreements, India asserts that the question whether one organ created by the CONTRACTING PARTIES could encroach upon the jurisdiction of another arose in the context of Article XXIV of the GATT 1947 in *European Community – Tariff Treatment on Imports of Citrus Fruit from Certain Countries of the Mediterranean Region* ("*EC – Citrus*")[12], and in *EEC – Member States Import Regimes for Bananas* ("*EC – Bananas I*")[13]. The question of institutional balance between panels and the Committee on Regional Trade Agreements is not necessarily whether or not panels may review agreements notified under Article XXIV:7, but the extent to which they should review them.

13. India submits that the principle of institutional balance was implicitly recognised recently by a WTO panel. The panel in *Turkey – Restrictions on Textile and Clothing Products* ("*Turkey – Textiles*") considered that a panel can assess the WTO compatibility of any specific measure adopted on the occasion of the formation of a customs union, but not the WTO compatibility of a customs union as such.[14] The panel said that the latter is generally a matter for the Committee on Regional Trade Agreements since it involves a broad multilateral assessment of matters which concern the WTO Membership as a whole.

[12]L/5776, 7 February 1985, unadopted.

[13]DS32/R, 3 June 1993, unadopted.

[14]WT/DS/34/R, circulated 31 May 1999.

14. Turning specifically to Article XVIII:B, India submits that the panel in *Republic of Korea – Restrictions on Imports of Beef* ("*Korea- Beef*"), found that the BOP Committee had already determined the legal status of the restrictions imposed by Korea, and it could, therefore, base its decision on this determination.[15] This case provides legal authority for the conclusion that the principle of institutional balance was already recognized under the GATT 1947. It does not, however, justify the conclusion that panels can exercise their authority without any regard for the powers assigned to the BOP Committee, the General Council and the IMF.

15. India submits that the United States attempted to amend the balance-of-payments provisions of the GATT in 1954 as well as during the Uruguay Round, and that these efforts were resisted by developing countries.

16. According to India, the ordinary meaning of footnote 1 to the *Understanding on the Balance-of-Payments Provisions of the GATT 1994* (the "*BOP Understanding*") is that the DSU may be invoked in respect of matters that relate to the specific use or purpose of a balance-of-payments measure or to the manner in which a balance-of-payments measure is *applied* in a particular case. The footnote may not be invoked with respect to the question of balance-of-payments *justification* of these measures, which remains within the competence of the BOP Committee.

17. India asserts that the reference to the DSU in footnote 1 to the *BOP Understanding* has the dual function of confirming the right to resort to the DSU and defining matters in respect of which this right may be exercised. The phrase in footnote 1 which reads "with respect to any matters arising from the application" refers only to the *application* of balance-of-payments restrictions and not to their *justification*.

18. India submits that the Panel's interpretation of "any matters arising from the application of" as referring to both the *application* of balance-of-payments restrictions and their *justification* is contrary to the principle of effectiveness in the interpretation of treaties adopted by the Appellate Body, according to which an interpreter is not free to adopt an interpretation that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[16] In disregard of this principle, the Panel interprets the clause "any matters arising from the application of" out of existence, so that the words could be struck from the text of the footnote without any legal consequence.

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[15] *Republic of Korea – Restrictions on Imports of Beef*, complaint by Australia, adopted 7 November 1989, BISD 36S/202-234, *Republic of Korea – Restrictions on Imports of Beef*, complaint by New Zealand, adopted 7 November 1989, BISD 36S/234-268 and *Republic of Korea – Restrictions on Imports of Beef*, complaint by the United States, adopted 7 November 1989, BISD 36S/268-306.

[16] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, adopted 1 November 1996.

19. India argues that the BOP Committee and the Committee on Regional Trade Agreements deal with trade policy matters that concern the WTO Membership in general. It would, therefore, be inappropriate to determine the overall consistency of a general import policy in a dispute settlement proceeding limited normally to two WTO Members. If a measure notified under Article XVIII:B is designed to protect individual sectors or to discriminate against other Members, it will have an impact on individual Members. The footnote to the *BOP Understanding* makes it clear that in the latter case, those Members have a right to invoke the DSU.

20. India notes that the drafters of the *WTO Agreement* created a complex institutional structure under which numerous bodies are empowered to take binding decisions on matters within their competence that confirm or define the rights and obligations of Members. These bodies must cooperate to achieve the objectives of the WTO. They can achieve that end only if each of them exercises its competence with due regard to the competence of all other bodies. Each of the organs of the WTO charged with making legal determinations operates within a different legal framework. Moving an issue from one organ to another, therefore, changes the legal framework in which decisions are taken, which can profoundly impinge on the procedural and substantive rights of the Members concerned.

21. It is India's conviction that each shift in the institutional balance between the organs administering the law of the WTO inevitably entails a shift in the balance of rights and obligations between Members. If Members adversely affected by balance-of-payments restrictions had the possibility to obtain a determination on the balance-of-payments *justification* under the DSU procedures, they would no longer have any interest in joining a consensus for the removal of restrictions in a time schedule that is longer than the implementation period provided for in Article 21.3 of the DSU. The rules specifically designed to permit a gradual phasing out of balance-of-payments restrictions maintained legally for long periods of time would be rendered useless in practice, and the negotiated balance of rights and obligations under Article XVIII:B and the *BOP Understanding* would be upset.

22. India contends that when an organ of the WTO determines its own jurisdiction, it interprets the provisions of the *WTO Agreement* conferring jurisdiction upon it. It follows from Article 31 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[17] that, when an organ of the WTO determines its jurisdiction, it must also take into account not only the terms of the provision attributing powers to it, but the context in which this provision appears. This implies that an organ of the WTO cannot determine its jurisdiction in a manner that entails a change in the procedural or substantive rights and obligations of Members. Each organ of the WTO must, in determining the

[17]Done at Vienna, 23 May 1969, 1155 *U.N.T.S.* 331; 8 International Legal Materials 679.

scope of its own powers, proceed with due regard to the powers of the other organs of the WTO, and with due regard for the rights and obligations of Members.

23. India disagrees with the view of the Panel that assigning legal functions to other WTO bodies is only relevant if there is an express provision that limits the panel's competence. Domestic courts and the European Court of Justice have developed doctrines providing for deference by courts to political institutions without there being an explicit limitation on their competence. There is, therefore, no reason why panels and the Appellate Body could not do the same.

24. India asserts that the Panel's recognition of a "dual track system" under which both panels and the BOP Committee are equally competent to examine the balance-of-payments justification of measures notified under Article XVIII:B is, in effect, a propagation of the principle of institutional duplication. Under this principle, the judicial and political organs of the WTO can simultaneously or successively address the same legal issue. The Panel is not correct when it claims that its "dual track approach" does not affect either the institutional balance between panels and the BOP Committee or India's exercise of its procedural rights under the balance-of-payments provisions and the *BOP Understanding*.

25. According to India, it is incompatible with Article 3.2 of the DSU to permit Members to invoke the DSU in a way that diminishes the rights of the defendant under the WTO Agreements. India does not agree with the Panel that its rights under the BOP Committee process have not been diminished because there is nothing that prevents India from invoking these rights. Article 3.2 of the DSU does not merely prohibit the formal elimination of the rights of the defendant; the defendant must be left with the possibility to effectively exercise them.

26. India argues that the Panel fails to take supplementary means of interpretation into account. The Panel should have thus been guided by discussions in the GATT Council of Representatives on the role of panels, the GATT panel reports on the issue, as well as the rejection of the United States' dual track proposal, all of which point in one direction: that in examining balance-of-payments restrictions and regional trade agreements, there should be a division of tasks between the judicial and political organs of the WTO.

27. India submits that the principle of institutional balance would imply that a panel, in examining whether the complainant's rights under Article XVIII:B and the *BOP Understanding* have been violated, would have to take into account the competence conferred upon the BOP Committee, the General Council and the IMF. A panel would be free to examine, for instance, whether the measures at issue are applied in a manner that is consistent with the WTO Agreements, and whether they are

capable of being approved under Article XVIII:B procedures, taking into account the range of discretion available to the BOP Committee, the General Council and the IMF.

28. According to India, on the basis of the principle of institutional balance, the Appellate Body could develop a jurisprudence which ensures that each organ of the WTO determines its jurisdiction with due regard for the powers conferred on other organs, and that the rights and obligations of Members are not modified through changes in the agreed institutional balance.

2. The Note *Ad* Article XVIII:11 of the GATT 1994

29. In its first subsidiary claim of legal error, India argues that the Panel erred in law by interpreting the word "thereupon" in the Note *Ad* Article XVIII:11 of the GATT 1994 to mean "immediately" with the consequence that the Ad Note would apply only in situations in which a removal of the restrictions would produce "immediately" the conditions of Article XVIII:9.

30. India submits that definition of the word "thereupon" is crucial because it determines the scope of policy options available to a developing country. The Note *Ad* Article XVIII:11 is a provision meant to benefit developing countries, which may need, over a period of time, to control the general level of their imports in order to prevent that level from rising beyond the means available to pay for them.

31. India submits that the Panel acknowledged that the Note *Ad* Article XVIII:11 applies in situations where balance-of-payments difficulties have ceased to exist, but there is a threat that they might return. The Panel still concluded that India is not entitled to phase out its balance-of-payments restrictions because the Note *Ad* Article XVIII:11 applied only in situations in which the removal would "immediately" give rise to balance-of-payments difficulties. This interpretation of the word "thereupon" eviscerates the Note *Ad* Article XVIII:11 of its practical applicability and is inconsistent with accepted principles of interpretation.

32. In India's view, the Panel should have interpreted the word "thereupon" to mean that the recurrence of balance-of-payments difficulties must be a *direct* consequence of the removal of India's balance-of-payments restrictions. In practice, this would imply that the removal of balance-of-payments restrictions would have to entail a direct and foreseeable rise in foreign exchange expenditure of such magnitude that the foreign reserves would no longer be adequate. This interpretation would serve to qualify the nature of the causality between the removal of restrictions and the reserve level, by requiring that there be a direct link between the two.

33. India submits that it is reasonable to require a direct and, therefore, clear and foreseeable causal link between the removal of the balance-of-payments restrictions and the recurrence of

balance-of-payments difficulties because the indirect consequences of a removal of restrictions on the external financial position are difficult to trace and quantify. The purpose of Article XVIII:11 and the Ad Note can only be achieved if developing country Members are permitted to remove their restrictions gradually in all cases in which the clear and foreseeable consequence of an immediate removal would be renewed balance-of-payments difficulties.

3. The Proviso to Article XVIII:11 of the GATT 1994

34. In its second subsidiary claim of legal error, India argues that the panel erred in law by requiring India to use macroeconomic and other development policy instruments to meet balance-of-payments problems caused by the immediate removal of its balance-of-payments restrictions.

35. According to India, the proviso to Article XVIII:11 of the GATT 1994 and the corresponding provision in Article XII:3(d) make it clear that the balance-of-payments provisions permit the imposition of restrictions, even if the Member has policy instruments at its disposal that could render the restrictions unnecessary. It is up to each Member to choose among those policy instruments, taking into account, not only the economic efficiency considerations on which the IMF bases its policy advice, but also its structural, institutional and political constraints.

36. India submits that it demonstrated before the Panel, that the immediate removal of all its balance-of-payments restrictions, covering one-fourth of all tariff lines, would require substantial changes in its development policy. In particular, India showed that an immediate removal of all restrictions, by itself, was bound to reduce India's reserves below levels considered adequate by the IMF. The United States did not submit any specific evidence on this issue.

37. According to India, the IMF confirmed that the removal of the restrictions had to be coupled with changes in India's macroeconomic and structural adjustment policies. While the IMF said that India could achieve balance-of-payments equilibrium by replacing import controls with macroeconomic policy instruments complemented by structural adjustment policies, it never stated that India could remove all restrictions at once, maintain its existing policies, *and* face no balance-of-payments difficulties.

38. India notes that the Panel dismissed as irrelevant the references of the IMF to the need for structural adjustments in the context of Article XVIII:B because the *Agreement on Safeguards* has established rules for dealing with such problems. This is, however, completely beside the point. Structural adjustments are needed to cause an increase in foreign exchange receipts from export and foreign investment so as to offset the rise in foreign exchange expenditure on imports.

39. India objects to the finding implied in the Panel's reasoning that the adverse balance-of-payments impact of an immediate removal of India's restrictions could be expected to be offset immediately by the positive effects following the removal. The Panel essentially argues that expecting a surge in imports is not sufficient to establish that the conditions of Article XVIII:9 will immediately occur because of the potentially favourable effects on India's balance-of-payments following the removal of India's restrictions, such as the attraction of foreign capital into the distribution of consumer goods and other service industries. The Panel incorrectly assumes that these potentially favourable effects could and would occur, within the framework of India's current macroeconomic and structural policies, "immediately upon lifting the restrictions".

4. Burden of Proof

40. In its third subsidiary claim of legal error, India argues that the Panel failed to properly assess and apply the burden of proof in respect of the proviso to Article XVIII:11 of the GATT 1994 and the Note *Ad* Article XVIII:11. While the Panel correctly identified the main claims of the United States in this dispute, it did not exactly specify, in the context of its finding on the burden of proof, the assertions or defences that India must support.

41. India submits that the text of Article XVIII:12 (c) and (d) expressly allocates the burden of proof on the justification of balance-of-payments restrictions maintained under Article XVIII:B to the United States. Under Article XVIII:12, the United States would have had to establish a *prima facie* case of inconsistency of India's balance-of-payments restrictions with Article XVIII:11 as well as the trade damage caused thereby. The burden of proof, therefore, must remain with the complaining party in a dispute settlement proceeding as well.

42. India notes that the Appellate Body has stated that the burden of proof is on the party making a claim or assertion.[18] However, the Appellate Body did not intend to rule that the burden of proof must be carried by the party making a claim or assertion, even where the text of a provision expressly clarifies which party must carry the burden of proof. India requests the Appellate Body to find that the United States, as the complaining party, bore the burden of proving the lack of justification of India's restrictions under Article XVIII:11 even though India invoked that provision in its defence.

43. Turning firstly to the proviso to Article XVIII:11, India argues that the Panel incorrectly concluded that the proviso to Article XVIII:11 is an affirmative defence, and, therefore, incorrectly placed the burden of proof on India. The proviso is limited in scope. Read in the context of

[18]Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States – Shirts and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, Appellate Body Report, *EC Measures Concerning Meat and Meat Products* (*Hormones*) ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

Article XVIII:11, the proviso imposes an obligation on the complaining party to provide evidence that is unqualified by any statements that what is required of India to attain external balance does *not* involve a change in its development policy.

44. With regard to the Note *Ad* Article XVIII:11, India submits that the Panel did not expressly render a finding on whether the burden of making a *prima facie* case in respect of the Ad Note lay on India or on the United States. If India's assumption is correct that the Panel placed the burden of proof on India to establish that it met the conditions in the Note *Ad* Article XVIII:11, the Panel clearly erred in the allocation of the burden of proof. If, on the other hand, the Panel in fact placed the burden of proof on the United States, the Panel erred in its application of the burden of proof in terms of the principles laid down in *United States – Shirts and Blouses*[19] and *European Communities – Hormones*.[20]

45. As to the manner in which the Panel applied the burden of proof with respect to the Ad Note, India notes that the Panel recounted the evidence adduced by the United States prior to the Panel's consultations with the IMF. The Panel, however, failed to analyze whether this evidence could, in the absence of refutation by India, require the Panel, to hold in favour of the United States.[21]

46. India submits that none of this evidence addressed the issue of the impact on India's reserves of the removal of its balance-of-payments restrictions. Therefore, the Panel failed to carry out its obligation to ensure that the United States had established a *prima facie* case prior to shifting the burden to India. These errors of the Panel cannot be dismissed merely as an issue of the weight to be ascribed to the evidence adduced by the United States, because they constitute fundamental legal errors in the assessment and application of the burden of proof in this case.

47. India submits, therefore, that the evidence introduced by the United States did not meet the requirements of a *prima facie* case with respect to the requirements of the Note *Ad* Article XVIII:11.

5. Objective Assessment of the Matter

48. In its final subsidiary claim of legal error, India requests the Appellate Body to reverse the Panel's finding that India's balance-of-payments restrictions are not justified under the Ad Note because this finding was not based on an objective assessment of the matter in accordance with Article 11 of the DSU. According to the Appellate Body's interpretation, the assessment of the facts

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[19] *United States – Shirts and Blouses*, *supra*, footnote 18.

[20] *European Communities – Hormones*, *supra*, footnote 18.

[21] *United States – Shirts and Blouses*, *supra*, footnote 18.

is a duty that a panel must carry out itself; it cannot be delegated to another body, unless there is a special dispute settlement procedure that specifically permits it to do so.[22]

49. It is India's contention that while Article 13 of the DSU permits the Panel to consult the IMF as an expert to obtain its opinion, the Panel could not permit the opinion of the expert to substitute for its own. It follows from the reasoning of the International Court of Justice in the *Corfu Channel Case* that an expert appointed by a judicial tribunal can perform only the functions of gathering facts and rendering expert opinions.[23] It is vital that the tribunal places itself in a position to examine and weigh the relevance of the facts on its own.

50. India argues that the Panel nowhere attempts an independent analysis to determine whether the IMF views and judgement could be inferred from the evidence. The Panel was to seek facts and an expert opinion from the IMF, but instead obtained unverifiable views, and then decided to base its own findings on those views. The Panel's treatment of the information and opinions obtained from the IMF with respect to the Ad Note and the proviso demonstrates an abdication of its judicial responsibilities to the IMF. The Panel impermissibly delegated its judicial responsibilities to the IMF and, therefore, acted inconsistently with Article 11 of the DSU.

B. *Arguments of the United States - Appellee*

1. Competence of the Panel

51. In response to India's principal claim of legal error, the United States contends that the Panel correctly ruled that the DSU mandated it to review the status of balance-of-payments restrictions and the justification of those measures to the extent necessary to address the claims of the United States. India states that it is appealing the Panel’s conclusion that the authority of panels to determine the balance-of-payments justification of balance-of-payments restrictions is unlimited. The Panel, in fact, nowhere reaches this conclusion.

52. According to the United States, the principle of institutional balance invoked by India cannot be found in the DSU or anywhere else in the *WTO Agreement*. India does not base its contention on an analysis of the text in accordance with the principles of the *Vienna Convention,* but asks the Appellate Body to adopt that concept through judicial legislation. India’s argument requires the Appellate Body to ignore the provisions of the *WTO Agreement* that establish the scope of the dispute settlement system and the function of dispute settlement panels.

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[22]*European Communities – Hormones*, *supra*, footnote 18.

[23]*Corfu Channel Case*, ICJ Reports, (1949), 4, 18-22.

53. According to the United States, the Appellate Body should, like the Panel, conclude that the reports cited by India, namely, *EC – Citrus*[24] and *EC – Bananas I*[25], do not seem to support India's contention that past practice under the GATT 1947 did not permit the application of dispute settlement procedures when a specific review procedure, such as that in Article XXIV, exists. These reports are unadopted and, in addition, they are of limited relevance as they relate to the relationship between Article XXIII and Article XXIV of the GATT 1947.

54. The United States notes that the panel in *Korea – Beef* considered subsequent information about Korea's balance-of-payments situation and conducted its own examination of the matter.[26] This panel report, therefore, supports the conclusion reached by the Panel in the present case concerning its competence to examine the justification of India's balance-of-payments restrictions.

55. The United States notes that India proposes to read footnote 1 to the *BOP Understanding* as having the dual function of confirming the right to resort to the DSU, and limiting the matters with respect to which this right may be exercised. Such a reading is hardly in keeping with the ordinary meaning of that provision as the language is affirmative: the DSU may be invoked. Moreover, the language is comprehensive: the DSU may be invoked with respect to "any matters arising from the application" of the covered measures.

56. The United States rejects India's argument that the Panel, in effect, read the words "any matters arising from the application of" out of the footnote. India makes too much out of the principle of effectiveness. The Appellate Body stated that an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[27] However, as the reference to "clauses and paragraphs" makes clear, the *Vienna Convention* does not require that words should be looked at in isolation. Moreover, the word "application" reflects the fact that, under consistent GATT practice, dispute settlement panels review the application of measures. With the exception of mandatory legislation where a measure is certain to be applied, measures can be reviewed only if they are applied.

57. The United States submits that, as India has admitted, there is no relevant record of the negotiating history for the *BOP Understanding*. Contrary to India's assertion, the fact that a United States–Canadian proposal on balance-of-payments restrictions was not adopted does not mean

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[24]*EC – Citrus*, *supra*, footnote 12.

[25]*EC – Bananas I*, *supra*, footnote 13.

[26]*Korea – Beef*, *supra*, footnote 15.

[27]Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996.

that the applicability of dispute settlement provisions to balance-of-payments restrictions was not eventually accepted.

58. In response to India's objection that the Panel propagates what one might call the principle of institutional duplication, the United States argues that the Panel undertook a thorough consideration of the potential conflicts and redundancies between its work and that of the BOP Committee. The existence of two tracks to consider balance-of-payments matters is not exceptional within the WTO system. Article 3.9 of the DSU recognizes that the provisions of the DSU are without prejudice to the right to seek authoritative interpretations of provisions of a covered agreement, including the GATT 1994, through decision-making under the *WTO Agreement*. Article IX:2 of the *WTO Agreement* gives the Ministerial Conference and the General Council the authority to adopt interpretations of that Agreement and the Multilateral Trade Agreements.

59. According to the United States, panels should take all relevant matters into account and, in particular, should respect the conclusions of the BOP Committee where applicable. Indeed, to the extent that India requires panels to respect the roles of other WTO bodies, the Panel in this case did so.

2. The Note *Ad* Article XVIII:11 of the GATT 1994

60. In response to India's first subsidiary claim of legal error, the United States argues that the Panel's construction of the Note *Ad* Article XVIII:11 is required by the interpretive principles of the *Vienna Convention*. The word "thereupon" means "immediately" wherever it appears in the GATT and that reading is compelled by the French and Spanish texts of the Agreement. The interpretation of "thereupon" to mean "immediately" gives proper effect to the object and purpose of the Agreement.

61. The United States notes that, while India concedes that "thereupon" cannot be interpreted as simply expressing a causal link, India considers that the word expresses *direct causality*. It is not clear that India is proposing an interpretation that is very different from that of the Panel. The Panel correctly made it clear that the function of the word "thereupon" is to ensure that remote possibilities are not held up as the basis for retaining balance-of-payments restrictions at a time when balance-of-payments difficulties have ended.

62. The United States submits that the unstated assumption in India's argument, namely, that the removal of balance-of-payments restrictions will necessarily lead to new balance-of-payments difficulties, is not tenable in the face of the fact that many developing countries have been able to disinvoke Article XVIII:B.

63. The United States argues that India is wrong to imply that the Panel's interpretation would require a developing country Member to remove its restrictions when the Member can actually foresee serious balance-of-payments difficulties, as opposed to India's "balance-of-payments impact". The *Ad* Note does not require a developing country Member to remove its restrictions, if doing so would thereupon produce the conditions specified in Article XVIII:9. One of those conditions is the threat of serious decline in monetary reserves.

64. The United States submits that India fails to take into account the text of the *WTO Agreement*. India's argument that the word "thereupon" should be read to imply "directly" ignores the fact that the GATT 1994 routinely uses the word "directly", e.g., in Articles II:1(b), III:2, III:5, and XI:2(c)(i). By contrast, the word "thereupon" appears in the GATT in only two other places: Articles XV:6 and XVIII:18. In each of these provisions, the word clearly has a temporal meaning which is confirmed by the French and Spanish texts of these provisions.

65. The United States argues that even if India's proposed reading of the Ad Note were adopted, the outcome in this case would not change. After weighing the evidence, the Panel found that, as a matter of fact, the removal of India's measures would not immediately produce conditions justifying the re-imposition of balance-of-payments restrictions. Even if India's proposed legal test of direct causality were applied to the Panel's factual findings, the same result would be reached.

3. The Proviso to Article XVIII:11 of the GATT 1994

66. According to the United States, India's assertion that the Panel erred by "requiring India to use macroeconomic policy instruments to meet any balance-of-payments problems caused by the immediate removal of its import restrictions" is a misconstruction of the proviso to Article XVIII:11 and of the Panel's analysis.

67. The United States argues that, while the proviso to Article XVIII:11 merely proscribes a particular argument applicable to Members whose reserves still meet the requirements of Article XVIII:9, the Ad Note sets out the limited parameters under which a Member may maintain its balance-of-payments restrictions, even though its reserves no longer meet the requirements of Article XVIII:9. The Ad Note clearly requires an examination of the impact on its reserves.

68. The United States notes India's contention that the IMF comment according to which the external financial situation can be managed using macroeconomic policy instruments alone, is inconsistent with the proviso to Article XVIII:B. India's position is mistaken for several reasons. The IMF statement is not an argument of the type that the proviso to Article XVIII:11 proscribes. The IMF was explicit about the basis of its findings on India's reserve situation. The IMF view was based on the size of India's existing and potential claims on reserves, examined in the context of its

economic circumstances. Moreover, this statement is not a statement about change in India's development policy. India already manages its external financial situation through macroeconomic policy instruments, such as exchange rate mechanisms, current account convertibility, and the reduction of the level of its short-term debt. Furthermore, macroeconomic policy instruments with respect to a Member's external financial situation, like its commercial trade policy, are not instruments of "development policy" within the meaning of the proviso to Article XVIII:11. Finally, the IMF did not say that the external financial situation would, or should, be managed by "macroeconomic adjustment complemented by structural adjustment measures". The IMF stated that the external financial situation can be managed using macroeconomic policy alone. The reference to the "need" for structural policy reforms is clearly an additional comment on India's balance-of-payments situation, as it applies only to reform in consumer goods. Since macroeconomic policy instruments that are already in use can alone manage the external financial situation, the structural measures mentioned by the IMF are not required for that purpose.

69. In the view of the United States, India's argument that its development policy is based on the principle of gradual liberalization of imports is completely circular because it amounts to a contention that India's development policy is a policy that requires its balance-of-payments restrictions to be removed gradually, which would make Article XVIII:11 entirely meaningless.

4. Burden of Proof

70. The United States argues that the text of Article XVIII:B and the *BOP Understanding* imply that India has the burden of proof on issues relating to the Note *Ad* Article XVIII:11 and the proviso to Article XVIII:11. If the Appellate Body disagrees, the United States submits that the evidence it submitted to the Panel prior to the latter's consultations with the IMF met the United States' obligation to make a *prima facie* case.

71. The United States notes India's argument that under Article XVIII:12, the United States had the burden of proof with respect to all aspects of Article XVIII:B. The United States argues that India misreads that provision. Article XVIII:12(d) provides for additional consultations, outside of the ordinary biannual cycle, if a Member requesting such additional consultations can establish a *prima facie* case that the restrictions are inconsistent with Article XVIII:B, and that its trade is adversely affected thereby.

72. The United States asserts that the proviso to Article XVIII:11 does nothing more than prevent a Member from being required to eliminate its balance-of-payments restrictions on the ground that a change in its development policy would render those measures unnecessary. Therefore, there is

effectively no burden of proof allocation to be made as the proviso merely proscribes a particular type of argument.

73. In the alternative, if its position in the preceding paragraph is not accepted, the United States agrees with the Panel that the proviso to Article XVIII:11 is an affirmative defence, in respect of which India should bear the burden of proof. Moreover, even if the United States had the burden of presenting a *prima facie* case with respect to the proviso, the United States asserts that it met that burden. In particular, the United States provided evidence that India's monetary reserves, considered by themselves and without reference to India's development policy, were not declining at all, nor inadequate, nor threatened with serious decline.

74. With respect to the Note *Ad* Article XVIII:11, the United States considers that India should bear the burden of proof in respect of it, as the Ad Note is an affirmative defense to the claim under Article XVIII:11. India is in the best position to demonstrate that the removal of its balance-of-payments restrictions would thereupon produce any of the conditions specified in Article XVIII:9.

75. In the event that the Appellate Body disagrees, the United States considers that it met the burden of establishing a *prima facie* case on all of these matters. In light of India's allegation that the United States improperly relied on the material presented by the IMF in response to the Panel's questions, the United States emphasizes that all the evidence and arguments discussed in this section were offered before the Panel decided to consult the IMF. After the United States had presented this material, the burden shifted to India to rebut the evidence adduced by the United States. However, India did not do so.

5. Objective Assessment of the Matter

76. The United States considers that the Panel did not abdicate its responsibilities to the IMF. While India contends that the Panel acted inconsistently with Article 11 of the DSU, India does not attempt to meet the standard set by the Appellate Body that the Panel deliberately disregarded, refused to consider, wilfully distorted, or misrepresented the evidence in this case, or committed an error that calls into question the good faith of the Panel.[28]

77. In the view of the United States, India's contention that a violation of Article 11 of the DSU arises "because the Panel delegated its duty" does not have merit. India's analysis takes practically no account of the provisions of Article XV of the GATT 1994. Article XV:2 requires panels, and not just the BOP Committee and the General Council, to accept the findings and determinations of the IMF on the subjects specified in that provision. Further, India mis-characterizes the Panel's

[28] Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999; *European Communities – Hormones*, *supra*, footnote 18.

assessment of the IMF contribution to its work. It is clear that the Panel did not abdicate its responsibilities.

78. The United States submits that, in addition to the IMF replies, the Panel took into account the evidence that the United States furnished before the Panel consulted the IMF, India's submissions on increased imports following removal of restrictions, the stock of India's reserves, and other factors cited by India, such as the Asian currency crisis and the evolution of India's reserve situation from November 1997 through June 1998.

III. Issues Raised in this Appeal

79. This appeal raises the following issues:

(a) whether the Panel erred in law in finding that it was competent to review the justification of India's balance-of-payments restrictions under Article XVIII:B of the GATT 1994;

(b) whether the Panel correctly interpreted the Note *Ad* Article XVIII:11 of the GATT 1994 and, in particular, the word "thereupon";

(c) whether the Panel's finding that India is not entitled to maintain its balance-of-payments restrictions under the terms of the Note *Ad* Article XVIII:11 is consistent with the proviso to Article XVIII:11;

(d) whether the Panel correctly allocated and applied the burden of proof in respect of the proviso to Article XVIII:11 and the Note *Ad* Article XVIII:11; and

(e) whether the Panel delegated to the IMF its duty to make an objective assessment of the matter and, therefore, acted inconsistently with Article 11 of the DSU.

IV. Competence of the Panel

80. India appeals the Panel's conclusion on its competence to review the justification of India's balance-of-payments restrictions under Article XVIII:B of the GATT 1994. According to India, the Panel erred in law by failing to take into account that each organ of the WTO must exercise its power with due regard to the powers attributed to the other organs of the WTO. India argues that the Panel thus failed to respect the institutional balance reflected in the provisions of the *WTO Agreement*. In view 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*, the

Panel erred, according to India, in finding that the competence of panels to review the justification of balance-of-payments restrictions is "unlimited".[29]

81. In paragraph 5.114 of its Report, the Panel concluded with regard to its competence to review the justification of India's balance-of-payments restrictions:

> We are thus competent to review the legal status of balance-of-payments measures and the justification of these measures to the extent necessary to address the claims submitted to us, within the scope of our mandate under the DSU. We are aware of the fact that the BOP Committee and panels have different functions and our finding is without prejudice to the role of the Committee and the General Council in reviewing balance-of-payments measures in the context of consultations under the balance-of-payments provisions of GATT 1994. By finding that panels can review the justification of balance-of-payments measures, we do not conclude that panels can substitute themselves for the BOP Committee. … It is also clear that panels could not ignore determinations by the BOP Committee and the General Council.

82. In light of this conclusion and the detailed reasoning which precedes it, we note that, contrary to what India argues, the Panel did not conclude that the competence of panels to review the justification of balance-of-payments restrictions is "unlimited". We also note that the Panel, when determining the scope of its competence, carefully considered the powers of the BOP Committee and the General Council. The Panel came to the conclusion that it was, nevertheless, competent to review the justification of balance-of-payments restrictions. India's appeal raises the issue whether the Panel erred in law in coming to this conclusion.

83. We are of the opinion that the competence of the Panel to review all aspects of balance-of-payments restrictions should be determined in light of Article XXIII of the GATT 1994, as elaborated and applied by the DSU, and of footnote 1 to the *BOP Understanding*.

84. This dispute was brought pursuant to, *inter alia*, Article XXIII of the GATT 1994.[30] According to Article XXIII, any Member which considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired as a result of the failure of another Member to carry out its obligations, may resort to the dispute settlement procedures of Article XXIII. The United States considers that a benefit accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under Article XVIII:B of the GATT 1994. Therefore, the United States was

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[29] India's appellant's submission, paras. 2 and 109.

[30] This dispute was also brought pursuant to Article 19 of the *Agreement on Agriculture* and Article 6 of the *Agreement on Import Licensing Procedures,* both of which refer to Article XXIII of the GATT 1994.

entitled to have recourse to the dispute settlement procedures of Article XXIII with regard to this dispute.

85. Article XXIII is elaborated and applied by the DSU. The first sentence of Article 1.1 of the DSU provides:

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements").

We note that Appendix 1 to the DSU lists "Multilateral Agreements on Trade in Goods", to which the GATT 1994 belongs, among the agreements covered by the DSU. A dispute concerning Article XVIII:B is, therefore, covered by the DSU.

86. Article 1.2 of the DSU provides in relevant part:

> The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding.

Appendix 2 does not identify any special or additional dispute settlement rules or procedures relating to balance-of-payments restrictions. It does not mention Article XVIII:B of the GATT 1994, or any of its paragraphs. The DSU is, therefore, fully applicable to the current dispute.

87. 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*, which reads:

> 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. (emphasis added)

88. 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.

89. We note that India is of the view that the words "matters arising from the application of" imply a limitation on the scope of application of the dispute settlement provisions. According to India, these words define and limit what aspects of balance-of-payments restrictions can be examined by panels. Panels can examine whether specific balance-of-payments restrictions are *applied* in a manner that is consistent with the WTO agreements. In India's view, however, panels are not allowed to examine the overall *justification* under Article XVIII:B. We are unable to accept this interpretation of the footnote.

90. First, the footnote provides that the dispute settlement provisions may be invoked with respect to "*any matters*" arising from the application of balance-of-payments restrictions. The dispute settlement provisions can, therefore, be resorted to with respect to any claims of inconsistency with WTO obligations arising from the application of balance-of-payments restrictions.

91. Second, according to the footnote, the dispute settlement provisions may be invoked with respect to any matters "*arising from*" the application of balance-of-payments restrictions. According to the relevant dictionary meaning of the word "arise", the dispute settlement provisions can, therefore, be resorted to with respect to any matter which "presents itself" or "occurs" as a result of the application of balance-of-payments restrictions.[31]

92. Third, the footnote provides that the dispute settlement provisions can be invoked with respect to any matters arising from the "*application*" of balance-of-payments restrictions. The relevant dictionary meaning of the word "application" is "use, employment; a specific use or purpose to which something is put".[32] The dispute settlement provisions can, therefore, be resorted to in respect of any matters arising from the "use" or "employment" of balance-of-payments restrictions. In addition, we note that the words "application" and "applied" are frequently used in other provisions of the *WTO Agreement* and, in particular, in paragraphs 1 to 4 of the *BOP Understanding* and Articles III:2, III:4, XIII, XVIII:12 and XXIII:1 of the GATT 1994. In these provisions, the words "application" and "applied" clearly refer to the practice of "using", "employing" or "imposing" measures.

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[31] *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 113.

[32] *Ibid.*, p. 100.

93. We do not agree with India that, under the Panel's interpretation, the words "matters arising from the application of" would have no meaning at all and would be read out of existence. These words reflect the traditional GATT doctrine that, with the exception of mandatory rules, only measures that are effectively applied can be the subject of dispute settlement proceedings. We, therefore, do not share India's view that the Panel disregarded the principle "that interpretation must give meaning and effect to all the terms of a treaty" and that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[33]

94. We note India's arguments relating to the negotiating history of the *BOP Understanding*.[34] 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.[35] We do not exclude that footnote 1 to the *BOP Understanding* was "heavily negotiated", and that it tries to accommodate opposing views held by different parties to the negotiations on the *BOP Understanding*.[36] We are convinced, however, that the second sentence of footnote 1 does not accord with the position held by India. To interpret the sentence as proposed by India would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so.[37]

95. 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.

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[33] *United States – Gasoline*, *supra*, footnote 27, p. 23. See also *Japan - Alcoholic Beverages, supra*, footnote 16, p. 12.

[34] India's appellant's submission, paras. 17 and 83.

[35] In its appellant's submission, India states that "there is no formal record of the discussions leading to the adoption of this clause". See India's appellant's submission, para. 11. The United States agrees with India that "there is no relevant negotiating history for the [*BOP Understanding*]". See United States' appellee's submission, para. 84. The only document referred to by India is the United States–Canadian Proposal for a "Declaration on Trade Measures Taken for Balance-of-Payments Purposes", discussed by the Panel in paras. 5.106-5.109 of its Report.

[36] India refers to the "heavily negotiated text of the footnote in the [*BOP Understanding*]". See India's appellant's submission, para. 17.

[37] *European Communities – Hormones*, *supra,* footnote 18, para. 181.

96. Our view that panels are competent to review *any* matters that arise from the application of balance-of-payments restrictions is also confirmed by past GATT practice. The panel in *Korea – Beef* found:

> … the wording of Article XXIII was all-embracing; it provided for dispute settlement procedures applicable to all relevant articles of the General Agreement, including Article XVIII:B in this case. Recourse to Article XXIII procedures could be had by all contracting parties. However, the Panel noted that in GATT practice there were differences with respect to the procedures of Article XXIII and Article XVIII:B. The former provided for the detailed examination of individual measures by a panel of independent experts whereas the latter provided for a general review of the country's balance-of-payments situation by a committee of government representatives.
>
> It was the view of the Panel that excluding the possibility of bringing a complaint under Article XXIII against measures for which there was claimed balance-of-payments cover would unnecessarily restrict the application of the General Agreement. This did not preclude, however, resort to special review procedures under Article XVIII:B. Indeed, either procedure, that of Article XVIII:12(d) or Article XXIII, could have been pursued by the parties in this dispute. But as far as this Panel was concerned, the parties had chosen to proceed under Article XXIII.[38]

97. Thus, the panel in *Korea – Beef* was clear in its conclusion that the dispute settlement procedures under Article XXIII, as well as the procedures under Article XVIII:12, are both available for disputes relating to balance-of-payments restrictions. We believe that the Panel in the present case was correct in interpreting GATT practice as permitting the Member concerned to choose either course of action. Should a Member decide to have recourse to dispute settlement procedures under Article XXIII, such action would in no way prejudice the competence of the BOP Committee and the General Council to consider the same matter in accordance with Article XVIII:12.

98. In support of its claim of legal error, India argues that there is a principle of institutional balance which requires panels, in determining the scope of their competence, to take into account the competence conferred upon other organs of the WTO. According to India, the drafters of the *WTO Agreement* created a complex institutional structure under which various bodies are empowered to take binding decisions on related matters. These bodies must cooperate to achieve the objectives of the WTO, and can only do so if each exercises its competence with due regard to the competence of all other bodies.[39] In order to preserve a proper institutional balance between the judicial and the political organs of the WTO with regard to matters relating to balance-of-payments restrictions,

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[38] *Korea – Beef* , complaint by the United States, *supra*, footnote 15, paras. 117-118.

[39] India's appellant's submission, para. 58.

review of the justification of such measures must be left to the relevant political organs, i.e., the BOP Committee and the General Council.[40] In light of the powers attributed to these organs under Article XVIII:12 of the GATT 1994 and the *BOP Understanding*, panels should, according to India, refrain from reviewing the justification of balance-of-payments measures under Article XVIII:B.

99. During the oral hearing, India conceded that the principle of institutional balance, as defined by it, does not flow from a general principle of international law. India argues, however, that, while there is no explicit textual basis for this principle in the *WTO Agreement,* it is nevertheless a principle of WTO law.

100. In support of this proposition, India refers to the GATT 1947 panel reports in *EC – Citrus*,[41] *EC – Bananas I*[42] and *Korea – Beef*.[43] The panel reports in *EC – Citrus* and *EC – Bananas I* are both unadopted. Moreover, these two reports concern the relationship between Article XXIII and Article XXIV on regional trade arrangements, not that between Article XXIII and Article XVIII on balance-of-payments restrictions, which is the relationship at issue in this case. The panel in *Korea – Beef*, far from supporting the interpretation suggested by India, was explicit in adopting the "dual track" approach. Moreover, the panel in that case did not limit itself to merely espousing the conclusions of the BOP Committee. In addition to taking into account the deliberations and conclusions of the BOP Committee, that panel looked to other sources of information, including data originating from Korea and the IMF, evaluated the evidence before it, and concluded that Korea's balance-of-payments restrictions were no longer justified. We, therefore, conclude that the three reports cited by India do not support its contention that there is a principle of institutional balance, as defined by India, in WTO law.

101. In support of its argument on the principle of institutional balance, India also contends that the review by panels of the justification of balance-of-payments restrictions would be inconsistent with Article 3.2 of the DSU and the first sentence of footnote 1 to the *BOP Understanding*. Article 3.2 of the DSU reads in relevant part:

> Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

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[40] India's appellant's submission, para. 27.

[41] *EC – Citrus*, *supra*, footnote 12.

[42] *EC – Bananas I*, *supra,* footnote 13.

[43] *Korea – Beef*, complaint by the United States, *supra,* footnote 15.

The first sentence of footnote 1 to the *BOP Understanding* states:

> Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994.

India argues that the review by panels of the justification of balance-of-payments restrictions would diminish the procedural rights of developing country Members under Article XVIII:12 and the *BOP Understanding*.

102. We do not agree with India. 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.

103. 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*.

104. 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.[44] 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.[45]

105. We, therefore, consider that India failed to advance any convincing arguments in support of the existence of a principle of institutional balance that requires panels to refrain from reviewing the justification of balance-of-payments restrictions under Article XVIII:B. We note, in addition, that such a requirement would be inconsistent with Article XXIII of the GATT 1994, as elaborated and applied by the DSU, and footnote 1 to the *BOP Understanding* which, as discussed above, clearly provides for the availability of the WTO dispute settlement procedures with respect to any matters relating to balance-of-payments restrictions.

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[44]Panel Report, para. 5.91.

[45]*Ibid*., paras. 5.90 and 5.114.

106. During the oral hearing, 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. With regard to this argument, we make the following observations.

107. First, we note that this argument is incompatible with India's view that, under footnote 1 to the *BOP Understanding*, panels have no competence in matters relating to the justification of balance-of-payments restrictions. Evidently, judicial restraint implies that panels *do* have competence in these matters.

108. Second, we 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*.

109. For the reasons set out above, we conclude that panels have the competence to review the justification of balance-of-payments restrictions. More generally, we conclude that the dispute settlement provisions of the GATT 1994, as elaborated and applied by the DSU, can be invoked with respect to any matters relating to balance-of-payments restrictions. We, therefore, uphold the Panel's finding in paragraph 5.114 of its Report that it was competent to review the justification of India's balance-of-payments restrictions under Article XVIII:B of the GATT 1994.

V. The Note *Ad* Article XVIII:11 of the GATT 1994

110. India appeals the Panel's interpretation of the Note *Ad* Article XVIII:11 of the GATT 1994 and, in particular, the word "thereupon". India claims that the Panel erred in law in interpreting the word "thereupon" to mean "immediately". According to India, "thereupon":

> … indicates that there must be a *direct* causal link between the removal of measures imposed [for] balance-of-payments reasons and the recurrence of the conditions defined in Article XVIII:9.[46] (emphasis added)

[46]India's appellant's submission, para. 121.

111. The Note *Ad* Article XVIII:11 provides:

> 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. (emphasis added)

112. The conditions which justify the intensification or institution of balance-of-payments restrictions under Article XVIII:9 (a) and (b) are a threat of a serious decline in monetary reserves, a serious decline in monetary reserves, or inadequate monetary reserves.

113. The Panel found that to maintain balance-of-payments restrictions under the Ad Note:

> … it must be determined that one of the conditions contemplated in sub-paragraphs (a) and (b) of Article XVIII:9 would appear immediately after the removal of the measures, and a causal link must be established between the anticipated reoccurrence of the conditions of Article XVIII:9 and the removal. It should be noted that the text requires more than a mere possibility of reoccurrence of the conditions ("*would* produce"). The Ad Note therefore allows for the maintenance of measures on the basis only of clearly identified circumstances, and not on the basis of a general possibility of worsening of balance-of-payments conditions after the measures have been removed. (underlining added)[47]

114. 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.[48] In order to meet the requirements of the Ad Note, the probability of occurrence of one of the conditions would have to be clear.[49]

115. 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.[50]

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[47]Panel Report, para. 5.199.

[48]*Ibid*.

[49]*Ibid*., para 5.213.

[50]*Ibid*., para. 5.198.

116. The Panel considered the various dictionary definitions of the word "thereupon" and came to the conclusion that "the most appropriate meaning should be 'immediately'."[51] The Panel found support for this interpretation in the context in which the word "thereupon" is used [52], the objective of paragraphs 4 and 9 of Article XVIII and the Ad Note[53], and the object and purpose of the *WTO Agreement.*[54]

117. 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.[55] With regard to the first of these conditions, we agree with the Panel that the word "thereupon" means "immediately".

118. As to the two other conditions, i.e., a serious decline in monetary reserves or inadequate monetary reserves, we note that the Panel, in paragraph 5.198 of its Report, qualified its understanding of the word "thereupon" as follows:

> We do not mean that the term "thereupon" should necessarily mean within the days or weeks following the relaxation or removal of the measures; this would be unrealistic even though instances of very rapid deterioration of balance-of-payments conditions could occur. [56]

119. We agree with the Panel that it would be unrealistic to require that 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".[57] 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". However, in view of the Panel's own qualification of the word "thereupon", the use of "immediately" with respect to these two conditions does not amount to a legal error.

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[51]Panel Report, para. 5.196.

[52]*Ibid*.

[53]*Ibid*., para. 5.198.

[54]*Ibid*.

[55]See, *supra*, paras. 111-112.

[56]Panel Report, para. 5.198.

[57]See e.g: *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 1447.

120. We, therefore, uphold the Panel's interpretation of the Ad Note and, in particular, the word "thereupon".

VI. The Proviso to Article XVIII:11 of the GATT 1994

121. India claims that the Panel erred in law:

> … by requiring India to use macro-economic and other development policy instruments to meet balance-of-payments problems caused by the immediate removal of its import restrictions.[58]

India argues that such a requirement amounts to a change in its development policy, and is, therefore, inconsistent with the proviso to Article XVIII:11 of the GATT 1994.

122. The second sentence of Article XVIII:11 provides that Members:

> …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;

and adds the following proviso:

> *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.

123. In reply to a question by the Panel[59], the IMF stated:

> The Fund's view remains ... that the external situation can be managed using macro-economic policy instruments alone. Quantitative restrictions (QRs) are not needed for balance-of-payments adjustments and should be removed over a relatively short period of time. … [60]

124. In reaching its conclusion that the removal of India's balance-of-payments restrictions will not "immediately" produce the recurrence of any of the conditions of Article XVIII:9 and that the

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[58] India's appellant's submission, para. 122.

[59] The Panel asked:

> "Noting that these restrictions relate mainly to consumption goods, would relaxation or removal of the restrictions, as of 18 November 1997, have been likely to produce thereupon 'conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII' (Ad Note to Article XVIII:11) ?" (Question 3)

[60] Panel Report, para. 3.367.

maintenance of these measures is, therefore, not justified under the Note *Ad* Article XVIII:11, the Panel took this statement of the IMF into account.[61]

125. India argues that the Panel required India to change its development policy in order that the removal of the balance-of-payments restrictions would not produce a recurrence of any of the conditions of Article XVIII:9. We disagree. Nothing in the Panel Report suggests that the Panel imposed this requirement. On the contrary, in paragraph 5.220 of its Report, the Panel stated:

> India had in the past used macroeconomic policy instruments to defend the rupee, suggesting that the use of macroeconomic policy instruments as mentioned by the IMF would not necessarily constitute a change in India's development policy.

126. Furthermore, we 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.

127. In paragraph 5.209 of the Panel Report, the Panel referred to the following IMF statement:

> The macroeconomic policy instruments would need to be complemented by structural measures such as scaling back reservations on certain products for small-scale units and pushing ahead with agricultural reforms.[62]

128. 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.

[61]Panel Report, paras. 5.202, 5.213 and 5.214.

[62]The IMF made this statement as part of its response to Question 3 from the Panel (see, *supra*, footnote 59)

129. We note that the Panel did not take a position on the question whether the adoption of the structural measures of the type mentioned by the IMF would entail a change in India's development policy. The Panel concluded in paragraph 5.211 of its Report as follows:

> The IMF's suggestions on "structural measures" should not be taken in isolation from the context in which they are made. We recall that the IMF began its reply to Question 3 by stating that India's "external situation can be managed by using macroeconomic policy instruments alone". Its comments on structural measures appear only at the end of its answer after it has suggested other liberalization measures, such as tariff reductions. The adoption by India of "structural measures" is not suggested as a condition for preserving India's reserve position. Thus, we cannot conclude that the removal of India's balance-of-payment measures would thereupon lead to conditions justifying their reinstitution that could be avoided only by a change in India's development policy.

Clearly, the Panel interpreted the IMF statement to the effect that the implementation of structural measures is not a condition for the preservation of India's external financial position. We consider this interpretation to be reasonable.

130. We conclude that the Panel did not require India to change its development policy and, therefore, did not err in law with regard to the proviso to Article XVIII:11.

VII. Burden of Proof

131. India claims that the Panel erred in law in allocating and applying the burden of proof in respect of the proviso to Article XVIII:11 and the Note *Ad* Article XVIII:11.

132. With regard to the proviso to Article XVIII:11, India argues that the Panel erred in finding that the proviso to Article XVIII:11 is an affirmative defence and that India should, therefore, bear the burden of proof in respect of it.[63]

133. We recall that the second sentence of Article XVIII:11 provides that Members:

> … 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.

[63]Panel Report, paras. 5.210 and 5.219.

134. 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.

135. In *United States - Shirts and Blouses* the Appellate Body stated:

> … the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[64]

136. 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.

137. As to the burden of proof in respect of the Note *Ad* Article XVIII:11, India claims that the Panel never rendered a finding on whether the burden of proof was on India or the United States. We note, however, that the Panel stated in the context of its examination of the evidence relating to the Ad Note:

> In analyzing whether the United States has provided sufficient evidence to establish that the conditions foreseen in the Ad Note are not met in this case, we consider the US position in light of the responses thereto by India.[65]

The Panel thus appears to have considered that the burden of proof in respect of the Ad Note was on the United States. This is confirmed by the structure of the Panel's analysis in paragraphs 5.202 to 5.215 of its Report, in which the Panel begins its reasoning by considering the arguments advanced

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[64] *United States – Shirts and Blouses*, *supra*, footnote 18, p. 14.

[65] Panel Report, para. 5.205.

by the United States. Furthermore, we do not consider that a panel is required to state *expressly* which party bears the burden of proof in respect of every claim made.

138. We share the Panel's view that the burden of proof in respect of the Ad Note rests on the complainant, i.e., the United States.

139. India also argues that, assuming the Panel allocated the burden of proof with respect to the Ad Note to the United States, the Panel did not apply the rules on burden of proof correctly. According to India, the Panel made two mistakes. First, the Panel failed to analyze whether the United States made a *prima facie* case prior to considering the answers of the IMF to the Panel's questions, and prior to shifting the burden of proof to India. The Panel thus failed to conclude, after recounting the evidence adduced by the United States, that the United States had successfully made a *prima facie* case with respect to the Ad Note. Second, India argues that the evidence introduced by the United States could not, as a matter of law, have constituted a *prima facie* case that India's balance-of-payments restrictions were not justified under the Ad Note.

140. With respect to the first alleged mistake, we note that, indeed, the Panel did not explicitly find that the United States had made a *prima facie* case before it considered the answers of the IMF and the responses of India to the arguments of the United States. As mentioned above, the Panel stated that it would consider the position of the United States in light of the responses of India.[66]

141. In support of its argument, India refers to the Appellate Body Report in *European Communities – Hormones,* where the Appellate Body stated:

> In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal instruments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each article of the *SPS Agreement* addressed by the Panel. … Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.[67]

142. We do not interpret the above 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

[66] Panel Report, para. 5.205.

[67] *European Communities – Hormones*, *supra*, footnote 18, para. 109.

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. We, therefore, are not of the opinion that the Panel erred in law in proceeding as it did.

143. As to the second alleged mistake, namely, that the evidence introduced by the United States could not, as a matter of law, have constituted a *prima facie* case that India's balance-of-payments restrictions were not justified under the Ad Note, we recall that in *European Communities – Hormones*, the Appellate Body stated:

> … Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts …[68]

Similarly, in *Korea – Taxes on Alcoholic Beverages*, the Appellate Body stated:

> The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. …[69]

144. We believe that this second mistake alleged by India relates to the weighing and assessing of the evidence adduced by the United States, and is, therefore, outside the scope of appellate review.

145. For the reasons set out above, we conclude that the Panel did not err in law in its allocation and application of the burden of proof in respect of the proviso to Article XVIII:11 and the Note *Ad* Article XVIII:11.

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[68] *European Communities – Hormones*, *supra*, footnote 18, para. 132.

[69] Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, adopted 17 February 1999, para. 161. In para. 162, the Appellate Body added:

> A panel's discretion as trier of facts is not, of course, unlimited. That discretion is always subject to, and is circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it.

India's claim that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU is dealt with below.

VIII. Objective Assessment of the Matter

146. India claims that the Panel delegated to the IMF its duty to make an objective assessment of the matter and, therefore, acted inconsistently with Article 11 of the DSU.

147. Article 13 of the DSU provides in relevant part:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate …
>
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter …

148. Article XV:2 of the GATT 1994 provides:

> In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (*a*) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

149. On the basis of these provisions, the Panel submitted to the IMF a number of questions regarding India's balance-of-payments situation.[70] The Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions.

[70] Panel Report, para. 5.12.

150. In that respect, we note that, on the issue of whether India's balance-of-payments restrictions were justified under Article XVIII:9, we note that in paragraphs 5.170 to 5.184 of its Report, the Panel took into account evidence adduced by both the United States and India, including information from the report of the Reserve Bank of India. As to whether India's balance-of-payments restrictions were justified under Article XVIII:11 and the Note *Ad* Article XVIII:11, the Panel reached its conclusion after weighing all the evidence and considering the arguments of the parties.[71] With respect to the proviso to Article XVIII:11, the Panel based its conclusion primarily on the fact that India failed to supply convincing evidence that the removal of its balance-of-payments restrictions would entail a change in its development policy.[72] Moreover, it is clear from the Panel's analysis in paragraphs 5.211 and 5.220 of its Report that it critically assessed the views of the IMF on this issue.

151. We conclude that the Panel made an objective assessment of the matter before it. Therefore, we do not agree with India that the Panel acted inconsistently with Article 11 of the DSU.

152. The question whether Article XV:2 of the GATT 1994 requires panels to consult with the IMF and to consider *as dispositive* specific determinations of the IMF was debated at length by the parties before the Panel. However, the Panel did not consider it necessary, for the purposes of this dispute, to decide this issue.[73] As this finding of the Panel is not appealed, we abstain from taking any position on it.

IX. Findings and Conclusions

153. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding that it was competent to review the justification of India's balance-of-payments restrictions under Article XVIII:B of the GATT 1994;

(b) upholds the Panel's interpretation of the Note *Ad* Article XVIII:11 of the GATT 1994 and, in particular, the word "thereupon";

(c) concludes that the Panel did not require India to change its development policy and, therefore, did not err in law with regard to the proviso to Article XVIII:11 of the GATT 1994;

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[71] Panel Report, paras. 5.201-5.215.

[72] *Ibid*., para. 5.219.

[73] *Ibid*., para. 5.13.

(d) concludes that the Panel did not err in law in its allocation and application of the burden of proof in respect of the proviso to Article XVIII:11 and the Note *Ad* Article XVIII:11 of the GATT 1994; and

(e) concludes that the Panel made an objective assessment of the matter before it as required by Article 11 of the DSU.

154. The Appellate Body recommends that the DSB request that India bring its balance-of-payments restrictions, which the Panel found to be inconsistent with Articles XI:1 and XVIII:11 of the GATT 1994, and with Article 4.2 of the *Agreement on Agriculture*, into conformity with its obligations under these agreements.

Signed in the original at Geneva this 6th day of August 1999 by:

Claus-Dieter Ehlermann
Presiding Member

Said El-Naggar
Member

Mitsuo Matsushita
Member